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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOEY CARRILLO, Defendant and Appellant.	B271440 (Los Angeles County Super. Ct. No. BA417022)

APPEAL from a judgment of the Superior Court of Los Angeles County, Katherine Mader, Judge. Affirmed in part, reversed in part, and remanded.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, William H. Shin, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Joey Carrillo (defendant), a member of the KAM criminal street gang, attacked two men with a crowbar, hitting both over the head and causing them to bleed heavily. A jury convicted defendant on two counts of assault with a deadly weapon (but acquitted defendant of firearm possession charges brought in connection with a separate incident weeks before the crowbar attack). Defendant seeks reversal of his convictions, and failing that, reversal of five prior prison term enhancements the trial court imposed when pronouncing sentence. We consider whether there was substantial evidence at trial that defendant was the victims' assailant; whether the trial court abused its discretion in ruling on defendant's *Pitchess*[1] motion and in excluding any inquiry at trial concerning purported police misconduct; and whether the prosecution engaged in misconduct during closing argument. The parties agree that the prior prison term enhancements were erroneously imposed, but we are also asked to decide whether the prosecution is entitled to an opportunity to prove the enhancements true at a trial on remand.

I. BACKGROUND

A. The Offense Conduct

Late in the evening on October 24, 2013, victims Nestor Martinez (Martinez) and Alberto Barrera (Barrera) were "hanging out" together outside Martinez's house. Martinez had consumed four or five beers over a couple of hours. Barrera had finished "maybe about six."

At approximately 11:00 p.m., a man riding a bicycle approached Martinez and Barrera and asked them where they

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[1] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

were from, a question they understood as asking whether they were members of a criminal street gang. Martinez and Barrera told the man they were not gang members, and the man displayed a gang hand sign and said, "This is KAM gang." Nothing immediately came of the exchange, however, and the man rode away on his bicycle.

Approximately ten minutes after the man on the bicycle left, another man—later identified as defendant—was walking near Martinez's house. When a police squad car drove by the area, defendant approached Martinez and Barrera and began acting as if he was friends with both men. Defendant told Martinez and Barrera he was waiting for the police officers to leave and asked "if it was okay to hide out a little bit." Martinez agreed it would be okay, but when defendant tried to enter Barrera's car in the driveway to hide inside, Martinez told defendant not to get in the car. Defendant "started giving [Martinez] attitude," but Martinez continued to refuse to permit defendant to hide in Barrera's car.

Defendant became angry and repeatedly asked Martinez and Barrera why they were "acting like that." Barrera told defendant that Martinez was upset because someone from the "Kamotes" (a derogatory term for the KAM gang) had come by earlier to "hit [them] up." Upon hearing the term "Kamotes," defendant became aggressive and moved towards Barrera and said, "Where you from? Like, I'm Chucky from KAM." Martinez inserted himself between defendant and Barrera and pushed defendant away in an effort to protect Barrera. Martinez and defendant then bickered for a time, with Martinez repeating that neither he nor Barrera belonged to a gang. Eventually defendant

walked away from Martinez's house, but defendant still appeared "very mad."

Martinez encouraged Barrera to leave after the confrontation, but Barrera stayed, telling Martinez that nothing else was going to happen. Barrera was wrong. About five minutes after defendant left, the man previously riding the bicycle came running toward Martinez's house with defendant running behind him. Defendant swung a metal object, identified by Barrera as a crowbar, at Martinez and struck him in the head. Martinez fell to the ground, and the man with defendant began hitting Martinez with his fists while Martinez was on the ground. Defendant then ran toward Barrera and hit him in the head with the crowbar, causing Barrera to fall to the ground unconscious. Defendant then returned to Martinez and resumed attacking him until Barrera regained consciousness and threw a big recycling can toward defendant and his confederate—which caused them to panic and run off.

B. Police Investigation, and the Victims' Identification of Defendant

Paramedics arrived at Martinez's home after the crowbar attack. Both Martinez and Barrera were bleeding heavily from the head wounds they sustained from being hit in the head; Martinez recalled that his "pants looked like [he] was painting [because they] had so much blood on them" and Barrera's "whole face was, like, filled with blood." The paramedics transported Martinez and Barrera to a nearby hospital.

At the hospital, Los Angeles Police Department (LAPD) Officer Peter Bueno interviewed Martinez. Martinez related the details of the assault and gave Officer Bueno a description of his

attackers as roughly five feet, six inches tall, 170 pounds, and 20-30 years old—with one of the men (defendant) having a tattoo on his chin that Martinez could not identify. Officer Bueno also interviewed Barrera at the hospital, and Barrera gave a similar description of the assailants and stated he would be able to identify the men that were involved in the attack.

Officer Bueno prepared a report memorializing his interviews with Martinez and Barrera, and that report was transmitted to the investigating detective, Michael Zolezzi. After reviewing the report, Detective Zolezzi recognized the reported "I'm Chucky from KAM" statement, made in connection with the assault, as a reference to the gang moniker ("Chucky") used by defendant. Detective Zolezzi created a six-person photo lineup, which included a photo of defendant among the six pictures, to show the assault victims to see if they could identify defendant as one of the attackers.

About four days after the assault, Detective Zolezzi showed the photo lineup to Martinez at an LAPD station. Before doing so, Detective Zolezzi read an admonition to Martinez that indicated the perpetrator of the assault may or may not be in the photo lineup. Although Martinez recognized defendant in the lineup as one of the attackers, he nevertheless told Detective Zolezzi that the person who assaulted him was not depicted. Martinez falsely asserted he did not recognize his attacker when he looked at the photo lineup because he was afraid his family's safety might be jeopardized if he identified defendant.

Detective Zolezzi got the impression Martinez may have been afraid to make an identification and asked Officer Bueno, who seemed to have a better rapport with Martinez, to contact Martinez again and see if he could identify either of the men who

assaulted him. Officer Bueno went to Martinez's home later the same day and showed him the photo lineup again. Martinez was employed as a police cadet with the El Camino Police Department, and Officer Bueno urged him to "do the right thing," explaining that if Martinez wanted to be a police officer, identifying suspects who committed crimes was an important aspect of the job. Officer Bueno did not, however, suggest Martinez should pick any person in the photo lineup—telling Martinez instead that "if he's not on there, then he's not on there." Upon looking at the photo lineup this time, Martinez identified defendant within seconds as the man who hit him with "the object."

Several days after showing the photo lineup to Martinez (i.e., about a week after the assault), Barrera came to the police station at Detective Zolezzi's request. Detective Zolezzi gave Barrera the same admonition and showed him the same photo lineup that included a picture of defendant among five other photos. Barrera looked at the lineup for about a minute and identified defendant as the one who looked like the person who hit him with the crowbar. Barrera circled defendant's picture on the photo lineup and wrote the following comment: "It looks like number . . . five [i.e., defendant] but except his hair and compl[ex]ion look different."

C. The Charges Against Defendant, and Trial

The Los Angeles County District Attorney charged defendant with two counts of assault with a deadly weapon in violation of Penal Code section 245, subdivision (a)(1),[2] one count

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[2] Statutory references that follow are to the Penal Code.

for each of the victims. The amended information filed against defendant also included charges for possession of a firearm by a felon (section 29800, subdivision (a)(1)) and possession of a firearm near a school (section 626.9, subdivision (b)). These two charges stemmed from an incident weeks before the assault when two LAPD officers not involved in the later assault investigation (Officers Almeda and Arias) claimed to have seen defendant throw a firearm away near a school after he ran upon seeing the officers.

The amended information also alleged certain sentencing enhancements in connection with the charged offenses. Among them were (1) an allegation that defendant committed the assaults on Martinez and Barrera for the benefit of, at the direction of, or in association with a criminal street gang (section 186.22, subdivision (b)(1)(C)); and (2) allegations that defendant had served five prior prison terms within the meaning of section 667.5, subdivision (b).

Defendant pled not guilty to the charges and proceeded to trial. Martinez and Barrera testified during the prosecution's case. In addition to confirming their prior identifications of defendant in the photo lineup, both men identified defendant in court as the person who had hit them on the head with the crowbar (or, as Martinez described it, some type of metal object).

Defendant testified during the defense case. He had a tattoo of the number "69" on his chin, he admitted he was a member of the KAM gang (although he claimed he "grew out of all that"), and he further admitted he went by the nickname "Chucky" (although he claimed he had not used the nickname since he was in his teens). When questioned about the assaults on Martinez and Barrera, defendant claimed he was out picking

up food from a taco truck in the area of Martinez's house but had not assaulted Martinez or Barrera—as defendant told it, he had "never seen them, never spoken to them, never had a conversation." Regarding the gun charges, defendant admitted he ran from the police because he had marijuana in his pocket, but he maintained he did not have a gun. According to defendant, Officers Almeda and Arias produced a gun he had never seen before and told him he would be "'going down for this.'"

The jury convicted defendant on the two charged counts of assault with a deadly weapon, finding the associated gang allegation true. The jury acquitted defendant on the two charged firearm possession counts. Although defendant did not request bifurcation of trial on the alleged prior prison term allegations, the jury was not asked to render a verdict on those allegations and thus made no finding one way or the other on whether they were true. The trial court sentenced defendant to an aggregate term of 22 years and four months in prison. Included in that sentence, even though the jury did not find the prior prison term enhancements true, were five one-year prison terms—one for each of the five section 667.5, subdivision (b) allegations.

II. DISCUSSION

All but one of defendant's asserted grounds for reversal lack merit. Defendant argues there was no substantial evidence at trial that he was the man who assaulted Martinez and Barrera, but the out-of-court and in-court identifications made by both victims (plus other corroborating evidence) were ample evidence of identity. Defendant argues the trial court should have permitted him to cross-examine one of the law enforcement

witnesses about an anonymous citizen complaint deemed to be unfounded. We hold, however, that the trial court did not abuse its discretion in concluding such an inquiry should be precluded under Evidence Code section 352; there is also no possibility of prejudice even if there was error—the witness's testimony concerned only the charges that were the subject of the jury's not guilty verdicts. We further reject defendant's prosecutorial misconduct claims and hold the prosecution's argument, in context, was proper. We do conclude, though, that the trial court erroneously sentenced defendant to time in prison for prior prison term allegations that were not found true by the jury. In accordance with controlling authority, we remand the matter to the trial court to permit the prosecution the opportunity to retry the allegations.

A. Substantial Evidence at Trial Established Defendant Was One of the Two Men Who Assaulted Victims Martinez and Barrera

1. Standard of review

When considering a challenge to the sufficiency of the evidence to support a conviction, "'"we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] We determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.] In so doing, a reviewing court "presumes in support of the judgment the

existence of every fact the trier could reasonably deduce from the evidence." [Citation.]'" (*People v. Williams* (2015) 61 Cal.4th 1244, 1281.)

2. There was ample evidence at trial to support the jury's finding that defendant was the victims' assailant

"Identification of [an individual] by a single eyewitness may be sufficient to prove the [individual's] identity as the perpetrator of a crime. (See *People v. Anderson* (2001) 25 Cal.4th 543, 570-575, 106 Cal.Rptr.2d 575, 22 P.3d 347 (*Anderson*).) Moreover, a testifying witness's out-of-court identification is probative for that purpose and can, by itself, be sufficient evidence of the [individual's] guilt even if the witness does not confirm it in court. (*People v. Cuevas* (1995) 12 Cal.4th 252, 263-275, 48 Cal.Rptr.2d 135, 906 P.2d 1290 (*Cuevas*), overruling *People v. Gould* (1960) 54 Cal.2d 621, 631, 7 Cal.Rptr. 273, 354 P.2d 865; see Evid. Code, § 1238.)" (*People v. Boyer* (2006) 38 Cal.4th 412, 480; see also Evid. Code, § 411 ["Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact"]; *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052 ["Even when there is a significant amount of countervailing evidence, the testimony of a single witness that satisfies the [substantial evidence] standard is sufficient to uphold the finding"].)

Evaluated in light of this statement of governing law, the evidence of identity at defendant's trial is more than sufficient to sustain the jury's guilty verdicts. Martinez identified defendant in a photo lineup prior to trial, Barrera separately identified defendant in a photo lineup prior to trial, both men confirmed

their out-of-court identifications by fingering defendant as the culprit during trial, and Detective Zolezzi and defendant himself testified defendant used the "Chucky from KAM" moniker the victims reported hearing at the time of the assault (before being shown any photo lineups by the police)—which was further proof of identity.

The points defendant advances to argue the contrary are all unpersuasive. Defendant argues the prior identifications made by Martinez and Barrera were so unreliable as to be insubstantial evidence because (1) both men had been drinking heavily at the time of the assault; (2) neither victim described the specific "69" tattoo on defendant's chin (even though both recalled that defendant had *some* sort of tattoo on his chin), (3) Officer Bueno used "highly suggestive and coercive police tactics" by showing the photo lineup to Martinez a second time and telling him, as defendant characterizes the record, "if he wanted to be a police officer he had to make an identification"; and (4) Barrera's identification was too equivocal because he said the person he circled in the photo lineup "looked like" defendant but his hair and complexion were different.

The first, second, and fourth of these contentions simply amount to contentions that the jury could not have found Martinez and Barrera to be credible witnesses. We find the contentions unpersuasive and defer to the jury's implicit credibility determination. (*In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497 [reviewing court defers to trier of fact's decision to believe eyewitness identification "when the circumstances surrounding the identification and its weight are explored at length at trial"]; see also *People v. Mohamed* (2011) 201 Cal.App.4th 515, 522 ["'The strength or weakness of the

identification, the incompatibility of and discrepancies in the testimony, if there were any, the uncertainty of recollection, and the qualification of identity and lack of positiveness in testimony are matters which go to the weight of the evidence and the credibility of the witnesses, and are for the observation and consideration, and directed solely to the attention of the jury in the first instance . . . .' [Citation]"].)

As to the third reason, that the photo lineup procedure involving Martinez was suggestive, it fails for two independent reasons. First, it depends on a view of the evidence that is inconsistent with the standard of review that requires evaluating the evidence in the light most favorable to the guilty verdicts. Officer Bueno denied telling Martinez he should identify someone if he wanted to be a police officer,[3] and Martinez confirmed Officer Bueno did not point anyone out, suggest any of the individuals depicted, or confirm the assailant was in the photo lineup.[4] Second, even if the photo lineup procedure used for Martinez was suggestive to a degree, precedent nevertheless holds the jury was entitled to rely on Martinez's subsequent in-court identification. (*People v. Elliott* (2012) 53 Cal.4th 535, 585

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[3] Instead, Officer Bueno testified he "just basically advised [Martinez] that, you know, as a police officer, you need to—in your career you're going to have to identify individuals out on the street and take them into custody. So it's an important aspect of the job."

[4] Even excluding Martinez's identification of defendant, the jury would still have been left with substantial evidence of identity, namely, Barrera's identification of defendant and the corroborative "Chucky from KAM" evidence.

["Here, multiple witnesses identified defendant in court as the perpetrator of the crimes . . . . Their identifications of defendant were neither physically impossible nor inherently incredible. Inconsistencies in their initial descriptions of the perpetrator and any suggestiveness in the lineups or photo arrays they were shown are matters affecting the witnesses' credibility, which is for the jury to resolve"].)

B. The Trial Court's Pitchess *Discovery Rulings Were Not an Abuse of Discretion*

Pursuant to a defense motion filed before trial, the trial court held an in camera hearing to consider whether there was derogatory information concerning the veracity of Officers Almeda and Arias that should be disclosed to the defense under *Pitchess*. Defendant sought such information to defend against the two charges against him that were based on observations and investigation by Officers Almeda and Arias, namely, the two firearm possession charges on which the jury found defendant not guilty.

The trial court ordered certain information disclosed concerning each of the officers. Specifically, the court ordered production of two complaints made against the officers, one against each. The complaint against Officer Almeda (the Almeda Complaint) was made anonymously and the information disclosed indicated he engaged in "something inappropriate," with no additional details. The defense thereafter filed a supplemental *Pitchess* motion seeking further information concerning the disclosed complaints. The custodian of records for the officers' police files conceded that the statements of the complainants (and

any officer witnesses, if available) should be turned over, and the trial court ordered production of additional discovery.

At defendant's request, we have reviewed the sealed transcript of the July 20, 2015, in camera *Pitchess* proceedings to determine if any materials were incorrectly withheld. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1232.) The transcript of the in camera hearing constitutes an adequate record of the trial court's review of the materials presented and reveals no abuse of discretion.

C. The Trial Court Did Not Err, Prejudicially or Otherwise, in Barring Reference to the Almeda Complaint Under Evidence Code Section 352

1. Relevant procedural history

Outside the presence of the jury during trial, the prosecution made a motion to preclude defense counsel from cross-examining Officer Almeda on the facts of the anonymous Almeda Complaint produced to the defense as the result of the trial court's *Pitchess* rulings. The prosecution argued the Almeda Complaint was deemed unfounded and the person believed to be the complaining witness had since died. Defendant's attorney argued the court should permit cross-examination on the topic, and in doing so, made reference to a "Detective Edwards" having been implicated in the complaint as well.

The trial court summarized the nature of the Almeda Complaint on the record and ruled, pursuant to Evidence Code section 352, the defense would not be permitted to cross-examine on the issue. The trial court stated: "I have reviewed the report that was provided to me by defense counsel that was obtained as a result of *Pitchess* discovery. It would appear that the only thing

really in the report is that there is a—was an issue whether or not a particular informant had photographs on his phone that depicted someone looking like Officer Almeda doing various gang activities and other things like that. [¶] . . . [¶] The person who gave this information apparently is not locatable. Nobody ever[ ] really said that it was Officer Almeda in the photographs. [¶] I really see no relevance whatsoever to cross-examine Officer Almeda as to this information. [¶] . . . [¶] The relevance I see is next to nothing. And the consumption of time and the confusion that would result in him explaining something that there is no substance to apparently and nobody can prove otherwise greatly outweighs any relevance. [¶] So I am ruling that it cannot be mentioned.

2. Analysis

Section 352 of the Evidence Code gives a trial court discretion to exclude relevant and otherwise admissible evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." A trial court has broad discretion when exercising its authority under Evidence Code section 352, and we review the trial court's determination for abuse of discretion. (*People v. Winbush* (2017) 2 Cal.5th 402, 469 (*Winbush*).)

Under the circumstances here—a complaint made anonymously and later deemed unfounded, plus the absence of any ability to call the complainant to testify or otherwise corroborate the complaint—the trial court did not abuse its discretion in concluding cross-examination regarding the Almeda

Complaint would necessitate undue consumption of time and confuse the issues before the jury. (See *People v. Fuiava* (2012) 53 Cal.4th 622, 665-666 [upholding exclusion of evidence under Evidence Code section 352 partly because undertaking what would amount to a series of trials concerning allegations of law enforcement misconduct ran the risk of distracting the jury from its task].) Moreover, the trial court's ruling cannot have been prejudicial when considering the jury's verdicts. (*People v. Aznavoleh* (2012) 210 Cal.App.4th 1181, 1191 ["A court's erroneous admission of evidence under Evidence Code section 352 requires reversal only if there is a reasonable probability that the defendant would have obtained a more favorable result absent the error"].) The jury acquitted defendant on the sole counts of the information that involved observation or investigation by Officer Almeda (or Detective Edwards).

D. Defendant's Prosecutorial Misconduct Claims Are Meritless

During closing argument, "'it is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements [citation].' (*People v. Marshall* (1996) 13 Cal.4th 799, 831[ ].) Improper comments violate the federal Constitution when they constitute a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. (*People v. Hill* (1998) 17 Cal.4th 800[ ].) Improper comments falling short of this test nevertheless constitute misconduct under state law if they involve use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*Ibid.*) To establish

misconduct, [a] defendant need not show that the prosecutor acted in bad faith. (*Id.* at p. 822[ ].) However, [the defendant] does need to 'show that, "[i]n the context of the whole argument and the instructions" [citation], there was "a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner."' (*People v. Centeno* (2014) 60 Cal.4th 659, 667[(*Centeno*)].) If the challenged comments, viewed in context, 'would have been taken by a juror to state or imply nothing harmful, [then] they obviously cannot be deemed objectionable.' (*People v. Benson* (1990) 52 Cal.3d 754, 793[ ].)" (*People v. Cortez* (2016) 63 Cal.4th 101, 130 (*Cortez*).)

Defendant argues the prosecution committed misconduct during closing argument in three respects. Defendant contends the prosecutor misstated the applicable beyond a reasonable doubt burden of proof, maligned defense counsel, and "vouched" for the credibility of her own opening statement and key prosecution witnesses. We discuss each contention seriatim, highlighting the relevant statements made by the prosecution and explaining why none constitutes misconduct.

1. The prosecution did not misstate the burden of proof

In support of his claim that the prosecution misstated the burden of proof, defendant quotes an excerpt from the prosecution's rebuttal argument, which we have italicized when reproducing the excerpt in its fuller context: "The judge gave you an instruction on the law of circumstantial evidence which states that if the People's theory of the evidence is reasonable and the defense theory of the evidence is also reasonable, equally reasonable, then the tie goes to the defendant, and you vote not

guilty. [¶] If you feel after considering and weighing and evaluating the testimony of the witnesses in this case, if after you do all of that and you feel that the defense story is reasonable and the People's theory is not, then vote not guilty. [¶] However, *if you feel that the People's theory is reasonable and the defendant's theory is unreasonable, then the defendant is guilty.* [¶] *Use your common sense*."

When viewed in context and in light of the instructions given to the jury—which did indeed include an instruction on circumstantial evidence (CALCRIM No. 225) that discussed how the jury should proceed depending on its view of which competing interpretation of the evidence was reasonable—it is not likely that the jury understood the prosecution's remarks as lowering the applicable beyond a reasonable doubt standard of proof. To be sure, it may have been wise to adhere to the text of the court's instruction rather than ad libbing in a manner that directly linked interpretations of circumstantial evidence to how the jury should ultimately vote.[5] But a prosecutor need not "speak with

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[5] The challenged comment made no direct mention of the burden of proof, and the point being made by the prosecution appears to have been expressed in shorthand—skipping an express reference to all the necessary logical steps. That is to say, the argument was that the prosecution's theory of the evidence and witness credibility was reasonable and should be accepted, the defense theory of the evidence and witness credibility was unreasonable and should be rejected, and if the jury reached those conclusions regarding the evidence, the logical conclusion must be that defendant should be found guilty under the beyond a reasonable doubt standard of proof that the prosecution correctly discussed at the very outset of its closing argument.

the discrimination of an Oxford don" (*Davis v. United States* (1994) 512 U.S. 452, 476 (conc. opn. of Souter, J.)) when delivering his or her argument to the jury, and the remarks in question do not in our view transgress the proper bounds of argument identified in *Centeno*. (*Centeno*, *supra*, 60 Cal.4th at pp. 666, 672 [a prosecutor may appropriately argue "that the jury must "'decide what is reasonable to believe versus unreasonable to believe" and to "accept the reasonable and reject the unreasonable"'" but cannot "suggest that a 'reasonable' account of the evidence *satisfies the prosecutor's burden of proof*"].) As in *Cortez*, there is no reasonable likelihood the jury understood the challenged remarks here in an erroneous manner given that reasonable doubt was properly defined in the court's instructions (read before closing argument); the court informed the jury that it must follow the court's instructions rather than any contrary argument by counsel; defense counsel emphasized the concept of reasonable doubt and the court's instructions during his argument; and the "challenged comments . . . constituted a tiny, isolated part of the prosecution's argument." (*Cortez*, *supra*, 63 Cal.4th at pp. 131-134; see also *People v. Covarrubias* (2016) 1 Cal.5th 838, 894 [a reviewing court does not lightly infer that the jury drew the most damaging rather than the least damaging meaning from the prosecution's statements].)

2. *The prosecution did not malign defense counsel*

During the defense closing argument, defendant's attorney asserted the prosecution had not met its burden to prove the charges true beyond a reasonable doubt, in part because some of the testifying officers were "essentially, you know, lying to you." The defense urged the jury to "hold the People to their evidence"

and refrain from "giv[ing] the prosecution the old okie doke and say whatever you say, Ms. Prosecutor."

In rebuttal, the prosecution responded as follows (again, reproducing the remarks in context with the portion challenged by defendant italicized): "I said to you in voir dire when we were choosing the jury, does the mere fact that two sides of a story are presented, is that mere fact going to mean to you that there is reasonable doubt. . . . [¶] And *I was trying to find jurors who were thinking past the mere fact that there are two sides to a story. There [are] always going to be two sides to a story. If there is evidence pointing to guilt, the defense is going to say the guy is not guilty. I've never in my career had a defense attorney come up here and say you know what? That was a great witness. And the people have proven their case beyond a reasonable doubt. That's never going to happen.* [¶] *Just because the defense attorney got up here and said* [¶] . . . [¶] *that I didn't prove my case beyond a reasonable doubt doesn't make it so.* [¶] What you are to look at, according to the law, in evaluating the testimony, in deciding which side of the story is true, is to look at the credibility, the believability of each of the witnesses that you heard from."

"'A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel.' [Citations.] 'In evaluating a claim of such misconduct, we determine whether the prosecutor's comments were a fair response to defense counsel's remarks' [citation], and whether there is a reasonable likelihood the jury construed the remarks in an objectionable fashion [citation]." (*People v. Edwards* (2013) 57 Cal.4th 658, 738.) The challenged remarks made by the prosecution here were a hard blow delivered in response to the defense closing argument, but not a foul one. (*Berger v. United*

States (1935) 295 U.S. 78, 88 [a prosecutor "may strike hard blows . . . [but] is not at liberty to strike foul ones"].) The point made was not aimed at defendant's attorney personally, and it was fair argument, namely, an exhortation that the jury should not blindly accept the defense argument, just as defense counsel urged the jury not to blindly accept the prosecution's argument. (See, e.g., *Winbush*, *supra*, 2 Cal.5th at p. 484 ["We have upheld prosecutorial arguments suggesting defense counsel's 'job' is to confuse the jury and say anything necessary to obtain a favorable verdict"]; *People v. Huggins* (2006) 38 Cal.4th 175, 207 [prosecution did not commit misconduct when arguing defense counsel "'has a tough job, and he tried to smoke one past us'" and would "'admit only what he has to admit and no more'"].)

3. The prosecution did not engage in impermissible vouching

"As a general matter, '[i]mpermissible "vouching" may occur where the prosecutor places the prestige of the government behind a witness through personal assurances of the witness's veracity or suggests that information not presented to the jury supports the witness's testimony.' [Citation.]" (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1329.) Defendant contends the prosecution engaged in impermissible vouching here by referring back to the remarks she made during her opening statement and by commenting on the testimony of Officers Almeda and Arias.

As to the first instance of purported vouching, defendant complains the italicized portion of the following statement by the prosecution was improper: "Basically the burden of proof that these charges are true lies with me. And I am confident that we have proved this case to you beyond a reasonable doubt through

the evidence. [¶] At this point in the trial *everything that I said in the opening statement has borne out to be true*." Defendant concedes his trial attorney did not object to this remark, and his misconduct claim is therefore forfeited.[6] (*People v. Williams* (2016) 1 Cal.5th 1166, 1188 [a "defendant's failure to raise an objection to a prosecutor's remarks and to request a curative instruction forfeits the objection"] (*Williams*).) Further, and on the merits, we are skeptical of the notion that a prosecutor can be argued to have "vouched" for herself, but even taking defendant's argument on its own terms, it is unpersuasive. Defense attorneys routinely (and properly) highlight instances where the evidence as presented at trial may have deviated from a prosecutor's opening statement outline, and it is not vouching for a prosecutor to argue that, in his or her view, the evidence presented matched what the prosecutor predicted the evidence would show. That is what the prosecutor did here.

As to the second instance of purported vouching, defendant argues the italicized portion of the following excerpt of the prosecution's argument (concerning the firearm possession counts on which the jury returned not guilty verdicts) was improper: "If the officers are lying about what happened on this day, why wouldn't they just say that the gun was in the defendant's waistband, that they caught the defendant and found a gun in his waistband? That would be a . . . clearer way to testify and to tell you that he had a gun and they wanted to charge him with a gun. [¶] *The fact that the defendant tossed the gun is not made up.* That is how it happened. The gun has scratches on [it]—from the

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[6] Contrary to defendant's suggestion, nothing in the record indicates an objection would have been futile.

concrete, the same color as the concrete where it landed and slid into a grassy area. [¶] . . . [¶] Do we wish that the defendant's print was on it? Of course we do. Would that make this case easier for me to explain? Of course. But that's not how these facts played out. *The truth of the matter is the defendant tossed the gun.* Officer Almeda's print is on it and not the defendant's. But that's the way that it happened. Cases aren't perfect."

This vouching argument fails for three independently sufficient reasons. First, there was again no contemporaneous objection made during trial, and the argument is therefore forfeited. (*Williams*, *supra*, 1 Cal.5th at p. 1188.) Second, in context, the argument was not vouching. Using the phrase "the truth of the matter" during closing argument can be risky, but the phrase was properly couched here in a discussion of the evidence presented during trial, which means there is no reasonable likelihood that the jury understood the remark as a personal assurance of the officers' veracity or as an indication that evidence not presented to the jury during trial supported the witnesses' testimony. (*Cortez*, *supra*, 63 Cal.4th at p. 130; *Seumanu*, *supra*, 61 Cal.4th at p. 1329; see also *People v. Lopez* (2008) 42 Cal.4th 960, 971.) Third, even if vouching, there is no chance the remarks affected the outcome at trial because the jury returned not guilty verdicts on the sole counts of the amended information that depended on testimony from Officers Almeda and Arias. (*People v. Williams* (2010) 49 Cal.4th 405, 467.)

E. It Was Error to Impose Sentence for the Prior Prison Term Allegations, but Controlling Authority Permits Retrial

The trial court added one year to defendant's sentence for each of the alleged section 667.5, subdivision (b) prior prison terms, for a total enhancement of five years. Both defendant and the Attorney General agree that defendant never waived his right to a jury trial on the allegations nor requested bifurcation of the allegations for purposes of trial, that the prosecution did not introduce sufficient evidence to prove the prior prison term allegations true, and that the jury was not asked to find—and did not find—whether the allegations had been proven. The Attorney General appropriately concedes it was therefore error for the trial court to impose sentence based in part on the prior prison term allegations.

The Attorney General argues, however, that the People are entitled to a remand for the purpose of retrying the prior prison term allegations. Applying controlling authority, we believe the Attorney General is correct.

Defendant argues no remand is warranted because the procedural posture reflected in the appellate record is tantamount to a jury finding that the prior prison term allegations were not true, citing *People v. Mesa* (1975) 14 Cal.3d 466 (*Mesa*) and *In re Candelario* (1970) 3 Cal.3d 702 (*Candelario*).[7] These decisions have no application here. This is

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[7] Defendant appears to argue in passing that reversal might be warranted for a violation of sections 1025 or 1164, but that argument is forfeited. Our Supreme Court has held that a defendant, like defendant here, who fails to object on these statutory grounds in the trial court cannot be heard to assert on

not a case where the prior prison term allegations were presented to the factfinder for decision but the factfinder simply failed to make a finding; instead, as defendant concedes in his reply brief, the "allegations were never tried or submitted to the jury" at all. (Compare *Mesa*, *supra*, at p. 471 [prior convictions must be stricken where the defendant admitted the convictions but the trial court failed to mention the priors in orally pronouncing judgment]; *Candelario*, *supra*, at pp. 706-707 [the defendant admitted the prior conviction, which meant "the trier of fact need not have made an independent determination of its validity," but "the prior conviction must be included in the pronouncement of judgment for if the record is silent in that regard, in the absence of evidence to the contrary, it may be inferred that the omission was an act of leniency by the trial court"].)

Defendant's briefs on appeal can also be read to assert, albeit ever so briefly, that retrial of the prior prison term allegations would violate double jeopardy principles. Had defendant developed the argument more fully, it might have some force in light of the fact that defendant never requested bifurcation of trial on the prior prison term enhancements. (*Saunders*, *supra*, 5 Cal.4th at pp. 593, 595 ["assum[ing], without deciding, that double jeopardy principles apply to allegations of prior convictions" and concluding "that, because at defendant's request the determination of the truth of the alleged prior convictions had been bifurcated from trial of the current charges, defendant was not placed twice in jeopardy when the trial court,

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appeal that the failure to comply with the statutes is error. (*People v. Saunders* (1993) 5 Cal.4th 580, 590-591 (*Saunders*).)

without objection by defendant, discharged the jury following the guilty verdict and, as necessitated by the bifurcation order, conducted further proceedings to determine the truth of the alleged prior convictions"].) But we read subsequent authority from our Supreme Court and the United States Supreme Court to hold that double jeopardy principles do not preclude retrial for a prior conviction allegation that would not require a factfinder to re-evaluate the evidence underlying the substantive offense.[8] (*Monge v. California* (1998) 524 U.S. 721, 730-731, 734; *People v. Monge* (1997) 16 Cal.4th 826, 840-841, 845 (lead opn.) (*Monge*); *Monge*, *supra*, at p. 847 (conc. opn. of Brown, J.); see also *People v. Barragan* (2004) 32 Cal.4th 236, 254-255.)

F. A Corrected, Amended Abstract of Judgment Will Be Necessary

The parties agree the abstract of judgment does not reflect the correct statutory subdivision of the gang enhancement statute that served as a component of defendant's aggregate sentence. In the event the prosecution opts not to retry the prior prison term allegations, the abstract of judgment should be corrected to refer to section 186.22, subdivision (b)(1)(C), rather than subdivision (b)(1)(E). If there is a retrial on the prior prison term allegations, an amended abstract of judgment will be necessary, and we trust it will accurately reflect all relevant statutory subdivisions.

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[8] Defendant also relies on *People v. Ochoa* (2009) 179 Cal.App.4th 650, but the point for which defendant cites the decision is analyzed in the unpublished portion of the opinion.

DISPOSITION

Defendant's convictions are affirmed. The prior prison terms imposed as part of Defendant's sentence are stricken, and the matter is remanded to the superior court for further proceedings consistent with this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

DUNNING, J.*

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