Filed 11/24/25 P. v. Cooper CA1/4

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>TIMMY KENT COOPER,<br>Defendant and Appellant. | A167876<br><br>(Mendocino County<br>Super. Ct. No. 22CR02291) |

BY THE COURT:

It is ordered that the opinion filed herein on October 30, 2025 be modified as follows:

1. On page 7, in the second sentence of the first full paragraph, the phrase "a bank robbery with a firearm in 1990" is changed to "a federal bank robbery with a deadly weapon in 1985" so the sentence reads:

   Cooper also admitted on direct examination that he had been convicted of two counts of robbery in 1985, a federal bank robbery with a deadly weapon in 1985, and four counts of using force or violence to deter a peace officer in 2018.

2. On page 19, in the fourth sentence of the first paragraph, the language "on direct examination" is deleted, the phrase " 'bank robbery with a firearm in 1990,' " is changed to " 'bank robbery with a firearm' in 1985," so the sentence reads:

   Cooper also admitted that he had been "convicted of two counts of robbery in 1985," "bank robbery with a firearm" in 1985, and

"four different counts of using force or violence to deter a police officer in 2018."

3. On page 41, in footnote 16, delete the first, second, third, and fourth sentences and accompanying citation, so the footnote reads:

   While we conclude the record does not prove beyond a reasonable doubt that Cooper's 1985 state and federal convictions were based on separate criminal acts, Cooper proffers no evidence showing any of the information relied upon at sentencing was incorrect or unreliable. The case at bar is not like *People u. Eckley* (2004) 123 Ca1.App.4th 1072, where a denial of probation was based on false information. Cooper's due process claim is therefore meritless.

There is no change in the judgment. The petition for rehearing is denied.

Date: 11/24/2025 Brown, P. J.

Filed 10/30/25 P. v. Cooper CA1/4 (unmodified opinion)

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Defendant Timmy Cooper appeals his conviction by a jury trial for assault with a deadly weapon. At trial, there was no dispute that Cooper broke his neighbor's arm with a bike chain; rather, the central factual dispute was over who initiated the violent altercation, Cooper or his neighbor. The jury rejected Cooper's self-defense argument and found him guilty of the single count assault charge.

On appeal, Cooper raises numerous claims of prejudicial error committed by the trial court, the prosecution, and his defense counsel. He contends the trial court erroneously admitted his neighbor's prior statements and the nature of Cooper's prior convictions; he contends the prosecutor committed misconduct while questioning defense witnesses and in closing argument; and he contends defense counsel provided constitutionally deficient representation by failing to make certain objections or raise certain arguments. Cooper further argues the combined effect of the trial court

errors violated due process. He also challenges his sentencing, contending there was insufficient evidence that federal and state convictions he suffered in 1985 could be imposed as separate prior strike convictions or separate serious felony convictions, and he asserts he is entitled to resentencing.

To the extent they have merit, Cooper's claims do not establish prejudicial harm, either in isolation or cumulatively. However, we find there was insufficient evidence to prove beyond reasonable doubt that Cooper's prior strikes were based on separate criminal acts, and we remand for resentencing on that basis.

## I. BACKGROUND

In an amended information, the Mendocino County District Attorney charged Cooper with a single count of assault with a deadly weapon, alleging he had wielded a bike chain against, and caused great bodily injury to, Phillip McNally. (Pen. Code, §§ 245, subd. (a)(1), 12022.7, subd. (a).) The district attorney further alleged Cooper had suffered four prior strike convictions (Pen. Code, §§ 667, subd. (b)–(i), 1170.12; hereinafter prior strikes) and three prior serious felony convictions (Pen. Code, § 667, subd. (a)(1); hereinafter nickel priors), and the district attorney alleged seven different factors in aggravation under California Rules of Court, rule 4.421.

### A. Trial Evidence

#### *1. McNally's Testimony*

McNally testified that shortly after midnight on September 3, 2022, he was riding his bicycle in a bike lane on the way to a convenience store. Along the way, Cooper approached from the other direction while riding an adult tricycle. When the two men were "[w]ithin probably ten feet" of each other, McNally heard Cooper call him "a rat," and McNally saw that Cooper was "swinging something." McNally "put [his left] arm up and [the object] hit

[his] arm." Despite the impact, McNally managed to maintain control of his bike without falling. "[A]s [Cooper] was leaving," McNally saw the object used to hit him was a chain, which looked to be about four feet long and covered in plastic tubing. McNally believed that if he had not blocked the chain with his arm, then it would have struck his face or head. He identified Exhibit 6 as the chain that hit him.

McNally testified that he was by himself and unarmed when the assault happened, that he did not dismount his bike prior to the assault, and that he did not charge or threaten Cooper with a weapon of any kind at any point. McNally also denied that he drove his car earlier on the night of the assault.

After the assault, McNally waited for Cooper to ride off until there was enough distance "so [McNally] didn't have to deal with [Cooper] again." Then McNally took the same route home, where he dropped off his bike and had his girlfriend drive him to the hospital. There he told the hospital staff he had been "hit with a chain." He did not call the police because he "didn't want any more trouble," but the hospital staff called police. McNally then told the responding officer what had transpired.

McNally further testified that "probably a week" before the assault, he had "caught [Cooper] in [a] neighbor's yard" as Cooper "was robbing the neighbors." According to McNally, he "told [Cooper] to get out of their yard" and called the police. McNally believed that this incident was why Cooper had called him a "rat."

*2. Officer Randall's Testimony*

Officer Ralph Randall was the responding officer to the hospital's report of a possible assault. At the hospital, Randall spoke to McNally and his treating physician. Randall described McNally's demeanor as "slightly

dishevelled [*sic*] . . . kind of withdrawn, kind of quiet," but eventually McNally "kind of opened up." Randall relayed that McNally provided "a description of the [assailant], what he was a wearing, that he was on a red tricycle" and that McNally identified Cooper as the assailant. Despite McNally's initial reticence, Randall described McNally as "clear and concise."

Randall did not canvas the neighborhood where the assault happened or look for additional witnesses because it was a busy night and McNally did not report any other witnesses. However, Randall did drive through the area of the assault several times in the course of his duties. From the vantage of his patrol car, he did not see any physical evidence, such as a bat, laying around, and he did not get out of his car.

Later that night, though, Randall coincidentally saw Cooper "traveling on the tricycle matching [McNally's] description." Randall directed Cooper to come talk to him and to surrender the bike chain he was wearing around his neck; Cooper complied. The chain was slightly over three feet in length and weighed over three pounds. Randall identified Exhibit 6 as the chain he confiscated from Cooper.

Randall interviewed McNally again in the days following the assault. According to Randall, McNally's second interview was "very consistent" with his first interview at the hospital. However, in the second interview, McNally stated that he had been driving a vehicle sometime before the incident with Cooper, though McNally did not say what time of day he had done so.

*3. Dr. Colfax's Testimony*

Dr. Colfax was the emergency medical physician who treated McNally. Dr. Colfax recalled that McNally presented in the emergency room "complaining of arm pain after being struck in his arm while riding his bicycle."

Dr Colfax testified that McNally recounted "riding his bicycle and a neighbor struck him in the left forearm with a heavy chain." "It was an unusual enough story that [Dr. Colfax] asked [McNally] . . . why the neighbor would . . . attack him while he's riding his bike." McNally "related that he had been in an ongoing series of arguments or disagreements with this neighbor," including that McNally had caught the neighbor breaking into another neighbor's house.

Dr. Colfax further testified that McNally "was quite clear about his narration of the events," and Dr. Colfax had "no concerns" about the trustworthiness of McNally's account. Dr. Colfax explained the X-rays showed McNally sustained a "nightstick fracture," which Dr. Colfax verified was consistent with trying to parry a blow with an outstretched arm and was "typically" a defensive injury. However, Dr. Colfax acknowledged that the injury could have been sustained other ways. After examining the chain marked as Exhibit 6, Dr. Colfax opined that it was an "adequate weapon to cause" McNally's injuries.

*4. Video Recording of Randall's Initial Interview of McNally*

The People called Randall back to the stand to lay foundation for the video recording of McNally's initial interview. The jury then watched a four-minute and 46-second video clip in which McNally identified Cooper as the guy "who did this to [him]" and explained he believed Cooper did not like him because he had "turned [Cooper] in for breaking into the neighbor's house."

**B. Defense Case**

*1. Timothy Cooper's Testimony*

Cooper related that he and McNally were neighbors in a trailer park, but they had a falling out about "five months" earlier. Cooper expounded that McNally had caused problems for him, leading to Cooper gaining a

reputation as a "thief." He asserted that McNally is "a thief and . . . was . . . caught red-handed doing something that [McNally was now] blaming [Cooper] for doing."

Cooper further stated that McNally "[a]ssaulted" him. According to Cooper, he went to McNally's trailer to speak to him, but "when [McNally] came out, one thing led to the next and [McNally] got aggressive and put hands on [Cooper,] . . . threatened [Cooper,] and . . . called the police." The police allegedly searched Cooper's trailer while he was away, but they did not want to speak to Cooper when he went to the station.

Regarding the events on September 3, 2022, Cooper testified that he had gone to a convenience store shortly before midnight. On his way to the store, McNally drove a car "directly at" Cooper, causing them both to "swerve[]." McNally then "came around again," passed Cooper, and "came back at [Cooper] again." Cooper believed McNally intended to "scare" him. Cooper was able to continue his trip to the convenience store, where he spent about 15 minutes and then began his return trip home.

En route home, Cooper was intercepted again by McNally, who was no longer in a car but instead was on a bicycle. McNally "jumped off his bike" and approached Cooper, who also dismounted his tricycle "about 15 feet from [McNally]." At that point, McNally "started running towards [Cooper], swinging a bat." In response, Cooper "yanked the chain off [his own] neck and . . . swung it and [McNally] dropped the bat." Cooper initially thought he had hit the bat because it fell, but Cooper also testified that he "had no doubt that [he] broke [McNally's] arm."

Cooper said he also heard a motorcycle approaching from behind as he got off his tricycle. Cooper identified the motorcyclist as McNally's friend, "Johnny Boots," who Cooper also called "Mr. Morrison." After striking

McNally with the chain, Cooper "spun around" on Johnny Boots and threatened to hit him with the chain. Such recourse was unnecessary, however, and Cooper ended up helping Johnny Boots back onto his motorcycle. Meanwhile, McNally had "already turned around on his bicycle" and rode in "the direction of the trailer park." Cooper ended up walking his tricycle home because the drive chain (not the chain wielded against McNally) on his tricycle had "c[o]me off."

Cooper explained that he did not call the police because he was on parole and he believed he would go to "jail no matter what" because McNally had a broken arm. Cooper also admitted on direct examination that he had been convicted of two counts of robbery in 1985, a bank robbery with a firearm in 1990, and four counts of using force or violence to deter a peace officer in 2018.

On cross-examination, Cooper identified Exhibit 6 as his bike chain and the object he used to strike McNally. He stated that he normally carried the chain to lock up his tricycle.

The People confronted Cooper with his statements to Randall on the night of the assault. Cooper affirmed that he had told Randall that "the issues between [himself] and Mr. McNally revolved around a woman." He explained that his testimony had left out a lot of details regarding his interpersonal problems with McNally because he could "go for an hour or two" about them. Cooper did not recall telling Randall that he did not think McNally could hurt him, but he explained he may have said so to be "macho." Cooper then volunteered that McNally had thrown a bat at him during the assault, which struck him in the back. But he admitted that he was not treated for a back injury at jail.

Cooper also said he "might have had a bat in [his] basket" when Randall spoke to him the night of September 3, 2022. He stated that he "probably" told Randall that the bat in his tricycle was his own, but he did not specifically recall telling Randall that McNally threw the bat at him twice. Cooper was vague about where he had acquired the bat and why he had it. He denied that the bat came from his house and asserted, "[t]he bat came from the scene of the crime area." Later, however, he testified: "I don't even know where I got the bat or anything like that. It could have been the one I picked up -- but I brought it for protection. So, yes, I brought it as a -- you know. I seen it was in my back. I believe I had a bat and ball and glove."

*2. Damon Short's Testimony*

The defense next called Damon Short as a witness. Short works at a Safeway market, and he recognized Cooper as a customer and from "around town." Short denied being "close with" Cooper.

Short testified that, shortly after midnight on September 3, 2022, he saw two men accost Cooper. Short had a clear line of sight of the incident from about 60 to 70 feet away, and streetlights allowed him to see the events "pretty clearly." He identified Cooper from the "three wheel bike he rides."

Short described the events as follows. A motorcyclist was doing "doughnuts" or a "burnout" "[r]ight in front of [Cooper]," while another man was biking down the road "with a stick in his hand . . . or a bat." Both men were yelling at Cooper. Cooper told them, " 'I don't want no problem.' " The motorcyclist remained on his motorcycle, while the bicyclist got on foot and came towards Cooper to "hit him" with a bat. Short did not recognize the bicyclist, and he "couldn't figure out why [the men] were trying to hurt [Cooper]."

According to Short, the bicyclist swung the bat at Cooper from about three feet away. Cooper held a chain and was "trying to defend himself." But Short did not see Cooper swing the chain, nor did he see the bicyclist throw or drop the bat. Short identified Exhibit 6 as the chain that Cooper held.

Short further testified that he quickly left the scene, explaining he "didn't want to see nothing." He did not report the incident to the police because he's "not a cop caller."

However, Short overheard people at Safeway talking about the incident and learned that Cooper's sister, Tina Michaels, was looking for information. Short knew "[Cooper] wasn't in the wrong" and he "couldn't let it go," so Short communicated with Michaels through social media. Short then visited Michaels in person to talk about the case. Short said he was unable to provide the messages he exchanged with Michaels because his wife deleted them and his young children "got rid of the phone."

Several months later, Short contacted the public defender's office through Michaels, and Short was subsequently contacted by a district attorney investigator. Short did not recall telling the district attorney investigator that he "never saw anybody, in particular the two men, the man on the bike and the man on the motorcycle, attack [Cooper]." Short clarified that he "didn't see [the bicyclist] actually hit [Cooper], just reared back to hit him."

**C. The People's Rebuttal Evidence**

In the People's rebuttal case, Randall was called back to lay the foundation for the video recording of his interview with Cooper. A seven-second clip was then played for the jury, in which, Randall asked: "Were you actually concerned he would hurt you?" Cooper responded: "Well, I -- I don't

think he can. I mean, of course he could." Randall interjected, "Okay," and Cooper continued: "[B]ut I wasn't scared of him, you know?"

Randall also testified that Cooper had said the bat in his possession was his. Randall further attested that Cooper had claimed, "McNally had charged him with the bat and threw that bat at him twice."

The People next called Thomas Kiely, the district attorney investigator who had interviewed Damon Short. Kiely testified that Short had stated, "he never saw [the two men] attack anybody" but the men "were taunting the other individual." Kiely conceded that he did not clarify what Short meant by "attack" or "taunt."

**D. Stipulation Regarding the Nature of Cooper's Prior Convictions**

The parties agreed to a stipulation regarding the nature of Cooper's prior convictions. The trial court informed the jury: " 'The parties stipulate and agree that the crimes of robbery, bank robbery with a deadly weapon and resisting an executive officer, are all crimes that involve the use or threatened use of violence force or fear.' " After the stipulation was read to the jury, the parties rested.

**E. Sentencing**

The jury found Cooper guilty of the assault charge and found the great bodily injury enhancement to be true, and the trial court then held a bench trial on the prior conviction allegations and aggravating factors.

The People offered certified copies of conviction records for the four prior strike allegations. The same evidence went to the allegations of nickel priors. The first prior strike allegation pertained to a 1980 burglary conviction; the second and third prior strike allegations pertained to two 1985 robbery convictions; and the fourth prior strike allegation pertained to a 1985 federal bank robbery conviction. The trial court found all four prior strike

allegations, all three nickel prior allegations, and all seven aggravating factors to be true.

The trial court subsequently sentenced Cooper to a determinate term of eight years and an indeterminate term of 25 years to life. Under its discretionary authority, the court stayed two of the nickel priors.

Cooper appeals.

## II. DISCUSSION

We address each of Cooper's challenges in turn.

### A. Admission of McNally's Prior Statements

Cooper argues that the trial court erred by admitting McNally's out-of-court statements accusing Cooper of assaulting him and of robbing their neighbor. We agree the statements were inadmissible but conclude the error was harmless.

"[A] hearsay statement is one in which a person makes a factual assertion out of court and the proponent seeks to rely on the statement to prove that assertion is true. Hearsay is generally inadmissible unless it falls under an exception." (*People v. Sanchez* (2016) 63 Cal.4th 665, 674; Evid. Code, § 1200.[1]) One such exception is a testifying witness's prior consistent statement if it "is offered in compliance with [Evidence Code s]ection 791." (§ 1236.) Section 791 allows evidence of such a statement to "support [the witness's] credibility" if it is offered after "[a]n express or implied charge has been made that [the witness's] testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is

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

alleged to have arisen." (§ 791, subd. (b).) A witness's prior identification of a party is another exception to the hearsay rule. (§ 1238.)

We review a trial court's evidentiary ruling for abuse of discretion. (*People v. Sanchez* (2019) 7 Cal.5th 14, 39.) "Whether a trial court has correctly construed [the Evidence Code's provisions] is, however, a question of law that we review de novo." (*People v. Grimes* (2016) 1 Cal.5th 698, 712.)

Here, the trial court permitted evidence of two statements by McNally about the assault—one to Dr. Colfax, the other to Randall—on the basis that they were admissible as prior consistent statements under section 791. Defense counsel objected to each statement's admissibility on that ground. But the trial court found "neither evidence [n]or argument" that McNally had a motive to lie to Dr. Colfax or to Randall, expounding that it did not "see any reason [for McNally] to lie [to Randall] [because] he's not accused." After the video recording of McNally's statement to Randall was played for the jury, the court ruled that the statement was also admissible as a prior identification under section 1238. Defense counsel declined the opportunity to address the ad hoc justification.

The trial court's finding that no argument or evidence supported the charge that McNally harbored a motive to lie that arose before he made the prior statements defies common sense. Cooper and Short alleged that McNally was the actual aggressor. And Cooper charged that McNally had a motive to lie about his role. As defense counsel explained, as the actual aggressor McNally "would [have known] that he attacked someone" and "he could get in trouble," so McNally would not have "want[ed] to admit to the hospital staff about what happened if he did in fact" commit the assault. Accordingly, the asserted motivation to lie would have arisen *before* McNally gave his statements to Dr. Colfax or Randall.

The circumstances of the instant matter highlight why prior consistent statements are generally inadmissible after an improper motive is alleged to have arisen. "[W]hen there is a contradiction between the testimony of two witnesses it cannot help the trier of fact in deciding between them merely to show that one of the witnesses has asserted the same thing previously. 'If that were an argument, then the witness who had repeated his story to the greatest number of people would be the most credible.' (4 Wigmore, Evidence (3d ed.) § 1127, p. 202.)" (*People v. Gentry* (1969) 270 Cal.App.2d 462, 473 (*Gentry*).)

The People's arguments to the contrary are unpersuasive. McNally's motivation to lie would not have depended on being "accused" because McNally would have sought to avoid charges altogether. Nor is an allegation of fabrication undermined because McNally "could have lied about how he sustained a broken arm." If McNally was the aggressor, then he may have suspected that Cooper would report the incident; therefore, McNally reasonably could have concluded that he would be best served by pinning the blame on Cooper.

Nor does *Gentry*, *supra*, 270 Cal.App.2d 462 aid the People. *Gentry* held there is an exception to the requirement that a prior consistent statement must have been made before an improper motive is alleged to have arisen "when a charge of recent fabrication is made *by negative evidence* that the witness did not speak of the matter before when it would have been natural to speak." (*Id.* at p. 474; see *People v. Williams* (2002) 102 Cal.App.4th 995, 1011 ["[G]iven the negative nature of counsel's impeachment of [two witnesses] regarding their interview with [police] on the night of the offenses, the timing of the proffered prior consistent statement loses significance."].) Two factors control whether the *Gentry* exception

applies: "[one,] that at the time of [the witness's] initial silence he suffered from an incapacity that prevented him from speaking[,] and [two,] that he made the prior consistent statement at the 'earliest opportunity' after the incapacity was removed." (*People v. Lopez* (2013) 56 Cal.4th 1028, 1068 (*Lopez*), overruled on another point as stated by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)[2]

The *Gentry* exception's first factor was not met here. McNally's testimony expressly refutes the People's contention that McNally delayed reporting the crime because he "was in great pain and in need of immediate medical attention for his broken arm." McNally testified that he did not contact the police because he did not want "any more trouble" from Cooper, stating, "I was tired of [Cooper] harassing me so I just went to the hospital." McNally further testified on direct examination that he was not a willing participant in the trial proceedings for the same reason. Accordingly, we reject the People's contention that McNally's failure to call the police after

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[2] We consider this argument because Cooper did imply fabrication through the negative evidence. During opening argument, defense counsel stated that "McNally didn't call the police [after the assault] for obvious reasons," implying a contradiction between McNally's initial failure to report and his testimony. And on cross-examination, defense counsel had McNally affirm that "at no point that night did [he] call the police," again implying that McNally's failure to do so was inconsistent with his testimony. It matters not that "the only allegation by the defense of McNally's motive to lie" was "cover[ing] his responsibility for his assault on [Cooper]" because section 791, subdivision (b) expressly allows for prior consistent statements to rebut an "implied charge" that testimony is fabricated. (See *People v. Andrews* (1989) 49 Cal.3d 200, 210 [" 'The mere asking of questions may raise an implied charge of an improper motive . . . .' "]; see also *Gentry*, *supra*, 270 Cal.App.2d at p. 474 [" 'However, that there was always present a questionable motive to fabricate should not deprive the prosecution of its right to show that another motive, clearly established by the evidence, did not affect the witnesses' stories.' "].)

the assault was explained by his pressing need for medical treatment and that he provided his statements once that incapacity was removed.

Nor was section 1238 a proper basis for the admissibility of McNally's videotaped statement to Randall.

At the threshold, we reject that Cooper forfeited the issue by failing to object to the trial court's ruling. The court provided section 1238 as an alternative basis for admitting the video clip *after* it had been shown to the jury. Thus, any objection would have been futile. (Cf. *People v. Flint* (2018) 22 Cal.App.5th 983, 997.)

There are several problems with the trial court's alternative basis for admitting the prior statement. First, Cooper's identity was not in dispute at trial, and therefore the prior statement was unnecessary for that purpose. Second, the prosecution did not lay a proper foundation for the hearsay exception. (See § 1238, subds. (b), (c); *People v. Redd* (2010) 48 Cal.4th 691, 728–729.) Third, the videotaped statement went beyond the bounds of the prior identification hearsay exception. A witness's prior statement is only admissible under the provision if "[t]he statement is an identification of a party . . . who participated in a crime or other occurrence." (§ 1238, subd. (a).) "[A]n account of the complaining witness' description of the offense itself is admissible under this exception only to the extent necessary to make the identification understandable to the jury." (*Porter v. U.S.* (D.C.Ct.App. 2003) 826 A.2d 398, 410.) Here, however, the four-minute and 46-second video clip not only captured McNally's identification of Cooper as the guy "who did this to [him]"; through the video, the jury also heard an extended colloquy between Randall and McNally in which Randall asked, "What are you guys getting in arguments over," and McNally replied, "I turned [Cooper] in for breaking into the neighbor's house that's in between

our places, and [Cooper] doesn't like me much since then." This extraneous information cannot be smuggled in under the prior identification hearsay exception.

Although the trial court erred by admitting McNally's prior statements, Cooper has not shown that it was "reasonably probable" he would have secured a more favorable result in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 837; *People v. Seumanu* (2015) 61 Cal.4th 1293, 1308 [*Watson* standard applies to the erroneous admission of hearsay evidence].)

In his trial testimony, McNally provided the same accounts regarding the assault and his preexisting tensions with Cooper. (See *People v. Andrews*, *supra*, 49 Cal.3d at p. 211 [admission of tape recorded prior consistent statement deemed harmless in part because it "was substantially similar to [declarant's] testimony at trial, and thus was largely cumulative"].) Plus, Cooper engaged McNally's narrative and affirmed that McNally had accused him of being a thief, rendering marginal McNally's prior statements' effect on the jury. Other evidence also informed the jury's credibility determination, such as the witnesses' demeanor, Cooper's statement to Randall that he was not afraid of McNally, Cooper's conflicting statements about where he had acquired the bat in his possession when Randall stopped him, and Cooper's actions after the assault, including his decision to go back out with the bike chain and bat. Accordingly, it is not reasonably probable that a result more favorable to Cooper would have been reached merely if McNally's prior statements had been excluded. We likewise reject Cooper's contention that the trial court's erroneous ruling rendered the trial fundamentally unfair.

**B. Admission of the Nature of Cooper's Prior Convictions**

Cooper argues that the trial court erred in admitting the nature of his prior felony convictions as character evidence. The People concede that "the court's reasoning at the time of its in limine ruling was incorrect," but they

contend that "the ultimate admission of the evidence of [Cooper's] character for violence when [Cooper] testified was nonetheless proper" because Cooper presented evidence of McNally's character for violence. Cooper has the better argument, but we conclude he was not prejudiced by the error.

*1. Legal Standards*

Character evidence is generally inadmissible to prove a person acted in conformity with it on a given occasion. (§ 1101, subd. (a).) There are exceptions to this general rule. A criminal defendant may offer evidence of the victim's character to show the victim acted in conformity with it. (§ 1103, subd. (a)(1).) If the defendant offers evidence showing the victim has a violent character, then the prosecution may offer evidence of the *defendant's* violent character to show the defendant acted in conformity with it. (§ 1103, subd. (b); *People v. Myers* (2007) 148 Cal.App.4th 546, 552–553 (*Myers*).)

However, section 1101 is not intended to refer to character-trait evidence offered to prove a fact relating to credibility of a witness. (§ 1101, subd. (c); see *People v. Stern* (2003) 111 Cal.App.4th 283, 296.) Thus, a defendant who testifies may be impeached with a prior conviction of any felony evincing moral turpitude. (§ 788; see *People v. Campbell* (1994) 23 Cal.App.4th 1488, 1492.)

We review the trial court's ruling for abuse of discretion. (*People v. Sanchez*, *supra*, 7 Cal.5th at p. 39.)

*2. Relevant Background*

Prior to trial, the defense moved to exclude evidence of Cooper's prior convictions, except for convictions for crimes of moral turpitude committed in the past 10 years. The People moved to admit all of Cooper's prior felony convictions involving moral turpitude "to impeach him should he choose to testify," arguing the felony convictions were not stale because Cooper was

incarcerated from December 1994 to November 2015. The People also moved to exclude evidence of most of McNally's prior convictions involving moral turpitude on the grounds they were stale and mostly misdemeanors; although the People conceded that McNally's assault felony conviction suffered in 2002 was "proper impeachment."

At the motions' hearing, defense counsel took "a legally consistent position" by seeking to exclude Cooper's prior convictions that were over 10 years old and by not seeking to admit McNally's prior convictions that were over 10 years old. The trial court clarified that defense counsel's position meant he was not opposing the People's motion in limine to exclude McNally's prior convictions, and it accordingly granted the unopposed motion. The court then deferred ruling on the admissibility of Cooper's prior convictions, but it stated it was "inclined at this stage to allow, should Mr. Cooper testify, the most recent crime of moral turpitude from September 18th of 2018." Defense counsel did not object.

At trial, prior to Cooper's testimony, the trial court revisited the admissibility of Cooper's prior convictions for crimes involving moral turpitude. The court ruled that if Cooper testified, then his convictions going back to 1985 would be admissible for impeachment purposes. Under those circumstances, Cooper's convictions would be "sanitize[d]" where the fact of the conviction could be stated but the nature of the offenses would be excluded. But the court explained that if Cooper claimed self-defense, then the nature of the prior convictions would be admissible "not just for the truthfulness, . . . but who was the one who was more likely to be the person who was violent that evening," expounding that "the jury need[ed] to know that violence was involved."

After this ruling, Cooper took the stand in his own defense. During direct examination, Cooper testified that McNally had "[a]ssaulted" him on an occasion *before* September 3, 2022. Regarding the events that transpired on September 3, 2022, Cooper claimed that he acted in self-defense. Cooper also admitted on direct examination that he had been "convicted of two counts of robbery in 1985," "bank robbery with a firearm in 1990," and "four different counts of using force or violence to deter a peace officer in 2018." On cross-examination, the prosecutor elicited the exact dates and jurisdictions of those convictions. At the close of trial, the jury was informed of the parties' stipulation that all the crimes " 'involve the use or threatened use of violence force or fear.' "

*3. Analysis*

The trial court erred in ruling that the nature of Cooper's prior convictions was admissible as propensity evidence merely because he testified that he acted in self-defense. "Evidence Code section 1103 contemplates that character evidence comprises something *other than evidence of conduct at the time in question*, because character evidence is used to show the person acted 'in conformity with' his or her character." (*Myers*, *supra*, 148 Cal.App.4th at p. 552, italics added.) "If evidence of a victim's conduct at the time of the charged offense constitutes character evidence under Evidence Code section 1103, then every criminal defendant claiming self-defense would open the door for evidence of his own violent character. Evidence Code section 1103 cannot be read so broadly." (*Id.* at p. 553.) Thus, Cooper did not open the door for the People to introduce evidence of his violent character by testifying about McNally's actions on September 3, 2022, including the allegation that McNally drove his car at him prior to attacking him with a bat.

The court was not correct under any rationale when it issued its ruling, and therefore the People's argument that the trial court reached the correct decision despite its erroneous rationale is not tenable. Viewed in a vacuum, Cooper did open the door to his own violent character by testifying McNally had "[a]ssaulted" him in a discrete incident *prior* to September 3, 2022. But the trial court's erroneous ruling had put Cooper in a Catch-22 situation: evidence about his violent character was going to be admitted whether he opened the door or not once he put forth a defense of self-defense. The People's authorities are therefore inapposite.[3]

Moreover, the trial court had already ruled that McNally's prior convictions, including his 2002 felony conviction for assault, were inadmissible. Thus, Cooper could not use McNally's prior felony conviction to blunt the impact of his own prior convictions on the jury. On the horns of this dilemma, Cooper attacked McNally's credibility by testifying about McNally's violent outburst that occurred before the incident in question. (Cf. *People v. Calio* (1986) 42 Cal.3d 639, 643 [" 'An attorney who submits to the

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[3] In *People v. Zapien* (1993) 4 Cal.4th 929, 976, the trial court incorrectly stated that a witness's preliminary hearing testimony was admissible under section 1291 even if defendant's motive for cross-examining witnesses at trial was dissimilar, but the admission of the evidence was correct because defendant *did* have a similar motive for cross-examining the witnesses in both venues. In *People v. Eynon* (2021) 68 Cal.App.5th 967, the appellate court reversed a denial of a petition because the trial court did *not* reach the right result. (*Id.* at pp. 976, 979.) In *People v. Carter* (2005) 36 Cal.4th 1114, 1151–1152, the appellate court merely concluded that the trial court had not erred by failing to state on the record that it had weighed prejudice against probative value after the parties had agreed to waive oral argument and submit the issue on the strength of their written submissions. Moreover, it found that any error in failing to exclude the evidence would have been harmless. Here, in contrast, the trial court's ruling was wrong under any rationale.

authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible.' "].) If not for the court's erroneous ruling, it is unclear whether Cooper would have taken the same route. Indeed, defense counsel's attempt to mutually disarm the issue of prior convictions suggests otherwise.

Nonetheless, any prejudice to Cooper was slight because most of the information regarding his prior convictions was admissible for impeachment purposes.[4]

"Evidence of prior felony convictions offered for [impeachment] purpose is restricted to the name or type of crime and the date and place of conviction." (*People v. Allen* (1986) 42 Cal.3d 1222, 1270.) Here, the names of Cooper's convictions, as stated by defense counsel, were "robbery," "bank robbery with a firearm," and "using force or violence to deter a peace officer." Any juror would have reasonably understood that "bank robbery with a firearm" and "using force or violence to deter a peace officer" were crimes that involved the use of or threatened use of force or fear. Thus, the parties' stipulation that all the crimes " 'involve the use or threatened use of violence force or fear' " only provided additional information about the nature of the "robbery" convictions.

Plus, while the prosecutor reiterated during closing argument that the parties stipulated "these are violent crimes," the prosecutor did not explicitly argue that Cooper's prior convictions evidenced Cooper's propensity for violence. Instead, the prosecutor noted that Cooper did not have to testify,

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[4] Cooper expressly does *not* challenge the admissibility of his prior convictions for impeachment purposes.

but, because he did, the jury was entitled to consider his prior convictions to "evaluate his credibility." Likewise, the jury was instructed that it could consider prior convictions when evaluating a witness's testimony; otherwise, no other instruction was given on how the jury could use the nature of Cooper's convictions.[5]

Accordingly, the jury's knowledge about the nature of the crimes did not render the trial fundamentally unfair. Nor is it reasonably likely the jury would have resolved the credibility issues differently and reached a verdict more favorable to Cooper solely if the nature of Cooper's prior convictions had been excluded.

**C. Ineffective Assistance of Counsel Claims**

Cooper alleges that defense counsel was deficient in failing to seek the admission of McNally's prior convictions and in failing to object to the prosecutor's questions regarding McNally's out-of-court statements.[6] Cooper fails to demonstrate a reasonable probability that he would have achieved a more favorable outcome if defense counsel had performed differently.

An ineffective assistance of counsel claim "entails deficient performance under an objective standard of professional reasonableness and prejudice under a test of reasonable probability of an adverse effect on the outcome." (*People v. Huggins* (2006) 38 Cal.4th 175, 205–206 (*Huggins*).) Trial counsel's

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[5] At oral argument, Cooper's counsel stated that he was under the impression an instruction on propensity evidence had been given, and the People did not disagree. But counsel could not provide any citation to the record showing such an instruction was given, nor could this court find any evidence that such an instruction was given after review of the record.

[6] Because defense counsel preserved the issues concerning the admission of McNally's prior statements and the nature of Cooper's prior convictions, we need not consider Cooper's related ineffective assistance of counsel claims.

actions are presumed to be reasonable and " ' "within the wide range of professional competence." ' " (*People v. Bell* (2019) 7 Cal.5th 70, 125.) " 'If the record "sheds no light on why counsel acted or failed to act in the manner challenged," an appellate claim of ineffective assistance of counsel must be rejected "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." [Citations.] If a defendant meets the burden of establishing that counsel's performance was deficient, he or she also must show that counsel's deficiencies resulted in prejudice, that is, a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ' " (*Ibid.*; see *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050 [noting "reasonable probability" standard in connection with claims of ineffective assistance of counsel is comparable to *Watson* standard].) "If a defendant has failed to show that the challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1123.)

*1. Failure to Revisit McNally's Prior Convictions*

Cooper contends his defense counsel provided constitutionally deficient representation by failing to seek the admission of McNally's impeachable prior convictions at trial. Cooper "does not fault defense counsel" for not seeking to admit McNally's prior convictions that were over 10 years old at the motions in limine hearing, but Cooper does fault defense counsel for not "revisiting that tactical decision given the massive change in circumstances" after the trial court admitted Cooper's prior convictions. He maintains that "defense counsel should have been prepared for the eventuality that he might need admissible evidence of McNally's convictions involving crimes of

violence." Even if correct, he was not prejudiced under the reasonable probability standard.

As discussed above, defense counsel did not oppose the People's motion in limine excluding McNally's prior convictions because he maintained "a legally consistent position" to exclude Cooper's prior convictions that were over 10 years old. Defense counsel made this tactical decision despite the prosecutor's concession that McNally's 2002 felony assault conviction was "proper impeachment." The trial court accordingly granted the unopposed motion. The court then deferred ruling on the admissibility of Cooper's prior convictions, but it stated it was "inclined at this stage to allow, should Mr. Cooper testify, the most recent crime of moral turpitude from September 18th of 2018." By the time of Cooper's testimony, however, the court changed its mind. It was persuaded that Cooper's three prior convictions in 1985 were also admissible because Cooper's incarceration from 1994 to 2015 did not "really show a pattern of law abidingness."

Assuming arguendo that defense counsel's representation was deficient for failing to ask the trial court to reconsider the admissibility of McNally's prior 2002 assault conviction after it departed from its tentative ruling regarding the admissibility of Cooper's prior convictions, it is not reasonably probable the request would have resulted in a more favorable outcome for Cooper. First, considering the age of McNally's prior assault conviction, the trial court still may not have admitted evidence of it; and given the absence of a record on the issue, we cannot say there are no other valid grounds for excluding such evidence. Second, as outlined above, ample admissible evidence casts doubt on the credibility of Cooper's testimony. Even if the jury had viewed McNally more skeptically in light of his prior conviction, there is no reason to think it would have affected the outcome.

*2. Failure to Object to Questions*

Cooper argues that his defense counsel's performance fell below professional standards by failing to object during the direct examination of McNally when the prosecutor asked McNally if what he told medical staff and Randall was "essentially the same that you're telling the jury this morning." Even if we were to assume that Cooper is correct that the prosecutor elicited implied hearsay and that counsel's failure to object was deficient, there is no prejudice for the same reasons that the admission of McNally's prior statements through Dr. Colfax and Randall was harmless. (See *ante*, part II.A.)

*3. Defense Counsel's Failure to Object to Prosecutorial Misconduct Did Not Constitute Ineffective Assistance of Counsel*

Cooper also asserts two instances of prosecutorial misconduct, which were forfeited but we assess for ineffective assistance. He first contends that the prosecutor argued a falsehood to the jury by stating in his closing argument that it was unknown whether Johnny Boots was a "real person." He next contends that the prosecutor introduced prejudicial facts not in evidence by asking defense witnesses "would she be lying" questions.

Cooper forfeited these issues on appeal by failing to object at trial or request the jury be admonished. (*People v. Fayed* (2020) 9 Cal.5th 147, 204; *People v. Beck and Cruz* (2019) 8 Cal.5th 548, 657.)

No exception to the forfeiture rule applies here. (*People v. Fayed*, *supra*, 9 Cal.5th at p. 204 [" 'The failure to timely object and request an admonition will be excused if doing either would have been futile, or if an admonition would not have cured the harm.' "].) There is no reason to believe it would be "beyond a juror's ability" to disregard the prosecutor's oblique comments. Nor is this a case like *U.S. v. Garza* (5th Cir. 1979) 608 F.2d 659, 661, in which the prosecutor "sought personally to vouch for the credibility of

[witnesses] and to bolster the Government's case by indicating that it would not have been brought, and he would not personally have participated, if [defendant's] guilt had not already been determined." Cooper's reliance on *Richardson v. Marsh* (1987) 481 U.S. 200 is even more misplaced. (See *id.* at pp. 207–208 [holding that admission of nontestifying codefendant's confession did not violate defendant's right under confrontation clause where court instructed jury not to use confession in any way against defendant].)

In anticipation of forfeiture, Cooper maintains defense counsel's failure to object amounted to a denial of his right to effective assistance of counsel. Accordingly, we consider the merits of Cooper's prosecutorial misconduct claims in assessing his "assertion that the failure to assign misconduct constituted ineffective assistance of counsel." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1125–1126; see *Huggins*, *supra*, 38 Cal.4th at pp. 205–206.)

*a. Tactical Reasons Plausibly Explain Defense Counsel's Failure to Object to Prosecutor's "Would She Be Lying" Questions*

Our Supreme Court has held that "courts should carefully scrutinize 'were they lying' questions in context." (*People v. Chatman* (2006) 38 Cal.4th 344, 384 (*Chatman*).) It is permissible, for example, to ask testifying defendants "whether [they] knew of facts that would show a witness's testimony might be inaccurate" because they "could provide relevant, nonspeculative testimony as to the accuracy of their information and any motive for dishonesty." (*Id.* at p. 383.) But argumentative questions that do not provide relevant testimony are impermissible. (*Id.* at p. 384.)

Here, Cooper and Short each denied being friends or that Short had been to Cooper's residence. The prosecutor followed up by asking each witness whether Cooper's sister, Michaels, "would" be lying if she said that Short had been over to Cooper's house. Cooper responded that such a statement "would be a lie," and Short replied that she would be "[c]onfused."

At the time, Michaels had been released from her subpoena to testify, and the prosecutor was unable to reserve her. Consequently, Michaels never testified.

Because Michaels never testified and her purported statement was never received into evidence in any other manner, the questioning could not have assisted the jury in weighing conflicting testimony or "in ascertaining whom to believe." (*Chatman*, *supra*, 38 Cal.4th at p. 383.) In other words, Cooper and Short were not asked to explain why their testimony diverged from Michaels's *testimony*, nor were they asked whether they "knew of facts that would show [Michaels's] testimony might be inaccurate or mistaken" or whether Michaels's had a motive to be untruthful in her testimony. (*Ibid.*)

The People's argument that the questioning elicited relevant evidence because Cooper and Short had personal knowledge whether Michaels "would" be lying if she contradicted them is untenable. The People provide no limiting principle to allowing hypothetical questions about nontestifying witnesses' hearsay statements, and we discern none.[7] Such a rule would

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[7] We do not conclude, however, that the prosecutor's questions were improper merely because they were pregnant with prejudicial facts not in evidence. (But cf. *People v. Herring* (1993) 20 Cal.App.4th 1066, 1076–1077 [holding that prosecutor's argument that "defense counsel . . . 'does not want you to hear the truth' implied that the prosecutor knew facts not in evidence," which "amounted to unsworn testimony violative of appellant's Sixth Amendment right to confrontation and to his right to effective counsel"].) A prosecutor commits misconduct by asking questions that "suggest facts harmful to a defendant, *absent a good faith belief that such facts exist*." (*People v. Warren* (1988) 45 Cal.3d 471, 480, italics added; see *People v. Earp* (1999) 20 Cal.4th 826, 859–860.) Here, the prosecutor represented to the trial court that he had a good faith belief he could impeach the witnesses with Michaels's testimony based on her interview with the district attorney investigator, and Cooper concedes this on appeal.

invite prosecutors to give "speech[es] to the jury masquerading as . . . question[s]." (*Chatman*, *supra*, 38 Cal.4th at p. 384.)

None of the People's authorities speak to similar circumstances. (See, e.g., *People v. Steele* (2002) 27 Cal.4th 1230, 1263 [explaining that jurors' subjective thought processes leading to the verdict are of no jural consequence and therefore irrelevant]; *People v. Scott* (1997) 15 Cal.4th 1188, 1218 [prosecutor elicited witness testimony regarding defendant's prior statements]; *People v. Earp*, *supra*, 20 Cal.4th at p. 894 [prosecutor's questions whether witness "made his evaluation of defendant's future dangerousness based on a 'smattering' of information" and whether witness's consulting work would sustain financial loss if his dangerousness assessment was wrong—to each of which the trial court sustained objections—"did not affect the outcome of the penalty phase"].)

The record is devoid of any reason defense counsel elected not to object to the prosecutor's questions. We therefore begin with the presumption that defense counsel made a tactical decision to not object. (See *People v. Lucas* (1995) 12 Cal.4th 415, 492 [" '[M]ere failure to object to argument seldom establishes counsel's incompetence.' "]; see *People v. Riel* (2000) 22 Cal.4th 1153, 1202 ["Whether to object at trial is among 'the minute to minute and second to second strategic and tactical decisions which must be made by the trial lawyer during the heat of battle.' "].) Here, there was a plausible reason for why defense counsel did not object—the prosecutor had a good faith belief that he could impeach the witnesses with Michaels's testimony, and there was no reason to suspect the prosecutor would be unable to reserve Michaels with a subpoena. Indeed, defense counsel requested a section 402 hearing "if [the prosecutor] brings Ms. Michaels in." Thus, we presume defense counsel

made a tactical decision to not draw attention to a line of questioning that appeared likely to come in anyway.

Even if defense counsel's conduct fell below professional standards, the failure to object was not prejudicial. The questions were brief and ambiguous, and the prosecutor moved on quickly each time. (See *Lopez*, *supra*, 56 Cal.4th at p. 1073 ["The remarks in question were fleeting and rather obscure. Even if they constituted misconduct, they do not constitute the type of deceptive and reprehensible methods that require reversal."]; *People v. Turner* (2004) 34 Cal.4th 406, 420 [holding that, although prosecutor (inaccurately) argued " '*we did not have access to testimony from the defendants*' " and therefore improperly commented on a defendant's failure to testify, the comment was not prejudicial because it was "brief and mild"].) Moreover, there was other evidence from which the jury could infer that Cooper and Short knew each other well from before the case. For example, as the prosecutor pointed out to the jury, Short testified to an unlikely sequence of events that got him in touch with Michaels, and Short referred to Cooper by his first name when he took the stand.

*b. Tactical Reasons Plausibly Explain Defense Counsel's Failure to Object During Closing Argument*

During closing argument, the prosecutor cast doubt on Cooper's self-defense argument. At one point the prosecutor stated: "The Defendant is the one after the supposed attack by McNally -- keep in mind he's so afraid after being attacked by McNally and this Johnny Boots, aka Peter Rabbit, don't even know if he's a real person. There's no other evidence of him being there -- he says that he goes home, reaches a place of safety where he's free and safe from Mr. McNally. And he does what? Oh, glad I made it home. No. He goes back out on patrol, this time with a bat and his chain."

The only remark that plausibly crossed the line was the prosecutor's aside that "Johnny Boots, aka Peter Rabbit, don't even know if he's a real person" because Randall had testified at the preliminary hearing that he was "familiar with that subject [i.e., Johnny Boots] being John Morse." Considering the prosecutor did know Randall believed Johnny Boots was a real person, he arguably committed misconduct by arguing a falsehood. (*People v. Varona* (1983) 143 Cal.App.3d 566, 570 [holding prosecutor committed misconduct because he argued a "woman was not a prostitute although he had seen the official records and knew that he was arguing a falsehood"].)

Again, the record provides no insight into why defense counsel elected not to object to the offending statement. Accordingly, we presume defense counsel made a tactical decision not to draw the jurors' attention to the passing comment. (See, e.g., *Huggins*, *supra*, 38 Cal.4th at p. 206 [finding no ineffective assistance of counsel when counsel's failure to object could be explained as a tactical decision not to draw the jurors' attention to prosecutor's remarks in closing argument]; *People v. Milner* (1988) 45 Cal.3d 227, 245 ["Even if one or more of the statements were improper, none of them took up more than a few lines of the prosecutor's lengthy closing argument. Defense counsel would therefore have been well within the bounds of reasonable competence had he chosen to ignore the statements rather than draw attention to them with an objection."], disapproved on other grounds by *People v. Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13.; *People v. Padilla* (1995) 11 Cal.4th 891, 957 ["The fact that counsel did not follow up by asking the trial court to admonish the jury to disregard the prosecutor's comments regarding prison gang membership may well have been a tactical decision taken to avoid focusing the jury's attention on what amounted to a passing

comment by the prosecutor."], overruled on another ground by *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

Because the surrounding remarks were unobjectionable, there was a good reason to not object to the passing remark. Specifically, the prosecutor's argument that "[t]here's no other evidence of [Johnny Boots] being there [at the scene of the crime]" was fair. (*People v. Varona*, *supra*, 143 Cal.App.3d at p. 570 ["[I]n a proper case, a prosecutor may argue to a jury that a defendant has not brought forth evidence to corroborate an essential part of his defensive story."]; see also *People v. Armstrong* (2019) 6 Cal.5th 735, 797 [prosecutor may argue witness lied]; *People v. Shazier* (2014) 60 Cal.4th 109, 146 ["Harsh and colorful attacks on the credibility of opposing witnesses are permissible if fairly based on the evidence."].) Therefore, not objecting was reasonable—not only to avoid drawing attention to the passing objectionable statement, but also to avoid drawing further attention to the prosector's legitimate argument that no physical evidence corroborated Johnny Boots's presence at the crime.

Moreover, we conclude that there is no reasonable probability the result would have been more favorable to Cooper had defense counsel objected. Again, the thrust of the prosecutor's argument about the state of the evidence would have stood, and the offending statement was brief.

**D. Cumulative Prejudicial Error Claim**

Cooper argues that the combined effect of multiple trial court errors rendered his trial fundamentally unfair in violation of his constitutional due process rights. The People's only response to Cooper's cumulative error claim is that Cooper "failed to demonstrate that any trial errors occurred." But as we discussed *ante*, there were (harmless) errors. The question is whether cumulatively they warrant reversal. We conclude they do not.

" 'The "litmus test" for cumulative error "is whether defendant received due process and a fair trial." ' " (*People v. Rivas* (2013) 214 Cal.App.4th 1410, 1436.) "Lengthy criminal trials are rarely perfect, and [a reviewing] court will not reverse a judgment absent a clear showing of a miscarriage of justice. [Citations.] Nevertheless, a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill*, *supra*, 17 Cal.4th at p. 844 [citing cases]; cf. *People v. Roberts* (1992) 2 Cal.4th 271, 322–326 [while instruction error required reversal of a conviction, "the whole" of the other trial errors, including several evidentiary errors, "did not outweigh the sum of their parts" as to the "remainder of the judgment of guilt"].)

" ' "A trial is fundamentally unfair if 'there is a reasonable probability that the verdict might have been different had the trial been properly conducted.' " ' " (*People v. Rivas*, *supra*, 214 Cal.App.4th at p. 1422.) In assessing the effect of the cumulative error, Cooper contends this court should apply the harmless error standard articulated in *Chapman v. California* (1967) 386 U.S. 18, 24, under which a federal constitutional error warrants reversal unless it was harmless beyond a reasonable doubt. (See *People v. Williams* (1971) 22 Cal.App.3d 34, 58 [assessing whether cumulative error was harmless beyond a reasonable doubt because "[s]ome of the errors reviewed are of constitutional dimension"].) Even under this stringent standard, however, we find reversal unnecessary.

Again, each error was harmless and did not expose the jury to unduly prejudicial information. Indeed, nearly all of the erroneously admitted information was admissible through other means, and although the trial court ruled that it was admitting the nature of Cooper's prior convictions as propensity evidence, it did not instruct the jury that it could consider the

prior convictions for this purpose. Adding the erroneous exclusion of McNally's prior conviction to the sum of those errors does not amount to prejudicial harm.

As previously discussed above, there was ample admissible evidence to cast doubt on the credibility of Cooper's testimony, providing the jury with a sufficient basis to believe McNally's version of events over Cooper's based on their direct testimony. Accordingly, we are convinced the cumulative error was harmless beyond a reasonable doubt.

## E. Asserted Sentencing Errors

### *1. There Was Insufficient Evidence to Prove Separate Prior Strikes for Cooper's Bank Robbery and Robbery Convictions*

Cooper contends there was insufficient evidence to impose his federal conviction for bank robbery as a prior strike because it could not be shown that the conviction was based on a different criminal act than either of his two state robbery convictions. The People argue that certified court records prove beyond reasonable doubt the state robbery convictions and the federal bank robbery conviction were not based on the same criminal act because they involved different victims.[8] The People's reasoning is flawed.

Under California's "Three Strikes" law, if a defendant reoffends after having suffered two qualifying felony convictions, the Three Strikes law mandates that his sentence be "an indeterminate term of life imprisonment."

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[8] The prosecution offered certified and authenticated documents from state court and federal district court to prove Cooper's prior convictions, and there is no dispute about the records' admissibility or authenticity. Nor does Cooper dispute that he suffered three distinct convictions in 1985. (*People v. Epps* (2001) 25 Cal.4th 19, 27 ["[O]fficial government records clearly describing a prior conviction presumptively establish that the conviction in fact occurred, assuming those records meet the threshold requirements of admissibility."].)

(Pen. Code, § 1170.12, subd. (c)(2)(A); *People v. Vargas* (2014) 59 Cal.4th 635, 638 (*Vargas*).) If two strike offenses are based on a single act, however, the court must dismiss one of the strikes. (*Vargas*, at p. 645.) Prior convictions for "multiple criminal *acts*" "committed in a single course of conduct" may be treated as separate strikes, so long as the convictions are not "so closely connected that treating them as separate strikes would be contrary to the spirit of the Three Strikes law." (*Id.* at p. 648; see *People v. Benson* (1998) 18 Cal.4th 24, 35.)

The People must prove all elements of an alleged prior strike or sentence enhancement beyond a reasonable doubt. (See *People v. Tenner* (1993) 6 Cal.4th 559, 566.) The reviewing court must "review the record in the light most favorable to the judgment [citation] to determine whether substantial evidence supports the fact finder's conclusion, i.e., whether a reasonable trier of fact could have found that the prosecution had sustained its burden of proving the defendant guilty beyond a reasonable doubt." (*Id.* at p. 567.)

Here, the records are silent as to the details of the underlying crimes for which Cooper was convicted in 1985. What they show is this: In state court, Cooper was charged with two counts of "Robbery" under Penal Code section 211, and each count was alleged to have been committed against John Robert Reed,[9] for events that took place "on or about" July 14, 1985 in Los Angeles County.[10] In federal court, Cooper was convicted by guilty plea of

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[9] 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." (Italics added.)

[10] Cooper concedes that "those two state robbery convictions appear to result from two separate criminal acts."

"Robbery of Bank, Use of Dangerous Weapon in violation of 18 United States Code, Section 2113 (a)(d) as charged in the One Count Indictment." Subdivision (d) of section 2113 of Title 18 of the United States Code provides: "Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, *assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device*, shall be fined under this title or imprisoned not more than twenty-five years, or both." (Italics added.)[11]

In federal court, Cooper's arrest date was listed as September 18, 1985. But state court records establish he was already in custody and had been since July 14, 1985.[12] In state court, Cooper was convicted by plea of no contest and sentenced on November 27, 1985. The state court ordered Cooper's nine-year sentence was to run concurrently with his federal sentence "where [Cooper was] serving a sentence." Curiously, though, it appears that Cooper was sentenced in federal court about one month *later*, on December 23, 1985, to 10 years in federal custody.

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[11] Subdivision (a) of the provision may be violated by taking (or attempting to take) bank property "from the person or presence of another" by use of force, violence, or intimidation, or it may be violated by merely entering a bank with certain felonious intent. (18 U.S.C. § 2113(a).)

[12] The state court awarded Cooper credit "FOR 206 DAYS IN CUSTODY INCLUD[ING] 69 DAYS GOOD TIME/WORK TIME." Under the state sentencing scheme in place at the time, Cooper's 69 credit days for good time reflect at least 137 days of actual time in custody. (Former Pen. Code, § 4019, amended by Stats. 1982, ch. 1234, § 7 ["It is the intent of the Legislature that if all days are earned [while satisfactorily complying with labor assignments and the rules and regulations], a term of six days will be deemed to have been served for every four days spent in actual custody."].) Cooper would have been awarded credit for every day in custody, including his day of arrest and day of sentencing. (*People v. Smith* (1989) 211 Cal.App.3d 523, 525, 527.) Thus, his arrest date was July 14, 1985.

Viewed altogether, there is good reason to believe the convictions were based on a single criminal act. And a rational trier of fact could not conclude *beyond a reasonable doubt* that the convictions were based on different criminal acts merely because the state robberies convictions show Cooper took personal property from an individual, while the federal bank robbery conviction shows Cooper took or intended to take bank property. (18 U.S.C. § 2113(a).)[13] Again, a necessary element of Cooper's federal crime included assaulting or endangering an individual. (18 U.S.C. § 2113(d).)

Contrary to the People's suggestion, Cooper did not need to "produce . . . rebuttal evidence" showing "the state and federal robberies were based on the same criminal act or committed against the same victim." The prosecution bore the burden to prove beyond reasonable doubt that the convictions were for separate criminal *acts*. (*People v. Tenner*, supra, 6 Cal.4th at p. 566; *Vargas*, *supra*, 59 Cal.4th at p. 645.) The unrebutted documentary evidence merely established that Cooper suffered two state robbery convictions and a federal bank robbery conviction. Even considering the evidence in the light most favorable to the judgment, the evidence falls short of the reasonable doubt standard.

Accordingly, the trial court erred by finding four, rather than three, prior strike convictions. (*Vargas*, *supra*, 59 Cal.4th at p. 645.)

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[13] Because the federal offenses required proof of different conduct—namely, taking (or attempting to take) bank property or being physically present in a bank (18 U.S.C. § 2113(a)) and using a firearm (18 U.S.C. § 2113(d))—we may not assume that the convictions were based on different criminal acts merely because Cooper failed to mount a double jeopardy defense. (*People v. Homick* (2012) 55 Cal.4th 816, 844.)

*2. The Logic of* Vargas *Does Not Apply to Nickel Priors*

Cooper also contends that the logic of *Vargas* should be extended to "nickel prior" sentence enhancements imposed pursuant to Penal Code section 667, subdivision (a). We disagree.

Under Penal Code section 667, subdivision (a)(1), "[a] person convicted of a serious felony who previously has been convicted of a serious felony in this state *or of any offense committed in another jurisdiction that includes all of the elements of any serious felony*, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement *for each such prior conviction on charges brought and tried separately*." (Italics added.) The Supreme Court has construed the statutory phrase "brought and tried separately" to mean that "the underlying proceedings must have been formally distinct, from filing to adjudication of guilt." (*In re Harris* (1989) 49 Cal.3d 131, 136; see *id.* at p. 135 ["[T]here is 'no distinction between an adjudication of guilt based on a plea of guilt and that predicated on a trial on the merits.' "].)

Cooper's state robbery convictions and federal bank robbery conviction each qualify as serious felonies,[14] and they were brought and tried separately. Cooper does not dispute this.

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[14] The Penal Code enumerates "robbery" and "bank robbery" as serious felonies. (Pen. Code, § 1192.7, subds. (c)(19), (d).) And, although only "[o]ne of the two distinct offenses set forth in [18 U.S.C.] section 2113(a)" corresponds to a California serious felony, where a conviction for federal bank robbery also "involved aggravating conduct set forth in [18 U.S.C.] sections 2113(d) and 2113(e)" and "absent any rebuttal" a trial court is "entitled to conclude that [the] defendant [was] convicted of conduct constituting the California serious felony of bank robbery." (*People v. Miles* (2008) 43 Cal.4th 1074, 1077, 1094.)

Nonetheless, Cooper argues the circumstances "fall[] squarely within the logic of *Vargas*" and "no one should suffer two nickel priors resulting from one criminal act because those two priors could never have been separately brought and tried in California without violating Penal Code section 654, subdivision (a)." We are unpersuaded.

The logic of *Vargas* turned on the voters' and the Legislature's intent. Based on the ballot arguments provided to voters in favor of the Three Strikes initiative, *Vargas* explained, "the voting public would reasonably have understood the 'Three Strikes' baseball metaphor to mean that a person would have three chances—three swings of the bat, if you will—before the harshest penalty could be imposed. The public also would have understood that no one can be called for two strikes on just one swing." (*Vargas*, *supra*, 59 Cal.4th at p. 646; see *id.* at pp. 645–646 [noting that "ballot arguments of Three Strikes initiative is evidence of voters' intent"].) "Given the obvious twinning of the language used in the legislative version of the Three Strikes law, [the Supreme Court] discern[ed] no different intent with that version of the law." (*Vargas*, at p. 646.) Thus, the defendant—who suffered robbery and carjacking convictions for the same act—fell "outside the spirit of the Three Strikes law." (*Id.* at p. 647.)

In implementing the Three Strikes scheme, neither the voters nor the Legislature evidenced any intent to alter the meaning of Penal Code section 667, subdivision (a)(1). The provision's language predates the Three Strikes initiative (see former Pen. Code, § 667, amended by Stats. 1989, ch. 1043, § 1), and the legislative version of the Three Strikes law merely renumbered the subdivision as paragraph (1) and added paragraphs (2) through (5) to the subdivision, which do not pertain to the Three Strikes scheme. (Stats. 1994, ch. 12, § 1.) Accordingly, the baseball metaphor central to the Three Strikes

scheme has no bearing on meaning of Penal Code section 667, subdivision (a)(1) and therefore the logic of *Vargas* is inapplicable.[15]

Moreover, the specific statutory language "on charges brought and tried separately" was derived from another habitual criminal statute, former section 644 of the Penal Code, which "required that the defendant must have suffered prior felony convictions 'upon charges separately brought and tried' *and* must have 'served separate terms therefor' in prison." (*In re Harris*, *supra*, 49 Cal.3d at p. 136.) By not including the latter phrase, "the drafters evidently did not desire to introduce into [Penal Code] section 667 the requirement of former section 644 that the defendant must have served separate prison terms for his prior felony convictions," but they did intend for the phrase "brought and tried separately" to carry the same meaning as it did in the former statute—i.e., distinct proceedings. (*In re Harris*, *supra*, 49 Cal.3d at p. 136; see *People v. Ebner* (1966) 64 Cal.2d 297, 304.) Thus, the Legislature expanded the law's application to instances where a defendant did not serve separate prison terms for his prior felony convictions. This has direct application here, where the state court ran Cooper's state prison sentence for his robbery convictions concurrently with his federal sentence for bank robbery.

Cooper's invocation of Penal Code section 654 is unavailing. It is settled that Penal Code section 654 does not apply to successive federal and state prosecutions. (*People v. Belcher* (1974) 11 Cal.3d 91, 98.) Indeed, while California law "provides 'greater double jeopardy protection than the United States Supreme Court has determined to be available under the Fifth

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[15] We also observe that the Three Strikes Reform Act, passed in 2012, also did not amend subdivision (a)(1) of Penal Code section 667. (Prop. 36, § 2, as approved by voters, Gen. Elec. (Nov. 6, 2012), eff. Nov. 7, 2012.)

Amendment of the United States Constitution,' " a defendant may be tried for a state crime despite having suffered a federal conviction based on the same incident so long as the proof of conduct differs between the state crime and federal crimes. (*People v. Homick*, *supra*, 55 Cal.4th at pp. 838, 839–846 [new murder prosecution not precluded by conviction of interstate murder for hire because lying-in-wait special circumstance required proof of different conduct]; Pen. Code, § 656.) As shown, Penal Code section 211 and 18 United States Code section 2113(a) and (d) required proof of different conduct. Neither Penal Code sections 654 nor 656 governs here.

*3. The Matter Must Be Remanded for Retrial on the Priors*

Because we conclude that the record does not prove beyond a reasonable doubt that Cooper's 1985 state robbery and federal bank robbery convictions were based on separate criminal acts (*ante*, part II.E.1), the matter must be remanded for retrial on the priors and full resentencing.[16] (*People v. Buycks* (2018) 5 Cal.5th 857, 893 ["[W]hen part of a sentence is stricken on review, on remand for resentencing 'a full resentencing as to all counts is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances.' "].) At the retrial, the People may produce evidence to prove that the second and third prior strike allegations were based on separate criminal acts than the fourth prior strike allegation. (*People v. Fielder* (2004) 114 Cal.App.4th 1221, 1234 [Retrial of prior conviction findings is not barred by the state or federal prohibitions on double jeopardy even when a prior conviction finding is reversed on appeal for lack of substantial evidence].)

[16] To be clear, we reject Cooper's baseless contention that the trial court abused its discretion at sentencing. There is no basis for Cooper's conjecture that the court "did not consider" his sentencing motion. In the absence of an affirmative showing otherwise, we presume it did. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) We also reject that the court "considered apparently incorrect information." While we conclude the record does not prove beyond a reasonable doubt that Cooper's 1985 state and federal convictions were based on separate criminal acts, Cooper proffers no evidence showing any of the information relied upon at sentencing was incorrect or unreliable. The case at bar is not like *People v. Eckley* (2004) 123 Cal.App.4th 1072, where a denial of probation was based on false information. Cooper's due process claim is therefore meritless.

## III. DISPOSITION

The judgment is affirmed except that Cooper's sentence is vacated, the findings that the fourth strike allegation was true within the meaning of Penal Code sections 667, subdivisions (b)–(i), and 1170.12 is reversed, and the matter is remanded for a retrial on the priors in accordance with the views expressed herein.

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Clay, J. *

WE CONCUR:

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Brown, P. J.

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Goldman, J.

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