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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSHUA EDWARD HARVEST,

Defendant and Appellant.

A125036

(Contra Costa County
Super. Ct. No. 059334178)

Joshua Edward Harvest appeals from a judgment upon a jury verdict finding him guilty of second degree murder. He contends that the trial court erred in instructing the jury on the theories of aiding and abetting of implied malice murder and second degree felony murder. He also argues that the court erred in refusing to strike a co-perpetrator's testimony who refused to answer any questions despite a grant of immunity. We affirm.

I. PROCEDURAL BACKGROUND

On June 5, 1998, this court affirmed defendant's conviction of first degree murder in this case and reversed a second degree murder conviction resulting from the killing of Michael Gialouris on June 26, 1993. (*People v. Harvest* (June 5, 1998, A068802 [nonpub. opn.]); order modifying opinion filed on July 2, 1998.) We reversed the conviction for second degree murder with directions to the trial court to modify the judgment to reflect a conviction of voluntary manslaughter if the People elected not to retry him. The People elected not to retry defendant. The trial court sentenced defendant to 25 years to life for the first degree murder conviction and to a consecutive 11-year aggravated term for the voluntary manslaughter conviction.

On May 5, 2003, the United States District Court for the Northern District of California denied defendant's petition for habeas corpus. The Ninth Circuit Court of Appeals affirmed the denial in part but reversed it in part, finding error in the trial court's admission of certain accomplice testimony. The Ninth Circuit directed " 'the district court to order the state to release the petitioner unless the state either modifies the conviction to one for second degree murder or retries the petitioner.' " On March 23, 2005, the federal district court issued the order giving the State 60 days in which to either release defendant or initiate proceedings to modify the conviction to second degree murder or retry defendant. The Attorney General's office failed to transmit the order to the District Attorney of Contra Costa County. (*Harvest v. Castro* (9th Cir. 2008) 531 F.3d 737.) The error was not discovered until July 22, 2005. (*Id.* at p. 740.) At that point, the Attorney General's office nevertheless waited three more days before officially bringing the error to the District Attorney's attention, thereby allowing the District Attorney's office time to file a new complaint in superior court recharging defendant with the murder and providing time for the superior court to issue a no-bail warrant for defendant's arrest. (*Id.* at p. 747.)

On August 2, 2005, the federal district court granted the State's application for an extension of time in which to comply with the court's order. On July 9, 2008, the Ninth Circuit Court of Appeals reversed the district court's order, directing the district court to issue an unconditional writ of habeas corpus releasing defendant from custody. (*Harvest v. Castro, supra*, 531 F.3d at p. 740, 750.) The order, however, did not preclude the State from rearresting and retrying defendant. (*Id.* at p. 750, fn. 9.)

The retrial, which commenced on September 28, 2008, is the subject of this appeal.

II. FACTS

The evidence at trial revealed the following:

At approximately 3:00 a.m. on July 4, 1993, Deputy Beardsley was on patrol when he responded to a dispatch call to Inlet Drive between Shore Boulevard and the Port Chicago Highway in West Pittsburg. There, he found a body later identified as Joel

Vigil, lying on the ground. Vigil's face was encrusted with blood, his head was in the gutter and his pants were down around his ankles. Vigil was dead, having suffered a cerebral hemorrhage due to a penetrating wound of the left temple. Vigil had also suffered five additional wounds to the left side of his face and head. The wounds were inflicted with a blunt instrument. Coal chisels or spikes could have been used to inflict the wounds. Vigil also had several abrasions on his face that could have been caused by kicking and stomping.

The police arrested defendant on July 7, 1993. A videotape of the police interrogation of defendant was played for the jury. Defendant told the police that on July 3, 1993, Charles "Chuckie" Myers and James Pittman picked him up at a friend's house.¹ They went to Myers' house after defendant picked up some beer. Defendant had been drinking all day. They left Myers' house and went to Roy Jobe's house. Pittman left to go to his house and then quickly returned to Jobe's, saying that there was a man near his house shooting up heroin with a prostitute. Defendant stated that he, Myers and Pittman, carrying chisels that were similar to railroad spikes, went after Vigil because he was shooting up heroin and being orally copulated by a prostitute in front of Pittman's home. They did not like people who used heroin, and did not like prostitutes in the neighborhood. Defendant later said that the reason they attacked Vigil was because Pittman wanted the truck. He admitted that he punched Vigil a couple of times but claimed that he did not stick the chisel through his head. He threw the chisels in the river.²

Defendant explained that the incident began when someone threw a chisel through the back window of Vigil's truck and hit Vigil in the head. Defendant then also struck Vigil with a chisel through the window and ran up to the driver's side of the truck and

¹ The parties stipulated that defendant was 17, Myers was 16, and Pittman was 21 at the time of the murder.

² The parties stipulated that after the police concluded their interview of defendant, he directed the police to a point near the bay where he stood when he threw the chisels into the bay. The sheriff's dive team was unable to locate the spikes.

opened the door. He hit Vigil and stabbed him near his eye. The prostitute screamed and took off running. Defendant and Pittman pulled Vigil out of the truck. Vigil fell over on his side and hit his head. Pittman stomped on Vigil's head about four or five times. They then dragged Vigil to the back of the truck and tried to pick him up, but he was too heavy. Myers got the chisel out of the truck and he and Pittman drove off in Myers's pickup. Defendant took off running but then returned and drove off in Vigil's truck.

Myers testified for the prosecution. Prior to his testimony, the jury was informed that Myers admitted committing two felonies in juvenile court in 1993, and that the crimes involved moral turpitude and could be considered by the jury for the limited purpose of determining Myers's credibility as a witness. Myers had also testified at defendant's first trial in August 1994 and at Pittman's trial in December 1994. When he testified in 1994, he had already been committed to the California Youth Authority. He remained incarcerated until his 25th birthday.

Myers testified that during the early morning hours of July 4, 1993, he was with defendant and Pittman. They were at Jobe's house when Pittman handed him and defendant each a metal spike. Pittman told them, " 'Let's go over there and whip this guy's ass.' " They took off and went around the corner, with defendant running off ahead of them. He saw defendant at the driver's side of a pickup, striking Vigil's head. He did not know whether defendant punched Vigil or stabbed him. Myers threw a chisel through the rear window of the truck. Pittman also threw a chisel, striking the back of Vigil's head. At some point, Myers removed a chisel from the cab of the pickup.

Myers also testified that earlier that evening, defendant had suggested that they rob the Bonfare market. He admitted that in defendant's prior trial, he testified that he told the police defendant said, " 'Die, motherfucker, die' " as he stabbed Vigil.

After the attack, they returned to Myers's house. Defendant and Pittman had blood on their pants and hands. They went to the bathroom to wash the blood off their hands.

Wendy Morse Nguyen testified that in 1993, she was a prostitute and a heroin addict. On the morning of July 4, 1993, Vigil was her client and she was orally

copulating him at the time of the attack. She heard a window break, then saw Vigil being hit and stabbed in the head. She heard people talking. She tried to get the truck in gear to get away when Vigil's head fell forward. Blood splattered onto her and she got out of the truck and ran. As she fled, she saw Pittman standing some distance from the rear of the truck. She had seen Pittman walk past the truck about five to ten minutes before she heard the truck's window break.

Richard Rios's testimony at defendant's prior trial was read to the jury. He was 16 on July 4, 1993. Sometime between 2:00 and 3:00 a.m. that morning, he was at the Bonfare Market on Port Chicago Highway when defendant drove up in a black pickup truck. The truck was bloody on the inside. Defendant told Rios that he had just killed someone. Defendant had blood all over his hands. He drove away without getting out of the truck.

At approximately 3 a.m. on July 4, Barbara Popejoy heard a crash outside her home on Levy Road in West Pittsburg. She went outside and saw the pickup truck crashed into the fence outside her house.

Sarah Potter was Myers's girlfriend in July 1993. She was then 16 years old and was at Myers's house on the evening of July 3, 1993. She testified that Myers, Pittman, and defendant were at Myers's house drinking. They were talking about doing a drive-by and stealing a car. They were a little intoxicated.

Potter further recalled that Myers, Pittman, and defendant left the house about 2:00 a.m. on July 4, 1993, saying that they would be back in 15 minutes. When they returned, Pittman said that he had killed a man that was in a truck. He had thrown an object through the window of the truck that he thought had killed him. Pittman also said that he had kicked the man outside the truck because he thought he was still alive. He further said that he should have been a baseball player because he threw the spike so hard. Defendant said that he had stabbed the man in the eye when he opened the door of the truck. Potter also testified that she saw blood on the front of defendant's shoes and that Pittman had blood on his leg.

Witness Chris Lerch denied that he told the police a day or two after the murder that he and defendant had a conversation about the man who was killed, and that defendant made some statements about the killing. A DVD of the police interview of Lerch in July 1993 was played for the jury. During the interview, Lerch said that defendant told him he killed the man in the truck with a metal bar. Defendant told him that the man was shooting heroin and was with a hooker in the truck. Defendant also told Lerch that he was going to beat the guy up and take his truck.

The court granted Pittman use and derivative use immunity pursuant to section 1324. When the People called him as a witness, however, Pittman refused to answer any questions about the killing, replying, "I have nothing to say." The court thereafter admonished Pittman that if he refused to testify, the People and the Board of Prison Terms could consider or use his failure to testify as a reason to deny him parole in future parole proceedings. When Pittman continued to refuse to answer any questions, the court found him in contempt of court.

Various bloody shoeprints were found at the scene. At the time of his arrest, defendant had abrasions on his hands. When Pittman was arrested, he did not have any injuries on his hands, but he had a blistered area on his left hand that was healing and a slight abrasion on his right wrist area. Defendant's left palm print was found on the left door window on the driver's side of Vigil's truck. The parties stipulated that blood was found on defendant's shoes.

III. DISCUSSION

A. Jury Instructions

Defendant contends that the trial court committed prejudicial error in its instructions to the jury on several theories of second degree murder. We conclude that any instructional error was harmless.

Defendant first argues that the court erred in its instructions on aiding and abetting of implied malice murder because the instructions permitted the jury to convict him of second degree murder on the theory that he could be derivatively liable as a direct aider and abettor of implied malice murder. As defendant acknowledges, however, the jury

was given several alternative theories on how it might arrive at a second degree murder verdict, and we fail to discern, in light of the evidence, the arguments of counsel, and the instructions given, how the jury could have convicted defendant on the theory he advances.

The prosecution's theory was that defendant was the perpetrator of the murder and that Pittman and Myers aided and abetted him in the commission of the offense. To the extent that defendant relied on the theory that he was culpable only as an aider and abettor to Pittman, the jury was appropriately instructed on the standard instructions for aiding and abetting an implied malice murder.

In *People v. Beeman* (1984) 35 Cal.3d 547, 560, our Supreme Court considered the standard aiding and abetting instructions then in effect and concluded that in order to support a conviction for aiding and abetting there must be "proof that an aider and abettor act[ed] with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." In *People v. McCoy* (2001) 25 Cal.4th 1111, 1118, the Court further explained that "outside of the natural and probable consequences doctrine, an aider and abettor's mental state must be at least that required of the direct perpetrator. . . . 'When the offense charged is a specific intent crime, the accomplice must "share the specific intent of the perpetrator;" this occurs when the accomplice "knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." [Citation.]' [Citation.] What this means here, when the charged offense[s] and the intended offense[s] . . . are the same, i.e., when guilt does not depend on the natural and probable consequences doctrine, is that the aider and abettor must know and share the murderous intent of the actual perpetrator. [¶] Aider and abettor liability is thus vicarious only in the sense that the aider and abettor is liable for another's actions as well as that person's own actions. When a person 'chooses to become a part of the criminal activity of another, she says in essence, " 'your acts are my acts' [Citation.]" (Footnote omitted.)

Here, the court gave the jury the standard instructions on aiding and abetting, CALJIC Nos. 3.00 and 3.01, and on the types and degrees of murder and implied malice. It specifically instructed the jury on the mental state required for a conviction of second degree murder based on an implied malice theory pursuant to CALJIC No. 3.31: “In the crime of second degree murder based on a theory of implied malice, a necessary element is the existence in the mind of the defendant of a mental state of malice aforethought. [¶] In a crime based on a theory of liability as an aider and abettor, a necessary element is the existence in the mind of the defendant of both knowledge of the unlawful purpose of the perpetrator and an intent to assist that purpose” This instruction was preceded by several instructions defining the types and degrees of murder, felony murder, manslaughter, and malice (CALJIC Nos. 8.00, 8.10, 8.11, 8.20, 8.21, 8.25, 8.30, 8.31, 8.37, 8.50, and 8.51 among others).

It is well settled that in assessing whether the instructions given to the jury were objectionable, we must consider whether it is reasonably likely that the jury could have understood them in the manner defendant asserts. In making that determination, we must consider the entire record of the trial including the other instructions provided to the jury and the arguments of counsel. (*People v. Cain* (1995) 10 Cal.4th 1, 36; *People v. Kelly* (1992) 1 Cal.4th 495, 526.)

Defendant asserts that the court’s instructions improperly permitted the jury to find that defendant aided and abetted an implied-malice murder without finding that he had intended someone to be killed. We disagree. The court instructed the jury on implied malice several times and reiterated that in order to support a second degree murder conviction, the jury must find that defendant, either as a perpetrator or an aider and abettor, harbored malice, whether express or implied.

The jury was instructed on specific intent and the implied malice theory for murder. The parties’ closing arguments brought home the theory that implied malice was required to convict defendant of second degree murder. Defense counsel argued, “[s]econd degree murder. There’s two ways to get to second degree murder. One is through a theory of intent to kill that’s not mitigated in some fashion, an actual express

— express malice is the legal term and intent to kill somebody. The other is what they call an implied malice argument. Didn't intend to kill somebody, engaged in dangerous conduct with knowledge and conscious disregard of the consequences.” Defense counsel further reiterated the necessity to prove the existence of implied malice on an aiding and abetting theory for a conviction of second degree murder: “In the crime of second degree murder based on the theory of implied malice, a necessary element is the existence in the mind of the defendant of a mental state of malice aforethought. [¶] In a crime based on a theory of liability as an aider and abettor, a necessary element is the existence in the mind of the defendant of both the knowledge and of the unlawful purpose of the perpetrator and an intent to assist that purpose.” The prosecutor, in turn, urged the jury to find defendant guilty of first degree murder based only on felony robbery or murder by lying in wait, on which the jury did not convict. Finally, after the case was submitted to the jury, the court reiterated its instruction pursuant to CALJIC No. 3.31 on the mental state required for second degree murder.³ In light of the cohesive, extensive instructions given to the jury, the arguments of counsel, and the entire record of the trial, it is not reasonably likely that the jury misapplied the court's instructions. Had defendant believed that the jury required clarification of aiding and abetting principles with respect to implied malice murder, he could have requested clarification or modification of the instructions at trial. “ ‘If defendant believed that the instruction was incomplete or needed elaboration, it was his responsibility to request an additional or clarifying instruction.’ ” (*People v. Carpenter* (1997) 15 Cal.4th 312, 391–392.)

Defendant raises a further iteration of his instructional error argument by contending that a defendant cannot be convicted of aiding and abetting second degree implied-malice murder because the crime requires intent to kill. He argues that there can be no crime of aiding and abetting second degree implied-malice murder for the same reason there can be no crime of attempted implied-malice murder, relying on language in

³ The jury commenced deliberating on October 23, 2008. The following day, the court reread certain instructions including CALJIC No. 3.31, and then instructed the jury to commence its deliberations anew.

People v. Santascioy (1984) 153 Cal.App.3d 909, 918 [“[n]othing less than a specific intent to kill must be found before a defendant can be convicted of attempt to commit murder”].) Defendant, however, cites no pertinent authority for this proposition, and we conclude it is not persuasive.

Implied-malice second degree murder is not a specific intent crime. Therefore, the requirement that the aider and abettor “share the specific intent of the perpetrator” does not apply. (*People v. Beeman, supra*, 35 Cal.3d at p. 560.) Rather, the question is whether the aider and abettor intends “not only the act of encouraging and facilitating but also the *additional* criminal act the perpetrator commits” (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1129.) Thus, the sole question, here, is whether defendant, if convicted as an aider and abettor, had “knowledge of the [perpetrator’s] unlawful purpose” and acted “[w]ith the intent or purpose of committing or encouraging or facilitating the commission of the crime” (CALJIC No. 3.01.)

Second degree implied malice requires proof that the perpetrator committed an intentional act, “[t]he natural consequences of [which] are dangerous to human life, and [that] the act [] was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.” (CALJIC No. 8.31.) Additionally, “it is not necessary to prove that the defendant intended that the act result in the death of a human being.” (CALJIC No. 8.31.) Accordingly, a defendant may be convicted of aiding and abetting an implied-malice second degree murder if the defendant intended to, encouraged or facilitated the perpetrator’s actions *and* intended “the additional criminal act” committed by the perpetrator. (See *People v. Mendoza, supra*, 18 Cal.4th at p. 1129.) No proof of specific intent to kill is required.

Thus, reading the record as a whole, we are convinced that the jurors would have understood they could convict defendant of second degree murder on an implied malice theory only if they found he was the perpetrator or the aider and abettor and that he acted with implied malice. We must presume that the jury understood and correlated all of the instructions given to it. (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.) The court’s instructions were a correct statement of the law on second degree murder. (See

People v. McCoy, *supra*, 25 Cal.4th at pp. 1117–1118.) No additional instructions were warranted.

Even if the court erred in its instructions, defendant was not prejudiced. The evidence that defendant was guilty of second degree murder was overwhelming. Whether he was the perpetrator or an aider and abettor, the evidence showed that he hit and stabbed Vigil several times in the head with a chisel, yelling “Die, motherfucker, die,” and that he admitted his participation in the killing both to friends and the police. On this record, any instructional error was harmless.

Defendant also contends that the court erroneously instructed the jury on second degree felony murder based on the theory that he killed in the commission of felony battery, violating the merger doctrine of *People v. Ireland* (1969) 70 Cal.2d 522. The merger doctrine prohibits an assaultive crime from serving as the predicate felony in second degree felony-murder prosecutions; the assault merges into the homicide. (*People v. Chun* (2009) 45 Cal.4th 1172, 1178.)

Here, the court initially instructed the jury on two theories of second degree felony murder and immediately retracted the instructions. The court admonished the jury to disregard CALJIC No. 8.32 concerning second degree felony-murder as well CALJIC No. 8.34 on aiding and abetting second degree felony murder. We must presume that the jury adhered to the court’s admonition. The court did not further instruct on second degree felony murder. And it instructed the jury twice on the merger doctrine with respect to felony-assault.

The correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction, or from a particular instruction. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) Here, the court instructed the jury on the relevant theories of the case, and immediately admonished it to disregard the instructions on second degree felony murder that it erroneously gave. We must presume that the jury understood and correlated the court’s instructions. (*People v. Martin*, *supra*, 78 Cal.App.4th at p. 1111.) On this record, it is not reasonably likely that the jury misapplied the law.

Defendant argues that the court erred in giving the jury the first sentence of CALJIC No. 8.51 on felony murder — “If a person causes another’s death, while committing a felony inherently dangerous to human life, the crime is murder.”⁴ The court gave that instruction in the midst of other instructions on first degree felony murder.

We agree with the Attorney General that it is not reasonably likely that the jury applied the instruction to convict defendant on a theory of second degree felony murder, particularly here, where the jury was expressly instructed to disregard the instructions that it erroneously gave on second degree felony murder. Although defendant seeks to point out ways in which a jury might have interpreted the instructions, we cannot conclude that it did so. “ ‘Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.’ ” (*People v. Williams* (1995) 40 Cal.App.4th 446, 457, quoting *Boyde v. California* (1990) 494 U.S. 370, 380–381.) While the jury was presented with numerous theories on which to convict, it was adequately instructed. No error appears.

B. Pittman’s Testimony

Defendant also contends that the court erred in declining to strike Pittman’s testimony and to admonish the jury to disregard Pittman’s refusals to testify.

After Pittman’s testimony, defendant moved for a mistrial on the ground that the questions to Pittman regarding his parole hearings and his attitude toward the Vigil

⁴ The court continued the instructions with the remainder of CALJIC No. 8.51, instructing the jury that “[t]here are many acts which are lawful but nevertheless endanger human life. If a person causes another’s death by doing such a dangerous act in an unlawful or criminally negligent manner without realizing the risk involved, he is guilty of manslaughter. [¶] If, on the other hand, the person realized the risk and acted in total disregard of the danger to life involved, malice is implied and the crime is murder.”

family,⁵ highlighted the nature of Pittman’s incarceration, and prejudiced the jury. The court denied the motion. Although the court ruled that it would strike the testimony of the questions and responses about the parole hearing and the presence of Vigil’s parents at the parole hearing and that it would admonish the jury, it failed to do so following briefing by the parties on the issue. The court, without any objection from defendant, ultimately instructed the jury that “You may consider the willful disobedience of a court order to testify in assessing the credibility of a person who provides an out-of-court statement.”⁶

Defendant argues that he was prejudiced because the trial court’s failure to strike Pittman’s testimony allowed the prosecutor to argue that Pittman “has plenty to say,” but “chose not to share it with us.” Yet defendant failed to ask the court to admonish the jury to disregard questions about Pittman’s incarceration and parole hearings despite the court’s earlier indication that it would do so. An admonition would have cured any error from the court’s failure to strike the testimony.

⁵ The prosecutor questioned Pittman as follows after eliciting that he had the tattoos depicted in a photograph taken in July 1993: “[Mr. MacMaster (deputy district attorney)]: So Mr. Pittman, you’ve picked up quite a lot of ink in the intervening years, safe to say. [¶] [James Pittman]: I have nothing to say. [¶] [MacMaster]: How’s that working out for you, being in State Prison? [¶] [Pittman]: I have nothing to say. [¶] . . . [¶] [MacMaster]: you’re not mad at me for stuff I said at your trial, are you? [¶] [Pittman]: I have nothing to say. [¶] [MacMaster]: Not mad at me when I showed up at your last parole hearing, are you? [¶] [Pittman]: I have nothing to say. [¶] [MacMaster]: Are you mad at Mr. Vigil? [¶] [Jack Funk (deputy public defender)]: I’m going to object to that. Assumes facts not in evidence. [¶] [The Court]: Overruled. [¶] [MacMaster]: Are you mad at Mr. and Mrs. Vigil — [¶] [Pittman]: I have nothing to say. [¶] [MacMaster]: — when they showed up on behalf of their son? [¶] [Pittman]: I have nothing to say.” The court thereafter admonished Pittman that he had been granted use and derivative use immunity and that if he did not testify fully and truthfully, the People or the Board of Prison Terms might consider his failure to testify as a reason to deny parole. Pittman continued to refuse to testify.

⁶ The instruction was a correct statement of the law. (See *People v. Lopez* (1999) 71 Cal.App.4th 1550, 1554 [“[W]here a witness has no constitutional or statutory right to refuse to testify . . . [j]urors are *entitled* to draw a negative inference when such a witness refuses to provide relevant testimony”].)

In any event, the record fails to support defendant's argument that the jury was allowed to infer that whatever Pittman had to say would have been bad for him given Pittman's immunity agreement. Pittman's brief testimony merely allowed the jury to see the other man implicated in the crime. His identification of himself, his tattoos, and his incarceration added little to the case. In closing argument, the prosecutor was reduced to arguing that Pittman likely had no evidence to share that would have been useful to the prosecution, and that anything he might have said would have been of no assistance to the case as both Pittman and defendant "shared similar motivations when they were speaking to Detective Sergeant Ward."

The prosecutor's argument was not erroneous. It constituted a fair comment on the state of the evidence.⁷ (*People v. Cook* (2006) 39 Cal.4th 566, 608.)

⁷ We note that defendant failed to object to the prosecutor's argument and request an admonition below; he thus waived any claim of prosecutorial misconduct. (*People v. Cole* (2004) 33 Cal.4th 1158, 1201.)

IV. DISPOSITION

The judgment is affirmed.

RIVERA, J.

We concur:

RUVOLO, P.J.

BASKIN, J.*

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