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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Appellant,

v.

BRYAN EDWARD MAZZA,

Defendant, and Appellant.

A127113

(Contra Costa County
Super. Ct. No. 050615260)

Defendant Bryan Edward Mazza appeals from the trial court's judgment after a jury trial, in which he was found guilty on a number of counts related to armed robberies and/or attempted armed robberies that occurred in October 2005 in Contra Costa County. Defendant argues the trial court prejudicially erred by denying his motion to sever certain counts; that the prosecutor committed multiple instances of prejudicial misconduct and that he, defendant, received ineffective assistance of counsel to the extent his trial counsel did not object; and requests this court review the lower court's *Pitchess* ruling for abuse of discretion. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*))

The People cross-appeal that the trial court's dismissal of defendant's previous three strike convictions pursuant to Penal Code section 1385¹ was ineffective for lack of a statement of reasons in the court's minutes, requiring that sentencing be reversed and the matter remanded; defendant does not disagree. The People otherwise argue we should affirm the judgment.

¹ All statutory references herein are to the Penal Code unless otherwise stated.

We affirm the judgment, except that we reverse the sentence for the reasons argued by the People and remand for further proceedings consistent with this opinion.

BACKGROUND

In December 2006, the Contra Costa County District Attorney filed an eight-count information against defendant regarding four incidents at four retail establishments on October 11, 2005 and October 13, 2005. Count one, regarding Round Table Pizza, alleged second degree robbery of Kenny Haynes on October 11, 2005 (§§ 211, 212.5), with a personal use of a firearm enhancement allegation (§ 12022.53, subd. (b)); count two, regarding Peggs Grill, alleged attempted second degree robbery of Joseph McLaughlin and John Doe (§§ 664, 211, 212.5), with a personal use of a firearm enhancement allegation (§ 12022.53, subd. (b)); count three alleged that on October 11, 2005, defendant was a felon in possession of a firearm (§ 12021, subd. (a)(1)); count four, regarding Rasputin Records, alleged attempted second degree robbery on October 13, 2005 (§§ 664, 211, 212.5) with a personal use of a firearm enhancement allegation (§ 12022.53, subd. (b)); counts five and six, regarding Paradise 33, alleged second degree robberies on October 13, 2005 of Kenny Ly and Van Pham (§ 211), with intentional and personal discharge of a firearm enhancement allegations (§ 12022.53, subds. (b) & (c)); count seven, also regarding Paradise 33, alleged attempted murder of Kenny Ly (§§ 664, 187), with an intentional and personal discharge of a firearm enhancement allegation (§ 12022.53, subds. (b) & (c)); and count eight alleged that on October 13, 2005, defendant was a felon in possession of a firearm (§ 12021, subd. (a)(1)).

The information also contained numerous enhancement and other allegations. It was alleged pursuant to sections 667, subdivisions (b) through (i) and 1170.12 that defendant had three strike convictions; pursuant to section 667.5, subdivision (b) that defendant had suffered prior serious felony convictions for robbery, first degree burglary, and assault on a peace officer, and that he failed to remain free from prison custody for a period of five years; pursuant to section 667, subdivision (a)(1) that defendant was previously convicted of three serious felonies, they being robbery, first degree burglary, and assault on a peace officer; and pursuant to section 1203, subdivision (e)(4), that

defendant was not eligible for probation because of eight prior felony convictions in California.

Prior to trial, defendant filed a series of motions pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. The court granted a hearing regarding two Concord police officers and an officer from Napa. The court conducted an in camera review of these officers' personnel documents for allegations against any of them concerning the planting or falsifying of physical evidence. It found nothing.

Defendant also moved to sever count four (regarding Rasputin Records) and counts five through seven (regarding Paradise 33) from counts one through three (regarding Round Table Pizza and Peggs Grill). The court denied the motion.

Evidence Presented at Trial

The Prosecution's Case

At trial, which began in February 2009, the prosecution presented evidence regarding a series of incidents at different locations in Contra Costa County.

The Round Table Pizza Robbery

Kenny Haynes, a supervisor at a Round Table Pizza in Concord, California, testified that a little after 4:00 p.m. on October 11, 2005, a tanned Caucasian man, about 5 feet 11 inches tall, a little muscular in his arms, with long hair out of the sides and back of his hat, and wearing black-framed dark-tinted sunglasses, a red 49ers jersey, and a straw hat entered the restaurant and went up to the counter. When Haynes spoke to him, the man told Haynes to keep his hands visible, lifted his shirt, and displayed a black .22-caliber revolver with a brown handle tucked in his waistband. He asked several times, "Do you see this?" The man handed him a white plastic bag and told him to empty the cash register into it.

Haynes filled the bag with about \$200 to \$300 in bills. The robber told him to put in the money from an adjacent cash register and Haynes did so, adding about \$80 in bills and \$20 in change to the bag. Haynes gave the bag to the robber, who thanked him and left.

Haynes watched the robber drive away in a silver or gray Pontiac, which Haynes was “pretty sure” was a Grand Am. He did not see the license plate. At trial, he identified a photograph of defendant’s car as the same style, color, make and model as the one driven by the robber.

Concord Police Officer Summer Galer testified that Haynes gave a description of the robber to him when Galer arrived on the scene as a man as a Hispanic or a dark-complected white male, 28 to 34 years old, about 6 feet 2 inches in height with a buff build, with straight teeth and an unshaven face, wearing a red 49ers jersey.

Two weeks later, Haynes identified defendant in a photographic lineup as the man who had robbed him. He described defendant’s photograph as a “dead-on match,” although the person in the photograph appeared to have shaved and had shorter hair. Haynes identified defendant as the robber at the preliminary hearing and at trial, and said defendant’s facial features were the same, although defendant looked thinner at trial than Haynes remembered. He was “100 percent” certain of his identification.

Haynes was shown a photograph of a black revolver linked to defendant. He said the handle of the gun was not the same as he saw the robber carry, that the gun was more old-fashioned and western looking, and definitely was not the gun he had seen.

The Peggs Grill Robbery

Joseph McLaughlin’s Testimony

Joseph McLaughlin testified that he was working at Peggs Grill in Martinez, around 4:00 p.m. or 4:30 p.m. on October 11, 2005 when a dark-skinned, Caucasian man, possibly of Italian ethnicity, around 5 feet 10 inches tall with a muscular, stocky build came in and sat down near the cash register. He wore a zip-up shirt made out of mesh material, large, police-like sunglasses, and a straw hat that looked something like the hat shown to McLaughlin at trial, but not the same.

The man ordered coffee from McLaughlin and paid with a five-dollar bill. When McLaughlin opened the cash register, the man lifted his shirt and displayed a handgun that was tucked in his waistband, which McLaughlin thought was a revolver. The man said, “Give me the fucking money,” and when McLaughlin refused he demanded the

money a second time. When McLaughlin again did not comply, the man reached for the money in the register, but McLaughlin slammed the drawer shut. The man threw hot coffee at McLaughlin and ran out the door. He returned a few moments later and used a portion of his shirt to wipe the door handle, as if to wipe off his fingerprints. He then ran through the parking lot to the road, and McLaughlin lost sight of him.

McLaughlin described the robber to the police. Two weeks later, he was shown a photographic lineup. According to the officer who showed him the lineup, McLaughlin pointed at defendant's photograph and said, "That's him." When asked if he was sure, he said, "Yep, that's him."

McLaughlin identified defendant at the preliminary hearing in November 2006. At trial, he testified that he did not recognize defendant and did not know if he was the same man he had identified at the preliminary hearing. His memory was fresher at that hearing and he believed the person he pointed out at that time was the robber.

Dan Mello's Testimony

Dan Mello testified that he and his wife Carolyn Mello had just parked in the parking lot of Peggs Grill close to the front door when he saw a man walk out of the restaurant, then return and wipe off the door handle with his shirt. The man was a light-skinned Hispanic, around 5 feet 10 inches tall, probably weighed under 200 pounds, and looked "buffed" like a weight lifter. He walked across the street and got into a silver or gray Pontiac Grand Am. Dan could not recall if he wore a hat. He acknowledged that he told a prosecutor a week before his testimony that the man was wearing a hooded sweatshirt.

Two weeks later, a Martinez police officer showed the Mellos a photo lineup. Dan testified that he was not able to identify any of the photographs as the man he saw at Peggs because he had not gotten a good look at the man.

Carolyn Mello's Testimony

Carolyn Mello testified that the man was dark, with olive skin and looked Hispanic. She could not remember if he wore a hat. She acknowledged that when she was shown the photo lineup, she picked out defendant's photograph after a few minutes,

but told the officer she was not sure. She identified defendant at trial as the man she saw, although she said, “I couldn’t swear—if he walked past me on the street, I wouldn’t recognize him.” She also said, “I don’t know for sure. It was a glimpse. It really happened so fast that day.” Asked what was similar between defendant and the man she saw, she identified defendant’s facial coloring and hair as similar to the appearance of the man she saw, but said, “That’s about it.”

Robert Perry’s Testimony

Robert Perry testified that he was standing across the street from Peggs Grill around the time of the robbery when he saw a man around 5 feet 10 inches tall, 28 to 30 years old, with a dark complexion and a semi-muscular build, cross the street and get into a silver, gray, or light-bluish Pontiac, which might have been a Grand Prix or a Thunderbird. According to a testifying officer, Perry said on the day of the incident that it was a silver or gray Pontiac Grand Am.

The Rasputin Records Robbery

Brett Mathews’s Testimony

Brett Mathews testified that he was standing outside the Rasputin Records store in Pleasant Hill, on October 13, 2005, in the afternoon. He saw a silver or gray Pontiac Grand Am parked in a red zone about 18 feet away from him. A man got out of the car and approached the store’s front door. As he did so, he pulled a bright or medium blue ski mask over his face from what appeared to be a darker blue knit regular beanie. He had a handgun in his waistband. The man pushed against the store’s door, apparently not noticing that it had a sign that said “pull,” and then ran back to his car.

Mathews followed the man in his own vehicle as the man drove away. He saw some gray duct tape placed over part of the license plate, but could see the first digit of the plate was “5.” As he followed the man, Mathews saw a police officer and flagged him down. Mathews explained what had happened, told the officer the robber was driving a Pontiac Grand Am, and the officer drove after the Pontiac. Later that day, according to an officer’s testimony, Mathews reported that the man was a white male,

about 28 years old, 6 feet 2 inches tall, about 210 pounds, wore a bright to medium blue ski mask, and had a large tribal tattoo design on his right calf.

Twelve days later, Mathews viewed a photo lineup and identified defendant's photograph as the man he saw. He was very certain of his identification. He particularly recognized defendant's high cheekbones and strong jaw line.

At the preliminary hearing, Mathews identified defendant as the man he saw try to enter Rasputin Records. He could not remember the description he gave police, had no memory of the man's height or weight, and was not sure about his age and other features. He said the hair of the man he saw was "lighter than it is now," and that the man's hair was relatively short and straight.

At trial, Mathews again identified defendant as the man he saw tried to enter Rasputin Records. He recalled that the man was a bit taller than his own height, 5 feet 11 inches, was Hispanic or white male with tanned skin, between 28 and 36 years old, and wore tan or khaki baggy cargo shorts. He identified a tattoo on defendant's left calf as the same one he had seen on the robbery suspect, and said he was very familiar with tattoos because he had several friends who were tattoo artists. He also acknowledged that when he talked to police, he told them he thought the tattoo was on the robber's right calf.

Bonnie Jean Logan's Observations

Pleasant Hill Police Officer David Garcia testified that he interviewed Bonnie Jean Logan on October 13, 2005. She told him that earlier that afternoon, while she sat 20 feet from the Rasputin Records store, she saw a white male approach the doors who was about 25 to 30 years old, thin with a muscular build and about 6 feet tall. He had a tattoo of some sort on his left calf measuring four by eight inches. She saw him fidgeting with the right side of his waistband. At trial Logan could not recall these details, and acknowledged that she had trouble remembering because she was an epileptic, took medication for epilepsy, and used to use a lot of street drugs back when she was hanging out outside the Rasputin Records store.

The Paradise 33 Robbery

Brothers Kenny Ly and Trung Howard Ly (Howard) testified about events that occurred at their Concord, California restaurant, Paradise 33, in the afternoon of October 13, 2005, the same day as the Rasputin Records incident. We summarize their testimony.

Around 3:30 p.m. that day, Kenny was sitting near the cash register when he noticed an older, silver Pontiac, possibly from the 1980's, parked in a red zone outside with a license plate that was scratched so that he could not see the numbers. He saw a man get out of the driver's side door who had light-colored skin and long, wavy, naturally curly hair that fell almost to his shoulders. A second man remained in the passenger seat.

Kenny saw the man pull a brown mask with two-eye holes out of his front pocket and put it over his head so that it covered his face. The man, wearing jeans and a white t-shirt, entered the restaurant, pulled a handgun from his pants, and pointed it at Kenny and the restaurant manager, Van Phan. He told them, "You stay right there" and "Give me all the money." Kenny saw a tattoo between the robber's elbow and wrist and curly hair coming out from underneath his mask. His gun was black and looked like a police handgun, but Kenny could not say whether it was a semiautomatic or a revolver.

Terrified, Kenny took "some few" hundred dollars in bills from the cash register and handed them to the man, who took them with his left hand. He testified that he saw the robber's trigger finger move and stepped to the side; the gun went off, he felt something touch the skin on top of his arm, and he heard glass break behind him.

From the back of the restaurant, Howard noticed a man with a mask covering his whole head standing 3 to 4 feet in front of Kenny, pointing a silver handgun at Kenny. The man had a six to seven inch silver gun in his right hand. His right forearm had a dark blue tattoo on it. He wore blue pants, appeared to be Caucasian, and was taller than Howard, who was 5 feet 5 inches or 5 feet 7 inches, but not too big. Howard could not remember the color of the mask. Defendant displayed his right forearm to the jury; it was not tattooed.

Howard took a soup bowl and quietly stepped over to behind the robber. At some point after his brother handed bills to the robber, Howard hit the robber in the back of the head with the soup bowl; Howard contradicted himself repeatedly regarding whether the gun went off before or after he hit the robber in the head with the soup bowl, making it unclear what exactly occurred. Howard ran back to the kitchen so as not to be shot. He never saw the robber's face.

The robber stumbled, left the restaurant, and got into the passenger side of the car. The man waiting in the car drove off.

Neither Kenny nor Howard identified defendant at trial, nor had they done so at the preliminary hearing. Kenny identified a photograph of defendant's car as being the same as the getaway vehicle, except that he did not remember the getaway vehicle having a "wing contraption" on the trunk as depicted in the photograph shown him.

Kenny Ly acknowledged that he knew Dan Mello, one of the witnesses regarding the Peggs Grill robbery, and that the two had talked about the case.

Testimony Regarding Defendant's Arrest and the Police Investigation

Napa Police Officer John Metz testified that in the early morning of October 15, 2005, he was patrolling in a residential area of Napa when he noticed an unoccupied 2005 silver Pontiac Grand Am parked at the end of a street where houses were under construction and learned from a check of the license plate that it was a rental car. He heard the sounds of someone walking around one of the houses under construction, called for backup, and began searching the houses. Inside one of them, Metz found a small fanny pack containing a dark-colored, six-shot revolver with five live rounds and one expended round, a box of .22-caliber ammunition, and a pair of clear plastic gloves. A K9 officer and police dog arrived and investigated. The K9 officer, who testified at trial, concluded from the dog's conduct that the fanny pack owner had touched the Pontiac Grand Am.

Metz, upon receiving a report around 2:00 a.m. that a person was walking around the construction site with a flashlight, returned to the scene. Metz saw someone come out of one of the houses and go to the Pontiac. As the car went into motion, Metz shouted,

“Police!” and ordered the driver to stop. The driver did not stop until Metz and another officer pointed their weapons at the car. Defendant was the driver. He twice ignored the officers’ commands to step out of the vehicle and Metz forcibly pulled him out of the open driver’s door and forced him on the ground. Defendant resisted being handcuffed. He was very fit and muscular. He allowed the officers to handcuff him after Metz threatened to use pepper spray on him.

Metz searched defendant’s person and found over \$3,300 in bills, a pair of pliers, and a folding knife. He arrested defendant for being a felon in possession of a knife; defendant falsely stated he was not on parole.

The Pontiac Grand Am was searched, with defendant’s permission. Napa police found a gun holster designed to be concealed in a waistband, with the bottom tip cut out that would allow for a long-barreled gun to fit, a dark knit cap with eyeholes cut out, and a blue knitted ski mask. An officer testified that he observed a straw hat in the car, but did not seize it. Also, a .22-caliber Remington bullet was found in a pocket of defendant’s jean jacket, which was also booked into evidence. Concord police also searched defendant’s car. They seized a straw hat, a pair of cargo shorts, and two pairs of sunglasses.

Kenny Haynes and McLaughlin testified at trial that the straw hat shown to them at trial was not the same as the one wore by robbers they observed, and Haynes testified the handgun from the fanny pack was different. The license plate of the Pontiac was analyzed, and no evidence of adhesive tape residue was found.

The nurse at the Napa County jail testified that she assessed defendant on October 15, 2005, after he was taken into custody. She saw he had blood in his hair towards the back of his head, but he would not allow her to check the area or look more closely at it.

Defendant’s former girlfriend, Christine Cronin, testified that when she met defendant in April 2005, he was very muscular. They ended their relationship in September 2005, but remained friends. On October 13, 2005, around 5:30 p.m., she went with defendant to look at an apartment. When defendant took off the baseball cap he was wearing, Cronin saw a large gash on the back of his skull. Later, she cleaned the wound

with peroxide. It was fresh and about two to three inches long. He told her he had an altercation with some people and one of them had hit him in the head with a beer bottle, but that they left after defendant displayed a gun; she was not sure if he said he fired off a round during the altercation. She also testified that the fanny pack found by police belonged to defendant.

Cronin next saw defendant at the jail. In their conversation, which was recorded without her knowledge and played for the jury, defendant said, "I don't know. I don't think so. I don't remember anything about robbing anything." After Cronin said, "You can tell me," he stated, "Maybe, maybe. I can't say no. I can't say yes. I don't even know where, where or what. I know enough to wear gloves. And a mask." In response to Cronin saying, "I thought you got rid of the gun before hand," defendant stated, "No I was trying, that's what I was going to do, get rid of it. But you know what? They found it. They set a trap for me. I escaped from them the first time. And then they just laid in wait for me to come back to the car."

Two masks the prosecution contended were recovered from the Pontiac were examined by criminalist Rosary Marcelo of the Contra Costa County crime lab. She testified that she swabbed the surface of the two masks and a presumptive test on the swabs indicated the possible presence of blood. She opined that blood was likely present on both masks, but she did not perform a confirmatory test.

Marcelo's supervisor, criminalist David Stockwell, also examined the masks and found no evidence of blood. He stated that the techniques Marcelo had employed were not done in the proper manner. Stockwell also took DNA samples from the area of the wearer's mouth on each mask and compared them to a DNA sample from defendant. He found 15 out of 15 loci matched for the first mask and 14 out of 15 for the second. He testified that the chance of such random matches to a Caucasian was 1 in 49 quadrillion for the first mask and 1 in 1.1 quadrillion for the second; the chance of a Caucasian sibling sharing the same traits was 1 in 1.4 million for the first mask and 1 in 450,000 for the second.

A criminalist with the Contra Costa County Sheriff's Office testified that he test-fired the .22-caliber revolver found in the fanny pack and compared the bullet to one found in the wall of the Paradise 33 restaurant. The Paradise 33 bullet appeared to be a .22-caliber bullet and had a left-handed twist, the same as the revolver, which twist is used by less than five percent of manufacturers.

Records of defendant's cell phone were obtained by search warrant from Verizon Wireless. A Verizon analyst testified from the records about particular calls made from defendant's cell phone and which cell phone towers carried these calls. The analyst said that a cell phone call usually goes out through a cell tower that is closest to the location of the phone by line of sight, but that when a cell tower has reached its limit, which can occur during peak use times, the call is relayed to the cell tower next closest to the cell phone.

A deputy sheriff experienced in cell phone investigations applied the information obtained from the Verizon records to maps of Contra Costa County. His testimony indicated that on the afternoon of October 11, 2005, defendant placed a call at 3:34 p.m. via a cell tower that was six to seven miles away from the Round Table Pizza, and another call at 4:17 p.m. via a tower that was two and a half to three miles away from the restaurant. Defendant received a call at 4:48 p.m. through a Pinole cell tower. On October 13, 2005, he received a call at 3:02 p.m. via a cell tower that was about a mile away from Rasputin Records (the incident there occurring at 3:09 p.m.) and close to Paradise 33, made a 3:16 p.m. call via a cell tower on North Main Street in Walnut Creek, and a 4:04 p.m. call via a cell tower adjacent to the Carquinez Bridge in Vallejo.

Detective Amy Hunter of the Napa Police Department testified that she attempted to arrange a live lineup around October 25, 2005, with witnesses from various robberies in the area. Defendant refused to participate.

The Defense Case

Defendant's former landlord in Napa testified that he served defendant on September 15, 2005, with a 30 day notice to leave his rental in Napa so the landlord could sell the property.

Defendant's mother testified that defendant visited her regularly and in October 2005 was moving from a larger to a smaller house in Napa. He brought things to her home to store, including exercise machines, barbells, and boxes of clothing. Defendant was left-handed. She had never seen him with a gun, and had never seen the holster and gun involved in the case.

The owner of Basics Gym in Napa testified that defendant worked for him in 2005. He paid defendant for his work, but individual people defendant was training paid him directly. Defendant was starting his own personal training business.

Cheryl Risner testified that in 2005 she had a business relationship with defendant, paying him \$350 a week for about three months for his work doing fitness training with her two sons. She also invested in his business, paying \$4,000 to \$7,000 to gym equipment companies, \$1,200 to purchase a trailer to haul the equipment purchase, and \$5,000 to defendant via a check as start-up money.

Defendant stood before the jury and showed his bare forearms and calves. The only tattoo was on his left calf. Tattoo artist Justine May testified that the tribal tattoo on defendant's left calf is very common, both in design and location.

Public defender investigator Douglas Hanley researched Pontiac Grand Am models. He opined that Grand Am's had a similar body style from 1999 through 2004.

Another public defender investigator testified that he reviewed defendant's cell phone records and determined that no call was placed to Round Table Pizza, Peggs Grill, Rasputin Records, or the Paradise 33 restaurant, or received from these establishments. She tried to reach witness Brett Mathews in order to interview him, but concluded after various efforts that he was not willing to speak to her.

Napa County Public Defender James Solga represented defendant regarding other matters in Napa County and, as a "side issue," represented him regarding lineup procedures in the Contra Costa County case. He testified that, as indicated in an email he sent regarding the lineup to either the district attorney's office or the police, that he had advised defendant not to participate in a live lineup there because he believed the lineup procedure was flawed and the form given to the witnesses included language that was

unreasonably suggestive. He also advised defendant that his refusal to participate could be used against him at a later trial.

Napa Police Officer Bryan Campagna testified that he assisted in the search of the Pontiac Grand Am on October 15, 2005. He did not recall seeing a straw hat in the car, and described the car as cluttered with belongings, as if the owner was either moving or living out of the car.

A Concord Police Department expert in forensic evidence compared fingerprints taken from the Paradise 33 restaurant after the robbery with known fingerprints of defendant. There were no matches. He also wrote upon investigation of the shooting that it was unknown whether it was deliberate or accidental.

Laura Woodmansee testified that she cut defendant's hair. Her telephone number was listed on his cell phone regarding a call on October 11, 2005, at 4:17 p.m. She did not recall the phone call, but was sure it was to schedule a haircut appointment because that was the only thing she spoke with him about.

Defendant's parole agent testified that his number was listed as being called by defendant on October 11, 2005, at 3:16 p.m., but could not remember the specific call.

A criminalist from the Contra Costa County crime lab testified that he compared 10 fiber pieces from the broken soup bowl involved in the Paradise 33 robbery. He compared the fibers to those of the two beanie masks recovered from defendant's car. He concluded that they did not match.

Mary Riley testified that she met with defendant and a woman named Christine sometime in the afternoon of October 12 or 13, 2005, to show defendant a rental unit. She recalled that defendant dressed well, was enthusiastic, was in good shape, and did not have any blood on him; she could not recall if he wore a hat.

Verdict and Sentence

The jury found defendant guilty of all charges, except it found him not guilty of attempted murder as alleged in count seven, regarding the Paradise 33 robbery.

Defendant moved for a new trial on counts five and six, regarding Paradise 33. The trial court granted the motion on the grounds that the verdicts were contrary to the evidence. The court later dismissed these counts on the People's motion.

The trial court found the allegations of defendant's prior felony convictions were true. It ordered stricken his prior strike convictions in the furtherance of justice, but maintained them as prior serious felony enhancements pursuant to section 667, subdivision (a)(1). The court sentenced defendant to a total term of 35 years and 8 months. The court ordered this sentence to run concurrently to a sentence imposed in a Napa County case.

The People filed a timely notice of appeal from the trial court's order striking defendant's three prior strike convictions in the furtherance of justice. Defendant filed a timely notice of appeal from the judgment.

DISCUSSION

I. The Motion to Sever

Defendant argues that the trial court abused its discretion in denying his motion to sever under the criteria set out in *People v. Vines* (2011) 51 Cal.4th 830, 854-855 (*Vines*). Furthermore, he contends, even if the court's denial was not an abuse of discretion, the trial of the four incidents together nonetheless substantially prejudiced defendant and denied him due process and a fair trial. We disagree.

A. The Proceedings Below

Before trial, defendant moved to sever count four (regarding Rasputin Records) and counts five through seven (regarding Paradise 33) from counts one through three (regarding Round Table Pizza and Peggs Grill). In other words, he sought to have the incidents alleged to have occurred on October 11, 2005 tried separately from the incidents alleged to have occurred two days later, on October 13. Defendant contended that the joinder of these counts was improper pursuant to section 954 and that severance was required to protect his due process rights. Defendant pointed out in his papers that the preliminary hearing magistrate had not held defendant to answer for the two counts in the original complaint regarding the Paradise 33 incident, but that the prosecution had

still charged him with counts five through seven regarding that incident. Defendant conceded that all of the offenses alleged in the information were of the same class or were related offenses connected together in their commission and, therefore, were permissibly joined pursuant to section 954. Nonetheless, he argues, evidence of each set of offenses would be inadmissible in the trial of the other offenses, and their joinder would prejudice him without resulting in any substantial judicial economy.

The prosecution opposed the motion. The trial court denied it. It subsequently also denied defendant's proposed jury instruction, which was as follows:

"You may not consider evidence presented by the prosecution . . . that the defendant committed an offense regarding one incident to prove that he committed a crime involving a separate incident. For example, any facts presented that the defendant committed a crime involving Roundtable Pizza, may not be considered as evidence to prove whether he committed a crime involving Paradise 33."

The court instructed the jury pursuant to CALCRIM No. 3515 that "[e]ach of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one."

B. Relevant Legal Standards

Defendant concedes that the relevant crimes charges were assaultive crimes of the same class—assaultive crimes against the person—and thus satisfied the statutory requirement for joinder. (*People v. Poggi* (1988) 45 Cal.3d 306, 314, 320; *People v. Thomas* (1990) 219 Cal.App.3d 134, 140.)

Nevertheless, defendant argues the trial court should have exercised its discretionary authority pursuant to section 954 to grant his motion to sever. Section 954 provides in relevant part:

"An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the

offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately.” (§ 954.)

As the People point out, for reasons of judicial efficiency, “joint trial has long been prescribed—and broadly allowed—by the Legislature’s enactment of section 954. The purpose underlying this statute is clear: joint trial ‘ordinarily avoids the increased expenditure of funds and judicial resources which may result if the charges were to be tried in two or more separate trials.’ [Citation.] ‘A unitary trial requires a single courtroom, judge, and court attach[és]. Only one group of jurors need serve, and the expenditure of time for jury voir dire and trial is greatly reduced over that required were the cases separately tried. In addition, the public is served by the reduced delay on disposition of criminal charges both in trial and through the appellate process.’ ” (*People v. Soper* (2009) 45 Cal.4th 759, 771-772 (*Soper*)). Accordingly, “consolidation or joinder of charged offenses ‘is the course of action preferred by the law.’ ” (*Id.* at p. 772.)

The party seeking severance bears the burden “ ‘ ‘ ‘ “to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.” ’ ’ ’ ” (*Vines, supra*, 51 Cal.4th at p. 855.) The court is to consider the following criteria: “ ‘ ‘ ‘ ‘Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a “weak” case has been joined with a “strong” case, or with another “weak” case, so that the “spillover” effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case.’ ’ ’ ’ ” (*Ibid.*)

“If the evidence underlying the charges in question would be cross-admissible, that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify

a trial court's refusal to sever properly joined charges." (*Soper, supra*, 45 Cal.4th at pp. 774-775.) However, the lack of cross-admissibility "would not itself establish prejudice or an abuse of discretion by the trial court in declining to sever properly joined charges." (*Id.* at p. 775.) Section 954.1 states that "[i]n cases in which two or more different offenses of the same class of crimes or offenses have been charged together in the same accusatory pleading . . . evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together before the same trier of fact." (§ 954.1.) As defendant acknowledges, section 954.1 "prohibits the courts from refusing joinder strictly on the basis of a lack of cross-admissibility of evidence." (*Belton v. Superior Court* (1993) 19 Cal.App.4th 1279, 1285.)

"If we determine that evidence underlying properly joined charges would *not* be cross-admissible, we proceed to consider 'whether the benefits of joinder were sufficiently substantial to outweigh the possible "spill-over" effect of the "other-crimes" evidence on the jury in its consideration of the evidence of defendant's guilt of each set of offenses.' " (*Soper, supra*, 45 Cal.4th at p. 775.) In making that assessment, we essentially consider the remaining three criteria outlined in *Vines*. (*Soper*, at p. 775.) "We then balance the potential for prejudice to the defendant from a joint trial against the countervailing benefits to the state." (*Ibid.*)

C. The Court's Exercise of Discretion to Deny the Motion

Defendant argues that the evidence regarding the two sets of offenses that he sought to sever were not cross-admissible, and that the motion to sever should have been granted pursuant to the other criteria outlined in *Vines*. We conclude from our review of the record that whether or not the evidence was cross-admissible, the court did not abuse its discretion and, therefore, do not decide the cross-admissibility issue. Instead, we focus our discussion on whether, as defendant further argues, the evidence in certain incidents was so inflammatory, and the relative strength of different charges so varied, as to create a potential for prejudice to defendant that outweighed the countervailing benefits to the prosecution. We conclude that neither was the case.

As we have discussed, the benefits of joinder are substantial because of the benefits of efficiency and the conservation of resources. Defendant bears the burden of showing that these benefits were substantially outweighed by the potential for prejudice. Defendant argues they were for two reasons. First, defendant contends the Paradise 33 attempted robbery was particularly inflammatory because the incident involved “the perpetrator pointing a gun and actually firing the gun at employees of the restaurant, a level of violence that was more likely to inflame the passions of the jury when compared to the circumstances of the other three incidents.” He points out that in the Round Table Pizza and Peggs Grill incidents, the testimony indicated that the gun did not leave the robber’s waistband. In the Rasputin Records incident, the gun remained in the robber’s hand and there was no evidence the robber pointed it at anyone or fired it. Thus, defendant concludes, “[w]hen compared with the other counts, the evidence of the Paradise 33 counts—especially the attempted murder of count seven—were unduly likely to inflame the jury, who could only see such acts of violence and firing the gun as beyond the pale.”

The People disagree. They contend the incident was not particularly inflammatory because the robber was armed with a handgun in all four robberies and, as reflected by the felony murder rule, armed robbery is fraught with peril. The People point out that there “is a significant risk that the gun will discharge, either intentionally or accidentally, during a volatile armed confrontation between a robber and a victim. Given that this risk was present in all of the charged robberies, it was not reasonably likely that the jury would have been unduly inflamed by the Paradise 33 robbery, particularly when the victims of that robbery were not physically injured.”

We agree with the People. We fail to see how the facts of the Paradise 33 robbery, in which the robber pointed a gun at employees and may have fired it, would unduly inflame the jury in light of the testimony regarding the incidents defendant sought to have

severed.² Defendant's argument ignores that in the Round Table Pizza and Peggs' Grill incident, the testimony was that the robber lifted his shirt to reveal a gun and pointed it out to his victim. In context, the threat was clear: do as I say or I will shoot you. We do not see so great a difference between the nature of this threat—and its impact on a jury's sensibilities—and the evidence regarding the Rasputin Records and Paradise 33 incidents so as to find error. The court did not abuse its discretion in rejecting defendant's argument that the Paradise 33 incident was unduly inflammatory.

Defendant further argues that the cases should have been severed because the facts of the Rasputin Records incident were stronger than those of either the Round Table Pizza or Peggs Grill incidents. Defendant contends this was because Brett Mathews testified at the preliminary hearing that he saw the robber get out of a silver Pontiac Grand Am holding a gun, looked directly at the robber's face before he pulled a beanie mask over it, and saw a tattoo on the robber's calf. However, the witnesses of the Round Table Pizza and Peggs Grill incidents each did not get a direct look at the robber, who disguised his face with large sunglasses and a large hat, and the gun remained in the robber's waistband.

Defendant further argues that because the Rasputin Records incident occurred shortly before the Paradise 33 incident, jurors could have believed he committed the latter incident as well, although the evidence was purportedly weaker, since the Paradise 33 witnesses did not identify defendant as the robber at the preliminary hearing, said the robber had a tattoo on his arm, which defendant does not, and said there was another person in the robber's car.

The People disagree. They correctly point out that Kenny Haynes, the victim of the Round Table Pizza robbery, and Joseph McLaughlin, the victim of the Peggs Grill robbery, each identified defendant at the preliminary hearing as the robber. Regarding the Paradise 33 robbery, they contend there was, among other things, significant evidence

² As defendant points out, the trial court ruled on the motion to sever based on the preliminary hearing testimony rather than the trial testimony. Our summaries of the evidence in this portion of our opinion are based on that preliminary hearing testimony.

tying defendant to that robbery. That is, Howard testified that he hit the robber in the back of the head with a bowl. Defendant's former girlfriend told police that she noticed a large cut on the back of defendant's head later that same day. Furthermore, the gun recovered at the time of defendant's arrest had an expended casing in the chamber.

We agree with the People's assessment. As they point out, "as between any two charges, it always is possible to point to individual aspects of one case and argue that one is stronger than the other. A mere imbalance in the evidence, however, will not indicate a risk of prejudicial 'spillover effect,' militating against the benefits of joinder and warranting severance of properly joined counts." (*Soper, supra*, 45 Cal.4th at p. 781.) Defendant's contentions do not establish such an imbalance of strength in the evidence regarding the incidents so as to persuade us that the trial court abused its discretion in denying his motion to sever.

D. Due Process

Defendant also argues that, even if the trial court did not abuse its discretion, he was nonetheless denied a fair trial. Again, we disagree.

" '[E]ven if a trial court's ruling on a motion to sever is correct at the time it was made, a reviewing court still must determine whether, in the end, the joinder of counts . . . for trial resulted in gross unfairness depriving the defendant of due process of law.' " (*Soper, supra*, 45 Cal.4th at p. 783.) To make this determination, we look at the evidence actually introduced at trial. (*People v. Bean* (1988) 46 Cal.3d 919, 940.) "[D]efendant must demonstrate a reasonable probability that the joinder affected the jury's verdicts." (*People v. Grant* (2003) 113 Cal.App.4th 579, 588 (*Grant*), citing *Bean*, at pp. 938-940.)

Defendant makes several arguments why denial of his motion to sever resulted in gross unfairness, thereby depriving him of due process. Relying primarily on *Grant*, defendant contends that gross unfairness occurred because the evidence of the four incidents was not cross-admissible on the issue of identity, the prosecutor argued this impermissible inference in closing, the trial court denied his request to instruct the jury that the evidence was not cross-admissible, and evidence of defendant's identity as the robber of Paradise 33 was particularly weak.

The People, relying heavily on *Soper*, respond that the evidence was cross-admissible and, even assuming for the sake of argument that it was not, the prosecutor's inferences about the evidence and the trial court's refusal to instruct the jury that the evidence was not cross-admissible, "standing alone . . . does not establish gross unfairness depriving defendant of due process." (*Soper, supra*, 45 Cal.4th at pp. 783-784.)

We agree with the People, and conclude the facts and circumstances of this case are analogous to those considered by our Supreme Court in *Soper*, in which the court rejected a similar due process argument. As in that case, various factors lead us to conclude that defendant has not met his high burden of establishing that the trial was grossly unfair and that he was denied due process of law.

First, as did the *Soper* court, we assume for the sake of argument that the evidence at issue was not cross-admissible on the issue of identity and consider that the jury was not instructed as requested by the defense. (*Soper, supra*, 45 Cal.4th at p. 783.) However, this is only a factor in our assessment; "standing alone the absence of such a limiting instruction does not establish gross unfairness depriving defendant of due process." (*Ibid.*)

Furthermore, "[a]ppellate courts have found 'no prejudicial effect from joinder when the evidence of each crime is simple and distinct, even though such evidence might not have been admissible in separate trials.' " (*Soper, supra*, 45 Cal.4th at p. 784.) Here, we agree with the People that the evidence supporting the Round Table Pizza, Peggs Grill, and Rasputin Records crimes were "relatively straightforward and distinct" and that "the evidence related to each charge was independently ample to support defendant's conviction" of each of these crimes. (*Ibid.*)

Defendant contends that the evidence that he committed the Rasputin Records attempted robbery was much stronger than the evidence regarding the Round Table Pizza and Peggs Grill incidents, and that these latter two incidents were similar. We disagree. As our review of the trial evidence indicates, the evidence for these latter two incidents

was distinct, straightforward, had considerable strength, and was not effectively disputed by the defense.

Most notably, Haynes, the Round Table Pizza victim, gave consistent, detailed descriptions of the robber over time, saw him drive away in what he thought was a gray or silver Pontiac Grand Am, and readily identified defendant from a photographic lineup, describing the photo as a “dead-on match.” Haynes identified defendant at the preliminary hearing and at the trial, and stated he was “100 percent” certain of his identification.

McLaughlin, the Peggs Grill victim, also gave a detailed description of the robber who confronted him. He identified defendant’s photograph without qualification when shown a photographic lineup by police, and identified defendant as the robber at the 2006 preliminary hearing. While at the 2009 trial he said he did not recognize defendant and did not know if he was the same man he identified at the preliminary hearing, he also testified that he believed he identified the robber at the preliminary hearing. In addition, Dan and Carolyn Mello saw the robber leaving Peggs Grill. Dan testified that, although he did not get a good look at the man, he saw him get into a silver or gray Pontiac Grand Am. Carolyn, although she was not sure, identified defendant as the robber in a photographic lineup and at trial.

Furthermore, the trial court instructed the jury that “[e]ach of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one.” We agree with the People that this instruction “mitigated the risk of any prejudicial spillover. . . .” (*Soper, supra*, 45 Cal.4th at p. 784.)

We also agree with the People that any conceivable prejudice regarding the Paradise 33 counts was remedied by the jury’s acquittal of defendant on the attempted murder charge and the court’s grant of a new trial on the robbery and attempted robbery convictions related to the Paradise 33 incident. Defendant argues that this did not alleviate the potential prejudice caused by the inflammatory nature of the Paradise 33 evidence, given the weakness of that evidence against defendant. As we have discussed,

however, there was ample evidence against defendant regarding the other three incidents, and the Paradise 33 evidence was not particularly inflammatory in light of defendant's display of a gun and use of it in a threatening fashion in all four incidents.

Finally, defendant points to several statements by the prosecutor in closing argument that he contends were prejudicial. Defendant cites to the following: the prosecutor called the incidents a "robbery spree"; argued that "all of the evidence, all of the pieces that have come before you here are interconnected"; contended that defendant used a gun in a menacing manner at Round Table Pizza in "exactly the same menacing manner he used it at Peggs"; referred to the consistent descriptions of the perpetrator provided by the witnesses in all four incidents and talked about how they all narrowed to point to defendant; and said that the incidents corroborated each other by the fact that the witnesses identified defendant. We disagree that, given the record as a whole, these statements had a prejudicial impact on the jury's deliberations.

Grant, relied on heavily by defendant, is not persuasive authority because it involved facts and circumstances significantly different from those of the present case. The evidence of one of the counts reviewed by the court was particularly weak; the prosecutor directly urged the jury to draw the impermissible inference that, because defendant committed one count, for which there was much stronger evidence, he committed the other, for which the evidence was weaker and largely circumstantial; and, although the trial court appears to have given a jury instruction similar to the ameliorative one given in the present case, the court also made a statement to the jury suggesting it could use the evidence as it saw fit. (*Grant, supra*, 113 Cal.App.4th at pp. 588, 589-590, 591-592, 592, fn. 8.)

In short, considering the record as a whole, defendant has not shown there is a "reasonable probability that the joinder affected the jury's verdicts" (*Grant, supra*, 113 Cal.App.4th at p. 588) and "has not met his high burden of establishing that the trial court was grossly unfair and that he was denied due process of law." (*Soper, supra*, 45 Cal.4th at p. 783.)

II. *Defendant's Claims of Prosecutorial Misconduct*

Defendant next argues that the prosecutor committed multiple instances of misconduct that violated defendant's constitutional rights to due process and a fair trial, requiring reversal of the judgment. Again, we disagree.

A. *Applicable Legal Standards*

“We review claims of prosecutorial misconduct pursuant to a settled standard. ‘Under California law, a prosecutor commits reversible misconduct if he or she makes use of “deceptive or reprehensible methods” when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant’s specific constitutional rights—such as a comment upon the defendant’s invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action “ ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’ ” ’ [Citations.] In addition, “ ‘a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]” ’ [Citation.] Objection may be excused if it would have been futile or an admonition would not have cured the harm.” (*People v. Dykes* (2009) 46 Cal.4th 731, 760 (*Dykes*).

“Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.” (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) We review claims of prosecutorial misconduct under the state and federal standards for prejudice. (*People v. Booker* (2011) 51 Cal.4th 141, 186, citing *People v. Watson* (1956) 46 Cal.2d 818, 836 [state standard] and *Chapman v. California* (1967) 386 U.S. 18, 24 [federal standard].)

B. *The Prosecutor's Use of a Cat Puzzle*

Defendant first argues that the prosecutor committed misconduct at the beginning of his rebuttal argument by using a “cat puzzle” to illustrate how the jury should approach the evidence. Defendant’s argument is unpersuasive.

1. *The Prosecutor's Cat Puzzle Argument*

a. *Prosecutor's Use of the Puzzle at the Beginning of Rebuttal*

The prosecutor first displayed that part of the puzzle that was a portion of a cat’s tail to the jury. His comments indicated it was impossible to tell what the piece was, joking that it might be the “Loch Ness monster.” He said, “If I asked the 12 of you to go back in the deliberation room right now, right now and render a verdict on what this is, it would be easy. You would have to vote not guilty because we don’t know what we are looking at, so let’s put it aside for a second.”

The prosecutor then displayed a portion of the puzzle that showed cat ears and suggested that, while it might give the jury some ideas, it was the “[s]ame deal. I send you back in the jury room, the 12 of you are going to have a great laugh and throw your hands up and go I don’t know what that is.”

The prosecutor next displayed the portion of the puzzle that showed two legs. He indicated that the jurors might now have some idea what the puzzle depicted, such as a “really fat squirrel” or “a child’s skinny boot,” but that it would still be difficult to deliberate about it.

The prosecutor placed another portion of the puzzle that showed an additional two legs. Again, he stated that the jury still did not have enough information to render a verdict about what the puzzle depicted.

Next, the prosecutor displayed a portion of the puzzle showing the body of a cat. He said, “Now I think we are getting somewhere. You sort of recognize what we might be looking at here. But it could be a stuffed animal or even a fur coat Still can’t makeup [*sic*] your mind based on this one piece, but you know what you can do? You can take the pieces and put them together.

As the prosecutor presented each portion of the puzzle, he used magnets to attach them to a board before displaying the next piece. Next, the prosecutor displayed the full image of a cat. He stated:

“Now, this would have been a heck of a lot easier if I just stood up and showed you this picture. All right? That’s a picture of a cat. That’s easy. All right. Mr. Feinberg [prosecutor], what [does] a cat have to do with a criminal jury trial?”

“When you do a jury trial, you don’t have just one big aha moment where I lift up the board and say here is all the evidence on this one board, go. The evidence is presented to you in pieces because there is only one witness chair there. There is only one space for one person, one at a time. One piece of physical evidence at a time. One piece of testimony at a time. One ruling at a time. Ms. Barker [defense counsel] wants you to take the cat apart and look at each piece individually and start throwing it out the window. She wants you to do that under the guise of the circumstantial evidence instructions. Now, she is correct, actually correct, about what to do if there are two reasonable interpretations. But you don’t do that in a vacuum one piece of evidence at a time. I’m not asking you to render a verdict based on this, the Loch Ness monster.”

Defense counsel objected that the prosecutor was misstating the jury instruction, but the court overruled the objection. The prosecutor then stated:

“I’m asking you, ladies and gentlemen, to consider all the evidence that has been presented to you and put all the evidence together when looking at it. Yeah, sure. He could maybe sort of possibly have a reasonable explanation for where that cash came from. That was Item No. 1. You must just disregard the cash because there could be a reasonable explanation. Forget for a moment that we don’t know when he came into possession of any of that legitimate source of money. Set that aside for a second. She [defense counsel] wants you to say, look, people have money for legitimate reasons. Throw the tail out. Don’t throw the tail out, you don’t know what the tail has to do with anything yet.

“Same for his refusal in the lineup. That was Item No. 2. We don’t know what it could mean. It could mean a lot of different things. Take the legs and throw them out, Mr. Feinberg.

“That conversation with Christine Cronin, it is just a front paw, it could be anything. That resisting arrest, it is just—it is just ears up here, we don’t know what it means. Throw it out.

“Well, Ms. Barker wants you to throw every part of the cat out so we are left with an empty board. That’s not what your job is. You are supposed to look at the evidence, all of it. And look, four years later maybe the pieces don’t fit quite as tightly as they did when that was first cut up, but it doesn’t mean that we are not looking at a cat. And you know that because you have common sense. You have common sense when you look at the whole picture and you are patient enough to wait for weeks and weeks and weeks while the rest of the cat came into focus. That is what a cat has to do with robbery.”

b. *The Prosecutor’s Further Use of the Puzzle*

Later in his rebuttal, the prosecutor returned to the cat puzzle, using it to analyze the statement from the Rasputin Records witness, Brett Mathews, who said that he had seen defendant with a tattoo on one of his calves, but gave inconsistent statements about which calf was tattooed: “The fact he was uncertain as to which leg the tattoo was on is not reasonable doubt. No more so than if you cut off a whisker from the cat and try to say, well, well, well, let’s take a little tiny microscopic thing out of here and make it reasonable doubt.”

2. *Analysis*

a. *Prosecutor’s Use of the Puzzle at the Beginning of Rebuttal*

Defendant argues the prosecutor’s argument “inferentially diminished the legal requirements for a finding of proof beyond a reasonable doubt.” He “improperly compared the identification of an instantly recognizable image of a cat with a finding of guilt beyond a reasonable doubt. In so doing, the prosecutor diminished the burden of proof. Furthermore, the prosecutor claimed that the defense was trying to throw small pieces of the puzzle that it was arguing would create reasonable doubt, but the prosecutor

asserted that the removal of the evidence would not keep the jury from seeing the whole picture, the whole cat.”

The People argue that the prosecutor used the puzzle in a permissible manner. He did not use the puzzle at the beginning of his rebuttal to suggest anything about the reasonable doubt standard. Instead, the People contend the prosecutor analogized the cat puzzle to the circumstantial evidence instruction, emphasizing only that the jurors should consider all of the evidence in reaching its verdict.

We agree with the People. Defendant does not establish that the prosecutor argued anything to the jury that diminished the standard of proof required to be met by the People. Rather, the prosecutor referred only to circumstantial evidence, and indicated that the jury was to consider all of the evidence before reaching a determination.

Defendant argues that the circumstances of this case are like those found in *People v. Katzenberger* (2009) 178 Cal.App.4th 1260 (*Katzenberger*). We disagree. In *Katzenberger*, the appellate court concluded that the prosecutor committed misconduct by using a puzzle to illustrate the concept of reasonable doubt. The prosecutor finished her closing argument with several comments regarding the reasonable doubt standard, quoting the relevant jury instruction. (*Id.* at p. 1264.) She then told the jury she was going to show a picture to the jury that related to the jury instruction, and displayed in a Power Point presentation six of eight pieces of a puzzle of the Statue of Liberty, but left out the statue’s face and torch. Over defense objection, to which the prosecutor responded that the puzzle “was simply an illustrative example of reasonable doubt,” the prosecutor argued that even without the missing pieces, a person would know “beyond a reasonable doubt” that the puzzle depicted the Statue of Liberty, then added the two missing pieces. (*Id.* at pp. 1262, 1264-1265.)

The appellate court concluded that the prosecutor’s use of the Statue of Liberty misinterpreted the beyond-a-reasonable-doubt standard, and constituted misconduct. (*Katzenberger, supra*, 178 Cal.App.4th at pp. 1266-1268.) The court based its conclusion on a number of concerns. First, the prosecutor displayed portions of the iconic Statue of Liberty in a way that was “almost immediately recognizable,” which invited the jury “to

guess or jump to a conclusion, a process completely at odds with the jury’s serious task of assessing whether the prosecution has submitted proof beyond a reasonable doubt.” (*Id.* at p. 1266-1267.) Furthermore, the prosecutor’s argument suggested an “[i]mproper quantification of the concept of reasonable doubt,” as the prosecutor told the jury the picture of six of eight puzzle pieces was beyond a reasonable doubt, thereby suggesting 75 percent as an appropriate standard. (*Id.* at pp. 1267-1268.)

As the People argue, the prosecutor used his cat puzzle in a very different way than the Statue of Liberty puzzle was used in *Katzenberger*. He did not use an iconic image that was easily recognizable at first (to the contrary, he indicated by his own comments that it was *not* easily recognizable), did not refer to reasonable doubt, and did not suggest a quantification based on a portion of the puzzle that would satisfy the People’s burden of proof. Thus, the prosecutor did not take any of the steps that concerned the *Katzenberger* court and led to its conclusion that misconduct occurred. Defendant fails to establish that the prosecutor’s use of the cat puzzle at the beginning of his rebuttal was misconduct.

b. *The Prosecutor’s Further Use of the Puzzle*

As for the prosecutor’s reference to the puzzle in arguing that Mathews’s differing statements about which calf contained a tattoo did not constitute reasonable doubt, the People correctly assert that defendant waived any claim of misconduct by its failure to object below. (*Dykes, supra*, 46 Cal.4th at p. 760.)

Even if there were no waiver, we also agree with the People that the prosecutor’s comment was not impermissible, particularly when we take into account that “ “[t]he prosecution has broad discretion to state its views as to what the evidence shows and what inferences may be drawn therefrom” ’ ” (*People v. Welch* (1999) 20 Cal.4th 701, 752.) The prosecutor’s comments were consistent with one of the instructions given to the jury, CALCRIM No. 226, which states in relevant part, “Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember.”

Defendant argues that in the event we conclude waiver occurred regarding any of its misconduct arguments, he received ineffective assistance of counsel.

“ ‘To establish a violation of the constitutional right to effective assistance of counsel, a defendant must show both that his counsel’s performance was deficient when measured against the standard of a reasonably competent attorney and that this deficient performance caused prejudice in the sense that it “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” ’ ’ ” (*People v. Sapp* (2003) 31 Cal.4th 240, 263; *Strickland v. Washington* (1984) 466 U.S. 668, 686.) The standard on direct appeal is highly deferential; the claim must be rejected unless “there could be no satisfactory explanation” for counsel’s conduct. (*People v. Anderson* (2001) 25 Cal.4th 543, 569.)

In light of our conclusion that no error occurred, we do not further address defendant’s ineffective assistance of counsel argument except to note that in any event, there was no prejudice resulting from the comment, given the strong evidence presented that defendant committed attempted robbery at Rasputin Records.

Further indication there was no prejudice was the court’s instructions to the jury pursuant to CALCRIM No. 220, regarding proof beyond a reasonable doubt, pursuant to CALCRIM No. 222 that the jury was to base its decision on the evidence presented and that counsel’s arguments were not evidence, and pursuant to CALCRIM No. 200 that the jury must follow the law as stated by the court, even if counsel’s comments conflicted with the court’s instructions. (*See Katzenberger, supra*, 178 Cal.App.4th at pp. 1268-1269 [finding no prejudice, including under the federal standard, in large part because of the court’s proper instructions to the jury].)

B. Defendant’s Argument About the Prosecutor’s “Reasonableness” Reference

Defendant next argues that the prosecutor impermissibly denigrated the beyond-a-reasonable-doubt burden of proof to one of “mere reasonableness” by certain other statements in his closing argument to the jury, thereby committing misconduct. We conclude defendant waived this argument by his failure to first raise the issue below. In

any event, the argument lacks merit and, therefore, defendant did not receive ineffective assistance of counsel.

1. *The Prosecutor's Statements*

Defendant focuses on this prosecutor statement at the start of closing argument:

“So I took my closing statement and I dropped it in the recycle bin and I said I’m done with all the lawyering because it is unfair to you to let the court proceedings get in the way of themselves. So what I’m going to do, what I’m going to use this opportunity to do is to talk with you about common sense, about your common experiences, your life experiences and how that tells you exactly what happened in this case. We are not going to let common sense die here.”

Defendant also points out that the prosecutor later told the jury, “I want to give you a hypothetical just so you understand that the common sense out there is common sense in here. Okay? What’s reasonable out there is reasonable in here.” Later, the prosecutor also told the jury, “And this is where I want to bring you back to your common sense. Reasonable out there; reasonable in here.”

2. *Analysis*

The People first assert that defendant, by failing to first raise the issue below, waived his claim of misconduct. Once more, we agree. (*Dykes, supra*, 46 Cal.4th at p. 760.) Furthermore, we agree with the People that defendant’s argument lacks merit.³

Defendant contends that, “[b]y arguing that the jury could find [defendant] guilty by simply using their common sense and what is simply ‘reasonable,’ the prosecutor was giving the jury permission to find guilt on something much more akin to the preponderance-of-the-evidence standard rather than the higher and critical, constitutional beyond-a-reasonable-doubt standard applied to all criminal prosecutions.” According to

³ The People acknowledge that the defense objected at trial to a portion of the prosecutor’s comments that, it contended, suggested that the jury should be concerned about public opinion as well. Defendant does not raise a claim regarding this portion in his opening brief. In any event, the court reserved ruling on the objection until the conclusion of argument and the defense did not raise its objection again, thereby arguably waiving the issue.

defendant, “[t]he instant case is similar to *People v. Nguyen* [(1995)] 40 Cal.App.4th [28,] 35-36, in which the court found that the prosecutor improperly suggested the reasonable doubt standard applied to daily life decisions, such as changing lanes or getting married. Also similar is *People v. Johnson* (2004) 119 Cal.App.4th 976, 985, in which the court improperly altered the statutory reasonable doubt definition by equating proof beyond a reasonable doubt to everyday decision making.”

Defendant’s argument distorts the significance of the prosecutor’s statements. We agree with the People that it is a “fair comment for the prosecutor to urge the jurors to use their common sense in evaluating evidence,” and do not think the prosecutor did anything more. As the People point out, the jury was given an instruction pursuant to CALCRIM No. 226 that they are to use their “common sense and experience” in deciding whether a witness is believable, and the prosecutor’s comments were consistent with this instruction. Unlike *Nguyen* and *Johnson*, the cases cited by defendant, the prosecutor did not connect his references to “common sense” or “reasonableness” to an argument about the beyond-a-reasonable-doubt standard of proof. We conclude that no misconduct occurred. Accordingly, defendant’s ineffective assistance of counsel argument lacks merit.

C. Defendant’s Claims That the Prosecutor Disparaged Defense Counsel

Defendant next argues that the prosecutor made comments in closing arguments that impermissibly maligned the character of defendant’s defense attorneys so as to require reversal. Once more we disagree.

1. The Prosecutor’s Comments About Joe Solga

Defendant first points to the prosecutor’s following statement, made in the course of discussing defendant’s refusal to participate in a live lineup, purportedly upon advice of counsel: “Enter Joe Solga. Defendant’s lawyer. Whose job, by his very own admission, is to help this man avoid responsibility.” Defense counsel’s objection that the statement misstated the testimony was sustained.

As defendant points out, courts have long held that argument “that vilifies, without warrant, defense counsel” is improper. (*People v. Talle* (1952) 111 Cal.App.2d 650,

676.) However, that was not the case here. During cross-examination, the prosecutor, focusing on the issue of Solga's representation of defendant regarding a lineup, asked Solga, "In representing [defendant], protecting him, you are trying to help him avoid criminal conviction, correct?" Solga replied, "That's what my job is. Yes. I have—I'm a zealous advocate on behalf of my client, and I'm trying to protect his legal interests. In my view again in this limited procedure, I saw my role as making sure that he wasn't involved in an unfair process." The prosecutor then asked Solga if his job involved protecting guilty people and "helping guilty people avoid conviction," to which Solga answered affirmatively. Given this testimony, the prosecutor's characterization of Solga's testimony was not without warrant, even if the objection was sustained.

Furthermore, as the People point out, the prosecutor's comment was similar to that found not to be misconduct in *People v. Cunningham* (2001) 25 Cal.4th 926 (*Cunningham*). There, the prosecutor said about defense counsel, " 'They are extremely fine. And what is their job? Their job is to create straw men. Their job is to put up smoke, red herrings. And they have done a heck of a good job. And my job is to straighten that out and show you where the truth lies. So let's do that.' " (*Id.* at p. 1002.) The court concluded that there was not a reasonable likelihood that the jury improperly was influenced by these remarks, and that the remarks "would be understood by the jury as an admonition not to be misled by the defense interpretation of the evidence, rather than a personal attack on defense counsel." (*Id.* at p. 1003.) In our view, the prosecutor's comments in the present case were milder than those made in *Cunningham* and, therefore, that there was not a reasonable likelihood that the jury was improperly influenced by them.

Furthermore, the *Cunningham* court found the remarks were not so extreme that they could not be cured by an admonition from the court. (*Cunningham, supra*, 25 Cal.4th at p. 1002.) While the trial court did not admonish the jury regarding the prosecutor's remarks, it did sustain defendant's objection. We agree with the People that doing so ameliorated any potential harm in light of the court's earlier instruction to the jury to disregard statements to which an objection was sustained. (*People v. Roldan*

(2005) 35 Cal.4th 646, 742, disapproved on another ground in *People Doolin* (2009) 45 Cal.4th 390, 421 & fn. 22.)

2. *The Prosecutor's Comments About Defendant and the Lineup*

Defendant next points to the prosecutor's statement to the jury that an innocent man would want to stand up in a lineup to show he was not guilty. The prosecutor then added, "Unless, of course, you are the robber. And then what you do is you put as much time and as much distance and as many lawyers as you can find between you and the truth[.]" The People correctly assert that defendant has waived this claim of misconduct by failing to object to the statement below. (*Dykes, supra*, 46 Cal.4th at p. 760.)

Furthermore, defendant did not receive ineffective assistance of counsel by the failure to object. Assuming for the sake of argument that the comment was improper (a questionable assumption given that the comments said nothing disparaging about defense counsel), defense counsel responded to the prosecutor's comments in her own closing. She stated: "The prosecution wants to argue that because [defendant] followed the advice of his attorney, he was concerned about a false positive, that [defendant] must be guilty. You cannot adopt that interpretation of circumstantial evidence. [Defendant] followed the advice of his attorney who legitimately believed that here was a real possibility of a false positive. There is a reasonable explanation that points to innocence and that reasonable explanation must be adopted. That's all that means.

"All this hoopla about his lawyer and [defendant] must have been hiding something, there are—the reason I had Mr. Solga testify is so you know [defendant] was following the advice of counsel and that that counsel had legitimate concerns about the lineup."

As both parties acknowledge, when considering whether a defendant received ineffective assistance of counsel, we are mindful that "[i]n the heat of a trial, defense counsel is best able to determine proper tactics in the light of the jury's apparent reaction to the proceedings. The choice of when to object is inherently a matter of trial tactics not ordinarily reviewable on appeal." (*People v. Freeman* (1994) 8 Cal.4th 450, 516.) Thus, in *Freeman*, our Supreme Court concluded it could not find it unreasonable that defense

counsel countered a prosecutorial argument with one of his own, rather than object. (*Ibid.*) We reach the same conclusion here.

3. The Prosecutor's Comments About Defense Counsel

Defendant next argues the prosecutor engaged in misconduct when he said of defendant's trial counsel, "I think she has done an admirable job, but you have to realize she has a tough job to do in defending a guilty person." We disagree.

As the trial court indicated by overruling defendant's objection to this statement, it is not improper. As indicated in a case cited by the People, "a prosecutor is free to give his opinion on the state of the evidence." (*People v. Padilla* (1995) 11 Cal.4th 891, 945, disapproved on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823 & fn. 1.) The prosecutor's comment that defendant was a "guilty person" was made immediately before the prosecutor discussed the evidence that the prosecutor asserted proved defendant's guilt. Read in context, there was nothing objectionable about the prosecutor's comment.

4. The Prosecutor's "Self-References"

Finally, defendant argues that the prosecutor "compounded the impropriety of his argument by his "self references." Defendant objects specifically to the prosecutor's statements that "I don't have any interest in convicting an innocent person" and "I have no interest in convicting an innocent man." Again, we disagree.

As the People point out, defendant has waived any claim of misconduct based on these comments for failure to object below. (*Dykes, supra*, 46 Cal.4th at p. 760.)

Furthermore, as the People also point out, "[i]n addressing a claim of prosecutorial misconduct that is based on the denigration of opposing counsel, we view the prosecutor's comments in relation to the remarks of defense counsel, and inquire whether the former constitutes a fair response to the latter." (*People v. Frye* (1998) 18 Cal.4th 894, 978, disapproved on another ground in *People v. Doolin, supra*, 45 Cal.4th at p. 421 & fn. 22.) The prosecutor made these statements after defense counsel had argued that the prosecutor "feels a certain level of desperation where he has resorted to tactics that are not right. If he had confidence in his case, he would rely on the evidence. And

instead, what he has chosen to do time and time again is to rely on innuendo, unproven claims, suggestions and questions that the judge has sustained and stricken time and time again. He has done that because he knows that the evidence in this case is insufficient to prove the case beyond a reasonable doubt. He wants you to think that there is something else there that there is not.” We conclude the prosecutor’s remark were a fair response to these comments.

D. Defendant’s Claims that the Prosecutor Violated Court Rulings

Last, defendant argues that the prosecutor committed misconduct in his cross-examination of defendant’s mother by eliciting evidence in violation of court rulings, and also violated the court’s ruling when he referred to defendant’s brother in his closing argument. We do not necessarily agree that the prosecutor engaged in misconduct as argued by defendant. In any event, to the extent defendant engaged in misconduct, the court’s admonitions cured any potential prejudice.

1. Questions About Changes in Defendant’s Behavior

Prior to trial, defendant moved to exclude any reference of his “controlled substance use, being under the influence of controlled substances or in possession of drug paraphernalia.” The prosecutor argued that defendant’s drug use was relevant because it corroborated the statement of his ex-girlfriend, Cronin, that defendant had told her that he “ditched the gun and the drugs.” This admission, the prosecutor argued, tended to establish his ownership of the fanny pack found in the area of his arrest, which contained both a gun and drugs. The court stated its “tentative view” that if the defense challenged the evidence of what defendant told Cronin it would open the door to corroborating evidence of defendant’s drug use.

The prosecutor also argued that if defendant impugned Cronin’s character by suggesting he broke up with her after she started acting as an informant for the police, the prosecutor would seek to show they broke up because defendant was injecting her with methamphetamine. The court deferred ruling on the issue until it heard more about Cronin’s relationship with police.

At trial, defense counsel did not pursue any line of questioning with Cronin that could have opened the door to defendant's drug use. Later, while the prosecutor was questioning defendant's mother, Sandra Mazza, the following occurred:

"Q. [prosecutor]: There were some other big changes in [defendant's] personality you saw as well, right?

"MS. BARKER [defense counsel]: Objection. Relevance.

"THE COURT: Sustained.

"Q. [prosecutor]: Did you observe changes in [defendant's] behavior around the time he was moving?

"MS. BARKER: Objection. Relevance.

"THE COURT: Let me see counsel in chambers.

"(Discussion held off the record.)"

"Q. [prosecutor]: Around the time of October of 2005, isn't it true that [defendant's] behavior changes had affected his visitations to you there in your house in Clayton?

"A. No.

"Q. [prosecutor]: Isn't it true you were concerned that [defendant] was going to hurt somebody?

"MS. BARKER: Objection.

"THE WITNESS: No.

"THE COURT: Strike that.

"MS. BARKER: May we approach, please?

"(Discussion held off the record.)"

"THE COURT: Ladies and gentlemen, the previous question and answer stand. They are part of the record. That is, Mrs. Mazza's answer 'No' is part of the record. But I want to remind you of what I told you at the start of the trial that something that an attorney asks is not evidence and the fact that the attorney suggests something in his or her questions doesn't make it so. Only the witness' answers would make it so. In this case, the witness has answered no."

Defendant contends that “[i]t is clear from the prosecutor’s questions and the court’s responses to [defendant’s] objections that the court was concerned that the prosecutor was getting into the territory that could open up [defendant’s] drug use. But the prosecutor persisted, which resulted in the further admonition to the jury as noted above.”

We do not agree that the prosecutor necessarily engaged in misconduct with his line of questioning, as it is not clear from the line of questioning cited by defendant that the prosecutor was opening the door to defendant’s drug use, nor is it clear that the court’s pretrial ruling excluded this line of questioning. Regardless, assuming for the sake of argument that the prosecutor was improperly implying drug use by his questions, we conclude that there was no reasonable likelihood that the jury construed or applied any of the prosecutor’s questions in an objectionable fashion for two reasons. First, regardless of the prosecutor’s intent, the purpose of the prosecutor’s questions was less than clear. Second, the court’s admonition to the jury cured any harm caused by the prosecutor’s remarks. (*People v. Fuiava* (2012) 53 Cal.4th 622, 687 [“the trial court’s sustaining of defendant’s objections precluded any prejudice to defendant” resulting from improper questions by the prosecutor]; *People v. Bennett* (2009) 45 Cal.4th 577, 612 [stating, regarding a claim of misconduct, “[w]e assume the jury followed the admonition and that prejudice was therefore avoided].)

2. Questions About Defendant’s Half Brother, Woody

Defendant also argues that the prosecutor committed misconduct by his references to defendant’s half brother, Woody Mazza, both in questioning defendant’s mother and in closing argument. We conclude there was some misconduct, but that it was not prejudicial.

a. The Proceedings Below

After defendant’s mother confirmed that he had a half brother named Woody, the prosecutor asked if Woody had been to prison for robbery. Defense counsel’s objection was sustained and the witness nonetheless answered, “That’s not true.” The trial court told the prosecutor, “Mr. Feinberg, cut it out” and said, “We are not here to try Woody

Mazza for anything, and whether he does or doesn't have a record is not relevant here. Cut it out." The prosecutor then asked defendant's mother, "Mrs. Mazza, isn't it true that Woody Mazza went with [defendant] to do a robbery at Paradise 33?" Defense counsel's objection was sustained to this as well. The trial court denied motions for retrials, but admonished the prosecutor that "we are done with this line of questioning with this witness and I intend to admonish the jury to disregard all of this." The trial court then instructed the jury as follows:

"[Y]ou heard insinuation from the District Attorney to the effect that the defendant's half brother may have been involved in one of the robberies, may have had some kind of criminal record or something like that. You've heard no evidence to that effect. If the District Attorney thought that—if the District Attorney's theory of the case was that [defendant] did the Paradise 33 robbery in conjunction with his half brother, then the District Attorney should have presented you with evidence of that. There has not been one iota of evidence that implicates Woody Mazza in anything whatsoever. He is not on trial here today. So you should simply disregard that and remember what I told you that a question asked by an attorney is not evidence."

In further discussions outside the presence of the jury, the court stated, "I think the prosecution is on thin ice with respect to the Paradise 33 incident." The court also said, "I've already told the jury that there is no evidence whatsoever to support that theory. If you think that you have some, I want to hear about it before you put it on before the jury. Otherwise, I don't want to hear Woody's name again." The prosecutor indicated that he understood the court.

Nonetheless, the prosecutor again referred to "Woody" during closing argument. He said: "Now, the judge provided you with an instruction about a second perpetrator and not to concern yourself with a second perpetrator because we know that there was a second perpetrator. The witnesses tell us about the second perpetrator inside the car right here at Paradise 33. [¶] For our purposes, let's call this Toy Story, the movie. Toy Story, the movie. Because unless you are talking about Toy Story, the movie, I don't

want to hear anything about Buzz Lightyear and I don't want to hear anything about Woody. All right?"

The court overruled defendant's objection. During a break in the proceedings, defense counsel again objected to the prosecutor's reference to "Woody." The trial court told the prosecutor that it "wasn't at all happy with your reference to Woody. If I had seen it coming, I would have shut it down." The court stated that it "didn't do anything in response to the objection, frankly, because I didn't want to draw attention to it any further." The prosecutor stated that he was simply reiterating the court's instruction that the jury was not to consider uncharged suspects.

At defendant's request, the court gave the jury the following admonition: "I want to comment on one thing that [the prosecutor] said this morning. You had heard—well, he made a reference to the movie Toy Story. You should simply disregard that. It is stricken. You should pay no attention to it. [¶] During the course of the trial, you did hear a mention of somebody named Woody, but you also heard me tell you that you should disregard that. There simply is no evidence that anyone named Woody was involved in any of these crimes. [¶] We don't allow lawyers to proceed by a wink and a nod. But in this case, there simply isn't even anything to wink and nod to you about. Ignore that comment."

The trial court subsequently denied defendant's motion for a new trial on the Paradise 33 charges based on a claim of prosecutorial misconduct. The court stated its belief that misconduct had occurred, but that it had adequately remedied the misconduct by admonishing the jury to disregard any suggestion that "Woody" was the second perpetrator of the Paradise 33 robbery.

We agree with defendant that the prosecutor engaged in misconduct here, by persisting to refer in insinuating ways to "Woody" after the court made clear that he was not to do so. The prosecutor's disingenuous reference to "Toy Story" in his closing argument was particularly disturbing. Nonetheless, in light of the trial court's strongly stated admonitions (*People v. Bennett, supra*, 45 Cal.4th at p. 612), the jury's not guilty verdict regarding the attempted murder charge associated with the Paradise 33 incident,

were opposed by the Concord Police Department, the City of Napa, and the City of Martinez.

The court denied a hearing regarding the Martinez police officer who conducted the photographic lineups. It granted a hearing regarding the three officers involved in a search of defendant's car. The court ruled that it would review the officers' personnel files for any records "concerning the planting or falsification of physical evidence." After the in camera hearing was complete, the trial court announced on the record that "as to all three officers, nothing fitting my criteria was located."

A sealed transcript of the in camera hearing, but not documents, was provided to this court. Defendant asks that this court make an independent review of the sealed transcript and the documents provided to determine whether the Superior Court properly gathered all discoverable material and properly reviewed it, and to determine whether any discoverable material "was improperly withheld among the categories specified in the motion." Defendant further requests that we review the trial court's rulings on the *Pitchess* motion for abuse of discretion. (*Pitchess, supra*, 11 Cal.3d at p. 535; *People v. Samayoa, supra*, 15 Cal.4th at p. 827.)

The hearing transcript indicates that documents were provided to the court by witnesses and reviewed by the court at the hearing, and the transcript gives no indication that documents or copies of documents were kept by the court. The documents reviewed were described on the record. Our own independent research of the issue indicates such description is sufficient. We quote from our Supreme Court regarding the procedures that should be employed:

"When a trial court concludes a defendant's *Pitchess* motion shows good cause for discovery of relevant evidence contained in a law enforcement officer's personnel files, the custodian of the records is obligated to bring to the trial court all 'potentially relevant' documents to permit the trial court to examine them for itself. [Citation.] A law enforcement officer's personnel record will commonly contain many documents that would, in the normal case, be irrelevant to a *Pitchess* motion, including those describing marital status and identifying family members, employment applications, letters of

recommendation, promotion records, and health records. (See Pen. Code, § 832.8.) Documents clearly irrelevant to a defendant's *Pitchess* request need not be presented to the trial court for in camera review. But if the custodian has any doubt whether a particular document is relevant, he or she should present it to the trial court. Such practice is consistent with the premise of Evidence Code sections 1043 and 1045 that the locus of decisionmaking is to be the trial court, not the prosecution or the custodian of records. The custodian should be prepared to state in chambers and for the record what other documents (or category of documents) not presented to the court were included in the complete personnel record, and why those were deemed irrelevant or otherwise nonresponsive to the defendant's *Pitchess* motion. A court reporter should be present to document the custodian's statements, as well as any questions the trial court may wish to ask the custodian regarding the completeness of the record. [Citation.]

“The trial court should then make a record of what documents it examined before ruling on the *Pitchess* motion. Such a record will permit future appellate review. If the documents produced by the custodian are not voluminous, the court can photocopy them and place them in a confidential file. Alternatively, the court can prepare a list of the documents it considered, or simply state for the record what documents it examined. Without some record of the documents examined by the trial court, a party's ability to obtain appellate review of the trial court's decision, whether to disclose or not to disclose, would be nonexistent. Of course, to protect the officer's privacy, the examination of documents and questioning of the custodian should be done in camera in accordance with the requirements of Evidence Code section 915, and the transcript of the in camera hearing and all copies of the documents should be sealed.” (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229.)

We have reviewed the hearing transcript provided to us in camera. The trial court did not abuse its discretion in refusing to disclose the contents of the named officers' personnel files.

IV. The Order Striking Defendant's Three Strikes Convictions Was Ineffective

In their cross-appeal, the People argue that the trial court order striking defendant's three prior strike convictions under section 1385 was ineffective for lack of a statement of reasons in the court's minutes. Defendant "does not disagree with this assignment of error."

Although the reporter's transcript contains the court's discussion of its reasoning at the sentencing hearing, the court's minute order states only that "the court strikes the strikes" without a statement of reasons. Both parties agree the order is ineffective without such a statement of reasons and should be remanded with instructions to set forth the court's reasons in a written order entered upon the minutes.

We agree as well, based on *People v. Bonnetta* (2009) 46 Cal.4th 143. The trial court's "order of dismissal is ineffective" and "the matter must be remanded at least for the purpose of allowing the trial court to correct the defect by setting forth its reasons in a written order entered upon the minutes." (*Id.* at p. 153.)

DISPOSITION

The judgment is affirmed, except that sentence is reversed and the matter remanded for further proceedings consistent with section 1385 and *People v. Bonnetta*, *supra*, 46 Cal.4th 143, as discussed herein.

Lambden, J.

We concur:

Kline, P.J.

Richman, J.