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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ALONZO STEVENS,

Defendant and Appellant.

A131249

(Contra Costa County  
Super. Ct. No. 51007335)

**I. INTRODUCTION**

A jury convicted Alonzo Stevens (appellant) of attempted murder (Pen. Code, §§ 187, subd. (a)/664, subd. (a)<sup>1</sup>), second degree robbery (§§ 211/212.5, subd. (c)), and assault with a deadly weapon (§ 245, subd. (a)(1)). The jury also found true enhancement allegations that appellant used a deadly weapon (§ 12022, subd. (b)(1)), and inflicted great bodily injury (§ 12022.7, subd. (a)). Thereafter, the trial court found true a prior prison term enhancement allegation (§ 667.5, subd. (b)). Appellant was sentenced to an aggregate term of 12 years in state prison.

Appellant seeks reversal of the judgment on the grounds that the prosecutor committed misconduct and the trial court made numerous erroneous evidentiary rulings. Appellant also challenges the sufficiency of the evidence to support the prior prison term enhancement and contends that the trial court committed sentencing error. Although we

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<sup>1</sup> Unlabeled statutory references are to the Penal Code.

affirm the judgment, we will reverse the trial court's true finding as to the prior prison term enhancement because it is not supported by the evidence in this record.

## **II. STATEMENT OF FACTS**

On October 15, 2009, at approximately 10:30 p.m., a man attacked and stabbed Malissa Urrutia as she walked to her car where her husband Adam was waiting to give her a ride home from work. The incident occurred on Delta Fair Boulevard in Antioch, outside the Blockbuster Video store where Malissa worked.

Malissa was two feet away from the store when she saw her assailant "come from around the side of the building." The man said "Hey, hey" as he walked toward her. When Malissa reached the passenger door of her car, the man had advanced to the front driver's side of her car. It appeared that the man was talking to her and she assumed he wanted money so she began to look into her purse. At that point, the man moved quickly toward her, brushing across the front passenger side of the car, and Malissa saw that he was holding a knife. She tried but failed to open the passenger door of her car.

The man grabbed Malissa's elbow and she tried to give him her purse, throwing it to the ground. She broke free of him momentarily and moved toward the back of the car, but the next thing she remembered, she was on the ground and the man was holding her down with his knees and punching her. Malissa tried to get away by pushing and kicking but could not break free. Then she saw the knife, which appeared to be a seven-inch-long steak knife. When she felt the blade on her neck, Malissa screamed and tried to push away. The man stabbed her in the chest and then in the neck. When he pulled the knife out, Malissa "thought he was done," but he stabbed her again, pulling the blade up toward her ear.

At that point, Malissa saw Adam get out of the car, dropping his iPod to the ground. The man got off Malissa, and trapped Adam between the open door and the car. The man slashed the knife at Adam's face but did not make contact. Malissa got up and she and Adam ran to the front of the store. The man grabbed Malissa's purse and Adam's iPod and ran away.

Malissa and Adam described their attacker as an African-American male with the following unique characteristics: he had sunken in cheeks; he had acne scars or patchy facial hair; he moved his mouth in a strange manner as if he had no teeth; and there was something strange about the way he used one of his arms.

On the night of the attack, the police took Adam to two field identifications, but Adam did not identify either man as the robber who stabbed his wife. The following day, police took both Adam and Malissa to a field identification where they identified appellant as their attacker. Appellant, who is African American, has no teeth and one of his arms is impaired. At trial, both Adam and Malissa confirmed that appellant attacked and robbed them on the night in question.

Malissa had surgery and physical therapy as result of the injuries inflicted during the attack, which left a three-inch scar near her ear and caused nerve damage to her cheek, neck and arm. At the time of trial, Malissa was still attending therapy, was unable to drive or fully turn her head and had difficulty chewing as a result of her injuries.

Appellant's defense at trial was that he was not the person who attacked Malissa and Adam. Appellant's sister and niece testified that appellant was home with them when the incident occurred. Appellant also presented evidence that a fingerprint lifted from Adam and Malissa's car did not belong to appellant, and that a DNA analysis of appellant's clothing did not uncover any evidence of Malissa's blood. Appellant also elicited testimony from an Antioch police officer and a defense investigator regarding inconsistencies in the victims' descriptions of their attacker. And a defense expert on eyewitness memory and recognition testified about the problems and errors associated with victim identification.

### **III. DISCUSSION**

#### **A. *Prosecutor Misconduct***

Appellant contends that his federal and state constitutional rights were violated at trial because the prosecutor committed misconduct during her closing argument.

“ ‘The applicable federal and state standards regarding prosecutorial misconduct are well established. “ ‘A prosecutor's . . . intemperate behavior violates the federal

Constitution when it comprises a pattern of conduct “so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.” ’ ’ [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves “ ‘ “the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.” ’ ’ [Citation.]’ [Citation.] ‘[W]hen 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.’ [Citation.]” (*People v. Smithey* (1999) 20 Cal.4th 936, 960 (*Smithey*); see also *People v. Martinez* (2010) 47 Cal.4th 911, 955-956 (*Martinez*); *People v. Cook* (2006) 39 Cal.4th 566, 606; *People v. Friend* (2009) 47 Cal.4th 1, 29.)

### **1. Background**

During her closing argument, the prosecutor discussed the strength of circumstantial evidence that appellant was the person who attacked Malissa. She summarized Malissa’s testimony that the perpetrator “had a strange movement to his mouth, talked like he had no teeth, overusing his mouth, had acne scars or patchy facial hair, and had a bad arm.” After pointing out that appellant possessed all of these physical characteristics, the prosecutor continued as follows:

“[Prosecutor]: So when you take a look at it, how many reasonable conclusions can you come up with? The law is asking you to say how many other African-American, male, 6 feet tall, really thin, strange mouth movement, talks with his lips like he has no teeth and actually has no teeth, with a bad left arm are there in and around the area of Antioch? [¶] If you take all of these and put it together, what is the mathematical probability of finding someone else with all of these circumstantial characteristics about them? And they all work together, not independently. [¶] Think about mathematically African-American male, how much of Antioch? Maybe 40.”

“[Defense Counsel]: Objection; calls for—

“[Prosecutor]: 30 Percent

“[Defense Counsel]: Objection.

“[Defendant]: Somebody tell you that.

“[Defense Counsel] Objection; assumes facts not in evidence.

“[The Defendant]: Somebody tell her.

“[The Court]: That’s a common sense type of argument.

“[Prosecutor]: Of course if that’s all we had on the circumstantial evidence, there’s tons of alternate reasonable conclusions, tons of them. [¶] But you add to that then we’re going to narrow it to African-American males who are 6 feet or taller, now we’re getting to a smaller amount. But still too many. Obviously there’s alternate reasonable conclusions. [¶] You add to that really thin. You’re getting to a smaller percentage. How many alternate reasonable conclusions are there? [¶] Then he talks with his lips like he has no teeth. Here’s where you drop off.

“[Defendant]: Nobody know that.

“[Prosecutor]: What percentage are we talking about at this point? But then you add on top of that that the person actually does have a disabled left arm.

“[Defendant]: Somebody told her that.

“[Prosecutor]: How many alternate reasonable conclusions are we talking about? And then we’re going to confine it in and around the area of Antioch in the location of this crime. [¶] That’s what we’re talking about when we say that it works together, not independently, and the circumstantial evidence that is pointing directly to Mr. Stevens.”

## **2. Analysis**

Appellant contends that the prosecutor committed misconduct during the argument recounted above when she answered her own question and told the jury that approximately 30-40 percent of the residents of Antioch are African-American. By making this statement, appellant contends, the prosecutor testified as her own expert and presented the jury with a statistical fact that was not admitted into evidence at trial.

“A prosecutor engages in misconduct by misstating facts or referring to facts not in evidence, but he or she enjoys wide latitude in commenting on the evidence, including urging the jury to make reasonable inferences and deductions therefrom. [Citation.]” (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 95 (*Coffman*)). “Prosecuting

attorneys are allowed ‘a wide range of descriptive comment’ and their ‘ “ ‘argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom.’ ” ’ [Citations.]” (*Martinez, supra*, 47 Cal.4th at p. 957.)

“ “ ‘It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.’ [Citation.] ‘A prosecutor may “vigorously argue his case and is not limited to ‘Chesterfieldian politeness’ ” [citation], and he may “use appropriate epithets . . . .” ’ ” [Citations.]’ [Citation.]” (*People v. Hill* (1998) 17 Cal.4th 800, 819; see also, *People v. Morales* (2001) 25 Cal.4th 34, 44 [“At closing argument a party is entitled both to discuss the evidence and to comment on reasonable inferences that may be drawn therefrom”]; *People v. Young* (2005) 34 Cal.4th 1149, 1197 [“Counsel may argue facts not in evidence that are common knowledge or drawn from common experiences”].)

Applying these rules in the present case, we are not convinced that the prosecutor committed misconduct. When viewed in context, the challenged statement was not an assertion of fact but part of an illustration as to how to evaluate the cumulative strength of the circumstantial evidence. The prosecutor was commenting on the factual evidence regarding the physical description of the perpetrator and the physical description of the defendant and asking the jury to “make reasonable inferences and deductions therefrom.” (*Coffman, supra*, 34 Cal.4th at p. 95.) She was urging the jury to use common sense to assess the likelihood that someone besides appellant could have all of the physical characteristics of the person who attacked Malissa. Thus, we conclude that it is not reasonably likely that the jury interpreted the prosecutor’s argument as expert testimony about a statistical fact. (*Smithey, supra*, 20 Cal.4th at p. 960.)

Even if we could be persuaded that the prosecutor’s reference to a percentage was improper, we firmly reject appellant’s contention that this isolated comment “infected appellant’s trial with fundamental unfairness so as to constitute a violation of due process under the Fourteenth Amendment and a violation of appellant’s rights to confrontation

under the Sixth Amendment.” In an effort to support this bold claim, appellant argues that the prosecutor’s comment had “obvious racial overtones” in a case in which “both parties were acutely aware of and concerned about the issue of appellant’s race and its affect on the fairness of the trial.” The race of the assailant in this case was an evidentiary fact; referring to that fact did not inject an “obvious racial overtone[],” as appellant contends on appeal. Furthermore, appellant’s contention that the issue of his race created concern about the fairness of the trial is not supported by the single record reference he provides which shows only that both parties made motions under *People v. Wheeler* (1978) 22 Cal.3d 258, which the trial court denied.

Appellant complains about a single statement, made during an otherwise unobjectionable argument, which clearly does not amount to an egregious pattern of conduct that rendered the trial fundamentally unfair or otherwise deprived appellant of a federal constitutional right. Nor was this comment prejudicial under our state standard because it is not reasonably likely that the jury was misled by it. Although the trial court overruled defense counsel’s objection to this comment, it clarified for the jury that the prosecutor’s statement was part of a common sense argument and not an assertion of fact. Furthermore, after closing arguments, the jury was expressly instructed that “nothing that the attorneys say is evidence.” We presume that the jury followed the trial court’s instructions regarding this matter. (*Smithey, supra*, 20 Cal.4th at p. 961.)

**B. *Dog trailing evidence***

At trial, appellant attempted to introduce evidence of unsuccessful police efforts to locate the robber who attacked Malissa by using a police dog named Arco to track a “pool scent” from the crime scene.

**1. *Background***

At a hearing conducted pursuant to Evidence Code section 402 (section 402), Antioch police officer Matthew Koch testified that he arrived at the crime scene with police dog Arco. Koch directed Arco to a location on the street where the attacker may

have stood so that he could attempt to obtain a pool scent.<sup>2</sup> The dog then led the officer to a homeless camp. The officer searched the camp and focused the dog's attention on several items but Arco did not bite any of the objects to indicate that he had located the source of the scent. Koch then instructed Arco to resume trailing the scent. The dog obeyed and then stopped trailing when he reached a restaurant on Somersville Road, about a quarter mile from the Blockbuster.

Appellant's trial counsel argued this evidence was admissible and relevant to establish a reasonable doubt as to appellant's guilt because (1) the scent that Arco tracked did not lead police to the defendant; and (2) Arco's trail led police in the opposite direction from appellant's home, which was only a short distance from the crime scene. The trial court rejected this argument and concluded that the evidence was speculative and irrelevant. The court noted, among other things, that (1) Arco did not track a scent to any person; (2) it was not clear what scent Arco was tracking; and (3) if Arco was tracking the scent of the robber, he could have been following the trail that the robber took to the crime scene rather than away from it.

**b. Analysis**

Appellant contends that the trial court abused its discretion by excluding the dog tracking evidence "because [the] defense established an adequate foundation." To support this contention, appellant relies primarily on *People v. Malgren* (1983) 139 Cal.App.3d 234 (*Malgren*).<sup>3</sup>

The *Malgren* court held that evidence that a police dog tracked a scent to the defendant may be admitted to prove the identity of the perpetrator of a crime if the following elements are established: "(1) the dog's handler was qualified by training and

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<sup>2</sup> Koch testified that a "pool scent" refers to a situation where "there's no specific article that is given to the dog, you're asking for the dog to sniff the area in which you believe the suspect to have been standing or near, and you're requesting the dog to sniff the ground where the odor would have fallen and have the dog begin to do the trail or follow that scent from there."

<sup>3</sup> *Malgren* was disapproved on another ground in *People v. Jones* (1991) 53 Cal.3d 1115, 1144-1145.

experience to use the dog; (2) the dog was adequately trained in tracking humans; (3) the dog has been found to be reliable in tracking humans; (4) the dog was placed on the track where circumstances indicated the guilty party to have been; and (5) the trail had not become stale or contaminated.” (*Malgren, supra*, 139 Cal.App.3d at pp. 237-238.)

Appellant spends considerable time attempting to convince us that all of the foundational requirements outlined in *Malgren* were satisfied in this case. In our view, this exercise misses a fundamental point: the dog tracking evidence in this case was irrelevant and speculative. The evidence was irrelevant because, assuming that there was sufficient evidence to establish the foundational facts that Arco picked up the robber’s scent and then followed that scent, he did not lead the police to any suspect at all. Furthermore, admitting such evidence would invite the jury to speculate on a variety of matters, including whether Arco had picked up the trail that the robber took to the crime scene rather than the trail by which he fled.

Appellant contends that the fact that Arco’s trail “went from the Blockbuster to the homeless camp was itself relevant for the defense’s purpose of showing that the robber ran away in a direction different from the direction to appellant’s apartment complex.” But this theory only reinforces our conclusion that the evidence lacks probative value and invites speculation. Regardless where appellant lived at the time, he could have come from any direction before the crime occurred and fled in any direction thereafter.

All of the cases upon which appellant relies are distinguishable on the ground that they involved situations in which a dog followed a scent to the defendant. (See *Malgren, supra*, 139 Cal.App.3d 234; *People v. Gonzales* (1990) 218 Cal.App.3d 403, 409 (*Gonzales*); *People v. Craig* (1978) 86 Cal.App.3d 905.) The foundational requirements that were established by this line of authority are designed to ensure the reliability of otherwise probative evidence. Appellant cannot simply reverse engineer the process and create relevance where it does not exist. Furthermore, even when dog trailing evidence does lead to a specific suspect, it is not deemed to be sufficiently reliable to by itself prove identity; such evidence must be corroborated with other evidence which either independently links the suspect to the crime or otherwise supports the accuracy of the dog

tracking. (*Malgren, supra*, 139 Cal.App.3d at p. 239; *Gonzales, supra*, 218 Cal.App.3d at p. 409.) Here, as the trial court found, no such corroboration exists, and the officer's testimony was insufficient by itself to show that Arco was actually trailing the robber's scent. (See *Gonzales, supra*, 218 Cal.App.3d at p. 409.)

For all these reasons, we reject appellant's contention that the trial court abused its discretion by excluding the dog tracking evidence in this case.

### **C. *Impeachment of Appellant's Sister***

Appellant contends the trial court abused its discretion by permitting the prosecutor to cross-examine his sister Acquinetta Moore about his violent behavior during a mental health detention.

#### **a. *Background***

Before Moore was called as a defense witness, the prosecutor sought permission from the trial court to impeach Moore if she confirmed a prior out-of-court statement that she made to a defense investigator in this case that appellant "is a nonviolent person and that he does not become violent when he drinks alcohol and that his typical response is that he would actually fall asleep." If Moore confirmed her prior statement that appellant is not violent, the prosecutor wanted to impeach her testimony with evidence of an incident when appellant became so violent during a medical appointment that the nurse referred him for a mental health evaluation under Welfare and Institutions Code section 5150 (section 5150). The prosecutor intended to present this impeachment evidence through the testimony of the nurse who participated in the incident.

Defense counsel objected to the prosecutor's plan, arguing that the evidence should be excluded under Evidence Code section 352 (section 352) and that the prosecutor was attempting to introduce bad character evidence in violation of Evidence Code section 1101 (section 1101).

The trial court disagreed with defense counsel. The court reasoned that Moore was an alibi witness and that the veracity of statements she had made in favor of her brother was extremely probative of her credibility. As the court explained, "I think the

probative value for anybody that's creating an alibi, that they've been telling untrue things in order—on the same case and the same topic, is just extremely probative.”

Defense counsel insisted that admitting this evidence would open the door to collateral matters such as the reason for the section 5150 evaluation and the potential causes or justifications for appellant's allegedly violent reaction. Indeed, defense counsel stated that if this evidence was admitted, she intended to elicit testimony regarding alleged police brutality which precipitated the medical exam and which allegedly explained if not justified appellant's behavior during the incident.

The trial court reiterated that the relevant point was the state of mind of the alibi witness, and the veracity of statements that she made in an effort to protect her brother. In this regard, the court expressly stated that it would not allow counsel to question Moore about the reason for or nature of the section 5150 evaluation but only whether she had seen her brother be violent on a given time at a given place: “She can say what she saw and observed in terms of violence, but she can't, you know, tell his story about the beef he was having with the police in order to get that in. And, you know, Counsel, I'm not an idiot. I know where that goes and I'm not going to allow it.”

The prosecutor added that the entire matter could be resolved very expeditiously if Moore simply acknowledged that, regardless of her prior statement, appellant had been violent in the past. Defense counsel responded that was unlikely to occur and attempted to prolong the discussion of what evidence would be admissible if “we're going to open up this 5150.” The trial court pointed out that such matters were not relevant to this witness, but to the potential rebuttal witness and reiterated that both parties' examination of Moore should be limited to questions about what she observed. Cutting off further argument between the two attorneys, the court reiterated that “it's a very limited topic, and that is did you try to help your brother in the past, and by doing so did you say things that weren't true.”

The next day, while the prosecutor was cross-examining Moore, the following exchange occurred:

“[Prosecutor]. You love your brother very much don't you?”

“A. Yes.

“Q. Do almost anything for him?

“A. Yes.

“Q. Been through a lot of hard times with him, right?

“A. Um-hmm.

“Q. Isn't it true that you told the defense attorney in a statement that your brother has never been violent?

“A. Yes.

“[Defense Counsel]. Objection, your Honor; relevance.

“THE COURT: Overruled.

“[Prosecutor]. That's not true, correct?

“A. Can you repeat that?

“Q. It's not true that you've never seen your brother violent.

“A. It's true I've never seen him violent.

“Q. Isn't it true that you've took [sic] your brother to a doctor's appointment where he became irate and threw a bunch of items during the appointment?

“[Defense Counsel]. Objection, your Honor; 352, relevance.

“THE COURT: Overruled

“THE WITNESS: No. I don't remember that.

“[Prosecutor]. And isn't it true that after that appointment your brother was so out of control that the nurse found him a danger to others and himself and had him committed?

“[Defense Counsel]. Objection; hearsay, lack of foundation, calls for a medical opinion and a legal conclusion;

“THE COURT: Overruled. She can tell us what she knows.

“THE WITNESS: No.”

Later in the trial, during the People's rebuttal case, the trial court conducted a section 402 hearing at which a nurse practitioner testified about an incident during which appellant's behavior led her to refer him to the “psychiatric emergency room for further

evaluation and care.” At the conclusion of that testimony, the court excluded impeachment testimony from this witness on the following grounds: “I’m going to base it on 352, and I’m going to base it on the HIPPA rights of the defendant. It is the view of this court that knowledge of a mental condition of the nature that’s been described by this witness is not knowledge of violence sufficient to impeach a witness that says she doesn’t think her brother is violent.”

**b. Analysis**

Appellant contends that the trial court abused its discretion by denying the defense request to hold a section 402 hearing *before* permitting the prosecutor to question Moore about her prior statement that her brother was not violent. We disagree. Section 402 provides that “[w]hen the existence of a preliminary fact is disputed,” the trial court “may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury . . . .” Here, although defense counsel objected that the prosecutor should not be permitted to ask Moore about this issue, the court addressed and resolved that objection without relying on any disputed fact. There was no dispute regarding the fact that Moore made the prior statement to the defense investigator that her brother was never violent or that the incident resulting in the section 5150 evaluation occurred. Thus, there was no reason to hold a section 402 hearing at that point in the trial.

Appellant argues that the section 402 hearing should have been held prior to Moore’s testimony because defense counsel raised issues under section 352 and because “there was a dispute between defense counsel and the prosecutor as to the relevance of this incident” and whether appellant’s conduct during the section 5150 hold was properly characterized as violent. However, as the trial court explained to the parties at the time, these concerns were not pertinent to Moore’s testimony but rather to potential testimony by the nurse. Whether the nurse’s testimony was admissible impeachment simply was not an issue until after Moore testified.

Appellant next contends that the trial court erred by permitting the prosecutor to cross-examine Moore about appellant’s “mental health detention.” However, as reflected in our background summary above, the trial court expressly advised both counsel that

they were not to ask Moore about the nature or outcome of appellant's section 5150 evaluation and, in fact, the prosecutor did not ask Moore about that distinct issue.

Appellant erroneously contends that the trial court eventually conceded that the cross-examination of Moore on this issue was improper impeachment after it finally conducted the section 402 hearing and ruled that the nurse's testimony was inadmissible. Clearly, the trial court made no such concession. Rather, after Moore confirmed her prior statement to the defense investigator that she had never seen her brother display violent behavior, the court conducted a section 402 hearing to consider the admissibility of the nurse's testimony. The admissibility of the nurse's testimony was a distinct issue and the court's resolution of that issue is not before us on appeal.

Appellant also contends that the prosecutor's cross-examination was improper because Moore's statement to the defense investigator was inadmissible hearsay and improper character evidence. However, these theories simply mischaracterize the nature of the prosecutor's inquiry. This evidence was not admitted for its truth or to show appellant's reputation. Rather, the prosecutor was exercising her right to test the credibility of this alibi witness and to uncover her potential bias.

#### **D. *Defense Counsel's Closing Argument***

Appellant contends the trial court erred by sustaining several objections to arguments defense counsel made during her closing argument to the jury.

##### **1. *Appeal to Treat Appellant Like a Human Being***

During her closing, defense counsel made this argument:

"I'd ask you not to rush to judgment in this particular case or to feel that you can't stick in there because you have Christmas shopping to do or you need to get back to work. It would be very easy to dismiss Mr. Stevens because he doesn't seem like someone you might want to hang out with, doesn't seem like someone you might identify with. If you saw him on the street, you might cross to the other side because he's an alcoholic, or you might be annoyed by him because he talks loudly when he's drunk. [¶] But Mr. Stevens is a human being like you and I, and he is entitled—"

Defense counsel was precluded from completing her sentence because the trial court sustained the prosecutor's objection that defense counsel was making an improper appeal to the jury's passions and prejudice. However, after the objection was sustained, defense counsel reminded the jury that appellant "is entitled to the same protections that the constitution gives every single person in this room."

In this court, appellant contends that the trial court erred by sustaining the prosecutor's objection. We disagree. " " "It is, of course, improper to make arguments to the jury that give it the impression that 'emotion may reign over reason,' and to present 'irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational, purely subjective response.' [Citation.]" " 'It has long been settled that appeals to the sympathy or passions of the jury are inappropriate at the guilt phase of a criminal trial.' [Citation.]" (*People v. Vance* (2010) 188 Cal.App.4th 1182, 1192.) Therefore, the trial court did not abuse its discretion by sustaining the objection to defense counsel's emotional plea.

Appellant argues that (1) there was simply nothing improper about defense counsel's reminder to the jury that appellant was "entitled to the same protections that the constitution gives every single person in this room," and (2) defense counsel was simply making a "common sense" argument in order to remind the jury of appellant's constitutional rights. As reflected above, defense counsel did actually remind the jury about appellant's constitutional rights and the prosecutor did not object to that statement. However, prior to the statement, defense counsel's argument had a distinctly different tone as she made an emotional plea that had nothing to do with the substantive evidence or issues in this case.

## **2. *Speculation About Another Suspect***

Defense counsel asked the jury to recall Adam's testimony about the field identifications on the night of the stabbing. She reminded the jury that Adam testified that he was shown two suspects and that he really could not remember much about the second suspect. Then defense counsel made the following statement: "Wouldn't it be nice to know where that second person was found, when he was found, what he looked

like?” The prosecutor objected that this query called for speculation and the trial court agreed, telling the jury that “It’s an improper argument.”

Appellant contends that the trial court erred by sustaining the prosecutor’s objection because defense counsel’s comments about the state of the evidence and the inadequacy of the robbery investigation “were within the bounds of permissible vigorous advocacy.” First, as a factual matter, the objection that the trial court sustained was not to the prosecutor’s argument about the inadequacy of the investigation but rather to the specific statement inviting the jury to speculate about the second individual that the police asked Adam to look at on the night that his wife was stabbed. Second, appellant’s self-serving interpretation of defense counsel’s statement simply does not show that the trial court abused its discretion in this instance.

### **3. *The Fingerprint Evidence***

During her closing, defense counsel reminded the jury that “Officer Kidd came in, testified that he lifted fingerprints from the victim’s car.” Counsel then described the procedure that was used to lift the prints and analyze them in the crime lab. Then, the following comments were made:

“[Defense Counsel]: When he [came] to court it is clear that everyone knew that Mr. Stevens’ fingerprints had already been excluded from the fingerprints he lifted from the hood.

“[Prosecutor]: Objection; no evidence in the record to support that contention.

“THE COURT: Sustained. He said he took it from the right panel of the car.

“[Defense Counsel]: I—

“THE COURT: The driver panel.

“[Defense Counsel]: Well—

“[Prosecutor]: Going to the fact that the officer never testified he knew the results of the fingerprint cards.

“THE DEFENDANT: Yeah, he did.

“THE COURT: You may proceed.

“[Defense Counsel]: Okay. Go ahead and look at Defendant’s Exhibit A. That’s a pretty good drawing I think. [¶] So we know that those fingerprints excluded—were excluded from Mr. Stevens.

“And he has now come to court and said that he dusted half of the hood. You think about that. Does it make sense to dust half of the hood? If your job is to obtain physical evidence, attach it to someone who you think you correctly arrested, would you dust half of it? And look at those fingerprints, how much of it is put on that hood.

“Officer Colley then comes in and says, well, he dusted the passenger right panel. And now we hear testimony that there is some fingerprints on the passenger right side panel. Remember, that’s the panel. That’s not the hood. That’s the side. There has been no testimony from the victims in this case that the robber touched the side.

“I think what’s most interesting is what happens on the hood of the car. And I suggest to you, as I did before, that despite the changes in what perhaps comes out from the witness stand versus the police report that the fingerprints, and the only ones that you’ve heard evidence about, excluded my client.”

Appellant contends that the trial court abused its discretion by sustaining the prosecutor’s objection in the middle of the argument recounted above. The objection was to the defense comment that, when Officer Kidd appeared at trial he and “everybody” knew that appellant was excluded from the fingerprints lifted from the hood of the car. That objection was properly sustained because there was no evidence as to what Officer Kidd knew about the results of the fingerprint analysis before he came to court.

Appellant also contends that the trial court abused its discretion and violated appellant’s constitutional right to confrontation by injecting its own version of the fingerprint evidence when it told the jury why it was sustaining the prosecutor’s objection. This theory rests on assumptions about both the state of the evidence and the jury’s interpretation of the trial court’s rather brief comment.

First, appellant posits that his “main defense theory” was that the fingerprint evidence excluded him as the robber. To demonstrate the strength of this theory, appellant points out that Adam testified that the robber touched the hood of his car,

Malissa testified that the robber brushed over the front of the car, and the evidence showed that the print that Officer Kidd lifted from the car hood did not belong to appellant.<sup>4</sup>

Second, appellant contends that when the trial court told the jury that Officer Kidd lifted a print from the side of the car rather than the hood, it was not only wrong, but it also essentially told them that the fingerprint that Kidd lifted did not actually belong to the robber, since there was no evidence that the robber touched the side panel of the car. Therefore, appellant contends, the trial court's comment "eviscerated the main defense theory that appellant was ruled out as the robber based on the analysis of the print lifted by Kidd."

The assumptions which fuel this convoluted argument are simply not justified by the record before us. What is clear from the face of this record is that when the court listened to defense counsel's argument, it became confused about the names of the two officers who lifted fingerprints from different locations on the car. However, after the objection was sustained, defense counsel was permitted to complete her argument, without interruption. During that argument, she clarified which officer did what and then fully presented her theory as to how the fingerprint evidence excluded appellant as the robber. Thus, even if the court's comment was somehow improper, it was not prejudicial under any standard of error.

**E. Section 654**

The trial court imposed a one-year term for the deadly weapon enhancement (§ 12022, subd. (b)(1)) and a three year term for the great bodily injury enhancement (§ 12022.7, subd. (a)). Appellant contends that imposing punishment for both of these enhancement violates section 654 which required that the court stay the lesser of the two punishments.

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<sup>4</sup> We note for the record that Malissa testified that she did not see her attacker touch the front hood or any other part of the car.

A parallel argument was rejected by our Supreme Court in *People v. Ahmed* (2011) 53 Cal.4th 156, a case that was decided after appellant filed his appellant's opening brief in this case. Therefore, appellant's contention that his sentence violates section 654 is summarily denied. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

**F. *The Prior Prison Term Finding***

Appellant contends that (1) the trial court's finding that he suffered a prior prison term under section 667.5 is not supported by substantial evidence; (2) even if there is sufficient evidence to support the section 667.5 finding, the trial court erred by staying punishment for this enhancement rather than striking the allegation; and (3) clerical errors in the minute order and abstract of judgment regarding the section 667.5 finding must be corrected.

Section 667.5 requires enhancements for prison terms for certain new offenses when the defendant has served a prior prison term for a felony offense. Under subdivision (f) of section 667.5, "A prior conviction of a felony shall include a conviction in another jurisdiction for an offense which, if committed in California, is punishable by imprisonment in the state prison or in county jail under subdivision (h) of Section 1170 if the defendant served one year or more in prison for the offense in the other jurisdiction."

In the present case, the prosecutor presented evidence that appellant suffered two prior felony convictions in Nevada: (1) a 2006 felony conviction for which he was sentenced to state prison "for the minimum term of twelve (12) months to a maximum term of forty-eight (48) months," and (2) a 2004 felony conviction for which he was sentenced to prison "for the minimum term of twelve (12) months to a maximum term of thirty (30) months." Based on this evidence, the trial court found that the prior prison term enhancement allegation was true.

Appellant contends there is insufficient evidence to support the trial court's finding because the prosecutor failed to establish that appellant served a period of one year or more for either of the Nevada felonies. We agree. "When a prior California prison term is charged as an enhancement, the duration of the term actually served is

irrelevant. [Citation.] Under subdivision (f) of section 667.5, however, a prior prison term from another jurisdiction qualifies as an enhancement only ‘if the defendant *served one year or more in prison* for the offense in the other jurisdiction.’ (Italics added.)” (*People v. Gamble* (1996) 48 Cal.App.4th 576, 578.)

The People tacitly concede there is no evidence in this record that appellant served one year or more in prison for either of the felony offenses he committed in another jurisdiction. They argue, however, that the trial court could have inferred that appellant served at least the minimum term imposed for the 2004 conviction because that would have been required by the Nevada sentencing statute, at least under the People’s interpretation of that law. However, as appellant points out, the prosecutor did not ask the trial court to take judicial notice of the Nevada statute. Indeed, we do not find a single reference to that law. Thus, the section 667.5 finding is not supported by the evidence and must be reversed.

“Retrial of prior conviction findings is not barred by the state or federal prohibitions on double jeopardy even when a prior conviction finding is reversed on appeal for lack of substantial evidence.” (*People v. Fielder* (2004) 114 Cal.App.4th 1221, 1234, citing *Monge v. California* (1998) 524 U.S. 721; *People v. Monge* (1997) 16 Cal.4th 826; *Cherry v. Superior Court* (2001) 86 Cal.App.4th 1296; *People v. Scott* (2000) 85 Cal.App.4th 905.) Therefore, we will remand the case so that either (1) the prosecutor can retry the enhancement allegation, or (2) the trial court can resentence appellant.

While our decision to remand this issue makes it unnecessary to address appellant’s other contentions, we note for the record that the parties agree that the trial court erred by staying punishment for the section 667.5 enhancement because punishment for this enhancement is mandatory unless stricken. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.) The parties also agree that there are clerical errors in the sentencing order and the abstract of judgment. These errors can and should be corrected by the trial court when the case is remanded.

#### IV. DISPOSITION

The trial court's finding regarding the prior prison term enhancement allegation is reversed. The cause is remanded to the trial court for resentencing or, at the prosecutor's election, for retrial of the prior prison term enhancement allegation. In all other respects, we affirm the judgment.

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Haerle, Acting P.J.

We concur:

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Lambden, J.

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Richman, J.