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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES M. CARSTEN,

Defendant and Appellant.

A132407

(Contra Costa County  
Super. Ct. No. 05-101198-0)

Defendant Charles M. Carsten climbed through the back window of his neighbor's mobile home and took a box of collectable comic books worth between \$1,500 and \$2,500. A jury subsequently convicted him of first degree burglary and he was given three years' probation. On appeal, he complains of prosecutorial misconduct during argument, the erroneous admission of juvenile priors, and cumulative error. Although the priors were erroneously admitted, we conclude their admission does not require reversal. Finding his other contentions lacking in merit, we affirm.

**FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

On October 21, 2010, an information was filed charging defendant with one count of felony first degree residential burglary. (Pen. Code, §§ 459/460, subd. (a).)

***I. The Prosecution's Case***

The facts are essentially undisputed. James Billeci lives in a mobile home located in a mobile home park in Pittsburg. He has a large, valuable comic book collection that he stores in special boxes designed to preserve the books from water damage. He

generally keeps the boxes in a storage facility, but periodically he brings them home to replace the books' protective plastic covers. During this process, he usually stores the boxes in his bedroom. To keep track of his collection, he makes an inventory list of the comics contained in each box. Defendant is Billeci's next door neighbor. Prior to the incident that led to defendant's arrest, they were on friendly terms and defendant had been inside Billeci's home about a dozen times.

One evening in July 2010, Billeci and his girlfriend went grocery shopping. When they left, defendant was standing by his driveway. Later that night when he went to bed, Billeci noticed his bedroom window was slightly ajar. The next morning, he checked through his home and did not notice anything amiss. Later that day, defendant's wife came over and gave him an inventory list from one of his comic book boxes. He checked his boxes and noticed the box corresponding to the inventory list was missing. He also noticed some money was missing from a cash box that he keeps in his home office. Later, defendant's wife brought over the missing box with about half of the books in it. Over the next two or three days, she and defendant's father returned the remaining comic books. She also brought back two bank deposit pouches, one of which contained his checkbook.

This was not the first such incident. Sometime in 2007, Billeci came home and found the same bedroom window ajar. On that occasion, a pistol and some cash were taken from his bedroom. About six months later, defendant confessed to Billeci that he had stolen the gun and had given it to a friend in Stockton. Billeci decided not to report him to the police. At trial, the trial court instructed the jury that it could consider this evidence only for the limited purpose of determining whether it tended to show defendant's intent at the time of the charged offense.

Officer Jason Waite responded to a residential burglary report on July 24, 2010. When he arrived at the location, he spoke with defendant and placed him under arrest. He took him back to the police station and interviewed him in a conversation that was recorded on video. In the portion of the video introduced by the prosecution, defendant,

after receiving *Miranda* admonishments,<sup>1</sup> admitted he entered Billeci's residence through a window and removed the comic books. Defendant also told Waite he had taken the drug ecstasy earlier on the day of the interview. It did appear to Waite that he was under the influence. Defendant had also recently used methamphetamines, marijuana, and alcohol. Defendant's counsel requested the jury be allowed to view the entire video of interview, citing to Evidence Code section 356.<sup>2</sup> During the balance of the interview, defendant admitted to extensive drug use and described himself as a drug addict who desperately needed help. After Waite testified, the prosecutor was allowed to inform the jury that in 2003 defendant had admitted to committing misdemeanor second degree burglary and misdemeanor vehicle theft.

Defendant did not testify at trial. In his opening statement to the jury, defense counsel indicated that the key issue would not be whether defendant had entered his neighbor's home and taken the items. Instead, the key issue would be his purpose in doing so. Counsel claimed the burglary was an attempt to convince defendant's family that he needed treatment for his substance abuse problems: "The idea being that by breaking into the neighbor's house, taking these items, his wife will recognize, his parents will recognize that he's hit rock bottom and then that will be the catalyst that will help them get him into treatment." Specifically, the defense was that he did not intend to commit a theft because he did not intend to permanently deprive Billeci of the comic books and the other items he removed from the home.

## ***II. Verdict And Sentence***

On April 13, 2011, after two hours of deliberation, the jury found defendant guilty of felony first degree residential burglary.

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<sup>1</sup> *Miranda v. Arizona* (1966) 384 U.S. 436.

<sup>2</sup> Evidence Code section 356 provides: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

On May 27, 2011, the trial court granted defendant three years' formal probation. The court required that he serve 365 days in custody, with day-for-day credit for time served in an approved residential program.

## **DISCUSSION**

### ***I. Claim of Prosecutorial Misconduct***

Defendant claims the prosecutor committed pervasive misconduct during closing argument by repeatedly impugning the integrity of his defense counsel and implying that counsel was fabricating his defense. He also asserts that to the extent defense counsel's failure to object has waived the misconduct claim, this failure constitutes ineffective assistance of counsel. He further contends the misconduct denied him his right to due process and a fair trial. “ ‘A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the *federal* Constitution when they infect the trial with such “ ‘unfairness as to make the resulting conviction a denial of due process.’ ” [Citations.] Under *state law*, a prosecutor who uses deceptive or reprehensible methods commits misconduct even when those actions do not result in a fundamentally unfair trial.’ [Citations.]” (*People v. Lopez* (2008) 42 Cal.4th 960, 965–966 (*Lopez*).

#### ***A. Forfeiture***

We first observe defendant's counsel did not object to any of the challenged statements on the ground of prosecutorial misconduct. “ ‘A defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety.’ [Citation.]” (*Lopez, supra*, 42 Cal.4th 960, 966.) Absent an objection, the claim is only reviewable “if an admonition would not have cured the harm caused by the misconduct.” (*People v. Price* (1991) 1 Cal.4th 324, 447.)

#### ***B. The Prosecutor Did Not Impugn Defense Counsel's Integrity***

Here, the allegations raised by defendant do not amount to prosecutorial misconduct. His first claim of misconduct is directed at the prosecutor's argument

concerning feelings of sympathy towards defendant. The prosecutor said in his closing argument: “Sympathy for the defendant. You just saw a 17-minute video where he looks pathetic. I admit it. It’s okay for you to feel sorry for him. He’s a young father, couple young kids, he’s got a wife, and it’s okay to feel sorry for him, but you cannot let that sympathy for him influence your decision. Sympathy is not in the equation of whether or not the law was broken. [¶] . . . You need to trust that her Honor will do the right thing when it comes to sentencing.” The prosecutor later reiterated this point: “The relevant portion of that video is the defendant saying ‘Look, I did it. I went through the window. This is how I did it.’ The remainder of that video is—was introduced for you to have sympathy for the defendant. And like I said, it’s okay to be sympathetic, but you promised—the 12 of you were selected as jurors . . . because you promised to follow the law and not let sympathy influence your decision on whether or not a crime has been committed.” Defendant contends this line of argument suggested to the jury that defense counsel had wrongfully introduced evidence for an improper purpose. We disagree.

It is not reasonably probable that the jury would have interpreted these statements to be an attack on the defense attorney’s actions. Rather, the remarks would have been understood as directing the jury not to be misled by defendant’s interpretation of the evidence.<sup>3</sup> The prosecutor’s comments were entirely proper as the tape did present defendant in a light suggesting he was deserving of compassion. The prosecutor did not attack defendant’s counsel, and did not suggest defendant was unworthy of sympathy. The point was that the jurors should not allow their emotional response to influence their verdict.<sup>4</sup> “[T]he law is clear that a jury’s decision is to be made on the basis of the evidence presented and, that it is not to be affected either by prejudice against or sympathy for the defendant.” (*People v. Sanchez* (1965) 232 Cal.App.2d 812, 816.) The

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<sup>3</sup> During his closing argument, defendant’s counsel drew the jury’s attention to the video, stating “again and again in that video he’s crying out for help.”

<sup>4</sup> On appellate review, we presume the jury drew the least damaging meaning from the prosecutor’s statements. (*People v. Dykes* (2009) 46 Cal.4th 731, 772.)

trial court properly instructed the jury to that effect.<sup>5</sup> Therefore, the prosecutor's argument simply underscored this point and was not improper.

Defendant also complains that the prosecutor attacked defense counsel's integrity by telling the jury that his counsel's job was "to get up here and tell you when it's okay to break into somebody else's house and steal their valuables." He further alleges the prosecutor implied his counsel was fabricating a defense by asserting the district attorney's office had mischarged the case.<sup>6</sup> Again, no misconduct occurred.

"It is generally improper for the prosecutor to accuse defense counsel of fabricating a defense [citations], or to imply that counsel is free to deceive the jury [citation]. Such attacks on counsel's credibility risk focusing the jury's attention on irrelevant matters and diverting the prosecution from its proper role of commenting on the evidence and drawing reasonable inferences therefrom." (*People v. Bemore* (2000) 22 Cal.4th 809, 846.) Here, the remarks referenced by defendant were unfortunate, at best. They fall well short of "pervasive misconduct." "[T]he prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account." (*Ibid.*) "An argument which does no more than point out that the defense is attempting to confuse the issues and urges the jury to focus on what the prosecution believes is the relevant evidence is not improper." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1302, fn. 47.)

With respect to the comment regarding mischarging, we note the prosecutor was responding to remarks made by defense counsel. He did not attack defense counsel personally. Rather, his comment was about a tactic that defendants sometimes use. Further, he was entitled to respond to defense counsel's attacks on the integrity and credibility of the district attorney's office. In the context of the prosecutor's entire

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<sup>5</sup> The jury was instructed not to let "bias, sympathy, prejudice, or public opinion influence your decision."

<sup>6</sup> Defendant's counsel stated that the prosecutor had "undercharged" the case. In rebuttal, the prosecutor repeated that description: "If neither the facts nor the law are on your side, blame the police or in this case blame the prosecutor for undercharging the case." While the parties agree that counsel meant to say "overcharged," it is unclear how the jury would have interpreted these remarks.

argument, there is no reasonable likelihood the jury interpreted this remark as a personal attack on the integrity of defense counsel. (*People v. Young* (2005) 34 Cal.4th 1149, 1192.) Moreover, to the extent the jury possibly could have construed these comments in an objectionable manner, this could have been cured by an admonition.

### ***C. Other Misconduct Allegations***

Defendant also attacks the prosecutor for having argued evidence for an improper purpose when he tried to use the 2003 misdemeanor second degree burglary adjudication to counter the defense of lack of criminal intent. Although two misdemeanor juvenile adjudications had been admitted solely for the purpose of evaluating defendant's credibility, during his rebuttal argument the prosecutor urged the jurors to consider the burglary adjudication as evidence that he knew the mental state required for burglary: "The other thing [defense counsel] pointed out, how would the defendant know that intent to permanently deprive was an element of burglary? Well, actually, he did know that intent to permanently deprive was an element of burglary because in 2003 he admitted in a judicial proceeding that he committed a burglary. And in 2003 the law was the same then as it is now, both second degree commercial burglary and first degree residential burglary have the same element of intent to permanently deprive. So it's not truthful to say there's no evidence he didn't know." At that point, defense counsel objected, asserting the prosecutor had used the evidence for an improper purpose. The court agreed: "Yes. Ladies and gentlemen, that prior was only to go to his veracity, and so I think it is improper argument." The prosecutor apologized.

As noted, defense counsel's objection was sustained by the trial court. Further, the jury was later instructed that evidence admitted for a limited purpose could not be considered for any other purpose. The jury is presumed to have followed the court's instructions. (*People v. Cain* (1995) 10 Cal.4th 1, 34.) Thus, even if we were to find the prosecutor's statements constituted misconduct, we would find the conduct harmless under these facts. We observe here that prosecutorial misconduct objected to and properly admonished does not constitute grounds for reversal except where the case is closely balanced and there is grave doubt as to the defendant's guilt, or where the act

done or the remark made is of such a character that a harmful result cannot be obviated or cured by any retraction of counsel or instruction of the court. (*People v. Berryman* (1936) 6 Cal.2d 331, 337.) As we discuss further below, the case against defendant was not a close one, nor were the statements such that they were not cured by the trial court's instruction to the jury.

Next, defendant claims the prosecutor committed misconduct by urging the jurors to consider the societal consequences of a not guilty verdict. In response to defense counsel's argument that defendant did not have intent to permanently deprive Billeci of his comic books, the prosecutor argued the following in rebuttal: "[I]t's nonsense. If somebody walks out of Safeway with a 12-pack of beer, doesn't pay, gets caught by the security guards, puts the beer down and says, 'I'm glad you caught me. I'm ready for sobriety. This is great. Thanks for doing this for me,' what kind of world would we be living in? A world of no accountability. The criminal courts are here to hold people accountable . . . ." We agree with the People that the prosecutor merely offered an easily understandable analogy in an attempt to demonstrate the weakness in defendant's asserted defense. Contrary to defendant's arguments on appeal, the prosecutor's remarks were not designed to appeal to the passions, fears and vulnerabilities of the jury by suggesting that an acquittal would encourage others to engage in criminal activity. In particular, the facts used to illustrate the analogy were much less egregious than the conduct at issue in this case.

In any event, reversal is not required. Prosecutorial misconduct that violates the federal Constitution is reversible error unless the reviewing court finds beyond a reasonable doubt the misconduct did not affect the verdict. (*People v. Pigage* (2003) 112 Cal.App.4th 1359, 1375.) Misconduct under state law mandates reversal if there is a reasonable probability a result more favorable to the defendant would have occurred absent the error. (*Ibid.*) Again, under the facts of this case, there is not even a reasonable probability defendant would have received a more favorable result had the complained-of conduct not occurred.

#### ***D. Ineffective Assistance of Counsel***

We turn to defendant's allegations of ineffective assistance of counsel. "A defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel's inaction violated the defendant's constitutional right to the effective assistance of counsel. The appellate record, however, rarely shows that the failure to object was the result of counsel's incompetence; generally, such claims are more appropriately litigated on habeas corpus, which allows for an evidentiary hearing where the reasons for defense counsel's actions or omissions can be explored." (*Lopez, supra*, 42 Cal.4th 960, 966.)

"In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel's performance was deficient because it "fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms." [Citations.] Unless a defendant establishes the contrary, we shall presume that "counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy." [Citation.] If the record "sheds no light on why counsel acted or failed to act in the manner challenged," an appellate claim of ineffective assistance of counsel must be rejected "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." [Citations.] If a defendant meets the burden of establishing that counsel's performance was deficient, he or she also must show that counsel's deficiencies resulted in prejudice, that is, a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." [Citation.] [Citation.]" (*Lopez, supra*, 42 Cal.4th 960, 966.)

Because the prosecutor's arguments discussed above were not improper or pervasive, or were cured by the trial court's instructions, there was no reason for a defense objection. Therefore, defense counsel's failure to object on the grounds of prosecutorial misconduct did not result in a violation of defendant's constitutional right to the effective assistance of counsel. (*People v. Dickey* (2005) 35 Cal.4th 884, 915.)

## ***II. Admission of Priors***

In limine, the prosecution moved to admit evidence of the bare facts of defendant's admissions to allegations in a 2003 juvenile petition. The trial court ruled that should the defense choose to introduce the entirety of the video of Waite's interview with defendant, the prosecution would be entitled to introduce the admission of the two juvenile priors for impeachment purposes, on the ground that the priors involved moral turpitude. As noted above, following the introduction of the entirety of the video, the prosecutor recited the two juvenile adjudications. He did not describe the underlying facts of either of the offenses. The court thereafter instructed the jurors that they could use evidence of prior criminal misconduct in evaluating defendant's credibility.

The People concede the trial court erred in allowing the prosecutor to inform the jury of defendant's juvenile adjudications. Under *People v. Wheeler* (1992) 4 Cal.4th 284, 298, juvenile adjudications themselves are not admissible to prove the underlying conduct because they constitute hearsay. While the Evidence Code contains exceptions allowing criminal convictions to be admitted for impeachment purposes (Evid. Code, §§ 452.5, subd. (b), 788), no such exception allows a juvenile adjudication to be used as proof of the commission of an offense.

The error by the trial court in allowing impeachment with the juvenile adjudications was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836 (reversal is not required unless it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.") (*Ibid.*) The evidence of defendant's guilt was very strong as the facts surrounding the crime were essentially conceded. The only issue was his intent when he removed the property from Billeci's bedroom. The jury was told defendant had admitted he broke into Billeci's bedroom a few years before and had stolen a gun, which he never returned. In the present case, he again did not return Billeci's property, leaving it to his wife and father to return the comic books and other items over a period of several days. Thus, his "cry for help" defense was effectively undermined by his own conduct, even without the juvenile

priors. Viewing the record as a whole, it is not reasonably probable that he would have achieved a more favorable result absent admission of the juvenile adjudications.

### ***III. Cumulative Error***

Defendant contends that the cumulative effect of the purported errors undermined the fundamental fairness of the trial. However, as we have “ ‘either rejected on the merits defendant’s claims of error or have found any assumed errors to be nonprejudicial,’ ” we reach the same conclusion with respect to the cumulative effect of the purported errors. (*People v. Cole* (2004) 33 Cal.4th 1158, 1235–1236, quoting *People v. Sapp* (2003) 31 Cal.4th 240, 316.)

### **DISPOSITION**

The judgment is affirmed.

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Dondero, J.

We concur:

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Margulies, Acting P. J.

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Banke, J.