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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **ROBERT MOSELLE HICKERSON,** **Defendant and Appellant.**	**A135990** **(Solano County** **Super. Ct. No. FCR287796)**

Robert Moselle Hickerson appeals from a judgment of conviction and sentence imposed after a jury found him guilty of obtaining public aid by misrepresentation. (Welf. & Inst. Code, § 10980, subd. (c)(2) [obtaining or retaining aid "willfully and knowingly, with the intent to deceive, by means of false statement or representation, or by failing to disclose a material fact"].) He contends: (1) the prosecutor committed misconduct when she commented on his prearrest refusal to meet with an investigator; and (2) the trial court erroneously instructed the jury as to the requirements for a verdict of not guilty. We will affirm the judgment.

I. FACTS AND PROCEDURAL HISTORY

Hickerson was charged in an information with obtaining aid by misrepresentation in count one (Welf. & Inst. Code, § 10980, subd. (c)(2)) and perjury by declaration in count two (Pen. Code, § 118). The matter proceeded to a jury trial.

A. *Trial*

1. *Prosecution Case*

Susan Cinelli, executive director of Bi-Bett Corporation (Bi-Bett), testified that Hickerson interviewed for a job with Bi-Bett on November 14, 2008. He was invited back for a second interview on November 19, 2008.

On December 2, 2008, Hickerson was hired by Bi-Bett as a "DUI instructor slash counselor," worked there for two hours beginning at 5:00 p.m., and continued to work for Bi-Bett through at least January 2010. According to Cinelli, an employee would be given at least a day's advance notice of the date to report to work.

On the same day he reported to work at Bi-Bett, however, Hickerson also applied for food stamps. Maria Paz, an eligibility benefits specialist for the Solano County Department of Health and Social Services (DHSS), testified that she interviewed Hickerson on December 2, 2008. During the interview, Paz completed a "statement of facts" form that DHSS uses to determine eligibility for food stamp benefits. According to her procedure, Paz would have asked Hickerson questions regarding his income and resources, entered his responses into the computer system, printed out the completed form, provided Hickerson a copy, reviewed it with him, given him the opportunity to make corrections or clarifications, and had him sign it.

Hickerson's statement of facts form was admitted into evidence at trial. Question No. 20 on the form asked: "Has anyone, including children, worked or does anyone expect to go to work, including part time and occasional work?" Hickerson responded: "No." The form was dated December 2, 2008, and Hickerson signed it under penalty of perjury.

Paz also provided Hickerson a "rights and responsibilities" form during the interview. Based on her customary procedure, Paz would have reviewed this form with Hickerson and emphasized that it was important for him to report any changes to his income within 10 days. Hickerson signed and dated the form, indicating that his rights and responsibilities were explained to him and that he was given a copy.

In December 2008, Hickerson was approved to receive food stamps.

In January 2010, Hickerson provided DHSS with a "copy of his reported earnings from a job." According to Paz's testimony, and based on his case file, this was the first time Hickerson had reported income from a job.

Paz determined that Hickerson's income made him ineligible for food stamps. Furthermore, because Hickerson had not reported his change in income in a timely manner, the case was referred to DHSS's overpayment recovery unit. Based on information from the Employment Development Department, DHSS determined that Hickerson was overpaid in food stamps in the amount of $2,060.

Joseph Mangiameli, a welfare fraud investigator for Solano County, identified the overpayment as a case for investigation. Twice in June 2011, Mangiameli went to Hickerson's home and, when he found no one there, left his business card with a note asking Hickerson to call. Mangiameli did not receive a call from him.

On June 28, 2011, Mangiameli telephoned Hickerson and identified himself. Hickerson acknowledged receiving Mangiameli's business cards, but claimed he did not call because he did not know who Mangiameli was or what he wanted. When Mangiameli explained that he wanted to talk about the food stamps overpayment notice Hickerson had received, Hickerson asserted he was a busy person and did not have time to talk to him. Hickerson acknowledged that he was working part time, but claimed he had completed the necessary paperwork. Mangiameli tried to arrange a meeting with Hickerson, explaining that "it was important that we meet because this case was probably going to get sent to the District Attorney's Office." Hickerson replied to the effect of, " 'Do what you have to do, but just be quick about it,' " in a calm, matter-of-fact voice. With that, the conversation ended.

2. *Defense Case*

Hickerson testified that he retired from his job at Vacaville State Prison in November 2008 and began receiving social security benefits as his sole source of income. In the middle or end of November 2008, he went to the DHSS to apply for food stamps, and an appointment was scheduled for the morning of December 2, 2008.

On December 2, 2008, Hickerson met with Paz. He claimed at trial that he could not remember what questions Paz asked him, but he answered them as truthfully as he could. He denied making a false statement to Paz about future employment, intentionally misrepresenting facts to her, declaring under penalty of perjury any fact that he knew was false, or anticipating employment at the time of his interview. He claimed he did not remember Paz reviewing the statement of facts form with him or receiving a copy. Nor did he remember Paz reviewing the rights and responsibilities document with him or telling him verbally what his obligations were.

Hickerson did recall that Paz told him to notify DHSS if he started working, but he claimed that he complied with this requirement on approximately December 15, 2008—around the time he received his first paystub from Bi-Bett—by handing a copy of the paystub to the DHSS receptionist.

Hickerson also testified that he began to receive food stamps after he advised DHSS that he was working. Sometime in 2010, the monthly food stamp amounts "went to $6" and he was told that he had been overpaid. He received a phone call from Mangiameli about an overpayment of food stamps, but claimed he did not understand what Mangiameli was talking about.

3. *Prosecutor's Rebuttal Argument*

As set forth in greater detail *post*, the prosecutor commented upon Hickerson's refusal to meet with Mangiameli, arguing to the jury that an innocent person would have met with him, and his refusal evinced an intent to defraud.

4. *Court's Response to Jury Question*

During deliberations, the jury asked the court a number of questions, including whether all the elements of each count had to be "unanimous, individually." The court replied, in part, that a guilty verdict required all jurors to agree that the People had proved each element, and a nonguilty verdict required all jurors to agree that the People had not proved at least one element. Additional colloquy followed, as set forth *post*.

B. *Jury Verdict and Sentence*

The jury found Hickerson guilty on the count one charge of obtaining aid by misrepresentation, but not guilty on the count two charge of perjury by declaration. The court placed Hickerson on probation for three years.

This appeal followed.

II. DISCUSSION

We address each of Hickerson's contentions in turn.

A. *Prosecutorial Misconduct / Ineffective Assistance*

Hickerson contends the prosecutor committed misconduct—and his attorney provided ineffective assistance by failing to object—when the prosecutor commented on Hickerson's "refusal to discuss the overpayment investigation with DHSS fraud investigator, Mangiameli, a law enforcement agent." His argument has no merit.

1. *Background*

As mentioned, Mangiameli testified that Hickerson claimed he was too busy to talk with him and, when Mangiameli said the matter "was probably going to get sent to the District Attorney's Office and we needed to meet and go over the information," Hickerson replied to the effect of, " 'Do what you have to do, but just be quick about it.' "

Hickerson, by contrast, testified that he did not know what Mangiameli was talking about, he had not intended to deceive Paz on December 2, and he complied with her request by informing her of his job on December 15 as opposed to the January date Paz recalled. In her closing argument, defense counsel argued that Hickerson "did everything that Ms. Paz told him to do," Paz made a mistake, and "it's not reasonable for you to convict Mr. Hickerson because a mistake was made."

In her rebuttal argument, the prosecutor used Hickerson's statement to Mangiameli, and his refusal to speak further or meet with him, to argue that Hickerson had obtained aid not as a result of any mistake, but as a result of his intentional act. The prosecutor argued: "Do what you have to do, but just do it quickly. That's what the defendant told my investigator Mr. Mangiameli. You heard all the evidence here today,

that there is a case of welfare fraud. Mr. Hickerson knew about that. My investigator, Mr. Mangiameli, contacted him, tried to go to his house two times on separate occasions in June of 2011. Left business cards at his door to call him back. The defendant did not call him back. In fact, my investigator had to call him again, had to call him because he went to his house twice. No success. No contact for him. [¶] Now, I think it's very telling when you hear the defendant's response. Mr. Mangiameli is in charge of investigating fraud. He is there and he told Mr. Hickerson, look, there's a possible case of overpayment. I would like to meet with you. [¶] What would a reasonable person do under the situation? If the defendant were truly innocent, if this truly were simply a mistake and not something that he deliberately lied about, isn't it reasonable to conclude that if this was a mistake? Oh, yes, please. Thank you. I would like to meet with you, Mr. Mangiameli. I think there's some mistake. I want to tell you that I did not commit fraud. In fact, this is what I did, and this is my side of the story. [¶] However, the defendant completely shut down my investigator. He said he was a busy man. He said I don't know what you want from me. I don't know what information you want from me. [¶] Mr. Mangiameli told him. He explained the situation. He said there seems to be a case of possible fraud here, and it's important that I meet with you. [¶] Again, he says I'm a busy man. I don't have time for this. [¶] When Mr. Mangiameli told him this case may be sent to the district attorney's office for review for possible prosecution, do you think a reasonable man who is innocent would say do what you have to do, but just do it quickly, and end a conversation on that note? [¶] The People submit that is a sign of a person who has finally been caught of fraud and does not want to meet with the investigator because he's afraid the truth has now been uncovered. He's been afraid that he had a free ride from the government on food stamps for over a year. He received over $2,000 in benefits, which he was not entitled to. [¶] So think about that. Would a reasonable person who is not guilty of fraud completely avoid the questions of an investigator who simply wanted to get his side of the story? And say let's meet. Sit down, tell me what happened here. No. The defendant was a busy man. He had no time to meet with my investigator. [¶] The People would submit he didn't want to meet with the investigator because he

knew he was guilty of fraud. He knew there was nothing—no mistake to be corrected. There was no mistake because he intended to commit that fraud. And he received the food stamps for over a year, a free ride from the government."

2. *Waiver/Forfeiture*

Defense counsel did not object to the prosecutor's comment at trial. The failure to object and request the court to admonish the jury to disregard purported misconduct forfeits a misconduct claim on appeal, absent a showing that the objection would have been futile and an admonishment would not have cured the misconduct. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) Hickerson fails to show that an objection or a request for a curative admonishment would have been futile, and his misconduct claim is forfeited.

Nonetheless, we consider whether the prosecutor's conduct constituted misconduct within the rubric of ineffective assistance of counsel.

3. *Ineffective Assistance*

To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) counsel's performance was deficient because his representation fell below an objective standard of reasonableness under prevailing professional norms; and (2) prejudice flowing from counsel's performance or lack thereof. (*People v. Lucas* (1995) 12 Cal.4th 415, 436–437.)

a. Counsel's Performance Was Not Unreasonable

Hickerson contends his attorney failed to perform adequately because she did not object to the prosecutor's comment, which he now claims was prosecutorial misconduct.

The definition of prosecutorial misconduct is well established. " 'A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. 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 trial court or the jury.' [Citation.] When a claim of misconduct is based on the prosecutor's comments before the jury, as all of defendant's claims are, ' "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." ' [Citations.]" (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 305.)

Hickerson argues that the prosecutor committed misconduct because her comment on Hickerson's refusal to speak further to Mangiameli violated his Fifth Amendment privilege against self-incrimination. He urges that this comment was analogous to the error identified in *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*), in which the court held "that the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." (*Doyle*, at p. 619, italics added & fn. omitted.) The Supreme Court in *Doyle* explained that, once people have been arrested and advised of their right to remain silent, a comment on that silence unfairly penalizes them for exercising their rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). (*Doyle*, at pp. 616–618.)

Doyle is plainly inapposite to the matter at hand. *Doyle* dealt with a defendant's assertion of his right to remain silent *at the time of* arrest and *after* being advised by the police of this right under *Miranda*. When Hickerson declined to speak further or meet with Mangiameli, Hickerson had not been arrested or Mirandized.

Using a defendant's prearrest, pre-*Miranda* silence to impeach a defendant who has testified at trial does *not* violate the Fifth Amendment. "[T]he Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant's credibility"; further, "impeachment by use of prearrest silence does not violate the Fourteenth Amendment." (*Jenkins v. Anderson* (1980) 447 U.S. 231, 238, 240 [prosecutor argued in closing against defendant's claim of self-defense by pointing out that he did not report the stabbing for two weeks].)

Here, the prosecutor used Hickerson's prearrest refusal to speak further or meet with Mangiameli to impeach Hickerson's claim at trial that he honestly thought he had done everything Paz had asked him to do. Because Hickerson's conversation with Mangiameli occurred before he was in custody or given a *Miranda* warning, the

prosecutor did not violate Hickerson's Fifth Amendment right, and there was no prosecutorial misconduct.

In his reply brief, Hickerson indeed acknowledges that "the cases on this point are clear" that the prosecutor could have used his prearrest silence to impeach his credibility when he testified at trial. He next asserts, however, that the prosecutor violated his Fifth Amendment right by using his prearrest, pre-*Miranda* silence as *substantive* evidence of guilt.

Hickerson is incorrect, for two reasons. First, this is not a situation where evidence was used against a nontestifying defendant as substantive evidence of guilt; instead, the evidence of Hickerson's refusal was used to *impeach* Hickerson, who had taken the stand at trial and testified that he thought he had been truthful with Paz and did what she asked in reporting his income. Second, Hickerson could not claim any Fifth Amendment violation based on the prosecutor's use of his prearrest refusal to meet with Mangiameli as substantive evidence anyway, because he did not *expressly invoke* his Fifth Amendment privilege.

In *Salinas v. Texas* (2013) ___ U.S. ___ [133 S.Ct. 2174] (*Salinas*), the defendant voluntarily answered questions posed by the police in a noncustodial interrogation, except for one question he declined to answer. At trial, the defendant did not testify, but the prosecution used his nonverbal reaction to the question as evidence of his guilt. (*Salinas*, *supra*, 133 S.Ct. at p. 2178.) In a plurality opinion, the United States Supreme Court ruled that a suspect who desires the protection of the Fifth Amendment privilege must expressly invoke the privilege when he purportedly relied on it—at the time of the interview. (*Id*. at p. 2179.)

Here, Hickerson did not expressly invoke his Fifth Amendment privilege in response to Mangiameli's request for a meeting; instead, he said he was too busy to talk and Mangiameli should do what he needed to do. As Hickerson acknowledges in his reply brief, "[t]here is no dispute in this case that Mr. Hickerson *did not expressly invoke his privilege* when being questioned by the state fraud investigator." (Italics added.)

Hickerson contends that he nevertheless falls within a "governmental coercion" exception to the invocation requirement, because there was an "explicit threat to refer the investigation to the district attorney's office for criminal prosecution and the denial of a continued governmental benefit, namely his food stamp benefit," which "exerted such a tremendous coercive effect which denied Mr. Hickerson the free choice to admit, to deny, or to refuse to answer and thus the requirement to expressly invoke a right to remain silent was unnecessary under the *Salinas* holding." (See *Salinas*, *supra*, 113 S.Ct. at p. 2180.) We disagree. Mangiameli did not pose a threat of any withdrawal of a significant government benefit, since the food stamps had *already* ceased (or been reduced to $6) due to Hickerson's true income. Nor did Mangiameli do or say anything to deprive Hickerson of a free choice to admit, deny or answer: Mangiameli's statement over the phone that the matter was "probably going to get sent to the District Attorney's office" was no more coercive than the in-person questioning conducted by the detectives at the police station in *Salinas*.[1]

Hickerson's reliance on *People v. Waldie* (2009) 173 Cal.App.4th 358 (*Waldie*) is misplaced. In *Waldie*, a detective testified that the defendant did not follow up on his promise to call when the detective was attempting to investigate allegations of child molestation, despite the detective attempting to contact him more than a dozen times. (*Id*. at p. 366.) The defendant did not testify. (*Id*. at p. 363.) The appellate court acknowledged that using prearrest silence to impeach credibility does not violate the Fifth Amendment or the due process clause of the Fourteenth Amendment, but that the United States Supreme Court had not yet ruled on the constitutionality of using prearrest, pre-*Miranda* silence as substantive evidence of guilt, and on that issue there was a split in the federal circuits. (*Id*. at pp. 365–366.) The court ruled that the detective's testimony, and the prosecutor's comment on the evidence, violated the Fifth

[1] Hickerson contends that *Salinas* is inapposite because the suspect there voluntarily went to the police station and answered some questions, while Hickerson did not. He misses the point. In both *Salinas* and this case, the defendant's refusal to answer (or meet) arose in the context of a noncustodial interrogation.

Amendment, because the defendant was deprived of any meaningful right to refuse to talk to the police: "If the police are allowed to *call a suspect persistently* and then offer his unwillingness to respond as evidence of guilt, a defendant would never be able to claim the protection of freedom from incrimination. *A different result might be indicated if the detective had called defendant only one time or a few times*. But testimony about repeated phone calls and apparent evasiveness by defendant is constitutionally infirm." (*Ibid*., italics added.)

Here, to the extent *Waldie* remains viable after *Salinas*, it is distinguishable. Mangiameli did not call Hickerson persistently or numerous times. He left his card at Hickerson's home twice and called him only once. *Waldie* is inapposite.[2]

Hickerson further contends that the prosecutor could not comment on Hickerson's refusal to discuss the matter with Mangiameli because she failed to raise the topic when she cross-examined Hickerson. Not so. The fact of Hickerson's failure to meet with Mangiameli was admitted into evidence, without objection, through a prior witness. The

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[2] *Waldie* preceded *Salinas*. Applying *Salinas* to the facts in *Waldie*, there could be no Fifth Amendment violation because the defendant in *Waldie*—like the defendants in *Salinas* and this case—did not expressly invoke the Fifth Amendment.

In *People v. Ramos* (2013) 216 Cal.App.4th 195—a more recent pre-*Salinas* case—a detective was permitted to testify that he spoke to the defendant at least three times on the telephone, she was consistently argumentative and uncooperative, she refused to give a statement over the telephone or in person, she would not talk about the incident at all, and she did not go to the police station despite her agreement to do so. (*Id*. at p. 205.) The parties stipulated at oral argument on appeal—and the appellate court agreed—that the defendant *had* expressly invoked her Fifth Amendment rights by stating that she did not want to talk to the detective. (*Id*. at pp. 206–207.) A person's invocation of the right to remain silent, the court noted, cannot be used as evidence of guilt. (*Id*. at p. 206.) But because the defense had not preserved its Fifth Amendment objection, and the matter was presented to the trial court before the detective testified that the defendant had invoked her right rather than simply remaining silent, the court did not base its ruling on the Fifth Amendment. (*Id*. at pp. 208–209 & fn. 14.) As the court explained, deciding whether precustody silence violates the Fifth Amendment involves different legal principles than deciding whether there has been an express invocation of the right to remain silent. (*Id*. at p. 208.) The court ultimately ruled that any error in admitting the testimony was harmless in light of the overwhelming evidence of the defendant's guilt. (*Id*. at p. 209.)

prosecutor may comment on any facts in evidence, and Hickerson provides no authority that the prosecutor loses that right if she does not also ask the defendant about it on cross-examination. The fact that Hickerson's election to forego his privilege and testify at trial *permitted* the prosecutor to use his earlier silence to impeach him on cross-examination did not mean that the prosecutor was *required* to do so.

For the foregoing reasons, the prosecutor did not commit misconduct. Her comment neither rendered the trial fundamentally unfair nor constituted a deceptive or unreasonable method of persuasion. Because there was no misconduct, there was no ineffective assistance in failing to object.[3]

b. Counsel's Failure to Object Was Not Prejudicial

To obtain relief on the ground of ineffective assistance of counsel, Hickerson must demonstrate that his attorney's failure to object prejudiced him. For reasons explained *ante*, a Fifth Amendment objection to the prosecutor's statement would not have been meritorious or successful. There is no reasonable probability that Hickerson would have obtained a more favorable outcome if defense counsel had objected, and Hickerson fails to establish ineffective assistance of counsel.

B. *Jury's Questions Regarding Unanimity of the Verdict*

Hickerson contends the trial court erred when it answered a jury question in a manner that purportedly precluded jurors from reaching a not guilty verdict unless they

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[3] Although the parties do not make the point, we note that *Salinas* had not been decided by the time of Hickerson's trial, so defense counsel could not have relied on it in deciding whether to object to the prosecutor's comment. Nonetheless, trial counsel might have rationally concluded it was unwise to object and seek a curative instruction: an objection would have drawn further attention to the prosecutor's argument; the objection fared little chance of being sustained (even before *Salinas*), since Hickerson did not invoke the Fifth Amendment, prearrest silence can be used to impeach a testifying defendant, and *Waldie* is distinguishable; and defense counsel might have thought that the jury would reject the prosecutor's argument anyway, since Hickerson had in fact spoken with Mangiameli to the extent of asserting that he was working but had completed the necessary paperwork. Because the record does not preclude a rational tactical purpose for counsel's failure to object, it does not support a claim of ineffective assistance. (*People v. Fosselman* (1983) 33 Cal.3d 572, 581–582; *People v. Babbitt* (1988) 45 Cal.3d 660, 707.)

all agreed that a specific element of an offense was unproved, and required jurors voting not guilty to articulate a reason for their doubt. His contention has no merit.

1. *Background*

During deliberations, the jury sent the court two questions, read by the court as follows: "Question number one: Do all five elements in Count 1 have to be unanimous, individually? And then question number two: Ditto for six elements in Count 2."

The court responded: "In order to find a defendant guilty of a count, all jurors must agree that the People have proved each element. In order to find a defendant not guilty of a count, all jurors must agree that the People have not proved at least one element, but they don't have to agree on which element the People have not proved."

When the court inquired whether its response satisfactorily answered the jury's questions, the following exchange ensued: "JURY FOREPERSON: Could you repeat the first part? [¶] THE COURT: Sure. In order to find a defendant guilty of a count, all jurors must agree that the People have proved each element. And the People's burden of proof is beyond a reasonable doubt. [¶] So I'm seeing some quizzical looks. Count 1 has, I believe, five elements. Let me just double-check, because I believe there was some differences. Yes. Count 1 has five elements. A defendant can't be convicted of Count 1 unless all of the jurors agree that each element has been proved. [¶] JURY FOREPERSON: That was the question. [¶] THE COURT: So if ten jurors agree that element one was proven and eight jurors agree that element two was proven, and other numbers of jurors agree that other elements were proven, that's not sufficient. All jurors have to agree that each element was proved. [¶] JURY FOREPERSON: Can I speak? [¶] THE COURT: Yes. If it's a question. [¶] JURY FOREPERSON: It's a question of confirmation of understanding. [¶] THE COURT: Okay. [¶] JURY FOREPERSON: So we need twelve affirmations on each element to find guilty? We

need at least twelve confirmations of not guilty on any of the elements to find him not guilty? [¶] THE COURT: Correct."[4]

2. *Analysis*

Hickerson contends the court misled the jurors by stating that, "[i]n order to find a defendant not guilty of a count, all jurors must agree that the People have not proved at least one element" and by agreeing with the foreperson's later paraphrase that there needed to be "at least twelve confirmations of not guilty *on any of the elements* to find [defendant] not guilty." (Italics added.) He urges that this suggested that the jurors all had to agree on the lack of proof as to one specific element in order to find Hickerson not guilty. Hickerson's argument is meritless.

Hickerson ignores the fact that the court, in telling the jurors that a not guilty verdict would require that "all jurors . . . agree that the People have not proved at least one element," *also* stated: "*but they don't have to agree on which element the People have not proved*." (Italics added.) Thus, while the court's utterance of the word "correct" after the foreperson stated that the jury would need "at least twelve confirmations of not guilty on any of the elements to find him not guilty" might in isolation be ambiguous, it was clear from the totality of the court's instructions that the jury could find Hickerson not guilty if they all found that the prosecution had not proved an element of the offense, even if they could not agree on which element had not been proved.

Hickerson argues that the court's instruction "erroneously demanded that any juror voting not guilty would need to be able to *articulate*, either for themselves or for other jurors," a reason for concluding that the prosecution failed to prove a particular element in order to vote not guilty. (Italics added.) The court, however, said no such

[4] Defense counsel did not object at trial. Hickerson contends the issue is nonetheless cognizable on appeal, arguing that the court's comment shifted the burden of proof in violation of the due process requirement that a defendant's guilt be proven beyond a reasonable doubt and the court correctly instruct the jury accordingly. Respondent does not contend to the contrary.

thing. At no time did the court instruct the jurors that they needed to state an articulable reason for a not guilty vote.

In any event, any error in the court's instructions regarding the requirements for finding Hickerson not guilty was harmless. As to count two, the jury found Hickerson not guilty, so the instruction certainly did not preclude the jurors from reaching a not guilty verdict on that count. As to count one, the jury found Hickerson guilty, so they necessarily found that the prosecution *had* met its burden of proof as to each element of the offense. Because all jurors found that every element had been established, there is no possibility of the prejudicial error Hickerson now claims, since such an error could arise only if jurors had found that an element had *not* been established. In other words, there is no indication that the jury reached a guilty verdict simply because they might have mistakenly thought a not guilty verdict would have required their unanimous agreement that a specific element was unproved.

Hickerson fails to establish error.

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P. J.

BRUINIERS, J.