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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION 5

**THE PEOPLE,**

**Plaintiff and Respondent,**

v.

**BRICE ROBINSON,**

**Defendant and Appellant.**

**A141457**

**(San Francisco County  
Super. Ct. No. SCN220582)**

A jury convicted appellant Brice Robinson of second degree robbery (Pen. Code, § 211)<sup>1</sup> and found true various sentencing enhancements. The trial court sentenced him to state prison. Robinson appeals. He contends the prosecutor committed misconduct during closing argument.

We disagree and affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

The People charged Robinson with second degree robbery (§ 211) and receiving stolen property (§ 496, subd. (a)). The People also alleged various sentencing enhancements.

*Prosecution Evidence*

One afternoon, T.L. was walking along O'Farrell Street, carrying her iPhone in her hand. The phone started to ring. As T.L. brought the phone to her ear to answer the call, a man grabbed her wrist and twisted it toward her body. T.L. resisted, holding the phone

<sup>1</sup> Unless noted, all further statutory references are to the Penal Code.

tightly in her hand. The man, however, twisted T.L.’s wrist more forcefully. Eventually, T.L.’s “strength wasn’t enough to hold anymore,” and the man grabbed the phone and ran toward Market Street. T.L. screamed for help, ran into a nearby store, and called the police.

A San Francisco police officer met with T.L. at the scene of the robbery. Crying, T.L. told the officer her phone had been stolen and described the man “as a black male, bald head, wearing a gray sweater or sweatshirt.” San Francisco Police Officer Robert McMillan saw a man matching the description — Robinson — enter a bakery a few blocks away from where the robbery occurred. People sell stolen property at the bakery. Officer McMillan arrested Robinson. With his hand on Robinson’s chest, Officer McMillan felt Robinson’s “rapid heartbeat.” T.L. identified Robinson during a “cold show” outside the bakery. The officers searched Robinson and found T.L.’s black and white cell phone cover and \$140. A third police officer reviewed the bakery’s surveillance video and saw Robinson in the bakery, talking to a man appearing to have a white iPhone in his hand. The officer recorded the video with his phone and the court admitted the video into evidence.

### *Defense Evidence, Verdict, and Sentencing*

A cognitive scientist testified for the defense and described problems with the reliability of eyewitness identifications. The jury convicted Robinson of second degree robbery (§ 211) and found true various sentencing enhancement allegations (§§ 667, 1170.12). The court sentenced Robinson to seven years in state prison.

## DISCUSSION

### A. Prosecutorial Misconduct or Prosecutorial Error

“‘[T]he term prosecutorial “misconduct” is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.’ [Citation.]” (*People v. Centeno* (2014) 60 Cal.4th 659, 666-667.) Although “[a]dvocates are given significant leeway in discussing the legal and factual merits of a case during argument . . . ‘it is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to

absolve the prosecution from its . . . obligation to overcome reasonable doubt on all elements [citation].’ [Citations.]” (*Id.* at p. 666.) “When attacking the prosecutor’s remarks to the jury, the defendant must show that, ‘[i]n the context of the whole argument and the instructions’ [citation], there was ‘a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we “do not lightly infer” that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements. [Citation.]’ [Citations.]” (*Id.* at p. 667; see also *People v. Adams* (2014) 60 Cal.4th 541, 568-569.)

#### B. There Was No Prosecutorial Error

Robinson claims the prosecutor committed misconduct during closing argument by “repeatedly” shifting the burden of proof, and by “highlight[ing]” his failure to testify in his defense. Robinson bases his claim on the following three instances:

1. At the beginning of his rebuttal to Robinson’s closing, the prosecutor noted the difference between direct and circumstantial evidence and explained: “[t]he circumstantial things are when you look at like the video, when we’re trying to answer the question of where the cell phone went. That’s true, that’s subject to interpretation, but you don’t—and jury instruction 224 doesn’t say you look at each piece of circumstantial evidence piecemeal in a vacuum, which is really what [defense counsel] was asking you to do. [¶] You don’t sit there and say, ‘Let me look at this one isolated issue,’ right, and say, without knowing anything else, is there another interpretation, because if you do that, you would never be able to use circumstantial evidence.’”<sup>2</sup>

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<sup>2</sup> CALCRIM No. 224, on the sufficiency of circumstantial evidence, provides “Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt. [¶] Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when

The prosecutor continued, “[Defense counsel]’s right on that. If you took it to its logical conclusion . . . could someone have run around one of those blocks? Could the defendant have gone into U.N. Plaza, talked to somebody and come back around to the bakery? Sure. This is a short interaction, but there is probably time for that. I don’t have to prove that. [¶] So when she’s describing that every link in the chain has to be proved beyond a reasonable doubt, go back to your jury instructions. I don’t have to prove that every single thing you heard in the trial is proof beyond a reasonable doubt. I have to prove the six elements of robbery are proved beyond a reasonable doubt. That’s what I have to do, okay?” Defense counsel objected that the prosecutor “misstate[d] the evidence and the People’s burden” and the court overruled the objection.

On appeal, Robinson claims these comments “pressed the jury to return a guilty verdict based on a conclusion that [he] had failed to . . . prove his innocence.” This claim is forfeited. “[A] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citations.]” (*People v. Stanley* (2006) 39 Cal.4th 913, 952, italics added (*Stanley*)). Here, defense counsel “lodged objections to these remarks,” but “failed to further request admonitions that could have cured any harm, thereby waiving the claim on appeal. [Citation.]” (*Id.* at p. 952.)

Robinson’s claim also fails on the merits because the prosecutor did not attempt to shift the burden of proof. (*People v. Edwards* (2013) 57 Cal.4th 658, 740-741.) Here, the prosecutor *explicitly* stated: “I have to prove the six elements of robbery are proved beyond a reasonable doubt. That’s what I have to do, okay?” To the extent the prosecutor urged the jury to reject defense counsel’s interpretation of the evidence, there was no error. (CALCRIM No. 224 [“when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable”].) It is not error “to ask the jury to believe the prosecution’s version of events as drawn from the

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evidence. Closing argument in a criminal trial is nothing more than a request, albeit usually lengthy and presented in narrative form, to believe each party's interpretation, proved or logically inferred from the evidence, of the events that led to the trial. It is not misconduct for a party to make explicit what is implicit in every closing argument. . . .” (*People v. Huggins* (2006) 38 Cal.4th 175, 207.) The prosecutor may comment on the defendant's interpretation of the evidence without erroneously implying the defendant bears the burden of proof. (*People v. Lewis* (2004) 117 Cal.App.4th 246, 256-257.)

2. Later, the prosecutor stated: “it's my burden to prove, but there's not a specific required amount of evidence and you're not allowed to create one. You are to gauge what the evidence actually already says. [¶] What [defense counsel] said throughout her argument . . . [¶] She's talking about things we don't have testimony about: cell phone towers; right? We don't know what cell phone towers can do. That's not something that I have to prove. [¶] The officers didn't do that, they didn't think that was something they could use. If it's something that certainly would have made a difference, [defense counsel] obviously has the same power to bring in witnesses. It doesn't cut either way[.]” Defense counsel objected “as to burden shifting” and the court overruled the objection.

Any claim of prosecutorial misconduct arising out of these statements is forfeited by defense counsel's failure to request an admonition. (*Stanley, supra*, 39 Cal.4th at p. 952.) We also reject the claim on the merits. The prosecutor correctly stated it was the People's burden to prove the elements of the charged crimes. The prosecutor had no obligation to prove irrelevant information or disprove defense counsel's proffered hypotheticals. Nor did the prosecutor — as Robinson seems to suggest — argue Robinson had to “testify and prove his innocence.” “[A] prosecutor may argue to a jury that a defendant has not brought forth evidence to corroborate an essential part of his defensive story” (*People v. Varona* (1983) 143 Cal.App.3d 566, 570) and may comment on the failure of the defense to call logical witnesses (*People v. Johnson* (1992) 3 Cal.4th 1183, 1229). Here, the prosecutor's comments merely drew attention to the absence of witnesses who might have corroborated the defense. There was no prosecutorial error.

(*People v. Weaver* (2012) 53 Cal.4th 1056, 1077 [rejecting claim that prosecutor’s argument shifted the burden of proof by suggesting the defendant had an obligation to “provide affirmative evidence of his innocence”].) This is not a situation like the one in *People v. Woods* (2006) 146 Cal.App.4th 106 where the prosecutor told the jury the “defense had an ‘obligation’ to present evidence[,]” which “expressly and erroneously advised the jury that appellant bore some burden of proof or persuasion.” (*Id.* at p. 113.)

3. Toward the end of rebuttal closing argument, the prosecutor stated: “And the suggested alternative we heard, remember [defense counsel] was arguing in opening about maybe Mr. Robinson just found the cell phone cover. It doesn’t make sense because it’s speculation and it’s not reasonable. So you don’t get to consider it. It’s not evidence. ¶¶ The only proof we have points to guilt. It has to be rejected as unreasonable because it makes less sense than the truth and because there is no time for it to have happened; right? ¶¶ If a guy has \$140 in his pocket already, why is he going to go sell the cell phone [cover] which at retail value is like 40 bucks? What, he’s going to get 2 bucks on the street if he’s already got 140 in his pocket? That’s ridiculous. ¶¶ What makes more sense is the guy robbed somebody and then goes and sells the principal piece of value, which is the phone, not the cover, and he hasn’t gotten rid of the cover yet by the time the police arrived. ¶¶ So the defense story doesn’t stand up because when she said that in opening, that was trying to come up with a story, trying to fit in the holes where we don’t have video; right? You come up with a story trying to tie—sort of tie the loose ends around what you know I don’t have a video to disprove, but it’s speculation in any event. There’s no evidence.” The court overruled defense counsel’s “[b]urden shifting” objection.

Like Robinson’s other claims, this prosecutorial error claim is forfeited for the reasons discussed above. (*Stanley, supra*, 39 Cal.4th at p. 952.) The claim also fails on the merits. “[T]he prosecutor has wide latitude in describing the deficiencies in opposing counsel’s tactics and factual account” and “may highlight the discrepancies between counsel’s opening statement and the evidence.” (*People v. Bemore* (2000) 22 Cal.4th 809, 846.) The prosecutor did not commit misconduct by urging the jury to reject

defense counsel’s version of the events. (See *People v. Frye* (1998) 18 Cal.4th 894, 978 [no misconduct where prosecutor accused defense counsel of making an “irresponsible” third party culpability claim and characterized defense counsel’s arguments as “ludicrous”], overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421; *People v. Fierro* (1991) 1 Cal.4th 173, 212 & fn. 9 [criticizing defense theory of the case as lacking evidentiary support], overruled on another ground in *People v. Thomas* (2012) 54 Cal.4th 908, 941.)

We conclude there was no prosecutorial error. The prosecutor did not shift the burden of proof or comment improperly on Robinson’s decision not to testify.

#### DISPOSITION

The judgment is affirmed.

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Jones, P.J.

We concur:

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Simons, J.

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Bruiniers, J.