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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LUIS AGUIRRE,

Defendant and Appellant.

B231368

(Los Angeles County
Super. Ct. No. NA087280)

APPEAL from a judgment of the Superior Court of Los Angeles, Charles D. Sheldon, Judge. Affirmed.

Kari E. Hong, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Kenneth C. Byrne and Baine P. Kerr, Deputy Attorneys General, for Plaintiff and Respondent.

Jose Luis Aguirre appeals from the judgment entered after his conviction by a jury for battery with serious bodily injury (Pen. Code, § 243, subd. (d)), contending the court committed instructional error and abused its discretion in denying a defense request for a continuance to allow Aguirre to locate and recall one of the People’s witnesses.¹ We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

According to Eddie Ortega’s testimony at trial, on the morning of November 7, 2010 Ortega was playing in an adult soccer match in Long Beach. Aguirre was on the opposing team. The two men were unacquainted. As Ortega was running with the ball toward the goal, Aguirre ran into him from behind. Ortega fell to the ground. The referee called a foul on Aguirre, momentarily stopping the match. As Ortega picked up the ball, ready to resume play, Aguirre approached him, angrily yelling, “What? What?” and then struck Ortega in the face with his forehead. Ortega lost consciousness and fell to the ground. He was later transported to the hospital and treated for a broken nose.

Irvin Cruz, one of Ortega’s teammates, testified through a court interpreter that, after being fouled by Aguirre, Ortega pushed himself up on one knee and slammed his closed fists on the ground. Aguirre was standing about six feet behind him. Ortega got to his feet and picked up the ball to resume play. Aguirre approached, said something to Ortega and then head-butted him. Cruz corroborated Ortega’s testimony that Ortega did not speak, move his arms or advance on Aguirre before Aguirre struck him with his head.

After Cruz testified, Aguirre’s counsel requested he be subject to recall. The trial court admonished Cruz not to leave town. Cruz said he worked in the area and was not going anywhere.

After the People rested, Aguirre presented evidence he had acted in self-defense. Luis Martinez, the referee, testified Ortega fell after being fouled but then quickly stood up and said something. Ortega had his hand in a fist and made a downward motion from

¹ The court sentenced Aguirre, who was on probation for a misdemeanor domestic violence conviction at the time of the assault, to state prison for the lower term of two years.

his elbow as if he were throwing something. However, Martinez did not see Ortega throw anything. After Ortega made the throwing motion, he turned to face Aguirre and said, “Don’t be a pig.” The two men walked toward each other, and Aguirre struck Ortega with his head. Aguirre fled when two players from Ortega’s team went after him. In Martinez’s opinion Aguirre’s foul was not “abnormal,” and Ortega’s behavior was “unsportsmanlike.”

When the trial resumed the next morning, defense counsel advised the court an error had occurred the day before during Cruz’s testimony. Court interpreter Marina Cardonatto, who was assisting Aguirre during the proceedings, explained she had heard Cruz testify, “[Ortega] grabbed some dirt” after being fouled. However, court interpreter Juan Escobar, who was translating questions and answers for Cruz, a Spanish speaker, failed to translate that statement; and it had not become part of the record. Cardonatto reported she had talked to Escobar after Cruz testified and Escobar said he had not heard Cruz make the statement. A third interpreter who was in the courtroom at the time, on the other hand, said he also heard Cruz testify that Ortega had grabbed some dirt after he fell to the ground.

Aguirre’s counsel candidly told the court the apparent omission had been brought to his attention while Cruz was still on the witness stand, “but I really didn’t understand because shortly you [(the court)] asked who was interpreting what, and there was a witness on the stand and I was kind of confused.” He subsequently added, “I don’t know Spanish. I didn’t understand what the interpreters were telling me.”

Defense counsel requested the jury be instructed there was an omission in the translation of Cruz’s testimony and Cruz had testified Ortega “grabbed some dirt.” The court declined to give the instruction.

The defense then called Alejandro Gutierrez, one of Aguirre’s teammates, who testified, after being fouled, Ortega stood up and threw “something” toward Aguirre before slowly approaching him. When Ortega reached Aguirre, Aguirre head-butted him; and Ortega fell.

Long Beach Police Officer Eric Fernandez testified out of order as a rebuttal witness for the People. Several days after the incident, Fernandez, a certified Spanish speaker for the Long Beach Police Department, spoke with referee Martinez. At that time Martinez said Aguirre had fouled Ortega with “a leg sweep,” an “aggressive and unnecessary” maneuver. Martinez did not tell Officer Fernandez that Ortega had made a swinging motion or had thrown dirt or anything else at Aguirre after the foul. According to Martinez, Aguirre “leaned his head back and drove his forehead into [Ortega’s] face, causing [Ortega] to be knocked unconscious.”

Officer Fernandez also testified he interviewed Aguirre’s teammate Gutierrez, who said Aguirre tried to take the ball from Ortega with “a leg sweep” and both men fell to the ground. They immediately stood up and faced each other. Ortega said something, and Aguirre “drove his forehead into Ortega’s face.”

Just before the noon recess, the trial court asked if defense counsel intended to call another witness. Counsel said, “not at this time” but, when proceedings resumed, he stated he would recall Cruz, who was supposed to be in the courtroom at 1:30 p.m. After the jury had been excused, counsel informed the court he had telephoned Cruz and was unable to reach him, but the person who answered the phone would try to contact Cruz. The court stated, “Well, let’s hope he shows up at 1:30.”

When trial reconvened at 1:35 p.m., defense counsel told the trial court he had been unable to contact Cruz, but the prosecutor had relayed a message to Cruz that he was to come to court. Defense counsel said he could not proceed without Cruz and requested a body attachment. The court agreed to issue a body attachment, but also stated the trial would continue.²

The trial resumed, and Aguirre testified in his own defense. According to Aguirre, Ortega was the aggressor. The two men fell after Aguirre accidentally tripped Ortega as

² The clerk indicated the attachment could not issue without Cruz’s date of birth and other personal information. Defense counsel said he did not have that information; the prosecutor said he had provided the defense with Cruz’s name, date of birth and telephone number.

they were both going for the ball. When Aguirre heard the whistle, he stood up, turned away from Ortega and approached the referee to complain he had not committed a foul. Ortega, who was upset, followed Aguirre, calling him a “pig” and threatening him with harm. Ortega stopped five or six feet away from Aguirre, picked up some dirt and threw it at Aguirre’s back. When Aguirre felt the dirt, he turned and took a step toward Ortega. Fearing Ortega was going to hit him, Aguirre moved his head forward a couple of inches and looked down. Ortega then fell to the ground. Aguirre insisted he did not lean his head back before lowering it or otherwise make an aggressive move with his head.

On cross-examination Aguirre conceded Ortega made no attempt to hit or kick him, but said he feared Ortega would. Aguirre admitted he struck Ortega in the face with his forehead and acknowledged in soccer a player occasionally “heads” a ball—that is, uses the forehead to hit the ball by leaning the head back and then thrusting it forward against the ball to achieve maximum force.

After Aguirre completed his testimony, the court inquired whether there were any other defense witnesses. Defense counsel said, “just Irvin Cruz,” who had been “placed on call.” The court then asked whether the defense intended to call any additional witnesses who were currently available in the courtroom. Defense counsel answered, “No your Honor.” The court then advised the jury, “We have all the testimony in then, ladies and gentlemen.”

After the trial court and counsel discussed jury instructions, counsel argued to the jury; and the court instructed the jury with modified versions of the CALJIC instructions. Following two hours of deliberation, the jury returned a verdict of guilty.

DISCUSSION

1. Aguirre Has Forfeited His Claim of Interpreter Error

In criminal proceedings, court interpreters perform three distinct but interrelated roles: (1) to facilitate the questioning of non-English-speaking witnesses by counsel (as a “witness interpreter”); (2) to enable non-English-speaking defendants to understand what is occurring during the proceedings (as a “proceedings interpreter”); and (3) to enable a

non-English-speaking defendant to communicate with his or her English-only-speaking attorney (as a “defense interpreter”). (*People v. Romero* (2008) 44 Cal.4th 386, 411.)

“The right to an interpreter has its underpinnings in a number of state and federal constitutional rights. These include a defendant’s rights to due process, to confrontation, to effective assistance of counsel, and to be present at trial. [Citation.] The California Constitution provides that a criminal defendant who does not understand English ‘has a right to an interpreter throughout the proceedings.’ (Cal. Const. art. I, § 14.) In addition, . . . an interpreter must interpret accurately, without embellishing, omitting, or editing, and when ‘interpreting for a witness, the interpreter must interpret everything that is said during the witness’s testimony.’” (*Romero, supra*, 44 Cal.4th at p. 410.)

Aguirre contends his trial was fundamentally unfair because the court refused to instruct the jury the witness interpreter failed to translate Cruz’s testimony that Ortega had “grabbed some dirt” after being fouled—testimony he argues would have reinforced his claim of self-defense and invited the jury to question Ortega’s assertion he was not the aggressor. This argument has been forfeited because not raised in a timely fashion in the trial court.

To preserve an issue for review on appeal, a defendant must interpose a specific and timely objection in the trial court on the same ground that he asserts on appeal. (*People v. Partida* (2005) 37 Cal.4th 428, 434.) This “requirement is necessary in criminal cases because a ‘contrary rule would deprive the People of the opportunity to cure the defect at trial and would “permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a convictions would be reversed on appeal.”” (*Ibid.*) In *People v. Romero, supra*, 44 Cal.4th 386, where the defendant claimed unreported discussions between interpreters and witnesses at trial violated his federal and state constitutional rights, the Supreme Court held the defendant had forfeited that argument by failing to raise it at trial: ““[A]s a general rule, ‘the failure to object to errors committed at trial relieves the reviewing court of the obligation to consider those errors on appeal.’ [Citations.] This applies to claims based on statutory violations, as well as claims based on violations of fundamental constitutional rights. [Citations.]” [Citation.]

The reason for this rule is to allow errors to be corrected by the trial court and to prevent gamesmanship by the defense. [Citations.] We see no reason why the general rule of forfeiture should not be applied to violations of rules of court or to claims of error relating to interpreters for the witnesses.” (*Id.* at p. 411; see *People v. Scott* (1994) 9 Cal.4th 331, 353 [party may forfeit right to present claim of error if the party did not do enough to prevent or to correct the claimed error in the trial court].)

Here, although the purported error in translation of the witness’s testimony was raised in the trial court, it was not presented in a timely fashion. Aguirre’s trial counsel acknowledged he was told of the omission from the translation of Cruz’s testimony while Cruz was still on the witness stand and his testimony could have been clarified and the translation error, if any, remedied. Notwithstanding counsel’s claimed confusion about what the proceedings interpreter was telling him, it was counsel’s responsibility to promptly raise the matter with the court so any error could be cured.

2. *The Trial Court Properly Declined To Instruct the Jury About the Alleged Interpreter Error*

Even were the issue of the alleged translation error not forfeited (or, alternatively, if we were to consider it under the rubric of ineffective assistance of counsel³), the trial court properly rejected the defense proposal the jury be instructed that Cruz had testified Ortega “grabbed some dirt” after Aguirre had tripped him. As the court observed at the time, all three interpreters involved in the trial were qualified. The record reflects the witness interpreter did not hear Cruz make the statement subsequently attributed to him and, accordingly, did not include it in his translation of his testimony. The trial court was justified in relying on the competence of the witness interpreter and correctly concluded it could not “change the testimony from the interpreter’s standpoint.” (See *People v. Mendes* (1950) 35 Cal.2d 537, 543 [“[t]he competence of the interpreter is ordinarily for

³ The trial court invited defense counsel to provide some authority as to what should be done in light of the claimed error in translation. Counsel did not respond to the request.

the trial court to determine”]; *People v. DeLarco* (1983) 142 Cal.App.3d 294, 306-307 [same].)

On appeal Aguirre argues, as an alternative to instructing the jury that Cruz had testified Ortega grabbed some dirt, the court should have at least advised the jury there was disagreement among the court interpreters as to what Cruz had said on this point. However, Aguirre’s counsel did not ask the court for any such instruction and did not proffer the testimony of the proceedings interpreter to impeach the witness interpreter’s translation. (See *People v. Johnson* (1975) 46 Cal.App.3d 701, 705 [recognizing defendant’s right to present evidence to impeach translation of victim’s preliminary hearing testimony].) Counsel’s and the interpreter’s unsworn descriptions of the disagreement were not themselves relevant evidence. (Cf. Evid. Code, § 210.)

3. *There Was No Abuse of Discretion in Denying a Continuance of the Trial*

A continuance of a criminal trial may be granted only upon a showing of good cause. (Pen. Code, § 1050, subd. (e); *People v. Wilson* (2005) 36 Cal.4th 309, 352.) Although no express request for a continuance of the trial was made by Aguirre’s counsel when Cruz failed to appear for further examination, the trial court made it plain it would not delay the proceedings to permit additional time for the defense team to locate him. This implicit denial of a continuance was not an abuse of discretion. (*People v. Howard* (1992) 1 Cal.4th 1132, 1171 [granting or denying a continuance during trial “rests within the sound discretion of the trial judge”]; *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1548.)

“To establish good cause for a continuance, defendant had the burden of showing that he had exercised due diligence to secure the witness’s attendance, that the witness’s expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven.” (*People v. Howard, supra*, 1 Cal.4th at p. 1171.) In weighing the request for a mid-trial continuance, as here, the trial court must consider ““not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all,

whether substantial justice will be accomplished or defeated by a granting of the motion.’”’” (*People v. Doolin* (2009) 45 Cal.4th 390, 450.)

We do not fault defense counsel’s diligence in seeking to recall Cruz or to ensure his presence in court. In fact, the court facilitated the defense effort to some extent by ordering a body attachment and having the People proceed with a rebuttal witness without first requiring the defense to rest. Nonetheless, after that rebuttal witness, Officer Fernandez, and then Aguirre himself had testified, neither side had any additional witnesses; and there was no indication where Cruz was or when (if ever) he could be located and brought to court. Balanced against the burden of a continuance on the court and the jurors, Cruz’s proposed additional testimony—that he may have seen Ortega grab a handful of dirt while on the ground—had only minimal value.

To be sure, Aguirre and his teammate Gutierrez had both testified Ortega threw dirt at Aguirre’s back before Aguirre turned around and head-butted Ortega; but referee Martinez, another defense witness, testified Ortega had not thrown anything, and Cruz had expressly denied Ortega had moved his arms or approached Aguirre before the attack. Ortega, as well, denied he had acted toward Aguirre in an aggressive manner following the foul. Moreover, even if Ortega had tossed some dirt at Aguirre’s back, taunting him, that is not the type of conduct that would justify Aguirre’s head-butt to Ortega’s face. Finally, Aguirre’s claim of self-defense was seriously undermined by his highly implausible testimony that, although he felt threatened by Ortega’s words and actions, all he did was bend his head forward a few inches and that limited action somehow caused Ortega to break his nose and fall to the ground unconscious. The jury’s evaluation of the likelihood of that scenario and of the comparative credibility of Ortega’s and Aguirre’s version of events would not have been materially assisted by any further testimony from Cruz. Accordingly, the trial court reasonably concluded the burden of delaying the proceedings outweighed any potential benefit to Aguirre. (See *People v. Beames* (2007) 40 Cal.4th 907, 920.)

4. Any Instructional Error Was Harmless

Aguirre contends the trial court improperly failed to instruct the jury not to decide the case by chance in its modified version of CALJIC No. 17.40, incorrectly advised the jury about the consequences of the People's and the defendant's discovery violations in its modified version of CALJIC No. 2.28 and omitted entirely to tell the jury it had the right to receive and review a written form of the instructions during deliberations (as specified in CALJIC No. 17.45).⁴ The People concede the instructions as read to the jury were incorrect, and we agree: Deviations from the approved form of standard instructions, other than to conform to the facts of the case being tried, are risky and should be avoided. (See *People v. Briscoe* (2001) 92 Cal.App.4th 568, 589.) Nonetheless, we also agree with the People's contention any error was harmless. "In assessing a claim of instructional error, 'we must view a challenged portion "in the context of the instructions as a whole and the trial record" to determine "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution.'" (See *People v. Jablonski* (2006) 37 Cal.4th 774, 831; see *People v. Mower* (2002) 28 Cal.4th 457, 484 [if trial court's instructional error violates California law, appellate court applies harmless error standard stated in *People v. Watson* (1956) 46 Cal.2d 818, 836]; *People v. Jennings* (2010) 50 Cal.4th 616, 677 ["[w]hen an appellate court addresses a claim of jury misinstruction, it must assess the instructions as a whole, viewing the challenged instruction in context with other instructions, in order to determine if there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner"].)

⁴ Although defense counsel objected to the trial court's modified version of CALJIC No. 2.28, he did not object to the omission from CALJIC No. 17.40 or the failure to instruct with CALJIC No. 17.45. Nonetheless, we review any claim of instructional error that allegedly affects a defendant's substantial rights even in the absence of objection. (Pen. Code, § 1259; *People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012.)

a. *The failure to give CALJIC No. 17.45* Penal Code section 1093, subdivision (f), requires the trial court to advise the jury of the availability of a written copy of the instructions for its use during deliberations. Although both counsel during closing argument referred to specific instructions by number and told the jurors they would be able to review the written instructions, the court itself did not read CALJIC No. 17.45 or otherwise inform the jurors they could request a copy of the instructions. Nonetheless, the record contains a file-stamped set of the written instructions, initialed by the trial judge. It is reasonable to infer these written instructions were, in fact, provided to the jury even though no minute order memorializes that action. (See Evid. Code, § 664 [“[i]t is presumed that official duty has been regularly performed”]; *People v. Sullivan* (2007) 151 Cal.App.4th 524, 549-550 [in the absence of any affirmative showing to the contrary, it is presumed the court regularly performed its lawful duty]; see also *People v. Mungia* (2008) 44 Cal.4th 1101, 1133.) As a consequence, any failure to inform the jury they could review the instructions was necessarily harmless.

Even if the court did not actually provide the written form of instructions to the jury during its deliberations, however, any error in failing to advise the jurors they could review the instructions was harmless. In its oral instructions the court explained the jury could ask questions or request a read-back of portions of the trial proceedings. The jury did not do either, and there is no suggestion in the record that there was any confusion as to the meaning of the court’s instructions or that the absence of a written copy of the instructions in any way prejudiced Aguirre.

b. *The omission from CALJIC No. 17.40*

The trial court combined and modified CALJIC Nos. 17.40 and 17.41, orally instructing, “[The] People and the Defendant are entitled to your individual opinion. So each of you should consider the evidence for the purpose of reaching decisions, verdicts, if you can do so. Decide the case for yourself, but do so only after discussing, talking about the case with your fellow jurors. Don’t let pride enter in. Do not hesitate to change an opinion if you go out with one opinion and you talk about it and you change your mind. Pride is not what’s involved here. What’s involved here is that you do the right

thing based upon how you see it after you're done with the discussing with your fellow jurors. When you go into the jury room, don't have somebody say 'I'm guilty,' 'I'm not guilty,' and before you know it, there's pride. We don't want pride. We want you just to discuss the case. If you do that, you know, people don't want to back off from an opinion sometimes. You have to be willing to listen to one another and see what you can do with that. You're impartial judges of the facts. Impartial judges of the facts." As read, the instruction omitted the final sentence of CALJIC No. 17.40, which states, "Do not decide any issue in this case by the flip of the coin, or by any other chance determination."

Even if the jury was not provided with the file-stamped, full written version of CALJIC No. 17.40 in the record, which contained the missing language, the court's omission, if error at all, was harmless.⁵ Although the court did not specifically advise the jurors not to surrender conscientiously held beliefs or not to decide the case by some form of chance determination, as Aguirre argues, the instruction as given did direct the jurors that each of them must consider the evidence in attempting to reach a verdict and decide the case for themselves and that they should do so only after discussing the evidence and instructions with their fellow jurors. Other instructions informed the jurors the People had the burden of proving Aguirre guilty beyond a reasonable doubt (CALJIC No. 2.90); they must base a decision on the facts and the law (CALJIC No. 1.00); and the jurors had to determine what facts have been proved from the evidence received in the trial and not from any other source. (CALJIC No. 1.00.) The trial court also instructed that both the People and the defendant have a right to expect them to conscientiously consider and weigh the evidence, apply the law and reach a just verdict. (CALJIC No. 1.00.) Jurors were also admonished not to decide an issue by the simple process of counting the number of witnesses who testified on each side. (CALJIC No. 2.22.) In light of the court's instructions viewed as a whole, no reasonable juror would have believed it was proper to abandon his or her deliberative role by disregarding sincerely

⁵ If accurate written instructions were provided, no prejudicial error occurs from deviations in the oral instructions. (See *People v. Osband* (1996) 13 Cal.4th 622, 717; *People v. Rodriguez* (2000) 77 Cal.App.4th 1101, 1112.)

held beliefs based on the evidence or deciding the case by flipping a coin or other chance device.

c. The modified version of CALJIC No. 2.28

i. The alleged discovery violations

The timely disclosure of the names of anticipated witnesses with identifying information and copies of relevant written or recorded statements is one of the reciprocal pretrial discovery requirements in criminal cases. (See Pen. Code, §§ 1054.1, subds. (a), (b), 1054.3, subd. (a)(1).) Penal Code section 1054.5, subdivision (b), authorizes the trial court to “make any order necessary to enforce” the mandatory pretrial discovery provisions, including “prohibiting the testimony of a witness,” and further provides “the court may advise the jury of . . . any untimely disclosure.”

Both sides in this case claimed there had been improper, delayed disclosures. Aguirre objected the People had failed to identify Cruz as a potential witness until shortly before trial. The People, in turn, objected to the failure of the defense to produce a copy of a statement referee Martinez had given to a defense investigator until after Martinez had testified as a defense witness.

ii. The court’s modification of CALJIC No. 2.28

After much discussion the trial court agreed to instruct the jury with a modified version of CALJIC No. 2.28 to address the mutual pretrial disclosure violations. The court explained its rationale for the truncated form of instruction it intended to give: “I’ve modified it way down, and I’ve taken out all this blame, blame, blame, and all that language. What I’ve said is what the evidence is before the court right now. [The prosecutor] comes up with a statement late in the game, but I’m not finding that he intentionally withheld anything until he got it and gave it to [the defense]. [The defense], you have a guy that’s been on direct examination and we don’t even hear from you about that until the direct examination is over and that’s when he gets your statement. So, I’m telling them those two things. Whether it means anything to them or not, it’s up to them.”

The instruction as given stated, “The prosecution and the defense are required to discuss—disclose to each other—I’m talking about discovery now. Something I talked about early in the trial, not knowing whether there would be an issue or not. They’re required to disclose to each other evidence each intends to present at trial so as to promote the ascertainment of truth, save court time, avoid surprise which may result during trial. Delay in the disclosure of evidence may deny a person a sufficient opportunity to subpoena necessary witnesses or produce evidence which may exist to rebut the noncomplying party’s evidence. Any new evidence, if it’s new evidence, must be disclosed right away. As soon as you know it, give it to the other side as soon as you can. In this case there were two things that need to be talked about along this line. There were two reports. One witness had to do with one report. That was Luis [Martinez]. The other had to do with a person by the name of Irvin Cruz. Irvin Cruz was called by the People. Mr. [Martinez] was called by the defense.” “So one by the People; one by the defense. The reports came in late in the game, but the reports were turned over. One report was turned over before the witness testified, that’s Mr. Cruz. One report was not turned over until after the direct testimony was offered by the defense in this case. So you had two things that occurred. And whether that makes any difference to you, I just tell you because I’m supposed to talk about everything.”⁶

Aguirre challenges three omissions in this modified instruction: (1) the court did not caution the jury that untimely disclosure was insufficient by itself to support a finding of guilt; (2) it did not explain how each party may have been disadvantaged by the opponent’s delayed disclosure; and (3) it failed to advise the jury only to consider the delayed disclosure in assessing the credibility of the underlying evidence if that evidence related to a material fact not already established by other evidence. Aguirre argues these

⁶ The 36-page packet of file-stamped written instructions contains a partially typed, partially handwritten version of this instruction that is virtually the same as the oral instruction given by the court. A copy of the standard form of CALJIC No. 2.28 is also included in the clerk’s transcript with what appears to be the word “no” written at the top. There is no reason to believe this copy of CALJIC No. 2.28 was provided to the jury.

errors in the modified instruction impermissibly allowed the jury to conclude he was guilty merely because he had failed to comply with pretrial discovery requirements.

Although we have characterized CALJIC No. 2.28 as “a problematic jury instruction” because it offers insufficient direction to the jury (*People v. Saucedo* (2004) 121 Cal.App.4th 937, 942),⁷ nothing in this record suggests the trial court’s version of the instruction affected the jury’s deliberations. The instruction was entirely neutral and reciprocal, simply advising jurors both parties had failed to timely produce a witness report. No reasonable juror could have inferred that the defense’s delayed disclosure of Martinez’s witness statement was sufficient to convict Aguirre because the court told them the significance of that delay was for them to decide. To the contrary, the wording of the instruction suggested the jury should give no weight at all to the mutually delayed discovery. At most, as we concluded in *Saucedo*, this instruction “was merely a vehicle for credibility challenges that would have been made even in the absence of the instruction.” (*Id.* at p. 943.) Defense counsel did just that in closing argument, making much of Cruz’s unexpected testimony on Ortega’s behalf without focusing on the prosecutor’s failure to comply with pretrial disclosure. For his part, the prosecutor mentioned pretrial disclosure during closing argument only to state that neither party had committed a discovery violation. Under these circumstances Aguirre cannot establish prejudice from the use of the modified CALJIC No. 2.28.

⁷ Other courts, as well, have criticized CALJIC No. 2.28. (See, e.g., *People v. Lawson* (2005) 131 Cal.App.4th 1242; *People v. Cabral* (2004) 121 Cal.App.4th 748; *People v. Bell* (2004) 118 Cal.App.4th 249 [1996 version]; *People v. Riggs* (2008) 44 Cal.4th 248 [pre-1996 version].) CALCRIM No. 306 addresses those issues.

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.