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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
CHARLES GRAVES,  
  
Defendant and Appellant.

C065818  
  
(Super. Ct. No.  
06F07649)

A jury convicted defendant of being a felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1)) and found he had two prior serious or violent felonies (Pen. Code, §§ 667, subds. (b)-(i); 1170.12). Sentenced to 25 years to life in prison, defendant appeals.

He contends (1) the prosecutor committed misconduct in vouching for the credibility of witnesses and unfairly denigrating defendant's credibility; (2) the instruction on transitory possession erroneously required defendant to prove the defense by a preponderance of the evidence rather than

merely to raise a reasonable doubt; and (3) his sentence of 25 years to life is cruel and unusual punishment. He also raises ineffective assistance of counsel in an attempt to prevent our finding of forfeiture where he failed to object in the trial court as required to preserve his claims. As we explain, we find neither error nor ineffective assistance of counsel. Accordingly, we shall affirm.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

In August of 2006, Clem Carney, also known as Toot,<sup>1</sup> was living with Joakima Gregg and her boyfriend Marcus Owens. Gregg sold methamphetamine out of the house.

Defendant was a good friend of Carney's. He came to Carney's house multiple times on August 20.<sup>2</sup> On one of the visits, he bought drugs from Gregg. He returned about 2:00 a.m. the next morning, August 21, with a shotgun. Gregg and two other women were in the living room playing dice. Carney and Owens were in the back bedrooms. Defendant pointed the gun at Gregg and demanded money, claiming she had "gypped him off [sic] of \$10, or something like that." Carney came in the living room, followed by Owens. There was a struggle, and Carney was shot in the leg.

Defendant's wife was waiting in a car in front of the house. Defendant got in the car with the gun and left.

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<sup>1</sup> "Toot" is expressed elsewhere in the record as "Two."

<sup>2</sup> Further unspecified references to dates are in year 2006.

The police went to defendant's residence that same morning and spoke with his wife, who arrived at the house just after 3:00 a.m. She said defendant had not stayed there for two weeks. She told the police that she had seen defendant the day before, August 20, at about noon for an hour, and after that had not seen him again until he came over to the house and asked for a ride that same morning, August 21, at about 2:30 a.m. She had just returned from taking him to the area of Sacramento City College (Freeport and Sutterville Roads), where she had left him awaiting a ride to Stockton. The police searched defendant's residence, his wife's car, and the front yard at Carney's, but never found the gun.

Almost three years later, defendant was found in Houston, Texas. In his original interview, he told the police he was not at Carney's house the morning of the shooting. He instead claimed that he was fishing with his nephew (who was now at an unknown prison) and that the witnesses who had identified him as the shooter all owed him money and all were lying.

At trial, defendant admitted to visiting Carney's house twice on August 20, purchasing methamphetamine from Gregg through Carney, and snorting it while there. He added that while there, he had loaned Carney \$10 and Carney had promised to pay him \$15 back later that day. He then left and went fishing again, with his wife and others, and did not get home from fishing until about 9:00 p.m. He left his house with his wife and stepdaughter at around 2:00 a.m. the next morning, and decided to pick up the \$15 owed to him.

He testified that when he went to Carney's house to ask for his \$15, Gregg had a "crack attitude," meaning she did not want to deal with him, and she started screaming at him. Owens emerged from the back with a shotgun; defendant hit him twice in the jaw and took the gun. Carney came out yelling about a gun in his house. As they stood outside and talked, Carney tried to take the gun away from defendant and the gun fired, wounding Carney. Defendant left, unloading the gun and throwing it on the grass as he went to the car where his wife was waiting. He went to meet his nephew "on Freeport by the airport." When defendant saw a bulletin on the news that he was wanted for a shooting, he was scared and fled California.

Defendant was charged with assault with a deadly weapon with personal use of a firearm, being a felon in possession of a firearm, and grossly negligent discharge of a firearm. In the first trial, he was acquitted of the first and third charges; the jury failed to reach a verdict on the felon in possession charge. He was retried on that charge and the strike allegations. The second jury convicted defendant of being a felon in possession of a firearm and found the strike allegations true.<sup>3</sup> The trial court sentenced defendant to 25 years to life in prison.

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<sup>3</sup> We discuss the relevant happenings at trial only where necessary to the Discussion, *post*.

## DISCUSSION

### I

#### *Alleged Prosecutorial Misconduct*

Defendant contends the prosecutor committed misconduct when addressing the credibility of witnesses in her closing argument. He contends the prosecutor improperly vouched for the credibility of prosecution witnesses, going beyond the evidence to argue they should be believed. Further, defendant argues, the prosecutor engaged in "vindictive sermonizing" by calling defendant a liar and a con man.

"To preserve a claim of prosecutorial misconduct during argument, a defendant must contemporaneously object and seek a jury admonition. [Citations.]" (*People v. Bonilla* (2007) 41 Cal.4th 313, 336 (*Bonilla*)). Defendant failed to object to a single instance that he now claims was misconduct. Recognizing that by not objecting in the trial court he has forfeited any claim of error, he asserts counsel was ineffective in failing to object.

Defendant's claim of prosecutorial misconduct, and consequently his claim of ineffective assistance of counsel, lack merit.

"[A] prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. [Citation.] Nor is a prosecutor permitted to place the prestige of [her] office behind a witness by offering the impression that [she] has taken steps to assure a witness's truthfulness at

trial. [Citation.] However, so long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the "facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief," [her] comments cannot be characterized as improper vouching.'" (*People v. Ward* (2005) 36 Cal.4th 186, 215.) Prosecutors are given wide latitude during argument so long as the argument "amounts to fair comment on the evidence." (*Bonilla, supra*, 41 Cal.4th at pp. 336-337.)

The challenged comments fall within the scope of permissible comment. Defendant complains the prosecutor vouched for Gregg's credibility by arguing that she was honest and could be believed because she had cleaned up her life and was not using drugs anymore. Defendant objects that Gregg testified only that she was not *selling* drugs anymore, not that she had stopped *using* drugs.

Gregg testified that after the shooting she moved in with her aunt and uncle who were Jehovah's Witnesses. She broke up with Owens, studied the Bible, got a job, and tried to "clean up a lot of things that I had done in the past." In 2008, she was baptized as a Jehovah's Witness and lived her life "strictly by Bible principles." It is certainly reasonable to infer from this testimony that Gregg no longer sold or used illegal drugs. The argument was permissible.

Defendant also contends the prosecutor improperly vouched for the credibility of witness Kasavi Willis, one of the women playing dice with Gregg the night of the shooting. Willis

testified defendant entered the house with a gun. The prosecutor argued Willis had no reason to lie because she did not associate with "these people" any more. Defendant argues the prosecutor implied Willis had *renounced* her drug-dealing friends, when in fact they had simply moved away and were unavailable for her to associate with.

Willis testified that she saw Gregg and Owens after the incident, but after six or seven months when Gregg and her mother moved, "I lost contact with everyone." The prosecutor argued Willis had no reason to lie and support the testimony of others because she was no longer in contact with them. This was a fair comment on the evidence, whatever the *reason* for the loss of contact.

Finally, defendant contends the prosecutor unfairly commented on his credibility by calling him a "liar" and a "con man."<sup>4</sup> We find no error. "Referring to the testimony and out-of-court statements of a defendant as 'lies' is an acceptable practice so long as the prosecutor argues inferences based on evidence rather than the prosecutor's personal belief resulting from personal experience or from evidence outside the record. [Citations.]" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1030.) Similarly, referring to defendant as a "con man" is an appropriate comment on the evidence. (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1059, reversed on other grounds in

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<sup>4</sup> Defense counsel argued everyone in Carney's house the morning of the shooting lied.

*Stansbury v. California* (1994) 511 U.S. 318 [128 L.Ed.2d 293].) The prosecutor's argument that "[defendant] has turned this case into a case about whether or not a con man can get away with this . . ." was almost immediately followed by a reference to defendant's choice to testify at trial and the unbelievable nature of his testimony and was not based on experience or evidence outside the record. Rather, her characterization of defendant was based on his many versions of the happenings of August 20-21. When caught in Texas, he vehemently denied being present at the shooting; his subsequent testimony changed to accommodate additional witnesses and ultimately his claims differed substantially from the observations of all the others present that night, including the various renditions of events by his own witnesses. The argument was appropriate under the circumstances.

Defendant has not shown prosecutorial misconduct. Since we have found no misconduct, it follows that defense counsel's failure to object did not result in ineffective assistance of counsel. (*People v. Osband* (1996) 13 Cal.4th 622, 700; *People v. Thomas* (1992) 2 Cal.4th 489, 531.)

## II

### *Instruction on Transitory Possession*

Defendant's defense was transitory possession; he argued that he possessed the shotgun only momentarily to abandon or dispose of it. Defendant contends the trial court erred in instructing the jury with CALCRIM No. 2511, which required that

defendant prove this defense by a preponderance of the evidence.<sup>5</sup> He contends the defense of transitory possession is not collateral to his guilt or innocence and therefore he was required only to raise a reasonable doubt as to his guilt.

In *People v. Mijares* (1971) 6 Cal.3d 415 (*Mijares*), the California Supreme Court first applied the defense of momentary possession to a charge of possession of heroin. The court found that the act of handling a narcotic for the sole purpose of disposal did not constitute "possession" within the meaning of Health and Safety Code section 11500. (*Mijares, supra*, 6 Cal.3d at p. 422.) In *People v. Hurtado* (1996) 47 Cal.App.4th 805, 813-815, the court applied this defense to a charge under Penal Code section 12021, subdivision (a)(1), the charge at issue here.

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<sup>5</sup> The trial court instructed the jury in pertinent part as follows: "If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove the defense of momentary -- prove the defense of momentary possession. In order to establish this defense, the defendant must prove that, [¶] 1. He possessed the firearm only for a momentary or transitory period; [¶] 2. He possessed the firearm in order to abandon or dispose of it; and [¶] 3. He did not intend to prevent law enforcement officials from seizing the firearm. [¶] The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than prove [sic] beyond a reasonable doubt. [¶] To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true. If the defendant has not met this burden, he has not proved this defense."

Defendant relies on *People v. Mower* (2002) 28 Cal.4th 457 (*Mower*), where our Supreme Court held a defendant raising a medical marijuana defense under Health and Safety Code section 11362.5, subdivision (d) need not prove the defense by a preponderance of the evidence but instead need only raise a reasonable doubt. (*Mower, supra*, 28 Cal.4th at pp. 464, 481.) The *Mower* court observed that in only a handful of defenses, most prominently entrapment, where the defense is collateral to the defendant's guilt or innocence, are defendants required to prove the underlying facts by a preponderance of the evidence. (*Mower, supra*, at p. 480.) The court noted that momentary possession was included in this category of defenses, citing *People v. Spry* (1997) 58 Cal.App.4th 1345, 1367-1369 [holding defendant has burden to prove defense by a preponderance of the evidence], but declined to decide whether this defense properly requires a defendant to prove its underlying facts by a preponderance of the evidence. (*Mower, supra*, at p. 480, fn. 8.)

In *People v. Martin* (2001) 25 Cal.4th 1180 (*Martin*), our Supreme Court clarified the nature and scope of the affirmative defense of transitory possession for disposal. The court held "the defense of transitory possession devised in *Mijares* applies only to momentary or transitory possession of contraband for the purpose of disposal." (*Martin, supra*, 25 Cal.4th at p. 1191.) The *Martin* court disapproved *Spry* to the extent it accepted that the defense applied where possession was more than momentary or transitory for disposal. (*Martin, supra*, at pp. 1191-1192.)

The *Martin* court noted, however, that *Spry* was "good authority" for the allocation of the burden of proof. (*Id.* at p. 1192, fn. 10.) Thus, our Supreme Court has confirmed that a defendant must prove the defense of transitory possession by a preponderance of the evidence. Tellingly, defendant fails to cite or discuss either *Spry* or *Martin*. His contention fails.

### III

#### *Cruel and Unusual Punishment*

Defendant contends his 25-year-to-life sentence constitutes cruel and unusual punishment because it is due to a single offense, that is not a serious or violent felony, and his strike priors, from 1983 and 1988, are 20 years old. Recognizing that the failure to raise this point below forfeits it (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 27), defendant contends his trial counsel was ineffective in failing to bring a motion to strike under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 or to object to his sentence.

Counsel was not ineffective in failing to bring a *Romero* motion. It is proper to strike a prior serious or violent felony under the three strikes law only when "in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) Here,

defendant was not outside the spirit of the three strikes law because he had a significant criminal record dating from 1979. His record included attempted robbery, drug and weapons offenses, shooting at an occupied dwelling, two counts of assault with a deadly weapon or with force likely to cause great bodily injury, inflicting corporal injury on a spouse or cohabitant, and forgery. He had served six prison sentences.

Nor was counsel ineffective in failing to object to defendant's sentence as cruel or unusual. The United States Supreme Court has repeatedly held that recidivism justifies the imposition of longer sentences for subsequent offenses, even nonviolent offenses, and has upheld sentences similar to defendant's. (See *Ewing v. California* (2003) 538 U.S. 11, 30-31 [155 L.Ed.2d 108, 123] [25 years to life for grand theft of golf clubs was not cruel and unusual]; *Lockyer v. Andrade* (2003) 538 U.S. 63, 76-77 [155 L.Ed.2d 144, 159] [sentencing recidivist to two 25-year-to-life terms on two counts of petty theft not cruel or unusual under either state or federal Constitutions]; *Rummel v. Estelle* (1980) 445 U.S. 263, 266 [63 L.Ed.2d 382, 386] [life sentence under Texas recidivist statute for obtaining \$120.75 by false pretenses after previous convictions for credit card fraud and passing a forged check does not violate the United States Constitution].)

California courts routinely uphold 25-year-to-life sentences where the current offense is not a serious or violent felony. (See, e.g., *People v. Poslof* (2005) 126 Cal.App.4th 92, 109 [failure to register as sex offender]; *People v. Meeks*

(2004) 123 Cal.App.4th 695, 706-710 [failure to register];  
*People v. Romero* (2002) 99 Cal.App.4th 1418, 1431-1433 [felony  
petty theft]; *People v. Goodwin* (1997) 59 Cal.App.4th 1084,  
1093-1094 [petty theft with a prior].)

Counsel was not ineffective for failing to make ineffectual  
objections and arguments.

**DISPOSITION**

The judgment is affirmed.

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DUARTE, J.

We concur:

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BUTZ, Acting P. J.

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HOCH, J.