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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

WARREN ANTHONY RABB,

Defendant and Appellant.

D059073

(Super. Ct. No. SCD216083)

APPEAL from a judgment of the Superior Court of San Diego County, John S. Einhorn, Judge. Reversed.

A jury convicted Warren Anthony Rabb of two counts of first degree murder (Pen. Code,¹ § 187, subd. (a); counts 1 & 2) and one count of attempted murder (§§ 664, 187, subd. (a); count 3). The jury also found true, as to all counts, that Rabb personally used a firearm (§ 12022.5, subd. (a)); personally discharged a firearm causing great bodily injury or death (§ 12022.53, subd. (d)); and personally inflicted great bodily injury on the

¹ Statutory references are to the Penal Code unless otherwise specified.

victims (§ 12022.7, subd. (a)). In addition, the jury found true a special circumstances allegation that Rabb was convicted of multiple murders (§ 190.2, subd. (a)(3)).

The court sentenced Rabb to prison for two consecutive life terms without parole plus 25 years to life for the firearm enhancement under section 12022.53, subdivision (d) on each of the first two counts, and 15 years to life plus 25 years to life for the firearm enhancement under section 12022.53, subdivision (d) for the third count. The court stayed the sentence of the remaining enhancements. The total sentence consisted of two life terms without the possibility of parole, plus 90 years to life.

Rabb appeals, contending the court abused its discretion by denying his motion to dismiss for the prosecution's delay in charging Rabb. He also argues his constitutional rights were violated when: (1) the prosecutor misstated the law regarding the appropriate burden of proof during her closing argument and (2) the court prohibited Rabb's expert witness from testifying about certain issues. We determine the court did not abuse its discretion in denying Rabb's motion to dismiss, but conclude the prosecutor prejudicially misstated the law as to the reasonable doubt standard during her rebuttal closing argument, and reverse the judgment for this reason. We do not reach Rabb's assertion that his Sixth Amendment rights were violated because the court, as a discovery sanction, did not allow Rabb's expert witness to offer certain testimony.

STATEMENT OF FACTS

Prosecution

The Shootings

After using methamphetamine earlier in the day, Hong "Bethy" Nguyen rode with her boyfriend, Maroun Khalife, in his car to Midvale Drive in San Diego in the early evening on January 23, 2002. Khalife planned to sell a stereo to Jerry Rico who lived in the area. Upon arriving, Bethy saw Rico standing in his driveway and then walk across the street to where Khalife had parked his car.

While Khalife and Rico spoke through the driver's side window, a silver SUV pulled up and blocked Khalife's car from easily leaving. An African-American male, between 17 and 21 years old, got out of the passenger side of the SUV and walked straight to Rico saying something like, "Give me the stuff." When Rico replied, "What stuff?" the person pulled out a gun. Bethy ducked forward as far as she could while Khalife sat still and said nothing, then tried to start his car. The person with the gun told Khalife not to start his car and threatened to shoot him if he tried to leave. Khalife stopped trying to start the car. Bethy testified that she then heard two sets of gunshots, the first outside the car, and then into the car. Khalife slouched over her, and Bethy could tell he was hurt. She felt her stomach and arm go numb because she had been shot. She heard what sounded like someone rummaging through the car. Eventually, someone helped Bethy out of the car and she was taken to the hospital where, after multiple surgeries, she ultimately recovered.

Bethy described the shooter as wearing a jacket and being relatively dark skinned. It appeared to Bethy that the shooter was targeting Rico and the fact she and Khalife were there was an unfortunate coincidence. Bethy said she had never seen Rabb before, outside of a courtroom.

Several neighbors on Midvale Drive testified about what they heard or saw of the shootings. Lisa Peoples heard gunshots, looked outside, saw a body in the street, and saw a young African-American with a gun in his hand run around the back of the SUV and jump back in the passenger side. Peoples described the shooter as wearing a baseball cap, a sweatshirt-like top, and dark pants. The SUV then drove away. Other neighbors testified that they heard shots and saw a white or silver SUV leaving the scene.

Anthony Quinley, a taxi driver, was driving a passenger to a house on Midvale Drive when he came up behind the SUV, with doors and rear hatch open, blocking the street. Quinley saw two males standing between the SUV and another car (presumably Khalife's car), apparently talking normally. Then the passenger in Quinley's cab said, "He has a gun." Quinley looked up, saw someone shooting, and started backing up, away from the confrontation, hearing gunshots as he left. Quinley described the shooter as taller than the victim, but had difficulty recalling the shooter's clothes.

The medical examiner's analysis showed Rico and Khalife were killed by multiple gunshot wounds. Bethy was struck by the four bullets that exited Khalife's body. Although Bethy's wounds were life threatening, she recovered after multiple surgeries and an extended hospital stay.

Miscellaneous Evidence

Bethy testified that Khalife was associated with the Oriental Mafia Crips (OMC) and went by the nickname Subzero. Khalife had particular problems with members of one of OMC's rivals, the Tiny Rascal Gang (TRG). Bethy was present at confrontations between Khalife and TRG members. Once Khalife fought with TRG members called Gecko and Shogun at a 7-11. Another time, in 2001, Khalife and Bethy were in Khalife's car, stopped at a red light, when they saw TRG members drive by in the opposite direction. Bethy saw one TRG member named Shiny in the other car, but did not recognize the others. Moments later, several people ran up to Khalife's car and bashed the windows. Bethy thought there were more than three attackers, one of whom, hitting the passenger side window, was African-American. A window on the driver's side was smashed, and then the attackers left.

The day after the shooting, police searched the area and found a silver Nissan Xterra SUV parked in a Navy housing development on Home Avenue. The car had two different license plates and had red stains on the outside. The owner of the Xterra had reported it stolen from a North Park street on January 17, 2002. The other license plate on the silver Xterra was stolen from a white Xterra sometime in January 2002.

Several blood samples found on the SUV matched Rico's DNA. Crime lab personnel took 180 fingerprint impressions from the silver Xterra, compared those with the known prints of 31 different people, and found 70 matches, including 29 from the owner and his partner. Some of the matched prints were from Rabb and four of his friends: eight from Rabb, all clustered near the gas tank opening and rear tail light on the

passenger side; nine from Darnell Butler, including on the owner's manual and on a receipt that had blood on it; one from Christian Maldonado on a DMV envelope; one from Carolina M. on the inside of the driver's door window; and one from Antwuan Simms on the license plate stolen from the white Xterra.

On January 10, 2002, a residence in City Heights was burglarized. Among other things, a registered Daewoo nine-millimeter handgun was stolen. On February 25, 2004, police found the stolen gun while serving a search warrant on the residence of someone named Derrick Mack. Forensic analysis showed that the casings and bullets from the Midvale Drive crime scene were fired from that gun.

Carolina M.

In January 2002, Carolina M. was 15 years old and lived across an alley in City Heights from Rabb. She and Rabb were among several teens, including Destini Speaks, who lived with the Rabb family; brothers Christian and Eduardo Maldonado; and Tanaeka Moore, Carolina M.'s best friend and Simms's girlfriend; who hung around in the alley. Carolina M. knew Butler as friends with Rabb, but Butler rarely hung around in the alley. Carolina M. and Rabb had an intermittent sexual relationship. Carolina M. believed Rabb was in TRG and went by the name Smoke. Carolina M. said Eduardo was not in a gang, but looked up to Rabb, followed him everywhere, and called himself Little Smoke.

Carolina M. testified that she saw Rabb in a silver SUV twice on the same evening. According to Carolina M., Butler pulled up to the front of the alley in the SUV. The passenger side window was down. "Some kid named Dirty B," a dark-skinned

Cambodian, was either in the car or the alley. Rabb and Christian got in and the SUV drove off. Carolina M. said she, Moore, Simms, Eduardo, and possibly Speaks were in the alley at the time. The SUV returned 20 to 40 minutes later. Carolina M. saw Rabb get out and Christian come running around from the other side. Carolina M. described Rabb as "kind of stiff" and Christian as "paranoid . . . jumpy . . . not Christian."

Carolina M. said Rabb reached into his pocket, pulled out an inch or two of what looked like the butt end of a gun and said, "Take this." She declined. Rabb then went inside his house.

While Rabb was inside for 10 to 20 minutes, Christian said, "They did a drive-by." Carolina M. asked if he was serious and Christian said yes, adding something about "Asians and a lady, a girl." Carolina M. said Christian "regularly lied about things to make him[self] look tougher than he really was." After Christian made that statement, Rabb came back to the alley wearing a different jacket and briefly walked toward the canyon at the end of the alley. Carolina M. believed Rabb was wearing a black and white flannel jacket when he got in the SUV.

After the night of the shootings, around March 5, Rabb told Carolina M. the police were trying to pin something on him that he did not do and he was going to South Carolina where he had family. Other than in court, Carolina M. never saw Rabb again.

San Diego police interviewed Carolina M. twice, once in October 2002 and again in April 2007. She also met with the prosecutor three or four times prior to trial, reviewing her statement each time. Carolina M. knew the events she described in the alley occurred in January 2002, but she was not sure of the exact date. In the October

2002 interview, she said it happened in early or mid-January. In that interview, Carolina M. told the police that the people who left the alley were Butler, Demetrius Harrell, Dirty B., Christian, and Rabb. She also said Rabb was wearing a sweater when he left in the SUV. She later mentioned Rabb was wearing a black and white flannel jacket in an unrecorded third interview with the police in 2008.

In October 2002, Carolina M. also told police that Rabb "threw two guns at" her when he returned to the alley. Carolina M. denied ever being near the silver SUV and could not explain how her fingerprint was found on the driver side window. She also denied being upset in October 2002 that Rabb had other girlfriends, although some letters she wrote to Rabb that month and the following January suggested otherwise.

The Camp Barrett Conversations

In 2002, Joe Banh was in juvenile custody at Camp Barrett, along with Rabb. Banh had been a friend of Khalife. Although at trial Banh denied he or Khalife were gang members, in a 2002 interview with police, he said they were both members of OMC and Banh knew Rabb was with the rival TRG. Banh testified that he knew of Rabb from the streets and did not like him.

Detective Bruce Pendleton testified about two interviews with Banh, the first in 2002. In 2002, Banh told detectives that during recreational "hill time" one day at Camp Barrett, there was an argument between Rabb and Banh during which Rabb said something to the effect, "I'll do you like I did your homeboy." Banh said that before he was in custody at Camp Barrett, he had heard a rumor that Khalife was killed by two

black people from TRG – Laughter and Smoke. Detective Pendleton testified that Banh told him Rabb said something about nine-millimeter hollow point or hollow tip bullets.

When questioned again in 2008, Banh said he did not hear Rabb's statements because he had fallen asleep or was walking away, but another juvenile, Vu Nguyen, told him about them later. At trial Banh acknowledged telling Pendleton that Rabb threatened to kill him like he killed Khalife, but said he was lying to get Rabb in trouble.

Vu Nguyen also was in Camp Barrett in August 2002. In 2002, Vu told detectives that Rabb admitted to him that he had killed Khalife. In April 2008, Vu was interviewed by two detectives in state prison. Vu confirmed knowing Rabb and remembering the incident where Rabb and Bahn were arguing at Camp Barrett and Rabb said something to Bahn about Rabb shooting someone. Vu also confirmed what he previously told the detectives in 2002.

At trial, Vu said he had made up the story he told detectives in 2002 and again in 2008. He had heard a rumor that Rabb was involved in Khalife's murder and at trial said Rabb was referring to the rumor rather than saying he had shot Khalife. Vu said he and Banh were 15 to 20 feet away when the alleged statement was made. Vu also stated he was mad at Rabb for failing to cover for him after Vu acted as a lookout while Rabb got in a fight at Camp Barrett.

Abdirizak Arab was another Camp Barrett resident in 2002 present at the "hill time" encounter. Arab testified that he was having "a little argument" with Rabb and when Arab would not back down from Rabb, Rabb responded by saying something about

killing Khalife. Arab said others were around, but not right next to him when the statement was made.

Other Witnesses

Duc Nguyen was a childhood friend of Khalife and a family friend of Bethy. Duc met Rabb in juvenile hall in February 2001. Duc testified that he was fighting Rabb when Rabb told him that he was going to kill Khalife. In February 2002, Duc told police that he had seen Rabb riding in a silver Nissan about five days before the shooting. Duc said Rabb was asking where Khalife lived.

On cross-examination, Duc was impeached several times. He acknowledged that by the time he spoke to police in 2002, he had heard rumors that TRG and two African-Americans were involved in the shooting. He repeatedly told detectives in 2002 that a lot of what he knew was based on rumors. Duc testified that he did not like Rabb because Rabb had "banged on" Duc – "asked me where I'm from, stuff like that" – prior to February 2002. Duc also testified that he had seen Rabb in an SUV a few days before Khalife was killed, but that the car did not stop and Rabb did not say anything. He said he blamed Rabb for the shooting based on his personal history with Rabb. Duc claimed that he exaggerated and lied about certain things that Rabb said and/or did. He also said he talked to police in 2002 hoping to get out of custody.

Nam Nguyen signed an agreement to cooperate with the prosecution and pled guilty to three criminal charges prior to testifying. Nam testified that, in May 2009, while he was in custody with Rabb at the South Bay jail, Rabb asked him if he knew Bethy. Nam continued to testify that Rabb told him that he shot Bethy and her boyfriend as well

as another male when a robbery got out of control. Rabb said he was with another guy from his gang when he shot the three people. Nam also testified that Rabb said that Bethy and a Mexican female were the only witnesses, and the Mexican had been taken care of. Rabb told Nam he had given the gun to the Mexican girl, but she could not be found so he only was facing car theft charges because his fingerprints were found on the car.

Rabb

Rabb was interviewed by police about the shootings twice in 2002, in February and April. The second interview was conducted in South Carolina, where Rabb had relocated. Rabb told police he had been in and/or drove a Nissan Xterra he claimed Butler owned about 10 times. Detective Lynn Rydalch, who conducted the interview, was aware of a rumor that Rabb was involved in the Midvale Drive shooting. In subsequent interviews in 2004 and 2008, Rabb told a detective he had been in TRG since he was 15 and went by the name Smoke.

In February 2010, while Rabb was an inmate at the San Diego Central jail, he mailed a letter to Eduardo Maldonado, who also was an inmate at another San Diego jail, which contained a message intended for Eduardo's brother, Christian. This letter, however, was intercepted by jail personnel. In the letter, Rabb asked Christian to testify that he witnessed Butler and Simms borrow the keys to the Xterra and then return them later, saying they had done a drive-by shooting. A document analyst confirmed the letter was in Rabb's handwriting.

A search of Rabb's room turned up a photo of Rabb displaying TRG hand signs as well as three compact discs, some note paper, and a baseball cap that said TRG. A gang expert opined that Rabb was a TRG member in 2002 and remained in the gang at the time of trial.

Defense

Rabb testified in his own defense. He joined TRG when he was 15, following some older friends; although he knew they occasionally got into fights, he thought racing was their main activity. He took the nickname Smoke from a character in a video game. Rabb became inactive from TRG at the end of 2005 when his girlfriend got pregnant with their son.

Rabb met Carolina M. through friends. He acknowledged they had a sexual relationship and that he treated her disrespectfully. They were never boyfriend and girlfriend, although she had something of an obsession with him. Rabb said he saw Carolina M. smoke crystal meth 15 to 20 times. Rabb never used drugs.

Rabb described the incident where he participated in bashing Khalife's car's windows in the summer of 2001. Rabb was riding in a car with three TRG friends, Laughter, Sleepy, and Shiny, when Khalife threw a gang sign at them. Rabb had never seen Khalife before. The windows on Shiny's car had been smashed three or four times, and Rabb decided to smash the rival's windows in retaliation. Rabb, with two others, got out and ran to the rival's car. Rabb struck the rear passenger side window with a ratchet. He saw Bethy sitting in the car. Later, when he was questioned by police, Rabb suggested Bethy could clear him in the shooting because she had seen him before, during

the window bashing. Rabb testified that this one incident was his only encounter with Khalife.

Rabb did not know Rico and did not know about people selling things to someone on Midvale Drive.

Rabb admitted he and Christian stole the silver Xterra off a street in North Park. Rabb said he gave the keys to friends who wanted to drive the car and multiple people did. Rabb put gas in the car two or three times. He denied having anything to do with stealing the license plate from the white Xterra or knowing that the plates were ever switched. Rabb refuted participating in the burglary where the Daewoo gun was stolen and claimed that he never tried to give Carolina M. any guns in the alley as she described. He testified that Butler never picked him up in the SUV at the alley on the evening of the shootings.

Butler and Simms were members of West Coast Crips, a black street gang. The last time Rabb saw the silver Xterra, he had parked it on 44th Street. Later that night, he was at home playing video games with Christian and Eduardo, and possibly Demetrius Harrell, when Butler and Simms came to the door. They wanted to borrow the SUV. Christian gave them the keys and then left with them. Rabb went back to playing video games with Eduardo.

Christian returned no more than an hour later and told Rabb what had happened. Christian then told Rabb's father the same story, after which Mr. Rabb sent Christian home. Later, Simms came back to Rabb's house and asked if he could stay the night there, but Rabb's father would not let him. Rabb testified he did not know what Butler

and Simms were going to do when they borrowed the SUV, and he did not see either of them with a gun.

In March 2002, Rabb took a bus to South Carolina where his uncle lived "to get away from all the rumors and things that had been happening to [him] since the rumors came out." For example, Rabb and his father had guns and knives pulled on them. In February 2002, a rival gang member pulled alongside Rabb as he was walking home from school. The rival said, "You killed my homey Sub-zero. Go to the alley. I'm going to smoke you too." Rabb ran off in the opposite direction.

When Rabb was in Camp Barrett, a friend approached him and said some rival gang members were claiming he killed one of their friends. Rabb got angry "because that's a rumor you don't want around." Rabb confronted a group that included Banh, whom Rabb recognized from the streets. Rabb questioned Banh about the accusation that Rabb had killed one of Banh's friends. They had a heated argument in which Rabb denied having killed Khalife.

Rabb met Duc in juvenile custody around the beginning of 2001. Rabb "hit up" Duc and they had a fist fight that Rabb won. Later, they had another fight, also won by Rabb. Rabb recalled seeing Duc on the street in early 2002 as Rabb was riding in the Xterra. They made eye contact, but the SUV did not slow down, and Rabb did not say anything to Duc.

Rabb met Nam in jail in South Bay. Rabb asked Nam about Bethy because he wanted Bethy to see his face so she would know he was not the shooter at the Midvale

Drive shootings. Rabb denied telling Nam details of the case, or that he shot anyone, but he had case reports in his cell, and his cellmate, Lon Chhay, was friends with Nam.

Rabb explained the letter he sent to Christian. The story proposed by Rabb, partly true and partly false, distanced Christian from Butler and Simms, so Rabb hoped it would get Christian to testify at trial. The true part of the story was Simms and Butler coming to the house and borrowing the keys to the SUV. The false part was that they returned later, said they had done a shooting, and asked Rabb, Christian, and Eduardo to get rid of the car and Rabb to get rid of the gun. Rabb said he sent another letter a few days later to Christian, instructing him to forget the story Rabb proposed and just tell the truth.

Rabb had suffered five juvenile adjudications for burglary, four before January 2002 and one after, and one adult conviction for burglary in 2005. He acknowledged he lied when questioned by police about the SUV, TRG, and the window bashing incident.

Speaks, a teenage friend of the Rabb family who lived with them for two or three years beginning in 2001, hung out in the alley with Rabb, Carolina M., and the other kids. Speaks never saw the silver Xterra. She also never saw Rabb try to hand Carolina M. a gun. In addition, Speaks testified that she never saw Rabb do anything violent. Speaks said Carolina M. "lied about a lot of stuff."

A defense investigator interviewed Carolina M. on May 2, 2009, and asked her about methamphetamine use around the time of the events she reported about the silver SUV appearing at the alley. Carolina M. told him "that she was using methamphetamine at the time and that her recollection of events about that time were skewed as a result of

that." She said she was "really strung out" back then. She also said she could not be sure whether or not the gun she saw was a BB gun.

Another defense investigator interviewed Carolina M. on February 2, 2010. At that time, she said the only thing she was certain was that she saw Rabb ride in the silver Xterra, and she said was not sure if the other events she reported happened on that same day – "her times could have been confused."

Dr. Francisco Gomez, a forensic neuropsychologist, testified that he reviewed reports of two psychological evaluations of Carolina M. from 2002, when she was in juvenile custody. Dr. Gomez opined that Carolina M. not only abused methamphetamine, but had a dependence on it during that time.²

Dr. Gomez testified that daily use of methamphetamine "is already to a point where it starts to affect your mental health, your neurological functioning." After about six months of daily use, "it ends up affecting your memory. . . . [Y]our memories aren't being stored correctly . . . so the memories that you have during that point are not stored correctly." Memories may be "jumbled up," not stored in a typical order, or perhaps filled in by what others say.

² At trial, Carolina M. testified that she was not on methamphetamine while she was in juvenile hall in 2002, but only became "strung out" later when she was 16 or 17 years old and living in El Cajon.

DISCUSSION

I

RABB'S MOTIONS TO DISMISS FOR PREJUDICIAL DELAY

The murders in this case occurred on January 23, 2002. Rabb, however, was charged with two counts of murder and one count of attempted murder on September 17, 2008 - almost seven years later. He contends the trial court violated his state and federal rights to due process and a fair trial by denying his motion to dismiss the charges because of this delay.³ We disagree.

"Delay in prosecution that occurs before the accused is arrested or the complaint is filed may constitute a denial of the right to a fair trial and to due process of law under the state and federal Constitutions. A defendant seeking to dismiss a charge on this ground must demonstrate prejudice arising from the delay. The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay. [Citations.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 107; see *People v. Cowan* (2010) 50 Cal.4th 401, 430; *People v. Nelson* (2008) 43 Cal.4th 1242, 1250.) " 'In the balancing process, the defendant has the initial burden of showing some prejudice before the prosecution is required to offer any reason for the delay [citations]. The showing of prejudice requires some evidence and cannot be presumed. [Citations.]' " (*People v. Morris* (1988) 46

³ Rabb filed two motions to dismiss based on the delay. The court denied the first motion, without prejudice, finding Rabb had not carried his burden of proving prejudice caused by the delay. After trial, Rabb renewed his motion and filed additional pleadings. The court denied the renewed motion, again finding Rabb had not shown any prejudice.

Cal.3d 1, 37 (italics omitted), disapproved on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5.) The court need not engage in the balancing process if the defendant fails to meet his or her initial burden of showing actual prejudice since there is nothing against which to weigh such justification. (*People v. Mirenda* (2009) 174 Cal.App.4th 1313, 1327-1328.)

The prejudice protected by a defendant's due process rights are "unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence." (*People v. Martinez* (2000) 22 Cal.4th 750, 767, citing *United States v. Lovasco* (1977) 431 U.S. 783, 790.) A defendant must establish prejudice by means of competent evidence rather than "speculation, surmise or conjecture." (*Shleffar v. Superior Court* (1986) 178 Cal.App.3d 937, 947 (*Shleffar*).

Here, Rabb challenges the trial court's finding that the loss of four types of evidence due to the delay in filing the charges did not prejudice him. The lost evidence includes the disappearance of Simms, the improvement of Carolina M.'s credibility as she transformed from drug abusing teenager to sober young adult, Speaks's failed memory, and Rabb's losing the opportunity to testify in his defense as a 16 year old instead of an adult with a felony burglary conviction. We conclude substantial evidence supports the trial court's finding that Rabb failed to prove prejudice, and the trial court therefore properly denied the motion as to those items. (See *People v. Alexander* (2010) 49 Cal.4th 846, 874.)

Rabb claims he was prejudiced by the disappearance of Simms. During trial, he argued that Simms and Butler were responsible for the shootings. Carolina M. testified that Simms was in the alley with her when Rabb and Maldonado got in the SUV prior to the murders. Rabb offered evidence that Simms matched the general description of the shooter and his fingerprint was on the stolen license plate that was put on the silver Xterra. Despite the evidence Rabb offered at trial to prove Simms was involved in the shootings, Rabb still maintains he was prejudiced because the police failed to take Simms's palm print and compare it to the palm prints found on Khalife's car. However, in his opening brief, Rabb admits Simms's palm print is "potentially exonerating evidence." In other words, Rabb is merely speculating that Simms's palm print could be exonerating. This argument is nothing more than conjecture, and we agree with the trial court that the loss of this "evidence" did not prejudice Rabb. (See *Shleffar, supra*, 178 Cal.App.3d at p. 947.)

Rabb also contends he was prejudiced by the delay because Carolina M., a key prosecution witness, testified as a "young woman over three years into her admirable recovery" from drug addiction and not as the "meth addict" she was at the time of the shootings. Rabb thus insists the delay allowed Carolina M. to transform into a much more credible witness. Rabb's argument fails to appreciate Carolina M.'s actual testimony during trial. Carolina M. was impeached by inconsistencies in her testimony and by testimony of other witnesses. During cross-examination, Rabb's attorney brought ample attention to Carolina M.'s past drug abuse. Further, Rabb offered an expert witness who testified regarding the effect of methamphetamine abuse on the perception and

memory of a drug addict. Rabb was not prejudiced because Carolina M. testified at trial as a recovering drug addict who was sober.

Rabb next argues that Speaks's failed memory prejudiced him. At trial, Speaks testified primarily to impeach Carolina M.'s account of the evening of the shootings. She stated she was present in the alley on the night of the shootings and never saw Rabb attempt to give Carolina M. a gun. Nevertheless, Rabb claims her failed memory made her less credible because Speaks could not remember Rabb moving to South Carolina a short time after the shootings. We agree with the People that this impeachment is insignificant and Rabb never established if Speaks could not remember Rabb moving to South Carolina or if she never realized he had left. There was no prejudice based on Speaks's "faulty memory."

Finally, Rabb asserts he was prejudiced by the fact that the delay required him to testify as "a less-sympathetic adult with a felony burglary conviction" and "not the youthful Rabb who allegedly did the crimes." We are not persuaded. The delay did not force Rabb to commit burglary. He did so on his own volition. Indeed, it was entirely within Rabb's power, even with the delay, to testify as a youthful 24 year old without a felony burglary conviction. Because of his own actions, he did not do so. He cannot now claim he was prejudiced by his own misdeeds and poor choices even if there was a delay between the crimes being committed and the prosecution's charging of Rabb, and based on this delay, Rabb was almost eight years older when he testified.

For all the above reasons, we conclude substantial evidence supports the trial court's finding that Rabb did not carry his burden in proving he was prejudiced by the delay.

II

PROSECUTORIAL ERROR

Rabb contends the prosecutor misstated the law during closing argument by obscuring the reasonable doubt standard and implying the burden of proof fell on Rabb. The People argue the alleged misstatement was merely hyperbole and, given the jury instructions, there is no likelihood the jury would have misunderstood the prosecutor's argument as an erroneous definition of the burden of proof.

A. Closing Arguments

During the prosecutor's closing argument, she reminded the jury that Rabb had the opportunity, after listening to all of the prosecution's witnesses, to prepare his testimony, lie in his defense, and convince others to lie for him. She discussed Rabb's deceit, flight, and admissions. She also reviewed the evidence that she believed proved Rabb committed the charged crimes. Finally, the prosecutor reminded the jury that their interpretation of the evidence controlled over anything she said during her closing argument. Although she mentioned reasonable doubt a couple times in her closing, she did not attempt to explain or define it for the jury.

In his closing argument, Rabb's counsel claimed Butler and Simms were the actual murderers. He also focused on the credibility of Carolina M., asserting she was not to be trusted because she was a woman scorned and a recovering drug addict. He also

challenged the bias and credibility of the various prosecution witnesses and emphasized there was no physical evidence that Rabb shot anyone. Toward the end of his closing, Rabb's attorney discussed the concept of reasonable doubt:

"That jury instruction on reasonable doubt, 224 – I'm sorry – 220, proof beyond a reasonable doubt is that proof that leaves you with an abiding conviction that the charge is true. Based on this rumor, bias, easy way out, hearsay, and Carolina [M.]. If you convict him, every time you drive by this courthouse, next year, five years from now, 20 years from now, you have to be confident that you did the right thing. That's what an abiding conviction is all about. And ladies and gentlemen, just with everything that I've shown you here, there's no reasonable [sic]. It's not beyond a reasonable doubt."

The prosecutor's rebuttal argument attempted to address Rabb's counsel's claim that the prosecution's case was undermined by bias, unsubstantiated rumor, unbelievable witnesses, and a lack of evidence linking Rabb to the shootings. The prosecutor ended by discussing reasonable doubt:

"Beyond a reasonable doubt standard is not Mount Everest. It happens every day in and out of these courts. Beyond a reasonable doubt is not a scare tactic. Beyond a reasonable doubt is that thing that you come to after you examine all of the evidence. And for the defendant to be not guilty in this case, you have to believe every word that came out of his mouth on the stand. You have to believe every word that came out of his mouth, and you can't do that. [Defense objection overruled.] -- good reasons to lie then or now, you have to believe every word that came out of his mouth. The defendant's conduct in this case was reprehensible in the commission of these murders. He committed them. He is guilty beyond a reasonable doubt. And when he got caught, he did everything he could to get out of it. His actions do not speak the actions of an innocent man."

B. The Law

"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.)

" [A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.' [Citation.] . . . [¶] . . . [¶] . . . A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state.' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 819-820 (*Hill*), overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

"The standards under which we evaluate prosecutorial misconduct⁴ may be summarized as follows[:] A prosecutor's conduct violates the Fourteenth Amendment to

⁴ "We observe that the 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." (*Hill, supra*, 17 Cal.4th at p. 823, fn. 1.) We see no indication in the record that the prosecutor acted with malicious intent or in bad faith. Any reference to "prosecutorial misconduct" in this opinion (in a

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. Furthermore, . . . when the claim focuses upon comments made by the prosecutor before the jury, 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." (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

It is improper for the prosecutor to misstate the law, and even an innocent misstatement of law can constitute error. (*Hill, supra*, 17 Cal.4th at pp. 822, 829-832.)

C. Analysis

"[C]ourts must avoid defining reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires." (*Victor v. Nebraska* (1994) 511 U.S. 1, 22.) The statutory language of the reasonable doubt standard "has with near, if not complete, universality been accepted as the best definition of the concept of proof beyond a reasonable doubt. Well intentioned efforts to 'clarify' and 'explain' these criteria have had the result of creating confusion and uncertainty, and have repeatedly been struck down by the courts of review of this state." (*People v. Garcia* (1975) 54 Cal.App.3d 61, 63.)

Here, the prosecutor informed the jury: "And for the defendant to be not guilty in this case, you have to believe every word that came out of his mouth on the stand. You

case quote or otherwise) should not be construed as an indication that we believe the prosecutor here engaged in any wrongdoing or acted untowardly.

have to believe every word that came out of his mouth, and you can't do that." The People claim that these comments are mere hyperbole. We disagree.

The prosecutor's comments are not simple exaggerations intended to emphasize a particular point (here, Rabb's lack of credibility). Instead, they suffer from two main problems. First, the prosecutor's comments could reasonably be interpreted as suggesting to the jury that she did not have the burden of proving every element of the crimes charged beyond a reasonable doubt. (See *People v. Marshall* (1996) 13 Cal.4th 799, 831.) Instead, she implies that Rabb had the burden to prove reasonable doubt, which also leads to a second concern. The prosecutor is mistaken as to the law to the extent she is informing the jury that there must be some affirmative evidence demonstrating a reasonable doubt (here, Rabb's testimony) when the jury may simply not be persuaded by the prosecution's evidence. (*Hill, supra*, 17 Cal.4th at p. 831.)

We are no less troubled by the prosecutor's statements even if we consider the People's argument that the comments were merely a "sentence during rebuttal argument in light of lengthy arguments by both counsel." The context of the prosecutor's comments actually undermines the People's argument. The last thing the jury heard in this trial was the prosecutor's misstatement regarding reasonable doubt. Moreover, Rabb's counsel immediately objected to the prosecutor's comments on the grounds that the prosecutor had misstated the law, but the court overruled the objection. Thus, the jury retired to the jury room believing that the prosecutor's misstatement of the law was in fact correct, as approved by the court. In other words, the jurors were left with the court

endorsed belief that they could not find reasonable doubt unless they believed all of Rabb's testimony.

Also, the jury instructions on reasonable doubt did not cure the problems stemming from the prosecutor's rebuttal argument. "When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former, for '[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.' [Citation.]" (*People v. Osband* (1996) 13 Cal.4th 622, 717.) However, here, Rabb's argument did not contradict the jury instruction on reasonable doubt, but instead offered an incorrect explanation regarding how to apply reasonable doubt in this case. Further, the court overruled Rabb's counsel's objection to the misstatement, thus sanctioning the misstatement and giving it the imprimatur of a correct statement of the law. The jury instructions could not cure the prosecution's dilution of the proof beyond a reasonable doubt standard. (Cf. *People v. Johnson* (2004) 119 Cal.App.4th 976, 985-986.)

D. Effect of Prosecutorial Error

Having concluded that the prosecutor's statements about reasonable doubt during rebuttal argument were improper, we next must determine whether reversal is warranted. A prosecutor's remarks "can 'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.'" [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 969; disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) In such cases, the prosecutorial error amounts to federal constitutional

error and reversal is required unless we conclude the prosecutorial error was harmless beyond a reasonable doubt. (*People v. Estrada* (1998) 63 Cal.App.4th 1090, 1106-1107, citing *Chapman v. California* (1967) 386 U.S. 18, 24.) If the prosecutor's remarks did not rise to that level, we will not reverse unless we conclude it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the prosecutorial error. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) Under either standard, we must reverse the judgment in this matter.

Not atypical in criminal trials, the outcome at trial hinged largely on the credibility of the witnesses. Many of these witnesses, however, presented substantial obstacles that could have influenced whether a jury found them credible. For example, Banh was a member of a rival gang of Rabb's gang. Banh and Vu testified at trial inconsistently with previous interviews with police, and both claimed that they had lied previously to the police and were motivated by their dislike of Rabb. Carolina M., one of the prosecution's key witnesses, was a recovering drug addict who Rabb spurned. She also was impeached several times at trial from her own testimony as well as the testimony of other witnesses. Rabb actually admitted on the stand that he had previously lied to the police and asked another witness to lie for him prior to trial.

Against this backdrop, the prosecutor told the jury that it could not find reasonable doubt unless it believed every word of Rabb's testimony. The court overruled Rabb's objection to the prosecutor's statement. Therefore, the jury reasonably could have concluded that it had to convict Rabb of all charges except if it believed all of Rabb's

testimony. As such, in a case like this, when there exists several credibility challenged witnesses on both sides, especially the defendant who testified in his defense and admitted to having lied, we cannot conclude the prosecutorial error was harmless beyond a reasonable doubt.

Based on the record before us, we also conclude it is reasonably probable that a result more favorable to Rabb would have been reached in the absence of the prosecutorial error. Our high court has emphasized "that a 'probability' in this context does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility. ([*Watson, supra*, 46 Cal.2d] at p. 837; cf. *Strickland v. Washington*[, *supra*,] 466 U.S. 668, 693-694, 697, 698 ['reasonable probability' does not mean 'more likely than not,' but merely 'probability sufficient to undermine confidence in the outcome'].)" (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715; italics omitted.) A more favorable outcome under this analysis includes a hung jury. (Cf. *People v. Soojian* (2010) 190 Cal.App.4th 491, 519-522.)

Here, the jury was told that it could not find reasonable doubt unless it believed everything Rabb said at trial. This statement, approved by the trial court, creates the very reasonable chance that the jury would not have been able to convict Rabb absent the prosecutorial error. At best, the physical evidence directly linking Rabb to the shootings was weak. Some of the prosecution's witnesses were impeached and testified inconsistently with their previous interviews with police. Rabb admitted he had lied previously. Except for the law enforcement and expert witnesses, the jury had good reason to question the veracity of almost every other witness at trial. As such, the

prosecutor's error, approved by the trial court, sufficiently undermines our confidence in the outcome of this matter. (See *College Hospital, Inc. v. Superior Court, supra*, 8 Cal.4th at p. 715.)

DISPOSITION

The judgment is reversed.

HUFFMAN, Acting P. J.

I CONCUR:

O'ROURKE, J.

McINTYRE, J., Dissenting.

I respectfully disagree with the majority's conclusion that the prosecutor's comment at the end of her rebuttal argument meets the standard of rendering the trial fundamentally unfair so as to require reversal of the judgment. (*People v. Hill* (1998) 17 Cal.4th 800, 818, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

The majority's conclusion is based on the premise that the prosecutor's comment that "for the defendant to be not guilty in this case, you have to believe every word that came out of his mouth" constituted a misstatement of law. (Majority Opinion at p. 24.) I submit that the trial court overruled defense counsel's misstatement of law objection because it concluded, as I do, that the prosecutor's comment was not a statement of law, but rather the argument of an advocate attempting to persuade the jury that Rabb's testimony was not credible. (*People v. Sanchez* (1995) 12 Cal.4th 1, 70, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421 ["we presume the jury treated the court's instructions as statements of law, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade"].) What I believe the prosecutor meant to convey was that, consistent with CALCRIM No. 302, after evaluating all the evidence, the jury should conclude that Rabb's testimony was not convincing.

The touchstone for a claim of prosecutorial error is whether there is a reasonable likelihood the jury construed or applied the remarks in an improper manner. (*People v. Ayala* (2000) 23 Cal.4th 225, 284.) I submit that, examining the prosecutor's comment in the context of the whole argument and the instructions to the jury given by the trial court

(People v. Lucas (1995) 12 Cal.4th 415, 475), no reasonable juror would have retired to the deliberation room under the mistaken belief that the juror had to convict Rabb of all charges unless he or she believed "every word" Rabb said. Nor do I agree that a reasonable juror would interpret the prosecutor's comment as suggesting to the jury that the People did not have the burden of proving every element of the crimes charged beyond a reasonable doubt. (Majority Opinion at pp. 24–25.) The trial court properly instructed the jury on the concept of reasonable doubt, including the requirement that anytime the "the People must prove something . . . they must prove it beyond a reasonable doubt." (CALCRIM Nos. 103 and 220.) The jury was also instructed that it must follow the court's instructions if counsel's comments on the law conflicted with the instructions. (CALCRIM No. 200.) For these reasons, I dissent.

McINTYRE, J.