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COURT OF APPEAL, FOURH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON RUTAN PAPPAS, JR.,

Defendant and Appellant.

D059177

(Super. Ct. No. INF065853)

Appeal from a judgment of the Superior Court of Riverside County, David B. Downing, Judge. Affirmed.

A jury convicted Jason Rutan Pappas, Jr. of second degree murder (Pen. Code, § 187, subd. (a)); recklessly evading a police officer (Veh. Code, § 2800.2); driving while under the influence (Veh. Code, § 23152, subd. (a)) and driving while intoxicated with a blood alcohol concentration over 0.08 percent (Veh. Code, § 23152, subd. (b)). In bifurcated proceedings, the trial court found true allegations that Pappas had incurred one strike prior as a juvenile, and subsequently incurred five prior offenses. The court sentenced Pappas to 32 years to life in state prison as follows: fifteen years for the

second degree murder conviction, doubled because of his prior juvenile adjudication plus two years for evading a police officer.

Pappas contends: (1) the trial court erroneously declined to instruct the jury with his proffered pinpoint instruction regarding malice; (2) the prosecutor committed misconduct in closing arguments; (3) the jury committed misconduct; (4) the cumulative effect of the errors deprived him of his rights to due process and a fair trial; and (5) the trial court improperly relied on his prior juvenile adjudication to enhance his sentence. We affirm.

## BACKGROUND

On June 3, 2009, Cathedral City Police Officer Daniel Clary, Jr. was driving his marked patrol car at approximately 3:55 a.m., when he saw Pappas drive by at approximately 80 miles per hour in a 35 mile-per-hour zone. Officer Clary turned on his patrol car's siren and flashing lights and gave chase. Pappas continued driving over the speed limit and failed to stop, despite having opportunities to do so. At one point, Pappas drove into a hotel parking lot, reduced his speed to about four miles per hour, and exited the parking lot. He next ran a red light and increased his speed to approximately 90 miles an hour, entered a highway, and drove across all three lanes of traffic. At an intersection, Pappas tried to make a turn while driving approximately 85 to 90 miles per hour, and hit a palm tree. The chase lasted approximately four minutes and covered about three miles.

Officer Clary approached the vehicle and saw that Pappas and a passenger, later identified as Gregory Fisher, were both unconscious. Pappas regained consciousness, and the officer asked him if he had been drinking alcohol. Pappas answered in the

affirmative. The toxicologist testified that Pappas's blood alcohol content measured 0.25 percent. At the accident scene, Fisher was unresponsive and gasping for breath. Fisher was taken to the hospital but did not regain consciousness, and was pronounced dead shortly afterwards.

The parties stipulated, and Pappas also testified, that 12 years earlier he had crashed a vehicle during a police chase. Pappas had then pleaded guilty to driving under the influence. At that time, the trial court orally informed him—and Pappas subsequently signed a statement advising him—that being under the influence of alcohol or drugs impairs his ability to drive or safely operate a motor vehicle, it is extremely dangerous to human life to drive while under the influence, and if he did so and killed someone, he could be charged with murder. Pappas also testified that independent of the trial court's previous warning, he had thought it was dangerous to drive while intoxicated.

Pappas unsuccessfully moved for a new trial on grounds of juror and prosecutorial misconduct.

## DISCUSSION

### I.

Pappas contends the trial court violated his constitutional right to due process of law by erroneously refusing to instruct the jury with a pinpoint instruction he had proffered that sought to modify CALCRIM No. 520 to incorporate a quotation from *People v. Garcia* (1995) 41 Cal.App.4th 1832, 1849, disapproved on other grounds by *People v. Sanchez* (2001) 24 Cal.4th 983, stating, "In order to establish the requisite

intent for [implied] malice murder, you must find that the defendant actually appreciated that his action would likely result in death."<sup>1</sup>

Pappas contends, "Here, the only matter in dispute was what [he] actually appreciated at the time of the vehicle crash. If [he] actually appreciated he was performing an act that carried a risk to human life, there was implied malice and the crime was second degree murder. However, if [he] did not actually appreciate that his act carried a risk to human life, there was no implied malice and the crime should have been manslaughter." He further contends the court's instruction with CALCRIM No. 520 did not suffice because it "did not make clear that the 'conscious disregard' relates only to what the defendant actually appreciates. Instead it focused on whether [he] deliberately performed the act with knowledge of its danger irrespective of whether the defendant had an actual appreciation of the risk involved in the act."

The court declined the pinpoint instruction because CALCRIM No. 520 and CALJIC No. 3.81 do not use the phrase, "high probability that death will result." The court instead instructed the jury about implied malice with CALCRIM No 520 as follows: "The defendant acted with implied malice if: [¶] 1. He intentionally committed an act; [¶] 2. The natural consequences of the act were dangerous to human life;

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<sup>1</sup> The court granted Pappas's separate request to instruct the jury with a special instruction stating in part, "You may consider the evidence that Mr. Pappas has previously been arrested and charged with drinking and driving for the limited purpose of determining whether Mr. Pappas learned from that experience that the natural consequences of that conduct are dangerous to human life or[,] phrased in a different way, that there was a high probability that the conduct would result in death."

[¶] 3. At the time he acted, he knew his actions [were] dangerous to human life; and [¶]  
4. He acted with conscious disregard to human life. [¶] Malice aforethought does not  
require hatred or ill will toward the victim. It is a mental state that must be formed before  
the act that causes death is committed. It does not require deliberation or the passage of  
any particular period of time."

The California Constitution guarantees a defendant's "right to have the jury  
determine every material issue presented by the evidence" and addresses the prejudicial  
effect of instructional "misdirection of the jury." (*People v. Flood* (1998) 18 Cal.4th 470,  
480-483; Cal. Const., art. VI, § 13.) "[W]rongly omitted instructions may . . . 'misdirect'  
the jury's deliberations." (*Flood, supra*, at p. 487.) Instructional errors that remove an  
element of a crime from the jury's consideration may be analyzed in the "context of the  
evidence presented and other circumstances of the trial to determine whether the error  
was prejudicial" under a harmless-error analysis. (*Id.* at pp. 489-490, 500.) Such errors  
are reviewed to determine whether the verdict would have been the same beyond a  
reasonable doubt had the jury been properly instructed. (*Id.* at p. 499; *Chapman v.*  
*California* (1967) 386 U.S. 18, 23-24.)

Second degree murder is an unlawful killing with either express or implied malice,  
but without the premeditation and deliberation that elevates the offense to first degree  
murder. (*People v. Prince* (2007) 40 Cal.4th 1179, 1265-1266; *People v. Bohana* (2000)  
84 Cal.App.4th 360, 368.)

The California Supreme Court has stated: "We have suggested that 'in appropriate circumstances' a trial court may be required to give a requested jury instruction that pinpoints a defense theory of the case . . . [Citations.] But a trial court need not give a pinpoint instruction if it . . . [citation] merely duplicates other instructions[.]" (*People v. Bolden* (2002) 29 Cal.4th 515, 558.) In determining the correctness of jury instructions, we consider the instructions as a whole. (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1061.) An instruction can only be found to be ambiguous or misleading if, in the context of the entire charge, there is a reasonable likelihood that the jury misconstrued or misapplied its words. (*People v. Frye* (1998) 18 Cal.4th 894, 957, overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The California Supreme Court has noted with approval that CALCRIM No. 520 uses the definition of implied malice the court has articulated in its prior cases. The instruction emphasizes the defendant must act with " 'conscious disregard for human life.' " (*People v. Knoller* (2007) 41 Cal.4th 139, 152.)

Here, in light of the trial court's instruction with CALCRIM No. 520 and one special instruction Pappas proffered, Pappas's other proposed pinpoint instruction was duplicative. Moreover, Pappas was warned by the trial court 12 years earlier about the danger of driving while under the influence, and Pappas testified he was independently aware of that danger. Accordingly, the court did not commit instructional error.

Pappas concedes that the trial court's warning to him 12 years earlier was certainly probative as to whether he subjectively appreciated the risk; nonetheless, he maintains the warning was not dispositive. We are not persuaded. The jury reasonably could infer

based on the trial court's warning that Pappas knew the risk he took when he drove recklessly under the influence of alcohol. Pappas also claims any error was not harmless, particularly because the jury raised questions about the definition of implied malice. We perceive from this that the jury carefully reviewed the facts and law to determine any reasonable doubt as to Pappas's guilt. Absent some indication otherwise, we conclude the jury understood from the instructions it was to decide if Pappas knew before he acted that his actions were dangerous to human life, and the jury did so.

## II.

Pappas contends the prosecutor made several comments constituting prosecutorial misconduct during closing arguments.

We set forth the various comments by the prosecutor to which defense counsel objected, and the trial court's ruling. At the start of closing argument, the prosecutor said, "[V]igilance in the face of this particular crime is a virtue, and lenience is a luxury we simply can no longer afford." The court sustained defense counsel's objection that the prosecutor was appealing to the jury's passions, and told the prosecutor to stay away from anything relating to sentencing. The prosecutor spoke of the tragedy of Fisher's death, including its painful repercussions on others. Defense counsel objected, and the court told the prosecutor to "just go to the facts, please."

The prosecutor continued: "We heard Officer Clary testify he's [*sic*] investigated somewhere in the neighborhood of a hundred D.U.I.'s, recognized by MADD [Mothers Against Drunk Driving] two years ago for his performance on D.U.I. investigations[.]" The court overruled defense counsel's objection, stating, "That is the evidence."

The prosecutor attacked the defense theory that Pappas's prior head injury caused the defendant's conduct, saying, "There was the odor of alcohol on his breath. Did a head injury cause that? [Pappas] was also slurring his speech, watery eyes, and unsteady on his feet. In any D.U.I. crash, you're always going to have that ready-made defense: It was a crash, not the booze, that caused the objective symptoms of intoxication." The court overruled the defense objection that the argument was improper.

The prosecutor argued, "Then the defendant told us that he didn't think it was dangerous. He didn't think it was dangerous because there was no traffic, no near collisions, he can handle himself. Defendant was driving at night with nearly empty streets. He's a good drunk driver. He didn't think this was dangerous to human life in that condition, the manner in which he was driving. [¶] He doesn't get to decide that. The law doesn't say it's okay for certain people to drive under the influence at high speeds." The court sustained an objection that the argument was improper and misquoted the law.

The prosecutor argued: "Now, we've seen this too many times, and, as a society, we took a stand and we said, 'no more.' We wrote laws with teeth, with harsher punishment for repeat offenders[.]" The court sustained the defense objection to that statement and cautioned the prosecutor to "stay away from all that stuff." The court also sustained an objection that the prosecutor was personalizing the argument when he told the jurors: "The 12 of you are the conscience of this community." On the same ground, the court sustained an objection to this statement by the prosecutor: "What will this

community's response be? You are our voice." The court admonished the prosecutor to "just talk about the facts of this case."

Yet again, the court sustained an objection to the prosecutor's follow-up argument: "Ladies and gentlemen, it is not only this community's criminal justice system's moral authority that is at stake here, it is its credibility. Make it clear to this defendant that we were not bluffing; we mean what we say, what we promise we are good for. ¶ This criminal justice system made a commitment to this defendant, and your verdict is reflective of our resolve. Be steadfast and resolute." The court instructed the jury, "[Y]our verdict has to be based on what you heard in this trial, and the evidence and the law that I gave you."

#### *New Trial Motion Based on Alleged Prosecutorial Misconduct*

The trial court discussed defense counsel's claim of prosecutorial misconduct during a motion hearing: "[I]n his motion, [defense counsel] laid out each of the comments made in closing argument. I have reviewed both the transcript . . . and the defense lawyer[']s . . . analysis of it. ¶ . . . I sustained those objections that I thought should be sustained. I overruled the [other] objections . . . so I don't think [the prosecutor's] remarks rise to a level of misconduct." The court noted it had admonished the prosecutor to stick to the facts of the case.

The court concluded any error by the prosecutor was harmless beyond a reasonable doubt: "So, in any case, the evidence against Mr. Pappas was quite overwhelming, and anything [the prosecutor] may have said in this area certainly wouldn't have swayed the jury one way or another, since the evidence spoke for itself.

[¶] And the evidence here was overwhelming. A fire truck and an ambulance responded, returning to a station after another call came upon the car crashed. They stopped and rendered aid, found the passenger unconscious, unresponsive in the right front seat, and they went into respiratory and cardiac arrest at the scene, and they found Mr. Pappas behind the wheel. [¶] A police officer from Cathedral City Police Department chased Mr. Pappas, watched his car crash into the tree, and ran up there and found Mr. Pappas behind the driver's wheel. [¶] And the right front passenger died. [¶] And Mr. Pappas's blood alcohol level was three times the legal limit. And Mr. Pappas had been warned by [a different judge] a year previously, he had been given the [*People v. Watson* [(1981)] 30 Cal.3d 290] . . . advisement when he had plead[ed] guilty to driving under the influence misdemeanor. . . . and he was speeding really fast, anywhere from 70 to 80 [miles per hour], maybe faster, trying to get away from the [police], and that's when he crashed. So as far as *Watson* murders are concerned, this was a very, very strong case for the [People]. [¶] So the evidence against Mr. Pappas was in fact overwhelming and the comments made by [the prosecutor], while I wouldn't have done it had I been the prosecutor, that isn't the standard, and I don't find they were misconduct."

Pappas concedes, "The court did sustain numerous defense objections to the prosecutor's inflammatory rhetoric and provided the occasional admonishment." Nonetheless, Pappas argues, "In the face of each sustained objection and/or admonishment by the trial court, the prosecutor merely continued exactly where he had left off."

### *Applicable Law*

It is misconduct for a prosecutor to make arguments that appeal to the jury's passion or prejudice, to introduce inadmissible evidence through the backdoor of impermissible questions, to misstate the law, or to impugn the credibility of defense counsel. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1406; *People v. Hudson* (1981) 126 Cal.App.3d 733, 735-740.) In short, it is misconduct to use deceptive or reprehensible methods to persuade the court or the jury. (*People v. Navarette* (2003) 30 Cal.4th 458, 506.)

Prosecutorial misconduct includes appealing to the sympathy or passions of the jury. (*People v. Vance* (2010) 188 Cal.App.4th 1182, 1192 (*Vance*).) For example, inviting the jury to put itself in the victim's position and imagine what the victim experienced "is a blatant appeal to the jury's natural sympathy for the victim." (*Id.* at p. 1188.) Likewise, urging the jury to consider the impact of the crime on the victim's family is prosecutorial misconduct. (*Id.* at p. 1193.)

When the misconduct 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.) In *Vance*, for example, the court found the prosecutor's improper comments prejudicial because "they 'may have been the deciding factors which brought about his conviction' of first degree murder." (*Vance, supra*, 188 Cal.App.4th at pp. 1206-1207.) We will reverse only if a different result was reasonably probable absent the misconduct. (*People v. Ochoa* (1998) 19 Cal.4th 353, 466.)

To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct. (*People v. Wharton* (1991) 53 Cal.3d 522, 591.)

We conclude that even assuming, for the sake of argument, that the challenged statements crossed the line from heated argument to misconduct, it is unlikely the jurors would have been swayed by any of the prosecutor's remarks because objections were properly sustained and the jury admonished. There was no dispute that Pappas was driving while intoxicated and he caused the collision or that the injuries Fisher suffered caused his death. The only issue at trial was whether Pappas had the requisite state of mind for implied malice second degree murder. There was overwhelming evidence that he did. This includes the undisputed evidence that he had a prior conviction for evading a police officer that involved a car collision, after which the court warned Pappas that if he caused another accident and someone died, he would be charged with murder. The only reasonable inference from this evidence was that Pappas knew the natural and probable consequences of driving while under the influence are dangerous to life. Under these circumstances, it is not reasonably probable the jury would have reached a different result had the prosecutor not made the challenged statements.

### III.

Pappas contends various acts of juror misconduct occurred because one juror refused to deliberate; during voir dire, a juror concealed her affiliation with MADD; and some jurors bullied the complaining juror, including by asking her whether she was "stupid."

#### *Background*

During deliberations, a complaining juror told the judge she believed one juror was biased because at the start of deliberations he firmly expressed his view of the case, and the complaining juror believed the other jurors were influenced by him and proceeded to influence the rest of the jurors. The court asked the complaining juror if they were still deliberating, and she answered affirmatively, but also said that because the other jurors had "their feelings fixed," she and another juror were feeling pressured. The court asked the complaining juror, "You don't feel any problem going back to the panel; right?" She replied, "No, because I am standing my ground. I am not—nobody is pushing me around. I have my—I have my beliefs[.]"

The court next interviewed the jury foreperson, who said one of the jurors apparently was having a problem with the concept of intent. The foreperson confirmed the jurors were still deliberating freely and openly, and said they had reached verdicts on three of the four counts. The foreperson elaborated, "[W]e were . . . trying to . . . go over the laws and their—the guidance that we've gotten from the Court, step-by-step to the point where we are writing it out and trying to get a consensus on each of these individual

points." The foreperson said the jury was trying hard, and he did not believe the situation was hopeless, noting that one juror "reaches her conclusions slowly and very deliberate[.]" The court asked the foreperson, "Do you think that juror feels intimidated by the group or—" and the foreman interjected, "I can tell you there is zero intimidation there."

After interviews with those two jurors, defense counsel moved for a mistrial on the ground the complaining juror had said she felt intimidated. In denying the motion, the court ruled that the foreperson had testified no intimidation had occurred.

The jury requested the court provide a definition of malice aforethought, and after discussions with counsel, the court instructed the jury anew with CALCRIM No. 520 and two other instructions. The court subsequently answered two other jury questions about malice aforethought by referring the jury to its previous instructions. That same day, the jury reached guilty verdicts on all counts. The court polled each juror, asking, "[A]s to the verdicts just read, counts 1 through 4, are these your verdicts?" Each juror answered, "Yes."

#### *New Trial Motion Based on Alleged Juror Misconduct*

Defense counsel obtained the trial court's permission to contact jurors to prepare a new trial motion. At the hearing on the motion, the court evaluated one aspect of the juror misconduct allegation, and summarized its investigation into the matter: "[The complaining juror] had said that . . . a woman juror[] had made a comment about 'We at MADD had finally got some new laws passed,' or something to that effect. So there was some concern on my part that a member of MADD was on the jury. . . . [¶] We

contacted six female jurors, one of whom we could never find, so then we were down to five. One of the female jurors refused to cooperate . . . . [¶] So we were left with four who said they would talk to us. Those four jurors . . . wrote declarations . . . . None of the four said that any member of the jury said, 'We at MADD.' One or two of them said the statement was made about MADD, but none of the four jurors who filled out the declarations were any of those four. [¶] In any case, nobody said they were a member of [MADD], leading me to conclude that there were no members of [MADD] on the jury."

At the hearing on the new trial motion, the complaining juror testified she was "verbally bullied" during deliberations, elaborating, "One elderly juror—because what I would do is I would listen to what everybody had to say, and I would look at the judge's instructions, and then I would look at the evidence, and she told me, 'Are you stupid or something? Can't you get it?' And I respect my elders, but she was basically—I basically told her to back off and leave me alone."

The court concluded there was no misconduct under the applicable legal standard: "First of all, the Court must determine whether the affidavits supporting the motion are admissible. And four jurors filled out declarations and they were admitted, so yes. [¶] Second, if the evidence is admissible, the Court must consider whether the facts establish misconduct. And after considering the affidavits and listening to [the complaining juror] testify, I concluded there was no misconduct because there was not a MADD member on the jury. [¶] Third part of the test is assuming misconduct, the court must determine whether the misconduct was prejudicial. So I never had to determine the third element of

this inquiry, so that was the end of that. [¶] So I could not find any juror misconduct here, and there isn't any; there was none."

The court addressed the other aspect of the charge of jury misconduct regarding failure to deliberate, and concluded: "The jurors deliberated. . . . [The complaining juror] wrote me a note. I brought [that juror] in on the record in chambers with a court reporter, a transcript of which has been provided. [¶] I brought the foreperson of the jury in after that and had him tell me what was going on, and I concluded that the jury was acting appropriately at that time, and they were deliberating. [¶] Furthermore, I might add that in all four affidavits written by the four jurors, they all said that everybody was treated appropriately. . . . [One juror said in an affidavit] that none of the jurors were irrational or emotional about drunk driving. 'I sat next to [the complaining juror] during the deliberations process, and all the jurors were very kind, calm and professional in their dealings with her.' [¶] So I don't . . . find any failure to deliberate. I think my analysis of [the complaining juror] is that she is suffering from judicial—she made a decision, and after the fact, she regrets it. . . . [¶] . . . And as far as I can tell, [the complaining juror] was treated appropriately by the foreperson and the other jurors, and she just, in hindsight, didn't like the verdict."

The court noted that at the end of the chambers discussion with the complaining juror, before the verdict was reached, she had said she would go back and deliberate, and would not be intimidated. Further, when the jury was polled, she stated she had voted for the guilty verdict. Finally, neither the foreperson nor the four jurors who gave declarations disclosed any misconduct.

### *Applicable Law*

"We review independently the trial court's denial of a new trial motion based on alleged juror misconduct. [Citation.] However, we will "accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence." " ( *People v. Gamache* (2010) 48 Cal.4th 347, 396.) " [J]uror misconduct involving the concealment of material information on voir dire raises the presumption of prejudice,' and . . . '[t]his presumption of prejudice " 'may be rebutted by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party [resulting from the misconduct] . . . .' " " ( *People v. Carter* (2005) 36 Cal.4th 1114, 1208; see also *People v. Williams* (2006) 40 Cal.4th 287, 334; *In re Hamilton* (1999) 20 Cal.4th 273, 296; *In re Carpenter* (1995) 9 Cal.4th 634, 653; *In re Hitchings* (1993) 6 Cal.4th 97, 119 (*Hitchings*).)

A unanimous verdict is not readily set aside; rather, the likelihood of bias must be substantial. " 'The criminal justice system must not be rendered impotent in quest of an ever-elusive perfection. The jury system is fundamentally human, which is both a strength and a weakness. [Citation.] Jurors are not automatons. They are imbued with human frailties as well as virtues. If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias. To demand theoretical perfection

from every juror during the course of a trial is unrealistic.' " (*People v. Danks* (2004) 32 Cal.4th 269, 304, quoting *Carpenter, supra*, 9 Cal.4th at pp. 654-655.)

Here, as set forth in detail above, the court investigated the claim of juror intimidation and inquired of the foreperson whether the jurors were deliberating. The court made a credibility determination, and was entitled to believe the foreperson's assertion the jurors were deliberating and no juror intimidated the complaining juror. We defer to the trial court's finding that no jury misconduct occurred because it was supported by sufficient evidence.

#### IV.

Based on the foregoing contentions, Pappas argues the trial court committed cumulative error. In a close case, the cumulative effect of multiple errors may be sufficient to cause the trial to have been unfair and hence cause a miscarriage of justice. (*People v. Buffum* (1953) 40 Cal.2d 709, 726, overruled on other grounds by *People v. Morante* (1999) 20 Cal.4th 403, 415.) Multiple errors may require reversal even when the errors, considered individually, would not warrant the same conclusion. (*People v. Jackson* (1991) 235 Cal.App.3d 1670, 1681.) If, in the absence of the cumulative errors, it is reasonably probable that the jury would have reached a result more favorable to a defendant, the decision must be reversed. (*People v. Holt* (1984) 37 Cal.3d 436, 459, superseded by statute on another ground as stated in *People v. Muldrow* (1988) 202 Cal.App.3d 636, 645.) As noted, we have found no instructional error, or prosecutorial or juror misconduct; therefore, there are no errors to cumulate.

V.

Pappas contends the trial court improperly doubled the sentence on the second degree conviction based on his prior juvenile adjudication. He concedes the California Supreme Court has ruled adversely to his position in *People v. Nguyen* (2009) 46 Cal.4th 1007, and that we are bound by that opinion (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455); nonetheless, he raises the issue to preserve it for review in federal court. Relying on the above cited California Supreme Court authority, we reject this contention.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

McDONALD, Acting P. J.

McINTYRE, J.