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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL ANTHONY PETRIC,

Defendant and Appellant.

E052595

(Super.Ct.No. SWF029554)

OPINION

APPEAL from the Superior Court of Riverside County. Timothy F. Freer, Judge.

Affirmed.

Charles R. Khoury, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Bradley Weinreb, William M. Wood, and James D. Dutton, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Michael Anthony Petric placed an advertisement on Craigslist, an Internet website for posting items for sale, listing a wine refrigerator for sale. The wine refrigerator was stolen from an empty, bank-owned home in Temecula. Defendant was found guilty by a jury of receiving stolen property. (Pen. Code, § 496.)¹ Defendant was sentenced to three years in state prison.

Defendant contends on appeal as follows:

1. The trial court erred by admitting a prior conviction for receiving stolen property and uncharged conduct occurring after his arrest similar to the instant case under Evidence Code section 1101, subdivision (b).
2. The trial court committed reversible error by excluding his third party culpability evidence.
3. Prosecutorial misconduct violated his due process and fair trial rights under the federal Constitution.
4. Errors in the transcription of the audio interview with defendant warrant reversal.
5. Cumulative error warrants reversal.²

We affirm the judgment.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² Defendant filed a petition for writ of habeas corpus in case No. E055037. We ordered that the petition be considered with the instant appeal. We have considered the petition and will decide it by separate order.

I

FACTUAL BACKGROUND

A. *Prosecutor's Case*

Sandra Keen, a real estate agent, handled bank-owned homes that were usually vacant. In October 2009, she had a listing of a bank-owned home located on Chaparral Drive in Temecula. The home had upscale, stainless steel appliances, including a wine refrigerator.

On October 23, 2009, Keen received a phone call that the property had been broken into. A huge boulder had been thrown through the bedroom window. The wine refrigerator was missing. A pedestal sink and all of the hanging mirrors were also missing. Keen had the paperwork for the appliances, including the serial number for the wine refrigerator.

Keen started her own investigation by looking on Craigslist because in her experience stolen merchandise was often advertised on the website. She found a listing for a wine refrigerator that appeared similar to the one taken from the Chaparral Drive home. She contacted the Riverside County Sheriff's Department with the information.

Riverside County Sheriff's Deputy Dennis Cheshier met with Keen on October 26, 2009, and she gave him the Craigslist advertisement for the wine refrigerator and the serial number for the refrigerator taken from the Chaparral home. Deputy Cheshier called the number on the advertisement. The contact person was "Mike." Deputy

Cheshier posed as a potential buyer. He set up a meeting to look at the wine refrigerator and was directed to a home on Cottonwood in Winchester.

Deputy Cheshier arrived at the location in a marked patrol car and in uniform. Defendant answered the door and identified himself as Mike. Deputy Cheshier asked to see the wine refrigerator. Defendant said, "I just got out of jail for doing the same thing. I am on felony probation for selling stolen property on Craig's List." Defendant appeared nervous and agitated. Defendant allowed Deputy Cheshier to search his home.

Deputy Cheshier found the wine refrigerator taken from the Chaparral Drive home on the side of defendant's house. Deputy Cheshier took the wine refrigerator back to the sheriff's station, and it was released to Keen.

The jury was presented with evidence of a prior conviction defendant suffered for receiving stolen property (the prior conviction). Sometime around August 29, 2009, high-end appliances, including a dishwasher, refrigerator, and an oven, were taken from a home located on Avenida Verde in Temecula. It appeared that someone entered the home through a window. The appliances were listed for sale on Craigslist on September 1, 2009. The phone number was the same as in the one defendant used in the current case to advertise the wine refrigerator. The stolen appliances were found at defendant's home located on Cottonwood Street. On October 20, 2009, defendant pled guilty to receiving stolen property pursuant to section 496, subdivision (a).

The jury also was presented with evidence of an incident occurring after defendant's arrest and release in this case (the uncharged conduct). Paula Nottingham

was an investigator employed by the Riverside County District Attorney's office. Nottingham searched Craigslist for the phone number that defendant had used for advertisements in both the prior conviction and the current case. In May 2010, she found a microwave oven for sale on Craigslist under the same number but with the name listed as "David." Nottingham called the number and spoke with someone who identified himself as David. She set up a time to see the microwave oven; the address to which she was directed was the Cottonwood address where defendant was residing.

When Nottingham arrived at the Cottonwood address, defendant answered the door and told her that "David" was not there. Defendant showed Nottingham the microwave oven. Nottingham told defendant she would think about buying the oven but wanted to speak with David. Nottingham went out to her car. Nottingham then went back and knocked on the door and no one answered the door. No arrest was made in connection with this incident.

B. Defense

Defendant testified on his own behalf. At the time of the prior conviction, defendant had a tool franchise. He sold tools to automotive shops in Carlsbad and Oceanside. Oftentimes, he would trade his tools for merchandise, such as motorcycles, computers, and appliances, rather than taking cash. If he did not keep the items, he sold them on Craigslist or other internet marketing sites.

As for the prior conviction, defendant had traded a tool box for some appliances. He had received the appliances from a man named Pepe Diaz, who owned Oceanside

Automotive. He did not know the appliances were stolen. The appliances were delivered to his house. He advertised the items on Craigslist. He observed uniformed officers approaching his house on September 1, 2009. Defendant claimed they accused him having stolen appliances, and defendant denied they were stolen. He told the officers where he got the items. Defendant was arrested for receiving stolen property.

As for the current case, defendant claimed that Deputy Cheshier knocked on his door and told him he was there for the refrigerator. Defendant told him that he did not have a refrigerator. Defendant told Deputy Cheshier that he had just completed a court case regarding stolen appliances. Defendant told him he had a search condition on his probation and that he could search his house. Deputy Cheshire walked to the side of the house and told defendant, "We got you." There was an unlocked side gate to defendant's property where the refrigerator was found. Defendant denied that he knew the refrigerator was in his yard.

Defendant claimed that the phone number listed in the Craigslist advertisements was for his tool company. He used the phone number when he sold the five appliances that were the basis of the prior conviction. Defendant lost the phone number associated with the tool company when he pleaded guilty in the prior conviction.

Defendant denied that he had a microwave stored on his property on May 25, 2010, the basis for the uncharged incident. Defendant had never seen Nottingham prior to the day she testified in court and had never seen the microwave.

Sherrie Jones was a private investigator and contracted with criminal defense attorneys to conduct investigations. Jones was hired by defendant's counsel to create an advertisement and put it on Craigslist. Jones used defendant's name and his phone number to create a fake advertisement to post on Craigslist. She was able to post the fake advertisement using his information.

C. *Rebuttal*

In rebuttal, the People presented a taped interview between defendant and Riverside County Sheriff's Deputy Gerald Rohn when defendant was arrested on the prior conviction.³ The interview took place at defendant's residence at the time of his arrest. Defendant was asked what he knew about "these appliances." He stated that he traded a man named "Pepe Diaz," who worked at Mission Auto Care in Oceanside, a \$6,895 toolbox for the appliances. Defendant received the items, which included a refrigerator, stove, dishwasher, microwave, three weeks prior to his arrest.

Defendant explained that he commonly traded items with people, including Diaz. He admitted that he had no "title" for the appliances and did not think the appliances had serial numbers. Defendant believed the items were new. Defendant had all of the items listed on Craigslist for \$7,300. Deputy Rohn told defendant that the appliances he possessed were worth \$30,000. Defendant continued to deny that any of the appliances were stolen.

³ During defendant's testimony, he denied that he ever talked to Deputy Rohn when arrested on his prior conviction.

II

ADMISSION OF PRIOR CONVICTION AND UNCHARGED INCIDENT

Defendant contends that the trial court erred by allowing in the prior conviction evidence and the uncharged incident pursuant to Evidence Code section 1101, subdivision (b), as it was more prejudicial than probative.

A. *Additional Factual Background*

The People filed a pretrial motion in limine seeking to admit evidence of the prior conviction and the uncharged incident under Evidence Code section 1101, subdivision (b). They sought to introduce the evidence to show knowledge, modus operandi, plan, identity, and lack of mistake.⁴ They set forth an extensive argument that the evidence was not more prejudicial than probative under Evidence Code section 352.

Defendant filed opposition to the admission of the uncharged incident only. He claimed there was no evidence that the microwave oven was stolen property. There was no similarity as there was no evidence of illegal activity.

The trial court considered the motions. It noted that it was familiar with Craigslist and took judicial notice that it was an Internet website where items were bought and sold.

The trial court felt the uncharged conduct was “almost a fingerprint, in terms of defendant’s conduct.” The trial court noted, “Essentially, the defendant either assists or manages to find a way to obtain high-end appliances from residences, presumably from

⁴ The motion included an offer of proof of the prior conviction and uncharged incident that mirrors the evidence presented at trial, which will not be repeated here.

high-end residences in custom homes. Within days the defendant then advertises the same appliances on a website, on Craigs list.” It noted that defendant used the same phone number on all three advertisements.

As to the prior conviction, the trial court stated, “On September 1st, 2009, the sheriff’s investigator did just that in response to reported thefts of some appliances. The defendant was arrested, charged and then convicted in that particular case. In that particular case, the one in September, defendant stated he had received appliances weeks ago when he didn’t know how or the fact that they were stolen.” It noted that defendant got out of custody and engaged in the same conduct again. He even told the law enforcement officers who came to his house, “I just got out of jail for doing the same thing.”

The trial court then addressed the uncharged incident. It noted that Nottingham had looked up defendant’s phone number on Craigslist and discovered that there were five separate advertisements under that same number.

The trial court ruled that both the prior conviction and uncharged incident were admissible. First, it showed identity, as it was almost a “signature” as to who was committing these crimes. Further, it went to absence of mistake. It showed that someone did not leave the items on defendant’s property. Further, the evidence went to knowledge in that defendant knew the appliances in his possession were in fact stolen. It also showed a preferred method for obtaining items and selling them for profit.

Finally, the trial court stated, “Thus it is relevant under all factors. The Court is obligated to consider the [Evidence Code section] 1101 ([b]) evidence that is proffered by the People under a 352 analysis. The Court finds it is highly probative as to all the areas the Court has cited under 1101(b), and the prejudicial affect is minimal, given the fact that, in fact, it is the defendant. [¶] There is a significant indication of trustworthiness, because the defendant was at both locations when he was actually convicted of one of the offenses that is before the Court, so the probative value is very high. The prejudicial affect, when the Court considers it under the 352 analysis, its minimal, and it refutes some of the things the defendant has spontaneously stated; that he doesn’t know the items were, in fact, stolen or, in fact, that . . . he was a victim of a set-up by somebody else.”

B. *Admission of Prior Conviction and Uncharged Incident Pursuant to Evidence Code sections 352 and 1101, subdivision (b)*

Evidence Code section 1101, subdivision (b) provides, in relevant part: “Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact []such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident”

However, even if the evidence is relevant, under Evidence Code section 352, “the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion ‘must not be disturbed on appeal *except* on a showing

that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]’ [Citation.]” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125; see also *People v. Davis* (2009) 46 Cal.4th 539, 602.)

Hence “[w]e review for abuse of discretion a trial court’s rulings on relevance and admission or exclusion of evidence under Evidence Code sections 1101 and 352.’ [Citation.]” (*People v. Davis, supra*, 46 Cal.4th at p. 602.)

Initially, as argued by the People, defendant never objected in the lower court that the prior conviction was inadmissible under Evidence Code section 1101, subdivision (b). As such, his failure to object would normally constitute a waiver of the issue on appeal. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 20-21.) However, since the trial court considered the prior conviction in its ruling under Evidence Code section 352 and 1101, subdivision (b), we will consider the merits of the claim here.

Both the prior conviction and uncharged incident were admissible here to show identity, absence of mistake of fact, and knowledge. “To be admissible to show intent, “the prior conviction and the charged offense need only be sufficiently similar to support the inference that defendant probably harbored the same intent in each instance.” [Citations.]” (*People v. Davis, supra*, 46 Cal.4th at p. 602.) In all three cases, defendant advertised appliances on Craigslist and used his home address and his own phone number. The appliances he advertised in the prior conviction and the current case were conclusively proven to be stolen appliances. In the prior conviction, defendant admitted

the offense. As such, it was relevant to show absence of mistake in the current case and knowledge the wine refrigerator was in fact stolen property. Defendant claimed in the prior conviction that he was not aware the appliances were stolen property. The People were entitled to introduce the evidence under Evidence Code section 1101, subdivision (b) and argue to the jury he was aware that the appliances were stolen property based on his admissions and evidence.

As for the uncharged incident, the evidence was somewhat weaker given the fact there was no conclusive evidence that the microwave oven was stolen property. However, it was relevant to show that defendant's phone number and address continued to be used to advertise appliances for sale despite his prior conviction and ongoing court case, which was relevant to again show absence of mistake and identity. It also showed that defendant had not been set up in this case.

The prior conviction and the uncharged incident were not overly prejudicial, as they involved the same conduct and would not evoke an emotional bias in the jury. As noted by the trial court, these incidents were practically a "signature" as to how defendant conducted business. Additionally, as also noted by the trial court, the evidence was particularly trustworthy, as defendant was at the location with the property. Finally, the evidence did not mislead the jury. The trial court properly admitted the evidence.

C. *Prejudice*

In any event, assuming there was an abuse of discretion, reversal is not warranted it is not reasonably probable that a more favorable result would have occurred had the

prior conviction and uncharged incident been excluded. (*People v. Rodrigues, supra*, 8 Cal.4th at p. 1125; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Initially, the jury was admonished that they were not to consider the evidence of the prior conviction and uncharged incident in determining whether he was guilty of the current case. The jury was instructed with CALCRIM No. 3.75. The jury was advised they received evidence that defendant had a prior conviction for receiving stolen property and that the defendant committed other behavior for which he was not charged on May 25, 2010. “You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged offenses or acts. Proof by a preponderance of the evidence is a different burden than proof beyond a reasonable doubt. . . . [A] fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. If the People have not met this burden, you must disregard this evidence entirely.” If the jury found the uncharged and charged offense true, it could use the evidence in assessing defendant’s guilt in the instant case only to show identity, motive, knowledge, accident, or common plan. “If you conclude that defendant committed the uncharged offense and act, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of receiving stolen property has been proved. The People must still prove the charge beyond a reasonable doubt.” We presume the jury followed the instructions. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005.)

Furthermore, defendant's guilt was firmly established by the other evidence. Keen discovered that the wine refrigerator was missing from a home she was selling in Temecula. She searched Craigslist and found the wine refrigerator listed for sale. When Deputy Cheshier called the number, he was directed to go to the Cottonwood address.⁵ Once there, defendant answered the door. Defendant immediately stated after Deputy Cheshier asked about the wine refrigerator, "I just got out of jail for doing the same thing. I am on felony probation for selling stolen property on Craig's List." There was overwhelming independent evidence of defendant's guilt without the prior conviction or uncharged incident.

III

THIRD PARTY CULPABILITY

Defendant contends the trial court committed prejudicial error by depriving him of the opportunity to present third party culpability evidence. He claims he should have been allowed to present testimony that Diaz, who he claimed was a Vagos motorcycle gang member, set him up because of defendant's admission to the police on the prior conviction.

A. *Additional Factual Background*

At the end of their case, the People filed a motion in limine to exclude evidence of third party culpability. They anticipated that defendant was seeking to admit evidence

⁵ We note that, had defendant in fact been set up by someone leaving the wine refrigerator in his backyard, it is inconceivable that Deputy Cheshier would have been directed to defendant's home when he called on the advertisement.

that someone else put the wine refrigerator on his property and created the Craigslist advertisement, even though defendant had not made an offer of proof as to this evidence.

The trial court inquired of defendant's counsel if there was going to be a claim that another person committed the crimes and that defendant was going to point the finger at this person. Defendant's counsel indicated that there would be names of person who could have set up defendant and that defendant did not have knowledge that the items had been stolen. The People objected to a mention of specific names of persons who were responsible. The trial court deferred its ruling until the testimony was presented and indicated that, if a person was going to be named, the People could request a ruling at that time. It admonished defendant's counsel that if defendant were to present the name of a person, there would have to be a nexus connecting the person to the crime.

Defendant testified that he had been contacted by the person who sold him the appliances involved in the prior conviction sometime between his arrest and the time he entered his guilty plea. The People objected. Defendant's counsel asked for an offer of proof, but the trial court sustained the objection. It stated, "It's not relevant. It's not relevant under 352 grounds. The Court has sustain[ed] the objection. There is no need to make an offer of proof."

Later, defendant's counsel asked defendant if he had met with two undercover detectives and why he met with the detectives. The People objected and the trial court sustained the objection under relevance and Evidence Code section 352 grounds.

At a break, defendant's counsel addressed the objections. She claimed she had wanted to inquire further about the person from whom defendant received the first five appliances, Pepe Diaz. Defendant had been contacted and threatened by Diaz that he should not have told that Diaz was the person from whom defendant bought the appliances on the prior conviction. Defendant's counsel claimed that Diaz was a member of the Vagos motorcycle gang and that defendant was afraid of him. The man could have set up defendant by placing the refrigerator in his yard.

The People objected that the evidence was only speculative and should not be admitted as third party culpability evidence. It also should be excluded under Evidence Code section 352. The trial court found that the self-serving statement by defendant was not trustworthy. Defendant had stated this evidence for the first time in court. Further, since defendant was not given documentation on the appliances and was buying them from a gang member, defendant reasonably should have known the property was stolen.

The trial court found, "There might be some, if you will, extrinsic logical connection but legally it's not relevant under 352. The prejudicial effect of asking those questions and the follow-up questions simply outweighs the probative value."

Defendant's counsel also inquired about the sustained objection to his discussions with undercover detectives. Defendant would testify that he spoke with a detective, presumably from the Riverside County Sheriff's Department, about the Vagos gang, which the detective suspected was behind taking appliances from Temecula homes. The detective wanted defendant to help find these persons. Further, defendant would testify

that other detectives came to one of his son's baseball games and spoke to him about the Vagos gang. He would claim he had no knowledge that the gang was stealing appliances. The People argued the evidence was based entirely on speculation and hearsay. No witnesses were being offered.

The trial court agreed but indicated it would allow testimony by defendant that he received the five appliances from Diaz, since he had given Deputy Rohn this information. However, the remaining evidence (that he was speaking the detectives) was not third party culpability evidence because defendant was charged with only receiving stolen property. Whether he was questioned about Vagos gang members taking items from Temecula homes would be excluded, as it had very little probative value because defendant denied any knowledge of such thefts. Any mention that Diaz was a Vagos gang member would be excluded.

Defendant's counsel inquired whether she could ask defendant about Diaz contacting him after he was arrested but prior to pleading guilty. She argued it was relevant to whether Diaz may have planted the refrigerator on his property. The trial court felt there was not a "logical connection or nexus" to the current crime.

B. *Analysis*

All evidence having any tendency in reason to prove or disprove a disputed fact is admissible. (Evid. Code, § 210.) "In general, third party culpability evidence is admissible if it 'rais[es] a reasonable doubt of defendant's guilt.' [Citation.] This does not mean, however, that no reasonable limits apply. Evidence that another person had

‘motive or opportunity’ to commit the charged crime, or had some ‘remote’ connection to the victim or crime scene, is not sufficient to raise the requisite reasonable doubt.

[Citation.] . . . [T]hird party culpability evidence is relevant and admissible only if it succeeds in ‘linking the third person to the actual perpetration of the crime.’ [Citations.]” (*People v. DePriest* (2007) 42 Cal.4th 1, 43.) “[E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant’s guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.” (*People v. Hall* (1986) 41 Cal.3d 826, 833; see also *People v. Geier* (2007) 41 Cal.4th 555, 581.)

Here, there was no direct or circumstantial evidence linking Diaz to the current crime, but rather, the evidence proffered by defendant was based only on his own statements. There was no independent evidence that Diaz was involved in planting the wine refrigerator on defendant’s property. The only evidence to be presented was defendant’s own self-serving testimony that he was threatened by Diaz, that Diaz was a member of a gang, and that Diaz planted the refrigerator on his property. The trial court did not abuse its discretion by excluding this evidence.⁶

Moreover, even if the trial court erred, we find that it was not prejudicial. “When the reviewing court applying state law finds an erroneous exclusion of defense evidence,

⁶ At oral argument, defendant complained that this court was using an incorrect standard of review, arguing that we must accept his offer of proof as true. If defendant presented any circumstantial or direct evidence tying Diaz to the crime we might agree. However, we are not required to accept defendant’s self-serving statements as espousing the truth.

the usual standard of review for state law error applies: the court must reverse only if it also finds a reasonable probability the error affected the verdict adversely to defendant. [Citations.]” (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1089; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

Defendant was able to make a case for the proposition that he was set up. He presented testimony that a Craigslist advertisement could be posted by anyone. He argued in closing that he had been set up because he had never seen the wine refrigerator until police arrived at his home. He was allowed to argue that the wine refrigerator was placed at his property, and it was possible that the person who placed it there had tipped off the police. Hence, we reject that defendant was foreclosed from presenting a defense or that such exclusion of his third party culpability evidence requires review under the *Chapman v. California* (1967) 386 U.S. 18, 23 [87 S.Ct. 824, 17 L.Ed.2d 705, 710] beyond a reasonable doubt standard.

Moreover, even had the evidence been admitted that defendant was threatened by Diaz and that defendant believed that Diaz had placed the wine refrigerator on his property as revenge, it “would not undermine the significant evidence linking defendant to the” the crime. (*People v. Hall*, *supra*, 41 Cal.3d at p. 835.) When Deputy Cheshier called the number listed on Craigslist, which was defendant’s phone number, he was directed to defendant’s home. If defendant had no knowledge of the wine refrigerator being on his property, there is no explanation for how Deputy Cheshier was directed to his property to look at the refrigerator. Moreover, when Deputy Cheshire arrived at the

location, defendant answered the door and remarked he was on probation for possessing stolen property. If defendant had no knowledge of the wine refrigerator, why did he tell Deputy Cheshier he was on probation for the same thing? As such, the evidence was overwhelming that defendant was aware that he was in possession of stolen property, and any third party culpability evidence would not have changed the result here.

IV

PROSECUTORIAL MISCONDUCT

Defendant contends the prosecutor committed misconduct by arguing to the jury during closing argument that the microwave oven involved in the uncharged incident was stolen property.

A. *Additional Background*

As set forth, *ante*, Nottingham testified that there was a listing for a microwave oven on Craigslist under the name “David” but with defendant’s telephone number. Nottingham saw the microwave oven at defendant’s house (defendant showed it to her) but there was no evidence presented affirming it was stolen property.

The People argued in closing that defendant had a pattern of selling items on Craigslist. After detailing the events surrounding the uncharged incident, the People argued, “And, again, that Craigslist advertisement for that microwave in May of 2010, listed that phone number Every time these Craigslist’s ads went up, that phone number was there. Every time somebody made a contact with the person selling it, they were directed to go to that home on Cottonwood. And every time they contacted the

defendant. This isn't coincidence. This is the defendant selling property that he shouldn't have that he knew was stolen."

During closing argument by defendant's counsel, she argued, "As I mentioned, . . . you've received evidence on three different incidents. There was a May 25th incident. But I want you to remember that that investigation on May 25th did not arise because of a complaint that a microwave oven had ever been stolen and it did not result in an arrest."

During rebuttal argument, the prosecutor argued as follows: "Paula Nottingham got on the stand and talked about her encounter with the defendant on May 25th, 2010. The defendant's response, 'That never happened. I've never met that woman before.' [¶] Really? Is that . . . what we are to believe[,] that this never occurred and that this woman, a sworn peace officer, is creating something out of . . . mid air. She is mistaken in the exact person she saw, who she was sure about, and what she told us that day; that when she arrived at his house, he wasn't the one who answered the door and took him around back and opened that car? [¶] That is just plain insulting. And the reason is, because that piece of evidence, just like every piece of evidence that was submitted to you, demonstrates that this happened and he knew exactly what he was doing. [¶] He had property that was stolen and he was trying to sell it on Craigslist. He has an incentive to lie here, just as he's done before. He is biased in his testimony and his story just does not add up." There was no objection.

B. *Analysis*

Defendant did not object to the alleged incidents of prosecutorial misconduct. A defendant must object to prosecutorial misconduct to preserve the claim on appeal. (*People v. Martinez* (2010) 47 Cal.4th 911, 956.) “To preserve a misconduct claim for review on appeal, a defendant must make a timely objection and, unless an admonition would not have cured the harm, ask the trial court to admonish the jury to disregard the prosecutor’s improper remarks or conduct. [Citation.]” (*Ibid.*)

It is undisputed by defendant that his counsel failed to object to the comments by the prosecutor. It is clear that she was aware of the argument by the prosecutor, as she addressed that there was no evidence the microwave oven was stolen in her own argument. Defendant makes no argument that an objection would have been futile or that an admonition would not have cured any purported error. Rather, defendant points to the accompanying habeas petition to resolve the matter. Hence, we will not address the matter on direct appeal and find defendant has waived the issue of prosecutorial misconduct.

V

TRANSCRIPT ERROR

Defendant contends that the trial court erred by refusing to correct the transcript that accompanied the audio recording heard by the jury.

A. *Additional Factual Background*

Prior to the jury hearing the audio tape and getting the transcript, the trial court admonished the jury as follows: “It’s up to you to determine what occurred and what was said in any type of recording. [¶] The transcript is somebody’s interpretation as to what was said during an interview, and so that in itself is not the evidence. It’s being provided for your assistance so you can follow along with the audio recording or DVD. But . . . you, as the jury, ultimately determine what was said and what wasn’t said in any type of audio recording. [¶] And you’re instructed to follow that instruction with respect to the transcript. The transcript . . . is just someone’s interpretation to what they heard on the audio recording.”

We have detailed the contents of the transcript, *ante*, but defendant complains that a portion of the transcript was erroneous. At one point in the interview, Deputy Rohn asked defendant, “Now you’re under arrest, okay? Now, how far we go with you under arrest, how far we have to dig here is_____ I start hearing the truth come out. Okay? Because I have to, because I’m telling you right now, possession of stolen property, right? I’m not saying you stole it, I’m saying you’re in possession of stolen property that you knew was stolen.” In the transcript, it shows defendant’s response as, “I did know it was stolen.” The transcript of the interview was given to the jury.

Defendant’s counsel pointed out to the trial court after the recording had been played and the transcripts had been given to the jury, that there were errors in the transcription. She claimed she did not receive the transcript until just before it was

played. She complained that the transcript stated, “I did know it was stolen.” It was clear the recording stated that he did *not* know it was stolen. Defendant’s counsel wanted the jury admonished that there was an error.

The People objected that the jury had already been instructed that the recording was the evidence. The trial court was not certain if the recording was different. It ruled, “And the reason the Court gives that admonishment to the . . . jury is for the very purpose you just raised. It is because the people hear things differently when people are transcribing things. They think they might hear something or don’t hearing something.”

The trial court recalled that portion of the recording and could not tell what defendant had actually said. Defendant’s counsel could make the argument to the jury rather than the court admonishing the jury. Defendant’s counsel could emphasize the trial court’s admonishment that the transcript was not the evidence. It was not obvious to the trial court that it was an error so it would not be corrected. Further, if it was erroneous, defendant’s counsel could point to that fact in order to attack the credibility of the prosecution. During closing argument, defendant’s counsel did not address the transcript or recording.

B. *Analysis*

We have listened to the recording. There are muffled noises, and defendant speaks quietly, but it does sound as though defendant states that he did *not* know the appliances were stolen. We agree with the trial court that it was not an entirely clear part of the audio, but the transcript does appear to be erroneous.

However, even with the inaccuracy, it was not so inaccurate as to mislead the jury into convicting an innocent man. “Transcripts of admissible tape recordings are only prejudicial if it is shown they are so inaccurate that the jury might be misled into convicting an innocent man.” (*People v. Brown* (1990) 225 Cal.App.3d 585, 599.)

The jury was admonished that they were to consider the audio recording as the evidence in this case and that the transcript was merely one person’s interpretation of what the audio recording stated. “‘We presume that jurors understand and follow the court’s instructions’ [citation]” (*People v. Hovarter, supra*, 44 Cal.4th at p. 1005.)

Moreover, viewed in its totality, the audio and transcript reflect that defendant denied knowledge that the five appliances in the prior conviction were stolen. Moreover, this evidence went to defendant’s guilt on the prior conviction. As set forth, *ante*, the jury was instructed that it could not convict defendant in the instant case based solely on its finding that defendant committed the prior conviction. Again, we presume that the jury followed the instruction and found independent evidence of defendant’s guilt in the instant case. Hence, any error in the transcript went to the prior conviction and not defendant’s guilt in the current case. We reject defendant’s claim.

VI

CUMULATIVE ERROR

Defendant asserts that the multiple errors he raised in his opening brief combined resulted in cumulative error. He provides no independent argument as to how these errors deprived him of a fair trial. The only conceivable error in this case was the error in

the transcript, but we have found it was not prejudicial, as the trial court admonished the jury that the audio recording was the evidence in the case, and the jury was instructed that it must find defendant guilty in the current case based on independent evidence other than the prior conviction. This minor error did not affect the outcome in this case, and the remaining claims were not error.

VII
DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P.J.

McKINSTER
J.