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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 LASHAUN MARTINEZ, JR.,

Defendant and Appellant.

E052821

(Super.Ct.No. FVI1002201)

OPINION

APPEAL from the Superior Court of San Bernardino County. Eric M. Nakata, Judge. Affirmed with directions.

Tony F. Farmani, 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, Peter Quon, Jr., Susan Miller, and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Michael Martinez, of inflicting corporal injury on a cohabitant (Pen. Code, § 273.5, subd. (a)).¹ In bifurcated proceedings, defendant admitted having suffered a prior conviction of the same offense, for which he served a prison term. He was sentenced to prison for six years and appeals, claiming the trial court erred: 1) in admitting evidence of his prior act of domestic violence perpetrated on the victim of the charged crime; 2) in failing to excuse a juror due to alleged juror misconduct or to further inquire into this alleged misconduct; 3) in instructing the jury that this was not a Three Strikes case; and 4) in failing to award him all the conduct credits to which he was entitled. Defendant also asserts that the prosecutor committed acts of misconduct during argument to the jury and his trial counsel was incompetent for failing to object to them. We reject all his contentions, save the one concerning conduct credits. Upon agreement of the parties, we will direct the trial court to increase defendant's credits. In all other respects, we affirm the judgment.

FACTS

Having pled guilty to inflicting corporal injury on the victim in 2009, defendant, on September 27, 2010, engaged in similar acts with the victim, his live-in girlfriend, which will be described in detail below.

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

ISSUES AND DISCUSSION

1. *Admission of Evidence of Defendant's Prior Incident of Domestic Violence Perpetrated on the Victim*

In their trial brief, the People sought permission, pursuant to Evidence Code section 1109,² to introduce evidence of the 2009 act of domestic violence perpetrated by defendant on the victim. In their brief, the People represented, concerning the charged offense, that on September 27, 2010, the victim told a police officer that defendant, with whom she lived, had bitten her three times on her arm and once on her wrist and had knocked out her false teeth. The People represented that on May 22, 2009, defendant had inflicted corporal injury on the victim, including biting her. The People anticipated presenting evidence of this incident through the testimony of the victim and a police officer and court records showing that defendant had pled guilty to a violation of section 273.5, subdivision (a) due to his actions that day.

The People also moved to be permitted to impeach defendant with this conviction, along with another, should defendant testify. In response only to this specific use of defendant's 2009 conviction for inflicting corporal injury on the victim, defendant moved in writing to either exclude or sanitize evidence of that conviction.

At the hearing on the admission of this evidence under Evidence Code section 1109, defense counsel questioned whether it was material and cumulative. The People

² That section provides in pertinent part, "[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352."

responded that it was its understanding that the defense would be claiming self-defense as to the charged offense and evidence of the 2009 offense was relevant to that, particularly where, as here, the same conduct, i.e., biting, occurred on both occasions. The People also asserted that the victim told the police that during the 2009 offense, defendant told her that he was going to hit himself and falsely claim that she had hit him, which would be identical to the defense the People anticipated defendant using for the charged crime. The trial court ruled that the People could not anticipate what defendant's defense to the charged offense would be, but the evidence of the 2009 offense was relevant to intent during the charged offense, which "is always an issue[.]" Therefore, the trial court concluded that the evidence was admissible under Evidence Code section 1101, subdivision (b),³ as well as Evidence Code section 1109.⁴ The court also concluded that the probative value of the evidence outweighed its prejudicial impact.

Pointing only to evidence of the 2009 prior introduced at trial, the instruction the trial court gave as to its use and the number of times the prosecutor referred to it during

³ The subdivision reads in pertinent 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 . . . other than his or her disposition to commit such an act."

⁴ Defendant points out that the jury was instructed to use the evidence only to prove propensity under Evidence Code section 1109. However, it was defendant's job to request instructions for using it also under Evidence Code section 1101, subdivision (b), if defense counsel saw this as advantageous to his client. The absence of an instruction under Evidence Code section 1101, subdivision (b) did not make this evidence any less admissible for that purpose.

his argument to the jury, defendant asserts that admission of this evidence violated his constitutional rights. However, he did not object below to its admission on this basis, therefore, he waived it. (*People v. Hartsch* (2010) 49 Cal.4th 472, 496.) Moreover, Evidence Code section 1109's counterpart, 1108⁵ has been upheld by the California Supreme Court against the assertion that it violates due process. (*People v. Falsetta* (1999) 21 Cal.4th 903, 907, 917, 918.) In *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1027, 1028, this court concluded that, for the same reasons cited in *Falsetta*, Evidence Code section 1109 did not violate due process. (Accord, *People v. Williams* (2008) 159 Cal.App.4th 141, 147; *People v. Cabrera* (2007) 152 Cal.App.4th 695, 703, 704 [Div. One of this court]; *People v. Rucker* (2005) 126 Cal.App.4th 1107, 1120 [same]; *People v. Price* (2004) 120 Cal.App.4th 224, 240; *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095, 1096; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1309, 1310; *People v. James* (2000) 81 Cal.App.4th 1343, 1353; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1335; *People v. Johnson* (2000) 77 Cal.App.4th 410, 417-420.) We also concluded in *Hoover* that Evidence Code section 1109 did not dilute the requirement of proof beyond a reasonable doubt. (*Hoover*, at p. 1028.) Defendant fails to mention our holdings in *Hoover* or any of the other appellate court decisions cited above. In *Jennings* at pages 1310 through 1313 and *Price* at page 240, equal protection challenges to Evidence Code section 1109 were rejected and we adopt their reasoning as our own. To the extent defendant also asserts that the jury instruction given here on the use of evidence of the

⁵ Evidence Code section 1108 deals with sexual offenses.

2009 offense⁶ contributes to the unconstitutionality of Evidence Code section 1109, we disagree (see *People v. Reyes* (2008) 160 Cal.App.4th 246, 251-253; *People v. Pescador* (2004) 119 Cal.App.4th 252, 261, 262).

Defendant relies on the same facts to argue that the trial court abused its discretion in concluding that the prejudicial impact of this evidence was outweighed by its probative value. However, none of these facts were before the trial court at the time it exercised its discretion, therefore, they are not legitimate considerations for us to make in determining the propriety of the court's ruling. Defendant continues on this ill-advised journey, asserting that evidence of the charged crime was weak while evidence of the 2009 offense was "vivid and inflammatory." If that is what unfolded during trial, it was incumbent upon defendant to renew his objection, however, he did not. At the time it ruled on the admissibility of the evidence, the trial court knew only what the People represented in their trial brief concerning both offenses. That information, as already

⁶ That instruction, in pertinent part, was, "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 domestic violence. Proof by a preponderance of the evidence is a different burden of proof from 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 of proof, you must disregard [this] evidence entirely. [¶] If you . . . decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from the evidence that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit and did commit corporal injury to [a] cohabitant . . . as charged here. If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all of the other evidence. It is not sufficient by itself to prove that the defendant is guilty of corporal injury to a . . . cohabitant The People must still prove each charge beyond a reasonable doubt."

stated, was that during the charged offense, defendant bit the victim four times and knocked out her false teeth and during the 2009 incident, defendant had bitten her. The trial court had not been presented, at the time it made its ruling, with evidence that the 2009 incident was demonstrably worse than the charged offense. Nor was it even asserted by defense at the time of the trial court's ruling that evidence of the current offense was weak.⁷ Therefore, these cannot serve as bases for the conclusion that the trial court abused its discretion in making its determination.

⁷ In fact, as things developed at trial, it was not. In her call to the 911 dispatcher, a recording of which was played for the jury, the victim asserted twice that defendant was biting her and that he had broken into the bathroom when she was "holed up." In fact, her screams and yell of "Get off me" can be heard on the recording. In her recorded interview with the police officer who responded to her home pursuant to her 911 call, which was also played for the jury, she repeatedly stated that defendant bit her a number of times and broke out her false teeth when he hit her in the mouth because they had been arguing. She also said that defendant said he would keep biting her every time she told on him and twice she said that he threatened to "fuck her up." During this recorded interview, she also reported a third incident of domestic violence, about a month before the charged offense, during which defendant drug her across the rocks after her daughters tried to remove him from the home. The jury was shown photographs of the injuries the victim sustained during the charged incident. The responding officer testified that the victim was upset, shaken and scared when the officer arrived following the victim's 911 call. The officer said the victim told her that she ran to the bathroom and locked the door, but defendant tried to get in, so she called 911. Defendant admitted that he had fought with the victim that day. The victim claimed at trial that the bite marks had been inflicted consensually during sex with defendant and/or by her dog, matters she had not disclosed to the responding officer or during the preliminary hearing. She claimed her false teeth "fell out" because of shoddy dental work. She denied that defendant told her he was going to fuck her up. She claimed she called 911 because she got paranoid due to her failure to take her medication, and she wanted defendant to leave so he would not have sex with her anymore. She admitted yelling, "Get off of me" during the 911 call, but said she did this "most likely" because defendant wanted to get her phone away from her because he did not want to go to jail. She allowed that she may have told the 911 operator that defendant was breaking into her bathroom during the call, but she said she could have been lying about this. She admitted that she ran into the bathroom because

[footnote continued on next page]

2. Possible Juror Misconduct

On Monday, December 6, 2010, the victim testified, during which the recording of her interview with the responding officer was played for the jury, and that officer very briefly testified after being recalled to the stand. The defense presented no evidence. Following that, the jury was instructed and arguments were delivered. Before the jury left the courtroom to begin deliberations, one juror asked to speak privately to the judge and counsel. That juror told them, “I was concerned that the defendant over the weekend doesn’t have a case, and that the only reason he would plead not guilty is because this is a third strike. And I’m worried that I cannot consider, keep the punishment out if that’s” The trial court interrupted the juror, saying, “This is not a third strike case.” The juror responded, “Okay. Then I should be fine.” The prosecutor asked the trial court to tell the other jurors what it had just told this juror “because I have the same concern.” The trial court asked defense counsel if he had any problem with that and the latter said

[footnote continued from previous page]

defendant would have taken her phone from her to stop her from calling the police. She admitted reporting the third incident of domestic violence, but claimed that she had lied about it and she had injured herself while falling down during drinking. She claimed she lied when she told the responding officer that defendant had bitten her four times. She also backtracked substantially on what she had claimed at the time and what the physical evidence showed had occurred during the 2009 incident. However, she did admit that defendant struck her several times in the head and bit her during that incident, but she explained that he hit her only after she hit him. The officer who responded following this incident testified that defendant admitted to him that he had hit the victim in the head following an argument and after the victim had hit him once in the face. Proof of defendant’s guilty plea to inflicting corporal injury on a cohabitant, this victim, in connection with this incident was introduced into evidence. As no surprise, the victim testified at trial that she wanted defendant acquitted of the charged offense.

he did not. The trial court then told the jury, “[T]he concern has been voiced to the court . . . [that] this [is a] third strike case, this is not a third-strike case, okay?”

Defendant here contends that this juror’s comments established that he had committed misconduct by prejudging the case and this requires reversal of his convictions. We disagree.

In *People v. Allen and Johnson* (2011) 53 Cal.4th 60, 66 (*Allen and Johnson*), the foreperson and another juror reported to the trial court that the juror in question had made up his mind before deliberations began because on the second day of deliberations, the latter had said that when the prosecutor rested, she did not have a case. However, when questioned by the trial court, the juror in question hesitatingly said that he had not made up his mind and he had voted undecided during a preliminary vote on the fifth day of deliberations. (*Id.* at p. 74.) The second juror asserted that the juror in question had, several times before deliberations began, said he was waiting for the prosecutor to bring her case forward, but it never happened. (*Id.* at p. 66.) The juror in question admitted having said more than once during deliberations that when the prosecution rested, they had not convinced him. (*Id.* at p. 68.) The juror that reported these statements to the trial court felt that the juror in question was not being honest in denying that he had prejudged the case. (*Ibid.*) Yet another juror said that he or she suspected that the juror in question began deliberations with his mind made up, but the later had said, at the start of deliberations, that he was undecided. (*Id.* at p. 67.) Another juror said that the juror in question said that he had his mind made up before deliberations began. (*Ibid.*) Another

juror said the same thing, but added that the juror in question then recanted his statement.
(*Ibid.*)

The California Supreme Court reversed the trial court's dismissal of this juror on the basis that he had made up his mind before deliberations began, saying, "This record does not manifestly support [that the juror in question prejudged the case.] ¶ Although the record amply demonstrates that during deliberations [the j]uror [in question] did say words to the effect that, 'When the prosecution rested, she didn't have a case,' the precise meaning of his statement is not entirely clear. . . . ¶ . . . ¶ . . . [The juror in question]'s statement was made during deliberations, and only made reference to his previous state of mind at a single point during the trial. *It did not indicate an intention to ignore the rest of the proceedings.* . . . ¶ . . . [His] comment . . . was subject to some interpretation. His remark was not an 'unadorned statement' that he had conclusively prejudged the case. *It did not establish that he had ignored further evidence [(when he made it, the defense had not yet put on its case-in-chief)], argument, instructions, or the views of other jurors.* Although [Penal Code] section 1122 requires jurors not to form an opinion about the case until it has been submitted to them, *'it would be entirely unrealistic to expect jurors not to think about the case during the trial . . .'* [Citation.] *A juror who holds a preliminary view that a party's case is weak does not violate the court's instructions so long as his or her mind remains open to a fair consideration of the evidence, instructions, and shared opinions expressed during deliberations.* ¶ . . . *The record does not demonstrate that [the j]uror [in question] refused to listen to all of the evidence, began deliberations with a closed mind, or declined to deliberate.* . . . ¶ . . .

[¶] *The reality that a juror may hold an opinion at the outset of deliberations is, as we have noted [citation], reflective of human nature. . . . We cannot reasonably expect a juror to enter deliberations as a tabula rasa, only allowed to form ideas as conversations continue.* What we can, and do, require is that each juror maintain an open mind, consider all the evidence, and subject any preliminary opinion to rational and collegial scrutiny before coming to a final determination. [¶] . . . [¶] *Certainly, a court may not discharge a juror merely because he or she harbors doubts about the prosecution’s case. [Citation.] That [the j]uror [in question] was unimpressed by the strength of the evidence and unpersuaded by his colleagues’ assertions during deliberations does not amount to prejudgment. To conclude otherwise would . . . undermine the principle that both parties are entitled to the independent judgment of each individual juror. [Citation.]” (Id. at pp. 71-73, 75-76, italics added.)*

The statement made in the instant case had two parts—first, that defendant didn’t have a case, and, second, that because he didn’t have a case, the only reason he would plead not guilty and go to trial is because this is a third strike case. The first assertion is similar to the comments made by the juror in question in *Allen and Johnson*, i.e., that, based on what he had heard thus far, this juror did not see a viable defense for defendant. The juror here did not state, or imply in any manner, that he would not consider the additional evidence presented by the prosecutor, including the taped interview, the brief additional testimony of the responding officer, the instructions, the arguments of counsel and comments made by other jurors during deliberations. Under *Allen and Johnson*, his preliminary view was permissible so long as he retained an open mind and the record

does not suggest that he did not. According to *Allen and Johnson*, his statement did not establish that he had prejudged the case.

The second part of the juror’s statement—his speculation that defendant went to trial only because this was a third strike case, was put to rest by the trial court’s unobjected-to response. The juror recognized this by replying, “Okay. Then I should be fine.” This response suggested that the juror was now satisfied that defendant had not gone to trial only because he was facing a sentence of 25 years to life. If anything, this response would have motivated the juror to carefully decide whether he had reasonable doubt, as there must have been a reason, other than the fact that this was a three strikes case, for this matter to go to trial. One of those reasons may have been that defendant did not commit the crime or that he had a defense to the charges. Under the circumstances, we cannot agree with defendant that the record shows that this juror prejudged the case to a demonstrable reality. (*People v. Farnam* (2002) 28 Cal.4th 107, 141.)

Next, defendant asserts that the trial court had a sua sponte duty to inquire in order to establish the extent of the asserted misconduct. In claiming that this duty is sua sponte, defendant hopes to bypass the forfeiture of the issue that resulted from his lack of such a request below (see *People v. Holloway* (2004) 33 Cal.4th 96, 124).

“““The decision to investigate the possibility of juror . . . misconduct . . . rests within the sound discretion of the trial court. [Citation.] . . . [¶] As our cases make clear, a hearing is required only where the court possesses information which, if proven to be true, would constitute ‘good cause’ to doubt a juror’s ability to perform his duties, and would justify his removal from the case. [Citation.]” [Citation.]’ [Citations.]”

(*People v. Fuiava* (2012) 53 Cal.4th 622, 702.) This case is distinguishable from *People v. McNeal* (1979) 90 Cal.App.3d 830, 835, which defendant cites, wherein the foreperson informed the trial court that a juror had some personal knowledge concerning a defense witness that “definitely had a bearing on the way she will vote.” This case is also distinguishable from *People v. Burgener* (1986) 41 Cal.3d 505, 519 [disapproved on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 753], wherein the trial court learned that one of the jurors may have been intoxicated during deliberations. If, in fact, that juror had been intoxicated, excusal would have been appropriate, but it could not be determined if such a basis existed absent an inquiry.

Here, there was no basis for inquiry by the trial court. The juror stated the obvious—up to that point, defendant had mounted no defense, and the prosecution’s case was *very* strong,⁸ a situation which did not change with the evidence presented after this juror’s concern was voiced. This is why, no doubt, it took the jury only 55 minutes to chose a foreperson, deliberate and reach a verdict. We have already concluded that the statement did not demonstrate that the juror had prejudged the case. Because there was no basis for the trial court to suspect that this juror had prejudged the case, there was no reason for the court to further inquire about the extent of his prejudgment. As far as defendant’s assertion that the trial court should have allowed the parties to participate in the process, defense counsel was present and said nothing, except to go along with the trial court telling all the other jurors what it had told this juror.

⁸ See footnote seven, *ante*, page seven.

3. *Telling the Jurors That This Was Not a Three-Strikes Case*

Although defendant said he had no problem with the remaining 11 jurors being told that this was not a three strikes case, he now claims that this requires reversal of his conviction. He engages in no discussion of the prejudicial aspect of what occurred here, thus suggesting that what took place is prejudicial per se.

We have already concluded that the information conveyed by the trial court put to rest the afore-mentioned juror's speculation that defendant had gone to trial merely because this was his third strike, and not because he, in fact, might not be guilty or might have a viable defense to the charge. When viewed in this context, the information was entirely proper. Viewed in any context, the information did not constitute a prohibited calling of the jury's attention to the punishment for the crime because no affirmative information as to punishment was conveyed.

The cases defendant cites in support of his position are distinguishable. In *Rogers v. United States* (1975) 422 U.S. 35, 36 (*Rogers*), the jury sent the trial court a note asking it if it would accept verdicts of guilty "with extreme mercy of the Court." Without notifying the defendant or his attorney, the trial court instructed the bailiff to tell the jury that it would. (*Ibid.*) The jury returned verdicts five minutes later, and after entering them as the judgment, the trial court informed the jury that while it would take into consideration the jury's recommendation of mercy, it would also have to consider the probation report and any criminal history the defendant had. (*Id.* at p. 37.) The United States Supreme Court reversed the convictions because it deemed the jury's question to be a request for further instruction, which was delivered by the trial court in the absence

of defendant and his attorney. (*Id.* at p. 39.)⁹ The Court was unable to conclude that this constituted harmless error because, at the very least, the trial court should have told the jury that it would not be bound by the jury's recommendation of mercy and that the jury had no sentencing function and should reach its verdicts without regard to what sentence might be imposed. (*Id.* at p. 40.) The Court went on to reason that the fact that the jury returned verdict five minutes after receiving the trial court's response to its question "strongly suggests that the trial [court's] response may have induced unanimity by giving members of the jury who had previously hesitated about reaching . . . guilty verdict[s] the impression that the[ir] recommendation [of mercy] might be an acceptable compromise." (*Id.* at p. 40.) Contrary to defendant's assertion, *Rogers* does not support his position that when a trial court fails to instruct the jury not to consider punishment, automatic reversal is appropriate. Defendant here was free to request an instruction that punishment not be considered. His failure to make the request waives the matter. Unlike the defendant in *Rogers*, who was not aware that the trial court had communicated with the jury (*id.* at p. 41), here there was an opportunity to make such a request or to object to what the trial court had told the jury.

Defendant also cites *United States v. Greer* (10th Cir. 1980) 620 F.2d 1383 (*Greer*), in support of his position. In *Greer*, during trial, the marshal told jurors that a particular person, who had no connection to the case before them, could receive either a straight sentence or one under a federal youth act. (*Id.* at p. 1384.) The marshal

⁹ Defendant completely omits this very important aspect of *Rogers* in his discussion of it.

explained eligibility for treatment under the act and its expungment provisions and there was an “extensive discussion” of the act and its effect on sentencing of those eligible for its provisions. (*Ibid.*) At least one juror incorrectly believed that all the foregoing was about the defendant, not about someone unrelated to the case. (*Ibid.*) The Tenth Circuit observed, “The authorities are unequivocal in holding that presenting information to the jury about possible sentencing is prejudicial. Breach of this standard has often been grounds for reversal. . . . [¶] We need imagine no improbable hypotheticals to appreciate the prejudicial effects of sentencing discussions *as specific as those in this case.*

Information about sentencing or other consequences of a verdict is prejudicial because, if the jury is convinced that a defendant will receive a light sentence, it may be tempted to convict on weaker evidence.¹⁰ . . . [¶] Any private contact with jurors during trial court about the matter pending before them is ‘presumptively prejudicial.’ [Citation.] If a guilty verdict following prejudicial contact is to be sustained, the government must ‘establish . . . that such contact with the juror was harmless to the defendant.’ [Citation.] . . . [¶] . . . [A federal rule of evidence provides that i]t is no longer proper for a court to inquire into ‘the effect of anything upon (a juror’s) mind or emotions as influencing him

¹⁰ Defendant’s reliance on *United States v. Meredith* (4th Cir. 1987) 824 F.2d 1418, which he reports reasoned that a suggestion that defendant may receive a light sentence may make the jury willing to convict on weaker evidence than it would otherwise require, is also misplaced. We do not disagree with the reasoning that telling a jury that defendant will get a lighter sentence could tempt a jury to convict that defendant on weaker evidence than the jury would otherwise require. We merely disagree with defendant’s assertion that this jury was told that defendant would get a light sentence. It was not. The same is true for defendant’s reliance on *United States v. Reagan* (7th Cir. 1982) 694 F.2d 1075 and *United States v. Frank* (9th Cir. 1992) 956 F.2d. 872, where, according to defendant, juries were told about possible sentencing.

to assent to or dissent from the verdict.’ [Citation.] The effect of the Rule is that a presumption of prejudice cannot be overcome once a jury has reached its verdict. [¶] The effect of [this rule] . . . may require the courts to narrow the definition of ‘presumptively prejudicial . . . ’ (*Id.* at pp. 1384-1385, fn.1.) As already stated, the conveying of information by the trial court here did not occur in private, therefore, there was no basis for the presumption of prejudice that arose in *Greer* to be deemed to have occurred here. Moreover, the information conveyed and the discussion concerning it was far more extensive in *Greer* than in the instant case. Finally, as we have already observed, this jury was not given affirmative information about sentencing. It was merely told that this was not a third strike case in a context completely unrelated to sentencing.

4. *Prosecutorial Misconduct*

Because defendant claims that his trial counsel’s failure to object to any of the matters he now asserts constituted prosecutorial misconduct, we will side-step the forfeiture he should suffer as a result of his failure to object below and address each of his points on their merit.

As already stated, the police officer who apprehended defendant following this incident testified that defendant admitted having had a fight with the victim that day. During cross-examination of the officer, who responded to the scene and spoke to the victim, defense counsel asked her if the victim had told her that she had struck

defendant.¹¹ The officer replied that the victim had not. Defense counsel also solicited from the officer that defendant had injuries, specifically, scratch marks under his left eye, above his right eye and on his left bicep. During cross-examination of the victim, defense counsel solicited her testimony that when she does not take her medication and drinks, instead, as she did on the day of the crime, she gets combative and she thinks people are after her even when they are not. As already stated, after the May 22, 2009 incident, defendant told a police officer that he hit the victim after she hit him in the face. The victim testified that she hit defendant in the mouth that day because she thought defendant had deliberately tried to trip her. It was in response to this that defendant hit the victim. According to the victim, the bite marks supposedly inflicting during this incident were “probably” the result of rough sex.

The first incident of asserted misconduct defendant points to during argument to the jury occurred while the prosecutor was reviewing the elements of the charged offense. The jury had been instructed that the third element was that “The defendant did not act in self-defense.” Of this element, the prosecutor said, “Did [defendant] act in self-defense? Absolutely not. There’s no evidence here of self-defense.” Defendant did not object to this. There was nothing improper about the prosecutor stating that there was no evidence supporting the negation of an element of the charged offense. Contrary to defendant’s assertion, the comment did not shift the burden of proof to defendant. (*People v.*

¹¹ The previous question, to which the prosecutor successfully objected, was, “And when you interviewed [defendant], he indicated to you that he was defending himself at the time of the altercation with [the victim]?”

Bradford (1997) 15 Cal.4th 1229, 1339, 1340; *People v. Ratliff* (1986) 41 Cal.3d 675, 690, 691.) To the extent defendant appears to claim that this was a prohibited comment on his failure to testify, he is incorrect. This prohibition “does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses.” (*People v. Brown* (2003) 31 Cal.4th 518, 554; *People v. Wash* (1993) 6 Cal.4th 215, 263.) This case is clearly distinguishable from *People v. Hill* (1998) 17 Cal.4th 800, 831, which defendant cites, wherein the prosecutor argued to the jury that there had to be some evidence from which the jury could derive a reasonable doubt. In *Hill*, the California Supreme Court concluded that the jury might have interpreted the argument to mean that defendant had the burden of producing evidence to demonstrate the existence of a reasonable doubt. (*Id.* at p. 832.)

Next, defendant points to a comment the prosecutor made concerning the May 22, 2009 incident. He said, “The defendant’s story, he didn’t even try rough sex as a defense. He claim[ed] self-defense.” This was true and it conflicted with the victim’s claims that the bite marks that were evident following this incident were “probably” due to rough sex. Defense counsel did not object to this remark and we see nothing improper about calling the jury’s attention to the conflicts between the victim’s defense of what defendant did on this occasion and defendant’s.

Finally, defendant objects to the following remarks by the prosecutor, made while he was discussing the elements of the charged offense, “Self-defense doesn’t apply in this case. Self-defense was raised by defendant in the [May 22, 2009] incident, the biting, punching, choking incident. Of course[, defendant] had no injuries himself. Still, he

claimed that was self-defense. It has not been raised at all in [the September 27, 2010] incident that he's charged with. You're not getting any jury instructions regarding self-defense. That's because there's no self-defense. There's zero evidence of self-defense so you can't go there. You can't be speculating [that] . . . maybe they might have been fighting. Maybe she started it. Maybe because she's drunk, maybe . . . she scratched him or whatever. No. There's no evidence of self-defense. You can't go there even if you want to once we have proven that the defendant unlawfully inflicted corporal injury to [the victim] and they were cohabitants, that's it. There's no defense."

Defense counsel did not object to the foregoing nor should he have. What the prosecutor said about the May 22, 2009 incident was based on the evidence presented, as set forth herein. Also, as we stated, defense counsel successfully introduced evidence that defendant had some injuries following the charged incident and the victim claimed that she had failed to take her medication that day and drank, which caused her to become combative. When combined with evidence that the victim and defendant both claimed that defendant hit the victim during the May 22, 2009 incident in self-defense, the suggestion had been made that perhaps the victim started the charged incident and defendant inflicted injury on her only in response to her aggression.¹² To prohibit the prosecution from attempting to counter-act this suggestion by not allowing it to argue that

¹² In this regard, we agree with defendant that the prosecutor was incorrect in stating that there was *no* evidence of self-defense. There was a *very small* amount, but the prosecutor was entitled to argue that it was the People's position that there was not enough to even seriously consider, which is how we interpret the prosecutor's remark. Therefore, we reject defendant's contention that this statement constituted misconduct.

there was no self-defense as to the charged incident would have been monumentally unfair. We completely disagree with defendant's categorization of the prosecutor's comments as an attempt to shift the burden of demonstrating a defense to defendant. As stated before, because the absence of self-defense is an element of the charged offense, the prosecutor had to prove the absence of self-defense and that was precisely what he was attempting to do. We have no idea on what basis defendant asserts that the prosecutor's "repeated . . . arguing [that] there was no evidence of self-defense . . . violated [defendant's] due process right to present a meaningful and complete defense."

Next, defendant criticizes the prosecutor for pointing out to the jury that defendant had not claimed self-defense to the officer who apprehended him, however, defendant's citations to the record in support of his argument concerned matters that were not objected to by defense counsel and did not involve self-defense as to the charged offense.¹³ Moreover, pointing out that defendant claimed no self-defense at the time he first encountered the police following the charged incident would not, contrary to defendant's assertion, have constituted misconduct. Defendant asserts that he is entitled to have his "failure to provide a better explanation of self-defense" at trial go

¹³ Defendant first cites to the Reporter's Transcript at page 251. However, on that page, the prosecutor was addressing rough sex during the charged incident and the May 22, 2009 incident, and self-defense during the latter incident. Defendant also cites to the Reporter's Transcript at pages 259 and 260, but those references were to the May 22, 2009 incident. Defendant's last citation, to the Reporter's Transcript at page 263, was in reference to the charged offense but concerned the "defense" of rough sex and not self-defense.

unmentioned by the prosecutor. He is not. Defendant is stuck with what he did or did not say at the time the officer interviewed him. The prosecutor cannot be prohibited from commenting on it because defendant chose not to testify at trial and attempt to explain his failure to claim such a defense earlier.

In the same vein, defendant asserts that the prosecutor pointing out that there was no evidence to contradict the victim's testimony and defendant's statement to the police on September 27, 2010 that established the element of the charged offense that she and defendant were cohabitants, also unobjected to, was somehow a prohibited commentary on defendant's failure to testify. We disagree. As we have already stated, defendant is stuck with what he told the police. The victim testified on the stand that she and defendant were cohabitants. Defendant could have attempted to rebut this evidence by means other than taking the stand and testifying. He did not. We surmise that he did not because he, in fact, was a cohabitant with the victim, a matter he admitted as part of his plea of guilty in connection with the May 22, 2009 incident.¹⁴

Having concluded there was no prosecutorial misconduct as alleged by defendant, we need not address his throw-back position that his trial counsel was incompetent for failing to object to it.

¹⁴ In an unusual move, the charging documents for the May 22, 2009 offense, defendant's change of plea form in connection with that incident, the minute order for his guilty plea to inflicting corporal injury on a cohabitant, the victim, the abstract of judgment for that conviction and defendant's prison packet were not brought to the jury's attention until during argument. These exhibits were not entered into evidence until after the jury began deliberating and they are not mentioned in the list of exhibits admitted at trial in the Index of the Reporter's Transcript.

5. *Conduct Credits*

The parties agree that defendant is entitled to one-for-one conduct credits under the version of section 4019 that was in effect when he committed this crime. Therefore, we will direct the trial court to credit defendant with an additional 44 days of local conduct credit, for a total of 176 days.

DISPOSITION

The trial court is directed to amend the abstract of judgment and minutes of the sentencing hearing to show an award of 88 days of local conduct credit, for a total credit of 176 days. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ

P. J.

We concur:

MILLER

J.

CODRINGTON

J.