

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

EUGENE ROBERT OSBORN,

Defendant and Appellant.

E054387

(Super.Ct.No. RIF154240)

OPINION

APPEAL from the Superior Court of Riverside County. Thomas Kelly (retired judge of the Santa Cruz Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) and Gary B. Tranbarger, Judges. Affirmed as modified.

Janice M. Lagerlof, 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, and William M. Wood and Meagan J. Beale, Deputy Attorneys General, for Plaintiff and Respondent.

## I. INTRODUCTION

Defendant Eugene Robert Osborn appeals from his conviction of second degree murder (Pen. Code, § 187; count 1) and vehicular manslaughter (Pen. Code, § 191.5, subd. (a); count 2).<sup>1</sup> Defendant contends the trial court erred in admitting irrelevant and inflammatory testimony about the emotional effect of the death of a witness's family member in a drunk driving accident to show defendant's knowledge of the life-threatening nature of his conduct; or, in the alternative, his counsel provided ineffective assistance by failing to object to that evidence. Defendant further contends the prosecutor committed misconduct by appealing to the passion and prejudice of the jury; or, in the alternative, his counsel provided ineffective assistance by failing to object to the prosecutor's conduct. Next, defendant contends the trial court abused its discretion by admitting into evidence a photograph of the victim while he was alive; the court denied defendant his constitutional rights by limiting cross-examination of a prosecution expert witness; the cumulative effect of the errors was prejudicial; and the trial court exceeded its jurisdiction in imposing \$120 in fees under Government Code section 70373. The People concede error in the imposition of fees, and we agree with that concession. We find no other errors.

---

<sup>1</sup> Before trial, defendant also entered a plea of guilty to misdemeanor driving without a license (Veh. Code, § 12500, subd. (a); count 5).

## II. FACTS AND PROCEDURAL BACKGROUND

In a first trial, the jury reached a deadlock on count 1 and found defendant guilty of count 2.<sup>2</sup> The court declared a mistrial as to count 1, and a second trial took place, in which the jury found defendant guilty of count 1. Because the evidentiary issues raised in this appeal are from the second trial, we use the transcript of the second trial as the basis for our statement of facts.

On December 8, 2009, defendant visited Brandy Reid at her home in Perris at about 7:00 p.m. with his coworker Kenny Crellin. Defendant asked Reid to go with him to a bar in Lake Elsinore, but she refused. Defendant told Reid he had drunk two “40s,” meaning two 40-ounce bottles of beer, just before going to her house. Defendant, Crellin, and Reid’s brother, Brian Vasquez, went to the bar with defendant driving them in his mother’s pickup truck.

Security videos from the bar, played for the jury, showed the three men enter at 8:26 p.m., buy a pitcher of beer, and leave at 8:52 p.m. Defendant said he drank two or three glasses of beer at the bar.

The three men left for defendant’s neighborhood in Menifee and stopped on the way to buy a 12-pack of beer. At about 9:30 p.m., they arrived at a house where Crispin Zabala and two other men lived, a few houses away from defendant’s home. Defendant said he drank five beers while at the house.

---

<sup>2</sup> Counts 3 and 4, which alleged lesser included offenses to count 2, were dismissed on the motion of the prosecutor.

Zabala started arguing with defendant about bringing Vasquez into the house because Zabala did not know Vasquez. Defendant had had a fight with Zabala a few days before, and Zabala thought defendant brought Vasquez to assist in beating Zabala up. Zabala called Vasquez names and badgered him, then suggested they “take it outside.” The men went outside, and Zabala continued to accuse Vasquez of coming to the house to cause problems. At first, Vasquez remained calm, but eventually he started yelling back. Defendant said he did not see Zabala and Vasquez fight, and he did not see Zabala stab Vasquez, but defendant was hit hard on the back of the head and had a temporary blackout. When he “came to,” he did not see Vasquez; Crellin said Vasquez had left on Crellin’s bicycle.

Shortly after 10:00 p.m., Richard Kunath, who lived in Menifee, heard a man (later identified as Vasquez), screaming loudly and using profanity in his neighborhood. The yelling also awakened Kunath’s next-door neighbor, Sandra Buchanan. Kunath and Buchanan saw Vasquez standing near another neighbor’s house, yelling and beating on the side of the house. Vasquez crumpled to the ground, and Kunath and Buchanan believed he was drunk. A DVD from the security camera on Buchanan’s house was played for the jury.

Kunath and Buchanan saw a pickup drive down the street with its lights off and saw a man, later identified as Crellin, running along outside the pickup. Someone said, “There he is,” or “He’s over here,” and the pickup stopped in front of the house where the man was slumped over. Crellin and the driver of the pickup, later identified as defendant,

shook Vasquez and tried to get him to stand, but Vasquez kept collapsing. Defendant and Crellin picked him up, but dropped him to the ground so they could open the tailgate of the pickup. They then picked him up again and threw him into the bed of the pickup, making a thud. Vasquez did not move or make a sound. Someone yelled, “Get the fuck out of here.” Defendant got into the pickup and “peeled out,” very fast, while Crellin left on foot. The pickup went through a dip in the road, and Vasquez’s body bounced up and thudded down. Defendant made a fast and erratic left turn. Buchanan and Kunath thought defendant was picking up a drunk friend and taking him home, so they did not then call the police. The next morning, they found a trail of blood along the street to where the man had been pounding on the neighbor’s house. They also found a wallet with Vasquez’s identification, and they called the police.

Between 11:00 and 11:30 that night, defendant walked into a market at the corner of Highway 74 and Menifee Road. The clothing on the right side of his body was covered with blood spatter, and he appeared sweaty. He said he needed to use the telephone, but when the clerk gave it to him, he just looked at it and then asked the clerk to call for help. He said he had been driving a dead body to the hospital and had gotten into a collision. The clerk called 911. Defendant told the clerk his fiancée’s<sup>3</sup> brother had called, saying he had been stabbed and needed to go to the hospital. Defendant had picked up the brother and had been in an accident when checking on the brother while he was driving. He said when he came to after the accident, the body was gone. The clerk

---

<sup>3</sup> Defendant was infatuated with Reid, but they never had a romantic relationship.

relayed the conversation to the 911 dispatch operator. The clerk believed defendant had been drinking because his eyes were red and glossy and he smelled of alcohol, although his speech was not slurred. He seemed like he was in shock and showed no emotion.

Sheriff's Deputy Terrell Young arrived at the market at about 11:50 p.m.

Defendant showed signs of intoxication, including red eyes, slurred speech, and an unsteady gait, and he had urinated on himself. He was coherent, however, and he told the deputy he had been in a collision. Investigator Angel Gasparini arrived at the market after 1:00 a.m. the next morning, and he observed the same signs of intoxication.

Defendant failed a horizontal gaze nystagmus test for intoxication. Defendant's blood was drawn at 2:41 a.m., and his blood alcohol content was then 0.19 percent. A forensic toxicologist testified it would have been 0.24 percent at 11:00 p.m.

Officers located the accident scene about a mile down Highway 74 from the market. At that spot, Ethanac Road bends to the south and becomes Matthews Road, and Highway 74 comes south and bends to the east. The two roads are adjacent at the arc of each curve. Ethanac is about six feet higher than Highway 74, and there is an 18-inch high guardrail on Highway 74. The speed limit on both roads is 45 miles per hour.

Physical evidence showed defendant had been driving east on Ethanac, but failed to negotiate the curve and instead continued straight, crossing from the eastbound lane across the westbound lane and striking the guardrail on the northwest edge of Ethanac. The impact caused the pickup to go airborne and clear the guardrail. Metal was torn off the pickup and embedded in the guardrail, and the force of the impact tore the metal of

the pickup's front passenger wheel assembly so the hub and tire fell off a few hundred feet down Highway 74. After the pickup landed on Highway 74, it continued about 900 feet east down the roadway, crossing from the outside lane to the inner lane. The bare metal where the wheel and hub had been torn off gouged the concrete of the highway. The three remaining tires blew out, and all fluids drained from the pickup.

Vasquez was ejected from the pickup. He flew about 200 feet from the second point of impact and then struck a post of the guardrail and landed on Highway 74. The impact caused an internal decapitation; his spinal column was fractured, and his spinal cord was cut both at the base of the neck and lower on his back. Eleven of his ribs were broken, his intestines were extensively bruised, he had cuts to his right kidney, his aorta was severed, and a large portion of his right shoulder was missing. The cause of death was major trauma, including the internal decapitation, brain hemorrhaging, and transected aorta. His heart had been beating at the time of the collision. Vasquez had two stab wounds on his chest; however, the impact injuries made it impossible to determine which injuries to the liver and lungs had been caused by the stabbing versus the impact. With immediate medical treatment, the stab wounds were potentially survivable.

Blood in the bed of the pickup indicated he had been in the bed, not the cab, before the collision. A blood smear on the pillar of the passenger side appeared to have been from someone reaching into the pickup from the outside, not from someone seated inside.

An accident reconstruction expert stated his opinion that the pickup had been traveling at more than 70 or 80 miles per hour to achieve the force of impact necessary to cause the damage. There were no tire friction marks on the road, indicating the driver had not braked or tried to make a sharp turn to avoid the guardrail. A video from a nearby business recorded the end portion of the accident and was played for the jury.

In 2002, the car defendant was driving hit a parked car and pushed it into the yard of a residence in Washington State; both cars were severely damaged. Defendant was intoxicated. The arresting officer talked to him about the seriousness of drinking and driving and the danger that someone could be killed. Defendant responded he knew that and should have known better.

Defendant testified in his own behalf. He admitted he had entered a plea of guilty to driving under the influence of alcohol in Washington in 2002 and that he had gone to a victim impact panel (described by Paul Ossorio below). However, defendant never attended the court-ordered eight-hour alcohol education class. His sister had been killed by a driver under the influence of alcohol, and his friend killed herself in a collision when she was driving under the influence of alcohol.

Defendant testified that after the fight at the Zabala house, he got in his pickup to look for Vasquez; Crellin found Vasquez on the ground, apparently unconscious. They put him in the bed of the pickup because defendant thought he might vomit from drinking, and the cold air might sober him up. Defendant did not know Vasquez had been stabbed, and he did not notice wounds or blood when he picked Vasquez up. He

wanted to get out of the area to get away from the fight so he drove past his mother's house and past open businesses to Ethanac Road. Just before he reached Ethanac Road, Vasquez knocked on the rear window and said he was cold. Defendant stopped and helped Vasquez get into the passenger side. Defendant still did not know Vasquez had been hurt; Vasquez walked to the passenger side and climbed into the cab on his own.

Just before they reached the intersection of Murrieta and Ethanac, Vasquez said he had been stabbed and pointed to his stomach. Defendant saw an open wound and a lot of blood, and he decided to take Vasquez to a hospital as quickly as he could. He did not feel "buzzed," and it did not occur to him that he would crash or that anyone could get killed. Just before he reached the curve on Ethanac, he looked over and saw that Vasquez's eyes were rolled back and his mouth was open. Defendant thought Vasquez was dying, and he took his eyes off the road while driving to hit Vasquez on the chest to revive him. He then heard a loud boom. The crash was a blur, and he thought he had a flat tire.

He did not look over at Vasquez, but drove to the side of the road, got out, and walked around the pickup and saw that all his tires were flat; he did not notice the front wheel was missing. He then looked in the cab and saw that Vasquez was gone. He walked around for several minutes looking for Vasquez, drank a beer to calm himself down, and then walked to the market on Highway 74 to call for help.

He knew it was dangerous to drink and drive, but he was not thinking about it when he drove Vasquez away. He had not planned to drive after leaving the Zabala house because he lived only a few houses away.

Defendant was convicted of second degree murder (Pen. Code, § 187; count 1) and vehicular manslaughter (Pen. Code, § 191.5, subd. (a); count 2). The trial court sentenced him to 15 years to life on count 1 and stayed sentence on count 2 under Penal Code section 654.

Additional facts are set forth in the discussion of the issues to which they pertain.

### III. DISCUSSION

#### **A. Admission of Testimony About the Emotional Effect of the Death of a Witness's Family Member**

Defendant contends the trial court erred in admitting irrelevant and inflammatory testimony about the emotional effect of the death of a witness's family member in a drunk driving accident to show defendant's knowledge of the life-threatening nature of his conduct.

##### *1. Additional Background*

Defendant was convicted of driving under the influence in 2002 in the State of Washington. He was ordered to go to an educational program on drinking and driving, but he never attended it. Washington also requires that persons convicted of driving under the influence must attend victim-impact panels. Each panel has at least three panelists who are victims who have been injured or are immediate family members of

victims killed or injured by drunk drivers, and the panels last about an hour and a half. The purpose of the panels is to convey the impact of drunk driving on those whose lives have been personally affected.

Paul Ossorio testified that after his brother was killed in 1992 by a drunk driver, he and other family members administered victim-impact panels in Washington. After defendant's 2002 driving under the influence conviction, he attended a panel administered by the Ossorio family. Ossorio's entire testimony, including cross-examination, covered 26 pages of the reporter's transcript. For the most part, Ossorio testified about the victim-impact panels in general, including the background of the program. With regard to his personal experience, Ossorio testified that he liked to start off the panels by telling the attendees that "they should feel encouraged that they are there" and they "shouldn't feel guilty and that they should be open-minded and that we aren't going to chastise them or be condescending, and we really do hope that they take the information that we provide them in the form of testimony and use it to create a better future for themselves and for our community. [¶] Because the things that I say to them, it obviously can't take away my pain or the fact that my brother's dead. But I do believe that by sharing it, they can make a better choice in the future, which, in turn, would make our community safer. [¶] I talk about how my brother was killed. He was struck—killed by a drunk driver on December 23rd, 1992. And the circumstances surrounding his death, they were . . . particularly tragic because he didn't die on impact. It took him over four and a half hours to die, and the injuries that he suffered, and I go—typically go into

detail about that aspect. But he . . . suffered tremendously, and it was very painful for us. [¶] We were all able to get to the hospital. [Ossorio's brothers] . . . got there, and they were able to say 'Goodbye' to him. And myself and my mom, we didn't make it in time. And so he died by the time we had gotten there. And this was December 23rd. So, you know, it was Christmas. [¶] And so, you know, the other things I talk about is the—how it's surreal, you know. Like Christmas now isn't like it is for other folks because we . . . tend to think of Christmas as our time that Todd died, and we—I talk about how we go visit him at his grave and just emphasize, you know, that really, that one person could have made a different choice. And if that person had chosen to do something different, then all the pain in my family's life and all the years would be gone from our . . . lives. And that's powerful. [¶] It's because . . . they are not there to see all of these moments that I talk about. They are not there to see us cry. They are not there to see us stand over his grave, but they certainly relate on the fact of family.”

## 2. *Analysis*

Defendant was charged in count 1 with second degree implied malice murder. That crime requires proof that defendant personally and actually knew that death or great bodily injury is a natural consequence of driving under the influence and that he acted with conscious disregard for human life. (*People v. Watson* (1981) 30 Cal.3d 290, 296-297, 300.) Thus, a defendant's prior experiences, including prior convictions and attendance at mandatory educational programs, are often used to show his actual knowledge of the dangers of driving under the influence. (See, e.g., *People v. David*

(1991) 230 Cal.App.3d 1109, 1112 [defendant’s attendance at a mandatory education program about the risk of driving under the influence showed implied malice]; *People v. Brogna* (1988) 202 Cal.App.3d 700, 707 [attendance at alcohol education programs following prior convictions could give rise to an inference of defendant’s subjective awareness of the dangers of drunk driving].) Ossorio’s testimony was therefore highly probative on the issues of defendant’s actual knowledge of the dangers to human life of drunk driving and his conscious disregard for human life. (See *People v. Murray* (1990) 225 Cal.App.3d 734, 744-745 [traffic school instructors’ testimony describing the course content was admissible].)

Evidence may not be excluded merely because it is prejudicial; rather, evidence is inadmissible under Evidence Code section 352 only when its probability of undue prejudice outweighs its probative value. Evidence is “unduly prejudicial” when it “. . . tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues. . . .” [Citation.]” (*People v. Samuels* (2005) 36 Cal.4th 96, 124.) Here, the challenged testimony, even if emotional, was highly probative on the primary issue at the trial: defendant’s subjective mental state when he chose to drive after drinking. We therefore conclude the trial court did not abuse its discretion in admitting Ossorio’s testimony.

#### **B. Assistance of Counsel**

Defendant contends, in the alternative, his counsel provided ineffective assistance by failing to object to Ossorio’s testimony.

To establish ineffective assistance of counsel, a defendant must show “both that his counsel’s performance was deficient when measured against the standard of a reasonably competent attorney,” (*People v. Lewis* (2001) 25 Cal.4th 610, 674) and that there was a reasonable likelihood the outcome of the trial would have been more favorable but for counsel’s deficient performance (*People v. Williams* (2006) 40 Cal.4th 287, 304). In evaluating counsel’s performance, we “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ““might be considered sound trial strategy” [Citation.]’ [Citation.]” (*In re Valdez* (2010) 49 Cal.4th 715, 730.) Our Supreme Court has stated that “[t]he decision whether to object to the admission of evidence is ‘inherently tactical,’ and a failure to object will rarely reflect deficient performance by counsel. [Citation.]” (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1335.) Because we have concluded there was no error in admitting the disputed evidence, we conclude defendant has failed to establish ineffective assistance in his counsel’s failure to object to that evidence.

### **C. Prosecutorial Misconduct**

Defendant contends the prosecutor committed misconduct by appealing to the passion and prejudice of the jury.

#### *1. Additional Background*

The prosecutor began her argument in the second trial as follows: “We live in a culture, we live in a society where this type of behavior is not acceptable. It’s wrong, It’s

wrong. [¶] The law is created in such a way so that we can live as a civilized society. Right? We have traffic laws . . . in order to save lives, to protect lives, and so that we can live and work and be around one another in a civilized manner. . . . We have these laws in effect to protect one another and to protect ourselves. [¶] . . . [¶] But we as a society trust the laws and we trust those regulations and hope that others will follow them as well. . . . [¶] That's why this case is so important. . . . And we as a culture, we as a community live and abide by these laws all day, every day. Whether you think about them consciously or subconsciously they are engrained in our minds.”

She further argued: “As a society . . . we have decided that people who drink and drive are going to be culpable for . . . their conduct. Right? So if [Vasquez] would have, in fact, not have been in this state of distress that he would have been in and this man having his prior experience, having his prior knowledge, he still could potentially be charged with murder. And rightfully so as you look at the instructions, okay.

“And we want as a society for people to be held accountable for the things that they have done. And we want people to make the right choices. As we get behind our cars to drive home, as we get in the cars to drive to the grocery store, we can know and be reassured that someone else isn't just going to disregard what we've created as a community and take someone's life like that.

“Because driving a vehicle . . . and until maybe you've gotten into a collision, it's a very dangerous thing. And you may not realize it until you're actually struck and you realize wow, someone could get hurt very easily, very quickly.

“This case, ladies and gentlemen, isn’t just about [defendant]. And I want to show you a quote, [‘]Injustice anywhere is a threat to justice everywhere. Whatever affects one directly affects us all indirectly.[’]

“This is one of my favorite quotes as a prosecutor. And I think it’s so relatable in this particular case. Because every day, each and every one of us, everyone in the community, can relate to the facts of this case when it deals with someone who’s been drinking and driving. It happens to everyone. It’s not only with one economic— socioeconomic group or individual. It doesn’t affect only one race. It affects everybody all day, every day. And that’s why you’re here now. Right? To evaluate the case as it’s been presented to you.

“And this case isn’t just about [defendant]. This case is about seeking justice for [Vasquez] as well. And if you think about the things that were done to this man on that night and you think the way he was treated, you can appreciate the value of our laws. You can appreciate the values of our community and the regulations that we’ve created.”

Finally, the prosecutor argued in rebuttal, “We as a community do not want people who are drunk driving other injured individuals to the hospital.” Defense counsel did not object to the argument.

## *2. Forfeiture*

The People argue that defendant forfeited the argument because his counsel never objected in the trial court and did not request an admonishment. Defendants must raise a timely objection when prosecutorial misconduct occurs and must request an

admonishment to the jury to ignore the misconduct, or the claim of error is forfeited. (*People v. Young* (2005) 34 Cal.4th 1149, 1184-1185.) Because defendant argues, in the alternative, that his counsel provided ineffective assistance by failing to object to the prosecutor's argument and because the People have addressed the issue on the merits, we will also reach the merits of the issue.

### 3. *Standard of Review*

“We review the prosecutor's remarks to determine whether there is a reasonable likelihood that the jury misconstrued or misapplied them. [Citation.] Also, we do not view the prosecutor's remarks in isolation but rather ‘in the context of the argument as a whole.’ [Citation.]” (*People v. Adanandus* (2007) 157 Cal.App.4th 496, 512.)

### 4. *Analysis*

Under the federal Constitution, a prosecutor commits misconduct if he uses deceptive or reprehensible methods to persuade the jury, and such actions infect the trial with such unfairness as to make the defendant's conviction a denial of due process. (*People v. Gonzales* (2011) 51 Cal.4th 894, 920.) Under state law, a prosecutor commits misconduct if he uses such methods even if they do not result in a fundamentally unfair trial. (*Ibid.*)

In *People v. Adanandus*, in which the defendant was convicted of murder based on a shooting from a vehicle, the court found no impropriety in the prosecutor's comment that the jury could restore law and order to the community. (*People v. Adanandus, supra*, 157 Cal.App.4th at p. 511.) The court explained, “[I]t ‘is permissible to comment on the

serious and increasing menace of criminal conduct and the necessity of a strong sense of duty on the part of the jurors. [Citation.] . . . The prosecution’s references to the idea of restoring law and order to the community were an appeal for the jury to take its duty seriously, rather than efforts to incite the jury against defendant.” (*Id.* at p. 513.) Similarly, in *People v. Wash* (1993) 6 Cal.4th 215, 261-262, the court found no misconduct in the prosecutor’s argument to the jury “‘to make a statement,’ to do ‘the right thing,’ and to restore ‘confidence’ in the criminal justice system . . . .” (Footnote omitted.)

Defendant relies primarily on *United States v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142 (*Weatherspoon*), in which the prosecutor argued, “‘Convicting Mr. Weatherspoon is gonna make you comfortable knowing there’s not convicted felons on the street with loaded handguns, that there’s not convicted felons carrying around semiautomatic . . . .’” (*Id.* at p. 1149.) The court sustained the defendant’s objection to the line of argument, but the prosecutor nonetheless reiterated “‘that ‘you can feel comfortable knowing there’s a convicted felon that’s been found guilty of possessing a loaded firearm, a fully loaded semiautomatic weapon.’” (*Ibid.*) The prosecutor further argued, “‘the law of being a felon in possession of a firearm, that protects a lot of people out there too.’” (*Ibid.*) Again, the court sustained a defense objection, but the prosecutor repeated the argument that “‘finding this man guilty is gonna protect other individuals in this community.’” (*Ibid.*) On appeal, the court found reversible error because of the foregoing argument and because the prosecutor had further committed misconduct by

vouching for the credibility of law enforcement witnesses. (*Id.* at pp. 1146-1148.) The court explained, ““A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society’s woes is far too heavy a burden for the individual criminal defendant to bear.”” (*Id.* at p. 1149.) The court found that the prosecutor’s argument had impermissibly and prejudicially urged the jury to convict the defendant to ameliorate social problems. (*Id.* at pp. 1146-1148.) Thus, the court reversed the defendant’s conviction for being a felon in possession of a firearm.

*Weatherspoon* is distinguishable on several bases. First, the prosecutor’s argument in that case appealed to the prejudice of the jury because it repeatedly emphasized the defendant’s status as a prior felon. Second, the error was compounded by additional misconduct of vouching for the credibility of witnesses and of continuing with a line of argument after the trial court sustained objections. Third, the court observed that “the case against [the defendant] was not particularly strong and depended in large measure on witness credibility.” (*Weatherspoon, supra*, 410 F.3d at p. 1151.) Finally, the prosecutor’s remarks in *Weatherspoon* were not even similar to the argument defendant challenges. We conclude there was no prosecutorial misconduct in argument.

Because we have concluded the prosecutor did not commit misconduct, we therefore will not assume counsel was ineffective for failing to object. (See *People v. Mesa* (2006) 144 Cal.App.4th 1000, 1007-1008 [on direct appeal “a conviction will be reversed for ineffective assistance of counsel only when the record demonstrates there could have been no rational tactical purpose for counsel’s challenged act or omission”].) Here, defense counsel could reasonably have concluded that the prosecutor’s argument did not constitute misconduct, and an objection would not only have been overruled but also would have called further attention to the argument. We therefore reject defendant’s claim of ineffective assistance of counsel.

#### **D. Admission of a Photograph of the Victim**

Defendant contends the trial court abused its discretion by admitting into evidence a photograph of the victim while he was alive..

##### *1. Additional Background*

Defendant moved in limine under Evidence Code sections 350 and 352 to exclude photographs of Vasquez before he was killed. The trial court limited the prosecution to introducing a single photograph that showed only Vasquez’s face for identification; Vasquez was smiling in the photograph. Defense counsel argued that the photograph had little relevance and presented a distorted picture of the victim because it did not depict his tattoos. At trial, Reid identified the photograph as showing how Vasquez had looked in December 2009.

## 2. *Standard of Review*

We review the trial court's admission of evidence over relevance and undue prejudice objections under the deferential abuse of discretion standard. (*People v. Carrington* (2009) 47 Cal.4th 145, 195.)

## 3. *Analysis*

Evidence may be unduly prejudicial if it ““uniquely tends to evoke an emotional bias against a party as an individual,”” or if it may cause the jury to ““prejudg[e] a person or cause on the basis of extraneous factors.”” (*People v. Cowan* (2010) 50 Cal.4th 401, 475.) A photograph of a victim is inadmissible if the sole purpose for admitting it is to garner sympathy for the victim. (*People v. Kelly* (1990) 51 Cal.3d 931, 963-964.) However, if the photograph is relevant for other proper purposes, its potential for garnering sympathy does not render it inadmissible. (*People v. Cowan, supra*, at p. 477.) Here, the photograph was proffered for the purpose of identifying the victim.

Our Supreme Court has repeatedly upheld the admission of photographs of victims for purposes of identification, among other legitimate purposes. (E.g., *People v. Osband* (1996) 13 Cal.4th 622, 676-677 [a photograph of the victim on her birthday, with Christmas presents in the background, was properly admitted for identification, even though the defendant offered to stipulate to identity]; *People v. Tully* (2012) 54 Cal.4th 952, 1020 [a photograph of the victim, a nurse, in her work clothes was properly admitted for identification]; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1230 [a photograph of two victims—“a harmless- and congenial-appearing elderly couple”—were properly admitted

for identification even when the defendant offered to stipulate to their identity]; *People v. Martinez* (2003) 31 Cal.4th 673, 692 [two photographs of the victim with some relatives were properly admitted for identification].)

Defendant argues the prosecution could have used “far more relevant and timely” images from the video the night of the accident showing defendant at the bar or from Buchanan’s surveillance video. However, defendant does not contend that he requested at trial that such an image be used in lieu of the smiling photograph. Moreover, the People point out that “those videos did not have sufficient clarity or detail for most people to identify the victim.”

We conclude the photograph was relevant and admissible for identification, and the trial court did not abuse its discretion in allowing it into evidence.

#### **E. Limitation of Cross-examination of Expert Witness**

Defendant contends the court denied him his constitutional rights by limiting cross-examination of a prosecution expert witness.

##### *1. Additional Background*

Defendant’s blood alcohol level was measured at 0.19 percent at 2:41 a.m. Maureen Black, a toxicologist, testified as to her expert opinion that defendant’s likely blood alcohol level at 11:00 p.m. had been 0.24 percent. To reach that conclusion, Black assumed all the alcohol defendant drank had been fully absorbed. She testified that alcohol elimination rates vary from 0.010 percent to as high as 0.030 percent per hour for experienced users, but she always uses an assumed, standard elimination rate of 0.017

percent per hour, which is a rate suitable for moderate social drinkers. Other factors, including the amount and type of food in one's stomach, affect an individual's absorption rate—alcohol is absorbed more quickly on an empty stomach.

Defense counsel posed a hypothetical based on the following scenario: At 4:15 p.m., a man drank two 32-ounce beers and ate three cheese enchiladas. At 8:40 p.m., he had one and one-half glasses of beer. At 10:10 p.m., he drank five 12-ounce beers. His blood alcohol content at 2:41 p.m. was 0.190 percent. Black testified the man's blood alcohol content at 10:40 p.m. would have been 0.200 percent, based on the standard elimination rate.

Later, out of the presence of the jury, defense counsel argued that he had wanted to ask Black a hypothetical question about the range of blood alcohol content based on different elimination rates, and the trial court's limitation of testimony to average elimination rates was a denial of a fair trial. Although counsel did not make an offer of proof, he stated, "I think there's some relevance if not just psychological, the difference between [defendant] potentially being .11, .12—.12 at the time of the accident versus a .20. Leave it at that." The trial court explained it had required the defense to use only standard absorption rates because during a break, the witness said she could not use defense numbers in her calculation.

## *2. Standard of Review*

““[N]ot every restriction on a defendant's desired method of cross-examination is a constitutional violation,”” and ““the trial court retains wide latitude in restricting cross-

examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance.” [Citations.] . . . Under Evidence Code section 352, the trial court “in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . necessitate undue consumption of time . . . .” (*People v. Elliott* (2012) 53 Cal.4th 535, 579-580.)

### 3. Analysis

In *People v. Fields* (2009) 175 Cal.App.4th 1001, the defendant’s civil commitment under the Sexually Violent Predator’s Act was extended. He appealed, contending the trial court erred in preventing him from cross-examining the prosecution’s expert witnesses about “the extent to which they did or did not consider the results of the polygraph examination that was administered” to the defendant in reaching their opinions he would likely engage in sexually violent predatory behavior if released. (*People v. Fields, supra*, at p. 1015-1016, 1018.) The court found it unnecessary to determine whether the trial court had erred because it concluded any error was harmless. (*Id.* at p. 1018.) The court explained that error in excluding evidence requires reversal only when the error caused a miscarriage of justice such that it is reasonably probable a result more favorable to the defendant would have been reached in the absence of the error. (*Ibid.*, citing *People v. Richardson* (2008) 43 Cal.4th 959, 1001.)

As in *Fields*, any error in restricting cross-examination of the expert witness was harmless. Black testified that all people are unable to safely drive with a blood alcohol content of 0.080 percent, and many people are impaired with a blood alcohol content of

between 0.050 and 0.080 percent. Thus, even if defendant had been able to elicit a blood alcohol level of 0.110 or 0.120 percent from Black, he would still have been impaired. Moreover, he admitted he drank two 32- or 40-ounce beers between approximately 4:30 and 5:30 p.m. He drank two or three glasses from a pitcher of beer at the bar between about 8:30 and 9:00 p.m. He drank about five beers at the Zabala house between 9:30 p.m. and approximately 11:00 p.m. He testified he knew it is dangerous and illegal to drink and drive and that driving under the influence can cause death. He had a prior conviction for driving under the influence and had attended a victim impact panel. Moreover, his own sister and a friend had been killed in drunk driving accidents. The evidence he acted in conscious disregard of human life was overwhelming.

#### **F. Cumulative Error**

Defendant contends the cumulative effect of the errors was prejudicial. We conclude however, that whether considered singly or cumulatively, any assumed errors were harmless. (See *People v. Seaton* (2001) 26 Cal.4th 598, 691, 692.)

#### **G. Fees Under Government Code Section 70373**

Defendant contends the trial court exceeded its jurisdiction in imposing \$120 in fees under Government Code section 70373. The People concede error in the imposition of fees, and we agree with that concession.

Defendant was convicted of second degree murder (count 1), vehicular manslaughter (count 2) and misdemeanor driving without a license (count 5). Penal Code section 1465.8, subdivision (a)(1) requires a fee of \$40 for every conviction of a criminal

offense, and Government Code section 70373, subdivision (a)(1) requires a fee of \$30 for each conviction of a misdemeanor or felony. Thus, the trial court should have imposed a fee of \$120 under Penal Code section 1465.8 and a fee of \$90 under Government Code section 70373. However, the reporter's transcript and minute order for the sentencing hearing and the abstract of judgment reflect that the amounts were switched. We will therefore order the error corrected. (*People v. Smith* (2001) 24 Cal.4th 849, 853.)

#### IV. DISPOSITION

The minute order for the sentencing hearing shall be corrected to reflect a \$120 fee under Penal Code section 1465.8, subdivision (a)(1), and a \$90 fee under Government Code section 70373, subdivision (a)(1), and the abstract of judgment should be amended accordingly. The amended abstract of judgment shall be forwarded to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

Acting P. J.

We concur:

MCKINSTER

J.

CODRINGTON

J.