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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.

DONNIE RAY COLE et al.,

Defendants and Appellants.

E055228

(Super.Ct.No. BAF1100297)

OPINION

APPEAL from the Superior Court of Riverside County. Edward D. Webster, Judge. Affirmed.

Jean Ballentine, under appointment by the Court of Appeal, for Defendant and Appellant Donnie Ray Cole.

Richard de la Sota, under appointment by the Court of Appeal, for Defendant and Appellant Tony Eugene Williams.

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

This case involves two individuals, defendants and appellants Donnie Ray Cole and Tony Eugene Williams (collectively “defendants”). A jury found Cole guilty of two counts of robbery. (Pen. Code, § 211.)<sup>1</sup> Cole admitted suffering three prior convictions for which he served prison terms. (§ 667.5, subd. (b).) The trial court sentenced Cole to prison for a term of nine years. The jury found Williams guilty of two counts of robbery (§ 211) and one count of being a felon in possession of a firearm (§ 12021, subd. (a)(1)). In regard to both of Williams’s robbery convictions, the jury found true the enhancement that Williams personally used a firearm during the commission of the felonies. (§ 12022.53, subd. (b).) Williams admitted suffering three prior serious felony convictions and three prior strike convictions (§ 667, subds. (a), (c) & (e)(2)(A).) The trial court sentenced Williams to prison for a determinate term of 50 years and an indeterminate term of 50 years to life.

Cole raises four issues on appeal. First, Cole asserts the trial court erred by permitting a law enforcement officer to testify that, in his opinion, Cole was guilty. Second, Cole contends the prosecutor committed misconduct by misstating the reasonable doubt standard during closing argument. Third, Cole claims his trial counsel was ineffective for failing to object to the prosecutor’s alleged misconduct during closing argument. Fourth, Cole asserts the cumulative effect of the foregoing errors resulted in a denial of his right to a fair trial.

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<sup>1</sup> All subsequent statutory references will be to the Penal Code unless indicated.

Williams raises two issues on appeal. First, Williams asserts the prosecutor committed misconduct by misstating the reasonable doubt standard during closing argument. Second, Williams contends his trial counsel was ineffective for failing to object to the prosecutor's alleged misconduct during closing argument. We affirm the judgments.

### **FACTUAL AND PROCEDURAL HISTORY**

On May 15, 2011, at approximately 2:30 a.m., victim1 arrived at Casino Morongo. Victim1 parked her car in a casino parking lot. After victim1 stopped her car, a man appeared at the driver's door of the car. The man opened the driver's door, but blocked victim1's ability to exit the car. The man yelled at victim1, telling her to give him her purse. Victim1 asked the man not to take her purse. At that point, the man "pulled out a gun and he told [victim1] that if [she] didn't hand over [her] purse he would kill [her]." Victim1 physically struggled with the man over her purse, which resulted in victim1 exiting the car. Eventually, victim1 realized the man might shoot her, so she let go of the purse and the man "took off" with it. Victim1's purse contained \$380, her identification, her credit card, and the pink slips for her cars.

The man ran to a white van and entered the van. Victim1 ran into the casino and yelled that she had been robbed. Casino security guards called the sheriff. Victim1 described the robber as a Black man, with a medium build, whose hair was braided. Victim1 estimated the robber was "in his late 30s." Victim1 was unable to identify anyone at trial as the robber.

Also on May 15, 2011, at approximately 2:30 a.m., victim2 exited Casino Morongo and went to the parking lot to retrieve \$30 from her car. Victim2 took the money from the trunk of her car and closed the trunk, then, as she turned around she saw a man pointing a gun at her. The man demanded victim2's money, so she gave it to him. Victim2 began walking away. The man told victim2 that if she turned around he would shoot her, so she continued walking. Victim2 went inside the casino and told a security guard she was robbed.

Victim2 described the robber as a Black man with a medium build. Victim2 estimated the robber was in his "mid-20s." Victim2 was unable to identify anyone at trial as the robber.

Riverside County Sheriff's Investigator Bonaime investigated the two robberies. Bonaime reviewed the surveillance photographs and videos from the casino in order to determine the van's license plate number. The surveillance video was played for the jury. The video reflected a white van with a green fender entering the casino's parking structure on May 14, 2011, at approximately 6:14 p.m. The driver parked the van at 6:16 p.m.; two men exited the van and walked into the casino. The two men were Cole and Williams.

The surveillance footage reflected defendants exited the casino together at approximately 1:45 a.m. on May 15. Defendants returned to the van. At 1:49 a.m., the driver backed the van out of its parking place and drove through the parking structure. Bonaimé was able to read the van's license plate number due to the angle of the van while it moved through the structure. In court, the image of the license plate was too blurry to read. However, Bonaimé originally viewed the video on the casino's equipment, which had better image quality than the equipment in the trial court. Bonaimé read the van's license plate number from his report.

At 1:51 a.m., the driver parked the van in the parking structure. At 2:05 a.m. the driver moved the van out of the parking place, exited the parking structure, and went to a second parking lot at the casino. The van stopped in a parking stall. At 2:22 a.m., a man can be seen moving from the area where the van was located and walking toward the parking structure where the van had been originally parked. The man was wearing the same shoes Williams had been wearing when he exited the casino earlier that night.

At 2:24 a.m., the man pulled a gun from his waistband, and then disappeared from the camera's coverage area. At 2:25 a.m., the man appeared on the surveillance footage again. The man exited the parking structure and walked toward the van. At the same time, a car entered the parking lot and parked in a parking stall. A man came "around the front of the van" and went to the driver's door of the car that just parked. At 2:27 a.m., a person can be seen running across the parking lot, while victim1 can be seen running toward the casino. At that point, the headlights of the white van turn on,

and the driver moves the van toward the person running through the parking lot. The van exited the casino property and drove onto Interstate 10, toward Moreno Valley.

Bonaime found the registered owner of the van was Irene Ward; she resided in Moreno Valley. Bonaime went to Ward's home and saw the white van with the green fender and license plate number matching the van in the surveillance video. Bonaime went to Ward's apartment. Cole was inside the apartment. Bonaime searched the apartment. Bonaime found shoes and a shirt matching those Cole was wearing when exiting the casino.

Cole and Ward were romantically involved, and Cole lived with Ward. Williams's wife was Ward's friend; defendants met and became friends. Defendants "look[ed] for jobs" together. Ward lent her van to Cole on May 14 at approximately 6:00 p.m. Cole returned home the following morning at approximately 8:00. When Cole returned with the van, he gave Ward \$120 for groceries. Cole did not have a regular job, but sometimes did "odd jobs here and there."

A couple of days after searching Cole's apartment, Bonaime searched Williams's apartment. Bonaime found shoes matching the shoes Williams wore at the casino.

## **DISCUSSION**

### **A. CLOSING ARGUMENT**

#### **1. *PROCEDURAL HISTORY***

##### **a) Voir Dire**

During voir dire, the prosecutor asked the jury to imagine a parent whose child asks for piece of cake and the parent tells the child to wait for the cake until after dinner.

The parent later enters the kitchen to find a piece of the cake missing, crumbs leading from the kitchen to the child's bedroom, and frosting covering the child's face. The prosecutor asked jurors if they could conclude the child ate the piece of cake. A couple of prospective jurors said they would want more evidence. The prosecutor explained that sometimes there is not direct evidence presented at a trial, for example, a murder victim never testifies but juries convict people of murder.

The prosecutor asked, "Theoretically, would anybody have a problem convicting someone of a crime, assuming that they thought that they were guilty beyond a reasonable doubt, if the victim flat out did not testify?" Prospective Juror No. 2 raised his/her hand. The prosecutor asked, "Assuming you felt strongly you had an abiding conviction that there was guilt, even if there was no victim, you could probably convict; is that fair?" Prospective Juror No. 2 responded, "It's possible."

b) Closing Argument

During closing argument, the prosecutor made the following statements: "What are the chances that all of these factors are lining up to these two guys, and yet, it's not them? Astronomical. Is it possible? Is it physically possible in the universe? Yes, it is absolutely possible, but that's not the question, which leads me into my final section, reasonable doubt.

"The question is not whether it's possible. If someone's voting not guilty because it's possible, that is wrong. That is against the law. The question is, what's reasonable? What's the reasonable explanation for the evidence? Reasonable doubt is kind of a—it's a topic that gets more confusing the more people talk about it. The law

says it's an abiding conviction that the charge is true. So what I like to do is I like to talk about what reasonable doubt is not, because I think that makes it a little bit easier.

“First of all, it's not beyond all possible doubt, like I just said. The law tells you there are an infinite number of possibilities, but that's not the question. The question is, what is a reasonable possibility? The little kid with cake on his face—we talked about him during jury selection. There are an infinite number of possibilities to explain that situation I gave you last week. Maybe he tripped and fell face first into the cake. Maybe someone broke [in], took the cake, and smeared it on his face. We [can] think up any number of things. Do any of those make sense? No. What makes sense is that he ate the cake and he got busted.

“Same thing in this case. There are all kinds of possibilities, but what makes sense? Given the evidence that we have, what makes sense? It was the defendants who committed this robbery. It was Mr. Cole who was driving the van. Mr. Williams had the gun. That is what makes sense in this case.

“Sometimes we hear this: Well, we knew he was guilty but we wanted more evidence. Everyone always wants more evidence. I'm sure I want more evidence. I'm sure the defense attorneys want more evidence. Everyone wants more evidence. That's not the question. Just like there's always another possible explanation, there's always some other thing you might want. The question is, the evidence that we actually have, is it enough to convict? That answer is yes. Yes, it is. The only reasonable explanation for this evidence is that these two are guilty.”

c) Juror Question

After closing arguments were finished, and after the court gave instructions to the jury, but before the jury was sworn, Juror No. 12 submitted questions that the trial court addressed. The following dialogue occurred:

“The Court: [Juror No. 12], your question, ‘Is the kid with the cake a good example of proof beyond a reasonable doubt?’ Remember that what the attorneys say is argument. It is not evidence. You have the evidence and you have the law. It’s up to you to figure it out. If you have questions that I can answer, I will do so. The area of reasonable doubt is one that judges are specifically told not to get into. The problem is that when you start talking about reasonable things, you start using words that are just like reasonable and we really don’t add much to it. So if you ask me anything more about reasonable doubt, all I say is, ‘You have the instruction.’ If you have a specific question, it’s up to you, but I will make no comment about any further examples given by counsel. Fair enough?

“[Juror No. 12]: Yeah.

“The Court: Second is, ‘Does the law require us to include or exclude reasonable explanations not based o[n] the evidence?’ The case is to be decided on the evidence and the law that’s given to you by the Court. In fact, that’s what your oath is. So again, you have to take that for what it’s worth, and you have the other jurors to talk [with] as to what reasonable inferences are and what are not reasonable inferences, but again, that’s typically a jury task.

“[Juror No. 12]: So we get to decide what to include and exclude?

“The Court: Well, you are told what the evidence is. You are told about making reasonable inferences from the evidence. Again, you shouldn’t look at this process as being an alien enterprise. We’re trying to have you go through a common-sense process that, essentially, is consistent with your experiences in life. Does that help?”

“[Juror No. 12]: Yeah, thank you.”

## 2. ANALYSIS

### a) Contentions

Cole asserts the prosecutor committed misconduct by telling the jury it could reach a verdict based on a finding that Cole’s alleged criminal conduct was a reasonable possibility. Williams contends the prosecutor committed misconduct by “conflat[ing] the concepts of circumstantial evidence and proof beyond a reasonable doubt.”

Williams faults the prosecutor for arguing that the jury could find Williams guilty “based upon what made sense, or what the most reasonable explanation of the evidence was, rather than on proof beyond a reasonable doubt.” The People contend defendants forfeited the prosecutorial misconduct issue for appeal by failing to object at the trial court. We agree defendants forfeited this issue for appeal. In examining the merits, we conclude the prosecutor did not commit misconduct.

### b) Forfeiture

“[A] claim of prosecutorial misconduct is not preserved for appeal if defendant fails to object and seek an admonition if an objection and jury admonition would have cured the injury. [Citation.]” (*People v. Crew* (2003) 31 Cal.4th 822, 840.) The record reflects defendant did not object to the reasonable doubt statements made by the

prosecutor. Further, the record shows that, during trial, the trial court sustained some of defense counsel’s objections. Thus, it appears the trial court gave defense counsel a positive response to prior objections. As a result, there is nothing indicating that an objection would have been fruitless. Further, there is nothing indicating an admonition would not have cured the problem, especially in light of the juror’s question regarding reasonable doubt—an admonition likely would have cured any perceived ills because at least one juror was seeking more information.

In sum, defendants should not be raising this claim of prosecutorial misconduct for the first time on appeal. The time to raise it was during closing arguments, and the place to raise it was the trial court. As a result, we conclude defendants have forfeited this issue for appeal. Nevertheless, we will address the merits of defendants’ contention because it is easily resolved.

c) Merits

“It is misconduct for a prosecutor to misstate the law during argument. [Citation.] This is particularly so when misstatement attempts ‘to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements. [Citation.]’ [Citation.]” (*People v. Otero* (2012) 210 Cal.App.4th 865, 870-871.) ““When, as here, the point focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained of remarks in an objectionable fashion.’ [Citation.]” (*People v. Thomas* (2012) 53 Cal.4th 771, 797.)

Section 1096 defines reasonable doubt as follows: “It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.” No further information about the definition of reasonable doubt, other than that in section 1096, needs to be given to a jury. (§ 1096a.)

Both defendants find it troublesome that the prosecutor said: “The question is, what is a reasonable possibility?” It appears the prosecutor was trying to explain to the jurors that the conviction could not rest on any speculative possibility, but additionally that the charge also did not need to be proven beyond all possibilities. The prosecutor was not eloquent in making this point; however, it does not appear that the prosecutor misstated the law. Rather, the prosecutor talked and talked, trying to explain to the jury “[W]hat’s reasonable?” In doing so, the prosecutor seems to have fallen into a trap that he himself recognized, which is, “[r]easonable doubt is kind of a—it’s a topic that gets more confusing the more people talk about it.” Unfortunately, the prosecutor did not heed his own warning and continued talking. The prosecutor’s presentation was confusing. The prosecutor said he was going to tell the jury, “what reasonable doubt is not,” because that is an easier way to explain the concept. However, the prosecutor then launched into explaining what reasonable doubt is not while at the same time attempting to discuss the true meaning of reasonable doubt. The prosecutor’s presentation was messy, but when examined it does not contain a misstatement of the law.

When the prosecutor’s statements are considered as a whole, they reflect a proper representation of the law—it is simply a matter of sorting through the statements and considering them holistically. For example, the prosecutor told the jury, “The law says it’s an abiding conviction that the charge is true.” This is a correct statement. The prosecutor also explained, “[I]t’s not beyond all possible doubt . . . .” This is also a correct statement. However, the prosecutor continued speaking and began asking questions such as, “There are all kinds of possibilities, but what makes sense?” If considered in isolation, this question could appear problematic, but it can be inferred from the overall context that the prosecutor understood the law of reasonable doubt and meant, “what makes sense and leaves you with an abiding conviction?” Again, the presentation was messy, but it does not appear to contain a misstatement of the law. Nevertheless, for the sake of thoroughness, because the prosecutor’s closing argument could be considered confusing, we will address the issue of prejudice.

d) Harmless Error

“‘A defendant’s conviction will not be reversed for prosecutorial misconduct’ that violates state law . . . ‘unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.’ [Citation.]” (*People v. Wallace* (2008) 44 Cal.4th 1032, 1071.) Prosecutorial misconduct under federal law requires reversal unless the prosecutor’s error was harmless beyond a reasonable doubt. (*People v. Williams* (2010) 49 Cal.4th 405, 467.) For the sake of caution we will apply the federal standard.

In light of the trial court's instructions to the jury, and the trial court's responses to Juror No. 12's questions, we conclude beyond a reasonable doubt that a result more favorable to defendant would not have been reached in the absence of the prosecutor's comments about reasonable doubt. (See *People v. Williams*, *supra*, 49 Cal.4th at p. 467 ["result more favorable"].) The trial court instructed the jury with CALCRIM No. 200, which provides: "If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." The trial court also instructed the jury on the reasonable doubt standard of proof. (CALCRIM No. 220.) Further, in answering Juror No. 12's question about the prosecutor's "child with the cake" example, the trial court referred the jury back to the reasonable doubt instruction.

We presume the jury obeyed the admonition in CALCRIM No. 200 and disregarded any part of the prosecutor's argument that could have conflicted with the court's instructions on reasonable doubt. (*People v. Stanley* (1995) 10 Cal.4th 764, 836-837.) Defendants do not assert any errors concerning CALCRIM Nos. 200 and 220. Accordingly, it does not appear defendants were prejudiced by the prosecutor's statements concerning reasonable doubt because the jurors received proper instructions from the court and we assume they disregarded any conflicting information from the prosecutor.

Defendants assert the trial court's responses to Juror No. 12's questions compounded the prosecutor's errors related to the reasonable doubt standard. Williams argues Juror No. 12 was confused by the prosecutor's reasonable doubt presentation and the trial court "did not provide any guidance." Cole asserts the trial court should have

responded to Juror No. 12's question with a "resounding 'No.'" We disagree. The trial court referred the jury back to the reasonable doubt instruction, saying, "You have the instruction." Under the law, little else needed to be said about reasonable doubt. (§ 1096a.) Accordingly, we find defendants' arguments to be unpersuasive because the trial court gave an appropriate response.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendants contend their respective trial attorneys were ineffective for failing to object to the prosecutor's comments on reasonable doubt. We disagree.

"To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings. [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003.)

We have concluded *ante*, that the prosecutor did not commit misconduct. Therefore, we conclude defendants' trial attorneys were not ineffective for not raising an objection to the prosecutor's statements. Since there was not misconduct, the defense attorneys could not be expected to raise an objection. Further, as set forth *ante*, prejudice was not suffered due to the prosecutor's statements. The trial court's instructions and answers to Juror No. 12's questions clarified any confusion that may

have been created by the prosecutor's comments. Accordingly, to the extent it could be concluded defense counsel should have objected, ineffective assistance has not been shown because it is not reasonably probable defendants would have obtained a more favorable result.

C. OPINION TESTIMONY

1. *PROCEDURAL HISTORY*

Prior to Bonaime testifying at trial, defendants objected to Bonaime testifying about what he saw on the casino's surveillance video. Defense counsel said, "I believe [Bonaime] is going to give a long narrative of speculation of what he believes the video shows. And I'd like to lodge an objection that the video speaks for itself. It's up for a trier of fact, and not to allow the officer to testify to a narrative."

The prosecutor raised two points in response. First, the prosecutor asserted, "it's important and relevant for the jury to compare Investigator Bonaime's interpretation of the video to what the video actually says." Second, the prosecutor argued, "[T]here are some small details that to a trained officer's eye would become important or significant, but to a lay person's eye, . . . they might not notice or they might go by too quickly. So I think it's worth the jury's time and relevant for them to get those details instead of just leaving them to their own devices."

The trial court reviewed the jury instruction concerning lay witness's opinion testimony. The court stated it would "wait to hear what he testifies" to, but the court offered to read the instruction about lay witness's opinion testimony to the jury prior to Bonaime testifying. Defense counsel responded, "Defense would absolutely be

requesting that the jury be admonished this is not expert testimony, so when the officer is giving his speculation that he sees a gun, and even further that it's Mr. Williams on the actual tape, that this is purely speculation in his opinion testimony." The trial court said, "I'm not going to say that. You can argue that to the jury, but he can explain it and why he thinks that's the case and that's his opinion and you can cross-examine [him] on it."

The trial court stated it would not instruct Bonaime or the prosecutor on how to refer to the people in the videotape. However, the trial court told defense counsel that defense counsel could refer to the person in the videotape "as the gentleman in black." Defense counsel asked the trial court, "Can the Court instruct the officer to refer to him as Mr. Williams and not Theus?"<sup>2</sup> In response to the defense's request, the trial court permitted Bonaime to refer to the people seen on the video as "Williams" and "Cole." Prior to Bonaime testifying, the trial court instructed the jury on the law concerning a lay witness's opinion testimony.

When Bonaime testified, he referred to the two men entering and exiting the casino as "Williams" and "Cole." However, after the men exited the casino, Bonaime no longer used defendants' names. When a person was seen moving away from the van, Bonaime referred to the person as "a dark figure." When a person was seen moving through the parking structure, Bonaime labeled the person "[t]hat same male subject." Bonaime remarked that the "male subject" was wearing the same shoes that

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<sup>2</sup> Theus was one of Williams's aliases.

Williams could be seen wearing earlier in the video, but Bonaime did not conclude Williams was the “male subject.” While testifying about the video recording of the crimes, Bonaime continued referring to the person in the video as “subject” or “person”—not using either defendants’ name.

## 2. ANALYSIS

Cole contends the trial court erred by permitting Bonaime’s testimony to invade the province of the jury, in that Bonaime gave his opinion that Williams was guilty. Williams joins in Cole’s contention. We disagree.

The People do not raise the issue of forfeiture as it concerns this issue. However, on our own, we note the trial court did not render a ruling on the defense’s objection. We raise this issue for the sake of clarifying the exact “ruling” we are reviewing. The trial court told defense counsel, “I think what I’ll do is I’ll just wait to hear what he testifies [to]. If you want, I can read that instruction ahead of time before he testifies.” The trial court did not render a ruling on defendant’s pretestimony objection. By failing to secure a ruling, defendants have forfeited this issue for appeal. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1097.) However, since the court is raising this procedural issue on its own, we will address the substantive merits of the arguments. We seek only to clarify that the trial court did not overrule the defense’s objection.

“A lay witness may testify to an opinion if it is rationally based on the witness’s perception and if it is helpful to a clear understanding of his testimony. (Evid. Code, § 800.)” (*People v. Farnam* (2002) 28 Cal.4th 107, 153.) However, “a witness cannot express an opinion concerning the guilt or innocence of the defendant.” (*People v.*

*Torres* (1995) 33 Cal.App.4th 37, 46-47.) “[O]pinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact[, because] the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt.” (*Id.* at p. 47.) A trial court’s ruling concerning admitting a lay witness’s opinion testimony is reviewed for an abuse of discretion. (*People v. Thornton* (2007) 41 Cal.4th 391, 429.)

Bonaime did not testify that in his opinion Williams was guilty, or that in his opinion Williams was the person committing the robbery or holding the gun. Rather, Bonaime stated Williams could be seen exiting the casino, and the person in the garage committing crimes was wearing clothes similar to those worn by Williams when Williams was at the casino earlier in the night. Given that Bonaime did not give an opinion on Williams’s guilt or innocence, we conclude the trial court acted reasonably and did not abuse its discretion.

Cole goes on to assert the trial court erred because “the jury could judge for itself whether the hair and clothing of the subject in the videotape matched Williams, and could judge for itself whether the video showed any evidence of a suspect with a gun.” Therefore, Cole asserts Bonaime’s opinions “invaded the province of the jury.”

Cole’s argument is interesting, but we are left in a quandary of how to address it. The true and primary problem here appears to be that Bonaime was permitted to testify about the contents of the recording in apparent violation of the secondary evidence rule, i.e., Bonaime should not have been testifying to the contents of the recording. (Evid. Code, § 1523.) Since this objection was not raised below, it has been forfeited. (*People*

*v. Blacksher* (2011) 52 Cal.4th 769, 797; *People v Tully* (2012) 54 Cal.4th 952, 1061.)

Exacerbating this problem is the fact that a ruling was not secured on defendants' pretestimony objection. Further complicating this matter is the fact that Bonaime attempted to testify that when the man in the video recording produced a gun and disappeared from view, the man was in the area where victim2 had been robbed. However, defense counsel objected that Bonaime was giving an improper conclusion and the trial court *sustained* the objection and *granted* a motion to strike.

Thus, while Cole may be correct that Bonaime's testimony was problematic because he was testifying about the contents of a recording, we cannot delve into this issue because the trial court never rendered a ruling on the matter in a manner unfavorable to defendants. The trial court delayed its ruling, and then when the objection was raised about improper conclusion testimony the trial court ruled in defendants' favor. We cannot find error on the trial court's part where defendants abandoned their objection (opinion testimony) or never raised an objection (secondary evidence). Thus, we find Cole's argument to be unpersuasive. (*People v. Partida* (2005) 37 Cal.4th 428, 446 [forfeiture].)

D. CUMULATIVE ERROR

Cole asserts the foregoing alleged errors combined to create a denial of due process. We have concluded *ante* that (1) defendants forfeited their claims of error by not raising timely objections in the trial court, (2) the prosecutor and trial court did not err, and/or (3) defendants did not suffer prejudice. Accordingly, we reject Cole's claim

of cumulative error. (See *People v. Tully, supra*, 54 Cal.4th at p. 1061 [rejecting cumulative error where errors were forfeited or not found].)

**DISPOSITION**

The judgments are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER  
J.

We concur:

HOLLENHORST  
Acting P. J.

CODRINGTON  
J.