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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.

MARCO ANTONIO SAUCEDO,

Defendant and Appellant.

E059903

(Super.Ct.No. INF1102887)

OPINION

APPEAL from the Superior Court of Riverside County. James S. Hawkins, Judge.

Affirmed as modified, with directions.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Charles C. Ragland and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

After drinking 12 beers — which raised his blood alcohol level to at least 0.25 percent — defendant Marco Antonio Saucedo started driving home. His roommate and “best friend” was his passenger. Defendant was speeding when he lost control of his car; it hit two trees, and his friend was killed.

After a jury trial, defendant was found guilty of:

Count 1: Second degree murder (Pen. Code, § 187, subd. (a)).

Count 2: Gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a)).

Count 3: Driving under the influence and causing bodily injury (Veh. Code, § 23153, subd. (a)), with an enhancement for personally inflicting great bodily injury (Pen. Code, § 12022.7, subd. (a)).

Count 4: Driving with a blood alcohol level of 0.08 percent or more and causing bodily injury (Veh. Code, § 23153, subd. (b)), with an enhancement for personally inflicting great bodily injury (Pen. Code, § 12022.7, subd. (a)).

Count 5: Driving with a license that has been suspended for a prior conviction of driving under the influence (Veh. Code, § 14601.2).

Defendant was sentenced to a total of 15 years to life in prison, along with the usual fines, fees, and requirements.

Defendant now contends:

1. The prosecutor committed misconduct by appealing to passion and prejudice in closing argument.

2. Defendant's conviction on count 2 barred his conviction on counts 3 and 4, which were lesser included offenses.

3. The trial court erroneously failed to instruct on the definition of "accomplice" for purposes of the great bodily injury enhancements to counts 3 and 4.

4. The abstract of judgment erroneously recites that defendant was sentenced as a "second-striker."

We find no prosecutorial misconduct. The People, however, concede that defendant's convictions on counts 3 and 4 must be stricken. This makes it unnecessary to discuss his claim of instructional error regarding the great bodily injury enhancements to those counts. The People also concede that the abstract of judgment is erroneous. We will modify the judgment and we will direct the clerk to amend and correct the abstract.

## I

### FACTUAL BACKGROUND

Grapefruit Boulevard in Coachella has two northbound lanes and two southbound lanes, with a dirt center divider.

On December 18, 2011, at about 12:20 a.m., a small older car was going south on Grapefruit, in the fast lane. Immediately ahead of it was a truck;<sup>1</sup> immediately ahead of the truck was a car driven by Monica Garcia. The speed limit was 50 miles an hour. Garcia was going 50; the small older car was going 60 or 70.

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<sup>1</sup> Although referred to throughout the record as a "truck," this vehicle resembled a Ford Silverado.

On seeing the speeding car in her rearview mirror, Garcia moved over into the slow lane. She saw the oncoming car swerve into the slow lane to go around the truck, then swerve back into the fast lane to go around her. At that point, it “lost control,” went into the center divider, and crashed. Garcia pulled over and called 911.

Responding officers and paramedics found a 1990 Volvo, rolled over onto its passenger side, lying in the northbound lanes, near the shoulder. “The smell of an alcoholic beverage” was coming from the Volvo. Defendant was in the driver’s seat, wearing his seatbelt. He was alive but unconscious. A second Hispanic male was in the front passenger seat, also wearing his seatbelt. He was dead. He was later identified as Ramon Villegas-Ortega.

According to a police officer trained in accident diagramming, when the Volvo went into the center divider, the left front of the car hit a palm tree. That caused it to spin; the passenger side then hit a second palm tree, with so much force that the passenger side was bent into a V-shape and the tree was uprooted.

Defendant was the registered owner of the Volvo. Another police officer inspected defendant’s car but did not find “anything that would have affected the normal driving operations of the car[.]” The steering system could not be examined because the front end was so badly damaged. However, the braking and acceleration systems were in good working order. The tread on one tire, on the rear passenger side, was low. The officer admitted that that “could” affect the braking system. However, there were no skid marks, which indicated that defendant did not attempt to brake before the crash.

The police found four beer cans inside defendant's car and another beer can outside, in the car's "path of travel."

Defendant's blood was drawn less than two hours after the accident, around 2:10 a.m. When tested, it showed that his blood alcohol level at that time was 0.25 percent. This indicated that he had had at least seven beers, assuming he drank them all at once, or eight to twelve beers, assuming (more realistically) that he drank them over the course of the evening.

In 2008, defendant had been convicted of driving under the influence. His blood alcohol test results at that time were also 0.25 percent. He had been advised "that being under the influence of alcohol. . . . impairs [your] ability to safely operate a motor vehicle. Therefore, it is extremely dangerous to human life to drive while under the influence of alcohol . . . . If [you] continue to drive while under the influence of alcohol . . . and, as a result of [that] driving, someone is killed, [you] can be charged with murder."

The police interviewed defendant four times.

The first interview took place at the hospital, about an hour and a half after the accident, at 2:00 a.m. Defendant smelled of alcohol, had red, watery eyes, and slurred his speech. Defendant said he did not know why he was in the hospital. He denied driving a vehicle or being in an accident. He claimed that paramedics had picked him up at his home.

The second interview took place eight hours after the accident, at 8:30 a.m. In this interview, defendant admitted that he had been driving the Volvo. He also admitted having no mechanical problems with his car. He identified Villegas-Ortega as his roommate and coworker. He said they had been coming from his boss's house. While at his boss's house, defendant drank 12 beers. However, he denied having felt any effects of the alcohol. He said he suddenly lost consciousness. He did not remember the accident.

The third interview took place two days after the accident, on December 20, 2011. Defendant said that Villegas-Ortega was his best friend. They had grown up in Mexico together and had moved to the United States together. In this interview, defendant said he had two beers at his boss's house, followed by eight or nine beers at the home of an "old friend" named Jorge. Villegas-Ortega had been drinking, too. Defendant said again that he did not remember the accident. When asked why he did not remember, he said, "I was drunk." When asked if he knew why he had had an accident, he replied, "Maybe for being drunk." He admitted that he should not have been driving.

The fourth interview took place four days after the accident, on December 22, 2011. Defendant admitted having a previous conviction for driving drunk. The amount he had had to drink then was "about the same" as in this case. At that time, the judge had asked him if he knew it was dangerous to drink and drive. Defendant admitted knowing that drinking and driving can cause "accidents and death."

## II

### PROSECUTORIAL ERROR IN APPEALING TO PASSION AND PREJUDICE

Defendant contends that the prosecutor committed misconduct by appealing to passion and prejudice in closing argument. Defendant also contends that, to the extent that his trial counsel forfeited his prosecutorial misconduct claim by failing to object, his trial counsel rendered ineffective assistance.

#### A. *Additional Factual and Procedural Background.*

In closing argument, the prosecutor stated:

“Now, in our society we commonly read in the paper, see on the news, stories about these types of cases where people get impaired, get behind the wheel, and someone dies as a result. We all know that drinking and driving is extremely dangerous to human life. Yet time and again people choose to do it and get behind the wheel and someone is killed.

“The fact that Roman Villegas Ortega died in this case will not change that. And it doesn’t make the case any less offensive than what it is. The fact that the defendant knew the victim in this case doesn’t make that any less offensive.

“Any one person could have died on December 18th, 2011, including the defendant. We often hear with these cases in the context of an innocent victim, someone who’s been working all day long, they are on their way home from work, and they fall victim to a drunk driver. Or the family that’s driving home from a party and doing the

right thing, having a sober driver, yet still falls victim to an impaired driver and gets killed.

“That is why these types of cases are so offensive and they are so egregious. It’s because we know, as a society, community, that they are avoidable.

“The fact that the defendant knew the victim in the case should not change your perception of what it is, and it should not make it any less offensive or change how offensive his behavior was, because he got to that level of impairment and still chose to drive home that night.

“There were other people on the road because Monica Garcia testified, and she told you she was driving right next to the defendant’s vehicle when he veered to the left. He just as easily could have veered to the right.

“There was also the truck driver that was driving behind the defendant that had to stop when the defendant’s car went into the center median and went over it to avoid whatever collision the defendant caused.

“Any of those people could have been killed that night. Out of she[e]r luck, the defendant killed the person in his car and someone he knew.”

In her rebuttal argument, she stated:

“Now, in this case, we have knowledge, we have repeated warnings about the dangers of drinking and driving. And when he does it, the defendant is disregarding our laws, disregarding common sense. He’s disregarding people’s lives. He’s drinking to a level of impairment that many of us will never even see.

“He’s driving and he’s speeding at that level of impairment and all of these things if they were done in the middle of nowhere and no one was harmed, you could say that the only life he’s putting at risk is his own. But that is not what happened on December 18, 2011. He did it in a city where we know other people were on the road, Monica Garcia, . . . the driver of the truck that we didn’t meet, the life of his passenger is taken, and this is where the conscious disregard comes in.”

Defense counsel did not object to any of these remarks.

B. *Analysis.*

“““A prosecutor’s conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.’ [Citation.] When a claim of misconduct is based on the prosecutor’s comments before the jury, as all of defendant’s claims are, ““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.] To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument. [Citation.]” [Citation.] A failure to timely object and request an admonition will be excused if doing

either would have been futile, or if an admonition would not have cured the harm.’ [Citation.]” (*People v. Adams* (2014) 60 Cal.4th 541, 568-569.)

“‘[T]he term prosecutorial “misconduct” is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.’ [Citation.]” (*People v. Centeno* (2014) 60 Cal.4th 659, 666-667.)

Here, defense counsel forfeited the claimed misconduct by failing to object. Defendant argues that we should reach the issue anyway, because it presents a question of law based on undisputed facts. This ignores the fact that, if defense counsel had objected and requested an admonition, the facts might have been changed; the trial court could have given an admonition that would have cured the prejudice defendant is claiming now. “‘To consider on appeal a defendant’s claims of error that were not objected to at trial “would deprive the People of the opportunity to cure the defect at trial and would ‘permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal.’”” [Citation.]” (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 465.)

Defendant also argues that we should reach the issue because it implicates his constitutional rights. The cases that he cites in support of that proposition, however, were both decided under Penal Code section 1259. (*People v. Baca* (1996) 48 Cal.App.4th 1703, 1706; *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) That statute allows an appellate court to consider an *instructional* error—even in the absence of any

objection below—if it affected the defendant’s substantial rights. It does not apply to *prosecutorial* error.

As a result of defense counsel’s failure to object, the only question preserved for our consideration is whether the failure to object constituted ineffective assistance.

“When challenging a conviction on grounds of ineffective assistance, the defendant must demonstrate counsel’s inadequacy. To satisfy this burden, the defendant must first show counsel’s performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceeding would have been different.”

(*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

“It is, of course, improper to make arguments to the jury that give it the impression that “emotion may reign over reason,” and to present “irrelevant information or inflammatory rhetoric that diverts the jury’s attention from its proper role, or invites an irrational, purely subjective response.” [Citation.]’ [Citation.]” (*People v. Linton* (2013) 56 Cal.4th 1146, 1210.) For example, “it is misconduct to appeal to the jury to view the crime through the eyes of the victim. [Citation.]” (*People v. Mendoza* (2007) 42 Cal.4th 686, 704.) Similarly, “[a] prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking.”

(*United States v. Leon-Reyes* (9th Cir. 1999) 177 F.3d 816, 822.)

On the other hand, “[a] prosecutor is allowed to make vigorous arguments and may even use such epithets as are warranted by the evidence, as long as these arguments are not inflammatory and principally aimed at arousing the passion or prejudice of the jury.’ [Citations.]” (*People v. Pearson* (2013) 56 Cal.4th 393, 441.)

““[T]o prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we ‘do not lightly infer’ that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements.” [Citations.]” (*People v. Shazier* (2014) 60 Cal.4th 109, 144.)

In this case, for purposes of the murder charge, the prosecutor needed to convince the jury that defendant knew that his conduct endangered the life of another and that defendant acted with conscious disregard for life. (*People v. Knoller* (2007) 41 Cal.4th 139, 143; *People v. Watson* (1981) 30 Cal.3d 290, 300.) Accordingly, it was fair game for her to point out that “in our society we commonly read in the paper, see on the news, stories about these types of cases where people get impaired, get behind the wheel, and someone dies as a result.” In other words, it is common knowledge that driving drunk is dangerous to life, yet some people still choose to drive drunk.

It was also fair game to point out that defendant did not have to know that his conduct endangered any *particular* person’s life. According to defendant, the victim was his best friend. Defense counsel could argue that defendant would not have knowingly

endangered the victim's life (nor his own); and even if defense counsel did not, the jury itself could reason along these lines. Thus, the prosecutor could properly counter this by pointing out that defendant was endangering the life, not only of the victim, but also of Garcia, of the nameless truck driver, and of everybody he encountered along the road. The prosecutor did not ask the jurors to put themselves in the victim's shoes or to imagine that they were on the road with defendant on December 18, 2011 and thus did not cross the line.

The prosecutor also could properly characterize defendant's conduct as "offensive" and "egregious." " . . . "A prosecutor may 'vigorously argue his case and is not limited to "Chesterfieldian politeness" [citation], and he may 'use appropriate epithets . . . .'" [Citation.]" [Citation.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 371.) It can be appropriate to "refer[] to 'the general community need to convict guilty people.'" (*Hicks v. Collins* (6th Cir. 2004) 384 F.3d 204, 219.) "[A] request that the jury 'condemn' an accused for engaging in illegal activity is not constitutionally infirm, so long as it is not calculated to excite prejudice or passion." (*United States v. Monaghan* (D.C. Cir. 1984) 741 F.2d 1434, 1442.)

Because the prosecutor's argument was not error, defense counsel did not render ineffective assistance by failing to object.

Separately and alternatively, defendant cannot show that his counsel's failure to object was prejudicial. The evidence of defendant's guilt was overwhelming. The defense did not call any witnesses. Defendant argues that "[t]he bald tire could have

limited the braking ability of the car.” The evidence, however, showed that defendant did not even attempt to brake before the accident. More fundamentally, this would not relieve defendant of guilt. Defendant would still be at fault for getting drunk, speeding and veering off the road. Impaired braking ability would be, at most, a concurrent cause of the accident, not an independent, superseding cause. (See generally *People v. Cervantes* (2001) 26 Cal.4th 860, 871.)

Defendant also argues that it was “impossible to know” whether something inside the car, such as carpet stuck under the accelerator, caused the car to speed. The officer who inspected the car, however, specifically testified that he did not find a floor mat or other object that “may have rolled up behind the brake pedal or behind the gas pedal.” This argument is an appeal to speculation, not to reasonable doubt.

Finally, defendant argues that, in 2008, he drove with a blood alcohol level of 0.25 percent, but he did not get into an accident; thus, he “could rightfully believe that he could similarly drive without an accident resulting.” This line of argument, however, was simply crushed by the fact that defendant had been advised at that time, both in writing and by the judge, that “it is extremely dangerous to human life to drive while under the influence of alcohol . . . .” Defendant even admitted to the police that he knew that drinking and driving can cause “accidents and death.”

For these reasons, there is no reasonable probability that, if the prosecutor had omitted the challenged arguments, defendant would have enjoyed a more favorable result.

### III

#### MULTIPLE CONVICTIONS ON A GREATER AND ON LESSER INCLUDED OFFENSES

Defendant contends that, having been convicted on count 2, he could not be convicted on count 3 and count 4, because the latter are lesser included offenses of the former.

Count 2 charged defendant with gross vehicular manslaughter while intoxicated. This crime is defined as “the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was in violation of Section 23140, 23152, or 23153 of the Vehicle Code, and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, and with gross negligence, or the proximate result of the commission of a lawful act that might produce death, in an unlawful manner, and with gross negligence.” (Pen. Code, § 191.5, subd. (a).)

Count 3 charged defendant with driving under the influence and causing bodily injury. (Veh. Code, § 23153, subd. (a).)

Count 4 charged defendant with driving with a blood alcohol level of 0.08 percent or more and causing bodily injury. (Veh. Code, § 23153, subd. (b).)

“When a defendant is found guilty of both a greater and a necessarily lesser included offense arising out of the same act or course of conduct, and the evidence supports the verdict on the greater offense, that conviction is controlling, and the

conviction of the lesser offense must be reversed. [Citations.]” (*People v. Sanders* (2012) 55 Cal.4th 731, 736.)

“‘In deciding whether multiple conviction is proper, a court should consider only the statutory elements.’ [Citation.] ‘Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former.’ [Citation.] In other words, “[i]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.” [Citation.]” (*People v. Sanders, supra*, 55 Cal.4th at p. 737.)

It could be argued that Penal Code section 191.5 can be violated without also violating Vehicle Code section 23153—for example, if the driving is in violation of Vehicle Code section 23140 (driving while under 21 with a blood alcohol level of 0.05 percent or more). Nevertheless, it has been held that Vehicle Code section 23153 is a lesser included offense of Penal Code section 191.5. (*People v. Givan* (2015) 233 Cal.App.4th 335, 351; *People v. Miranda* (1994) 21 Cal.App.4th 1464, 1466-1468; see also *People v. Binkerd* (2007) 155 Cal.App.4th 1143, 1147-1150.) Accordingly, the People concede that defendant’s convictions on counts 3 and 4 must be reversed. Rather than decide the issue independently, we accept the People’s concession.

#### IV

##### FAILURE TO INSTRUCT ON THE DEFINITION OF “ACCOMPLICE”

Defendant contends that, for purposes of the great bodily injury enhancement to counts 3 and 4, which required great bodily injury to a “person other than an accomplice” (Pen. Code, § 12022.7, subd. (a)), the trial court erroneously failed to instruct on the definition of “accomplice.”

Because we are reversing the counts to which this enhancement was attached (see part III, *ante*), we need not—and we do not—decide this contention.

#### V

##### ERROR IN THE ABSTRACT OF JUDGMENT

Defendant contends that the abstract of judgment erroneously recites that he was sentenced as a “second-striker.”

The abstract of judgment states that defendant was “sentenced per: PC 667(b)-(i) or PC 1170.12 (two strikes).” This is incorrect; no strike priors were alleged, much less found true.

The People concede the error. Accordingly, in our disposition, we will direct the superior court clerk to prepare a corrected abstract of judgment.

#### VI

##### DISPOSITION

The judgment is modified as follows: (1) The convictions on counts 3 and 4 and all allegations attached to them are stricken. (2) The court operations assessment (Pen.

Code, § 1465.8, subd. (a) [\$40 per count]) is reduced from \$200 to \$120. (3) The court facilities assessment (Gov. Code, § 70373, subd. (a) [\$30 per count]) is reduced from \$150 to \$90. The judgment as thus modified is affirmed.

The clerk of the superior court is directed to prepare an amended sentencing minute order and an amended and corrected abstract of judgment and to forward a certified copy of the amended and corrected abstract to the Department of Corrections and Rehabilitation. (Pen. Code, §§ 1213, subd. (a), 1216.)

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RAMIREZ  
P. J.

We concur:

McKINSTER  
J.

KING  
J.