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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL ZAMORA LOPEZ,

Defendant and Appellant.

E063703

(Super.Ct.No. FVI1301133)

OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin, Judge. Reversed with directions.

Eric S. Multhaupt, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Stacy A. Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

Michael Zamora Lopez appeals from the judgment entered after a jury verdict finding him guilty of theft (Pen. Code, § 484) and first degree burglary of an occupied dwelling (§ 459).¹ The jury convicted Lopez after hearing evidence he and his girlfriend, Tina Orozco, entered the apartment of Maria Palacios and stole both cash and methamphetamine. Palacios testified Lopez pushed her while Orozco took a coffee can containing approximately \$4,000 in cash. Lopez denied those accusations, but testified he learned later Orozco had stolen approximately \$4,000 worth of methamphetamine from Palacios. Law enforcement reported out-of-court statements by Orozco—who refused to testify on Fifth Amendment grounds—denying anyone stole money, admitting she had stolen drugs, and accusing Lopez of stealing drugs as well.

Lopez contends his convictions must be reversed for two reasons related to the introduction of Orozco’s statement that Lopez stole drugs from Palacios. First, he contends the prosecutor committed prejudicial misconduct by ignoring the trial court’s order to limit questioning about Orozco’s extra-judicial statement to her admission that she stole drugs. The prosecution asked a police officer who heard Orozco’s interview whether she had reported Lopez stole drugs. The police officer answered yes, and his testimony was the only evidence Lopez stole drugs. Lopez contends the prosecutor’s misconduct deprived him of due process, his right to a fair trial, and his right to confront witnesses against him. He also contends his attorney provided ineffective assistance

¹ Unlabeled statutory citations refer to the Penal Code.

when he failed to object. The People concede the misconduct, but argue we should affirm on the ground there was no prejudice. Second, Lopez contends the trial court committed prejudicial error by failing to sua sponte instruct the jury that to find Lopez guilty of the charges against him it must be in unanimous agreement about whether he stole (or intended to steal) cash or methamphetamine.

We conclude the introduction of Orozco's hearsay statement inculcating Lopez was prejudicial as to both convictions and necessitated giving the jury the unanimity instruction in relation to the robbery and theft charges. We therefore reverse.²

I

FACTUAL BACKGROUND

The District Attorney of San Bernardino County filed an information charging Lopez with robbery (§ 211, count 1) and first degree burglary of an occupied dwelling (§ 459, count 2). The information also alleged Lopez had suffered two serious and violent felony convictions (strikes) within the meaning of sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d), and had suffered two prison prior convictions within the meaning of section 667.5, subdivision (b).

The charges arose from events on the evening of April 7, 2013 at the Victorville apartment where Palacios, then 66 years old, lived with her adult son. Palacios reported

² Lopez also contends the prosecutor committed prejudicial misconduct by asking defendant, in the presence of the jury, whether a prior conviction for robbery constituted "the same charge we have here today." We need not reach this issue because we reverse the judgment on the other grounds Lopez raises.

she did not work outside the home, but collected rent from other tenants in her apartment complex on behalf of the owner. The jury heard testimony about the events of April 7 from Palacios, her friends, Myra and Jorge Garibay, and Lopez himself. Detective Don Campas reported on statements about the events Orozco and Lopez gave during post-arrest interviews.

A. Prosecution Witnesses

Palacios testified to the following facts. She was sitting in the kitchen of her apartment with her friends Myra and Jorge at 8:00 or 9:00 p.m. when Lopez and Orozco showed up at her back door. She had never seen the two before that night. Lopez and Orozco claimed they had come to inquire about renting an apartment in her complex. Palacios, who speaks Spanish and only a few words of English, relied on Myra and Jorge to communicate with Lopez and Orozco. She told Lopez and Orozco, through Myra, that no apartments were available and the two left. The two were at her door, but not inside, for about five or six minutes. After Lopez and Orozco left, Myra and Jorge argued about something in English and then left through the back door.

Palacios said she had a significant amount of money out when Lopez and Orozco first arrived. She testified she was counting the \$2,025 in cash she had collected from renters for her landlord and \$1,975 in cash her son gave her to take to the bank. After Lopez and Orozco left, she put the cash into a coffee can and placed the coffee can in a cabinet in her kitchen. Palacios testified she did not know where Lopez and Orozco went

after they left because it was dark outside, but at trial she expressed certainty they were outside her apartment looking in through her back door.

Later, Lopez and Orozco returned to Palacios' back door. According to Palacios, Lopez opened the door and asked her for a glass of water. Palacios testified she "stood up from the chair, and [Lopez] pushed me. When he pushed me, the woman came in, took the money out, and they left." She reported Orozco went directly to the cabinet containing the coffee can with the money. According to Palacios, she yelled, "Why are you doing this to me?" and the two left running. After Lopez and Orozco ran off, Palacios called the police and called Myra and Jorge.

Myra also testified about a visit from Lopez and Orozco. Her testimony differed in some particulars from Palacios' testimony. According to Myra, Palacios called to ask her to come over to translate for some people who were looking for an apartment in the complex. Myra went over to Palacios' apartment at around 6:00 or 7:00 p.m. and was sitting in the kitchen talking with Palacios when Lopez and Orozco came to the door. On cross-examination, Myra said she did not remember whether she was at Palacios' apartment when Lopez and Orozco arrived, but said she was there at the same time as them for approximately 30 minutes. She said the two were inside the kitchen during this time and reported she does not remember Palacios counting money at the table. Lopez and Orozco asked about the availability of apartments and Palacios looked for a renter's application. She said nothing about telling them no apartments were available. Myra's husband Jorge arrived at Palacios' apartment after Lopez and Orozco. She and her

husband argued because he wanted her to go home and help with their children. She left Palacios' apartment, Jorge remained for a few minutes, and returned home about five or 10 minutes later. She testified that about half an hour later Palacios called to report she had been robbed.

Jorge also testified about a visit from Lopez and Orozco, and gave a somewhat different version of the story. According to Jorge, Palacios called his house, said someone had called who spoke English, and asked Myra to come interpret. He said he and Myra went to Palacios' house around 6:00 or 7:00 p.m. He and Myra got to Palacios' apartment before Lopez and Orozco, who arrived a few minutes later, and asked about available apartments. Lopez and Orozco stayed outside the apartment and were present for five or six minutes. Jorge saw Palacios counting money on the table when Lopez and Orozco arrived. Jorge testified Myra left to go back home to attend to the children. Orozco then complained she wanted to talk to Myra because she could not understand Jorge, and Jorge left to get Myra. Between two and four minutes later, Myra and Jorge got a call from Palacios telling them Lopez and Orozco had robbed her.

B. Lopez's Testimony

Lopez testified in his own behalf and provided a substantially different story. At the time, Lopez and Orozco were homeless and living in a car, and he was addicted to methamphetamine. Lopez and Orozco met someone named Steve or Stevo in Hesperia who told them Palacios' home in Victorville was a "party house" where they could get marijuana or methamphetamine. They went to Palacios' house to smoke marijuana and

“trade some weed for some methamphetamine.” He told a police officer after his arrest they were looking for a “front” to get some drugs, meaning to find someone to give them drugs and accept payment later. They arrived at Palacios’ apartment at around 9:30 or 10:00 p.m. on April 7, 2013. When they arrived, “[Palacios], Myra, Jorge . . . [and] another guy [were] there.” “[Palacios] was sitting in the kitchen, and Myra and Jorge were outside kind of by the front—by the back door, and they just let us in.” “We were inside for maybe the first half hour. We had took a shower, cleaned up, because, you know, we had no place to stay, and smoked some weed right there.” They smoked marijuana with Jorge and Myra, but had little interaction with Palacios because they could not communicate with her in Spanish. Altogether, he estimated they were in Palacios’ apartment for about one to one-and-a-half hours. At some point during the visit, Palacios gave Myra methamphetamine and Myra gave it to Lopez and Orozco. Lopez said Myra had about three “good size containers” of methamphetamine, as well as a scale, Myra was talking to another person, and “they were doing like a little business dealing or something.” Lopez, Orozco, and Myra smoked the methamphetamine together using a pipe, but Lopez preferred injecting the drug. When he started preparing to shoot up, Jorge noticed and started arguing with Myra and made her leave.

Lopez also denied stealing anything from Palacios’ residence. He said he did not take money, did not see money on the table, and that neither he nor Orozco knew there was money in the apartment. Lopez admitted using drugs, but denied taking any drugs from the apartment. He also denied pushing or grabbing anyone, including Palacios, and

denied Orozco took money, saying “[t]hat never took place.” Asked whether he had told a police officer that they had gone to Palacios’ home to “burn them,” Lopez acknowledged using the term, but explained he never intended to “burn” Palacios.³ Lopez explained he intended to pay with money law enforcement seized when he was recently arrested. He said he had just received “a settlement check, and right before this occasion, I was in jail for a parole violation, and they seized my money. So I was planning on getting the money back. . . . I was looking at it like this, like, if I got the front and I didn’t get the money back, that’s more or less what would happen I had intentions on paying, but if I didn’t end up getting the money, that is what would happen.”

Lopez testified he learned after he and Orozco left that she had stolen some methamphetamine. According to Lopez, she took about four ounces of the drug, which he estimated had a street value of approximately \$4,000.

C. Orozco’s Extra-judicial Statements

Orozco made an appearance during trial, but invoked her Fifth Amendment right not to answer any questions. Defense counsel sought to introduce the contents of Orozco’s interview with the police under the declaration against self-interest exception to the hearsay rule: “She’s been interviewed. She’s made tapes with the police. And in

³ Detective Campas testified Lopez said in an extra-judicial interview with law enforcement that “he and [Orozco] went there to [Palacios’ home] to, quote ‘burn them for narcotics.’” Detective Campas testified in that context the term “burn” means “steal.”

those, she talks about being there, not for the purposes of ever stealing money, but at some point, she ends up stealing methamphetamines from that very location that is allegedly a robbery. She says she never took money. She took dope. . . . [¶] . . . And even though she's not here, . . . I believe those statements that she made concerning grabbing the dope are declarations against self interest, and those narrow areas can be brought in and played for the jury.”

The trial court declared Orozco unavailable as a witness, and determined the parties would be permitted to question Detective Campas about the statements she made against her penal interest in two interviews with law enforcement and issues affecting her credibility in making those statements. The court articulated its ruling as follows:

“I’m allowing the testimony—I’m allowing you to give testimony on the statements that were made by Ms. Orozco that I have ruled on specifically as being ones that are contrary to her penal interest. I’m going to give you an example.

“If she said, ‘I didn’t steal money. I stole drugs,’ ‘I stole drugs’ is contrary to her penal interest. Her stating that she didn’t steal money is not contrary to her penal interest. That’s a statement that she made that was exculpatory or trying to avoid implicating her penal interest.

“So the only thing that I think that [defense counsel] should be allowed to ask [Detective Campas] . . . is, ‘During the course of this interview, did she admit being with Mr. Lopez at the residence of Maria Palacios and that she stole narcotics’?”

“She also made the statement that the narcotics that she had with her at the time of the arrest, which we’ve heard described by [law enforcement], were narcotics from the bust or from the heist, if you will. So that’s what you can ask her about.

“And the only other thing that can be done is she can be—is her statements that are contrary to having any involvement, such as the fact, ‘I don’t know where Victorville is,’ ‘but I was never in Victorville,’ ‘but I didn’t take anything from anywhere,’ all of that kind of stuff, that can be questioned about by [the prosecutor], or [defense counsel], either one.

“If you want to establish that she was a liar, you may. Then there would be a stipulation that will be entered into in front of the jury that she suffered this prior conviction.

“Is there any misunderstanding about what my intent is here?

“[Defense Counsel]: None on my behalf, your Honor.

“[Prosecutor]: No.”

Defense counsel then called Detective Campas to testify about the police interviews with Orozco. In response to defense counsel’s questions, Detective Campas testified Orozco admitted she was with Lopez at Palacios’ residence on April 7, 2013, she stole narcotics from that residence, and the narcotics police found in her possession during her arrest were the same narcotics she had stolen.

The prosecutor then elicited testimony from Detective Campas that at a prior interview Orozco had denied being at Palacios’ home and denied knowing anything about

the theft. According to Detective Campas, at the first interview Orozco said “she didn’t know anything about any money being stolen, any coffee can, that type of stuff.”

Detective Campas testified Orozco was not forthcoming at the first interview, but was forthcoming at the second interview.

The prosecutor then asked about Orozco’s statements at the second interview concerning Lopez’s involvement in the incident.

“Q. [W]hen you were speaking to Tina Orozco, did she state that the defendant had stolen any drugs?

“A. Yes.

“Q. Okay. That was her statement?

“A. Yes. [¶] . . . [¶]

“Q. . . . When you were speaking with Ms. Orozco, is it true that Ms. Orozco told you that the defendant actually stole some drugs?

“A. Yes. [¶] . . . [¶]

“Q. . . . I’m sorry—that Mr. Lopez stole some drugs?

“A. Yes.”

Neither defense counsel nor the trial court objected to the introduction of hearsay or the violation of the court’s order limiting the questioning about Orozco’s extra-judicial statements.

D. Closing Argument

At closing argument, the prosecutor made use of Orozco's statement that Lopez stole drugs to undercut Lopez's defense that he did not steal anything. The prosecutor argued, "the defendant's testimony in this case really isn't backed by anything. We have a guy who obviously has a lot to consider, a lot on his plate, because he's the one being charged here. Gets up there, tells a story that is completely different from all three witnesses you heard from, all three witnesses who were present at the scene either immediately before, or during the actual commission of the crime. And that's all the defendant really has in this case. [¶] [Defense counsel] tries to bring up Tina Orozco's statements. . . . But even those stories aren't consistent. They say that, well, they are just taking the drugs, but this defendant said, 'Nah, I didn't steal anything.' Tina Orozco says, 'No, no, we both stole stuff.' [¶] So even the defendant's own co-defendant pointed him out as someone who stole something in this case."

E. Jury Instructions

The trial court instructed the jury that to prove Lopez guilty of robbery, the prosecution was required to prove: "One, the defendant took property that was not his own; two, the property was taken from another person's possession and immediate presence; three, the property was taken against that person's will; four, the defendant used force or fear to take the property or to prevent the person from resisting; and five, when the defendant used force or fear to take the property, he intended to deprive the owner of it permanently."

The trial court also instructed the jury on the lesser included offense of theft. “To prove that the defendant is guilty of this crime, the People must prove that: [¶] One, the defendant took possession of the property owned by someone else; two, the defendant took the property without the owner’s consent; three, when the defendant took the property, he intended to deprive the owner of it permanently; and four, the defendant moved the property, even a small distance, and kept it for any period of time, however brief.”

Last, the trial court instructed the jury on the elements of burglary. “To prove the defendant is guilty of [burglary] the People must prove that: [¶] One, the defendant entered a building; and two, when he entered the building, he intended to commit theft. [¶] To decide whether the defendant intended to commit theft, please refer to the separate instruction that I’ve given you on those crimes [*sic*].”

The trial court determined the case did not require instructing the jury that “[t]he People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed.” (CALCRIM No. 3500.) Defense counsel did not object to the omission.

F. *Jury Deliberations and Verdict*

Less than an hour after beginning deliberations, the jury asked the trial court, “Are we able to convict whether it was drugs or money that was taken?” The trial court

consulted with the parties and indicated it believed “the answer to this question for robbery is right in this instruction. It doesn’t say anything about it has to be drugs or it has to be money. I think that it could be drugs or it could be money.” The court also pointed out that “[t]he word ‘property’ is the word that is used throughout robbery, throughout theft, and throughout the instruction per burglary.” The trial court responded to the jury as follows: “Robbery, theft and burglary all require the taking of, or the intent to take, ‘property,’ along with other elements.”

The jury returned a verdict the same day. The jury did not find Lopez guilty of robbery, but found him guilty of the lesser included offense of theft and guilty of first degree burglary.

G. Sentencing

Lopez admitted the truth of the allegations he had been convicted of two previous serious and violent felonies within the meaning of sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d), exposing him to sentencing under the “Three Strikes” law. He also admitted the truth of the allegations that he had suffered two prior prison terms within the meaning of section 667.5, subdivision (b).

The trial court imposed a Three Strikes sentence of 25 years to life on the burglary count and a doubled upper term sentence of six years on the theft count, but stayed the latter sentence under section 654. The trial court also imposed consecutive one-year enhancements for the prison priors, bringing the aggregate sentence to 27 years to life.

II

DISCUSSION

A. *Prosecutorial Misconduct*

1. *Violation of due process and confrontation rights*

Lopez contends the prosecutor committed misconduct by eliciting Detective Campas's testimony Orozco told police Lopez stole drugs from Palacios. Lopez argues her statement was inadmissible hearsay and eliciting it from Detective Campas violated the trial court's order limiting testimony about her interviews to statements against her penal interest. The People concede "[t]he prosecutor's questions violated the court's order and elicited inadmissible hearsay evidence" and acknowledge doing so was error.

The hearsay rule makes inadmissible evidence of a statement made other than by a witness while testifying at the hearing if it is offered to prove the truth of the matter stated. (Evid. Code, § 1200.) Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, so subjected the declarant to the risk of criminal liability that a reasonable person in the same position would not have made the statement without believing it to be true. (Evid. Code, § 1230.) "[O]nly those portions of [a declarant's] statements that [are] 'specifically disserving' [citation] to [her] penal interests [are] admissible under [Evidence Code] section 1230." (*People v. Duarte* (2000) 24 Cal.4th 603, 612.)

Applying these principles, we agree with the parties that admitting Orozco’s hearsay testimony inculcating Lopez was improper. Detective Campas’s report of Orozco’s statement to police that Lopez stole drugs was an out-of-court statement by a witness who refused to testify and was relevant only for the truth of the matter asserted. It was therefore a classic instance of hearsay.⁴ (Evid. Code, § 1200.) And because it inculpated Lopez, rather than Orozco, it was not subject to the exception under which the trial court allowed Detective Campas to testify about Orozco’s extra-judicial statement. Additionally, in directly posing a question about Orozco’s statement about Lopez’s theft, the prosecutor violated the trial court’s evidentiary ruling, and, though there is no indication he acted intentionally, committed misconduct. (*People v. Friend* (2009) 47 Cal.4th 1, 33 [“[T]he prosecutor violated the trial court’s prior evidentiary ruling, and, whether done intentionally or not, committed misconduct”].)

2. *Ineffective assistance of counsel*

Lopez contends his trial counsel was ineffective for failing to object to the admission of Orozco’s extra-judicial statements inculcating him and argues there is a reasonable probability the jury would have reached a different result absent the misconduct. We agree.

⁴ The dissent misconstrues the record when it contends Orozco’s statement inculcating Lopez was admissible as a prior inconsistent statement. (Dis. opn., *post*, at p. 1.) Law enforcement conducted two interviews with Orozco. At the first, she denied knowing anything about the theft. At the second, she admitted stealing drugs and said Lopez stole drugs too. Thus, Orozco’s statement was neither prior nor inconsistent, and therefore was not admissible to impeach Orozco’s credibility.

To prevail on a claim of ineffective assistance, “First, a defendant must show his or her counsel’s performance was ‘deficient’ because counsel’s ‘representation fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms.’ [Citations.] Second, he or she must then show prejudice flowing from counsel’s act or omission. [Citations.] We will find prejudice when a defendant demonstrates a ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ [Citations.] ‘Finally, it must also be shown that the [act or] omission was not attributable to a tactical decision which a reasonably competent, experienced criminal defense attorney would make.’ [Citation].” (*People v. Gurule* (2002) 28 Cal.4th 557, 610-611.) On direct appeal, we will “reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.” (*People v. Zapien* (1993) 4 Cal.4th 929, 980.)

This is such a case. The People suggest no tactical reason for defense counsel to withhold objecting to the introduction of hearsay evidence implicating Lopez in the theft of drugs, and we cannot imagine one. The testimony reporting Orozco’s statement was plainly hearsay and even more plainly violated the trial court’s clear and explicit direction regarding the admission of Orozco’s extra-judicial statements. More importantly, it directly undermined defense counsel’s express tactical purpose in seeking to admit the self-inculcating portions of Orozco’s statement.

Before Lopez testified, defense counsel explained to the court how Orozco's statement would support his defense: "[Orozco's] been interviewed. She's made tapes with the police. And in those, she talks about being there, not for the purposes of ever stealing money, but at some point, she ends up stealing methamphetamines from that very location that is allegedly a robbery. She says she never took money. She took dope, and she took dope from the woman that has already testified. [¶] . . . And even though she's not here, is I believe those statements that she made concerning grabbing the dope are declarations against self interest, and those narrow areas can be brought in and played for the jury." Defense counsel explained Orozco's admission would corroborate Lopez's testimony that "They were invited in the residence. They were there inside the residence. They didn't enter by fraud or deceit. . . . The reason they were there was to see if there was drugs. This was somebody that was known to them to move drugs, sell drugs and have drugs" and Orozco was "the person that grabbed [the drugs]." The trial court ultimately decided it should permit the self-inculcating portions of Orozco's statements so as not to deny Lopez's right to present his defense, but strictly limited questioning concerning Orozco's statements to those that were self-inculcating.

By failing to object, defense counsel allowed the jury to hear a portion of Orozco's statement that tended to show Lopez *had* committed theft. The same testimony corroborated Detective Campas's interpretation of Lopez's out-of-court statement he entered Palacios' home with the intent to "burn" her for drugs as meaning he intended to steal drugs, a statement which was otherwise legally insufficient to establish the corpus

delicti of burglary. (*People v. Moreno* (1987) 188 Cal.App.3d 1179, 1187 (*Moreno*).

We believe this record affirmatively discloses that counsel had no rational tactical purpose for his failure to object to the prosecutor's questions. (*People v. Zapien, supra*, 4 Cal.4th at p. 980.)

Moreno supports our conclusion. In *Moreno*, police officers responded to an accident report and found a damaged pickup truck parked near a damaged telephone pole. (*Moreno, supra*, 188 Cal.App.3d at p. 1189.) No one was in the truck, but several bystanders were nearby. (*Id.* at pp. 1189-1190.) The police located the defendant, the truck's registered owner, intoxicated inside a nearby market. (*Id.* at p. 1190.) To meet its burden of proving the defendant was the driver, the police relied on the testimony of one of the police officers stating the bystanders claimed they had been passengers in the vehicle. (*Ibid.*) The Fifth Appellate District concluded that "[b]ecause the out-of-court statements of the bystanders were . . . offered for the truth of the matter asserted, these statements are hearsay and should have been excluded upon proper objection." (*Id.* at p. 1191.) Defense counsel did not object at trial, but the appellate court concluded there was no conceivable tactical reason not to object "[s]ince these statements appear to be the only evidence the prosecution was prepared to offer to satisfy its burden of establishing the corpus delicti of the two [offenses]." (*Ibid.*) We reach the same conclusion here. Defense counsel's failure to object provided the jury with a second factual basis for finding him guilty of theft and burglary and directly undermined Lopez's factual defense.

The People’s principal defense of the judgment is that Lopez was not prejudiced by the introduction of Orozco’s statements inculcating him. Thus, we must decide whether there is a reasonable probability that without that hearsay evidence the jury would have had a reasonable doubt that defendant was guilty. (*In re Wilson* (1992) 3 Cal.4th 945, 956; also *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) We conclude defendant has met this burden.⁵

Counsel’s error was critical because there was a meaningful factual dispute over the question whether Lopez participated in a theft. At trial, Palacios testified Lopez entered her apartment and pushed her to enable Orozco to steal a coffee can containing approximately \$4,000 in cash. Lopez took the witness stand and contradicted that testimony. He said, “I never stole anything from the house.” He also denied either he or Orozco took money from Palacios. Instead, he implicated Palacios in operating or allowing a drug business to operate from her apartment. Lopez said he and Orozco went to Palacios’ home because it was a known “party house” where they might be able to “smoke some weed, trade some weed for some methamphetamine,” and acquire more drugs on credit. He testified the only thing stolen from Palacios was approximately

⁵ The parties ask us to determine whether the error was harmless beyond a reasonable doubt. However, we apply the reasonable probability standard in evaluating an ineffective assistance of counsel claim, even when defense counsel’s error involves the failure to preserve federal constitutional rights. (E.g., *People v. Ledesma, supra*, 43 Cal.3d at pp. 208-209 [applying reasonable probability standard to ineffective assistance claim, including failure to protect defendant’s Fourth Amendment rights]; *People v. Mesa* (2006) 144 Cal.App.4th 1000, 1008.)

\$4,000 worth of methamphetamine and that Orozco stole the drugs without his participation or knowledge.

Setting aside Orozco's statement that Lopez stole drugs, Detective Campas's testimony about her extra-judicial statements corroborated Lopez's testimony. Orozco testified she had stolen drugs and said she did not "know anything about any money being stolen." Allowing the prosecutor to elicit Orozco's hearsay statement that Lopez stole drugs undermined Lopez's defense; it allowed the jury to conclude he committed a theft even if the jury rejected Palacios' testimony that Lopez stole cash. As the prosecution argued in closing, Lopez testified: "'Nah, I didn't steal anything,' [but] Tina Orozco says, 'No, no, we both stole stuff.' [¶] So even the defendant's own co-defendant pointed him out as someone who stole something in this case."

We know the jury considered whether Lopez could be convicted of theft based on his taking drugs. Within the first hour of beginning its deliberations, the jury asked the court, "Are we able to convict whether it was drugs or money that was taken?" The trial court indicated to the parties that the three substantive offenses—robbery, theft, and burglary—required the taking of "property" which "could be drugs or it could be money," and responded to the jury that "[r]obbery, theft and burglary all require the taking of, or the intent to take, 'property,' along with other elements." The jury's query demonstrates some jurors were considering whether they could find Lopez committed theft even if they rejected Palacios' testimony that he and Orozco stole \$4,000 in cash. And the court's answer permitted the jury to find Lopez guilty based on finding he had

stolen drugs. Moreover, Orozco's statement that Lopez had stolen drugs was the only evidence implicating him in the theft of drugs. We conclude, based on these facts, that there is a reasonable probability the jury would not have found beyond a reasonable doubt that Lopez was involved in a theft absent the improper admission of Orozco's statement implicating him. (See *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1524 [holding ineffective assistance prejudicial where defense counsel failed to object to improper impeachment of only witnesses contradicting the prosecution evidence].)

Counsel's error was also critical to the burglary conviction. The only evidence Lopez entered Palacios' home with the intent of stealing drugs came in the form of Detective Campas's testimony reporting Lopez's out-of-court statement that he went to Palacios' home to "burn them for narcotics."⁶ But Lopez's out-of-court statement cannot be the sole basis for his burglary conviction. (*Moreno, supra*, 188 Cal.App.3d at p. 1187 [no part of the corpus delicti can be proved by extrajudicial admissions or confessions, unless also established by independent evidence].) Orozco's improperly admitted statement provided the corroboration necessary for the jury to consider Lopez's

⁶ At oral argument, the People said there was evidence Lopez brought counterfeit money he intended to use to obtain drugs from Palacios. However, Detective Campas denied Lopez said he brought the fake bills into the house with the intent of using them to buy drugs. And Lopez testified what he had "wasn't counterfeit money," but fake bills advertising a church, with prayers printed on them. Lopez said he simply had the bills in his bag with his other things and denied taking the bills in with the intent to steal drugs. In any event, even if Detective Campas's report of Lopez's interview statement did support an inference Lopez had the intent to steal drugs, it would need corroboration it does not have to establish intent. (*Moreno, supra*, 188 Cal.App.3d at p. 1187.)

extrajudicial statement. Without Orozco's statement, the jury could not have convicted Lopez of burglary. (*Ibid.*)

Even if the jury could have considered Detective Campas's testimony, Orozco's statement provided critical support. Lopez denied telling law enforcement he intended to steal drugs from Palacios and explained he sought to obtain drugs on credit though he realized he would end up "burning" Palacios if he failed to recover from law enforcement the money to which he believed he was entitled.⁷ Orozco's testimony that Lopez in fact stole drugs gave the jurors a basis for concluding Lopez's defense was untrue, and to infer he entered Palacios' home with the intent to steal drugs. We therefore conclude it is reasonably probable the jury would not have found beyond a reasonable doubt that Lopez had the requisite intent for burglary absent the improper admission of Orozco's statement implicating him in theft.

Nor can we conclude Palacios' testimony that Lopez stole cash should assuage our doubts about the verdict. Palacios' testimony that Lopez and Orozco broke into her apartment, pushed her out of the way, and took a coffee can containing cash from her cabinet was the only evidence Lopez had the intent to steal cash. But the jury evidently

⁷ The dissent's assertion that Lopez said it was Palacios who seized his settlement check has no basis in the record. (Dis. opn., *post*, p. 3.) As a result, her testimony she had never seen Lopez before April 7, 2014 has no bearing whatsoever on the credibility of Lopez's testimony he intended to pay her when he recovered money law enforcement had seized when he was recently incarcerated. Thus, the dissent's conclusion that Lopez was not prejudiced relies on factual error. It also fails to acknowledge the prosecution could not rely on Lopez's out-of-court statement as the sole basis for his convictions. (*Moreno, supra*, 188 Cal.App.3d at p. 1187.)

questioned whether a theft of cash occurred at all by asking whether they could base their verdict on evidence Lopez stole drugs. Further, the jury appeared to discredit the testimony that there was a theft of cash when it rejected Palacios' robbery story. We are not asked, in this appeal, to determine whether substantial evidence in the record could support the inference Lopez intended to commit theft. Because there was an admitted constitutional violation and ineffective counsel, we must instead determine whether, if the error had not occurred, it is reasonably probable the jury would not have found beyond a reasonable doubt that Lopez had the requisite intent. (*In re Wilson, supra*, 3 Cal.4th at p. 956.) On this record, we are constrained to conclude it is reasonably likely Lopez would have received a more favorable result.

The People contend we should conclude there was no prejudice because "the evidence supporting the charges [against Lopez] was strong." In support of that contention, the People refer to Palacios' testimony that Lopez participated in the theft of cash. Setting aside the fact the jury appeared to reject her testimony, in our judgment, Palacios' testimony was not sufficiently strong to override our concerns that Orozco's inadmissible statement supplied the jury with the basis for the conviction. Only Palacios claimed to witness the theft. Lopez contradicted her story in every particular and implicated her in the sale of drugs. Orozco denied anyone stole cash. Meanwhile, the testimony of Palacios' friends, Myra and Jorge Garibay, included significant disagreements with Palacios and gave the jury a reasonable basis to doubt her veracity.

Those inconsistencies cut across Palacios' entire story. Palacios testified Myra and Jorge were present when Lopez and Orozco arrived. But Myra testified only she was present. Palacios testified Lopez and Orozco asked whether an apartment was available and Myra—translating for her—told them there were none. But Myra did not testify she told them no apartments were available. Instead, she testified Palacios went in search of a rental application when they asked about renting. Palacios testified Lopez and Orozco stayed outside her apartment and were present for only five or six minutes. But Myra testified the two were inside the apartment and stayed for about 30 minutes. Palacios testified she had cash out on the table when Lopez and Orozco arrived. But Myra said she had no memory of that. Finally, Palacios testified Lopez and Orozco left while Myra and Jorge were still present and returned to commit the crime some time later, after her friends had departed. Jorge testified the two remained at Palacios' apartment after Myra had left, that he went back to his home to get Myra because Orozco needed her to translate, and that Palacios called Jorge and Myra to report the theft two to four minutes after he left them.

These inconsistencies in the prosecution's case do not require a finding that Palacios was being untruthful. However, taken in combination with Lopez's testimony that the apartment was a known source of drugs, Palacios and Myra had large quantities of methamphetamine, and they were conducting drug transactions from the apartment, the inconsistencies provided the jury a substantial reason to doubt her testimony.

It is notable as well that the jury rejected Palacios' testimony as a basis for convicting Lopez of robbery, but instead convicted him of the lesser included offense of theft. The difference between robbery and theft is robbery requires a showing defendant took the property by force or fear, whereas theft does not. (*People v. Burns* (2009) 172 Cal.App.4th 1251, 1256.) Thus, it is apparent the jury rejected at least the portion of Palacios' testimony accusing Lopez of pushing her to enable Orozco to steal the cash. For all these reasons, we do not find the People's evidence that Lopez was involved in stealing cash from Palacios strong enough to engender confidence in the verdict.

B. *Unanimity Instruction*

Lopez contends the trial court committed prejudicial error by failing to instruct the jury sua sponte that to convict all its members must agree Lopez stole cash, as Palacios testified, or drugs, as asserted in Orozco's statement to the police. We agree the instruction was required for the theft conviction.

"A criminal defendant is entitled to a verdict in which all 12 jurors concur as a matter of due process under the state and federal Constitutions. [Citation.] In any case in which the evidence would permit jurors to find the defendant guilty of a crime based on two or more discrete acts, either the prosecutor must elect among the alternatives or the court must require the jury to agree on the same criminal act. [Citation.] . . . The omission of a unanimity instruction is reversible error if, without it, some jurors may have believed the defendant guilty based on one act, while others may have believed him guilty based on another." (*People v. Arevalo-Iraheta* (2011) 193 Cal.App.4th 1574,

1588-1589.) “ ‘The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count.’ [Citation.]” (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.)

For the reasons we discuss in part IIA. *ante*, we conclude the unanimity instruction was required for the theft conviction. The prosecutor elicited testimony implicating Lopez in two different acts of theft. Palacios testified Lopez entered her apartment and pushed her aside to enable Orozco to steal a coffee can filled with approximately \$4,000 in cash. Lopez testified he and Orozco were invited into Palacios’ apartment and Orozco absconded with approximately \$4,000 worth of methamphetamine. Detective Campas testified Orozco told police neither stole money, but both she and Lopez stole drugs from Palacios’ apartment. Though the prosecutor focused most of its attention on Palacios’ testimony about the assault and theft of cash in closing arguments, he also referred to Orozco’s hearsay statement implicating Lopez in the theft of drugs. The jury asked the court whether it could convict Lopez “whether it was drugs or money that was taken?” The trial court answered in the affirmative by telling the jury it must find Lopez stole (or intended to steal) property to convict him of robbery, theft, or burglary. Thus, the evidence and the court’s instructions permitted jurors to find Lopez guilty of theft based on either the act of assaulting Palacios and taking her money or the act of absconding with her drugs.

The People insist the record shows the prosecutor elected to rely solely on Lopez's assault and theft of \$4,000 in cash from Palacios to support the charges. The prosecutor may have begun the case intending to rest the prosecution on that act, but he chose to elicit testimony from Detective Campas that Lopez stole drugs and to argue that fact in closing. The jury understood the import of that evidence and argument, and when the jury asked, the trial court informed the jury it could convict on the basis of finding Lopez stole drugs or cash. Those developments had the effect of unwinding any election the prosecutor had made when the trial commenced. If the prosecutor wished at that point to rest his case on the theft of the cash, he should have asked the trial court to instruct the jury it could base a guilty verdict on the robbery or theft charges only on that act.

The People argue no unanimity instruction was required for the burglary charge because the evidence showed a single entry, but possible uncertainty as to Lopez's exact criminal intent, which involves only the theory of the case. We need not resolve this issue because we reverse the burglary conviction for the reasons discussed in part IIA. *ante.*

III

DISPOSITION

We reverse the judgment and remand for a new trial.⁸

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

SLOUGH
J.

I concur:

HOLLENHORST
J.

⁸ Business and Professions Code section 6086.7, subdivision (a)(2) mandates we report our reversal of the judgment to the State Bar of California for investigation into the appropriateness of initiating disciplinary action. (See also Cal. Rules of Court, rule 10.609.) We express no opinion as to whether discipline is warranted, though the errors we identify were few in number and appeared to be errors of inadvertence.

[*People v. Lopez*, E063703]

RAMIREZ, P.J., Dissenting.

I respectfully dissent. The prosecutor did not commit misconduct because the trial court expressly allowed the parties to impeach Orozco's credibility, and the questioning of the detective related to a prior inconsistent statement.

By way of general principles, I agree that a prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it "infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Tully* (2012) 54 Cal.4th 952, 1009.) In other words, the misconduct must be "of sufficient significance to result in the denial of the defendant's right to a fair trial." (*Ibid.*)

It is misconduct for a prosecutor to intentionally elicit inadmissible testimony. (*People v. Trinh* (2014) 59 Cal.4th 216, 248; *People v. Smithey* (1999) 20 Cal. 4th 936, 960.) "But if the defense does not object, and the prosecutor is not asked to justify the question, a reviewing court is rarely able to determine whether this form of misconduct has occurred." (*People v. Friend* (2009) 47 Cal.4th 1, 80.) Thus, to preserve a claim of misconduct, the defendant must object in a timely fashion and request an admonition. (Evid. Code, § 353.)

Where the defense does not object, a claim of misconduct is preserved for review only if an admonition would not have cured the harm. (*People v. Sanchez* (2016) 63 Cal. 4th 411, 475-476, citing *People v. Gonzales* (2012) 54 Cal.4th 1234, 1275.) A party is

generally not prejudiced by a question to which an objection has been sustained. (*People v. Mayfield* (1997) 14 Cal.4th 668, 755, disapproved on another ground in *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2.) I also agree with the general principle that the admission of testimonial hearsay violates a defendant's constitutional right to confrontation of witnesses, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine. (*Crawford v. Washington* (2004) 541 U.S. 36, 59, 68.) While it is true that failure to object has been excused in cases that went to trial before *Crawford* had been decided (see *People v. Harris* (2013) 57 Cal.4th 804, 840), this case went to trial more than 8 years after *Crawford* was decided.

The majority holds that defense counsel was ineffective in failing to object to the elicitation of this prior inconsistent statement. I disagree. In order to prevail on a claim of ineffective assistance of counsel, the defendant must establish two things: (1) counsel's performance was deficient, and (2) counsel's errors were so serious that there is a reasonable probability that, but for counsel's professional errors, the result would be different. (*Strickland v. Washington* (1984) 466 U.S. 668, 697 [104 S.Ct. 2052, 80 L.Ed.2d 674].) "If the defendant fails to show prejudice, a reviewing court may reject the claim without determining the sufficiency of counsel's performance." (*People v. Mendoza* (2000) 24 Cal.4th 130, 164, citing *People v. Kipp* (1998) 18 Cal.4th 349, 366.) Even assuming that defense counsel's conduct in failing to object was deficient, to find that defense counsel was ineffective, we would have to find that he would have obtained a more favorable result in the absence of counsel's error. Here, an instruction could have

cured the error and any error was harmless beyond a reasonable doubt. The prosecutor argued to the jury that defendant stole the money from Palacios, not drugs, and did not exploit the statement he elicited in summation to the jury. Instead, the prosecutor argued that the jury should ignore the statements of both.

Further, the evidence supporting the charges was strong, comprising testimony from three eyewitnesses, while the defense evidence was internally inconsistent and weak. Detective Campas testified about his interview of Lopez, in which the defendant admitted to the detective that he and Orozco had gone to Palacios' home to "burn them" for narcotics. In his own defense, defendant attempted to explain away this statement by stating that Palacios—whose residence he claimed never to have visited previously—had somehow seized his settlement check while he was in custody for a parole violation, and that he planned to get it back. He went on to say that if he didn't get his money back, he was going to "burn them."

Defendant also attempted to give the impression that he was unfamiliar with Palacios and went to her residence on the recommendation of an associate who described it as a "party house." But by revealing that Palacios had seized his settlement check, he gave the impression of a prior association with her. Defendant's own testimony was internally inconsistent, so that even without the error complained of, a different outcome was unlikely.

In my view, defendant's denials notwithstanding, he has failed to show that if

counsel had objected to the questioning of the detective by the prosecutor that he would have obtained a more favorable result. I would affirm the conviction.

RAMIREZ

P. J.