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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES OLIVER HABERKAM, SR.,

Defendant and Appellant.

F061175

(Super. Ct. No. 1234900)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Timothy W. Salter, Judge.

Audrey R. Chavez, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, and Julie A. Hokans, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Appellant James Oliver Haberkam, Sr., was convicted of attempting to murder his ex-girlfriend and assaulting her with a firearm. During the course of trial, the prosecutor pointed out the restraints binding one of the defense witnesses, and also brought up the

fact that the witness had had contact with appellant and at least attempted to discuss the case, while both were in custody in the Stanislaus County Jail. Appellant asserts the prosecutor committed misconduct in bringing attention to the restraints and making inappropriate argument about the jailhouse contact, and the trial court erred in permitting introduction of the jailhouse contact evidence. For the reasons discussed below, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On August 29, 2007, appellant's girlfriend, Judith Kielbasa, did not return from work back to the home they had shared for the past ten years. She had, in fact, moved out permanently and had unilaterally broken up with him. Approximately two weeks later, appellant found out that Kielbasa had not only moved out, but had moved in with her new boyfriend, whom she was going to marry.

On September 29, 2007, appellant decided he could not live without Kielbasa any longer. It is disputed, as discussed below, whether appellant also decided that Kielbasa could not live without him.

Appellant and Kielbasa arranged to meet at Donnelly Park in Turlock that morning, at approximately 10:00. Before leaving his home, appellant drafted and printed three letters. One was to his next-door neighbor, asking her to take care of his dog. One was to his landlord who lived in the same house as him, asking her to make sure the letters got to the designated recipients. One was to his son, Chris, telling him: "I'm sorry, son, that it had to end this way. I just couldn't live without Judy. I was so broken hearted when she left me, I just wasn't going to let them get away with it. I hope you can forgive me for doing this. I love you, son."¹

¹ Appellant had apparently originally wrote that he wasn't going to let them *think* they got away with it, or something of that nature, but he had no explanation for his revision.

Appellant first testified he formulated his plan on the way to the park that morning, but then revised his timeline when his attorney pointed out he had printed out the letters before leaving for the park. His plan, as he described it, was to force Kielbasa to return to her new home with appellant in tow, where he would then tie her up. They would then wait for Kielbasa's boyfriend to return home, and appellant would then tie the interloper up before then shooting himself in front of the pair, leaving them perhaps emotionally scarred, but by no means dead. On the way to the park, appellant stopped at a store and bought duct tape and cable ties.

Neither appellant nor Kielbasa dispute that the following events occurred at the park: 1) upon Kielbasa first approaching him, appellant asked Kielbasa if she would like to enter into an arrangement where he would pay her to meet him at a motel once a month and provide him certain personal services; 2) Kielbasa declined the proposition and stood up to leave; 3) Appellant shot Kielbasa. The bullet entered Kielbasa's lower left side and exited to the right of her belly button.

The moments between Kielbasa standing up to leave, and then getting shot, however, are disputed. Kielbasa testified that after she had rebuffed appellant, he had opened the lapel of his unzipped jacket and showed her his gun. She had observed it "over his heart," "on the left side" of appellant's jacket, "on his left breast." He told her, while displaying the gun to her, his plan was to drive Kielbasa back to her house, where they would wait for Kielbasa's boyfriend, and then appellant was going to kill the couple and then seek out Kielbasa's daughter and kill her as well.

Appellant, on the other hand, testified he had kept his jacket zipped up to his neck throughout his encounter with Kielbasa, though he had told her he had a gun in his pocket when she got up to leave. He testified he had the gun in the pocket on the "left-hand side inside my jacket" and that he was right-handed. The gun was loaded and the safety was off. Appellant testified Kielbasa was walking away and he had followed her a short distance before he pulled out the gun. Appellant had intended to shoot himself in front of

Kielbasa, but as he was pulling his gun from his interior jacket pocket in his zipped up jacket, with his right hand, he pulled the gun up “over the top of my right shoulder,” and it “[e]vidently” went off. He testified he was not facing Kielbasa when the gun went off. He did not recall hearing the shot and only realized the gun had gone off once he smelled the gunpowder. There was no bullet hole in the jacket.

Appellant saw that Kielbasa was shot and had fallen to the ground. He stood over her and attempted to shoot himself in the chest, but the gun may have misfired, and in any event did not go off. He made no efforts to comfort Kielbasa, and stated to her, “Now you know what it is to hurt.” He made no further attempts to shoot Kielbasa, despite having the opportunity to do so.

Kielbasa immediately called 911 from her cell phone and remained on the line with the dispatcher until she was able to receive medical attention. The call was recorded, and played back for the jury during trial. Turlock Police Officer Kim Briggs arrived on the scene and ordered appellant to drop his gun. He can be heard on the 911 recording. Appellant made a number of comments, which were also picked up by the recording, some in response to Kielbasa’s comments to the 911 dispatcher, and some in response to Officer Briggs. Of particular note were the following exchanges:

“[Kielbasa]: ... He’s standing over me. Please!

“Operator: He’s standing over you? Does he still have the gun?

“[Kielbasa]: Yes, he does.

“[Appellant]: She shit all over me, dude.

“[Officer Briggs]: Drop the gun now [¶] ... [¶]

“[Kielbasa]: The phone’s open. The phone’s open.

“Operator: Judy, how old are you?

“[Appellant]: I’m not going to prison! I’ve got cancer! No!

“Operator: Judy?”

“[Officer Briggs]: Drop it!”

“[Appellant]: No! Not going to happen. You guys are going to have to take me out. [¶] ... [¶]...”

“[Appellant]: She’s been shot. That’s why she called you guys.”

“Operator: Judy? Judy?”

“[Appellant]: You know what, I’ll back up and you guys can get her an ambulance if you want, but I’m not dropping the gun. You’re gonna have to take me out today because this is it. I’ve got cancer. [¶] ... [¶]”

“[Kielbasa]: I hear you.”

“Operator: Ok. Why did he shoot you?”

“[Kielbasa]: Because we split up.”

“Operator: He shot you because you split up?”

“[Kielbasa]: Yeah. He’s crazy. I left him ... I left him like a month ago, and he shot me out of revenge.”

“Operator: He shot you out of revenge?”

“[Appellant]: It was because of the way you left me, not because you left me.”

“[Kielbasa]: He says it is because of the way I left him. Help!”

“Operator: It was because of the way you left him?”

“[Appellant]: Yeah, with another man.” (Full capitalization omitted.)

Appellant backed away from Kielbasa, allowing other law enforcement officers to retrieve Kielbasa and take her to waiting medical personnel. Appellant retreated to a tree, where he sat down, and pointed the gun at his chest. He remained this way for two to three hours, during which Officer Briggs remained with appellant. It was during this time that appellant told Officer Briggs he had shot Kielbasa on accident and that his original

plan was to kill himself in front of the captive couple. Appellant eventually called one of his sons, who convinced him not to commit suicide. A SWAT team arrived on scene and appellant was taken into custody.

Appellant was charged with 1) attempted murder (Pen. Code, §§ 664 & 187, subd. (a)),² with an enhancement for acting intentionally, deliberately and with premeditation, an enhancement for personally using a firearm and proximately causing great bodily injury (§ 12022.53, subd. (d)), and a special allegation appellant inflicted great bodily injury under circumstances involving domestic violence while committing a felony (§ 12022.7, subd. (e)); 2) assault with a firearm (§ 245, subd. (a)(2)), with an enhancement for personally using a firearm (§ 12022.5, subd. (a)), and another instance of the domestic violence special allegation; and 3) making criminal threats (§ 422).

Defense Witness Stephen Salyer's Testimony and Subsequent References

Stephen Salyer lived across the street from Donnelly Park at the time of the shooting. On the day of the shooting, he was scheduled to meet a customer of his car detailing business at the park. He testified that he witnessed the shooting and that it appeared to him that it was accidental. He also testified the gun was still in appellant's pocket when it went off, and he assumed the bullet went through the jacket.

Salyer testified that a week after the incident, he had met with Detective Lee Peters, and Detective Peters had pressured him into saying things that the detective wanted to hear, rather than what had actually happened, in Salyer's view.³ He testified he had previously given false statements to Detective Peters that indicated appellant had acted intentionally.

² All further statutory references are to the Penal Code unless otherwise indicated.

³ The pressure stemmed from Salyer's ongoing business relationship with Detective Peters as a "good customer" of Salyer's car detailing business.

The first question the prosecutor asked Salyer on cross-examination was: “Mr Salyer, I noticed that you appear to be in some kind of a restraint. Are you in custody for something?” Salyer’s restraints had not come up on direct examination. Salyer and the prosecutor then had the following exchange:

Salyer: “Yeah, for driving on a suspended in Lake County.”

Prosecutor: “Okay.”

Salyer: “I’m actually getting released today so --”

Prosecutor: “So you are serving time in another county, and they brought you here?”

Salyer: “They brought me here for this, yeah.”

Defense counsel made no objection to this exchange and the trial court made no admonishment to the jury at that moment.

In the course of testifying on direct, Salyer had referred to appellant by his first name, James. The prosecutor picked up on this and questioned Salyer further during cross-examination about his relationship with appellant, prompting defense counsel to request a hearing on the issue, which was held outside the presence of the jurors. It appears this was when the prosecutor discovered Salyer and appellant had been in custody at the same time in the Stanislaus County Jail and had had contact with each other during their overlapping terms.⁴

Defense counsel moved to exclude mention of the surrounding circumstances of Salyer’s and appellant’s contact, that is, that they were both in jail at the time their contact took place. Defense counsel was concerned with the jury finding out that appellant was in custody, which he argued might unduly bias the jury against appellant. The trial court evaluated the evidence and determined the testimony concerning custodial

⁴ Appellant was still in custody at the time of trial, since he was unable to post bail.

context was relevant to the credibility of both Salyer and appellant and implicitly determined reference to appellant being in custody was harmless since the jury had already had in front of them the inference that appellant was arrested and taken to jail at some point. Furthermore, the trial court stated, “I think the fact that one prisoner agrees to help another prisoner, I think that is probative.” The trial court then discussed with the attorneys additional jury instructions to address the custody status of both appellant and Salyer. Defense counsel continued with his objection to references to being in custody together, and the court again explained, “there is something ... probative about the fact that two *inmates*, one of whom is being tried as a defendant and the other one being a witness, that they discuss the witness’s testimony.... [T]hat’s probative.” (Italics added.) Defense counsel believed that referring to appellant’s custodial status would unfairly weigh against the theory that appellant shot Kielbasa accidentally because it would lead the jury to believe appellant had been arrested immediately after the incident and had been incarcerated since then, thus precluding an inference that law enforcement officers had believed the incident had been accidental and released appellant that day.

After the trial court ruled that Salyer could testify about the location of his and appellant’s contact, the jury was called back in and Salyer testified to the following in front of the jury: 1) he had a conversation with appellant after the shooting, “a while ago when [they were] incarcerated here in the local jail”; 2) he had a prior felony conviction for forgery; 3) Salyer and appellant were housed in different tiers of the jail during their overlapping term; 4) Salyer talked to an investigator, who revealed that statements were attributed to him (Salyer) that indicated he thought appellant had shot Kielbasa intentionally; 5) after Salyer found out from the investigator the connection between himself (Salyer) and appellant, Salyer tried to talk to appellant and let him know he had given the investigator “the truth,” but appellant rebuffed him; 6) Salyer told appellant he would go to court and say the truth.

The prosecutor questioned Salyer further about his motivations for testifying. Salyer testified he did not care if appellant was mad at him, and that he was not testifying to help appellant out, but more out of principle to have “the truth” come out. The prosecutor then asked, “Because in custody at some point in time is there some code amongst folks that are in custody, hey, I’ll help you out?” Before Salyer could respond, defense counsel objected, and the trial court sustained counsel’s objection. No admonition was requested or given.

Salyer then went on to testify about the circumstances of certain prior inconsistent statements attributed to him in a police report made the day of the incident, and in two separate newspaper articles about the incident. The numerous statements indicated that at the time of the incident, Salyer expressed his belief that the shooting had not been an accident.

Salyer maintained he did not make a statement to police the day of the incident, even after the prosecution showed him a police report written the day of the shooting, which included statements attributed to Salyer.

Salyer also denied making the statements attributed to him in a Modesto Bee article that had noted that “Salyer doesn’t think it was an accident,” and had him describing the incident as, “[Appellant] had the gun pointed right at her and pulled the trigger.” He also denied making a statement to a Turlock Journal reporter who reported that Salyer “saw the man raise a gun from his side and shoot the woman once in her upper torso,” and that “Salyer heard the man say that he has cancer and doesn’t want to live anymore.”

During closing arguments, the prosecution boiled down the key issue to one of credibility as between appellant and Kielbasa. In characterizing Salyer’s testimony, the prosecutor stated, “talk about the prime example of someone lying through their teeth on the witness stand.” The prosecutor then pointed out Salyer’s prior statements made on the day of the shooting to police and journalists that were inconsistent with his trial

testimony. The prosecutor compared Salyer's trial version of events to appellant's version and discussed the circumstance of their contact while in jail. The prosecutor argued: "So we come to find out that Mr. Salyer spent some time behind bars with the defendant. And lo and behold, they talked about this case. And lo and behold, he now comes into this courtroom with the exact same story as the defendant, reaching into the jacket, pulling out the gun and it goes off on accident."

The prosecutor went on, "You can consider factors such as bias or prejudice or a personal relationship. And what Stephen Salyer's testimony showed was not only that Mr. Salyer was lying through his teeth, but so was the defendant, because they tell the exact same story. And that's because they concocted it while they were behind bars together."

Further attacking Salyer's credibility, the prosecutor stated, "we already know that Stephen Salyer's testimony is absolutely unbelievable and should not be considered. [¶] But if you need any more evidence to support that, you can consider the fact that he was convicted of a felony, which he told us he was. He was convicted of a felony fraud offense."

Defense counsel's closing argument tepidly rebutted the prosecutor's characterizations. He stated, "[t]hen we have Stephen Salyer, interesting character. Obviously, he got agitated. Obviously he has given inconsistent statements. You can sort through it, reach your own conclusions. It seems to me that the statement was, all in one motion that he was reaching in his pocket as it came out, the gun shot. Clearly he made a mistake saying that the bullet went through the jacket..."

Further discussing Salyer's testimony, defense counsel noted that Salyer had been consistent as between the statement he gave to the investigator and in court, and Salyer disputed the prior statements. Counsel noted that at this point in time, Salyer was serving time in another location and thus had nothing to gain from helping appellant.

After closing arguments, the trial court instructed the jury. As pertinent here, the trial court gave the following instructions, not objected by appellant, among others: 1) “The fact that the defendant was at some point in custody in this matter is not evidence. You must completely disregard this circumstance in deciding the issues in this case. Do not consider it for any purpose or discuss it during your deliberations”; 2) nothing the attorneys say is evidence, including their opening and closing arguments; 3) do not assume that something is true just because one of the attorneys asked a question that suggested it was true; 4) the jury alone must judge witnesses’ credibility, and in doing so may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony, including whether the witness has been convicted of a felony and any prior statements the witness made; 5) “When Stephen Salyer testified, he was physically restrained. You must completely disregard this circumstance in deciding the issues in this case. Do not consider it for any purpose or discuss it during your deliberations. [¶] Evaluate the witness’s testimony according to the instructions I have given you”; 6) “When Stephen Salyer testified, he was in custody. The fact that a witness is in custody does not by itself make a witness more or less believable”; and 7) having a motive may be a factor tending to show that the defendant is guilty.

The jury deliberated for slightly over three hours, including readbacks of portions of appellant’s and Kielbasa’s testimony. The jury then found appellant guilty of counts 1 and 2, and their associated enhancements and special allegations, but found him not guilty as to the criminal threats charge. The trial court sentenced appellant to an aggregate sentence of 32 years to life on count 1, stayed the sentence on count 2 in accordance with section 654, and awarded custody credits in accordance with the probation officer’s calculation at the sentencing hearing.

DISCUSSION

Appellant’s overarching contention is that two of the prosecutor’s attacks on defense witness Stephen Salyer’s credibility -- erroneously permitted once by the trial

court and once by defense counsel -- collaterally impacted appellant's credibility such that the jury was misled to a conclusion they would not have otherwise reached.

As appellant paints it, one instance concerns the prosecutor's misconduct in drawing the jury's attention to Salyer's restraints on the witness stand, which defense counsel failed to object to, and the other instance concerns the trial court's allowance of unduly prejudicial evidence, in violation of Evidence Code section 352, that Salyer and appellant were in the custody of the Stanislaus County Jail at the same time and had contact that at the least brushed upon the subject of appellant's trial case. He also argues these credibility attacks were further compounded by the prosecutor's closing argument, which explicitly drew a connection between Salyer's credibility and appellant's credibility. Since the controversy boiled down to a credibility determination between appellant and the victim, these credibility attacks prejudiced appellant such that reversal is required. We disagree.

Reference to Salyer's Restraints and Custody Status

“In general, a prosecutor commits misconduct by the use of deceptive or reprehensible methods to persuade either the court or the jury. [Citations.] But the defendant need not show that the prosecutor acted in bad faith or with appreciation for the wrongfulness of the conduct, nor is a claim of prosecutorial misconduct defeated by a showing of the prosecutor's subjective good faith. [Citation.] To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct. [Citation.]” (*People v. Price* (1991) 1 Cal.4th 324, 447.)

“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.” [Citations.] In other words, the misconduct must be “of sufficient significance to result in the denial of the defendant's right to a fair trial.”

[Citation.] A prosecutor’s misconduct that does not render a trial fundamentally unfair nevertheless violates California law if it involves “the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.” [Citations.]’ [Citations.]” (*People v. Clark* (2011) 52 Cal.4th 856, 960 (*Clark*).

Appellant contends the prosecutor committed misconduct in bringing to the jury’s attention the fact that Salyer was in restraints while on the witness stand, and that he was then in custody. However, because defense counsel made no objection to the prosecution’s comments, appellant has forfeited this claim.

Also, the prosecution made no further comments about Salyer’s then-current custody status. The jury was specifically informed that it must disregard Salyer’s custodial status in its consideration of Salyer’s testimony. We assume the jury followed this instruction. (See *People v. Stevens* (2009) 47 Cal.4th 625, 641.) This admonition cured any harm caused by any alleged misconduct.⁵ (See *Price, supra*, 1 Cal.4th at pp. 460-461.)

Admission of Evidence of Salyer’s and Appellant’s Simultaneous Custody

We apply a deferential standard of review. “A trial court’s exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation].” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10; see also *People v. Thomas* (2011) 51 Cal.4th 449, 488.)

⁵ Nor did the trial court err in permitting Salyer to remain in restraints as he testified. (See *People v. Hernandez* (2011) 51 Cal.4th 733, 741 [“Decisions to employ security measures in the courtroom are reviewed on appeal for abuse of discretion. [Citations.] [¶] Many courtroom security procedures are routine and do not impinge on a defendant’s ability to present a defense or enjoy the presumption of innocence”].)

With respect to references to a defendant being in custody, our Supreme Court has noted, “we previously have commented upon the effect of reminders of a defendant’s custodial status.... ‘The Supreme Court has observed that the defendant’s jail clothing is a constant reminder to the jury that the defendant is in custody, and tends to undercut the presumption of innocence by creating an unacceptable risk that the jury will impermissibly consider this factor. [Citation.]’ [Citation.] It may be inferred that other information, having the same tendency to remind the jury that a defendant is in custody, might have a similar effect.” (*People v. Bradford* (1997) 15 Cal.4th 1229, 1335-1336.) However, the court “observe[d] that in certain circumstances a jury inevitably will learn a defendant is in custody for the current charged offense, for example where the jury is presented with the testimony of a jailhouse informant. [Citation.]” (*Id.* at p. 1336.) Thus, references to a defendant’s custody status are not per se reversible.

Appellant asserts the trial court erred in permitting evidence of appellant’s custody status to be admitted by inference from questioning Salyer about the details of his contact with appellant. The trial court, however, weighed the probative value of evidence that appellant and Salyer discussed the case while in custody together, against the potential prejudicial impact of the jury realizing that appellant was in custody, or had previously been in custody, and reached a reasonable conclusion that the probative value outweighed the possible prejudice, in accordance with Evidence Code section 352.

The prosecutor’s question that there was a “code” among jail mates was immediately objected to and the objection was sustained. This ruling was sufficient to prevent any reasonable juror from being influenced by the prosecutor’s remark. (See *Price, supra*, 1 Cal.4th at pp. 451, 455.) Appellant fails to make an adequate showing that the trial court’s determination was arbitrary, capricious, or patently absurd. We find no abuse of discretion.

The Prosecutor's Closing Argument

It is misconduct “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.]’ [Citations.]” (*People v. Redd* (2010) 48 Cal.4th 691, 742.) “Regarding the scope of permissible prosecutorial argument, ““a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.’ ... [Citations.]”” (*People v. Stanley* (2006) 39 Cal.4th 913, 951-952.)

“[H]arsh and colorful attacks on the credibility of opposing witnesses are permissible. [Citations.]’ [Citations.]” (*Clark, supra*, 52 Cal.4th at p. 962.)

The prosecutor was entitled to question Salyer’s testimonial consistency and possible bias. (*People v. Sandoval* (1992) 4 Cal.4th 155, 180.) “Referring to testimony as ‘lies’ is an acceptable practice so long as the prosecutor argues inferences based on the evidence and not on the prosecutor’s personal belief. [Citation.] Closing argument may be vigorous and may include opprobrious epithets when they are reasonably warranted by the evidence.” (*Ibid.*)

The prosecutor argued that Salyer and appellant colluded to come up with the theory that the shooting was accidental while in jail together, and expressly associated Salyer’s credibility with appellant’s credibility. We find no misconduct. The evidence reasonably warranted this argument and the jury was instructed that the attorneys’ arguments were not evidence. Salyer was the sole witness who corroborated appellant’s defense that the shooting was accidental, but had had previous statements attributed to him indicating the contrary. It was therefore reasonable for the prosecutor to put forth the

inference that Salyer and appellant had talked about their case while both confined in the same facility.

Any Error Was Harmless

Even assuming, for the sake of argument, that the prosecutor and the trial court individually or cumulatively erred, any such error was harmless and its omission would not have changed the outcome of the trial. The sole controversy was whether appellant intended to shoot Kielbasa. This came down to a credibility determination between appellant and Kielbasa. “Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]” (*People v. Huston* (1943) 21 Cal.2d 690, 693, overruled on other grounds in *People v. Burton* (1961) 55 Cal.2d 328, 352.)

Appellant admitted writing a letter to his son telling him he “was not going to let them get away with it.” He told Kielbasa, who was shot through the torso and bleeding on the ground, “Now you know what it is to hurt.” The 911 tape recorded appellant providing a reason for why he shot Kielbasa: “[B]ecause of the way you left me.” Moreover, the 911 tape indicated appellant thought that he was going to go to prison for his actions, and repeatedly refused to drop his gun in an effort to avoid this outcome. The jury could have reasonably inferred that appellant’s belief he was going to prison indicated his belief he had committed a crime, rather than precipitated an accident. Nowhere on the 911 tape is there an indication that appellant’s actions were accidental. It was not until several minutes after appellant had retreated from the scene that he informed Officer Briggs that he had shot Kielbasa by accident.

Appellant testified he was right-handed and pulled the gun from his left side, but the shot went over his right shoulder. Salyer was the sole corroborating witness that the shooting was an accident, but his credibility was weakened by his inconsistent

statements. Both police and journalists had attributed statements to Salyer that indicated he thought appellant had shot Kielbasa intentionally that day. Moreover, as Salyer described the shooting, the bullet would have gone through appellant's jacket, contradicting appellant's version and the physical evidence. Even had the jury not known that Salyer was then-currently in custody or that Salyer and appellant were in custody together at some point prior to the trial, it is not reasonably likely it would have found appellant not guilty of attempted murder and assault with a firearm. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Finally, appellant asserts *People v. Robinson* (1995) 31 Cal.App.4th 494 (*Robinson*) is on point with respect to determining the prosecutorial misconduct claims. We disagree. In *Robinson*, the appellate court reversed the defendant's arson conviction because of a combination of malfeasance on the district attorney's part and error on the trial court's part. (*Id.* at p. 497.) More specifically, the appellate court found the prosecutor committed a prejudicial *Brady*⁶ violation by withholding exculpatory evidence of the identities of two eyewitnesses from the defense. This violation was then compounded by the prosecutor's threefold misconduct committed during the trial: 1) improperly pointing out the contemporaneous custody of defense eyewitness Mark Lytle and the defendant; 2) improperly eliciting the specific nature of Lytle's prior felony conviction, contrary to the trial court's order; and 3) abusing the closing argument structure by first presenting a perfunctory and brief initial argument designed to preclude effective defense reply, then giving a rebuttal argument immune from defense reply ten times longer than his initial argument. (*Robinson, supra*, at pp. 502-505) Further exacerbating the *Robinson* prosecutor's actions was the trial court's error in excluding Lytle's testimony that he saw one Ny Brown setting fires alone on two prior occasions, which would have rebutted a prosecution witness's testimony that she saw the defendant

⁶ *Brady v. Maryland* (1963) 373 U.S. 83, 87 (*Brady*).

and Brown committing another act of arson together three nights prior to the offense at issue. (*Id.* at p. 503.)

Except for the reference to contemporaneous custody, the *Robinson* facts are obviously distinguishable. With respect to the custody reference, during Lytle’s cross-examination, the prosecutor asked about the context of Lytle’s contact with the defendant, specifically asking if he had talked to the defendant, “[i]n custody” and “in the same hold.” (*Robinson, supra*, 31 Cal.App.4th at p. 504.) Defense counsel objected and the trial court sustained the objection but failed to strike the answer or give an admonition to the jury. (*Ibid.*) The *Robinson* court noted that “[t]he misconduct was not cured or ameliorated by the trial court,” and therefore could have “tilted the credibility balance” against Lytle, and in favor of a prosecution eyewitness whose credibility was “vulnerable.” (*Id.* at p. 504 & fn. 9.)

Here, as discussed, the trial court instructed the jury that both appellant’s and Salyer’s custody status were not evidence and were not to be considered in its deliberations in any manner. Thus, as noted above, any misconduct was cured. The *Robinson* court made clear that its decision to reverse the defendant’s conviction was based on the combination of the district attorney’s malfeasance prior to trial, misconduct during trial, and the trial court’s evidentiary error. (*Robinson, supra*, 31 Cal.App.4th at p. 505.) Here, no such cumulative error exists. Appellant suffered no prejudice and there was no miscarriage of justice arising from the prosecutor’s conduct.

The Abstract of Judgment

The trial court sentenced appellant to a term of seven years to life for the attempted murder charge, with an additional consecutive sentence of 25 years to life for the section 12022.53, subdivision (d) firearm enhancement. The court imposed a four-year sentence for the section 12022.7, subdivision (e) domestic violence enhancement for

count 1, but stayed it in accordance with section 654. The trial court then imposed the “midterm [sentence] of three years” for count 2,⁷ with two additional four-year sentence enhancements under sections 12022.5, subdivision (a) and 12022.7, subdivision (e), but stayed each of those as well in accordance with section 654. Defense counsel clarified with the court that the non-stayed sentences were to run consecutive. The trial court did not specify whether the sentences on count 2 were consecutive or concurrent. The trial court also awarded custody credits.

Appellant asserts the court clerk erred in transcribing the trial court’s sentencing to the abstract of judgment. Respondent congenially has no objection to appellant’s requested amendments. We find, however, that, upon a closer reading of the abstract of judgment in its entirety, appellant’s concerns have already been addressed.

Appellant makes the following claims: “The abstract on count one did not reflect the stayed sentence on count two, nor did it reflect all of appellant’s custody credits.... The clerk prepared an abstract showing a consecutive determinate term on count two, and applying appellant’s custody credits to that term.... However, the court did not impose a consecutive term on count two, but correctly stayed that sentence pursuant to Penal Code section 654.... A corrected abstract must be prepared which shows that the sentence on count two was stayed, and correctly applying appellant’s custody credits to his sentence on count one.”

The abstract of judgment here consists of two forms - one for an indeterminate sentence, and one for a determinate sentence, and each connected by reference to the other. The indeterminate sentence form noted the seven years to life imposed for count 1, plus the 25 years to life firearm enhancement. The other enhancement sentence was

⁷ Section 245, subdivision (a)(2) states in pertinent part: “Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years” Thus, the trial court imposed a full middle term sentence for count 2.

noted as stayed. The determinate sentence form noted a middle term for count 2 that was “consecutive full term” and “654 stay.”⁸ (Full capitalization omitted.) The two enhancements were also noted as stayed on the determinate sentence form. The count 1 abstract, by referencing the count 2 abstract, reflects the stayed sentence on count 2, contrary to appellant’s assertion.

As for application of custody credits, on the count 1 abstract, under the section denoting “credit for time served,” the clerk noted, “SEE CR 290” (the determinate sentence form). As we read the abstract, the clerk did not apply custody credits to one count or the other based on what form they were inscribed, but rather treated the two forms together as one abstract of judgment, and thus the custody credits applied to the sentence as a whole.

Although appellant states the trial court did not express in open court that the sentences for count 2 were to run consecutive to count 1, appellant makes no actual argument that the trial court erred in failing to so designate the sentence on count 2. Thus, any such argument is forfeited.^{9 10} (*People v. Scott* (1994) 9 Cal.4th 331, 351-353.) No corrections to the abstract of judgment are required.

⁸ These latter two orders were denoted by checkboxes marked with an “X.”

⁹ See section 669; California Rules of Court rules 4.424 and 4.406; and *People v. Alford* (2010) 180 Cal.App.4th 1463, 1472.

¹⁰ We note that both the indeterminate and determinate sentence forms expressly stated under the heading “Other orders” that the two sentences were consecutive. Appellant makes no mention of this additional designation.

DISPOSITION

The judgment is affirmed.

Franson, J.

WE CONCUR:

Dawson, Acting P.J.

Kane, J.