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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

TOMMY WAYNE BLACK,

Defendant and Appellant.

F062313

(Super. Ct. No. LF8175B)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Oliver J. Northup, Jr., 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, Louis M. Vasquez and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Cornell, Acting P.J., Gomes, J., and Detjen, J.

It was alleged in an information filed February 9, 2010, that appellant, Tommy Wayne Black, committed two felonies, viz., possession of methamphetamine for purposes of sale (Health & Saf. Code, § 11378; count 1) and possession of a firearm by a felon (former Pen. Code, § 12021, subd. (a)(1); count 2),<sup>1</sup> and, in connection with count 1, that in 2002, he suffered a conviction of violating Health and Safety Code section 11378 (Health & Saf. Code, § 11370.2, subd. (c)).

Prior to trial appellant made, and on February 15, 2011, the court denied, a motion to suppress evidence (§ 1538.5). Thereafter, on February 23, 2011, a jury convicted appellant of both counts and found true the prior drug offense conviction allegation. On April 7, 2011, appellant made, and the court denied, a motion for a new trial, and the court imposed a prison term of five years eight months, consisting of two years on count 1, three years on the prior drug offense conviction enhancement, and eight months on count 2.

On appeal, appellant contends (1) the police officers who conducted the search in the instant case were not authorized to do so, and therefore the court erred in denying his suppression motion, and (2) the prosecutor committed misconduct by eliciting testimony that in 2008, appellant had been arrested for sale of a controlled substance. We affirm.

## **FACTS**

### ***Prosecution Case***

On October 8, 2009 (October 8), several officers with the City of Bakersfield Police Department (BPD), including Officers Paul Yoon, Justin Lewis, Nicole Shihrer and Paul Bender, searched a house on Lowe Street in Lamont, Kern County (the house),

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<sup>1</sup> Effective January 1, 2012, former Penal Code section 12021, subdivision (a)(1), prohibiting possession of a firearm by a felon, was repealed and replaced without substantive change by Penal Code section 29800, subdivision (a)(1) (Stats. 2010, ch. 711, § 4 [repealed], Stats. 2010, ch. 711, § 6 [reenacted]). Except as otherwise indicated, all further statutory references are to the Penal Code.

pursuant to a search warrant. Upon entering the house, officers encountered appellant, who was in the kitchen. Appellant was searched, and on his person was found \$2,080.00, in sixteen \$100 bills and twenty-four \$20 bills, and a business card on which was written what Officer Shihrer described as a “pay and owe sheet[.]”

Officer Shihrer detained two persons she saw coming out of a shed on the north side of the house: Randall Dakins and Stephen Cate. Dakins and Cate at some point indicated that they had arrived at the house in a white vehicle. Officer Lewis searched the white vehicle and found a quantity of what he suspected was methamphetamine.

Officer Yoon testified that in a search of the shed on the north side of the property, he found the following: a loaded semiautomatic handgun, several torn plastic baggies, three hypodermic syringes, a glass pipe of the kind used to ingest methamphetamine, a plastic bag containing suspected methamphetamine, “paperwork ... in the name of [appellant],” a digital gram scale with some white residue on it, two cell phones, and a computer monitor that was connected to a closed circuit television camera and “was displaying what was going on to the front of the house.” Officer Bender testified another gram scale was found in a shed on the west side of the property.

Officer Bender also testified to the following: On one of the cell phones was a text message received on October 8 which stated, “‘It’s me, Monster. I got money, and I need two balls.’” A “ball” is a slang term for one-eighth of an ounce. Another October 8 text message stated, “‘Tommy, I got 300. Come see me, please.’” Another October 8 text message stated, “‘Hey, this is Randy. Can I hook up? Got money.’” The term “hook up” means “they’re looking to purchase something.”

Officer Bender had already detained and handcuffed appellant when he learned from Officer Yoon that narcotics paraphernalia had been found in the north shed. At that point, Bender placed appellant under arrest, “read [appellant] his *Miranda* rights,” and

told him of Officer Yoon's find in the north shed.<sup>2</sup> Appellant then said, "I'll show you where it is," and Bender escorted him to the north shed where appellant, pointing with his hands, indicated that contraband was located behind an air conditioner. Officer Yoon looked behind the air conditioner and found the plastic bag containing suspected methamphetamine, referred to above.

Thereafter, appellant told Officer Bender the following: He lived at the house; he was "involved in the sale of methamphetamine"; and he was receiving unemployment insurance (UI) benefits, "but he was selling to supplement his income and support his family."

A police criminalist testified that chemical tests of the substances found in the white vehicle and the shed contained methamphetamine. In response to a hypothetical question that tracked the facts as set forth here, Officer Bender opined that the methamphetamine found in the shed was possessed for the purpose of sale.

Appellant testified to the following: He was not guilty of the offenses charged in the information.<sup>3</sup> On October 8, he had recently lost his home through foreclosure; he had been living in the house, which belonged to his grandmother, "off and on," for approximately two or three weeks; and he had been away from the house for approximately two days. He had arrived back at the house approximately 30 minutes before the police arrived. At that time, also present in the house were his mother; Courtney Hinthier, his girlfriend; his stepdaughter; and his two children.

When the police arrived, he did not know the drugs and the gun were in the shed. Neither the glass pipe nor the cell phones belonged to him.

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<sup>2</sup> See *Miranda v. Arizona* (1966) 384 U.S. 436.

<sup>3</sup> Except as otherwise indicated, the remainder of our factual statement is taken from appellant's testimony.

Dakins and appellant were “[a]cquaintance[s],” and appellant had never met Cate. At one point, he was on the front porch and Dakins and Cate, who had been “escorted out,” were approximately eight feet away from him. He overheard them “saying something about stashing something behind the air conditioner,” and thereafter he “[told] an officer something about the dope being in an air conditioner.” He would not have known there was contraband in the shed had he not overheard Dakins and Cate talking.

Officer Bender testified that while he questioned appellant on the north side of the house, Dakins and Cate were being detained on the east side of the house. Bender heard no conversation between Dakins and Cate. The two “wouldn’t be allowed to speak to one another.”

Appellant testified he maintained the video surveillance system for “[p]rotection,” and because he parked his truck in the front yard and “[t]here [are] a lot of car thefts, stereos and such.” The currency found on his person was money he had received in UI benefits. He receives a check for \$916 every two weeks, and he had just cashed a UI check that day. When asked to account for the fact that he was unemployed yet had more than \$916 in his possession, he answered, “I save money.”

He did not have a pay-and-owe sheet in his possession. In his wallet, he had an attorney’s business card, on the back of which were written “some numbers,” but these related to “bills” and his income tax refund.

Appellant’s father is also named Tommy Black. Appellant’s father lived at the house “in the 90’s,” and the house is still his “mailing address.” Appellant’s mother, Rebecca Black, testified she was living in the house on October 8 and that while she lived there, mail for appellant’s father was sometimes delivered there.

In 2002, appellant was convicted of the sale of methamphetamine.

Courtney Hinthier testified to the following: She is appellant’s girlfriend; she lives with him. She has lived in the house for approximately two and one-half years. She had

been in the shed and she had never seen a gun there, or anywhere else on the property. She had never seen methamphetamine when she had been in the shed, and she had never seen the methamphetamine pipe the officers seized, “any scales,” or “anything that would indicate that methamphetamine is being used or sold in [the house][.]” Appellant does not smoke or “use” methamphetamine. She had never seen appellant “use” or smoke methamphetamine, although she “imagine[d]” that he had used the drug “in the past.” She did not know when he last used methamphetamine.

## **DISCUSSION**

### ***Denial of the Suppression Motion***

Appellant contends the court erred in denying his suppression motion because the search in the instant case was not authorized under section 830.1, subdivision (a).<sup>4</sup>

Section 830.1(a) lists categories of law enforcement personnel that qualify as “peace officer[s].” Included in these categories are “police officers,” such as the BPD officers who conducted the search in the instant case. (§ 831(a).) The statute provides that the “authority of ... peace officers extends to any place in the state, as follows:

“(1) As to any public offense committed or which there is probable cause to believe has been committed within the political subdivision that employs the peace officer or in which the peace officer serves.

“(2) Where the peace officer has the prior consent of the chief of police or chief, director, or chief executive officer of a consolidated municipal public safety agency, or person authorized by him or her to give consent, if the place is within a city, or of the sheriff, or person authorized by him or her to give consent, if the place is within a county.

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<sup>4</sup> We refer to subdivision (a) of section 830.1, and to its smaller components, in abbreviated form, i.e., sections 830.1(a), 830.1(a)(1), 830.1(a)(2), 830.1(a)(3).

“(3) As to any public offense committed or which there is probable cause to believe has been committed in the peace officer’s presence, and with respect to which there is immediate danger to person or property, or of the escape of the perpetrator of the offense.”

Appellant argues that the search in the instant case ran afoul of section 830.1(a)(2) because the BPD officers who conducted the search in Lamont, which is in Kern County but outside the boundaries of Bakersfield, did not obtain the prior consent of the Sheriff of Kern County. The People do not dispute the factual premises of appellant’s claim—that the BPD officers conducted a search in Kern County, but not in Bakersfield, without the prior consent of the Kern County Sheriff—but they argue that section 830.1(a) does not control here and that therefore prior consent was not necessary.<sup>5</sup> The People rely on sections 1528-1530, as interpreted in *People v. Emanuel* (1978) 87 Cal.App.3d 205 (*Emanuel*).

In that case, Long Beach Police Department (LBPD) officers served and executed a search warrant at the defendant’s residence in Lakewood. The warrant was issued based on information that the defendant had committed a crime in Long Beach. In challenging the denial of his suppression motion on appeal, the defendant argued that the warrant was served “outside the jurisdiction of the [LBPD].” (*Emanuel, supra*, 87 Cal.App.3d at p. 210.) The court rejected this argument, “holding ... that county-wide service or execution of a search warrant is authorized by the plain meaning of the language in Penal Code sections 1528-1530.” (*Id.* at p. 211.)

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<sup>5</sup> There is also no dispute that the search was not based on probable cause that an offense had been committed in the City of Bakersfield, thereby rendering section 830.1(a)(1) inapplicable, or that the search was based on an offense committed in the presence of a peace officer, thereby rendering section 830.1(a)(3) inapplicable.

The court pointed out the following: First, section 1528, subdivision (a) “requires a magistrate who is satisfied that probable cause exists to issue a search warrant ‘to a peace officer *in his county*, commanding him to forthwith search the person or place named ....’ (Italics added.)” (*Emanuel, supra*, 87 Cal.App.3d at p. 211.) Second, “Section 1529 then specifies the mandatory form of the warrant, which shall begin as follows: [¶] ‘County of \_\_\_\_\_ [¶] ‘The people of the State of California *to any sheriff, constable, marshall, or policeman in the County of \_\_\_\_\_ ....*’ (Italics added.)” (*Ibid.*) Finally, “Section 1530 next provides that ‘[a] search warrant *may in all cases be served by any of the officers* mentioned in its directions ....’ (Italics added.)” (*Ibid.*) The “plain meaning” of the foregoing, the court stated, is that “where, as here, a search warrant is properly issued, the warrant may be served any place within the county by the officers named in its directions.” (*Ibid.*)

Section 830.1, the court stated, does not control: “Seen in this light, the meaning of Penal Code section 830.1 comes into clearer focus. Thus, the provision in that section which extends the authority of an officer to ‘any place in the state’ where he has the prior consent of the police chief in a city, or of the sheriff in a county, does not refer to a nebulous statewide authority but synthesizes the concepts of territorial limitation and reciprocity of law enforcement services. A police officer executing a valid search warrant outside the boundaries of the city or political entity which he serves, but still within the county, does not need the prior consent of that county’s sheriff to properly serve the warrant because the officer is already authorized to serve the warrant anywhere in his county under Penal Code sections 1528-1530.” (*Emanuel, supra*, 87 Cal.App.3d at p. 212.)

Appellant contends the “inescapable meaning” of sections 1528-1530 is something quite different. He argues, as best we can determine, that sections 1528-1530 establish that only a “peace officer” can serve a search warrant, and that these statutes are

“controlled by” section 830.1(a) which defines peace officers and the extent of their authority. He argues further that the *Emanuel* court’s interpretation of section 830.1 was not necessary to its decision because the LBPD officers had probable cause to believe a crime had been committed in Long Beach, and therefore the search was authorized under the version of the statute then in effect corresponding to section 830.1(a)(1) which, as with current version, extended authority to any peace officer as to any offense for which there was probable cause to believe was committed within the political subdivision that employed him or her.<sup>6</sup>

Regardless of whether what the *Emanuel* court characterized as its holding is actually, as appellant asserts, dictum, we agree with the reasoning of *Emanuel*. Considered together, section 830.1(a) and sections 1528-1530, establish the following: Where neither section 830.1(a)(1) nor section 830.1(a)(3) applies, a peace officer may execute a search warrant outside of the boundaries of the political entity that employs him or her, and *outside of the county in which he or she is employed*, only with the prior authorization required under section 830.1(a)(2). However, sections 1528-1530 authorize the execution of a search warrant by police officers employed by a city anywhere in the county in which that city is located, without regard to section 830.1(a).

Therefore, in the instant case, the BPD officers were authorized to execute the search warrant in Lamont, a political subdivision of Kern County. Moreover, even if the BPD officers did not have peace officer authority under sections 830.1(a) and 1528-1530, reversal is not required. On this point, we find instructive *People v. Galvan* (1992) 5 Cal.App.4th 866.

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<sup>6</sup> At all times relevant in *Emanuel*, the substance of what is now contained in subdivisions (a)(1), (a)(2) and (a)(3) of section 830.1 was contained in former section 830.1, subdivisions (a), (b) and (c), respectively. (Stats. 1968, c. 1222, p. 2303, § 1.)

In that case, a search warrant was (1) issued by a San Bernardino County (S.B. County) magistrate, (2) directed to “any sheriff, policeman, or peace officer in the County of Los Angeles,” and (3) executed in S.B. County. (*Galvan, supra*, 5 Cal.App.4th at p. 869.) There was no indication in the record the search was authorized by the S.B. County Sheriff. The defendant argued on appeal that the Los Angeles County deputy sheriffs who executed the warrant “were not acting as peace officers because their peace officer status terminated at the boundary of the political subdivision where they were employed. (§ 830.1, subd. (a).)” (*Ibid.*)

The appellate court noted that section 1528, subdivision (a) specifies that “[i]f the magistrate is ... satisfied of the existence of the grounds for the application ... he must issue a search warrant ... to a peace officer in his county ...” (*Galvan, supra*, 5 Cal.App.4th at p. 870.) However, the court stated, the question of “whether a magistrate has the power to extend the authority of a peace officer from *another county* to *the magistrate’s county*” “appears to be an issue of first impression in this state.” (*Ibid.*, italics added.) In resolving this question, the court held: “Absent an indication in the record that the San Bernardino County Sheriff had given consent to the search, we must conclude that the Los Angeles County Sheriff’s deputies did not have peace officer authority within the meaning of sections 830.1 and 1528.” (*Id.* at pp. 870-871.)

However, the court held, this “technical error” (*Galvan, supra*, 5 Cal.App.4th at p. 871) did not require reversal. Based in part on principles announced in *United States v. Leon* (1984) 468 U.S. 897, where the court held that the Fourth Amendment does not require suppression of evidence obtained in objectively reasonable reliance on a search warrant issued by a neutral magistrate, even if the search warrant is later invalidated (*id.* at p. 922), the court reasoned as follows: “There is no indication the officers acted in bad faith in seeking a warrant from a magistrate in San Bernardino County. As we note, prior law was silent on the propriety of such an action. There is also no indication that the

magistrate would have proceeded any differently if the warrant had been requested by San Bernardino County law enforcement officers. As we determined above, probable cause supported the issuance of the search warrant” (*Galvan*, at p. 872).

Here too, there is no indication that BPD Officer Bender acted in bad faith in seeking a warrant to search the house in Lamont. Appellant, arguing to the contrary, asserts that “it must be presumed that [Bender] had full knowledge that his authority as a peace officer did not extend beyond the boundaries of the City of Bakersfield.” (Emphasis and unnecessary capitalization omitted.) We disagree. As demonstrated above, *Emanuel* supports the legality of the search, and appellant does not cite, and we are not aware of, any case authority to the contrary. Moreover, similar to *Galvan*, there is no indication here that the magistrate would have proceeded any differently if the warrant had been requested by Kern County Sheriff’s deputies, nor is there any indication, or any suggestion by appellant, that the warrant was unsupported by probable cause. Based on the foregoing, we conclude that even if section 830.1(a)(2) was applicable in the instant case, noncompliance with that section does not invalidate the search.

***Prosecutorial Misconduct***

The following exchange took place during the prosecutor’s cross-examination of Courtney Hinthier:

“Q Were you aware that [appellant] was arrested for selling a controlled substance in 2008?”<sup>[7]</sup>

“A Yes.”

Defense counsel objected. He argued, “Being arrested means nothing. I think it is unfair for the jury to have heard that, the fact he was arrested and never convicted.”

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<sup>7</sup> No evidence was adduced that appellant had been arrested for any offense in 2008.

After further argument, the court ruled: “With regard to the arrest, I will sustain the objection and instruct the jurors to disregard.”

Appellant contends the prosecution committed reversible prosecutorial misconduct in eliciting testimony from Hinthier that appellant had been arrested in 2008 for selling drugs. He argues that notwithstanding the court’s admonition to the jury to disregard Hinthier’s answer, such testimony was so “inflammatory”—presumably because of the danger the jury would determine that it showed appellant had a propensity for selling drugs—that the “outcome of the trial” was “foreordained.” We disagree.

“[I]n order to make out a federal constitutional violation based on the conduct of the prosecution, a defendant must establish that the challenged conduct “‘comprises a pattern of conduct ‘so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.’ ...” [Citations]. As the federal high court has framed the controlling standard, [t]he relevant question is whether the prosecutors’ comments “so infected the trial with unfairness as to make the resulting conviction a denial of due process.”” (*People v. Padilla* (1995) 11 Cal.4th 891, 939, overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) Under state law, “[C]onduct 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 court or the jury.’”” (*People v. Padilla, supra*, at p. 940.) “[T]he judgment will not be reversed [on state law grounds] unless, after a review of the entire cause, it appears that it is “reasonably probable” that a result more favorable to the defendant would have occurred had the district attorney refrained from the misconduct in question.” (*People v. Bryden* (1998) 63 Cal.App.4th 159, 182.)

“[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.” (*People v. Hill, supra*, 17 Cal.4th at p. 823, fn. 1.) It is generally not necessary for the defendant to “show that the prosecutor acted in bad faith or with appreciation of the wrongfulness of his or her conduct, because the prosecutor’s conduct is evaluated in accordance with an objective standard.” (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133.) The case of *People v. Smithey* (1999) 20 Cal.4th 936 (*Smithey*) illustrates this point in a context similar to the instant case.

In that case, the prosecutor questioned a defense expert as to whether the defendant had the capacity to form the intent to commit the crimes he was charged with. When the defense objected, the prosecutor stated he “[did not] mind having the door opened in this regard.” (*Smithey, supra*, 20 Cal.4th at p. 959.) However, as the court noted, under sections 28 and 29, “an expert may not offer an opinion regarding whether the defendant had the capacity to form the intent required for the crime...” (*Smithey*, at pp. 960-961.) Citing the rule that “It is, of course, misconduct for a prosecutor to “intentionally elicit inadmissible testimony”” (*id.* at p. 960), the court stated: “The prosecutor’s question seeking to elicit [the expert’s] inadmissible opinion regarding defendant’s capacity to form such intent at the time he committed the crimes, and the prosecutor’s subsequent remarks that he was willing to ‘open the door’ on that issue, were improper. Even if an experienced prosecutor legitimately could believe that the parties may waive the prohibitions in section 28 and 29, a showing of bad faith or knowledge of the wrongfulness of his or her conduct is not required to establish prosecutorial misconduct” (*id.* at p. 961). (But see *People v. Chatman* (2006) 38 Cal.4th 344, 379-380 [“question[ing] whether ... issue is properly considered one of misconduct” where “[a]lthough the prosecutor ... certainly asked the questions intentionally, nothing in the record suggests he sought to present evidence he knew was inadmissible”].)

Here also, the prosecutor, by asking Hinthier if she was aware appellant had been arrested—a fact, not in evidence—sought to elicit inadmissible evidence. “By statute, evidence of prior specific acts of misconduct is ordinarily inadmissible either to prove conduct on a specific occasion or to attack a witness’ credibility. [Citations.] More specifically, it has long been held that evidence of an accused’s prior arrests is inadmissible.” (*People v. Anderson* (1978) 20 Cal.3d 647, 650; accord, *People v. Medina* (1995) 11 Cal.4th 694, 769 [“mere arrests are usually inadmissible, whether as proof of guilt or impeachment”]; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1523 [“it is established that evidence of mere arrests is inadmissible because it is more prejudicial than probative”].)

This isolated instance of improper conduct, however, does not constitute a *pattern* of conduct, egregious or otherwise, that rendered the trial fundamentally unfair in denial of appellant’s federal constitutional right to due process of law. And, assuming the prosecutor’s conduct constituted a deceptive or reprehensible method to persuade the jury, in violation of state law, such misconduct was not prejudicial. First, although the prosecutor elicited Hinthier’s testimony that appellant had, in fact, been arrested for selling drugs in 2008, and thereby created the danger that the jury could conclude appellant had at that time committed an offense similar to the offense charged in count 1, the jury also learned through properly admitted evidence that appellant had been convicted of selling drugs in 2002. Therefore, evidence of similar conduct in 2008 was largely duplicative. This mitigated the prejudicial effect of the 2008 evidence. (Cf. *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1029 [the witness’s comment as she left the witness stand that defendant was a ““dog,”” ““mad dog,”” or ““dirty black dog”” was not prejudicial in part because the jury already knew that the witness scorned the defendant because “she saw him gun down her daughter in church”].) Second, the court quickly sustained the defense objection and instructed the jury to disregard Hinthier’s

testimony, and at the close of trial further instructed as follows: “If I sustain an objection, you must ignore the question. ... If I ordered testimony stricken from the record, you must disregard it and must not consider that testimony for any purpose.” We presume that the jury followed the court’s instructions and disregarded the prosecutor’s questions and Hinthier’s answer. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Third, the challenged question and answer “constituted an isolated instance in a[n] ... otherwise well-conducted trial ....” (*Smithy, supra*, 20 Cal.4th at p. 961.) Finally, the evidence against appellant was strong. On this record, we conclude no prejudice was shown.

Appellant argues for the first time in his reply brief that testimony regarding appellant’s 2002 arrest was prejudicial not only, as discussed above, because the jury might consider it as evidence of appellant’s character, but because it “undermined [Hinthier’s] credibility as to the persuasively exculpatory defense testimony she had given.” However, “It is improper to raise new contentions in the reply brief,” and “[t]herefore, this contention is forfeited.” (*People v. Taylor* (2004) 119 Cal.App.4th 628, 642-643.) In any event, although as to the question of Hinthier’s credibility the challenged evidence would not be duplicative, were we to consider this claim, we would still conclude appellant had not demonstrated prejudice for the other reasons discussed above.

### **DISPOSITION**

The judgment is affirmed.