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

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES EDWARD FORD, JR.,

Defendant and Appellant.

F068713

(Merced Super. Ct.
No. CRM027596)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Merced County. Marc Garcia, Judge.

Jin H. Kim, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and John G. McLean, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Poochigian, Acting P.J., Franson, J. and Smith, J.

INTRODUCTION

Defendant was convicted of multiple crimes arising from his attempt to cash an altered check with perfume on it. During closing argument, the prosecutor mentioned that liquids with alcohol, such as perfume, can be used to alter a check. No evidence was adduced at trial that alcoholic liquids enable alteration of a check. Defendant contends that the prosecutor's reference to matters outside the record was reversible misconduct. We conclude that while the prosecutor's comment was indeed made without evidentiary support, it was also harmless. We affirm.

BACKGROUND FACTS

Defendant was charged with forgery (count I - Pen. Code, § 476)¹ and receiving stolen property (count II - § 496, subd. (a)). The information also alleged that defendant had suffered a prior serious or violent felony conviction (§§ 667, subds. (b)–(i), 1170.12, 668) and two prior prison terms (§§ 667.5, subd. (b), 668).

On August 16, 2013, a jury convicted defendant of both counts, and the trial court found the enhancement allegations true in a bifurcated proceeding. The court sentenced defendant to two years on count one, doubled to four years. The court also sentenced defendant to a stayed (§ 654) term of two years on count two, doubled to four years. The sentencing court also stated that it “will impose both Enhancements 2 and 3 which are the prison priors, but stay the punishment on both of those.”²

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² In the respondent's brief, the Attorney General contends that the sentencing court erred in staying the prior prison term enhancements. (See *People v. Langston* (2004) 33 Cal.4th 1237, 1241.) We may correct an unauthorized sentence brought to our attention in this manner even though the People did not file a cross-appeal. (See *People v. Crooks* (1997) 55 Cal.App.4th 797, 811.) And we agree that once a prior prison term enhancement is found true, “the trial court may not stay the one-year enhancement, which is mandatory unless stricken. [Citations.]” (*Langston, supra*, at p. 1241.) Defendant suggests the trial court would have preferred striking the enhancements over imposing them without a stay. We do not think the sentencing court's statement that it “will impose both Enhancements 2 and 3 which are the prison priors, but stay the punishment on both of those” is a clear indication of what the court would have done if staying the

TRIAL EVIDENCE

Prosecution's Case

Dennis Snapp (Snapp) has a bank account with Bank of America. On April 26, 2013, Snapp paid three bills by placing three checks in the mailbox at his home. One of the checks Snapp wrote was to AT&T in the amount of \$30.86. When he placed the check to AT&T in the mailbox, it was in good condition and had no erasures on it.

Angie Alvarez (Alvarez) was a bank teller at Bank of America on April 26, 2013. At about 4:00 p.m., defendant tried to cash a check by presenting it to Alvarez. Alvarez, who had been trained in detecting fraudulent checks, testified that the check defendant presented appeared to have been “altered.” The check was moist and smelled like perfume or cologne.³ The check had been “written over” and had a tear “that looks like they tried to change what was underneath that” Defendant said drinks had been spilled on the check, so he had sprayed it with cologne. Alvarez went to her supervisor, Jessica Garcia (Garcia).

Garcia had also been trained on how to determine whether a check is genuine. Garcia testified the check defendant presented looked like it had been written over several times, and had “scratching” and a “bubble mark.” Defendant told Garcia the check was stained because his kids had spilled something on it. Garcia told defendant to “have a seat” while she verified the signature. Garcia tried to call Snapp but could not reach him. Garcia then contacted the police. Defendant became “restless” and tried to get a better look at what Garcia was doing. Defendant eventually walked out the front door without the check.

punishment was not an option. Therefore, we will remand for the court to determine whether to strike the enhancements or impose them without a stay.

³ Alvarez testified she was aware that perfume and cologne have an alcohol base.

A police officer responded to the bank and took possession of the check. The officer observed two distinct holes in the check. After the officer spoke with Garcia, he went outside where defendant was already in another officer's patrol vehicle.

Defendant's Testimony

Defendant claimed he did various "handyman" jobs for a man who claimed to be named "Dennis Snapp." Defendant said the man was not the same person as the Dennis Snapp who testified in the present case. Eventually the man gave him a check for the various jobs. Defendant did not see the man fill out the check. Defendant brought the check home where his nieces spilled a bottle of "cologne or perfume, baby perfume with glitter on the check" Defendant wanted to cash the check before it got "messed up," so he went immediately to the bank.

The teller told him they would need to " 'verify' " the " 'amount' " of the check and also contact the " 'owner' " to " 'make sure it's okay.' " Defendant waited and eventually did not see anyone at the teller station, so he went outside to smoke a cigar. A police officer approached him and eventually arrested him.

Defendant testified that the check was messy when he presented it at the bank. Both "James Ford" and the amount of \$1,300.86 had been marked over. Defendant claimed the check did not look like that before the perfume was spilled on it.

The prosecutor asked whether a check could be altered by moistening it with an alcohol-based product such as perfume. Defendant responded that he did not know.

DISCUSSION

I. Any Error Resulting from Prosecutor's Reference During Closing Argument to the Ability of Alcohol to Enable Alteration of Checks was Harmless

A. Background Facts

At closing argument the prosecutor argued that defendant used perfume to erase parts of the check, and then wrote in his own name on the check. In response, the defense conceded that the check had been altered, but argued that there was reasonable

doubt that defendant knew the check had been altered. On rebuttal, the prosecutor made the following comments:

“Perfume has an alcohol base, and that liquid just happens to be a way to alter paper in order to make erasures and deletions. You put perfume on a check and it makes it easier to remove what has been written on the check. And kind of a coincidence, isn’t it, that perfume would be spilled on the check as opposed” to some other liquid.

Shortly thereafter, the prosecutor said: “You recall Ms. Alvarez said perfume is alcohol-based. What an incredible coincidence it is that the exact liquid that is spilled on this check just happens to be liquid that can be used to make alterations” Defendant counsel objected that the subject of the prosecutor’s comment was “not in evidence,” but the court overruled the objection.

B. Prosecutor’s Reference to Fact that Alcohol can be used to Alter a Check was not Supported by the Portions of the Record Cited by the Attorney General

Defendant contends on appeal that the prosecutor committed misconduct by referring to matters outside the record. We conclude the prosecutor did err in referencing facts not in evidence.

“ ‘[S]tatements of facts not in evidence by the prosecuting attorney in his argument to the jury constitute misconduct.’ [Citations.]” (*People v. Galloway* (1979) 100 Cal.App.3d 551, 564.)

Defendant correctly notes that Alvarez testified that she was aware perfume and cologne have an alcohol base, but did not testify that alcohol could be used to make alterations on a check. The Attorney General does not dispute defendant’s characterization of Alvarez’s testimony on this point, but instead observes “there was another reference during trial to the use of alcohol-based products to alter documents.” The Attorney General points to a question posed by the prosecutor asking defendant whether alcohol-based products can be used to alter a check. The problem with the Attorney General’s contention is that defendant responded to the question: “I don’t know.” Though defendant’s testimony was evidence (Evid. Code, § 140), the

prosecutor's question was not. (*Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819, 843 [statements of attorneys are not evidence].) Thus, the actual *evidence* (i.e., defendant's testimony) does not support the prosecutor's claim made to the jury that alcohol can be used to make alterations on a check.

We, therefore, reject the Attorney General's suggestion that the prosecutor's argument was supported by his question to and answer from defendant. However, for the reasons explained below, we conclude that any error was harmless.

C. Harmlessness

When there is strong evidence of guilt, prosecutorial error may be deemed harmless. (E.g., *People v. Bonin* (1988) 46 Cal.3d 659, 690, overruled on another point by *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

The contested issue in the case was whether defendant knew the check had been altered. There was strong evidence – apart from the prosecutor's comments during closing argument regarding alcohol – that the altered nature of the check was clearly visible. Alvarez testified the check looked “altered.” The check had been “written over” and had a tear “that looks like they tried to change what was underneath that ...” Garcia testified the check looked like it had been written over several times, and had “scratching” and a “bubble mark.” The officer who responded to the scene and took possession of the check observed two distinct holes in the check.

In sum, there was strong evidence that the check was clearly and visibly altered which, in turn, is strong evidence that defendant knew the check had been altered. We, therefore, hold the prosecutor's reference to the ability of alcoholic liquids to enable alteration of a check to be harmless.

DISPOSITION

The judgment is affirmed. The matter is remanded for the trial court to either (1) strike the prior prison enhancements or (2) impose them without a stay. (See fn. 2, *ante*.)