

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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

THE PEOPLE,

Plaintiff and Respondent,

v.

MILES CLANCY,

Defendant and Appellant.

F070328

(Super. Ct. No. BF155457A)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Anne V. Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and Sarah J. Jacobs, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

**INTRODUCTION**

Appellant Miles Clancy was convicted of possession of a controlled substance while in custody and received an aggravated term of eight years in prison—the upper term of four years, doubled—because of a prior strike offense. He raises three main issues on appeal: (1) the prosecutor committed prejudicial misconduct during rebuttal

argument by denigrating the reasonable doubt standard; (2) the trial court abused its discretion by sentencing Clancy to the upper term of four years; and (3) the trial court abused its discretion by denying Clancy's motion to strike his prior strike for sentencing purposes. We hold that only the third issue is judicially cognizable since the first two were forfeited and will affirm the judgment in its entirety.

### **STATEMENT OF THE CASE**

On July 14, 2014, an information filed by the Kern County District Attorney charged Clancy with: possession of a controlled substance, methamphetamine, while in custody (count 1—Pen. Code, § 4573.6);<sup>1</sup> and possession of methamphetamine (count 2—Health & Saf. Code, § 11377, subd. (a)). The information further alleged one prior strike (§ 667, subds. (c)-(j)) and one prior prison term for each count (§ 667.5, subd. (b)).

On September 11, 2014, Clancy's bifurcated jury trial began. On September 16, 2014, count 2 was dismissed as a lesser included offense of count 1. On September 17, 2014, the jury returned a verdict of guilty in count 1. The trial court dismissed the prior prison term enhancement and found the strike true after a bench trial.

On October 16, 2014, Clancy was sentenced to the upper term, doubled, for a total of eight years to run consecutively to the term he was serving.

### **STATEMENT OF FACTS**

Clancy was booked into the Central Receiving Facility (CRF) in Bakersfield on March 28, 2014. Like all other inmates who are booked into CRF, Clancy received clothing, linen, and a "fish kit" before being taken to his housing unit. A fish kit is a small brown lunch bag that contains toiletries and two Tylenol packets containing one tablet each. The Tylenol packets are unopened when provided to inmates.

On the morning of March 30, 2014, Kern County Sheriff Deputy Daniel Garza prepared inmates for transfer to another jail facility. Clancy was among the inmates to be transferred that day. Deputy Garza prepared empty brown transfer bags with inmates'

---

<sup>1</sup> All further statutory references are to the Penal Code unless otherwise noted.

names, booking numbers, and cell locations on them for the inmates to use to store their toiletries and any legal paperwork in their possession. Garza then gave the bags to an inmate laborer to pass out.

After giving the brown transfer bags to the inmate laborer to distribute, Garza entered the pipe chase, which is a narrow corridor between two cell blocks where the cells' plumbing pipes are located. There are two-way mirrors in the pipe chase, and Garza wanted to observe the inmates pack their belongings to check for any suspicious behavior.

Garza observed Clancy with his chest against a top bunk bed manipulating an object on the bed with his arms lifted to shoulder height. Clancy's fingers were touching and his elbows were out, and Garza saw him manipulating an unknown object or substance on top of the bunk; his hands were touching or were close together the entire time. Garza suspected that Clancy was handling contraband or narcotics. Garza informed other deputies via radio and stayed in front of the two-way mirror, continuing to observe Clancy while waiting for his partner and other deputies to arrive at Clancy's cell. Deputies arrived at the door of the cell and ordered all of the inmates out. Before exiting, Clancy grabbed his brown transfer bag, which was on the top bunk near where his hands were, and threw it on the floor. The bag landed on the floor less than a foot from the bed. After the inmates were ordered out of the cell, Garza exited the pipe chase and went into the cell and found the brown transfer bag in the same spot he had observed it fall to the floor from his location in the pipe chase. Garza searched the bag with Clancy's name on it and located toiletries from a fish kit and two Tylenol packets. Inside one of these packets was a clear plastic bag containing 0.17 grams of methamphetamine. No other methamphetamine was found inside the cell or on the person of any of the inmates residing in the cell, including Clancy's person.

## DISCUSSION

### I. THE PROSECUTOR DID NOT COMMIT PREJUDICIAL MISCONDUCT DURING REBUTTAL ARGUMENT<sup>2</sup>

Clancy argues the prosecutor committed misconduct by denigrating the reasonable doubt standard. We first hold that the issue was forfeited by a failure to timely object. Next, as to Clancy's claim of ineffective assistance of counsel for failure to timely object, we hold that while counsel's failure to object did fall below the objective standard of reasonableness, any error was not prejudicial. Finally, as to the merits of the denigration issue, although the prosecutor may have been sloppy in describing the reasonable doubt standard in the way that he did, it did not rise to the level of prejudicial misconduct.

During his rebuttal closing argument, the prosecutor advised the jury:

"[I]f you go back into the jury room and each of you thinks that the defendant knew that it was in there, that is beyond a reasonable doubt. If each of you believes the defendant knew, that's beyond a reasonable doubt. If you talk about it and everyone agrees that the defendant knew that the methamphetamine was in his belongings, that's beyond a reasonable doubt. It's not a very – not such a hard thing to overcome that no one ever does it."

CALCRIM No. 220, the recommended California jury instruction for "reasonable doubt," reads in relevant part:

"A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I [(the court)] tell you the People must prove something, I mean they must prove it beyond a reasonable doubt ....

"Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

"In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the

---

<sup>2</sup> Clancy also argues the prosecutor committed misconduct by introducing facts not in evidence. However, he does not state what facts exactly were introduced that were not in evidence. Therefore, our analysis of that issue ends here.

evidence that was received throughout the entire trial. Unless the evidence proves the defendant[s] guilty beyond a reasonable doubt, (he/she/they) (is/are) entitled to an acquittal and you must find (him/her/them) not guilty.”

#### **A. Forfeiture**

As a general rule, “[A] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety.” ( *People v. Centeno* (2014) 60 Cal.4th 659, 674.) We agree with respondent that defense counsel forfeited this issue during closing argument by not objecting and not requesting an admonition.

Clancy is correct that a defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. ( *People v. Arias* (1996) 13 Cal.4th 92, 159.) Additionally, failure to request the jury be admonished does not forfeit the issue for appeal if “an admonition would not have cured the harm caused by the misconduct. [Citation.]” ( *People v. Bradford* (1997) 15 Cal.4th 1229, 1333.) However, Clancy offers no proof that an objection would have been futile. The trial court informed counsel during opening statements that the court’s response to objections would be to restate the admonition that “what the attorneys are saying is not evidence,” thereby indicating its readiness to give admonitions where needed. Also, as we discuss later, an admonition would have been sufficient to cure the alleged misconduct in this case, since it was rather modest and not prejudicial. In sum, it is very likely, based on the record, an admonition sufficient to remedy any misconduct would have been given had a timely objection been made.

#### **B. Ineffective Assistance of Counsel for Failing to Timely Object**

Clancy argues, in the event this court finds the issue was forfeited, that trial counsel was ineffective for failing to object to the prosecutor’s statements about the reasonable doubt standard. While we agree trial counsel erred by not objecting, we find this failure did not prejudice his defense.

### ***Standard of Review***

“A claim of ineffective assistance of counsel presents a mixed question of fact and law, which is generally subject to de novo review, especially where constitutional rights are implicated. [Citation.] As a reviewing court, we accept the superior court’s credibility determinations and independently determine ‘whether [defendant] has established by a preponderance of substantial, credible evidence [citation] that his counsel’s performance was deficient and, if so, that [defendant] suffered prejudice.’” (*In re Alcox* (2006) 137 Cal.App.4th 657, 664-665.)

### ***Applicable Law***

“A convicted defendant’s claim that counsel’s assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel’s performance was deficient” (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*)), meaning that it “fell below the objective standard of reasonableness.” (*Id.* at p. 688.) Second, the “defendant must show that the deficient performance prejudiced the defense,” meaning that the result of the proceedings is unreliable. (*Id.* at p. 687.)

### ***Analysis***

Although we find counsel’s performance was deficient, we also find that Clancy was not prejudiced by the failure to object, since we conclude that the prosecutor’s statements did not have any impact on the jury’s deliberations or verdict. The jury was instructed that what the attorneys say is not evidence, and if an attorney’s recitation of the law conflicts with the recitation given by the court, it is to follow what the court says to the exclusion of what the attorney says. Additionally, the court read the precise legal definition of reasonable doubt to the jury immediately before closing arguments began. Also, after closing argument, the court charged the jury with CALJIC No. 2.90, which gives the precise legal definition of reasonable doubt. The jury was also provided a physical copy of CALJIC No. 2.90 to take into the jury room, so if any juror was at all

confused on the reasonable doubt standard, they had a copy of the correct definition with them to consult. Therefore, we find it highly unlikely that the prosecutor's comments affected the jury, and in turn hold the verdict is not unreliable.

### **C. The Merits of the Denigration Claim**

Clancy argues the prosecutor's statements constituted prejudicial misconduct, and the judgment must therefore be reversed. Specifically, he argues that if the prosecutor had not made those comments about the reasonable doubt standard, it is reasonably probable a not guilty verdict would have been returned. We disagree and hold the statements did not constitute misconduct so prejudicial as to warrant reversal.

#### ***Applicable Law***

It is misconduct for the prosecution to misstate the law during closing argument. (*People v. Marshall* (1996) 13 Cal.4th 799, 831.) This is particularly so when the misstatement attempts "to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements." (*Ibid.*) Even a combination of "relatively unimportant misstatement[s] of fact or law," when considered on the "total record" and in "connection with the other errors," may require reversal. (*People v. Purvis* (1963) 60 Cal.2d 323, 348, 353, overruled on other grounds as stated in *People v. Morse* (1964) 60 Cal.2d 631, 642; *People v. Herring* (1993) 20 Cal.App.4th 1066, 1075-1077 [cumulative prejudicial effect of prosecutor's improper statements in closing argument required reversal].)

Since this issue implicates Clancy's federal constitutional right to due process and a fair trial, we must apply the federal standard for harmless error as articulated in *Chapman v. California* (1967) 386 U.S. 18, 24: "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

## *Analysis*

The prosecutor's comments were not an accurate statement of the reasonable doubt standard. Upon a close reading, the comments may be interpreted to imply that "thinking" the defendant committed the crime is enough to convict him. This is incorrect because "thinking" could mean that one merely has a hunch, or thinks it is more likely than not that something is true; but neither a hunch nor a more likely than not standard is enough to convict. Looking closer, the prosecutor's words may seem to suggest that "reasonable doubt" is the state where all 12 jurors "think" the defendant committed the crime. But once again, "thinking" per se is not enough; all 12 jurors must "think" the defendant is guilty *beyond a reasonable doubt* in order to convict.

In any case, the prosecutor's comments on the definition of reasonable doubt were not accurate and he should have known better than to make them. We are not saying the prosecutor has to use the precise language of CALJIC No. 2.90 when discussing the reasonable doubt standard with the jury, but he may not speak in such a way that denigrates or deviates from the proper legal definition.

Nevertheless, despite the prosecutor's sloppy and incorrect statements about the reasonable doubt standard, Clancy did not suffer any prejudice. As already discussed in part I.A., *ante*, the jury was admonished that what the attorneys say is not evidence and any statements they make about the law that conflict with the court's instructions should be disregarded. Furthermore, the jury was read CALJIC No. 2.90 and was provided a physical copy to consult in case of any confusion. Therefore, since the misconduct was very likely cured by the admonitions and CALJIC No. 2.90, we hold the error was harmless beyond a reasonable doubt.

## **II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY SENTENCING CLANCY TO THE UPPER TERM**

Clancy contends the trial court abused its discretion in imposing the upper term for possession of methamphetamine in custody by relying upon an improper aggravating factor, rejecting a proper mitigating factor, and failing to reasonably weigh the opposing

factors. We first hold that the issue was forfeited by failure to timely object. Next, we hold Clancy's claim of ineffective assistance of counsel fails because, although his counsel's performance in failing to object and preserve the issue did fall below the objective standard of reasonableness, he was not prejudiced. Finally, even if the court relied on an improper aggravating factor, the court did not improperly reject a mitigating factor, and thus the other aggravating factors still outweighed the mitigating factor. And not only did the aggravating factors quantitatively outweigh the mitigating, we believe they qualitatively did as well, which would support the trial court's decision to impose the upper term.

#### **A. Background**

The trial court cited the following three factors in aggravation: Clancy's lengthy adult and juvenile record, his prior unsatisfactory performance on misdemeanor probation and juvenile probation, and the fact that he was currently serving a sentence in custody when the crime was committed. Clancy argues that the third factor is an element of the crime he was convicted of and therefore cannot be used to impose the upper term. (Cal. Rules of Court, rule 4.420(d).)

The court found just one factor in mitigation: Clancy successfully completed probation pursuant to section 1210.1. Clancy argues the trial court abused its discretion by assuming drug addiction could not be a mitigating factor and in failing to evaluate whether Clancy's drug addiction did constitute a mitigating factor. On the topic of Clancy's drug addiction, the trial court noted, "I am sympathetic to people who have addictions that they are struggling with. But I cannot let my sympathy guide my exercise of discretion in the sentencing process."

Clancy argues the third aggravating factor (that he was currently serving a sentence in custody when the crime was committed) should be disregarded and Clancy's drug addiction should be considered a mitigating factor, bringing the total of aggravating

and mitigating factors to two each. And since the aggravating factors would equal the mitigating factors, the middle term would then be appropriate, according to Clancy.

### **B. Forfeiture**

“[C]omplaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal.” (*People v. Scott* (1994) 9 Cal.4th 331, 356.) We agree with respondent: Clancy was given ample opportunity to object to the court’s sentencing choice as the probation report recommended the upper term, listed that Clancy was currently serving a sentence in state prison at the time of the offense, and did not list his drug problem as a mitigating factor. The issue was forfeited.

### **C. Ineffective Assistance of Counsel**

Just like in part I.B., *ante*, Clancy argues, in the event this court finds the issue was forfeited, that trial counsel was ineffective for failing to object to the consideration of the improper aggravating factor and to the improper weighing of the factors in aggravation and mitigation. And again, we agree trial counsel erred by not objecting, but conclude this error was not prejudicial.

#### ***Standard of Review***

“A claim of ineffective assistance of counsel presents a mixed question of fact and law, which is generally subject to de novo review, especially where constitutional rights are implicated. [Citation.] As a reviewing court, we accept the superior court’s credibility determinations and independently determine ‘whether [defendant] has established by a preponderance of substantial, credible evidence [citation] that his counsel’s performance was deficient and, if so, that [defendant] suffered prejudice.’” (*In re Alcox, supra*, 137 Cal.App.4th at pp. 664-665.)

#### ***Applicable Law***

“A convicted defendant’s claim that counsel’s assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the

defendant must show that counsel's performance was deficient" (*Strickland, supra*, 466 U.S. at p. 687), meaning that it "fell below the objective standard of reasonableness." (*Id.* at p. 687.) Second, the defendant must show that the deficient performance prejudiced the defense," meaning that the result of the proceedings is unreliable. (*Id.* at p. 687.)

### ***Analysis***

There was no sound tactical reason for trial counsel's failure to object to the trial court's consideration of an improper factor in aggravation. The fact that Clancy was in custody at the time of the crime was clearly an element of that crime, and in our view defense counsel should have recognized this and objected. Nevertheless, this mistake was not prejudicial, because even if this improper factor were not considered, the remaining factors in aggravation would still have outweighed the factors in mitigation, both quantitatively and qualitatively, and thus imposition of the upper term would have likely been imposed. We do not find it reasonably probable the trial judge would have changed his mind and imposed a lesser sentence had a timely objection been made.

First, not only did Clancy have 10 prior convictions, but more importantly the court found an escalating degree of seriousness in the offenses over the years. Additionally, the court found no significant amount of time where Clancy remained out of trouble with the law, and he had twice performed unsatisfactorily on probation. The only positive factor to Clancy's credit was that he had once successfully completed a term of probation. In addition, the court found that Clancy had not "made any great strides toward rehabilitation." Again, in light of all of these findings, we cannot say it is reasonably probable the court would have given a lesser sentence had the court considered only two aggravating factors instead of three.

### **D. The Merits of the Abuse of Discretion Claim**

We first hold that although the trial court erroneously relied on an improper aggravating factor, the error was not prejudicial because it is not reasonably probable the

court would have chosen a lesser sentence had it had not considered the improper aggravating factor. Next, as to the issue of Clancy's drug problem, Clancy argues the trial court was unaware of its discretion to consider his problem a potential mitigating circumstance, and the matter must be remanded for sentencing accordingly. We hold there is insufficient evidence in the record to overcome the presumption that the trial court was aware of its discretion and exercised it properly.

### ***Standard of Review***

A trial court's sentencing is reviewed for abuse of discretion, and reversal is required only upon a clear showing the sentence is arbitrary or irrational. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.)

### ***Applicable Law***

A fact that is an element of the crime cannot be used to impose the upper term. (Cal. Rules of Court, rule 4.420(d); *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1262.) As to Clancy's substance abuse, drug addiction may be regarded as a mitigating factor but does not have to be. It is also presumed, absent direct evidence to the contrary, the trial court was aware of its discretion and intelligently chose to exercise it in the way that it did. (*People v. Mosley* (1997) 53 Cal.App.4th 489, 499.) A trial court's judgment is presumed to be correct and the defendant, as the party attacking the judgment, must clearly and affirmatively demonstrate that the trial court relied on improper considerations in determining that consecutive sentences were appropriate. (See *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 835.) Also, "[w]hen a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper." (*People v. Price* (1991) 1 Cal.4th 324, 492.)

## *Analysis*

Since it was improper to consider Clancy’s custody status at the time of the offense an aggravating circumstance, that brings the number of proper aggravating factors down to two. However, there is still only one mitigating factor. Concerning Clancy’s drug addiction, the trial court stated: “I am sympathetic to people who have addictions that they are struggling with. But I cannot let my sympathy *guide my exercise of discretion* in the sentencing process.” Clancy argues this comment “appears to signify a belief that drug addiction[,] while perhaps worthy of personal sympathy[,] was not a proper factor to be considered in mitigation.” We do not believe that Clancy’s interpretation of the court’s comment is reasonable. The trial court clearly stated that he should not allow sympathy to guide his discretionary decision. There is nothing in the record to indicate the trial court was unaware of its discretion.

Although we hold that the trial court should have considered only two aggravating factors and one mitigating, it is not reasonably probable the court would have given a lesser sentence had it known that. In other words, we do not believe it is reasonably probable the court considered the third aggravating factor—Clancy’s custody status at the time of the offense—to be the deciding factor, given that the other two aggravating factors were significant (10 prior convictions, increasing in severity) compared to the sole mitigating factor. Even assuming the court was unaware of its discretion and erroneously relied on improper factors, remand would result in no change in Clancy’s sentence. (*People v. Fuhrman* (1997) 16 Cal.4th 930, 944.)

### **III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FAILING TO STRIKE CLANCY’S PRIOR STRIKE**

At the sentencing hearing, the trial court refused to strike Clancy’s prior strike pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, and he contends this was an abuse of discretion. Specifically, he argues the trial court was unduly influenced by the fact he sustained 10 prior offenses and that he should have been

deemed outside the spirit of the three strikes law. For the reasons discussed below, we disagree.

### ***Standard of Review***

In refusing to strike a prior strike for sentencing purposes, the trial court's decision is reviewable for abuse of discretion, and we will not reverse unless its decision is so irrational or arbitrary that no reasonable person could agree with it. (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

### ***Applicable Law***

A trial court has discretion under the three strikes law to dismiss or vacate a prior conviction enhancement in the furtherance of justice. (§ 1385, subd. (a); *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at pp. 529-530.) In exercising this discretion, the trial court must consider the defendant's background, his constitutional rights, the nature of the current offense, and the interest of society. (*Id.* at pp. 530-531.) The California Supreme Court has further indicated that where the trial court has reviewed the facts presented to it and provided an impartial decision in conformity with the spirit of the law, it will not be reversed. (*People v. Carmony*, *supra*, 33 Cal.4th at p. 378.)

### ***Analysis***

To reiterate the standard of review, we may not reverse the trial court's decision to not strike Clancy's prior strike unless we find the decision was so irrational or arbitrary that no reasonable person could agree with it. That is a tall obstacle that Clancy cannot overcome. First, not only did he have 10 prior criminal convictions, the court found an escalating degree of seriousness in those crimes over the years. Additionally, the court found no substantial period of time where Clancy remained out of trouble, and he had twice performed unsuccessfully on probation. Finally, the court found that, since his prior strike offense, Clancy had not shown he had "made any great strides toward

rehabilitation.” In light of all of these findings, we cannot say the court’s decision to refuse to strike Clancy’s prior strike was so irrational that no one could agree with it.

**DISPOSITION**

The judgment is affirmed.

---

FRANSON, J.

WE CONCUR:

---

KANE, Acting P.J.

---

POOCHIGIAN, J.