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

THE PEOPLE,

Plaintiff and Respondent,

v.

DEAN DEE PHILLIPS,

Defendant and Appellant.

F071286

(Super. Ct. No. CRF45521)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tuolumne County. James A. Boscoe, Judge.

Kendall D. Wasley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and F. Matt Chen, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Franson, J. and Peña, J.

A jury convicted appellant, Dean Dee Phillips, of receiving stolen property (Pen. Code, § 496, subd. (a))¹ and grand theft (§ 487, subd. (a)). In a separate proceeding, Phillips admitted a prior prison term enhancement (§ 667.5, subd. (b)) and allegations that he had a prior conviction within the meaning of the Three Strikes law (§ 667, subds. (b)-(i)).

On February 19, 2015, the court struck the grand theft conviction and sentenced Phillips to an aggregate prison term of seven years, the upper term of three years, doubled to six years because of Phillips's strike conviction, and a one-year prior prison term enhancement.

On appeal, Phillips contends the prosecutor committed prosecutorial misconduct during closing arguments. We affirm.

FACTS

The Prosecution Case

Niki Hobba testified that on October 20, 2014, at approximately 9:00 a.m., Phillips and two other employees from Affordable Moving and Storage (Affordable Moving) arrived at her house in Sonora to help her pack and move. Hobba was a jewelry designer and packed jewelry worth approximately \$35,000 in an armoire-style jewelry box, three and a half to four feet tall, that she wrapped with two blankets and tape. During the day, Phillips and another worker placed the jewelry box, which weighed approximately 90 pounds, on the back seat of Hobba's car that was parked off to the side of her driveway. Phillips knew the wrapped box contained jewelry because during the day Phillips asked Hobba what was in the box and she told him it contained jewelry. Phillips also asked about some books that were on bookshelves and after Hobba gave him permission to take

¹ All further statutory references are to the Penal Code.

them, they were placed by some trash cans so Phillips could take them at the end of the day.

That night after the workers were gone, Hobba parked her car right in front of the garage door and left it unlocked. Hobba went to bed around midnight. To her knowledge, Phillips did not stop by the house that night.

Shortly after 6:00 a.m. the following morning, Hobba discovered the jewelry box was missing. After Hobba reported the matter to authorities, Tuolumne County Sheriff's Deputy Brandon Green took a report from her at her house. At approximately 9:00 a.m., after Deputy Green had left, Phillips and two other employees from the moving company showed up to continue the move.

Timothy Brown, manager of Affordable Moving, testified that Phillips had been hired as a casual laborer the day the thefts occurred. On the second day of the move, Phillips did not show up for work and Brown called him to find out why. Phillips told Brown he had gotten in a fight with his "old lady" and that he was in a hotel in Jamestown. Phillips eventually showed up for work at Hobba's house at approximately 10:00 a.m. Later, Phillips called Brown several times and during the course of those conversations he told Brown that things were missing, that he was being setup, and that he was leaving the job site and heading toward the Outpost.²

Tuolumne County Sheriff's Sergeant Robin Hunt testified that on October 23, 2014, at approximately 12:20 p.m., he received a call from Phillips. Sergeant Hunt asked Phillips about the theft of some books. Phillips told Hunt he was working for Affordable Moving and that the owner of the house where he was working offered him some books. Phillips told the owner he could not accept the books because it was against company policy. He acknowledged placing the jewelry in the homeowner's car. After work Phillips went to a hotel. When Angeline Meether arrived at the hotel, he explained to her

² The Outpost apparently was a market or convenience store.

about the books and asked her for a ride to get them. Meether took Phillips to the house where he worked that day and he knocked on the door three times. The homeowner did not answer so he took the books for Rhonda Timm, his girlfriend, and he and Meether left. Phillips denied taking the jewelry. However, he told the sergeant, “I don’t steal shit. I just take it.”

Angeline Meether testified that on October 20, 2014, at approximately 10:30 p.m., she visited Timm at the Country Inn where Timm and Phillips were staying.³ Phillips was there and asked her for a ride to pick up some things that he had been given. He did not mention anything about a jewelry box. Before going to Hobba’s house, Meether took Phillips to a liquor store where they bought some alcohol for Rhonda and took it back to the hotel. Afterwards they went to the Outpost and bought some drinks before going to Hobba’s house. They arrived at the house at approximately 11:00 p.m. and parked on the street. Phillips knocked on a door, identified himself and said he was there to pick up some things Hobba gave him. Meether did not see a door open but she heard a voice say, “Okay.” Meether did not get out of the car. She was texting on her phone and noticed only that Phillips made six to seven trips to the trash area located on the other side of the house during the approximately 15 minutes he loaded trash bags into her car. Meether drove back to the hotel. They arrived there at approximately 11:50 p.m. and she helped Phillips unload the bags from the car and take them into his hotel room.

Phillips went through the trash bags and found a jewelry box wrapped in two blankets. Upon opening the jewelry box, Phillips yelled, “We’re rich.” Phillips began sorting the jewelry and stated that he was going to sell it because he needed the money. Eventually Meether argued with Phillips because Meether believed everything was stolen

³ Meether testified pursuant to an agreement with the prosecutor that allowed her to plead guilty to receiving stolen property with a sentence cap of eight months in local custody. Meether was also impeached with five felony convictions involving theft or fraud.

and she wanted to put everything in her car and leave. Phillips then threw the jewelry box and kicked it, causing it to break into numerous pieces and its contents to scatter on the floor. Once everyone calmed down, Meether picked things up and packed most of the jewelry in an ice chest. She placed the ice chest and the pieces of the jewelry box in her car and went home where she unloaded them.⁴ Meether denied discarding the blankets in which the jewelry box had been wrapped in a trash bin at the hotel. The following day, after she was arrested at work, sheriff's deputies informed her that they had found some of the missing jewelry at her residence.

Deputy Green testified that on the afternoon of October 21, 2014, in a dumpster at the Country Inn, he found two blankets that matched the description of the blankets Hobba used to wrapped the jewelry box. Outside Phillips's hotel room, he found a garbage bag and books scattered on the ground. Inside Phillips's room, which he searched with Timm's consent, he found a stack of vinyl records in a dresser drawer. Timm told Green that some of the jewelry might be at Meether's house. While at the hotel, Deputy Green received a call from Brown informing him that Phillips was at the Outpost. Green went there and spoke to Phillips. When Deputy Green asked Phillips about his whereabouts the previous night, Phillips told him he had gone to the liquor store and returned to the hotel and that he did not leave after that. Phillips denied going to Hobba's house that night. However, he admitted that the previous day he loaded a jewelry box into Hobba's car. During a search of Meether's house, Deputy Green found some of Hobba's jewelry.⁵

The Defense

⁴ According to Meether, she was a woodworker and she was going to "fix" the jewelry box and return it to its owner.

⁵ The deputies eventually recovered approximately \$18,230 worth of the stolen jewelry.

Phillips testified that on October 20, 2014, he and another worker moved Hobba's jewelry box that was wrapped up from a corner in the house to the back seat of Hobba's car, but he denied knowing what was in it. Phillips arrived at his room at the Country Inn that night at approximately 8:00 p.m. After Meether arrived there at approximately 8:15 p.m., he went with her to a liquor store, bought some vodka for Timm, and returned to the hotel. Eventually, Phillips accompanied Meether to Hobba's house because earlier they had discussed the books and he had been told he could not take them unless he was "off the clock." As they pulled up to the house and parked in the driveway, Phillips told Meether, "You ought to see the size of the jewelry box that I put in that car today." Phillips knocked on the door and someone he was unable to see yelled back. Phillips replied that he was one of the movers and that he was there to get the books. He could not see the person inside but he heard the person say, "Okay." Phillips then got three bags of books that he later discovered also contained vinyl records and loaded them into Meether's car. Phillips did not see or take the jewelry box.

After leaving the house, Phillips and Meether stopped at a liquor store and bought more liquor before returning to the hotel to drink. At some point Meether left but Phillips did not know when because he fell asleep on a bed. He awoke later that night to find Meether and Timm dancing and screaming, and Meether wearing necklaces on her neck. Most of the jewelry was already inside and Phillips did not see who brought it in because he had been asleep. However, he did see Meether go outside and return with Hobba's jewelry box. Phillips started screaming and calling Meether a thief and eventually she left with all the jewelry.

The following day Phillips arrived to work at Hobba's house at approximately 10:00 a.m. At approximately 12:30 p.m., Timm called and told him that sheriff deputies had been by asking questions and that they wanted to talk to him. Phillips called Brown and asked him what was going on and why the "cops" wanted to question him. Brown told him the deputies said there were some things stolen from Hobba's house and that

Phillips should stay calm. Brown also told him that he would handle it and that he was going over there to straighten everything out. Phillips waited for almost an hour for Brown to show up before he walked about three-quarters of a mile to the Outpost.

Phillips denied putting the two blankets that had been wrapped around the jewelry box in the dumpster where Deputy Green found them. He also denied stealing any of Hobba's jewelry or her jewelry box. He admitted kicking the jewelry box after telling Meether to leave but claimed he only made a hole in it.

On cross-examination, Phillips again denied knowing there was jewelry in the jewelry box he loaded into Hobba's car. However, after being reminded that earlier he testified that he told Meether that she should have seen the box they put in Hobba's car, he admitted knowing the box contained jewelry. Phillips acknowledged that he told Deputy Green that he went to the liquor store and that afterwards did not leave the hotel room. He then claimed that he went to Hobba's house but that he did so during the same trip to the liquor store. Phillips admitted that prior to his testimony he had never told anyone that Meether was the person who stole the jewelry. He also testified that he had a prior conviction for accessory to attempted robbery and a felony conviction for being a felon in possession of a firearm.

Timm testified that Phillips left with Meether only once and when they came back they brought liquor and a bag of books. After they returned, Meether left the hotel room again at around 10:00 p.m. When Meether returned, Timm was sleeping but she woke up and let Meether in the room. Meether had something that was wrapped up and taped. Timm immediately went to wake up Phillips and they soon realized that it was a jewelry box. Timm asked Meether where she got the box and Meether did not answer. They were all screaming and then Phillips asked if she had gone back to Hobba's house. Meether admitted she had. Phillips got mad and told her to get "that stuff" out of the room and he kicked the jewelry box. Timm denied that when Meether came back with

the jewelry box, Phillips woke up to find her and Meether partying and playing with the jewelry.

The following day, when Deputy Green and other deputies came and told her they were looking for stolen jewelry, Timm allowed them to search the room. Timm left before the deputies because she had an appointment. She then called Phillips and told him the deputies had been at the room regarding some jewelry. Later that day she told the deputies that Meether had the jewelry.

The Alleged Prosecutorial Misconduct

During the prosecutor's rebuttal argument, the following colloquy occurred:

“[PROSECUTOR]: Now, [defense counsel] is trying to make you believe that this is some incredible hurdle we've got to get over. Beyond a reasonable doubt. Let me just tell you, every single person --

“[DEFENSE COUNSEL]: Your Honor, I object to this.

“[PROSECUTOR]: Object to what?

“THE COURT: All right. I'm going to overrule the objection.

“Go ahead, [prosecutor].

“[PROSECUTOR]: Thank you, [y]our Honor. [¶] Everyone who is doing time for a criminal act in California is there because people -- the people have found -- have been able to get over that hurdle, so it is not an impossible hurdle. And I would say right now, in courtrooms all over the country, people are getting convicted based on this standard.

“And you're going to hear -- you already heard and are going to read again, that all you need is an abiding conviction that the charge is true, and that everything is open to some imaginary doubt. It comes down to what is reasonable under the circumstances.”

After the jury had left the court room to begin deliberations, the following exchange occurred:

“[DEFENSE COUNSEL]: I just want to state on the record, my last objection during [the prosecutor's] closing argument, when he was talking about the burden of proof and other cases and it is not an impossible

burden, I think throughout that entire argument, he was -- I forgot the legal term, but minimizing the legal burden that he has and marginalizing it and -- by talking about 'It's not a huge burden.' That is the objection that I was making, and I move for a mistrial based on that.

“THE COURT: I didn't hear it that way, [defense counsel]. My understanding of the argument was that reasonable doubt is a standard that is employed by every jury in this country. It is not uncommon for people to use -- apply that burden in every case and reach a conviction, not that he was minimizing the significance of the burden or that he was shifting the burden from himself to the defense.”

The court then denied the motion for a mistrial.

DISCUSSION

Phillips contends that the prosecutor's statement that the reasonable doubt standard is not “some incredible hurdle” because everyone who is serving time for a criminal act in California is there because the People have been able to get over that hurdle is an inaccurate analogy. Phillips also contends that the prosecutor's statement that the issue “comes down to what is reasonable under the circumstances” equated the reasonable doubt standard of proof with reasonableness. According to Phillips, each of these comments amounted to prosecutorial misconduct because they lowered the prosecutor's burden of proof. He further contends that because the misconduct infringed upon his federal constitutional due process right to the presumption of innocence and proof of guilt beyond a reasonable doubt the error is reviewed for prejudice under *Chapman v. California* (1967) 386 U.S. 18, which requires reversal unless the error was harmless beyond a reasonable doubt. (*Id.* at p. 24.) We reject these contentions.

Phillips Forfeited His Claim of Prosecutorial Misconduct

“ ‘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 made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.’ ” (*People v. Hill* (1998) 17 Cal.4th 800, 820.) “ ‘A claim will not be deemed forfeited due to the failure to object and to request an admonition only when ‘an objection

would have been futile or an admonition ineffective.’ ” (*People v. Thomas* (2012) 54 Cal.4th 908, 937.)

Phillips did not interpose a timely, specific objection to the prosecutor’s statement that the reasonable doubt standard was not an “incredible hurdle” because his defense counsel did not state the basis for the objection. (*People v. Holman* (2013) 214 Cal.App.4th 1438, 1449 [objection must be made in such a way that advises the court of the basis on which exclusion of evidence is sought].) He also did not object at all to the prosecutor’s statement that the issue “[came] down to what was reasonable under the circumstances.” Nor did he request a curative admonition in either case.

In *People v. Scott* (1978) 21 Cal.3d 284 (*Scott*), the court stated, “In a criminal case, the objection will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented.” (*Id.* at p. 290.) Phillips cites *Scott* to contend he did not forfeit his challenge to the prosecutor’s argument because the wording of the argument, the timing of the objection and that the objection occurred during the prosecutor’s rebuttal argument were sufficient to advise the court of the substance of his objection. We disagree.

Phillips objected only to the prosecutor’s comment about the reasonable doubt standard not being an insurmountable hurdle. Thus, even if we found that Phillips preserved his objection, this finding would apply only to that statement by the prosecutor. However, the exception provided by *Scott* does not apply here because Phillips’s objection did not suffer from inadequate phrasing. Instead, it failed to state any basis at all for the objection and this appears to be the reason why the court overruled it. Thus, we conclude that Phillips forfeited his claim of prosecutorial misconduct.

The Prosecutor’s Statements Did Not Constitute Prosecutorial Misconduct

Even if Phillips’s claim of prosecutorial misconduct were properly before us, we would reject it.

“ [O]n claims of prosecutorial misconduct our state law standards differ from those under the federal Constitution. With respect to the latter,

conduct by the prosecutor constitutes prosecutorial misconduct only if it “ ‘ “ ‘so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process.’ ” ’ ” [Citations.] By contrast, our state law considers it misconduct when a prosecutor uses “ ‘ “ ‘deceptive or reprehensible methods to attempt to persuade either the court or the jury.’ ” ’ ” [Citations.] ... “A defendant’s conviction will not be reversed for prosecutorial misconduct” that violates state law, however, “unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.” ’ ”

“It is misconduct for a prosecutor to misstate the law during argument. [Citation.] This is particularly so when misstatement attempts ‘to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements.’ ” (*People v. Otero* (2012) 210 Cal.App.4th 865, 870-871.)

“When attacking the prosecutor’s remarks to the jury, the defendant must show that, ‘[i]n the context of the whole argument and the instructions’ [citation], there was ‘a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we “do not lightly infer” that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements.’ ” (*People v. Centeno* (2014) 60 Cal.4th 659, 667, fn. omitted (*Centeno*).)

Since many people plead guilty or no contest to criminal charges, the prosecutor’s argument that the reasonable doubt standard is not “some incredible hurdle” was based on the false factual premise that in every case in which someone is serving time on a criminal conviction the People were able to meet that standard. Although the prosecutor misspoke and this may have muddled his argument, the above argument was followed by the prosecutor’s statement that all over the country people are being convicted on proof beyond a reasonable doubt. This comment clarified that what the prosecutor was really arguing was that the reasonable doubt standard was not an impossible burden for the People to meet, which he bolstered by noting that it is not uncommon for defendants to be convicted based on this standard. Thus, viewed in context, the foregoing statement by the prosecutor did not suggest to the jury that they should decide Phillips’s guilt based on a lower standard than proof beyond a reasonable doubt. Nor did it disclose an intent by

the prosecutor to mislead the jury on the applicable burden of proof. Further, other than asserting that the prosecutor's argument "provides a picture that reduces the prosecution's burden of proof," Phillips does not explain, nor is it self-evident, how this occurred. Accordingly, we conclude that the above statement by the prosecutor did not constitute misconduct.

"Section 1096, codifying the standard of proof, expressly provides that a 'reasonable' doubt is not a mere 'possible' or 'imaginary' doubt. In *People v. Romero* (2008) 44 Cal.4th 386 (*Romero*), [the Supreme Court] approved the prosecutor's argument that the jury must "decide what is reasonable to believe versus unreasonable to believe" and to "accept the reasonable and reject the unreasonable." [Citation.] [The court] concluded that "[n]othing in [that] explanation lessened the prosecution's burden of proof. The prosecution must prove the case beyond a reasonable doubt, not beyond an unreasonable doubt." [Citation.] [¶] Conversely, it is error for the prosecutor to suggest that a 'reasonable' account of the evidence *satisfies the prosecutor's burden of proof.*" (*Centeno, supra*, 60 Cal.4th at p. 672.)

At first glance, the prosecutor's statement that "it comes down to what is reasonable under the circumstances" appears ambiguous. However, the prosecutor began his rebuttal argument by propounding what he purported was a reasonable interpretation of Phillips's enigmatic statement, "I don't steal shit. I just take it." He argued that based on Phillips's criminal background, this statement probably meant that Phillips did not take people's property by sneaking behind their back, he did it by taking advantage of people who were weak or careless, that Hobba was careless and that Phillips took advantage of her carelessness. Next, he addressed a rhetorical question posed by defense counsel during his closing argument, i.e., whether it was reasonable for Phillips to stay on the job after he returned to work the second day. The prosecutor responded to this question by arguing that it was "reasonable" for Phillips to stay so he could speak to a deputy and explain his "situation," especially since nothing was found during the search of Phillips's hotel room. The prosecutor then responded to a defense argument that four

of Phillips's coworkers were not "dealt with" like Phillips was by noting that none of the coworkers had the blankets used to wrap the jewelry box or the box in their possession and there was no evidence suggesting they were involved in the theft. The prosecutor also noted that the coworkers did not walk off the job and he reiterated that it was "unreasonable" that Phillips did. It was after the prosecutor made the foregoing arguments that he argued that "it comes down to what is reasonable under the circumstances." Viewed in context, it is clear this last statement did not suggest that a "reasonable" account of the evidence satisfied the prosecutor's burden of proof. Instead, through this statement the prosecutor merely told the jury, as he was entitled to do, to evaluate the reasonableness of the testimony and defense arguments when considered with the other evidence in the case. (Cf. CALCRIM No. 224 ["When considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."]; CALCRIM No. 226 ["In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony."].)

In *Centeno*, which Phillips cites in support of his argument, the prosecutor repeatedly prefaced her rhetorical questions to the jury with the phrase "is it reasonable to believe" one thing or another. By doing so, the prosecutor left the jury with the impression that as long as their interpretation of the evidence was reasonable, the People had met their burden. (*Centeno, supra*, 60 Cal.4th at p. 672.) *Centeno* is easily distinguishable because the prosecutor here asserted only once that the issue came down to what was "reasonable under the circumstances" and his statement did not leave an impression with the jury similar to the one left by the prosecutor's rhetorical questions in *Centeno*. Thus, we also conclude that the prosecutor's second challenged statement did not constitute misconduct.

The Prosecutor's Statements Did Not Prejudice Phillips

“ “[A]rguments of counsel “generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence [citation], and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law.” [Citation.] [Citation.] ‘When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former, for “[w]e presume that jurors treat the court’s instructions as a statement of the law by a judge, and the prosecutor’s comments as words spoken by an advocate in an attempt to persuade.” ’ ” (*People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1268.)

The court charged the jury with CALCRIM Nos. 103 and 220 which explained the presumption of innocence and defined the standard of proof beyond a reasonable doubt.⁶ It also instructed them pursuant to CALCRIM 224 that before they could rely on circumstantial evidence to conclude that a fact necessary to find Phillips’s guilt had been proved, they had to be convinced that the prosecutor “proved each fact essential to that conclusion beyond a reasonable doubt.”⁷

Moreover, the evidence of Phillips’s guilt was overwhelming. Phillips was impeached with at least one felony conviction and he provided three conflicting accounts of whether he returned to Hobba’s house to pick up the books she allegedly gave him.

⁶ Pursuant to CALCRIM 103 and CALCRIM 220, the court instructed the jury twice as follows: “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 tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise. [¶] 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.”

⁷ The court instructed the jury pursuant to CALCRIM 224 as follows: “Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.”

When he spoke to Sergeant Hunt, Phillips stated that no one answered Hobba's door when he returned to her house at night after work. When he spoke with Deputy Green, Phillips denied going to Hobba's house at all that night. Both statements were contradicted by Phillips's testimony that he went to Hobba's house, knocked on the door, and took the books after someone answered. Phillips also did not tell either deputy that Meether was responsible for the theft of the jewelry and that she had taken the jewelry with her, and he did not disclose either circumstance until he testified in this matter. After Phillips testified on direct examination that he did not know that the item he placed in Hobba's car contained jewelry, on cross-examination he was forced to reluctantly admit that he was in fact aware of its contents.

Phillips's testimony was also contradicted by his girlfriend, who testified that the night the theft occurred, Phillips did not leave the room after arriving there, that he arrived there with only one bag, that she woke Phillips that night when Meether returned with the jewelry, and that she and Meether were not partying and playing with it when Phillips woke up. It was also contradicted by Meether's testimony. Further, the jury likely viewed Phillips's statement to Sergeant Hunt that he just took things as a tacit admission of his guilt. Thus, under the *Chapman* standard of prejudicial error, any misconduct was harmless beyond a reasonable doubt.

DISPOSITION

The judgment is affirmed.