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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ROYNELL TERRY HALL,

Defendant and Appellant.

H037200

(Santa Clara County

Super. Ct. Nos. CC776986, CC898066)

Defendant Roynell Terry Hall was convicted by a jury of possession of cocaine (Health & Saf. Code, § 11350, subd. (a)), transportation of cocaine (*id.* § 11352, subd. (a)), and two counts of possession of marijuana for sale (*id.* § 11359). He was sentenced to six years eight months in prison.

On appeal, Hall contends that his conviction must be reversed because the prosecutor engaged in various acts of misconduct which, individually or cumulatively, violated his due process right to a fair trial. To the extent that his defense counsel failed to object to the prosecutor's actions, he claims his counsel was ineffective. We disagree that the prosecutor engaged in reversible misconduct or that his counsel was ineffective. Moreover, to the extent that there was any misconduct or ineffective assistance, we find that Hall was not prejudiced. Accordingly, we shall affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

By information filed October 28, 2008, Hall was charged with possession of cocaine for sale (Health & Saf. Code, § 11351, count 1); transportation of cocaine (*id.* §

11352, subd. (a), count 2); two counts of possession of marijuana for sale (*id.* § 11359, counts 3 & 6); resisting arrest (Pen. Code, § 148, subd. (a)(1), count 4); and escape after lawful arrest (*id.* § 836.6, subd. (b), count 5). The information also alleged that Hall had suffered a prior prison conviction (*id.* § 667.5, subd. (b)); two prior drug convictions (Health & Saf. Code, § 11370, subs. (a) & (c)); and had offended while on bail (Pen. Code, § 12022.1). Before trial, the prosecutor dismissed count 5 and renumbered count 6 as the new count 5.

A. July 13, 2007 arrest

On June 28 and July 3, 2007, San Jose Police Officer Omar Prieto conducted surveillance in the parking lot of a Kentucky Fried Chicken restaurant. Prieto observed Hall parked in the lot on both occasions. Based on his training and experience, Prieto concluded that Hall was engaged in narcotics transactions while in the parking lot because of the following observations: (1) vehicles would drive into the lot and park near or next to Hall's vehicle; (2) occupants of the second vehicle would exit their vehicles and get into the passenger side of Hall's vehicle; (3) after two or three minutes, the person would get out of Hall's vehicle, return to their own vehicle and drive away; and (4) neither Hall nor the other people who got into his vehicle ever entered the restaurant.

At approximately 6:00 p.m. on July 13, 2007, Prieto and his partner, Officer Michael Roberson, again conducted a surveillance operation in the Kentucky Fried Chicken parking lot. They saw a Camaro enter the lot and park. Approximately 20 minutes later, Hall drove into the lot and the driver of the Camaro, subsequently identified as Alejandro Bermudez, got into Hall's vehicle.

When Prieto and Roberson walked up to Hall's vehicle, they saw an open baggie of marijuana on Hall's lap, a digital scale on the center console and a \$20 bill on the dashboard near Hall. Hall was in the process of weighing some marijuana. As Roberson stood next to Hall on the driver's side, Hall looked up at him and said, "This isn't possession for sales."

Roberson and Prieto pulled Hall and Bermudez out of the vehicle. Bermudez was handcuffed and sat on the curb. As Roberson attempted to restrain Hall, he flailed his arms, trying to get away, but was handcuffed by Roberson and Prieto.

Prieto asked Hall for his identification and Hall said it was in the center console. When Prieto opened the console, he found Hall's ID sitting next to a bag which was later determined to hold 13.78 grams of cocaine, net weight. Hall, though still handcuffed, stood up and ran down the street. Roberson gave chase and caught him about a quarter of a block away. Roberson placed Hall under arrest and, in the course of a pat search, found \$6,466 in cash on his person.

At the police station, Hall waived his *Miranda*¹ rights. He told Prieto he was a low level drug dealer, and that the drugs in the car belonged to him, not Bermudez. Hall confirmed that Bermudez was going to buy marijuana from him, but claimed that the money that was found on him was supposed to cover college tuition for a family member. The interview was not recorded and Prieto did not put Hall's admissions in quotes when he subsequently wrote his report.

B. February 18, 2008 arrest

On February 18, 2008, San Jose Police Officer Mary Cayori was dispatched to a report of vandalism at a gas station. When she arrived, she saw Hall standing next to his vehicle, near a broken gas pump. Cayori smelled marijuana on Hall and asked for his identification. Hall said Cayori could look in his vehicle for his driver's license. As she entered the vehicle, Cayori smelled marijuana and saw a large plastic bag of marijuana, later determined to have a net weight of 210 grams, in the back seat. Two cell phones, which were ringing, were on the front passenger seat.

During the 40 minutes it took for Cayori to interview Hall and complete her investigation, the phones rang approximately 24 times. While booking the phones into

¹ *Miranda v. Arizona* (1966) 384 U.S. 436.

evidence, she observed two text messages on them, one which read, “What’s up with the dank?” and the other which read, “Can you front me a sack?” Cayori believed these text messages referenced marijuana sales. The phones also contained photos of Hall holding up bags of what appeared to be marijuana.

When Hall was searched at the police station, he was carrying \$1,267 in cash, mostly in small bills. Based on her training and experience, Cayori surmised the marijuana in Hall’s vehicle was intended for sale. On cross-examination, Cayori conceded the quantity of marijuana seized could be consistent with personal use, as well as sales. She also said no drug packaging materials, scales or pay/owe sheets were found in Hall’s vehicle.

C. Prior offenses

Pursuant to a pretrial in limine motion, the trial court allowed the prosecution to introduce evidence of Hall’s 1997 and 2003 convictions of possession of marijuana for sale in order to establish that he had knowledge the substance he possessed was marijuana and that he had the intent to sell it.² The circumstances of these offenses are described below.

On January 14, 1996, San Jose Police Officer Christina Lacap made a routine stop of a vehicle driven by Hall. Hall got out of the vehicle and consented to a search of the vehicle. Lacap found a marijuana cigarette in the ashtray and two large bags of marijuana hidden underneath the dashboard on the driver’s side of the vehicle. Lacap arrested Hall and, when she searched him, found \$177 in small bills, rolling papers and 36 smaller zip lock bags commonly used to package marijuana for sale.

On July 27, 2002, Milpitas Police Officer Lap La responded to a call at the Courtyard Marriott Hotel. Inside a room registered under Hall’s name, La found 10 large

² Before this testimony was introduced at trial, the jury was admonished the evidence could be used only for those limited purposes.

bags of marijuana, weighing a total of five pounds, hidden under the sofa and the bed. She also found two digital scales, a calculator and packaging materials.

D. Defense case

Hall testified and, on direct examination, admitted the two prior convictions for possession of marijuana for sale in 1997 and 2003. He further admitted three prior convictions for giving false information to a police officer (Pen. Code, § 148.9) and one prior conviction for petty theft (*id.* § 484).

Hall said Bermudez was a friend and a former neighbor with whom he regularly smoked marijuana, but Bermudez never paid him for drugs. On July 13, 2007, Bermudez called him and wanted to show off his new vehicle, so Hall told Bermudez to meet him at the Kentucky Fried Chicken restaurant parking lot. Hall went to that restaurant several times a week because he loved chicken, but sometimes he went and did not buy anything. He liked the parking lot there because it is “like a smoke spot. People go there to smoke blunts [¶] Lots of high schoolers [*sic*] go there to smoke a blunt. It’s like a back part, if you go back, you kick back and smoke a blunt in peace.”

Hall smoked marijuana frequently because he suffered residual pain from injuries sustained in a car crash in 2002. He used a scale to weigh out the marijuana he smoked to ensure he did not “go overboard.” When he was arrested on July 13, 2007, he tried to run away because he was on parole and knew he would be in trouble for having drugs.

Hall denied knowing anything about the cocaine that was found in the center console until after he was arraigned and denied ever telling Prieto he was a small-scale drug dealer. Hall’s sister’s boyfriend testified that the cocaine belonged to him and Hall’s sister. Some time before July 13, 2007, they had borrowed the vehicle from Hall, bought cocaine and put it in the center console. While in the vehicle, they got in an argument and forgot all about the cocaine.

As for the \$6,466 found on him, Hall explained the money belonged to his mother and he was supposed to get a money order with it to pay a family member’s college

tuition. At the time, he was working for Choices for Children, where he made \$10,000 over several months.

With respect to his February 18, 2008 arrest, Hall insisted that the marijuana Officer Cayori found in his vehicle was self-grown for his personal use. The two cell phones were ringing all the time because his mother called him frequently. He had no idea what the text messages on his phones, referring to “dank” and “front[ing] me a sack,” meant.

E. Verdicts and sentencing

On July 16, 2009, Hall was acquitted of possessing cocaine for sale (count 1) and found guilty of resisting arrest (count 4). The jury hung on the remaining counts, as well as the lesser included offense of possession of cocaine in count 1.

Following a retrial, the jury found Hall guilty on counts 1, 2, 3 and 5.³ Hall was sentenced to a total term of six years eight months in prison.

II. DISCUSSION

A. Prosecutorial misconduct

Hall argues the prosecutor engaged in misconduct in several ways: (1) failing to inform the court that an exhibit offered into evidence contained prejudicial prior arrest charges which the court had not ruled were admissible; (2) cross-examining Hall about a pending felony sex case the court had ruled inadmissible during a pretrial hearing; (3) arguing Hall’s priors showed a propensity for selling drugs; (4) arguing facts not in evidence, such as that Hall was selling drugs to high school students; and (5) trivializing the prosecutor’s burden of proof. These acts, individually or cumulatively, constitute reversible misconduct.

³ Before the second trial, the prosecutor amended count 1 to charge simple possession of cocaine (Health & Saf. Code, § 11350).

1. *Applicable legal standards*

a. *Prosecutorial misconduct*

“A prosecutor commits misconduct when his or her conduct either infects the trial with such unfairness as to render the subsequent conviction a denial of due process, or involves deceptive or reprehensible methods employed to persuade the trier of fact.” (*People v. Avila* (2009) 46 Cal.4th 680, 711 (*Avila*)). A finding of misconduct does not require a determination that the prosecutor acted in bad faith or with wrongful intent. (*People v. Crew* (2003) 31 Cal.4th 822, 839.) To preserve a claim of prosecutorial misconduct for appeal, a defendant must object and seek an admonition if an objection and admonition would have cured the harm. (*People v. Hill* (1998) 17 Cal.4th 800, 820 (*Hill*)). Furthermore, “[r]eversal of a judgment of conviction based on prosecutorial misconduct is called for only when, after reviewing the totality of the evidence, we can determine it is reasonably probable that a result more favorable to a defendant would have occurred absent the misconduct.” (*People v. Castillo* (2008) 168 Cal.App.4th 364, 386.)

When a claim of misconduct focuses on comments the prosecutor made before the jury, the question is whether there is a reasonable likelihood the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) We must place the challenged statement in context and view the argument as a whole. (*People v. Cole* (2004) 33 Cal.4th 1158, 1203; *People v. Lopez* (2008) 42 Cal.4th 960, 970-971.)

“[A] prosecutor is free to give his [or her] opinion on the state of the evidence, and in arguing [the] case to the jury, has wide latitude to comment on both its quality and the credibility of witnesses.” (*People v. Padilla* (1995) 11 Cal.4th 891, 945, disapproved on other grounds in *Hill, supra*, 17 Cal.4th at p. 823, fn. 1; *People v. Martinez* (2010) 47 Cal.4th 911, 958 [prosecutor “may comment upon the credibility of witnesses based on

facts contained in the record, and any reasonable inferences that can be drawn from them.”].)

b. Ineffective assistance of counsel

To prevail on an ineffective assistance of counsel claim, a defendant must establish both that counsel’s performance fell below an objective standard of reasonableness, and resultant prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Hernandez* (2012) 53 Cal.4th 1095, 1105; *People v. Bradley* (2012) 208 Cal.App.4th 64, 86-87.)

2. Relevant in limine rulings

Before trial, the prosecution filed an in limine motion seeking to admit evidence of several of Hall’s prior offenses. The trial court granted the prosecution’s motion to admit, for impeachment purposes, evidence of Hall’s three prior misdemeanor convictions for providing false information to a police officer (Pen. Code, § 148.9), two prior convictions for possession of marijuana for sale (Health & Saf. Code, § 11359) and one prior conviction for misdemeanor theft (Pen. Code, § 484). The court excluded Hall’s prior misdemeanor conviction for evading a peace officer (Veh. Code, § 2800.1). The trial court denied the prosecution’s motion to further impeach Hall with two child sexual abuse charges which were then pending in San Mateo County. (Pen. Code, §§ 261.5, 288, subd. (c).) The trial court denied this request on the ground the evidence was more prejudicial than probative, as well as because Hall would be unable to respond to this evidence without potentially incriminating himself in the San Mateo case.

The prosecution also successfully moved in limine for permission to use Hall’s prior convictions for possession of marijuana for sale for the purpose of proving his knowledge and intent to sell marijuana in this case.

a. Reference to pending felony case in San Mateo County

When Hall was on the witness stand, the prosecutor impeached him with his prior convictions for lying to a police officer and petty theft. She also asked Hall: “You

currently have a pending felony non-drug related case in the county of San Mateo; correct?” Hall said he did, and defense counsel raised no objection.

Hall argues that the prosecutor’s question violated the in limine order, and sought to elicit inadmissible evidence. Any objection or admonishment would have been futile as it would have simply highlighted the information for the jury.

Alternatively, Hall contends that if the court determines that this claim is forfeited by virtue of defense counsel failing to timely object, defense counsel was ineffective. There was no tactical reason for counsel not to object to this question. The felony charges were prejudicial and inflammatory and Hall had no way of explaining them without possibly incriminating himself.

The People counter that the argument is forfeited since defense counsel did not object to the question at trial. Furthermore, the question was consistent with the court’s ruling, as it made no reference to the nature of the charges involved, i.e., sexual abuse of a child.

We agree that the claim is forfeited. “A defendant who fails to make a timely objection or motion to strike evidence may not later claim that the admission of the evidence was error [citations] or that the prosecutor committed misconduct by adducing it.” (*People v. Abel* (2012) 53 Cal.4th 891, 924 (*Abel*)). The reason for this rule is simple. The trial court is in the best position to hear and rule on objections to evidence. Had Hall’s counsel raised an objection to the prosecutor’s question prior to it being answered, the prosecutor could have responded to counsel’s arguments and the trial court could have made an informed ruling. Even if Hall had inadvertently answered the question as the objection was being made, the trial court could have immediately admonished the jury to disregard his answer if the objection was sustained.

Assuming that the argument was not forfeited, however, the claim fails. We agree the question itself violated the letter, if not the spirit, of the trial court’s in limine ruling. Though sanitized to remove any reference to the nature of the charges, the question was

not explicitly permitted by the trial court. The trial court had previously denied the prosecution's motion to further impeach Hall with the felony child sex abuse charges pending in San Mateo County. It is true that the trial court's ruling on this matter was based principally on the inflammatory nature of the charges, but it was *also* based on the fact that Hall was the subject of a criminal action in another jurisdiction and *any* questions about that action would implicate his Fifth Amendment right against self-incrimination. After the trial court ruled that the prosecutor could not ask about the pending child sex abuse case, the prosecutor did not follow up and ask if she could make a more generic inquiry. Instead, she simply made the more generic inquiry set forth above. This was improper.

An improper question, however, does not necessarily warrant reversal. We must determine whether the violation infected the trial "with such unfairness as to render the subsequent conviction a denial of due process, or involve[d] deceptive or reprehensible methods employed to persuade the trier of fact." (*Avila, supra*, 46 Cal.4th at p. 711.) It did not. By not referring to the inflammatory nature of the charges, the prosecutor avoided the greatest danger recognized by the trial court in its ruling, i.e., that the jury would be improperly predisposed to convict Hall in this case because there was a separate child sex abuse case pending against him. There was no follow up on this line of inquiry, nor did the prosecutor reference it again in her final arguments. Hall admitted a number of prior convictions, so the fact that he was facing another criminal proceeding in another jurisdiction would have had little impact on the jury's determination that he was guilty of the charges laid against him in the instant case.

Even assuming the prosecutor's question constituted misconduct, it did not so taint the trial with unfairness so as to violate Hall's due process rights, and there is no basis for Hall's alternative argument that defense counsel was ineffective for failing to object to the question asked. While the defense counsel perhaps reasonably should have objected, there was no prejudice since the other evidence against Hall was so compelling.

b. Admission of Exhibit No. 9

While conducting the direct examination of Officer La regarding the 2002 discovery of marijuana in Hall’s hotel room, the prosecutor referred to a document labeled “ID Sheet,” which was later admitted into evidence as exhibit No. 9, without objection. The document, a certified copy of a booking sheet, contained Hall’s name, photo, identifying file numbers, and fingerprints. The document included a table, reproduced below.

CODE	CIRC	SECTION	BAIL	F/M/I/C	COURT	WARRANT NO.
HS	W	11359		F	43470	CC256972
PC	P	1203.2		F	43100	186968
PC	1	148(A)		M	43470	
PC	1	148.9		M	43470	
VC	1	12500(A)		M	43470	
VC	W	14601.1(A)		M	43470	CC245837

Hall argues that the prosecutor committed misconduct by introducing this exhibit, which contained inadmissible evidence of prior charges, specifically possession of marijuana with intent to sell (Health & Saf. Code, § 11359), a felony probation violation (Pen. Code, § 1203.2), misdemeanor obstructing a police officer (*id.* § 148, subd. (a)), misdemeanor falsely identifying oneself to a police officer (*id.* § 148.9), misdemeanor driving without a license (Veh. Code, § 12500, subd. (a)) and misdemeanor driving with a suspended driver’s license (*id.* § 14601.1). The prosecutor offered exhibit No. 9 knowing it was inadmissible, and failed to advise the court or defense counsel it contained such inadmissible and prejudicial information.

Alternatively, in the event the court finds this argument has been forfeited due to defense counsel’s failure to object, Hall contends his counsel was ineffective. There was

no tactical reason for not objecting and, had the document not been admitted, the jury would likely have reached a different verdict.

In response, the People argue Hall has forfeited the argument because defense counsel failed to object to its admission. Substantively, the People further argue that the introduction of exhibit No. 9 does not constitute misconduct because the document, on its face, does not set forth prejudicial information. The table consists of various letters and numbers, but there is no key to explain what those letters and numbers mean, nor did the prosecutor make any reference to the exhibit or explain any of the information contained therein. The prosecutor did not mislead the court or defense counsel about the document in any way, nor did it provide the jury with inaccurate or prejudicial information.

We agree Hall has forfeited this argument on appeal. As noted above, failing to timely object or move to strike particular evidence precludes a defendant from later claiming evidentiary error or prosecutorial misconduct in connection with its admission. (*Abel, supra*, 53 Cal.4th at p. 924.)

Assuming however that the failure to object did not amount to a forfeiture of the claim, we still find the admission of exhibit No. 9 did not amount to reversible misconduct. While the exhibit included information outside the scope of the trial court's in limine ruling, i.e., the table of letters and numbers which referred to various criminal charges brought against Hall in 2002, those letters and numbers were meaningless without some further explanation. There was no key on the document to disclose what they meant, nor did the prosecutor offer any guidance on the subject. In fact, following its admission into evidence, it was never referred to again. Consequently, even if the prosecutor committed misconduct in seeking to admit the document, its admission into evidence did not infect the trial "with such unfairness as to render the subsequent conviction a denial of due process, or involve[] deceptive or reprehensible methods employed to persuade the trier of fact." (*Avila, supra*, 46 Cal.4th at p. 711.)

Again assuming the prosecutor committed misconduct, that misconduct did not so taint the trial with unfairness so as to violate Hall's due process rights, thus there is no basis for Hall's alternative argument that defense counsel was ineffective for failing to object to the introduction of exhibit No. 9. Given that the other evidence against Hall was so strong, it is unlikely that the jury would have reached a different verdict had this exhibit not been admitted.

c. Misconduct in closing argument

i. Reference to priors for nonapproved purposes

In her closing argument, the prosecutor referred to Hall's past convictions to establish: (1) his knowledge that he possessed marijuana; and (2) his intent to sell marijuana. She argued, "[Hall] possessed marijuana with the intent to sell. Not once, not twice, but four times. It's not a strange set of coincidence [*sic*] that defendant was found with marijuana with the intent to sell." She described the circumstances of his prior convictions and compared them with the circumstances in the instant case, noting his behavior in this case was consistent with the expert testimony describing marijuana sales. Later, the prosecutor referred to Hall's lack of credibility stating, "The fact is we know he lies because he has a history of lying. This marijuana dealer who has been convicted of selling drugs, has also repeatedly provided false information to police officers."

The prosecutor also pointed out "when Officer Roberson opened the door [to Hall's vehicle], [Hall] knew he was guilty and lied to the officer and immediately said, this isn't possession for sales. He knew what he was doing[,] . . . [because] he was caught red handed and he knows the terminology because he did it before." Later in her argument, the prosecutor referenced Hall's prior convictions for marijuana sales to support her contention that Hall had over \$6,000 in small bills on his person because he was selling drugs, not because he was employed with a child care program.

Hall argues that the prosecutor overstepped the boundaries established by the court and used his prior felony convictions not just to show knowledge and intent, but to show he had a propensity to commit crimes.

The People counter that the prosecutor used Hall's prior convictions for the limited purposes permitted by the trial court, i.e., to show his knowledge and intent to sell marijuana.

Even if we were to agree with Hall that the prosecutor's argument crossed over the line established by the court's in limine order and improperly suggested that Hall's prior convictions of possession of marijuana for sale established his *propensity* to sell marijuana, the court's instructions on the limited use of Hall's prior convictions were sufficient to cure any potential prejudice. Those instructions were given when the evidence was first introduced, and at the close of evidence.⁴ The court further instructed the jury that the statements of counsel are not evidence: "Nothing that the attorneys say is evidence. In their opening statements and closing remarks the attorneys discuss the case but their remarks are not evidence." It also instructed, "You must decide . . . what

⁴ This is the instruction as read to the jury just prior to final arguments: "During the trial certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and no other. Some of that evidence that was allowed for a limited purpose includes the People's presentation of evidence that the defendant committed other offenses, prior possession of marijuana with intent to sell that were not the subject matter of this case. [¶] . . . [¶] . . . If you decide the defendant committed the uncharged acts, those prior acts, you may but are not required to consider that evidence for the limited purpose of deciding one, whether or not the defendant acted with the intent to sell in this case or two, whether the defendant knew the nature or character of the substance of marijuana when he allegedly acted in this case. [¶] In evaluating this evidence, consider the similarity or lack of similarity between the uncharged acts and the charged offenses. Do not consider this evidence for any other purpose except the other purpose that we mentioned earlier, the other limited purpose of determining the defendant's credibility. . . . [¶] And to evaluate whether or not the defendant acted with the intent to sell . . . in [this] case, or the defendant knew the nature or character of the substance of marijuana when he allegedly acted in this case. Do not conclude from this evidence that the defendant has a bad character and is disposed to commit crime."

the facts are. That's up to you and you alone to decide what happened based only on the evidence that's been presented to you in this trial and no other source." The court's instructions, not the prosecution's argument, are determinative (*People v. Mayfield* (1993) 5 Cal.4th 142, 179; *People v. Stewart* (2004) 33 Cal.4th 425, 499), and we presume the jurors understood and followed those instructions. (*People v. Holt* (1997) 15 Cal.4th 619, 662.) Thus, even if the prosecutor's remarks had been improper, given the instructions, the nature of the challenged comments, and the evidence presented at trial, no prejudice resulted.

ii. Reference to high school students

Also in closing, the prosecutor stated the following.

"[Hall] tells you [the Kentucky Fried Chicken parking lot] is a great smoke spot with lots of high school kids. Why would someone who claims to smoke three to four blunts a day by himself at his house feel the need to go into this parking lot where he knows there's a bunch of other users of marijuana, a bunch of other high school kids that use marijuana[,] except for the fact that he wants to go there to sell it to them[?] [¶] These are his customers. He was caught in the middle of a transaction consistent with what the officer saw, with [what] Mr. Bermudez told you, the money on his lap, the marijuana on his lap, the scale on the center console, the quick let's hop in the car, quick exchange before the officers interrupted. The amount of marijuana that was found, the digital scale, the money, the \$6,466 which isn't disputed consisting of lots of 20's, lots of 10's, lots of 5's."

Hall argues that the prosecutor improperly raised the idea that he went to the Kentucky Fried Chicken parking lot in order to sell drugs to students.

The People contend that the prosecutor's argument was based on a logical inference. Hall himself was the one who testified that high school students liked to go to the Kentucky Fried Chicken parking lot and smoke marijuana.

A prosecutor engages in misconduct by misstating facts or referring to facts not in evidence. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 95; *People v. Ellison* (2011) 196 Cal.App.4th 1342, 1353.) However, he or she “enjoys wide latitude in commenting on the evidence, including urging the jury to make reasonable inferences and deductions therefrom.” (*People v. Coffman and Marlow, supra*, at p. 95; *People v. Ellison, supra*, at p. 1353.)

In this case, it was Hall who testified that the Kentucky Fried Chicken parking lot was not just a good location to go to smoke marijuana, but that it was frequented by high school students for that same purpose. The prosecutor’s suggestion that Hall himself went to the parking lot because there were a lot of potential customers there, including the marijuana-smoking high school students Hall spoke about, is a reasonable deduction based on the evidence. Hall cannot complain that the prosecutor, in her argument, connected the dots between: (1) the presence of lots of high school students smoking marijuana in a particular parking lot; and (2) Hall’s presence in that same parking lot with lots of cash in small denominations, an open bag of marijuana and a digital scale.

iii. Argument regarding reasonable doubt

In addressing the concept of reasonable doubt, the prosecutor made the following argument.

“If somebody came in through those doors dressed in a black ski mask[,] completely black sweatshirt, black pants[,] and came and shot the deputy, ran through that door, was caught two minutes later at the metal detector with blood spatters on his clothing, he too has a right to a jury trial. Even though he was found with the murder weapon, [and] there [are] numerous eye witnesses. He’s found at the scene. He too has a right to a jury trial. [¶] Just because you’re here doesn’t mean there is [a] reasonable doubt.”

Hall contends this argument was improper as it trivialized the prosecution's burden of proof, implying that the trial itself was a mere constitutional formality since Hall was so obviously guilty.

The People counter that the argument was akin to that of the commonly-used example involving Jack Ruby shooting Lee Harvey Oswald, broadcast on national television. This is an accepted means of explaining the burden of proof and a defendant's constitutional right to a jury trial even when it appears there can be no reasonable doubt.

We agree that the prosecutor's hypothetical was proper, if perhaps an extreme example, and did not amount to prosecutorial misconduct. Examining the prosecutor's remarks in the context of her argument, as we must, we see no likelihood the jury would construe them in the way Hall suggests. (*People v. Cole, supra*, 33 Cal.4th at p. 1203.) The example was given following the prosecutor's review of all the evidence supporting the prosecution's case-in-chief, "with the evident aim of demonstrating [s]he had succeeded in proving defendant guilty beyond a reasonable doubt." (*People v. Marshall* (1996) 13 Cal.4th 799, 832.)

Furthermore the court instructed the jury on the reasonable doubt standard of proof, as well as on the presumption of innocence. "We 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. Clair* (1992) 2 Cal.4th 629, 663, fn. 8; see also *People v. Smith* (2005) 35 Cal.4th 334, 372.)

d. Cumulative error

A claim of cumulative error is in essence a due process claim and is often presented as such (see, e.g., *People v. Rogers* (2006) 39 Cal.4th 826, 911). "The 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.'" (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)

" '[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.' "

[Citation.] The few errors that occurred during defendant’s trial were harmless, whether considered individually or collectively. Defendant was entitled to a fair trial but not a perfect one.” (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) For the reasons set forth above, we find that, to the extent there was any prosecutorial misconduct, that misconduct did not so infect the trial as to render it unfair. We deny this final claim.

III. DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.