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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

LEONARD LEROY LLAMAS,

Defendant and Appellant.

H039026

(Santa Clara County

Super. Ct. No. C1119154)

Defendant Leonard Leroy Llamas appeals his felony conviction for inflicting injury on a cohabitant (Pen. Code, § 273.5, subd. (a)).<sup>1</sup> Defendant argues the conviction must be reversed because: the trial court improperly denied defendant's motion to represent himself; the trial court erred in admitting a statement made by the victim to a paramedic; defense counsel was ineffective for failing to object to hearsay during trial; the prosecutor committed misconduct during closing argument and defense counsel was ineffective for not objecting; the trial court provided an unduly coercive supplemental instruction to the deadlocked jury; and the foregoing errors were cumulatively prejudicial. For the reasons stated here, we will affirm the judgment.

Defendant's appellate counsel also filed a petition for writ of habeas corpus, alleging ineffective assistance of trial counsel. We dispose of the habeas petition by separate order filed this day. (See Cal. Rules of Court, rule 8.387(b)(2)(B).)

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<sup>1</sup> Unspecified statutory references are to the Penal Code.

## I. TRIAL COURT PROCEEDINGS<sup>2</sup>

The following facts are based on testimony by the victim, Stephanie Martinez, at defendant's preliminary hearing<sup>3</sup>, as well as the testimony of various individuals at defendant's jury trial.

### A. THE ASSAULT

In October 2011 Martinez and defendant spent approximately two hours at a club called Sabor in downtown San Jose, during which time Martinez drank two alcoholic drinks. Martinez and defendant had been dating for over three years and she was pregnant with his child. Police asked the couple to leave Sabor around 11:00 p.m. due to an altercation between Martinez and two or four other women. Martinez and defendant proceeded to a second club, where they stayed until 2:00 a.m.

After leaving the second club, Martinez was assaulted on the street and the identity of the assailant was disputed at trial. According to Martinez's testimony, "those girls" with whom she had an altercation at Sabor attacked her, leaving her with a black eye and a bloody nose. Martinez testified that defendant tried to protect her and picked her up after the girls fled.

A different version of the assault came from Tarrel Thomas, who testified for the prosecution at defendant's trial. Thomas testified that between 2:00 and 2:30 a.m., he and a few friends were talking on the sidewalk near the intersection of St. James Street and East Third Street in downtown San Jose. Thomas had consumed a beer and two or three shots of vodka over the course of the night but had stopped drinking at least an hour before the assault.

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<sup>2</sup> Our review of this appeal was hampered by defendant's failure to cite Clerk's Transcript and Reporter's Transcript volume numbers. Briefs must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." (Cal. Rules of Court, rule 8.204(a)(1)(C).)

<sup>3</sup> As discussed in Part I.B., *post*, the court found Martinez unavailable at trial and allowed the prosecution to read her preliminary hearing testimony to the jury.

Defendant approached the group, asked for a cigarette, and told them “about how he had just knocked somebody over trying to help his girlfriend.” When Martinez walked around a corner into Thomas’s view, defendant pointed her out and referred to her as a “ ‘bitch’ ” and “ ‘my baby mama.’ ” As defendant left to join Martinez, Thomas turned and began talking to his friends and then “heard the sound of somebody getting hit.” Thomas turned and saw Martinez on the ground about 15-20 yards away, with defendant punching and kicking her and he also saw defendant lift Martinez by her hair. At the time, Martinez “[l]ooked like she was knocked out.” Thomas stated that defendant was the only person he saw assault Martinez. Thomas and his friends confronted defendant, who threatened them and then eventually “walked off” before the police arrived. Thomas waited with Martinez, who was bleeding, until the police arrived a few minutes later.

Robert Van Peteghem, a firefighter and paramedic for the San Jose Fire Department, was the first responder who initially treated Martinez at the scene. When Van Peteghem arrived, Martinez was lying face up surrounded by bystanders at the corner of St. James Street and East Third Street. Martinez had a hematoma on her head and was actively bleeding from her mouth and nose. During the interaction, Martinez had an “altered level of consciousness.” She knew her name but had difficulty answering other questions. When Van Peteghem asked her how she received her injuries, “[s]he said her boyfriend hit her.” Defendant was arrested a short time later a few blocks away.

Defendant was charged by amended information in February 2012 with one count of willful infliction of corporal injury on a cohabitant. (§ 273.5, subd. (a).) The amended information also alleged two prior strike convictions, one in California for assault with intent to commit rape and one in Colorado for robbery. (§§ 220, subd. (a); 1170.12, subd. (c).)

## B. THE TRIAL

Certain pretrial proceedings are relevant to defendant's appeal. The first involves the victim's failure to appear at pretrial hearings despite having been ordered to do so. Though Martinez appeared at the preliminary hearing and a trial setting hearing, she did not appear on February 6 or 7, leading the court to issue a body attachment compelling her attendance at future hearings. When Martinez failed to appear at later hearings, the court found Martinez unavailable to testify at trial, and allowed the People to read her preliminary hearing testimony to the jury at trial.

After the jury was empanelled, defendant made an oral *Faretta*<sup>4</sup> motion to dismiss his appointed attorney and represent himself. The court explained the potential disadvantages of waiving his Sixth Amendment right to counsel and defendant acknowledged them.<sup>5</sup> Though the case had previously been in a time-not-waived posture, defendant indicated he was requesting a "time waiver" along with his request to represent himself. Defendant sought a continuance so that he could investigate the case, which he estimated would take six months. He stated that he did not make the request earlier because he was previously unaware that Martinez would be unavailable. When the court asked defendant if he would be willing to proceed even if the court denied his request for a continuance, defendant said he would be willing to go forward but that the trial "would be a circus act ... because I would be fumbling the ball" and that his "defense would end up being a no defense." The court denied defendant's request.

On the morning of trial, outside the presence of the jury, the court considered a defense in limine motion related to the planned testimony of first responder Van Peteghem. Defendant's main objection to the testimony was the hearsay statement made by Martinez to Van Peteghem that her boyfriend hit her. Defendant also objected to any

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<sup>4</sup> *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).

<sup>5</sup> References to the Fifth, Sixth, and Fourteenth Amendments in this opinion are to the corresponding amendments to the United States Constitution.

attempt by the People to use hearsay statements from anonymous bystanders overheard by Van Peteghem at the scene of the assault. Those objections were accompanied by a request for a continuance in the event the court decided to admit the statements to allow defense counsel to further investigate the context of Martinez's statements to Van Peteghem. The court conducted an Evidence Code section 402 hearing where the People called Van Peteghem as a witness to lay the foundation to admit Martinez's hearsay statement as a spontaneous declaration. (Evid. Code, § 1240.) Van Peteghem testified that he arrived within two or three minutes of receiving a call from his dispatcher; he was the first responder to Martinez; she had an "altered mental status" and difficulty answering questions; and when he asked her what happened, "[s]he told me that she was hit by her boyfriend." The court found that the prosecution met its burden under Evidence Code section 1240 and ruled the hearsay statement admissible. However, the court found the hearsay statements of bystanders inadmissible because none was identified by name and the prosecution did not present any evidence regarding their individual mental states. The court also denied the requested continuance.

In addition to calling Thomas and Van Peteghem to testify at trial and reading Martinez's preliminary hearing testimony to the jury, the People called two San Jose Police Department officers, Jennifer Majors and Wilbert Garlit, who responded to the assault. As relevant to defendant's appeal, the prosecutor asked Officer Majors if during her investigation of the assault on Martinez she ever received information that the victim was assaulted by "a group of females," "a group of males," or "anyone other than the defendant?" Defense counsel did not object to these questions and Officer Majors responded "No" to each of them. The prosecutor asked similar questions of Officer Garlit, inquiring whether the officer told Martinez that he had "witnesses [who] said that the defendant hit her in the face?" The prosecutor also asked Officer Garlit if he was "made aware that there were eyewitnesses that said she was assaulted by the defendant?"

Defense counsel made no objection and Officer Garlit answered “Yes, sir” to each of these questions.

In his closing argument, the prosecutor argued that defendant beat Martinez “[b]ut because he would not be man enough to accept the responsibility of his actions, we would have to go through this exercise of who was the person who did it.” The trial court overruled defense counsel’s objection that the foregoing constituted improper argument. The prosecutor later discussed Martinez’s failure to attend the trial and claimed her “lack of cooperation is being used to deny her justice.” The prosecutor then stated: “If there was a person, someone like you, someone like us, who came in the court and said they got beat on a public street by someone they didn’t know, you would give them justice. [¶] Everyone in this case knows who assaulted Ms. Martinez. Mr. Thomas knows who assaulted Ms. Martinez, and he told you. Officer Van Peteghem knows who assaulted Ms. Martinez. He told you why he knows that. Even Stephanie Martinez knows who assaulted her. That’s why she’s not here. [¶] Don’t be part of the tragedy of Ms. Martinez.” Defense counsel did not object to these statements.

During defense counsel’s closing argument, he discussed the reasonable doubt standard and Martinez’s preliminary hearing testimony, stating: “if you even believe that she might be telling the truth ... [that] she might have been attacked by someone else who caused those injuries, even if that is a reasonable possibility in your mind, then I submit to you you have reasonable doubt. You must find my client not guilty. You could end your inquiry there. You could stop.” In his rebuttal argument, the prosecutor responded: “That’s a blatant misrepresentation of the law in this case, blatant misrepresentation of your duty. You can’t do that. You took an oath to consider all of the evidence ... . So you can’t stop after you hear - review Ms. Martinez’s testimony. That’s a blatant misrepresentation of the law.” Defense counsel did not object to the prosecutor’s statements.

The jury began their deliberations just after 3:00 p.m. on February 15, 2012 and spent much of that afternoon listening to the court reporter read back the testimony of Van Peteghem at the jury's request. The jury resumed deliberations in the morning of February 16, 2012, and told the deputy they were having trouble reaching a verdict close to midday. That afternoon, the court reporter read back Thomas's testimony at the jury's request.

At about 4:45 p.m., the court learned that the jury was still having difficulty reaching a verdict and discussed the matter on the record. The court thanked the jury for its efforts and noted "a lot of resources and a lot of your time have been put into this so far." The court also inquired regarding the split of jurors and the foreperson informed him they were split nine to three, without disclosing which side was which. The court instructed the jurors to think about the case and expressed hope that they would be able to reach a verdict after "a good night's sleep ... or a good breakfast." The court then stated, "at some point hopefully you will reach a verdict, but if you don't, then at that point we'll take it from there." Once the court released the jury for the day, defense counsel objected to the court's treatment of the jury deadlock, arguing that the court should have asked the jurors whether there was a reasonable possibility that the jury could reach a verdict before ordering them to continue deliberating. The jury continued deliberating the next morning and reached a verdict after lunch, finding the defendant guilty. (§ 273.5, subd. (a).)

Defendant waived jury on the prior strike allegations and, after a bench trial, the trial court found both prior strike allegations true beyond a reasonable doubt. Before the sentencing hearing, defendant moved to reduce his felony conviction to a misdemeanor (§ 17, subd. (b)) and also filed a *Romero*<sup>6</sup> motion to dismiss the two prior strike convictions. After a hearing, the court dismissed one of defendant's prior strikes but denied the remainder of defendant's motions. The court sentenced defendant to a total

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<sup>6</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

term of eight years in state prison, consisting of the upper term of four years for his current section 273.5 conviction, doubled for the prior strike. (§ 1170.12, subd. (c)(1).)

## II. DISCUSSION

### A. FARETTA MOTION

Defendant claims his *Faretta* motion was timely and that he was therefore entitled to represent himself as a matter of right. Alternatively, defendant asserts that if his motion was untimely the trial court abused its discretion by denying it.

Generally, “[a] trial court must grant a defendant’s request for self-representation if the defendant unequivocally asserts that right within a reasonable time prior to the commencement of trial, and makes his request voluntarily, knowingly, and intelligently.” (*People v. Lynch* (2010) 50 Cal.4th 693, 721 (*Lynch*), abrogated on other grounds by *People v. McKinnon* (2011) 52 Cal.4th 610, 636.) Although the Supreme Court has not defined a time before trial at which a motion for self-representation is considered untimely, *Faretta* motions “on the eve of trial” are untimely. (*Lynch*, at p. 722.) On the other end of the spectrum, *Faretta* motions made “long before trial” are generally timely. (*Id.* at p. 723.) “[O]utside these two extreme time periods, pertinent considerations may extend beyond a mere counting of the days between the motion and the scheduled trial date.” (*Ibid.*) The *Lynch* court concluded that a trial court may consider the totality of the circumstances in determining the timeliness of a *Faretta* motion, including: (1) the length of time between the motion and the trial date; (2) whether trial counsel is ready for trial; (3) the number and availability of witnesses; (4) the complexity of the case; (5) “any ongoing pretrial proceedings”; and (6) whether the defendant could have made the motion earlier. (*Id.* at p. 726.) The *Lynch* court did not specify whether a de novo or abuse of discretion standard governs review of a trial court’s determination on the question of timeliness. However, *Lynch* made clear that if the motion is found to be untimely, it is then “ ‘addressed to the sound discretion of the court.’ ” (*Lynch*, at p. 722, quoting *People v. Windham* (1977) 19 Cal.3d 121, 128 (*Windham*).)

We conclude defendant's *Faretta* motion was untimely under either standard of review. Defendant made his request after the jury was empanelled, which is certainly "on the eve of trial ... ." (*Lynch, supra*, 50 Cal.4th at p. 722.) Because defendant made his request at the later of the "two extreme time periods," his case is not one where "pertinent considerations may extend beyond a mere counting of the days ... ." (*Id.* at p. 723.) Defendant's failure to make his motion until after the jury was empanelled meant that any delay would adversely affect not only the court but also several members of the public.

Additionally, defendant did not have a reasonable excuse for not making the motion earlier. Defendant argued that amending the information to convert a section 667.5, subdivision (b) prior prison term allegation to a second prior strike allegation justified his delayed motion to represent himself. The trial court noted, however, that the Colorado conviction on which it was based was a matter of public record and appeared in previous charging documents. Martinez's failure to appear also did not justify the delay because by the time defendant made his motion Martinez had missed multiple hearings. Thus, the totality of the circumstances supports the trial court's finding that defendant's motion was untimely.

Having determined the motion was untimely, we review the trial court's denial for an abuse of discretion. (*Lynch, supra*, 50 Cal.4th at p. 722.) When considering an untimely motion for self-representation, a trial court should consider: (1) whether defense counsel is ready to try to case; (2) whether the lateness of the defendant's request is justifiable; and (3) whether the defendant seeks to delay the proceedings. (*Windham, supra*, 19 Cal.3d at p. 128, fn. 5.) When defendant made his *Faretta* motion, defense counsel appeared ready to try the case.<sup>7</sup> Additionally, as discussed above, defendant had

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<sup>7</sup> Defendant notes that his attorney requested a short continuance, suggesting that he was not entirely ready to try the case. But counsel made that request a few days *after* defendant's *Faretta* motion. Because the trial court did not know of that request when it denied defendant's motion, the request for a continuance is irrelevant to our review of the *Faretta* issue.

no reasonable justification for the lateness of his request. While it does not appear defendant made the motion for purposes of delay, it was apparent that granting the motion would cause a potentially substantial delay. Defendant made his oral *Faretta* motion and immediately followed it with a request for a continuance in order to investigate the case. When asked how long his investigation would last, he estimated it would take six months.

Defendant contends that the trial court abused its discretion in considering his request for a continuance because the defendant stated he would be willing to represent himself even without extra time. However, defendant qualified his willingness to go forward without a continuance when he said that the trial “would be a circus act ... because I would be fumbling the ball” and that his “defense would end up being a no defense.” From these statements, the trial court could reasonably conclude that a trial so described by the defendant would likely delay proceedings. Further, defendant’s request for a continuance distinguishes his case from cases where appellate courts have found an abuse of discretion in denying untimely *Faretta* motions unaccompanied by requests for extensions of time. (See *People v. Rogers* (1995) 37 Cal.App.4th 1053, 1057 [“In making his *Faretta* motion, appellant did not request a continuance and was prepared to proceed with trial.”]; *People v. Nicholson* (1994) 24 Cal.App.4th 584, 594 [same].) In light of the likely delay that would be caused by granting defendant’s untimely *Faretta* motion, we see no abuse of discretion in denying it.

#### **B. MARTINEZ’S STATEMENT TO VAN PETEGHEM**

Defendant claims that the trial court erred by admitting Martinez’s statement to Van Peteghem that her boyfriend hit her because: (1) the statement did not meet the elements of the spontaneous declaration hearsay exception (Evid. Code, § 1240); and (2) admitting the statement violated defendant’s Sixth Amendment rights of confrontation and cross-examination. We review the court’s evidentiary decision that the spontaneous declaration exception applied for an abuse of discretion (*People v. Morrison* (2004) 34

Cal.4th 698, 719 (*Morrison*)), and review defendant's confrontation clause arguments de novo. (See *U.S. v. Mitchell* (9th Cir. 2007) 502 F.3d 931, 964 ["Alleged violations of the Confrontation Clause are reviewed de novo."].)

### **1. Martinez's Statement was a Spontaneous Declaration**

Though an out-of-court statement "made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated" is hearsay and generally inadmissible, a hearsay statement is admissible if it: "(a) [p]urports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) [w]as made spontaneously while the declarant was under the stress of excitement caused by such perception." (Evid. Code, §§ 1200, 1240.) Whether the statement was made under the stress of excitement "is informed by a number of factors, including the passage of time between the startling occurrence and the statement, whether the statement was a response to questioning, and the declarant's emotional state and physical condition." (*People v. Clark* (2011) 52 Cal.4th 856, 925.) " 'Neither lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity *if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance.*' [Citation.]" (*People v. Poggi* (1988) 45 Cal.3d 306, 319, original italics (*Poggi*)). Further, while "responses to detailed questioning are likely to lack spontaneity, ... an answer to a simple inquiry may be spontaneous." (*Morrison, supra*, 34 Cal.4th at p. 719.) Finally, "[t]he trial court must consider each fact pattern on its own merits and is vested with reasonable discretion in the matter." (*Ibid.*)

Van Peteghem testified during the Evidence Code section 402 hearing about his interactions with Martinez on the night of the assault. Van Peteghem arrived within two or three minutes of receiving the call from his dispatcher. He stated that Martinez "had a lot of facial trauma," a hematoma on her head, and was bleeding from the mouth and nose. Van Peteghem opined that the trauma was recent given the bright red color of the

blood. He also testified that she had “an altered mental status” and was not able to answer all of the questions posed to her. The question that prompted Martinez’s statement that her boyfriend hit her was “what happened?” On cross-examination, Van Peteghem explained that, in light of Martinez’s head trauma, he was asking her questions to gauge her level of consciousness. In finding that Martinez’s statement was a spontaneous declaration, the trial court focused on her injuries, that she was suffering from head trauma, and that her mental status was “altered” such that she had difficulty answering questions.

We find no abuse of discretion. Martinez’s statement that her boyfriend hit her indisputably “[p]urport[ed] to narrate, describe, or explain an act, condition, or event perceived by [Martinez.]” (Evid. Code, § 1240, subd. (a).) Additionally, the statement appears to have been made while she was “under the stress of excitement caused by such perception.” (Evid. Code, § 1240, subd. (b).) Though it is not clear from the record how much time had passed since the attack, Martinez suffered head trauma, was actively bleeding, had an altered mental status, and could not answer all the questions posed to her. It is reasonable to conclude that while in that state, her “ ‘reflective powers were still in abeyance.’ ” (*Poggi, supra*, 45 Cal.3d at p. 319, italics omitted.)

Defendant claims that by “altered mental status” Van Peteghem and the court were referring to Martinez’s intoxication and that “intoxication militates against a finding of admissibility” because it would adversely affect the trustworthiness of the statement. However, as neither Van Peteghem nor the trial court mentioned Martinez’s possible intoxication, it appears that they were referring to an altered mental status that was the result of the substantial head trauma Martinez suffered.

As for the statement’s spontaneity, though it was made in response to a question from Van Peteghem, his question was short and nonsuggestive. We find this case similar to *Poggi*, where the Supreme Court upheld the trial court’s admission of a statement about an attack made 30 minutes after the incident when made in response to short,

nonsuggestive questions, including “What happened?” (*Poggi, supra*, 45 Cal.3d at pp. 319-320.)

## **2. Defendant’s Confrontation Clause Claim is Without Merit**

“In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ... .” (U.S. Const., 6th Amend., cl. 4.) The confrontation clause protects the right to cross-examine not only those who testify at trial but also those who make out-of-court statements that are testimonial. (*People v. Cage* (2007) 40 Cal.4th 965, 978-979 (*Cage*)). To be “testimonial,” an out-of-court statement: “must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony [and] ... the statement must have been given and taken *primarily* for the *purpose* ascribed to testimony—to establish or prove some past fact for possible use in a criminal trial.” (*Cage, supra*, at p. 984, original italics.) Finally, while “sufficient formality and solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses, ... statements ... are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency ... .” (*Ibid.*) The primary purpose of the statement is determined objectively, “considering all the circumstances that might reasonably bear on the intent of the participants in the conversation.” (*Ibid.*)

In *Cage*, the defendant cut the victim’s face with a piece of glass. (*Cage, supra*, 40 Cal.4th at pp. 984-985.) Immediately upon arriving at the hospital, the victim’s treating physician asked him “ ‘what happened’ ” and the victim said the defendant had cut him. (*Id.* at p. 972.) The physician asked the question for purposes of determining the proper method of treatment because “the cut might contain ground-in debris that must be cleaned out to prevent infection.” (*Ibid.*) A police officer interviewed the defendant at her home and then went to the hospital where the victim was receiving treatment for his injuries about an hour later. At the hospital, the police officer asked the victim “

‘what had happened between [the victim] and the defendant’ ” and the victim told the officer that the defendant had attacked him. (*Id.* at pp. 971-972.) The victim did not testify at trial but his statements to the police officer and the physician were admitted into evidence. (*Id.* at p. 974.) The jury found the defendant guilty of, among other things, assault by means likely to produce great bodily injury. (*Id.* at p. 973.)

On appeal, the defendant claimed that the victim’s statements to the police officer and the physician were testimonial and that her Sixth Amendment right to confront and cross-examine the victim were violated because he did not testify at trial. (*Cage, supra*, 40 Cal.4th at p. 974.) The Supreme Court found the victim’s statement to the police officer testimonial for purposes of the Sixth Amendment because the officer’s “clear purpose in coming to speak with [the victim] at this juncture was not to deal with a *present emergency*, but to obtain a fresh account of *past events involving defendant* as part of an inquiry into possible criminal activity.” (*Id.* at p. 985, original italics.) However, the court found that the victim’s statement to the physician was not testimonial because the question he asked was “neutral in form” and “his sole object in asking [the victim] ‘what happened’ was to determine, in accordance with his standard medical procedure, the exact nature of the wound, and thus the correct mode of treatment.” (*Id.* at p. 986.) Further, “the context of the conversation had none of the formality or solemnity that characterizes testimony by witnesses.” (*Id.* at p. 987.)

Martinez’s statements to Van Peteghem are similar to those of the victim to his treating physician in *Cage*. Van Peteghem was the first medical professional to respond to the scene and noted that Martinez had suffered head trauma. Like the doctor in *Cage*, Van Peteghem asked a neutral question and his purpose for asking the question was to gauge Martinez’s level of consciousness in order to “deal with a contemporaneous emergency ... .” (*Cage, supra*, 40 Cal.4th at p. 984.) Moreover, the interaction did not “occur[] under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony.” (*Ibid.*) For these reasons, we find that Martinez’s statement

to Van Peteghem was not testimonial and therefore did not implicate defendant's Sixth Amendment confrontation or cross-examination rights.

### **C. HEARSAY STATEMENTS OF UNIDENTIFIED BYSTANDERS**

Defendant claims his trial counsel provided ineffective assistance when he failed to object to testimony of Officer Majors and Officer Garlit about what unidentified bystanders at the scene of Martinez's assault described. The Attorney General argues that the statements were not hearsay because they impeached Martinez's testimony at defendant's preliminary hearing that someone other than defendant attacked her.

To establish ineffectiveness of trial counsel in violation of defendant's Sixth Amendment right to counsel, defendant must show that counsel's performance was deficient and that he was prejudiced by the deficiency. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-217 (*Ledesma*)). To prove prejudice, defendant must affirmatively show a reasonable probability that, but for his trial counsel's errors, the result would have been different. (*Id.* at pp. 217-218.) A reasonable probability is one " 'sufficient to undermine confidence in the outcome.' " (*Id.* at p. 218, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 693-694.) "If a claim of ineffective assistance of counsel can be determined on the ground of lack of prejudice, a court need not decide whether counsel's performance was deficient." (*In re Crew* (2011) 52 Cal.4th 126, 150, citing *Strickland, supra*, at p. 697.)

#### **1. Officer Majors**

Before trial, the court discussed the use of Martinez's preliminary hearing testimony in the event she did not appear at the trial. Defense counsel did not object to the use of the preliminary hearing testimony at trial and also stated he had no objection to the use of Martinez's statements to the police to show prior inconsistent statements made by her so long as the prosecution laid a proper foundation. At trial, Martinez's preliminary hearing testimony was read to the jury, including the part where Martinez stated that a group of people attacked her and that the police did not give her a chance to

explain what had happened to her when she was interviewed after being treated by Van Peteghem. The prosecution then called Officer Majors, who was one of the investigating officers. The prosecutor asked Majors if she ever received information that Martinez was “assaulted by a group of females” or “by anyone other than the defendant?” Officer Majors responded “No” to each question.

On appeal, defendant appears to contend that trial counsel should have objected to these questions as calling for hearsay and that counsel’s failure to object amounted to ineffective assistance. We disagree for two reasons. First, although an affirmative response would have benefited defendant, trial counsel knew the questions would likely elicit a negative response. Trial counsel therefore had a tactical reason for not objecting to them. Second, even if trial counsel had objected, that objection would have likely been overruled because these questions did not actually call for hearsay. “ ‘Hearsay evidence’ is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.” (Evid. Code, § 1200, subd. (a).) The officer’s testimony here was not offered to prove the truth of any matter stated by the bystanders but rather to impeach Martinez’s testimony that someone else had attacked her.

## **2. Officer Garlit**

Officer Garlit testified about his investigation at the scene of the attack and about his interview with Martinez that night. Among other questions, the following exchange occurred between the prosecutor and Officer Garlit: “[Question]: During your conversation with Ms. Martinez, did you tell her that you had witnesses who said that she was hit in the face by the defendant? [¶] [Officer Garlit]: Yes, sir. [¶] ... [¶] [Question]: When you made that statement to her, did she in turn at that time say anything along the lines that actually I was assaulted by two to four women? [¶] [Officer Garlit]: No. [¶] ... [¶] [Question]: During the course of your investigation were you made aware that there were eyewitnesses that said she was assaulted by the defendant?

[¶] [Officer Garlit]: Yes, sir. [¶] [Question]: Was there any information given to you that she was actually assaulted or she may have been assaulted by a group of people? [¶] [Officer Garlit]: No.” Trial counsel made no objection.

In contrast to the limited questions posed to Officer Majors, we see no tactical reason for trial counsel’s failure to object to the questions of Officer Garlit. The Attorney General argues that the testimony was admissible because it was being offered solely to impeach Martinez’s testimony at the preliminary hearing that the police had not provided her an opportunity to identify her assailant, citing Evidence Code section 1202. While impeachment was a permissible purpose, trial counsel’s failure to object to the form of the questions allowed the prosecution essentially to inform the jury repeatedly that unidentified bystanders saw defendant assault Martinez. In light of the prosecution’s agreement before trial to not discuss bystander statements in connections with the testimony of Van Peteghem, defendant’s trial counsel was aware of that agreement and should have objected to the questions here. Even if the trial court overruled a hearsay objection, trial counsel could have sought an admonition that the jury should only consider the testimony for purposes of impeachment and should not rely on any out-of-court statements as proof that defendant attacked Martinez.

Despite trial counsel’s failure to object during Officer Garlit’s testimony, we find no reasonable probability that the result would have been different but for any deficiency. (*Ledesma, supra*, 43 Cal.3d at pp. 217-218.) The jury heard eyewitness testimony from Tarrel Thomas that on the night of the attack he saw defendant punching and kicking Martinez as she lay on the ground about 15-20 yards from Thomas. Thomas also testified that he saw defendant pick Martinez up by the hair during this assault and that defendant was the only person he saw assault Martinez. The trial court also properly admitted Martinez’s spontaneous declaration to Van Peteghem that her boyfriend hit her. Although there was some conflicting evidence, largely coming from Martinez’s later statements to police and at defendant’s preliminary hearing, we find no reasonable

probability that the result would have been different had defendant's trial counsel objected to the prosecutor's questioning of Officer Garlit.

#### **D. PROSECUTORIAL MISCONDUCT**

Defendant contends that a number of statements made by the prosecutor during closing and rebuttal arguments constituted prosecutorial misconduct. Prosecutors are held to a higher standard because they “exercise[] the sovereign powers of the state.” (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1076.) A defendant's Fifth Amendment right to due process, applicable to California via the Fourteenth Amendment, is violated when a prosecutor's conduct is “so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.” (*People v. Harris* (1989) 47 Cal.3d 1047, 1084; *People v. Ochoa* (1998) 19 Cal.4th 353, 427.) Prosecutorial misconduct occurs under state law if the prosecutor uses “deceptive or reprehensible methods to attempt to persuade either the court or the jury.” (*People v. Strickland* (1974) 11 Cal.3d 946, 955; *Ochoa, supra*, 19 Cal.4th at p. 427.) Generally a defendant must object to prosecutorial misconduct and request a curative admonition in the trial court to preserve the issue for appeal. (*People v. Lopez* (2013) 56 Cal.4th 1028, 1072 (*Lopez*).) However, we will review an otherwise forfeited argument if objecting would have been futile or if an admonition would not have cured the harm caused by the misconduct. (*People v. Hill* (1998) 17 Cal.4th 800, 820 (*Hill*).)

Though the Supreme Court has not precisely articulated a standard of review for a trial court's decision about whether a statement is improper, the mode of analysis in its decisions suggests that we independently review the record to determine whether misconduct occurred. (See *Lopez, supra*, 56 Cal.4th at p. 1073 [finding misconduct claim without merit, reasoning the “remarks in question were fleeting and rather obscure ... [and] do not constitute the type of deceptive and reprehensible methods that require reversal.”]; *Hill, supra*, 17 Cal.4th at pp. 822-836 [finding reversible misconduct after independently reviewing the record].) If misconduct implicates the federal Constitution,

it is reversible unless the Attorney General shows it is harmless beyond a reasonable doubt. (*People v. Hollinquest* (2010) 190 Cal.App.4th 1534, 1558 (*Hollinquest*).) If a prosecutorial misconduct claim is forfeited by failure to object, to obtain reversal on appeal the defendant must show that trial counsel was deficient for not objecting and that an objection would have created a reasonable probability of a more favorable result. (*Ledesma, supra*, 43 Cal.3d at pp. 216-217; *People v. Barnett* (1998) 17 Cal.4th 1044, 1133.)

### **1. Comment on Defendant’s Failure to Accept Responsibility**

At the beginning of his closing argument the prosecutor stated: “because [defendant] would not be man enough to accept the responsibility of his actions, we would have to go through this exercise of who was the person who did it.” Defendant’s trial counsel objected that the statement constituted improper argument but the trial court overruled the objection.

Defendant argues that the statement constituted prosecutorial misconduct because it penalized defendant for exercising his Sixth Amendment right to a trial and also “minimized the jury’s responsibility to carefully weigh the evidence ... .” (Citing *U.S. v. Smith* (1991) 934 F.2d 270, 275 (*Smith*); *U.S. v. Ochoa-Zarate* (2008) 540 F.3d 613, 618-619 (*Ochoa-Zarate*).) The Attorney General responds that the prosecutor’s statements were “directed not to [defendant’s] right to trial, but to the strength of the evidence of [defendant’s] guilt[.]” and notes that defendant cites only non-binding federal authorities. The Attorney General also points to the jury instructions provided before the closing arguments, including one instructing the jury to “not be biased against the defendant just because he’s been arrested, charged with a crime or brought to trial.”

Though non-binding, the federal authorities cited by defendant are “entitled to great weight” because they interpret provisions of the United States Constitution. (*People v. Bradley* (1969) 1 Cal.3d 80, 86.) In *Smith*, the prosecutor stated that “Smith ‘has not taken responsibility for his actions’ because he refused to plead guilty, whereas

his co-defendants entered guilty pleas.” (*Smith, supra*, 934 F.2d at p. 275.) The *Smith* court found the prosecutor’s statement improper because it penalized the exercise of the Sixth Amendment right to a trial, but it found the error harmless because the trial court sustained an objection and immediately gave a curative instruction to the jury. (*Ibid.*)

Similarly, in *Ochoa-Zarate*, the court found that the prosecutor committed misconduct by comparing Ochoa-Zarate to a co-conspirator who pled guilty and testified at the trial. Over a defense objection (which the court overruled), the prosecutor said: “ ‘And that’s the difference between [the co-conspirator] and this defendant ... [the co-conspirator has] at least taken responsibility for his own actions. As of today [Ochoa-Zarate] still has not.’ ” (*Ochoa-Zarate, supra*, 540 F.3d at p. 618.) In finding misconduct, the appellate court stated “the prosecutor’s remarks here nonetheless focused on Ochoa-Zarate’s ‘failure to take responsibility’ as of the last day of trial, and the prosecutor did not attempt to clear things up after the defense objection.” (*Id.* at p. 619.) Because the misconduct implicated a constitutional right, the court applied a harmless-beyond-a-reasonable-doubt standard (upholding the conviction given other evidence in the case). (*Ibid.*)

Here, in light of these authorities, we agree that the prosecutor’s reference to defendant’s failure “to accept the responsibility of his actions” improperly criticized the exercise of his Sixth Amendment right to a trial. We do not see how the statement can be construed as merely relating to the weight of evidence, as the Attorney General suggests. We note that defendant objected in the trial court but did not request a curative admonition. We find, however, that a request for admonition would have been futile given that the trial court overruled the objection. (*Hill, supra*, 17 Cal.4th at p. 820.) Because trial counsel preserved the issue by objecting and the misconduct implicated a federal constitutional right, “we must reverse the judgment unless beyond a reasonable doubt the error complained of did not contribute to the verdict.” (*Hollinquest, supra*, 190 Cal.App.4th at p. 1558.)

We find that the prosecution has met its burden. The court instructed the jury that they must “not be biased against the defendant just because he’s been arrested, charged with a crime or brought to trial.” The People presented evidence implicating defendant as the individual responsible for the assault through the eyewitness testimony of Tarrel Thomas as well as the spontaneous declaration of Martinez to Van Peteghem. The only evidence suggesting that someone other than defendant assaulted Martinez came from the victim herself, who at the time had a close personal relationship with the defendant and was pregnant with his child. Given the evidence supporting defendant’s conviction, we find the prosecutor’s misconduct was harmless beyond a reasonable doubt.

## **2. Comment on Not Being Part of Martinez’s Tragedy**

Later in his closing argument, the prosecutor stated: “If there was a person, someone like you, someone like us, who came in the court and said they got beat[en] on a public street ... you would give them justice. ... [But] [b]ecause it is Ms. Martinez and she lives with the defendant and he’s the ... father of her child and they have a relationship, she doesn’t deserve justice[?] [¶] Everyone in this case knows who assaulted Ms. Martinez. ... [¶] Don’t be a part of the tragedy of Ms. Martinez. Look at the evidence in this case. Your choice is clear. Let the defendant know that what he did will not be stood for.” Defendant’s trial counsel made no objection.

On appeal, defendant claims the prosecutor committed misconduct by attempting to arouse the passions and prejudices of the jury (*People v. Mayfield* (1997) 14 Cal.4th 668, 803, disapproved on other grounds by *People v. Scott* (June 8, 2015, S064858) 60 Cal.4th \_\_ [2015 Cal. LEXIS 3903, \*43, fn. 2]); exhorting the jurors to “ ‘send a message’ through its verdict” (*People v. Thomas* (2012) 54 Cal.4th 908, 944); and vouching for the strength of the case by stating his personal belief that “[e]veryone in this case knows” that defendant assaulted Martinez. (*People v. Huggins* (2006) 38 Cal.4th 175, 206-207.) The Attorney General counters that the prosecutor’s argument was not an appeal to the passions of the jury but rather an appeal to the concept that Martinez

deserved justice. Because he did not object in the trial court, defendant can only prevail on this claim if he can show that defense counsel provided ineffective assistance. Defendant must show his trial counsel's performance was deficient and that he was prejudiced by the deficiency. (*Ledesma, supra*, 43 Cal.3d at pp. 216-217.)

It is misconduct to tell the jury during the guilt phase of a trial "to view the crime through the eyes of the victim." (*People v. Mendoza* (2007) 42 Cal.4th 686, 704 (*Mendoza*)). By asking the jury to consider the assault happening against "someone like you," the prosecutor arguably asked the jury to view the crime through Martinez's eyes. Exhorting the jury to not "be part of the tragedy of Ms. Martinez" was also arguably an appeal to the jury's passions. Regarding the prosecutor's statement that "[e]veryone in this case knows who assaulted Ms. Martinez," there was a risk that the jury might interpret the argument as a statement of the prosecutor's personal beliefs derived from facts outside the record. (See *People v. Lopez* (2008) 42 Cal.4th 960, 971 ["'A prosecutor may not express a personal opinion or belief in the guilt of the accused when there is a substantial danger that the jury will view the comments as based on information other than evidence adduced at trial.' [Citations.]".])

Although these statements were arguably improper, defense counsel may have had a tactical reason for not objecting during closing argument, such as an interest in not highlighting the statements. (See *People v. Cruz* (1980) 26 Cal.3d 233, 255-256 [noting "omissions, such as failure to object at closing arguments, may have been tactical; and, except in rare cases, an appellate court should not attempt to second-guess trial counsel as to tactics."].) In any event, we find no prejudice from defense counsel's failure to object because any improper comments were brief and the bulk of the prosecutor's closing argument was properly focused on the reasonable doubt standard and the evidence in the case. (*Mendoza*, at p. 704 ["the misconduct was not prejudicial, as his comments were brief and he did not return to the point"].) Further, Martinez's spontaneous declaration and Thomas's eyewitness account implicating defendant provided sufficient evidence to

support the jury's decision. Defendant has not shown a reasonable probability of a more favorable result had counsel objected to the prosecutor's statement.

### **3. Comment on Reason for Martinez's Absence**

After stating that “[e]veryone in this case knows who assaulted Ms. Martinez,” the prosecutor said, “Even Stephanie Martinez knows who assaulted her. That’s why she’s not here.” Defendant did not object in the trial court but argues on appeal that the jury could have construed this statement as suggesting that the prosecutor had evidence that Martinez failed to appear because she knew that defendant was guilty. (Citing *People v. Padilla* (1995) 11 Cal.4th 891, 946 [“It is misconduct ... to suggest to the jury in arguing the veracity of a witness that the prosecutor has information undisclosed to the trier of fact bearing on the issue of credibility, veracity, or guilt.”], overruled on other grounds by *Hill, supra*, 17 Cal.4th at p. 823, fn. 1.) The Attorney General argues that the prosecutor was merely attacking Martinez’s credibility and that the prosecutor’s statement was a fair comment derived from a reasonable inference drawn from the evidence presented at trial. (See *People v. Wharton* (1991) 53 Cal.3d 522, 567; see also *Hill, supra*, 17 Cal.4th at p. 819.) Here, the prosecutor’s statement was a fair comment. That Martinez chose not to attend the trial despite being ordered to do so because she did not want to risk incriminating her cohabitant who was the father of her child was a reasonable inference to be drawn from the evidence presented to the jury, and trial counsel was not deficient for not objecting.

### **4. Claim that Defense Counsel Misrepresented the Law**

During his closing argument, defendant’s trial counsel stated: “if you even believe that [Martinez] might be telling the truth ... [that] she might have been attacked by someone else who caused those injuries, even if that is a reasonable possibility in your mind, then I submit to you you have reasonable doubt. You must find my client not guilty. You could end your inquiry right there. You could stop.” In his rebuttal, the prosecutor attacked defense counsel’s argument, claiming it was “a blatant

misrepresentation of the law in this case, blatant misrepresentation of your duty. You can't do that. You took an oath to consider all of the evidence. ... And you have to take every piece of evidence and contrast it with the other evidence that you received in this case. So you can't stop after you hear -- review Ms. Martinez's testimony. That's a blatant misrepresentation of the law." Because defense counsel made no objection, we review the issue for ineffective assistance.

Prosecutors may not impugn the honesty or integrity of opposing counsel during closing argument. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1302.) "If there is a reasonable likelihood that the jury would understand the prosecutor's statements as an assertion that defense counsel sought to deceive the jury, misconduct would be established." (*Ibid.*) Applying this standard, repeated references to "blatant misrepresentation" were improper because defense counsel was correct that reasonable doubt could be established if the jury believed Martinez's version of events. Although the prosecutor also pointed out that the jurors had to consider all of the evidence, there is a reasonable likelihood the jury would understand the prosecutor's statement as a claim that defense counsel was attempting to deceive the jurors about their duties. Here again, however, counsel's failure to object may have been for a tactical reason, such as avoiding the appearance of a petty squabble that would not serve his client's interests. Even if counsel should have objected, we find no prejudice from his failure to do so. The jurors had previously been instructed with the definition of reasonable doubt. They were also instructed that "[t]he testimony of only one witness can prove any fact," and that they must follow the law as the judge explained it to them. Given these proper instructions and the amount of evidence against defendant, we see no reasonable probability defendant would have obtained a more favorable result had defense counsel objected to the prosecutor's comment.

## E. JURY DELIBERATIONS

After deliberating for just over a day, the jurors informed the court they were having difficulty reaching a verdict. The court communicated that they were to return in the morning to continue deliberating, noting “a lot of resources and a lot of your time have been put into this so far.” The foreperson also informed the court that the jurors were split nine to three without stating which side was in the majority. The court instructed the jurors to think about the case and expressed hope that they would be able to reach a verdict after “a good night’s sleep ... or a good breakfast.” The court stated, “at some point hopefully you will reach a verdict, but if you don’t, then at that point we’ll take it from there.” After those comments, defense counsel objected outside the presence of the jury, arguing that the court should have asked the jurors whether there was a reasonable possibility that the jury could reach a verdict before ordering them to continue deliberating. The jury reached a guilty verdict the following afternoon.

On appeal, defendant contends the trial court’s response to the jury deadlock was unduly coercive, in violation of his rights to due process and a fair trial under the Fifth and Sixth Amendments, respectively. The Attorney General asserts that the trial court’s response was “substantially similar” to *People v. Valdez* (2012) 55 Cal.4th 82 (*Valdez*), where the Supreme Court upheld instructions to a deadlocked jury.

A “jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, ... unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.” (§ 1140.) “The determination ... of whether a reasonable probability of agreement exists ‘rests in the discretion of the trial court.’ [Citation.]” (*Valdez, supra*, 55 Cal.4th at p. 159.) “The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury’s independent judgment ‘in favor of considerations of compromise and expediency.’ [Citation.]” (*People v. Rodriguez* (1986) 42 Cal.3d 730, 775.)

It is permissible for a court to inquire into the numerical division of deadlocked jurors so long as the court does not ask which side is in the majority. “[I]t is error for a trial court to give an instruction which either (1) encourages jurors to consider the numerical division or preponderance of opinion of the jury in forming or reexamining their views on the issues before them; or (2) states or implies that if the jury fails to agree the case will necessarily be retried.” (*People v. Gainer* (1977) 19 Cal.3d 835, 852 (*Gainer*), disapproved on other grounds by *Valdez, supra*, 55 Cal.4th at p. 163.) “[A] reference to the expense and inconvenience of a retrial ... is equally irrelevant to the issue of defendant’s guilt or innocence, and hence similarly impermissible.” (*Gainer*, at p. 852, fn. 16.) But in *Valdez*, the Supreme Court found no error when the trial court “encouraged members of *both* the majority and the minority ... to ‘reweigh [their] positions’ in light of the ‘arguments’ and to ‘have an open mind ... to reevaluating.’ ” (*Valdez, supra*, at p. 162, original italics.) The *Valdez* court also noted that the instruction at issue there “ ‘emphasize[d] that this is not a matter of compromise’ and that ‘[o]ne should not compromise just for the purpose of reaching a verdict.’ ” (*Ibid.*) “Whether a trial court’s statements to the jury amount to coercion of the verdict is ‘peculiarly dependent upon the facts of each case’ [Citation] viewed against the ‘totality of applicable circumstances.’ [Citation.]” (*People v. Keenan* (1988) 46 Cal.3d 478, 547-548.)

Here, we see no undue coercion or pressure to reach a verdict. The court’s inquiry into the numerical split of the jurors was permissible and the court made clear that it did not want to know the breakdown between those voting for acquittal versus guilt. (*Valdez, supra*, 55 Cal.4th at p. 160.) Similarly, encouraging all jurors to take a “fresh look” at the case and expressing hope that they will reach a verdict were permissible and did not “single out minority jurors” nor urge those in the minority to reconsider their position. (*Id.* at p. 162.) Although jurors were not explicitly reminded to exercise their independent judgment, they had been previously instructed that “[e]ach of you must

decide the case for yourself ... .” The court’s statement that, “at some point hopefully you will reach a verdict, but if you don’t, then at that point we’ll take it from there,” emphasized to the jury that they did not need to reach a verdict. The court’s statement that “a lot of resources and a lot of your time have been put into this so far,” did not go so far as to discuss the “expense and inconvenience of a retrial” to encourage a verdict. (*Gainer, supra*, 19 Cal.3d at p. 852, fn. 16.) Reviewing the court’s instructions as a whole, we find no abuse of discretion and no coercion of the jury to reach a verdict.

#### **F. CUMULATIVE PREJUDICE**

Defendant claims that the various errors he identifies are cumulatively prejudicial. “Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice.” (*Hill, supra*, 17 Cal.4th at p. 844.) “Nevertheless, a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.” (*Ibid.*)

We have found that the prosecutor improperly criticized defendant for exercising his Sixth Amendment right to a trial, and that trial counsel should have objected to Officer Garlit’s testimony, and to certain statements in the prosecutor’s closing arguments. These issues are not insignificant, but neither are they cumulatively prejudicial. The eyewitness testimony of Tarrel Thomas and the spontaneous declaration of the victim identified defendant as the individual responsible for the assault. Although the victim testified at the preliminary hearing that someone other than defendant assaulted her, she also testified to having a close personal relationship with the defendant and that she was pregnant with his child at the time of the attack. In light of the evidence supporting the jury’s verdict, we find no reversible error.

### **III. DISPOSITION**

The judgment is affirmed.

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Grover, J.

**WE CONCUR:**

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Bamattre-Manoukian, Acting P.J.

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Mihara, J.