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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

ELIJAH GOETHE,

Defendant and Appellant.

C074791

(Super. Ct. No. 12F00877)

Victims D'Andre Lawrence and his cousin Joseph Washington were parked in Lawrence's Buick in a residential neighborhood when they were shot by two men in an SUV in apparent retaliation for a shooting that happened two hours earlier in which Lawrence and Washington were not involved. The prosecutor's theory was that defendant Elijah Goethe, a gang member, was the passenger in the SUV and fired the shot that wounded Lawrence and defendant's friend was the driver of the SUV and the person who fatally shot Washington. Lawrence and Washington were not gang members or affiliated with any gang.

A jury found defendant guilty of Washington's first degree murder, Lawrence's attempted murder, and discharging a firearm at an occupied vehicle (two counts) and found that these crimes were committed for the benefit of a street gang. The jury also found that a principal personally discharged a firearm causing Washington's death and defendant personally discharged a firearm causing Lawrence's great bodily injuries.

Defendant appeals, raising five contentions relating to violations of his constitutional rights and counsel's ineffectiveness. We find no errors or ineffectiveness and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I

The Prosecution's Case

A

Background: Shooting Of Oak Park Blood Gang Members

Around 2:00 a.m. on Sunday, October 12, 2008, Oak Park Blood gang members, including defendant's friend Wesley Taylor, were shot at the AM/PM gas station market at 4th Avenue and 65th Street in Sacramento. The suspects were members of the Killa Mobb street gang.

B

Murder Of Washington And Attempted Murder Of Lawrence

Approximately two hours after the AM/PM market shooting, Lawrence parked his Buick in front of a friend's house in Sacramento. Lawrence's cousin, Washington, was in the Buick with him, and the two of them were waiting for a phone call from Lawrence's girlfriend.

Suddenly, an SUV pulled up in front of Lawrence's Buick. The SUV's passenger jumped out and pointed a .38-caliber revolver at Lawrence. As the passenger approached the Buick's driver's side, Lawrence gave a quick glance and saw the SUV's driver approaching the Buick's right side where Washington was. Back on the driver's side, the

SUV's passenger opened the Buick's driver's side door and shot Lawrence in the face. When Lawrence came to, he saw Washington on the other side of the Buick, sprawled out and immobile. Lawrence called 911.

A neighbor on another street, Jesus Rangel, heard the shootings when he was outside leaving for work. He heard a first gunshot, turned to walk back to his house, and then heard the second gunshot. After the second, he saw two young men run toward their blue Blazer SUV and then drive away.

Police responded to the shootings shortly after being called. Both Lawrence and Washington were taken to the hospital. Washington was pronounced dead from swelling to his brain five hours after being admitted. Lawrence survived, despite being shot in his left cheek.

C

Investigation Into The Shootings

Police lifted a latent fingerprint from the Buick's driver's side door and collected a spent .380-caliber shell casing near the Buick. The fingerprint matched defendant's. The casing matched a gun that defendant's uncle had fired while committing a crime a month earlier.

With defendant as a suspect, police began surveilling the home of defendant's father, Gary Goethe. When police saw a blue Ford Explorer parked in front of the father's house, they took Rangel there to see if he could identify it. Rangel said the Explorer looked similar to the SUV involved in the shootings. On the exterior of the Explorer's passenger door was a characteristic gunshot residue particle and on the interior of the front driver's side door was a probable gunshot residue particle. Defendant's father said he never allowed defendant to drive the Explorer.

Defendant was arrested on October 15, 2008, and police interviewed him. His friend Wes Taylor had been one of the shooting victims at the gas station on 65th Street. Police showed defendant pictures of Lawrence and Washington. Defendant said he had

met Lawrence and Washington on the Thursday before the shootings and talked to them about buying Lawrence's Buick. Defendant got inside the car, offered \$1,200 for it, Washington said, "maybe," and defendant left.¹

Police also talked to defendant's father on the day defendant was arrested. Detective Thomas Higgins of the Sacramento Police Department told the father "almost everything" at that point that implicated defendant in the homicide. The detective also told the father that the police believed that defendant knew who the other shooter was and that police wanted to know. Police officers then let the father talk to defendant alone in the interview room. The father-son conversation was recorded by one of two visible cameras and played for the jury. Defendant did not admit to the shooting or knowing anything about it.²

Police looked into the cell phone records of defendant and his friend Wes Taylor. Defendant had been carrying around Taylor's phone since defendant visited Taylor in the hospital after Taylor had been shot. In the hours before Washington and Lawrence were shot, defendant exchanged a number of calls with his friend Semaj Douglas.³ At 4:21 a.m., Douglas sent defendant a text message saying, "Go 2 wes house and get the 223." According to police, "223" is used when people are referring to a rifle using .223-caliber ammunition. The cell phone tower records associated with defendant's and Taylor's phones were also used to track defendant's whereabouts when Washington and Lawrence were shot. At 4:18 a.m., defendant's cell phone accessed a cell phone tower at Florin

¹ Lawrence denied ever meeting defendant, testified he had never let anyone who wanted to buy his car sit in his car, and testified he was not with his cousin Washington on that Thursday.

² The details of this conversation will be recounted in part IIIA of the Discussion.

³ The prosecutor argued in closing that Douglas was likely the driver of the SUV and the other shooter in this case.

Road and Luther Drive. At 4:22 a.m., Taylor's phone accessed a cell phone tower on Franklin.

Police also looked into the records for Lawrence's cell phone. Lawrence called 911 at 4:44 a.m. and that call accessed the cell phone tower at Florin Road and Luther Drive.

On December 3, 2008, defendant's father had a conversation with a person who, unbeknownst to him, was a confidential informant. The father told the confidential informant that he (the father) had asked defendant, "Why did you do it?" Defendant replied, "Just because." Then the father asked defendant, "What's wrong with you?"

D

The Gang Evidence

Detective John Houston was a gang expert. The Oak Park Bloods is a large street gang in the Sacramento area. Its rival is the G-Mobb street gang. Detective Houston reviewed over 20 reports documenting defendant's contact with various law enforcement entities and formed the opinion defendant was an Oak Park Bloods gang member. He also was of the opinion that, given a fact scenario similar to the one here, the shootings of Washington and Lawrence were committed for the benefit of the Oak Park Bloods. It did not matter that the victims were not gang members and had nothing to do with the prior shootings because it showed that the Oak Park Bloods were "going to be out there" and were "going to hold people accountable, even if it is the wrong person."

II

The Defense

According to defendant's stepmother, defendant did not have access to the house she shared with defendant's father. During the time Lawrence and Washington were shot, the Ford Explorer was parked in front of their house. Defendant did not have access to that car, either.

According to defendant's girlfriend, Alia Young, she dropped defendant off at the hospital around 2:00 a.m. to see Wes Taylor after he had been shot. Young then left the hospital to pick up Taylor's girlfriend, and when Young returned, defendant had already left the hospital and the two girlfriends were unable to visit Taylor. The two girlfriends went to the Youngs' house, where defendant was with Young's mother and father. Around 5:00 a.m., the two girlfriends and defendant went back to the hospital to visit Taylor. The girlfriends and defendant all spent the night together at the Youngs' house and went to church together the next morning.

III

Rebuttal

Detective Higgins checked the cell phone records of Young and defendant. There were a number of calls between defendant and his girlfriend between 4:12 a.m. and 4:14 a.m. on the morning Washington and Lawrence were shot. The cell towers indicated the girlfriend's location was in the UC Davis Medical Hospital area and defendant's location was at Florin Road and Luther Drive.

Detective Higgins also checked the cell phone records of defendant and Lawrence regarding defendant's story about defendant trying to buy Lawrence's Buick on the Thursday before Lawrence and Washington were shot. Based on the phone records, the two of them did not "even remotely" intersect on that day.

DISCUSSION

I

Applying California Supreme Court Precedent, The Trial Court

Did Not Violate Defendant's Sixth Amendment Right To

Confrontation In Admitting Testimonial Hearsay By The Gang Expert

Defendant contends that the gang expert witness relied on testimonial hearsay as the basis of his expert opinions, in violation of defendant's Sixth Amendment right to confrontation. The question whether such reliance on testimonial hearsay by a gang

expert violates a criminal defendant's confrontation rights is pending before the California Supreme Court. (See *People v. Sanchez* (2014) 223 Cal.App.4th 1, review granted May 14, 2014, S216681 and *People v. Archuleta* (Apr. 11, 2014, E049095) [nonpub. opn.], review granted June 11, 2014, S218640.)

Defendant acknowledges *People v. Gardeley* (1996) 14 Cal.4th 605, 618, which held that the basis for an expert's opinion is not subject to the hearsay rule because it is not admitted for the truth of any assertions, and *People v. Hill* (2011) 191 Cal.App.4th 1104, 1127-1131, which was critical of applying this holding in the context of the constitutional right of confrontation but concluded it was obligated to do so under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455. He contends, however, that the concurring and dissenting opinions in *Williams v. Illinois* (2012) 567 U.S. ____ [183 L.Ed.2d 89] combine to create a holding contrary to *Gardeley*, which this court should follow to reverse the judgment for the admission of this prejudicial hearsay in violation of his right to confrontation.⁴

However, in contending that the trial counsel's failure to object on the basis of the confrontation clause did not result in a forfeiture, defendant admits the trial court was bound to follow *Gardeley*, making any objection futile. He is correct, not only as to the futility of trial counsel making such an argument, but also as to our ability to reach a holding contrary to *Gardeley*. Absent an opinion of the federal high court or the California Supreme Court to the contrary, the effect of *Gardeley* remains unchanged. (*People v. Whitfield* (1996) 46 Cal.App.4th 947, 956-957 [federal high court's "clearly decided" premise must be followed]; *People v. Rooney* (1985) 175 Cal.App.3d 634, 644

⁴ In *Williams v. Illinois* five of the nine United States Supreme Court justices agreed that out-of-court statements, even when offered solely as basis evidence to support an expert opinion, may effectively be offered for their truth. (*Williams v. Illinois, supra*, 132 S.Ct. at pp. 2255-2264 (conc. opn. of Thomas, J.); *id.* at pp. 2264-2277 (dis. opn. of Kagan, J., joined by Scalia, J., Ginsburg, J., and Sotomayor, J.)

[we must follow California Supreme Court if federal high court “has never squarely ruled on the issue”].) Thus, we must continue to follow *Gardeley* and reject defendant’s Sixth Amendment contention.

II

Trial Counsel Was Not Deficient In Failing To Object To Hearsay Evidence Regarding Defendant’s Statements To His Father About The Shooting Relayed By The Father To The Confidential Informant

Defendant contends his trial counsel was ineffective for failing to object on hearsay grounds to the testimony of defendant’s father that implied defendant had admitted to the shootings. The evidence to which defendant is referring is the testimony of defendant’s father that he remembered discussing the murder investigation with the confidential informant. The father told the confidential informant that he (the father) had asked defendant, “Why did you do it?” Defendant’s father then told the informant that defendant replied, “Just because.” Then the father told the informant that he recalled asking his son, “What’s wrong with you?”

The father’s testimony about what he told the informant that defendant said to him presented two levels of hearsay, and while the second level (what the father said to the informant) was not subject to a hearsay exception, the first level (what defendant said to his father) was subject to a hearsay exception.⁵

However, as we explain, counsel was not deficient in failing to object because the damaging information would have come in one way or another. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 693] [deficient performance is

⁵ The father’s statement to the confidential informant about what defendant said was indeed hearsay. Although defendant’s incriminating statement to his father was admissible as an admission of a party (Evid. Code, § 1220), the father’s statement to the confidential informant was hearsay because it was made out of court and admitted at trial for its truth (Evid. Code, 1200, subd. (a)).

the first prong of an ineffective assistance of counsel claim].) When trial counsel was faced with the father's testimony about his conversation with the informant, trial counsel could have reasonably feared that if he made a successful hearsay objection, the prosecutor would then have asked the father directly whether the father and defendant had ever spoken about defendant's involvement in the shooting. At this point, the father could have responded in three ways, none of which would have benefited defendant. One, consistent with testimony he gave at an earlier Evidence Code section 402 hearing, the father could have testified he and defendant never discussed the shooting. In that event, the father's contrary statements to the informant would have been admissible as prior inconsistent statements. (Evid. Code, §§ 770, 1235.) Two, consistent with testimony he gave at the preliminary hearing, the father could have testified that he and defendant discussed the shooting, but defendant denied being involved. Again, however, the father's contrary statements to the informant would have been admissible as prior inconsistent statements. Or three, the father could have simply testified directly to the same thing he told the informant (without actually discussing his conversation with the informant) -- that he asked defendant why he did it and defendant replied, "Just because."

Given the possibility of any of these questions and answers, trial counsel could have reasonably decided that objecting on hearsay grounds was a no-win proposition. At best, the evidence of the father's statements to the informant would have eventually been admitted anyway as inconsistent statements. At worst, a hearsay objection by trial counsel could have spurred direct testimony that defendant admitted committing the crimes. Trial counsel's failure to object on hearsay grounds was therefore not deficient.

III

*Counsel Was Not Deficient For Failing To Object To Defendant's Postarrest
"Silence" To His Father Because There Was Nothing Particularly
Incriminating About Defendant's Silence Or Statements,
And The Defense Used Them To Defendant's Advantage*

Defendant contends his trial counsel was ineffective for failing to object to defendant's "post-arrest silence to his father, during a conversation at the police station which he knew was being monitored." Specifically, he "contends that his silence was an exercise of his *Miranda* rights and was, therefore, inadmissible under *Doyle v. Ohio* (1976) 426 U.S. 610, 618. By failing to object when the prosecutor introduced the videotape, defense counsel provided ineffective assistance."⁶

We disagree that trial counsel was ineffective. His failure to object was not deficient because trial counsel had a tactical reason to use the videotape to defendant's advantage in closing argument and the videotape was of such little aid to the People that the prosecutor only briefly mentioned it in his rebuttal and not at all to show defendant's guilt or adoptive admissions.

A

The At-Issue Evidence, Including Background

The background leading up to the evidence and the evidence itself to which defendant is referring is the following:

In the early morning of October 15, 2008, police officers arrested defendant. That morning, police read defendant his *Miranda* warnings and then interviewed him. Later

⁶ In *Doyle v. Ohio* (1976) 426 U.S. 610 [49 L.Ed.2d 91], the United States Supreme Court held that a person's silence in the wake of *Miranda* warnings may be nothing more than an exercise of the right to remain silent, and that using that silence to impeach a person's trial testimony would be "fundamentally unfair and a deprivation of due process" (*Doyle*, at p. 618 [49 L.Ed.2d at p. 98].)

that day, detectives allowed defendant to speak with his father in an interview room inside the police department. Just before the father-son conversation, Detective Higgins had told the father “[a]lmost everything” at that point that implicated his son in the homicide. The detective also told the father that police believed that defendant knew who the other shooter was and that police wanted know. The father-son conversation was then recorded by one of two visible cameras and played for the jury.

At the beginning of the conversation, the father asked defendant, “Hey, how’s it going?” Defendant responded by pointing to one of the cameras and mouthing, “camera.”

The father then told defendant, “they said they have a thumbprint on you from the car, so you got the car. You were looking at the car on Thursday. The victim is denying that. They said they got your, you know, the cell phone tower communicating Florin and Luther at 4:12 in the morning.” Defendant asked, “The morning?” and the father responded, “Yeah. Florin and Luther at 4:12 in the morning. They got his cell phone.” Defendant responded, “Mm-hmm.”

The father then said, “Um, I guess when I went looking for you last night and I guess we told em that, um, you text somebody Aliyah [defendant’s girlfriend] or something like that to bring some weed or some shit and I’m like well I don’t [know] where the fuck that’s coming from.”⁷ Defendant responded, “I told em I was waiting for my dad. I told Aliyah I’m waitin for my dad.”

The father then said, “they are trying to say that you were involved and stuff like that but they know that you’re not the shooter and stuff like that. I -- I’m like, man,

⁷ When conversing with the father right before the father spoke to defendant in the interview room, Detective Higgins told the father “there was a text message as well as a statement by [defendant] about [the father] bringing him some weed the night before” and that “it didn’t look good for him [the father]. That was a problem for him because of his job.”

what's in your hair?" Defendant responded, "I can't touch it." "So that's sore. Where they gonna move me to now?" The father told him juvenile hall and told defendant, "[t]hey just -- they wanna know who the shooter was." Defendant's response was transcribed as "[u]nintelligible."

The father said, "And a murder investigation so there'll be, um, an investigation and they see a lot of holes in your story. They're looking for the video. He -- did you go to Carl's Jr[.] after you looked at the vehicle?" Defendant's response was transcribed as "[u]nintelligible."

The father said "they" were tapping his phone. Defendant responded, "And they said my phone was where?" The father told him again, "Florin and Luther at four o'clock in the morning" and then said, "[h]e's always pretty upfront with me and straight." Defendant asked, "Who him?" The father did not say, but repeated "[h]e's pretty straight with me" and that "they were saying that you were on the driver's side . . . but they're thinking that whoever was shot was doing some other kinda of dirt, you know, before that happened or whatever." Defendant asked, "Why?" The father said, "Because (unintelligible) shot them and shot Wes, you know, so I don't know." Defendant's response was transcribed as "[u]nintelligible."

B

The Law And Its Application Here

In *Doyle v. Ohio*, *supra*, 426 U.S. at p. 610 [49 L.Ed.2d 91], the United States Supreme Court held that a person's silence in the wake of *Miranda* warnings may be nothing more than an exercise of the right to remain silent, and that using that silence to impeach a person's trial testimony would be "fundamentally unfair and a deprivation of due process" (*Doyle*, at p. 618 [49 L.Ed.2d at p. 98].) However, the California Supreme Court has held that " '[i]f a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right

of silence guaranteed by the Fifth Amendment to the United States Constitution, and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt.’ ” (*People v. Jennings* (2010) 50 Cal.4th 616, 661.) “ ‘[A] typical example of an adoptive admission is the accusatory statement to a criminal defendant made by a person *other* than a police officer, and defendant’s conduct of silence, or his words or equivocal and evasive replies in response. With knowledge of the accusation, the defendant’s conduct of silence or his words in the nature of evasive or equivocal replies lead reasonably to the inference that he believes the accusatory statement to be true.’ ” (*People v. Silva* (1988) 45 Cal.3d 604, 623-624.)

The California Supreme Court has also held a defendant’s silence may not be used as an adoptive admission if the defendant has been given *Miranda* warnings, “suspect[s] the monitoring of his conversation,” and intends his silence as an invocation of his constitutional right to remain silent. (*People v. Medina* (1990) 51 Cal.3d 870, 890-891.)

Given these holdings by the California Supreme Court, the People were wrong to seek to use defendant’s silence or evasive answers when his father told him he was suspected of being involved in the shooting as evidence of defendant’s guilt. But even though an objection to its use by the defense would have been well taken, counsel’s performance was not deficient for failing to raise the issue because counsel had a tactical reason for allowing the People to introduce the videotape, which was made clear in closing arguments.

Preliminarily, we note that the prosecutor never mentioned this videotape in closing argument, which tends to indicate it was an unimportant piece of evidence for the People. However, when it came time for defense counsel’s closing argument, counsel urged the jurors to watch all the video clips and use them “as tools to evaluate whether you believe somebody.” “Look at him and how he’s talking. Look at [him] and the way he’s holding himself, carrying himself. He’s not this hard-core gangster that [the

prosecutor] is portraying him to be [¶] And use those. Watch them, because those help you fill in the pieces. Those give you a full, better understanding of who [he] is and the kind of person he is.” He also used the substantive content of the videotape to argue, “from a common-sense perspective,” if the “D.A.’s argument is [correct] that [defendant] is making this up,” why “[w]hen this interview happened, when the interview happened when they brought his dad into the room,” “why would [defendant] associate himself with two individuals who were just shot? He would distance himself, as opposed to bringing them together, and that’s not what he did.”

Despite defendant’s counsel’s use of the videotape, the prosecutor still did not argue the videotape contained adoptive admissions. The only thing the prosecutor argued in his rebuttal argument as to the videotape was that it actually showed a father who was trying to protect his son and give his son all the information that the father had.

In summary, then, given the beneficial use to which defendant’s counsel put the videotape (i.e., using the videotape to show defendant did not appear to be a “hard-core gangster” and that defendant had not contrived a story because if he was doing that, he would have made efforts to distance himself from the two victims mentioned during the videotaped conversation), his counsel had a tactical reason for not objecting to the videotape’s introduction.

IV

Defendant’s Contention Regarding Prosecutorial Misconduct In Closing Argument Is Forfeited; Defendant’s Trial Counsel Was Not Deficient For Failing To Object

Defendant contends the judgment must be reversed because the prosecutor committed misconduct in closing argument. Defendant has forfeited his contention by failing to object to the argument in the trial court. His backup ineffective assistance of counsel argument fares no better, as his counsel was not deficient for failing to object to an argument that was not misconduct.

A

The Prosecutor's At-Issue Argument

During his rebuttal closing argument, the prosecutor stated as follows:

“The presumption of innocence is now lifted. Okay. Yes, you’re supposed to presume him innocent until you’re at this juncture. Now the evidence is in. Now you can decide what the evidence is. He’s no longer presumed innocent if you start finding that the evidence is pointing to him.

“Your job as jurors is to find him guilty beyond a reasonable doubt. Reasonable doubt asks you to compare all of the evidence, all of it, and then make your decisions.

“[Y]ou have the benefit of all of this evidence, all of it, and you need to put your minds together, put it together, and decide what it means. That’s your job. You’re in a much better position than I am, than [defense counsel] is, than the police officers are, than anyone else in this case because you have a box. In that box goes all the facts of this case and the law, and you are now going to sort out what happened, what is the truth, what is the truth about what happened

“What really happened? You have the facts. You decide what they mean, you apply the law, and you find him guilty, if it’s there. You are not advocates. You are smart beings who have experiences in life that qualify you to sit as jurors and use logic and reason and decide what happened in this case.

“That’s your job. I recognize it’s intimidating, but it’s important. I ask that you take this task very seriously and you apply it, you apply yourselves with logic, logic and common sense. This is a decision that’s based in reason. It’s reasonable doubt. Okay.”
(Italics added.)

B

Defendant Has Forfeited His Contention That The Prosecutor Committed Misconduct

Defendant contends the prosecutor committed misconduct and violated his Fourteenth Amendment right to due process by misstating the law and reducing the

People's burden of proving each element of the offenses beyond a reasonable doubt. To preserve a claim of prosecutorial misconduct, trial counsel must make a timely objection on the same ground and request that the jury be admonished to disregard the impropriety. (*People v. Thornton* (2007) 41 Cal.4th 391, 454.) Trial counsel made no objection here, so this contention is forfeited.

C

Counsel Was Not Deficient In Failing To Object

Defendant contends that if he forfeited his misconduct argument, his counsel was ineffective for not objecting. Defendant's trial counsel was not deficient, because the prosecutor's argument was not misconduct. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 693] [first prong of an ineffective assistance claim is deficient performance].)

"When a prosecutor's intemperate behavior is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process, the federal Constitution is violated. Prosecutorial misconduct that falls short of rendering the trial fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the trial court or the jury." (*People v. Panah* (2005) 35 Cal.4th 395, 462.) In *Panah*, the "[d]efendant contend[ed] that the prosecutor improperly appealed to the prejudices and passions of the jury, and denigrated the presumption of innocence, when he argued that the prosecution's evidence had 'stripped away' defendant's presumption of innocence." (*Id.* at p. 463) Our Supreme Court "disagree[d]. '[T]he prosecutor has a wide-ranging right to discuss the case in closing argument. He has the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper.' [Citation.] Here, the prosecutor's references to the presumption of innocence were made in connection with his general point that, in his view, the evidence, to which he had just

referred at length, proved defendant's guilt beyond a reasonable doubt, i.e., the evidence overcame the presumption." (*Ibid.*)

The same is true here. In the prosecutor's closing argument, he began by explaining in detail all the evidence in the case and how it pointed to defendant's guilt, stressing defendant's fingerprint on Lawrence's car was "the biggest piece of evidence in this case" and that the phone records were "very powerful" evidence "illustrati[ng] . . . the scheming of this murder." In the rebuttal argument, the prosecutor made the limited, confined statement about "[t]he presumption of innocence [being lifted]." He reminded the jurors that "now that the evidence was in, the evidence has proven defendant guilty beyond a reasonable doubt." This was within the range of argument allowed.

V

There Was No Cumulative Prejudice

Defendant contends the cumulative nature of the errors and/or defense counsel's deficiencies were such that when aggregated together, they prejudiced him. As we have rejected each of defendant's previous contentions, there are no errors to accumulate.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

RAYE, P. J.

DUARTE, J.