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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. TIARA CHRYSTAL LINDEN, Defendant and Appellant.	G057929 (Super. Ct. No. 14NF3339) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Nancy E. Zeltzer, Judge. Affirmed.

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Acting Senior Assistant Attorney General, Michael R. Johnsen and Kristen J. Inberg, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Tiara Linden was convicted of two counts of burglary after the jury concluded she had entered two neighboring houses with intent to steal. On appeal, defendant contends there was insufficient evidence of her intent with respect to one of the houses and the trial court excluded evidence of domestic violence, which would have established reasonable doubt as to her intent. She also contends the prosecutor engaged in misconduct.

We affirm the judgment. The jury's conclusions regarding defendant's intent rested on substantial, if circumstantial, evidence, and it is not our province to retry the case. As for domestic violence, the court required defendant to make an offer of proof before she could put this evidence before the jury. Defendant never made this offer of proof. Nevertheless, she was allowed to argue as much of her version of events as there was evidence for. Finally, defendant waived several instances of purported misconduct by failing to object to them at the time of trial. Others she has identified on appeal – even if misconduct – were cured by court admonition.

FACTS

On June 9, 2014, Andrew Hoang returned to his home in the afternoon to find that it had been burgled. He found the back door open and the screen of a nearby window ripped. A pair of gym shorts and a baseball cap, which did not belong to the Hoangs, were lying outside near the window. Hoang testified the shorts were "large and wet." The bedroom was in disarray, and the Hoangs found a pair of sweatpants, large in size, discarded there.

As it happened, an Anaheim police officer was next door, responding to a call from the Hoangs' neighbor, Stephen Parks, about an unknown person (defendant) he had found sleeping in his family room. The officer showed Hoang a black duffle bag found in Parks' home; Hoang identified it as his. Hoang's wife identified the dress defendant was wearing at the time as hers. The contents of the duffle bag included 12

purses, numerous shirts and blouses, and jewelry, all of which Hoang identified as belonging to his wife.

It appeared defendant had entered the Parks residence through an unlocked sliding glass door at the side of the house, behind a gate. Parks found her asleep on the couch at about 7:30 p.m. Parks called 911 after shaking her awake and receiving a "garbled response." Paramedics and police responded. Parks told the responding police officer that none of his possessions had been taken or disturbed. That officer testified defendant was crying, mumbling, and apparently disoriented. She had a traumatic injury to her face.

Paramedics took defendant to the hospital. The officer interviewed her in the hospital and made a tape of the interview. During this interview, defendant made statements about having been hit in the face with a bat and getting away from an abusive boyfriend either the day before or two days before the burglary. She admitted she had smoked methamphetamine the morning of the burglary.

She was charged with two counts of first degree residential burglary under Penal Code section 459.[1] The information included an allegation, under section 667.5, subdivision (c)(21), that a nonaccomplice was present during one of the burglaries and an allegation that the burglaries had been committed while the defendant was on probation.

The defendant was convicted on both burglary counts. The court denied her motion for a new trial.

DISCUSSION

Defendant has identified three main issues on appeal. She argues the court improperly excluded evidence of domestic violence against her and refused to instruct the jury on this issue. She argues insufficient evidence supports the burglary conviction for

[1] All further statutory references are to the Penal Code unless otherwise indicated.

the Parks home. And finally, she contends the prosecutor engaged in misconduct during closing argument. Accordingly, she contends the judgment should be reversed.

I. Domestic Violence

This issue pervaded the entire trial, from motions in limine to closing argument. Defendant contended she had been beaten by an abusive boyfriend, who hit her in the face with a metal bat, either one or two days before the burglaries and that this circumstance affected her intent. She took two positions at trial. First, she did not have the requisite intent to steal when she entered the *Parks* home; instead, she was seeking "safety" and "sanctuary." The problem with this theory is that the Hoang burglary occurred *before* the entry into the Parks home. Since items were unquestionably taken from the Hoangs, the theory changed somewhat. By the end of trial, defendant was suggesting that a "large male" sexually or physically assaulted her, forced her to put on Mrs. Hoang's dress, and then "dumped" her "unconscious" at the Parks residence. In other words, she had committed neither burglary. The domestic violence evidence was intended to support either or both theories.

On appeal, defendant makes several arguments regarding the domestic violence evidence. First, she says the trial court improperly precluded defense counsel from alluding to evidence of domestic violence in the hospital interview transcript. Next, she says the court improperly refused to let defense counsel ask the responding police officer if defendant was "afraid" when he encountered her at the Parks residence, and improperly refused to admit pictures of her in the hospital into evidence, confining their use to refreshing the officer's recollection. She argues the court also erred by refusing the defense's request to instruct the jury with CALCRIM No. 3425 and CALCRIM No. 3428. Finally, the trial court refused to permit defense counsel to use a poster board entitled "Other Reasonable Interpretations" during closing argument. The cumulative effect of these rulings was to exclude defendant's evidence on the issue of specific intent and her affirmative defenses of duress and necessity.

A. Exclusion of Evidence and Offer of Proof

The trial court was not unwilling to admit evidence of domestic violence and the injury to defendant's face, provided it had some relevance to the case, specifically to defendant's intent. The court repeatedly asked defense counsel for an offer of proof – who was going to testify, what would this person or persons say – so that the court could evaluate relevance. This offer of proof was never forthcoming.

The parties and the court discussed the domestic violence issue at length before trial testimony began. At that point, the discussion concerned the tape of defendant's interview by a police officer at the hospital where paramedics had taken her and a transcript of the tape. The main issues appeared to be whether the transcript was going to be used at trial and, if so, whether and how it would be redacted.

Defense counsel insisted that defendant's statements on the tape were relevant to her intent upon entering both homes. The statements would show that she entered, not to steal anything, but because she was "running away" from an abusive boyfriend and was seeking "shelter" and "sanctuary," during an "ongoing emergency." From the arguments presented at that time, it also appeared that defendant planned to testify to the same effect. The defense offer of proof was defendant's testimony as well as Parks', who had conversed with her in his home.

As it turned out, the prosecutor decided not to use either the tape or the transcript in his case-in-chief. And defendant did not testify. Testimony was limited to the fact that defendant had a "traumatic injury to the jaw" when she was discovered in the Parks home and transported to the hospital. She was also acknowledged to be "crying," "mumbling" and "disoriented" at the time.

The record does not support defendant's first argument regarding exclusion of domestic violence evidence. The record makes it clear the context of the entire initial discussion was the admission of the hospital interview transcript. Once the transcript was off the table, as the court stated, "we're back now to the issue of what is the relevance of

the domestic violence issue, and [for] that, we still need an offer of proof."[2] The court also wanted an offer of proof as to the affirmative defenses of duress and necessity.[3] The defense never made either.

Under Evidence Code section 354, we cannot set aside a verdict or reverse a judgment for erroneous exclusion of evidence unless it appears from the record that the substance, purpose, and relevance of the excluded evidence was made known to the court. (See *People v. Anderson* (2001) 25 Cal.4th 543, 580-581.) In this case, the court asked several times for an offer of proof – whom the defense was going to call, what that person was going to say – so that it could evaluate the proposed testimony for relevance to the issues of the case, in particular how something that happened 24 to 48 hours before the burglaries bore on defendant's intent at the time of the burglaries. As the trial court stated, "What was [the] jury going to hear, from whom, the relevance to the issues in the case including intent and affirmative defenses and that same was essential before allowing defense counsel to present an opening statement and cross-examine[] witnesses regarding this theory with no assurance that admissible evidence to support same would be submitted." This was a prudent approach to this evidence, but counsel chose not to comply. Relying on an unexplained and inexplicable contention that compliance would require disclosing attorney work-product and privileged information, she chose to go forward with *no evidence* to establish the domestic abuse she wanted to show. The court gave all it could – a stipulation defendant had suffered traumatic injury to her jaw. Without any testimony or evidence to support anything more, we think the court's handling of the issue was proper.

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[2] "[T]he court gave you [i.e., defense counsel] the option – remember, I talked about it's not trial by ambush; that the People are entitled to know what the evidence is going to be. Not just that there was domestic violence, but who is going to testify and what they're going to say. We have a redacted version, but we did not get the offer of proof that the court said that she wanted the People to have also in order to meet that. Because now [i.e., start of trial] is the time to do that. . . . So the court's position is you're perfectly entitled to bring up this offer of proof, but you have still yet to make it."

[3] Before trial started, defense counsel offered to give the court an offer of proof "ex parte," i.e., for the court's eyes only, but the prosecutor objected to the court's viewing evidence that he had no opportunity to see.

B. Poster Board

From defense counsel's closing argument, it appears that the contentions at the time the poster board became an issue were (1) the People did not prove beyond a reasonable doubt that defendant entered the Hoangs' home and (2) defendant did not enter the Parks home with the intent to steal.

Defense counsel was permitted to argue that defendant was unconscious, presumably at the Parks residence, but only with an admonition that argument was not evidence and the jury must base its conclusions on evidence. Defense counsel also argued that defendant was "dumped" inside the Parks home, again with the admonition regarding the jury's reliance on evidence. Counsel argued, without objection or admonishment, that a large male entered the Hoang home and that there was no evidence defendant had entered. Counsel also argued that somebody else, perhaps the large male, put the duffle bag containing the Hoangs' possessions in the Parks house.

About halfway through defense closing argument, counsel produced a poster board for the jury. The poster board listed "other reasonable interpretations," or "conclusions"– other than an intent to steal – to account for defendant's presence in the Parks home. Among the "interpretations" was that defendant was "unconscious" when she was "dumped" at the Parks residence, which she entered only to "seek shelter and help," having been "forced to wear [a] dress after [a] sexual/physical assault" by a "large male" who "entered the home."[4] The prosecution objected and asked that the poster board be taken down. Having already admonished defense counsel three times regarding confining herself to the evidence, the court declared a recess and held an in-chambers discussion of the poster board.

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[4] Some of these "reasonable interpretations" were inconsistent with each other. For example, if defendant was "unconscious" when she was "dumped" in the Parks home, then she could not have "entered to seek shelter and help."

The discussion started off with the large heading "Forced to Wear Dress after Sexual/Physical Assault." The court asked for the factual basis of this statement. The response was that there were wet "male clothes" at the Hoang residence. From the wet "male clothes," counsel inferred that defendant had been assaulted at the Hoangs, and "the hose was running, and the reasonable possibility is that he was hosing himself down because [of] the assault."

The court refused to allow this argument because it was misleading: The poster board "is making it sound like, number one, it's the night of or the time of [the burglaries]. I think this goes too far, and I do think it misleads, and it's not a reasonable inference. You can argue some of these factors, but I don't think in this context with this board." The court further explained, "If you were going to try to argue there was somebody else at the scene forcing [defendant] to do this, you need an offer of proof. We discussed that at length." "I don't think you can argue [these other factors] in the context that somebody else was lurking around involved in this incident in such a manner. I think that's misleading." "[Y]ou can argue that in the context of what her demeanor was at the time, what her status was at the time, but not attempting to use that to infer, what you're doing here, that somebody else was involved in those incidents immediately at the time of the events and, therefore, was the perpetrator. I do not feel there's any evidence to support that."

When defense counsel resumed closing argument, she contended it was reasonable to attribute the cause of defendant's facial injury to someone else, that large male clothing was washed off, possibly to wash off evidence, and that defendant's missing clothing indicated the presence of another person. Another reasonable inference was that someone forced defendant to wear Mrs. Hoang's dress or that she took the dress from the duffle bag after it was already outside the Hoangs' home.

We review a trial court's decision to admit or exclude evidence for abuse of discretion and prejudice. (*People v. Young* (2019) 7 Cal.5th 905, 931; *People v. Caro*

(2019) 7 Cal.5th 463, 503.) We cannot find that the court abused its discretion in refusing to allow the poster board to be displayed to the jury. We agree with the court that the section on "sexual/physical assault" was highly misleading, suggesting as it did that defendant was assaulted just before or during the burglaries, instead of a day or two before.

Equally important, in her closing argument, defense counsel touched on every item included in the poster board, with the exception of the "sexual/physical assault." She argued that someone had forced defendant to wear the dress. She argued that the large male had washed off evidence. Defendant has also failed to explain how the exclusion of the physical poster board – but not most of the information on it – prejudiced her. (See Evid. Code, § 353, subd. (b).) This is a non-starter.

C. Defendant Was "Afraid" and Photos

During cross-examination, defense counsel asked the responding officer whether defendant was "afraid" when he saw her at the Parks home. The prosecutor objected that the question called for speculation. The court held a sidebar on this issue. The court explained why it found the question objectionable: "What would [the officer] see that would indicate [defendant] was afraid? . . . [T]his can only be based on what he observed. What else did he see that would indicate to him she was afraid?" After doing some research on the issue, the court stated that the problem was which came first, the opinion or the evidence. Since there were cases going both ways, the court decided to allow defense counsel to ask the responding officer whether defendant was afraid. But defense counsel did not ask the question. There is, therefore, nothing for us to review.

During the same sidebar, defense counsel brought up two photos of defendant in the hospital that she wanted to show to the jury, to show the injury to her jaw. The court ultimately decided that the photos could be used to refresh the officer's recollection of what defendant looked like, but they could not be shown to the jury. In

light of Evidence Code section 352,[5] the court held that the hospital pictures were of limited relevance to a burglary case. As it turned out, the officer's recollection did not need refreshing. He testified that defendant had a "traumatic injury to one side of her face" and an "extremely swollen jaw" without prompting.

We cannot find that the court abused its discretion in refusing to allow the hospital photographs. The jury was apprised of defendant's injuries and knew she had been hospitalized as a result. The photographs showed a neck brace, an oxygen tube, and an IV line and were "too graphic." The court ruled that "the scene from the hospital is not shedding any light on this." "It has extremely limited relevance and there is a 352 issue."

We do not reverse a court's ruling under Evidence Code section 352 unless "'"the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." [Citation.]' [Citation.]" (*People v. Merriman* (2014) 60 Cal.4th 1, 74.) We cannot find this here. The essential facts of defendant's injury were before the jury, and the hospital photos simply added nothing to the issues. It was within the trial court's discretion to exclude these photos.

D. Jury Instructions

The trial court properly refused to give CALCRIM No. 3425 (unconsciousness) and CALCRIM No. 3428 (mental impairment).[6] There was no

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[5] Evidence Code section 352 provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

[6] CALCRIM No. 3425 states, "The defendant is not guilty of <insert crime[s]> if (he/she) acted while unconscious. Someone is unconscious when he or she is not conscious of his or her actions. [Someone may be unconscious even though able to move.] [¶] Unconsciousness may be caused by (a blackout[,]/ [or] an epileptic seizure[,]/ [or] involuntary intoxication[,]/ [or] <insert a similar condition>). [¶] [The defense of unconsciousness may not be based on voluntary intoxication.] [¶] The People must prove beyond a reasonable doubt that the defendant was conscious when (he/she) acted. If there is proof beyond a reasonable doubt that the defendant acted as if (he/she) were conscious, you should conclude that (he/she) was conscious, unless based on all the evidence, you have a reasonable doubt that (he/she) was conscious, in which case you must find (him/her) not guilty."

evidence whatsoever that defendant was "not conscious of her actions" at any relevant time, either when she took the Hoangs' belongings or when she entered the Parks home. Parks discovered her asleep, covered with a blanket.[7] He roused her by shaking her awake, at which time they had a conversation about calling 911. As for CALCRIM No. 3428, "expert medical opinion testimony is necessary to establish that a defendant suffered from a mental disease, mental defect, or mental disorder within the meaning of CALCRIM No. 3428, because jurors cannot make such a determination from common experience." (*People v. Larsen* (2012) 205 Cal.App.4th 810, 824.) The defense offered no such expert opinion testimony.

II. Evidence of Intent to Commit Burglary

Defendant argues with respect to the Parks burglary alone that the People did not have sufficient evidence for a conviction on this count. She maintains that the evidence from the Hoang burglary cannot be used to imply intent to steal from Parks, and none of his possessions was taken. Evidence of her intent to steal from Parks was therefore lacking. In addition, the exclusion of evidence of domestic violence meant that the jury did not hear of an alternative explanation for her presence in the Parks home, her search for "shelter" and "sanctuary."

Section 459 provides, in pertinent part, "Every person who enters any house, room, . . . or other building . . . with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, 'inhabited' means currently being used for dwelling purposes, whether occupied or not. . . ." Defendant argues that the

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CALCRIM No. 3428 states, in pertinent part, "You have heard evidence that the defendant may have suffered from a mental (disease[,]/ [or] defect[,]/ [or] disorder). You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crime, the defendant acted [or failed to act] with the intent or mental state required for that crime."

[7] Defendant's pleadings and arguments repeatedly refer to her being "asleep" on the Parks sofa, rather than unconscious. For example, defendant's opening brief on appeal states three times that she was "asleep" and only once that she was unconscious. At the hearing on the new trial motion, her counsel told the court that defendant was "found asleep" in the Parks home. If trial counsel wanted to establish that being asleep represented hoofbeats of the zebra of unconsciousness upon entry rather than the horse of falling asleep afterward, she needed to lay a foundation.

People failed to present sufficient evidence of her specific intent to commit larceny when she entered the Parks home.

"In assessing a claim of insufficiency of the evidence, the reviewing court's task is to 'review the whole record in the light most favorable to the judgment . . . to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Ringo* (2005) 134 Cal.App.4th 870, 880.) "'The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt."' [Citation.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66.) "Although the People must show that a defendant charged with burglary entered the premises with felonious intent, such intent must usually be inferred from all of the facts and circumstances disclosed by the evidence, rarely being directly provable. [Citations.] When the evidence justifies a reasonable inference of felonious intent, the verdict may not be disturbed on appeal." (*People v. Matson* (1974) 13 Cal.3d 35, 41.)

The facts of this case resemble to a remarkable degree the facts of *People v. Sanghera* (2006) 139 Cal.App.4th 1567 (*Sanghera*). In *Sanghera*, the defendant, who was on the run from the police, entered a residence wearing only a pair of shorts and proceeded to ransack a bedroom. He dressed himself in women's clothes he found in the closet and a pair of children's slippers. He also took jewelry. He then proceeded to break into a neighbor's house, where police discovered him hiding in a closet wearing the neighbor's clothes and the slippers. (*Id.* at pp. 1570-1571.)

Like defendant in this case, Sanghera claimed on appeal that insufficient evidence supported the intent element of the crime of burglary. He claimed he had not

entered either house with an intent to steal, only to hide from the police. (*Sanghera, supra*, 139 Cal.App.4th at p. 1572.) "'An appellate court must accept logical inferences that the [finder of fact] might have drawn from the circumstantial evidence.' [Citation.] 'Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on *no hypothesis whatever* is there sufficient substantial evidence to support the verdict of the [finder of fact].' [Citation.]" (*Id.* at p. 1573, italics added.)

The jury could have accepted defendant's argument that she did not intend to steal when she entered the Parks home. Defense counsel vigorously argued this position during closing argument. She offered two possible alternatives – defendant was dumped unconscious at the Parks residence, and defendant entered to seek shelter and help. As to this latter alternative, counsel elaborated: "She was severely injured. She was scared, and she was crying. . . . She was upset. Her intent was obviously not to get up and steal." In order to convict defendant of burgling the Parks home, the jury must have rejected both alternatives and considered the People's circumstantial evidence strong enough to establish defendant's guilt beyond a reasonable doubt.

Defendant argues the intent to steal from the Parks home cannot be established from the burglary of the Hoang home, citing *People v. Gibson* (1930) 107 Cal.App. 76. *Gibson* is a propensity case. The People sought to prove larceny through evidence of earlier unconnected and uncharged larcenies. (*Id.* at pp. 80-81.) But in *Gibson*, the earlier burglaries took place *months* earlier. Ascribing intent on the basis of entering department stores months earlier and stealing from them is not even remotely comparable to a syllogism involving adjacent houses seriatim.

The jury was entitled to consider the Hoang burglary, which was charged along with the Parks burglary and which occurred close in time to the entry into the Parks home, as part of the overall circumstantial evidence that by reasonable inference logically tended to establish defendant's intent. There was fairly strong circumstantial evidence –

the duffle bag containing Hoang possessions in the Parks house – that defendant had visited the Hoang residence *before* she went to Parks'. There was also fairly strong circumstantial evidence that she had gone into the Hoang home not to seek sanctuary, but rather to seek purses, jewelry, and a change of clothes. She then left the Hoang house – where, from all the record shows, she would have been just as safe – and went into another house next door, through a side entrance behind a gate.

Since defendant does not challenge intent with respect to the Hoangs as part of this argument, she contends, in effect, that the evidence showed she *changed* her previous intent – helping herself to other people's belongings – when she entered the Parks home. That may be, but the evidence entitled the jury to think otherwise. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 402, superseded by statute on other grounds [misconduct sufficiently similar to imply same intent in both instances]; *People v. Robbins* (1988) 45 Cal.3d 867, 879, superseded by statute on other grounds ["'[I]f a person acts similarly in similar situations, he probably harbors the same intent in each instance' [citations] and . . . such prior conduct may be relevant circumstantial evidence of the actor's most recent intent."].) On this record, we cannot gainsay the jury.[8]

III. Prosecutorial Misconduct

Defendant contends six statements made by the prosecutor during closing argument, taken together, constitute prejudicial prosecutorial misconduct. The trial court ruled on each of these statements when it denied defendant's motion for a new trial on this basis.[9]

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[8] The trial court considered this argument as part of defendant's motion for new trial. After giving defendant "the benefit of its independent determination as to the probative value of the evidence," the court concluded that there was "sufficiently probative evidence of the requisite intent to commit residential burglary[.]"

[9] In addition to observing that defendant had failed to object to some of the statements, the trial court evaluated each one on the merits.

A. Statements Made without Objection

Two of the statements to which defendant now objects were made during the prosecution's initial closing argument. The prosecutor argued that entering the Hoang house resulted in more than just the theft of a few objects. "A house is not just four walls with a bunch of stuff in it. That's our safe place. . . So when [defendant] goes into this home, she's not just stealing these items. She's stealing peace of mind from the Hoangs. She's stealing a sense of security. She's stealing a peace [*sic*: piece] of their heart. That's the home where they raise their kids. And we all know that." Regarding intent, he also argued, "But let's just say you think maybe [defendant] had a different intent [other than "to take what is not hers"]. As long as one of her intents when she enters is to steal, she's guilty."

We point out, as did the trial court, that counsel did not object to either of these statements. As the trial court explained, you must object at the time and request an admonition. This is correct. "'In the absence of a timely objection the offended party is deemed to have waived the claim of error through his participation in the atmosphere which produced the claim of prejudice.' [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 553.) "It is only in extreme cases that the court, when acting promptly and speaking clearly and directly on the subject, cannot, by instructing the jury to disregard such matters, correct the impropriety of the act of counsel and remove any effect his conduct or remarks would otherwise have." (*Tingley v. Times Mirror Co.* (1907) 151 Cal. 1, 23.)

Defendant argues that no objection is necessary if an admonition would not have cured the harm, if repeated objections would negatively impress the jury, or if an objection or request for admonition would be futile. None of these arguments has merit here. There is no indication whatsoever in the record that an admonition could not have cured the harm or that a request for an admonition would have been futile. As for repeated objections having a negative effect on the jury, the purportedly objectionable statements occurred during the prosecution's initial closing argument. Defense counsel

had not objected to anything up to that point. An objection to the "peace of mind" statement would have been the very first objection by the defense.[10]

The third statement was made during the rebuttal argument. The prosecutor stated, "You heard about some sexual assault that happened, that never happened. You heard about some physical assault that never happened and something that you're not to consider even if you think it maybe did happen because that's not related to these charges, but the defense wants you to think so because they can't beat these charges on the facts. And it's offensive. It's just offensive that they would play to your emotions, your sensibility, to try to introduce an argument like that." There was no objection. It appears that defendant contends this statement constituted a personal attack on defense counsel. As the trial court stated, defendant's failure to object "doom[s] defendant's argument." (See *People v. Pearson* (2013) 56 Cal.4th 393, 426.)

B. Statements with Objections

The prosecutor led off his rebuttal argument with a criticism of "a lot of speculation" in the defense closing argument. "You heard a lot of theories which you, as jurors by law, are forbidden from considering . . ." At his point, defense counsel objected "regarding the law on this case." The court responded, "All right. Again, the instructions on the law that come from the court are what you must follow in this case. And what the attorneys are saying is not evidence. Also, if there are discussions on the law that conflict with the court's instruction, you're to follow the court's instruction."

Later during rebuttal, the prosecutor made three statements regarding the burden of proof and evidence, to which defense counsel objected. In each case, the court admonished the jurors that the People had the burden of proof on all the elements of the alleged crimes. They were also to disregard any arguments about evidence that could

[10] We should also point out that defense counsel repeatedly objected during the prosecution's rebuttal argument, apparently without worrying about alienating the jury.

have or should have been brought in by the defense. The court told the prosecutor, "Counsel, we're going to stop that line of discussion."

These passages demonstrate the efficacy of prompt objections. In each case, the court intervened to focus the jury on its main tasks – following the jury instructions and evaluating the admitted evidence. In the case of the "missing evidence" objections, the court quickly shut down the prosecution's argument, which may have been straying into forbidden territory.[11] This is exactly how it is supposed to work.

We assume the jury followed the court's directions and (1) observed the court's admonition regarding burden of proof and (2) disregarded any arguments about evidence that the defense should have produced but did not. (See *People v. Bennett* (2009) 45 Cal.4th 577, 595.)

In short, "[s]everal of the prosecutor's comments elicited no objection, could have been cured by jury admonition and will not be considered on appeal. [Citation.] Others were the subject of court admonitions which cured the error, if any. [Citation.]" (*People v. Sawyer* (1967) 256 Cal.App.2d 66, 78.) We cannot find a basis for reversing defendant's conviction for prosecutorial misconduct.

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[11] The prosecution has the right to comment on the failure of the defense to introduce material evidence or failure to call logical witnesses. (*People v. Medina* (1995) 11 Cal.4th 694, 755.) The trial court's action here represented an abundance of caution.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.