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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RODNEY McGEE, Defendant and Appellant.	A125779 (Contra Costa County Super. Ct. Nos. 05-070408-0, 05-090340-1)

Defendant was convicted following a jury trial of misdemeanor assault (Pen. Code, § 240).[1] In this appeal he claims that the prosecutor committed misconduct during voir dire and closing argument. We find that no prejudicial prosecutorial misconduct occurred, and affirm the judgment.

STATEMENT OF FACTS

The victim, Lorri Dean, testified that defendant was her "ex-boyfriend," whom she met in "the '80's" while he lived downstairs from her mother. They were "in a serious relationship" for about six months, and thereafter they dated "off and on." By 2009, Dean and defendant "would see each other occasionally," but their sexual relationship "was over." Dean described their relationship as "real rocky" by February of 2009, although they continued to speak with each other at most once a week. Dean "tried to be

[1] He was acquitted of the charged offense of aggravated assault (Pen. Code, § 245, subd. (a)(1)). In a separate case defendant was found in violation of probation based on commission of the assault; his probation was revoked and reinstated.

friends" with defendant, "but it didn't work." Defendant repeatedly told Dean that she "belonged to him."

After Dean's apartment flooded in late February of 2009, she moved to a room at the Best Value Motel on Carlson Boulevard in Richmond. Defendant paid the monthly rent for Dean's room, and helped her move there.

On the night of March 2, 2009, defendant unexpectedly arrived at Dean's motel room. After Dean let defendant into the room, she sat on the bed and folded clothes while he sat in a chair on the other side of the room. Defendant began to argue with Dean, sometimes at high volume, but she ignored him. After Dean told defendant she "wasn't listening," he "came around the bed" and scratched her face as he reached for her neck with both hands. Dean turned to cover her face, but defendant began to choke her. Dean "started having an asthma attack," and "couldn't breathe." She fought and kicked defendant until he released her.

Dean could not reach the front door without passing defendant, so she ran into the bathroom to get her asthma inhaler. Dean "tried to jump out the window" in the bathroom, but defendant snatched her ponytail and pulled her back inside. Dean struck her head and fell onto defendant, which caused him to tumble backwards to the floor. Dean then "bolted out the door." Defendant stayed inside the motel room and shut the door behind Dean.

Dean immediately used her cell phone to call 911.[2] She still did not have her inhaler and continued to have difficulty breathing. She tried to use her card key to re-enter her motel room, but it failed to work. Dean went to the manager's office to "recharge" the card, then returned to her room, but again the card "didn't open" the door. She returned to the manager's office. On her way there Dean observed defendant "jump[] out the window" of her room, run past her to his car, and drive out of the parking lot.

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[2] The audiotape of the 911 call was played for the jury.

The motel manager tried to open Dean's door for her, but his "key didn't work either." Finally, the manager sent someone through the front window of the motel room to open the door for her from the inside. When Dean entered the room she noticed that her belongings had been thrown "everywhere" around the room. She retrieved her inhaler and began "catching [her] breath."

Moments after Dean re-entered her motel room, the police arrived. Officer Chris Decious of the Richmond Police Department contacted Dean in her room at 11:27 p.m. She was "shaking and crying," and reported that "she had been beaten up." Officer Decious took a statement from Dean, but due to her distraught state of mind she was "all over the place as far as her recollection of what occurred." The officer observed injuries to Dean: redness on her neck; swelling on her upper lip and under her left eye; a bump on the back of her head; scratches on her left cheek and left forearm. The interior of her room was "ransacked," with "items scattered about the motel room." Officer Decious testified that Dean's mental state and injuries were consistent with someone who "had just been the victim of a violent crime." Photographs were taken of the victim's injuries and the interior of her room. She did not appear to be under the influence of alcohol or other drugs.

Two or three hours later defendant reappeared at Dean's motel room, "banging on the door and screaming and hollering outside." Dean called 911 again, and was told by the operator not to open the door. About five to seven minutes thereafter defendant left. As defendant drove away he sent Dean a text message in which he told her to "pack [her] things." Dean returned the message and told defendant "to pack his because he was going to jail."

At 3:15 a.m., Officer Decious returned to the Best Value Motel in response to Dean's 911 call. He observed a vehicle and driver leaving the parking lot of the motel that matched the description given by Dean. The officer followed the vehicle briefly and initiated a traffic stop. Defendant was the driver of the vehicle.

A stipulation was entered by the parties that on January 4, 2006, defendant was convicted of misdemeanor false imprisonment (Pen. Code, §§ 236, 237) of Dean, a crime "involving domestic violence."

The defense offered testimony from the manager of the Best Value Motel, Anil Kumar. He testified that defendant paid the monthly rent for Dean's motel room beginning in February of 2009, and was seen by Kumar once or twice a week at the motel. Kumar was in the office of the motel when Dean appeared on the night of March 2, 2009. She seemed to be calm, and was not crying; she neither mentioned that she had been attacked nor asked for help. Kumar did not notice that Dean suffered from any injuries. Dean "said her card key was not working," so Kumar "charged it for her." Dean left the office, but returned less than a minute later to inform Kumar that the card key still did not work. She mentioned that a "red light" illumined when she inserted the card, which Kumar said "means somebody is in the room." She appeared "a little bit more anxious," and told Kumar that she could not breathe and needed to get her inhaler in the room "really quick." Kumar escorted Dean to her room to open the door with the master key, but discovered that the interior latch was on the door. He went "around the back" and found the window open. He entered through the window, then opened the door from the inside so Dean "could get in and get her inhaler."

DISCUSSION

Defendant makes several claims of prosecutorial misconduct, which we will review serially. " 'The applicable federal and state standards regarding prosecutorial misconduct are well established. " 'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " [Citation.]' [Citation.] '[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that

the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citation.]" (*People v. Smithey* (1999) 20 Cal.4th 936, 960; see also *People v. Prieto* (2003) 30 Cal.4th 226, 260.)

I. Defendant's Failure to Object.

Defendant acknowledges that nearly all of the instances of alleged misconduct he challenges on appeal, including those that occurred during voir dire, were not the subject of any objection at trial. Thus, the issue of forfeiture of the claims is presented.[3] "Generally, ' " ' a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion – and on the same ground – the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.' " ' [Citation.]" (*People v. Avila* (2006) 38 Cal.4th 491, 609.) "[A] reviewing court will not review a claim of misconduct in the absence of an objection and request for admonishment at trial." (*People v. Gionis* (1995) 9 Cal.4th 1196, 1215; see also *People v. Scott* (1997) 15 Cal.4th 1188, 1217; *People v. Davis* (1995) 10 Cal.4th 463, 537.) " 'To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct.' " (*People v. Kipp* (2001) 26 Cal.4th 1100, 1130, quoting *People v. Price* (1991) 1 Cal.4th 324, 447; see also *People v. Arias* (1996) 13 Cal.4th 92, 159.)

Despite the lack of objections from the defense at trial, to resolve defendant's assertion that any prejudice from the remark could not readily have been cured by the court's intervention, and to respond to his additional contention that counsel was ineffective for failing to object, we proceed to the merits of the claims of misconduct. (See *People v. Turner* (2004) 34 Cal.4th 406, 431; *People v. Lucas* (1995) 12 Cal.4th 415, 457; *People v. Hawkins* (1995) 10 Cal.4th 920, 948–949; *People v. Clark* (1993) 5 Cal.4th 950, 1013.)

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[3] "Because defendant did not object" to the individualized questioning of prospective jurors "he has not preserved these issues for appeal." (*People v. Seaton* (2001) 26 Cal.4th 598, 635.)

II. The Questioning of Potential Jurors.

Defendant's first claim of misconduct is focused on the prosecutor's questioning of potential jurors, specifically, Jurors 39 and 40 in succession. Juror 39 mentioned in the course of questioning by the trial court that a relative of his wife was the victim of domestic violence committed by her boyfriend.[4] The prosecutor voiced concern with the juror's statement that he "didn't care about that." Juror 39 explained that he was not referring to the "idea of domestic violence," but rather to the "particular case," of his wife's aunt, due to the "repetition" of the acts of violence and the fact that the couple thereafter "got back together" again each time. Juror 39 felt that "it is just worthless to be involved in that particular case." He also stated that he would consider evidence of "history" and "repetition" in the present case, to evaluate both the defendant and the victim. The prosecutor also asked if Juror 39 would "be willing to convict" defendant even if he believed the victim unwisely kept "going back" to her abuser, and instead "should have left him a long time ago." The juror answered, "Maybe, I don't know."

The questioning proceeded directly to Juror 40, who was a domestic violence counselor for victims, families, and abusers.[5] The prosecutor asked if Juror 40 heard the discussion with Juror 39, and was familiar with "the cycle of violence." Juror 40 replied: "That is exactly what was going through my mind. The cycle of violence." The prosecutor then asked if Juror 40, as an "expert," could decide "this case" on the basis of any "cycle of violence evidence" presented, rather than "additional information that you have about the cycle of violence." The juror stated "I can do that."

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[4] During prior questioning by the trial court, Juror 39 indicated that his wife's aunt was "involved in domestic violence" while living in San Francisco, and obtained a "restricting order over her boyfriend," after which the boyfriend was incarcerated. Juror 39 stated that he was not aware of the "real facts" of the situation, and "didn't care." The court then asked: "Is there anything about that situation that you think you would carry over to here?" Juror 39 answered "No."

[5] Juror 40 previously told the trial court that she had both personal and professional experiences with domestic abuse, including abuse of her mother by her father, and working in a domestic abuse counseling clinic and programs started by her stepfather. Juror 40 stated that she is a "certified domestic violence counselor," and has worked as an abuse prevention programs director and "respite child care program coordinator."

Defendant complains that the prosecutor committed misconduct during jury selection by discussing the "cycle of violence" theory during questioning of Jurors 39 and 40 based on "information or evidence outside the record." Defendant points out that the prosecutor neither notified the defense of any anticipated expert witness on battered women's syndrome, nor presented any "evidence on the . . . 'cycle of violence' " at trial. Instead, defendant asserts, the prosecutor essentially testified "as her own expert" by referring to the "cycle of violence" doctrine, without the necessary support of expert testimony, and by doing so improperly "attempted to educate" and "indoctrinate" potential jurors.

"It is, of course, well settled that the examination of prospective jurors should not be used ' "to educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law." ' [Citations.]" (*People v. Fierro* (1991) 1 Cal.4th 173, 209.) The law is "clear that '[i]t is not a proper object of voir dire to obtain a juror's advisory opinion based upon a preview of the evidence' . . . . [Citation.]" (*People v. Butler* (2009) 46 Cal.4th 847, 860.) Also, "A prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record." (*People v. Frye* (1998) 18 Cal.4th 894, 971; see also see also *People v. Carter* (2005) 36 Cal.4th 1114, 1178; *People v. Cash* (2002) 28 Cal.4th 703, 721–722.)

In our examination of the prosecutor's questions and comments during voir dire we consider " ' "whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." ' [Citation.]" (*People v. Ayala* (2000) 23 Cal.4th 225, 284.) "In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Frye, supra,* 18 Cal.4th 894, 970.)

Upon our review we find that the prosecutor's questions and comments did not constitute improper comment without evidentiary substantiation or an effort to indoctrinate the jury. The prosecutor did not seek to offer evidence on battered women's

syndrome or the cycle of violence. The inquiries were directed at the past experiences of the prospective jurors, in an effort to determine if they remained impartial. While it is not a proper function of voir dire examination of prospective jurors to educate the jury panel to the particular facts of the case, counsel must be "allowed to ask questions reasonably designed to assist in the intelligent exercise of peremptory challenges whether or not such questions are also likely to uncover grounds sufficient to sustain a challenge for cause." (*People v. Williams* (1981) 29 Cal.3d 392, 407.) Either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias that would cause them not to follow an instruction on the issues presented in the case, although an inquiry must not be so specific that it requires prospective jurors to prejudge an issue based on a summary of the evidence likely to be presented. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 47; *People v. Burgener* (2003) 29 Cal.4th 833, 865; *People v. Cash, supra,* 28 Cal.4th 703, 721–722; *People v. Sanders* (1995) 11 Cal.4th 475, 538–539.) As we read the record here, the prosecutor was undertaking an appropriate examination of bias in light of the past, personal exposure of the prospective jurors to incidents of repeated domestic abuse, not attempting to offer evidence on the subject of cycle of violence as related to the specific facts of the present case. Proper inquiry is that which is " ' "directed to whether, without knowing the specifics of the case, the juror has an 'open mind' " ' " on the issues presented. (*People v. Butler, supra,* 46 Cal.4th 847, 859, citations omitted; see also *People v. Solomon* (2010) 49 Cal.4th 792, 838; *People v. Clark* (1990) 50 Cal.3d 583, 597.) We discern no impermissible attempt by the prosecutor to influence prospective jurors to vote guilty based on the facts of the case; nor do we perceive any reasonable likelihood that the jury understood or applied any of the remarks during voir dire in an improper or erroneous manner as comment on the evidence. (See *People v. Salcido* (2008) 44 Cal.4th 93, 153–154; *People v. Fierro, supra,* 1 Cal.4th 173, 209.)

III. The References During Closing Argument to Domestic Violence Incidents.

Defendant also argues that misconduct was committed by the prosecutor during closing argument by again mentioning the "cycle of violence" and informing the jury that

" 'other' incidents of prior domestic violence" occurred. In the context of discussing the lengthy and continuing "co-dependent" domestic violence relationship of defendant and the victim, the prosecutor suggested that "[d]omestic violence relationships are different." The prosecutor also asserted that the evidence demonstrated a "cycle of violence" between "these two people" that was repeated "again, and again and again and again." The prosecutor additionally indicated that Dean "talked about *other times* vaguely through her testimony of *other times* she was beaten" by defendant.[6] (Italics added.)

Defendant repeats the claim that by referring to the cycle of violence in closing argument the prosecutor improperly "testified as her own expert witness," despite the lack of any evidence presented "during trial on the theory of 'the cycle of violence' and on how and why '[d]omestic violence relationships are different.' " Defendant also maintains that the prosecutor "injected supposed facts not in evidence" by arguing that Dean was beaten multiple "other times," when the "only prior domestic violence incident introduced" was the "2006 misdemeanor false imprisonment" conviction.

We of course agree with defendant that reference to "facts not in evidence" by the prosecutor "is 'clearly . . . misconduct' [citation], because such statements 'tend[] to make the prosecutor his own witness—offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, "although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." [Citations.]' [Citations.] 'Statements of supposed facts not in evidence . . . are a highly prejudicial form of misconduct, and a frequent basis for reversal.' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 828.) " '[C]ounsel may not assume or state facts not in evidence [citation] or mischaracterize the evidence [citation].' [Citation.]" (*People v. Collins* (2010) 49 Cal.4th 175, 209.) A prosecutor is also " 'prohibited from vouching for the

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[6] While discussing the seemingly inexplicable behavior of the victim in "going back" to defendant "after he has beaten her, after he has been convicted," the prosecutor similarly stated during rebuttal argument that Dean told the jury of "other times" domestic violence occurred.

credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. . . .' [Citation.]" (*People v. Ward* (2005) 36 Cal.4th 186, 215.)

However, " 'The prosecution is given wide latitude during closing argument to make fair comment on the evidence, including reasonable inferences or deductions to be drawn from it.' [Citation.]" (*People v. Collins, supra,* 49 Cal.4th 175, 213.) " ' " 'The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.' [Citation.] 'A prosecutor may "vigorously argue his case and is not limited to 'Chesterfieldian politeness' " [citation], and he may "use appropriate epithets . . . ." ' " [Citation.]' [Citation.]" (*People v. Hill, supra*, 17 Cal.4th 800, 819.) "[W]e accord counsel great latitude at argument to urge whatever conclusions counsel believes can properly be drawn from the evidence. [Citation.] Such latitude precludes opposing counsel from complaining on appeal that the opponent's ' "reasoning is faulty or the conclusions are illogical." ' [Citation.]" (*People v. Cash, supra,* 28 Cal.4th 703, 732.) "Whether the inferences drawn by the prosecutor are reasonable is a question for the jury." (*People v. Tafoya* (2007) 42 Cal.4th 147, 181.)

We are persuaded that the prosecutor's argument was at least supported by deductions reasonably drawn from the evidence. Although evidence of only a single specific prior incident of domestic violence was presented, the evidence considered as a whole suggested a quite lengthy, co-dependent, tumultuous and sporadically abusive relationship. Dean testified that she and defendant began a serious, exclusive relationship "during the '80's," which lasted about six months. Thereafter, they had a sexual relationship "[o]ff and on" until after the year 2000. By 2009, they were not "sexually" involved, but "still would see each other occasionally." Dean "tried to be friends" with defendant, but "it didn't work;" their relationship was "real rocky." "On a daily basis" defendant told Dean that she "belonged to him" and was "always going to belong to

him." Phone records revealed that Dean and defendant often spoke with each other multiple times each day. Dean's description of her intermittent, troubled relationship with defendant, considered in conjunction with the 2006 conviction of a domestic violence offense against her by defendant, and his repeated comments that she "belonged" to him, justified an inference that a pattern of chronic domestic abuse existed.

We recognize that the prosecutor's references to violent acts committed by defendant "other times," or "again and again," were technically imprecise, given the stipulation of a single prior domestic violence conviction, but the essence of the prosecutor's message to the jury was neither deceptive nor constituted unfair comment on the totality of the evidence presented. A prosecutor's wide latitude to comment on the evidence includes "urging the jury to make reasonable inferences and deductions therefrom." (*People v. Coffman and Marlow, supra,* 34 Cal.4th 1, 95.) Further, the prosecutor did not suggest that she had special knowledge of the existence of facts outside the record related to defendant's prior acts of which counsel, but not the jury, was aware. (*People v. Rundle* (2008) 43 Cal.4th 76, 161–162; *People v. Monterroso* (2004) 34 Cal.4th 743, 786.) We find that the prosecutor did not mischaracterize the record or assume facts not in evidence, but merely commented on the evidence and offered the jury permissible inferences drawn from it. (*People v. Rowland* (1992) 4 Cal.4th 238, 278.) The closing argument was properly based on the prosecutor's interpretation of the evidence. (*People v. Valdez* (2004) 32 Cal.4th 73, 134.)

To the extent that the prosecutor incorrectly portrayed the evidence as offering proof of more than a single prior domestic assault other than the one charged, the error was harmless. "Reversal of a judgment of conviction based on prosecutorial misconduct is called for only when, after reviewing the totality of the evidence, we can determine it is reasonably probable that a result more favorable to defendant would have occurred absent the misconduct." (*People v. Castillo* (2008) 168 Cal.App.4th 364, 386.) The evidence that defendant committed at least a misdemeanor assault upon Dean is overwhelming. The victim's testimony was both credible and corroborated. Dean's portrayal of the incident was convincingly substantiated by the officer's observation of her demeanor and

the injuries she suffered following the assault. Her motel room was also found to be in disarray once she was finally able to re-enter the room. Soon after defendant's second appearance at Dean's room, he was seen by Officer Decious driving his car out of the parking lot. The impact of the prosecutor's comments was also mitigated by the argument of the parties and the court's instruction to the jurors to "base their verdict on the evidence at trial and that the statements of counsel are not evidence." (*People v. Cook* (2007) 40 Cal.4th 1334, 1359.) The prosecutor's references to multiple prior beatings suffered by Dean did not influence the verdict. No prejudicial prosecutorial misconduct occurred. Likewise, defendant's claim of ineffective assistance of counsel predicated on the failure of defense counsel to object to the misconduct fails. (*People v. Turner, supra,* 34 Cal.4th 406, 431; *In re Visciotti* (1996) 14 Cal.4th 325, 351–352.)

Accordingly, the judgment is affirmed.

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Dondero, J.

We concur:

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Marchiano, P. J.

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Margulies, J.