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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MELVIN MIMS, Defendant and Appellant.	B171163 (Los Angeles County Super. Ct. No. TA068155)

APPEAL from a judgment of the Superior Court of Los Angeles County. Allen J. Webster, Jr., Judge. Affirmed.

Carol S. Boyk, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary Sanchez and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Melvin Mims of two counts of resisting an executive officer in violation of Penal Code section 69.[1] Appellant admitted two prior prison term allegations. The trial court sentenced appellant to the midterm of two years on count 1 and a consecutive one-year for one prior prison term allegation pursuant to section 667.5, subdivision (b). The trial court stayed the sentence on count 2 pursuant to section 654. The trial court then suspended imposition of sentence and placed appellant on terms and conditions of probation for a period of three years.

Appellant appeals on the grounds that: (1) this court should independently review the personnel files of Officer Shear and Officer Jamison for undisclosed complaints relating to fabrication and use of excessive force; (2) the trial court abused its discretion by denying a new trial motion based on prejudicial prosecutorial misconduct consisting of referring to gangs despite repeated objections; and (3) the trial court abused its discretion by denying a new trial motion based on prejudicial prosecutorial misconduct consisting of vouching for the honesty and conduct of the police officers despite the prosecutor's awareness of many complaints against them.

FACTS

1. Prosecution Evidence

Shortly before midnight on January 10, 2003, Officer Erick Shear and Officer John Jamison of the Los Angeles Police Department were riding in their patrol vehicle when they noticed approximately 10 men engaged in a dice game. The game was taking place in the driveway of a home on East 110th Street, which belonged to Ronald Hamilton. The men, among them appellant, were standing in a circle and drinking alcohol as the game ensued.

The officers stopped their car in front of the driveway. They observed the game and its participants for several seconds and then exited the car and walked to the sidewalk bordering the driveway. Officer Shear asked the men what was going on, while Officer

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

Jamison stood to the side. The men who were gambling shouted responses such as, "Get the fuck out of here. Why don't you go find some real criminals. We're not doing anything illegal," and "We're on private property. Mind your own fucking business." Officer Shear informed them that they were not supposed to gamble in public. One of the gamblers, later identified as Gary Holden (Holden), asked the police to shine their lights on the game so that the gamblers could see the dice better. The men, including appellant, continued to gamble. Officer Shear saw appellant make a "C" with his hand, and appellant said, "[t]his is Crip Hood. Crip Nation."

Officer Shear radioed for backup. At that time, the men began leaving the driveway, and only three men remained. These were Ronald Hamilton (Hamilton), Holden, and appellant. Officer Shear told the three to put their drinks down and put their hands on top of their heads. Hamilton and Holden complied, but appellant continued drinking. Officer Shear handcuffed Holden and handed him to Officer Jamison, who escorted Holden to the police car. Hamilton placed his hands behind his head.

Appellant attempted to walk away. Officer Shear told him to stop and said he was not free to leave. Appellant ignored this and continued walking. Officer Shear approached to within one foot of appellant and told him he was being detained. He reached for appellant's arm to stop him, and appellant threw his drink in Officer Shear's face. The drink landed on the officer's face, neck, and uniform. Appellant then punched Officer Shear in the right cheek. Officer Shear grabbed appellant's arm, but appellant began jerking his arm back and forth. Officer Jamison came to assist and tackled appellant to the ground. Officer Jamison was on top of appellant and appellant was hitting Officer Jamison with his fist. Officer Jamison deflected most of the punches with his arms.

When backup arrived, appellant was on the ground on his stomach and Officers Shear and Jamison were trying to handcuff him. Appellant managed to grab a flashlight that belonged to one of the officers from the ground. Officer Shear tried to kick the

flashlight out of appellant's hand. His second kick did so, but the kick also hit appellant in the head. The officers managed to hobble appellant's ankles, and he stopped resisting.

Officer Shear suffered swelling and a bruise under his right eye and abrasions on his left forearm and one knee. Appellant was taken away in an ambulance complaining of back pain. A police investigation was undertaken because force had been used.

2. Defense Evidence

Altus Dangerfield (Dangerfield) was at the gathering on January 10, 2003, at Hamilton's home. When the police arrived, Dangerfield told them to look for the youngsters around the corner with guns, and that the people gathered were just gambling and having fun. When the police got out of the car, everybody began leaving the yard. Dangerfield went across the street, and he saw appellant move toward the front of the house. He then saw appellant turn back toward the back gate. The policeman who was talking to Hamilton, the owner of the house, reached over Hamilton and grabbed appellant. This was the short policeman, Officer Shear. Dangerfield did not see appellant throw his cup at the officer or strike the officer. He heard the officer say, "Stop moving." The officer slammed appellant into the ground and "all hell broke loose." Dangerfield saw that Officer Shear had appellant's arm bent and pushed up towards appellant's neck, and he saw Officer Shear's knee in appellant's back. As appellant was kneeling, he saw Officer Jamison hitting appellant with his knee.

Hamilton had known appellant for perhaps 20 years. When he heard the officers call for backup, he told everyone to leave. He began picking up cups and other trash from around the driveway area as people left. The police let everyone leave, but for some reason they stopped a man named Holden, also called "Gay Gay." Hamilton saw appellant walk towards the front gate, and Hamilton told him he could not get out that way. Appellant walked back toward the other gate. Officer Shear tried to grab Hamilton, and, as appellant passed Officer Shear and Hamilton, Officer Shear tried to grab hold of appellant. Appellant had a cup in his hand, and it went up and spilled all over the officer's uniform. The officer became a little angry and tried to grab appellant. A

"wrestling match" between appellant and the officer ensued. The taller officer (Jamison) had Holden up against the police car and he was handcuffing him. When the commotion began, Officer Jamison pushed Holden in the car and helped Officer Shear. Officers Jamison and Shear got appellant down. Officer Jamison kicked appellant as Officer Shear was getting appellant down to the ground. Both of the officers were on top of appellant, kicking and hitting him. Appellant was yelling that he was not resisting. Hamilton did not see appellant throw any punches at either officer.

Holden testified that he was the one who told the police to please flash the light down where they were gambling. Officer Shear got out of the car and said Holden was a "smart mouth." Officer Shear told him to put his hands on top of his head, and Holden complied. Officer Jamison took Holden to the police car, and as he leaned against the car, Holden turned around and saw Officer Shear grab appellant. Officer Jamison ran back to help Officer Shear, kicked appellant in the head or face, and then went back and put Holden in the police car. He heard appellant say, "'I'm complying. I'm complying. What you doing this for.'"

Appellant testified that when the police pulled up it seemed that they were joking and being friendly at first. Because the civilians began heckling, Officer Shear got mad and jumped out of the car and said he was calling for backup. People started leaving. Appellant went to the front gate because he thought it was an easier way out, but it was locked. He had to go back, and he saw that everyone was gone except Hamilton. Holden was being walked to the police car by Officer Jamison. As appellant walked by Hamilton and Officer Shear, Officer Shear grabbed appellant's shoulder and appellant pulled his arm back. At that point, his drink spilled. Officer Shear said, "mother fucker," and appellant replied, "mother fucker you did it." He and Officer Shear fell toward the ground. Appellant was trying his best to get down on the ground, but the officers kept hitting and kicking him. Appellant screamed, "Help. Help. I'm not resisting. . . ." Appellant was on his back and Officer Shear was on top of him, hitting him. Appellant grabbed Officer Shear's hand to protect himself. Appellant was handcuffed and Officer

Jamison kicked him about three times. Appellant did not see any flashlights on the ground and did not grab one. He never punched Officer Shear.

Appellant was taken to a hospital and then to the police station where photographs were taken of him.

DISCUSSION

I. Independent Review of Police Personnel Files

Appellant filed a *Pitchess* [2] motion regarding Officers Shear and Jamison, and the trial court granted the motion with respect to acts of "aggressive behavior, violence, excessive force, attempted violence or excessive force, fabrication or falsification of charges." The trial court denied as to each officer discovery of incidents of dishonesty, improper tactics, false arrest, illegal search and seizure and generic dishonesty. After an in camera review of the officers' files, the trial court deemed that 11 separate incidents were discoverable. Appellant requests this court to independently examine the transcript of the in camera *Pitchess* hearing to determine if the trial court disclosed all relevant complaints and whether there are other issues relating to this topic that can be raised on appeal.

It is well established that trial courts are granted wide discretion when ruling on motions to discover police officer personnel records. (*People v. Samayoa* (1997) 15 Cal.4th 795, 827; *People v. Memro* (1995) 11 Cal.4th 786, 832.) We have reviewed the transcript of the May 13, 2003, in camera hearing and have determined that it constitutes an adequate record of the trial court's review of the documents provided to the court. We have determined that the trial court did not abuse its discretion by failing to disclose discoverable information from the officers' personnel files. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1230, 1232.)

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[2] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*)

II. Prosecutor's Mention of Gangs

A. Proceedings Below

During direct examination of Officer Shear, the prosecutor asked him to describe the area in which the incident occurred, and the defense objected that this was irrelevant. At side bar, the prosecutor told the trial court that the neighborhood was dangerous and full of gang members, and the testimony would show the jurors that the officers legitimately needed backup and were not merely harassing the individuals. The trial court stated that the police were so outnumbered that it was unnecessary to discuss the neighborhood in order to support their call for backup. The trial court noted that the prosecutor had already mentioned the Crips in opening statement,[3] and therefore the jury knew the type of neighborhood it was. Ultimately, the trial court ruled that the information sought to be elicited was hearsay and prejudicial, and it sustained the objection.

After the trial court ruled that the prosecutor should not ask about gangs, the prosecutor was permitted to pursue the issue of why backup was needed without having Officer Shear talk about gangs. When the prosecutor asked Officer Shear why he thought he needed backup, however, Officer Shear's reply was that he had experience in the area and knew it was claimed by a gang known as Back Street Crips, and the gang members are commonly around. Defense counsel's objection was sustained, Officer Shear's remark about Back Street Crips was stricken, and the jury was told to disregard it. Later, the prosecutor asked Officer Shear what he specifically saw appellant do. Officer Shear said that appellant looked at him and made a "C" sign with his hands. The prosecutor elicited that this was a common sign for Crip gang members. When the prosecutor asked Officer Shear to explain what a Crip gang member was, the trial court sustained the

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[3] The mention of gangs during opening statements occurred when the prosecutor said, "[a]nd you'll hear the officer -- one of the officer's testimony that they heard the defendant saying things such as: This is Crip territory. This is Crips nation. Leave us alone. . . ."

defense objection on the ground that Officer Shear was not qualified to answer. The prosecutor asked several more questions about the sign. Officer Shear then stated that appellant looked at him and said, "'This is Crip hood. Crip nation.'" Officer Shear again referred to appellant's statement during redirect examination and said that appellant's remark that it was a Crip neighborhood was an attempt to show that the Crips ran the neighborhood, not the good citizens living there or the police who are there to maintain order.

During cross-examination of the first defense witness, Dangerfield, the prosecutor asked how long Dangerfield had known appellant and what they did together as close friends. Dangerfield replied, "You know what, tell the straight truth we gang bang together." The prosecutor asked which gang, and Dangerfield said it was Back Street Crips. The prosecutor asked Dangerfield if he was still a gang member and whether he was still considered part of the gang by friends. The prosecutor then asked Dangerfield if the gang engaged in crime and whether he and appellant committed any crimes. The prosecutor asked Dangerfield to relate what kinds of crimes the gang committed, and he did so. She asked about the method of gang initiation and asked if a gang member was not "kind of expected to participate" in criminal activities.

Defense counsel asked for a side bar during which he objected to any further cross-examination with references to gangs. The prosecutor argued that she was exploring the witness's bias. The trial court ruled that it was not necessary to go into gang activity to show the closeness between Dangerfield and appellant. The trial court stated that asking questions about gang activity was prejudicial pursuant to Evidence Code section 352.

In cross-examining appellant, the prosecutor asked him if he was a member of the Crips gang, why Hamilton's home was considered "safe," and what drivebys were. Appellant responded and stated, inter alia, that he was not an active gang member and that he had been jumped in at the age of 12 or 13. The prosecutor doggedly attempted to elicit a description of the kinds of activities appellant participated in when he was

involved in the gang. Appellant dodged the question several times with responses such as, "you know what he [presumably Dangerfield] said," and "what you hear on the news. . . ." The defense objected, and the trial court demanded to know the relevancy of the line of questioning. At side bar, the prosecutor stated that the relevancy was that appellant was trying to avoid the questioning. The trial court stated that the information was prejudicial, and it was irrelevant that appellant was in a gang at age 12. Appellant was not on trial for what he did before. The trial court sustained the defense objection under Evidence Code section 352.

During closing argument, the prosecutor stated, in referring to Dangerfield, "They gang bang together. And I will tell you right now, I will tell you right now that whatever testimony that you have heard about gang membership is not meant to tell you or to lead you to find him guilty based on that. Because this case is not about gangs. The defendant is not charged with gang activity. The defendant is not being accused of engaging in any gang activity. He's not being tried because he's a gang member. By no means should you think that because gang evidence has come in or gang evidence is being mentioned that that's the reason you should convict him. The reason you should convict him is because he's guilty of the crime as charged. Not because he's a gang member. [¶] And the reason you should considerate [sic] gang membership along with Dangerfield is because it goes to Dangerfield's bias, the reason why Dangerfield would come up here and sit in that witness stand, raise his right hand to tell you the truth and lie for his friend. They're in the same gang. . . ."

After trial, defense counsel moved for a new trial based on four areas of prosecutorial misconduct, two of which dealt with the questioning of prosecution and defense witnesses about gangs. After hearing argument from both parties, the trial court stated that it had always considered the gang references irrelevant. The trial court did not believe, however, that "anyone believed that this, in fact, was or had anything to do with gangs." The trial court noted that both attorneys told this to the jury in closing argument, and the trial court believed that "it was abundantly clear to the jury that this was not a

gang case whatsoever," and the trial court did not believe the jury was in any way prejudiced by the gang references.

B. Appellant's Argument

Appellant argues that the prosecutor's repeated references to gangs throughout the trial constituted prosecutorial misconduct and was prejudicial to his case, which rested on his credibility and that of his witnesses. He contends the trial court abused its discretion in denying his new trial motion based on this misconduct.

Appellant asserts that the references to gangs initiated by the prosecutor were not relevant and were more prejudicial than probative. Appellant states that, despite striking gang evidence and recognizing that it was irrelevant and prejudicial, the trial court denied the new trial motion because it apparently believed that the prosecutor's constant references to gangs constituted harmless error and did not influence the jury.

Appellant recognizes that much of the questioning he finds prejudicial was not objected to by the defense. He asserts that the issue was not forfeited for appeal because an admonition would not have cured the harm caused by the prosecutor's conduct, since the jury had heard the prejudicial comments about gangs, and the bell could not be "unrung."

Appellant further maintains that the error cannot be deemed harmless because the trial was a credibility contest between the officers and the defense. He states that some of the officer's testimony was inherently incredible, whereas appellant and his friends told credible and essentially consistent stories.

C. Relevant Authority

"'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.]’” (*People v. Ochoa* (1998) 19 Cal.4th 353, 427.)

With respect to new trial motions, “‘[t]he determination of a motion for a new trial rests so completely within the court’s discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.’” (*People v. Williams* (1988) 45 Cal.3d 1268, 1318.)

D. Waiver; No Prejudicial Prosecutorial Misconduct

We first observe that defense counsel did not object on the ground of prosecutorial misconduct below -- not until the motion for new trial. It is well settled that, in order to preserve on appeal the issue of prosecutorial misconduct, the defendant generally must object at the time the misconduct occurs and request a curative admonition to the jury. (*People v. Avena* (1996) 13 Cal.4th 394, 442.) “The primary purpose of the requirement that a defendant object at trial to argument constituting prosecutorial misconduct is to give the trial court an opportunity, through admonition of the jury, to correct any error and mitigate any prejudice.” (*People v. Williams* (1997) 16 Cal.4th 153, 254.) Subsequent arguments in a new trial motion may not substitute for such timely objection. (*Ibid*.) This requirement is waived only when a prompt admonition would not have cured the harm caused by the misconduct or objection would have been futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Bradford* (1997) 15 Cal.4th 1229, 1333.) We believe that, had the trial court been given the opportunity to admonish the jury to disregard the gang-related evidence, any harm could have been cured. Furthermore, although the prosecutor exploited the gang issue at every opportunity, the length of the questioning on each occasion was determined by defense counsel’s failure to object sooner. Each time the defense objected, the trial court agreed with its position.

Secondly, the trial court did not abuse its discretion in denying the new trial motion based on this aspect of appellant’s prosecutorial misconduct claims. As the trial court stated, it was clear that this was not a gang case. And as we have quoted, *ante*, the prosecutor made it very clear during argument that the jury was not to consider the gang

evidence for any purpose other than bias on the part of Dangerfield. Furthermore, some references to gangs were inevitable, since Officer Shear's testimony that appellant made a "C" sign and said "This is C nation" was not prohibited prior to trial. Later, Dangerfield said, when asked how he knew appellant, that he and appellant "gang bang[ed]" together.

We also note that appellant was obliged to admit to having three prior felony convictions, and the jury was instructed that these might be used in evaluating his credibility. (CALJIC Nos. 2.20, 2.23.) It would be pure speculation to presume that appellant's credibility was damaged by the mention of his gang membership more than by his criminal history.

As stated in *People v. Hardy* (1992) 2 Cal.4th 86, "The trial court necessarily decided that any prosecutorial misconduct did not require a new trial, and that court was in a better position to make that decision. Because the decision was not 'plainly wrong,' we have no occasion to upset it. [Citation.]." (*Id*. at p. 213.) Here, there was no egregious pattern of conduct so as to infect the trial with fundamental unfairness nor use of deceptive methods, and we find no abuse of discretion in the trial court's denial of the new trial motion on the ground discussed.

III. Prosecutor's Comments on Honesty of Officers

A. Appellant's Argument

Appellant contends that a statement that the prosecutor made during oral argument -- regarding a lack of evidence attacking the officers' credibility -- constituted prejudicial prosecutorial misconduct, and the trial court abused its discretion in denying appellant a new trial based on this conduct.

The prosecutor stated during closing argument: "And remember when you're considering what the officer said, you also have to consider that there's been nothing to say that this officer is a lie [sic], he lies, this officer has lied before, he's done this before, he's been known to create these kinds of situations before, he's been known to lie before, or that he's been known to use excessive force before. You have no testimony to that

effect. And if there were such a thing you would -- I could guaranty [sic] you would hear about that. So there's nothing for you to -- there's no reason for you to think that this officer has a tendency to do that."

According to appellant, the prosecutor, in making this statement, gave unsworn testimony about a fact not in evidence; i.e., that the officers had clean records. The prosecutor did so while knowing the officers did not have clean records and that numerous complaints against them had been disclosed in discovery. Thus, the prosecutor knowingly deceived the jury and violated appellant's constitutional right to confront and cross-examine witnesses under the Sixth Amendment and his right to due process. Appellant claims that, had the prosecutor not guaranteed to the jury that the officers had never lied, used excessive force, or created confrontational situations, it is reasonably probable that appellant would not have been convicted of resisting arrest.

Appellant concedes that defense counsel did not immediately object to the misconduct. However, he asserts, a timely objection and admonition would not have cured the harm because the prosecutor was implicitly testifying that she knew there had been no such complaints. Appellant also argues that his counsel was ineffective in failing to make a timely objection to the "vouching" statement.

B. Proceedings Below

After hearing argument from both counsel on this issue at the motion hearing, the trial court noted that both sides had made arguments to the jury in support of the credibility of their witnesses and in detriment to the credibility of the witnesses for the other side. In addition to the prosecutor's remarks, quoted, *ante*, defense counsel had argued that police officers lie many times, engage in "C.Y.A.," and write reports to justify their actions and make themselves look good. Defense counsel also alluded to the Rampart scandal.

The trial court noted that counsel and the trial court had actively tried to address the issue of witness credibility during voir dire to ensure that the jury understood that all witnesses would be judged by the same standard of credibility. The trial court stated that

the statements made by the prosecutor "might have been somewhat improper." However, it did not believe the prosecution harbored ill will in making the statements, and it believed it was professional advocacy as opposed to misconduct or ridicule. The trial court again noted that the defense made allusions to padding reports and lying in reports. The trial court was satisfied that the prosecutor's conduct did not "even come close" to constituting misconduct.

C. Relevant Authority

The case law governing a determination of prosecutorial misconduct was discussed in the previous section. We reiterate that, as a general rule, a defendant may not complain on appeal of prosecutorial misconduct without having made a timely assignment of misconduct on the same ground and without requesting that the jury be admonished to disregard the impropriety. (*People v. Samayoa*, *supra*, 15 Cal.4th 795, 841.) The general rule requiring assignment of misconduct and a request for jury admonishment does not apply if a defendant's objection or request for admonition would have been futile, or would not have cured the harm. (*People v. McDermott* (2002) 28 Cal.4th 946, 1001.) Despite appellant's assertion that this was the case, we disagree. An immediate objection and a subsequent admonition by the trial court that the prosecutor was not implying she had any outside knowledge would have eliminated any harm.

It is also well settled that, to preserve a claim based upon comments made by a prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury understood or applied any of the complained-of comments in an improper way. (*People v. Frye* (1998) 18 Cal.4th 894, 970.) "[W]e 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]" (*Ibid*.)

The prosecutor is given wide latitude to argue broadly the law and facts of a case. (*People v. Lucas* (1995) 12 Cal.4th 415, 473.) The prosecutor may comment on the actual state of the evidence (*People v. Medina* (1995) 11 Cal.4th 694, 755) and may "urge

whatever conclusions he deems proper." (*People v. Lewis* (1990) 50 Cal.3d 262, 283; accord, *People v. Thomas* (1992) 2 Cal.4th 489, 527-528.)

A prosecutor generally may not vouch for the credibility of prosecution witnesses. (*People v. Anderson* (1990) 52 Cal.3d 453, 479.) This occurs "where the prosecutor places the prestige of the government behind a witness through personal assurances of the witness's veracity or suggests that information not presented to the jury supports the witness's testimony. [Citations.]" (*People v. Fierro* (1991) 1 Cal.4th 173, 211.) "However, so long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the 'facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,' [his or] her comments cannot be characterized as improper vouching. [Citations.]" (*People v. Frye*, *supra*, 18 Cal.4th at p. 971; see also *People v. Fauber* (1992) 2 Cal.4th 792, 822; *People v. Medina*, *supra*, 11 Cal.4th at p. 757.) Moreover, a prosecutor may argue matters of common knowledge or illustrations drawn from common experience. (*People v. Williams*, *supra*, 16 Cal.4th at p. 221.)

D. No Prosecutorial Misconduct

Here, the prosecutor did not vouch for the officers' credibility by placing before the jury facts that were outside the record or seemingly known personally to her. Nor did her statement place the government's prestige behind the officers' testimony by giving a personal assurance of their veracity. The prosecutor's use of the word "guarantee" was unfortunate, and she would have been wise to borrow a phrase from defense counsel and say something like " . . . if there were such a thing 'you bet your sweet bippy' you would hear about that." We have no doubt that this would convey the gist of the prosecutor's meaning, and that the jury so construed the remark. The comment constituted fair comment on the evidence, and appellant has not shown there was a reasonable likelihood that the jury construed it in an improper manner. (*People v. Frye*, *supra*, 18 Cal.4th at p. 970.) As noted in *People v. Medina*, *supra*, 11 Cal.4th 694, "[p]rosecutorial assurances, based on the record, regarding the apparent honesty or reliability of prosecution

witnesses, cannot be characterized as improper 'vouching,' which usually involves an attempt to bolster a witness by reference to facts outside the record." (*Id*. at p. 757.) Here, no impermissible vouching occurred.

Moreover, the People were entitled to comment that common sense dictated any proof of the officers' lying and engaging in excessive behavior in the past would have been brought forward. The prosecutor was not referring to facts outside the record, but the converse; i.e., the lack of facts on the record that would allow one to draw this inference. Although the prosecutor was aware of the discovery, it is a fact that no witnesses were presented by the defense regarding the past complaints against Officers Shear and Jamison.

In *People v. Gaines* (1997) 54 Cal.App.4th 821, on which appellant relies, the court held that "a prosecutor commits misconduct when he purports to tell the jury why a defense witness did not testify and what the testimony of that witness would have been." (*Id*. at p. 822.) Clearly, this did not occur in the instant case. The *Gaines* prosecutor's argument was egregious in that it stated that an absent witness would have impeached the defendant's version of events, that the defense had ensured the witness did not appear, and that the People had tried to find the witness when it was clear the defense would not call him as an alibi witness. (*Ibid*.) In fact, *Gaines* offers direct support of the prosecutor's comments in the instant case, stating that "'a prosecutor may argue to a jury that a defendant has not brought forth evidence to corroborate an essential part of his defensive story[.]'" (*Id*. at p. 825.)

Under the totality of the circumstances of the instant case, we conclude the prosecutor was not guilty of misconduct. Furthermore, the jury was instructed with CALJIC No. 2.20 that they were "the sole judges of the believability of a witness and the weight to be given the testimony of each witness." As the trial court noted, the issue of police credibility versus the credibility of the defense was thoroughly explored during voir dire. It is not reasonably probable the jury was misled by the prosecutor's remark, and appellant suffered no prejudice. (*People v. Medina*, *supra*, 11 Cal.4th at p. 757.)

Given this conclusion, appellant's claim of ineffective assistance of counsel must also fail.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

ASHMANN-GERST

We concur:

_____, Acting P. J.

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_____, J.

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