People v. Schockner

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Appellant, Manfred Schockner appeals his murder conviction resulting in a life sentence without the possibility of parole. Before this court appellant complains the trial court erred in (a) denying a motion to suppress evidence collected by the police while executing a search warrant and (b) in sustaining certain hearsay objections. He also claims the prosecutor engaged in misconduct by eliciting overly prejudicial evidence from a prosecution witnesses and by misstating evidence during the closing argument. As explained below, we conclude that the trial court properly denied the motion to suppress evidence and did not abuse its discretion in ruling on the hearsay objections. In addition, appellant has failed to demonstrate that the prosecutor engaged in prejudicial misconduct. Accordingly, we affirm appellant's conviction.

FACTUAL & PROCEDURAL HISTORY

I. The Crimes[1]

In the fall of 2004, the victim Lynn Schockner and her husband appellant Manfred Schockner were in the process of getting a divorce. At the time Mrs. Schockner lived in the family home in Long Beach with the couple's 11-year-old son. Appellant lived elsewhere.

At about 11 in the morning on November 8, 2004, police were dispatched to the residence to check on a possible burglary based on a neighbor's report that he had observed a suspicious person, later identified as Harvey, in the alley near the rear of the residence. When the police arrived they formed a perimeter around the residence. Mrs. Schockner was the only one at home at the time and when she saw the police at the window of her home, they directed her to come outside to speak with them. The officers told Mrs. Schockner about the neighbor's report and she responded that everything was fine. The officers told her they wanted to check her backyard, but the gate was locked. Mrs. Schockner stated she would retrieve the key for the gate and went back inside the house. The officers went to the side gate and waited for her.

When the officers realized Mrs. Schockner had been gone for awhile they decided to look for her.

One of the officers yelled to her and another proceeded towards the backyard. The officer near the backyard saw Harvey jumping over the fence from the backyard into the alley. Harvey attempted to hide himself in an alcove and after repeated orders to come out, Harvey eventually complied. According to the officers, Harvey's demeanor was very calm and compliant. When the officers searched Harvey they found he had a black beanie containing items of jewelry, a cell phone, a stun gun, latex gloves with fresh blood on them and a dagger-style knife.

Officers became concerned about Mrs. Schockner and returned to the house. They entered and found two of the bedrooms had been ransacked, with drawers pulled out and items tossed upon the floor. Costume jewelry and other trinkets were on the floor near the walk-in closet in the master bedroom. Police found blood on the master bedroom light switch, the carpet, the dresser, on the bedroom door leading to the backyard and on the sliding glass door leading to a back patio area. When officers went outside, they found Mrs. Schockner dead, lying in a pool of blood in the patio area.

II. Telephone Records Implicating Jaramillo and Schockner

Harvey was arrested and transported to the police station. At the police station, on the same day (November 8), Harvey was advised of his Miranda rights. He waived his rights and agreed to speak with the police detectives. He stated he had gone to the residence to commit a burglary when Mrs. Schockner discovered him in the backyard. He told officers that he accidentally stabbed her in the neck while tackling her to the ground. He told officers that he then went inside the house and took a few items before he left. Harvey was interviewed again the next day and told the officers the same information.

Thereafter, on November 10, 2004, the police searched Harvey's car. In his car the police found, among other things, a business card for appellant with the address of the Long Beach residence written on the back. The police obtained the cell telephone records of Harvey as well as appellant and a third person, Frank Jaramillo. The records showed a pattern of calls (at least 118) among the three men in the months and days leading up to the crimes. The police believe that based on the times of the calls and call patterns on November 8, 2004, that Mr. Jaramillo was some kind of a "go-between" for Harvey and appellant.

After receiving this information, detectives interviewed Harvey again on November 10 and presented the evidence of the telephone calls. During this interview, Harvey admitted that he had been hired by Frank Jaramillo, at the direction of appellant to kill Mrs. Schockner and to stage the murder to look like a burglary. He said that he had been paid $2,500 up front and was promised $2,500 when the job was finished. Harvey was given the address of the home and a description of the layout of the house. He was told where to locate Mrs. Schockner's jewelry, the home's alarm code and a copy of Mrs. Schockner's schedule. He told the police that he travelled to Long Beach to conduct surveillance on the house several times and that a week before he bought a dagger and a stun gun. He also stated that he had paid a friend to drive him to the location. Nonetheless, Harvey maintained that he did not

intend to kill Mrs. Schockner. He said that after entering the backyard he became very frightened and sat near the door contemplating whether he could go through with it. He told police that he considered not going through with it and thought about calling Jaramillo and offering to pay back the $2,500 advance. He said that he was about to abandon the job when Mrs. Schockner found him in the backyard and confronted him. He told the detectives that he did not plan on attacking or killing her, but the family dog began barking and Mrs. Schockner screamed so he grabbed her and tackled her to the ground and they began to struggle. He said that he felt the dagger hit her neck and she started bleeding. Harvey said after he stabbed her he decided to complete the burglary because he was afraid of appellant.

III. Bank Records Connecting Appellant to Jaramillo

Timmi McShane, an investigator with Washington Mutual Bank, reviewed bank records of appellant and Jaramillo and their relatives. Jaramillo's account showed two separate deposits of $25,000 on October 14 and 26, 2004. The source of both deposits were checks drawn from a Wachovia Securities bank account in the names of appellant and his wife.

IV. The Wiretap Setup

The suspicions that Jaramillo was involved in the conspiracy were confirmed after an operation performed by undercover police feigning to be relatives of Harvey. Officer Nelson pretended to be a relative of Harvey's and met up with Jaramillo. Officer Nelson set up a meeting with Jaramillo during which Jaramillo gave Officer Nelson $1,500, which was a portion of the remaining $2,500 promised to Harvey for successfully murdering Mrs. Schockner. Officer Nelson maintained contact with Jaramillo and he received the remaining $1,000. Officer Nelson asked Jaramillo to call him the next day. They continued having discussions until Jaramillo was arrested.

Long Beach Police Department then prepared an order for wiretap on appellant's cellular phone, appellant's home phone and Jaramillo's cellular phone. No one other than appellant and Jaramillo used their cellular phones during the wiretap period.

In one wiretapped telephone call, appellant spoke with Jaramillo. During the conversation Jaramillo complained that the police were looking into him but not into appellant for doing something for the appellant and not for his own benefit. Appellant did not deny that the act was committed for his benefit. Later, in a conversation on that same day, appellant and Jaramillo agreed to meet at a restaurant.

Under the direction of Long Beach Police Department, a jacket camera was placed on Jaramillo and he was briefed on what he might say and how he might further the conversation. Police officers then escorted Jaramillo to a Chinese restaurant in Long Beach while many officers, including Officer Michael Dugan, stood watch in the restaurant.

Appellant and Jaramillo's conversation lasted for about 20 minutes. Appellant then started writing a note, which he showed to Jaramillo. Appellant made several notes during the conversation, which he held up to show Jaramillo.

Throughout the conversation, on multiple occasions, Jaramillo said, "we [Harvey and Jaramillo] would not be in this position if it weren't for you [appellant]" or Mrs. Schockner. Appellant responded that he would not leave Jaramillo and Harvey, "high and dry" and he did not get angry with Jaramillo for the accusations. At one point, appellant assured Jaramillo that, "There's nothing that's going to happen if we both maintain our cool."

Later in the conversation, Jaramillo again complained that appellant was responsible for Harvey's and Jaramillo's predicament. Jaramillo said, "I'm scared Fred. I understand you're scared, too. You have to understand that we would not be in this position if it wasn't for Lynn [Mrs. Schockner.]" Appellant responded by saying, "That's true. And if had not been sloppy on Nick's part." Still later in the conversation, Jaramillo said, "So what do we have to do to quiet him? What do I got to do to make sure he stays quiet with his family." Appellant replied, "Give him money."

Appellant conceded that it was all three of the men's problem and not merely Jaramillo's problem. Shortly after, Jaramillo became upset with appellant stating, "Oh really? I did not want fuckin' Lynn dead. You fuckin' did." In response, appellant asked, "Didn't I put cash in your pocket?"

V. Search Warrant

The next morning, appellant was arrested for the murder. On December 3, 2004, appellant's home was searched pursuant to a search warrant, which was accompanied by an affidavit. The affidavit described details dealing with the conspiracy scheme that Long Beach Police Officers had probable cause to believe developed between Nicholas Harvey, Frank Jaramillo and appellant. The search warrant authorized officers to search for: (1) "articles of personal property tending to establish the identity of the person in control of the premises, vehicles, and areas being searched;" (2) "Letters or correspondences between Frank Jaramillo, Neil Ican, Nicholas Harvey and Ronald Schockner, and/or any other persons identified during this investigation as having been contacted by Frank Schockner;" (3) "Banking records, accounts and bank statements and cancelled checks of the receipt and disbursement of money to Frank Jaramillo from Manfred Schockner and/or Lynn Schockner."

In his search, Officer Dugan located a crumpled paper with the words "Sloppy Nick" in the kitchen trash can. In the bedroom belonging to appellant, police officers found a briefcase, which contained a cancelled check from appellant to Jaramillo. At trial, Long Beach Police Detective Robbins testified that the briefcase also contained: appellant's social security card, commercial pornographic photos, nude photographs of appellant and Mrs. Schockner, family photographs, old letters between appellant and Mrs. Schockner, a prenuptial agreement between appellant and his wife, as well as additional checks between appellant and Jaramillo and receipts from Washington Mutual between

appellant and Jaramillo. The checks included: (1) a Bank of America check for $2,500, dated February 2003, from appellant to Jaramillo; (2) a Bank of America check for $2,000, dated May 12, 2004, from appellant to Jaramillo; and (3) a Bank of America check for $2,500, dated August 31, 2004, from appellant to Jaramillo. The bank receipts included: (1) an October 26, 2004, receipt for $25,000 for Washington Mutual Bank; and (2) an October 12, 2004, receipt for $25,000 for Washington Mutual Bank.

VI. Trial

A. Motion to Quash Search Warrant

On April 17, 2007, appellant moved to quash the December 1, 2004, warrant to search appellant's home on the grounds that there was insufficient probable cause. In an addendum filed on August 27, 2007, appellant argued that the warrant did not meet the requirement of reasonable particularity as to the description of the items to be seized and the area to be searched. Appellant's counsel referred the court to the statement authorizing police officers to search for, "letters correspondences between any other person identified during this investigation as having been contacted by the defendant, Mr. Schockner." Appellant's counsel further argued that the officers had no right to go through the wastebasket and find the "sloppy Nick" note.

The court denied the motion to quash, finding the declarations, the warrant and the accompanying affidavit met the reasonable particularity standard.

B. Alleged Prosecutorial Misconduct

1. Testimony of Detective Robbins

At trial, appellant's counsel requested a sidebar to discuss the prosecutor's use of the commercial and noncommercial pornographic material found in the appellant's briefcase. During the discussion that followed, the court stated: "I'm assuming we're not going to get into those items or in any way show this to the jury." The prosecutor responded, "I'm not going to hold that porn in front of the jury." To confirm, the trial judge reiterated, "And there is going to be no showing of any pictures to the jury. . . . And that is clear. I want to make sure that is clear." Detective Robbins was present during this sidebar discussion and the court confirmed that Detective Robbins understood its instructions.

In the presence of the jury, Detective Robbins testified that he found both commercial and noncommercial photographs in the briefcase. The prosecutor then asked, "The photographs that - they are photographs that are pornographic; is that correct?" The detective answered affirmatively and no objection was offered by defense counsel. The prosecutor then asked, "And when you say pornographic, do you mean like general . . . ." The trial judge then sustained defense counsel's objection. Then the prosecutor asked the officer: "You said they were commercial and

noncommercial. Who were the pictures of?" The court sustained its own objection.

The prosecutor requested a bench conference at which she explained that she was trying to demonstrate that the briefcase contained:

"things most important to him. . . . It was his place where he kept the things he didn't want floating around the rest of the house and that is significant. I'm not going to show the pictures, I'm not going to ask the graphic details. If the court wants me just to ask if there were pictures that were not clothed, I can do it, however the court wants me to couch it. But it is important for the jury to understand the significance of the briefcase."

The court ruled, "[w]e're not going into the photographs." Appellant's counsel then stated he wished to ask the detective whether the photographs were of appellant and his wife. The prosecutor explained that was the question she wanted to ask and appellant's counsel stated that he had no objection to that, but to the whole course of conduct. The court permitted the limited question.

In front of the jury, the prosecutor asked Detective Robbins, "Without going into any details, where there photographs of the defendant with Lynn Schockner without wearing clothes. The detective testified, "Yes."

2. Closing Argument

During his closing argument, the prosecutor referred to the videotaped conversation in the restaurant between Jaramillo and appellant noting, "a big recurring theme throughout the conversation" is keeping Harvey quiet. During the conversation, as the prosecutor noted, "Look, the phone - the two phones calls I got were for money."

After the prosecutor completed her argument, appellant's counsel requested a bench conference and argued that the prosecutor's argument was misleading because the police, and not Harvey, had requested more money. The court overruled the objection.

C. Hearsay Objections Sustained

On a number of occasions, the court sustained the prosecutor's objections when defense counsel questioned Jaramillo.

During the cross-examination of prosecution witness Detective Nelson, appellant's counsel asked, "And weren't you told that - didn't - weren't you aware that Mr. Jaramillo had been telling everybody that he had a business through his father in Cuba?" The prosecutor's objection was sustained.

Later, appellant's counsel asked appellant about a $25,000 check he gave to Jaramillo in February of

2004. He asked, "Did Jaramillo tell you why he wanted the money?" Appellant answered, "Yes." Appellant's counsel then asked, "And what did he tell you?" Again, the court sustained the prosecutor's objection on hearsay grounds. The court did allow appellant to testify that he thought he contributed the money to Jaramillo's import/export business and that he expected that Jaramillo would eventually give him a position in the company and a percentage of ownership shares.

VII. Conviction and Appeal

Following the trial, the jury found appellant guilty of first degree murder and found the special circumstance of murder for financial gain to be true. Appellant was sentenced to a state prison term of life without the possibility of parole. Subsequently, appellant filed a timely notice of appeal.

DISCUSSION

Before this court, appellant complains the trial court erred in (a) denying a motion to suppress evidence collected by the police while executing a search warrant and (b) in sustaining certain hearsay objections. He also claims the prosecutor engaged in misconduct by eliciting overly prejudicial evidence from a prosecution witness and by misstating evidence during the closing argument. We address these contentions in turn.

I. Motion to Suppress Items Seized by the Police

Appellant alleges that the government violated his Fourth Amendment right to be free from searches authorized by an unconstitutionally general warrant. We disagree.

On appeal, from a trial court's ruling on a motion to suppress, deference is given to the trial court where supported by substantial evidence. (People v. Kraft (2000) 23 Cal.4th 978, 1036.) When reviewing for substantial evidence, "our task . . . is twofold. First we must resolve the issue in the light of the whole record - i.e., the entire picture of the defendant put before the jury - and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements . . . is substantial; it is not enough for the respondent simply to point to 'some' evidence supporting the finding, for 'Not every surface conflict of evidence remains substantial in the light of other facts.'" (People v. Bassett (1968) 69 Cal.2d 122, 138; original italics, fn. omitted.)

The Fourth Amendment provides that: "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (U.S. Const., amend. 4.) Under California case law, courts have acknowledged that the requirement of particularity, "is a flexible concept, reflecting the degree of detail known by the affiant and presented to the magistrate." (People v. Smith (1986) 180 Cal.App.3d 72, 89.) Moreover, the California Supreme Court has recognized that in complex cases a more generalized warrant is

appropriate: "in a complex case resting on the piecing together of 'many bits of evidence,' the warrant properly may be more generalized than in a simpler investigation resting on more direct evidence." (People v. Kraft, supra, 23 Cal.4th at p. 1041.)

In the present case, law enforcement was investigating a murder-for-hire scheme. Appellant, and his co-conspirator Jaramillo, went to great lengths to avoid detection. The police officers tasked with searching for evidence of the crime discovered that most of the evidence of the murder scheme was contained in various documents, including checks and letters. In looking at the inventory of items seized from appellant's home, it appears that the police officers seized mostly checks, checkbooks and receipts related to transactions between appellant and Jaramillo.

Appellant's comparison of this case to Burrows v. Superior Court (1974) 13 Cal.4th 238 is misguided. In Burrows, a magistrate authorized the search of a residence for documents dealing with a list of persons. (Id. at p. 241.) While Burrows is similar in its factual basis, the resulting inventory from the search is completely distinct. Officers in Burrows seized documents unrelated to the people and transactions described in the warrant. (Ibid.)

Appellant's contention that the note reading, "Sloppy Nick" that police officers found in a kitchen wastebasket was outside the warrant's scope lacks merit. The search warrant instructed police officers searching the premises to look for any correspondences between appellant, Frank Jaramillo and Nick Harvey. Moreover, appellant had written many notes during his videotaped conversation with Jaramillo and had referred to Nick as "sloppy." Long Beach police officer Michael Dugan was present at the restaurant and witnessed appellant during the conversation. The police connected this note to the crime based on appellant's characterization of Harvey as "sloppy" during the meeting with Jaramillo which occurred days before the search warrant's execution. Therefore, in view of the foregoing, appellant has failed to demonstrate error, we conclude the warrant was sufficiently particularized in the items the officers had authority to seize.

In any event, appellant has not demonstrated that any error with respect to admission of this evidence was prejudicial. (Chapman v. California (1967) 386 U.S. 18, 24 [reversal required unless error is found to be harmless beyond a reasonable doubt]; People v. Watson (1956) 46 Cal. 2d 818, 836-837 [holding that it did not appear reasonably probable that the jury was prejudicially influenced by the evidence admitted in error, and that the admission did not result in a miscarriage of justice].)

The evidence demonstrating appellant's guilt was overwhelming. Police officers found evidence among Harvey's belongings directly connecting Harvey to appellant; Harvey had a business card containing appellant's name and the address of the Schockner home. Later Harvey implicated Jaramillo, who, in turn, implicated Schockner. Cellular telephone records showed over one hundred phone calls between Jaramillo and Schockner. Furthermore, the records indicated that on the day of Mrs. Schockner's murder there were several calls from Harvey to Jaramillo to Schockner, followed shortly by calls back from Schockner to Jaramillo to Harvey. Appellant gave Jaramillo $50,000 shortly

before Mrs. Schockner was murdered. He had also written two checks to Jaramillo in the amount of $2,500--the same amount that Jaramillo gave Harvey before Mrs. Schockner's murder and the amount Jaramillo promised to Harvey's family after the murder took place.

Additionally, appellant had a motive for the murder. He and Mrs. Schockner were in the middle of contentious legal separation proceedings. The couple had a large estate and while Mrs. Schockner obtained counsel to pursue the separation, appellant had not.

Furthermore, appellant made a number of incriminating statements indicating his involvement in the scheme to Jaramillo during the meeting at a Long Beach restaurant. During that conversation recorded on videotape, appellant agreed that they would not be "in this position if it wasn't for Lynn and if Nick hadn't been so sloppy." Appellant agreed that Harvey was in jail because of him. These oral admissions left little doubt that appellant was involved in Mrs. Schockner's murder.

In sum, in view of the evidence, appellant cannot demonstrate prejudicial error under either the state or federal standard of prejudicial error.

II. Rulings on Hearsay Evidence

Appellant contends that he was prejudiced by several erroneously sustained hearsay objections. Appellant further claims that the excluded testimony was necessary to provide an innocent explanation for his payments of large sums of money to Jaramillo. We find no prejudicial error.

The trial court is given wide discretion in ruling on the admission of evidence, and we do not find any abuse of discretion in its handling of the hearsay objections. Additionally, we hold even if these objections were in error that they were harmless error under both the Chapman and Watson standards. (Chapman, supra, 386 U.S. at p. 24; Watson, supra, 46 Cal.2d at p. 829.)

A. Standard of Review

A trial court's findings on whether evidence is or is not hearsay are reviewed under an abuse of discretion standard. (People v. Martinez (2000) 22 Cal.4th 106, 121.) The abuse of discretion standard requires reversal only "upon a clear showing of abuse," or "[where] the trial court exceeded the bounds of reason." (Miyamoto v. Dept. of Motor Vehicles (2009) 176 Cal.App.4th 1210, 1217-1218 citing Blank v. Kirwan (1985) 39 Cal.3d 311, 331.)

B. Questioned Objections

Appellant identifies three mains objections as having been erroneously sustained. First, appellant argues that during the cross-examination of Detective Nelson, defense counsel asked if the officer was aware that Mr. Jaramillo had been telling people that he and his father had a business in Cuba.

The prosecutor objected on hearsay grounds and the court sustained the objection. Appellant contends that the information regarding Mr. Jaramillo and his father's business was not offered for the truth of the matter, but instead to show it was reasonable that appellant relied on this information in giving Jaramillo a large amount of money. While that is certainly one interpretation of this evidence, this statement could also have reasonably been interpreted as offered for the truth of the matter. As a consequence, in view of the standard of review, this court does not find an abuse of discretion by the trial court in concluding the statements may have been offered for a hearsay purpose.

Appellant also identifies a second erroneous hearsay objection during his own testimony. Appellant's counsel asked him "Did [Jaramillo] tell you why he wanted the money?" Appellant answered "Yes." Then counseled asked "And what did he tell you?" To which the prosecutor objected on hearsay ground and the court sustained the objection. This statement would have required appellant to testify to an out-of-court statement by Jaramillo. Appellant argues that this testimony was offered for the purpose of establishing knowledge, however, the questioned merely asked what Jaramillo had told appellant and could reasonably have been interpreted as inadmissible hearsay. Again, given the deference given to the trial court, we do not find abuse.

Finally, appellant raises a similar complaint concerning the testimony of defense witness Sarmiento. Sarmiento was called to testify to information concerning Mr. Jaramillo, and Jaramillo's father's business. At the trial, the court required appellant to call Sarmiento after appellant's testimony for relevance concerns and instructed appellant that his testimony would be "very limited." Additionally, counsel was instructed he would have to prepare a limiting instruction stating that Sarmiento's testimony was not for the truth of the matter stated. The trial court has discretion in what information may be presented to the jury and in determining limiting instructions related to that evidence. (Martinez, supra, 22 Cal. 4th at p. 120.) Sarmiento's testimony concerning what Mr. Jaramillo's father said concerning his export/import business was admitted over a hearsay objection and was given proper limiting instructions. There is nothing to indicate any abuse of discretion by the court in the decision concerning this evidence

Finally, even were we to find error in the trial court's rulings with respect to the hearsay evidence, we would nonetheless conclude the errors were harmless. Based on the overwhelming evidence against appellant described elsewhere here, there is no possibility that these rulings resulted in prejudice under the state or federal law standards for such error.

III. Prosecutorial Misconduct

Appellant also argues that the prosecutor committed misconduct: (1) by asking questions of a police detective that elicited overly prejudicial testimony evidence; and (2) during closing argument when the prosecutor made reference to appellant's admissions during the videotaped conversation. Appellant claims that these comments were so egregious that they constitute reversible error. We

disagree.

"A prosecutor's rude and 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." (Darden v. Wainwright (1986) 477 U.S. 168, 181; People v. Gionis (1995) 9 Cal.4th 1196, 1214-1215; citations omitted.) Where the conduct does not render a criminal trial, "fundamentally unfair," it may nonetheless amount to misconduct under state law if it involves, "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (Ibid.) Moreover, a prosecutor has a duty to guard against statements by his witnesses containing inadmissible evidence. (People v. Warren (1988) 45 Cal.3d 471, 481-482.)

Generally, however, to preserve a claim for review on appeal, a defendant must make a timely objection and, unless an admonition would not have cured the harm, ask the trial court to admonish the jury to disregard the prosecutor's improper remarks or conduct. (People v. Tafoya (2007) 42 Cal.4th 147, 176.) Nonetheless, "the failure to request that the jury be admonished does not forfeit the issue for appeal if an admonition would not have cured the harm caused by the conduct." (People v. Cole (2004) 33 Cal.4th 1158, 1201.) Moreover, if the defendant objected, or if we find an admonition would not have been effective, we look to see whether the improper conduct was prejudicial, i.e., whether it is reasonably probable a jury would have reached a more favorable result absent the objectionable conduct. (People v. Herring (1993) 20 Cal.App.4th 1066, 1074.)

A. Questioning Concerning the Photographs in Appellant's Briefcase

In the instant case, outside the presence of the jury, the parties and the court discussed the contents of appellant's briefcase, namely, the nude photographs of appellant and Mrs. Schockner. The trial judge ordered that the prosecutor would not show the pictures to the jury. The prosecutor replied that she would not, "hold that porn in front of the jury." However, there was no explicit instruction to refrain from eliciting all testimony from Detective Robbins on the subject of the pictures. At this, defense counsel did not object. Thereafter, during the examination of Detective Robbins, when the prosecutor continued to inquire further into the nature of the "pornographic" photographs, the trial judge sustained defense counsel's objection. However, defense counsel did not request an admonition on the issue.

Preliminarily, appellant did not timely object to the initial offending question and did not request a curative admonition. Appellant has also not shown that an objection and admonition would have been futile or failed to cure any potential prejudice. Thus, we find appellant forfeited any contention on appeal that the prosecutor committed misconduct in eliciting testimony regarding the photographs. (People v. Cole, supra, 33 Cal.4th at pp. 1201-1202.)

In any event, the prosecutor did not use any reprehensible or deceptive tactics - it does not appear based on our review of the transcript that the prosecutor blatantly disregarded the trial judge's

instruction. Instead, it appears the prosecutor may have been mistaken or confused about the scope of the permissible inquiry about the photographs. The prosecutor assured both defense counsel and the trial judge that she would not, "hold that porn in front of the jury." The trial judge reiterated that the prosecutor was not permitted to show the photographs to the jury. In the context of the discussion about the photographs it therefore appears that the only thing the prosecutor thought she could not do was actually show the photographs--it does not appear that the court clearly precluded all inquiry into the photographs. Consequently, we find at the outset the prosecutor did not intentionally commit misconduct; she tailored her questions according to the instructions given by the trial judge--she did not show the pictures to the jury. In our view, under the circumstances this situation does not rise to the level of prosecutorial misconduct.

B. Comments During Closing Argument

In considering the prosecutor's statements made during closing arguments, we review the prosecutor's remarks to determine whether there is a reasonable likelihood that the jury misconstrued or misapplied them. (People v. Clair (1992) 2 Cal.4th 629, 611.) Appellant argues that the prosecutor committed misconduct by referring to appellant's statements regarding phone calls he had received from police investigators posing as Harvey's family members. Simply put, we hold that the trial judge was correct in overruling defendant's objection based on the fact that the jury might misconstrue that the calls appellant had received were not from Harvey's family, but from police investigators posing as Harvey's family members. Over the course of several days of the trial, the jury heard testimony regarding the course of events leading up to appellant's arrest. The jury heard of the tactics used by the Long Beach Police Department. Where a jury has heard ample evidence to put the prosecutor's statements during closing argument into context, we do not find any error. It is the task of every juror to weigh the evidence in its totality, and in turn, to make his or her determination. Appellant has not demonstrated that there was any likelihood that the jury misconstrued or misapplied the prosecutor's remarks.

IV. Cumulative Error

Appellant contends while the errors he asserts are individually sufficient to warrant reversal, taken together they violate appellant's state and federal constitutional rights to due process and a fair trial. We disagree. As discussed elsewhere here, we find no prejudicial error individually on these claims. Thus his claim of cumulative error necessarily fails as well. (People v. Avila (2006) 38 Cal.4th 491, 608.)

DISPOSITION

The judgment is affirmed.

We concur: ZELON, J., JACKSON, J.

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1. The following section of background facts describing the crime have been taken directly from this court's prior opinion in People v. Harvey (B198422).