Filed 8/17/07 P. v. Strier CA2/5

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>WILLIAM STRIER,<br><br>Defendant and Appellant. | B190007<br><br>(Los Angeles County<br>Super. Ct. No. LA044334) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Rand Rubin, Judge. Modified with instructions and affirmed.

Mike R. Horowitz for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General of the State of California, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted appellant William Strier of the attempted willful, deliberate and premeditated murder of Gerald Curry in violation of Penal Code[1] sections 664 and 187(a) and found true allegations that appellant discharged a firearm within the meaning of section 12022.53, subdivisions (b) through (d), and that he personally inflicted great bodily injury under section 120227(a). Appellant was acquitted of making criminal threats against Evelyn Murphy in violation of section 422.

Facts

Appellant first shot at Curry with a two shot "under-over" revolver, then shot all five shots in a five-shot revolver. His defense was that he lacked the specific intent required for attempted murder because a combination of drugs and alcohol had left him with no memory of the shooting and interfered with his ability to exercise judgment concerning his actions.

This is the background: Appellant and Curry had never met before the shooting, but appellant knew that Curry was a lawyer and that he represented Evelyn Murphy, the trustee of a special needs trust which was established for appellant with the proceeds of litigation after he was injured in a 1999 automobile accident. Appellant also knew that Murphy's petition for discharge as trustee was to be heard that morning in the Van Nuys courthouse and that fees might be awarded. He was dissatisfied with Murphy and wanted her to be removed and replaced with his sister, Ethel Celnik. However, he contested the amount of fees that Murphy and Curry had requested for their services and had refused to agree not to sue Murphy.

At the hearing, the judge granted Murphy's petition for removal as trustee, approved Murphy's actions taken during her tenure as trustee, and awarded Curry and Murphy fees to be paid from the trust. The hearing ended just before 10:00 a.m. Appellant testified that he witnessed the end of the hearing from the back of the

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

courtroom. Curry, Murphy and Celnik, who attended the hearing, were questioned on this point and testified that appellant was not present.

Before discharging the two weapons, appellant approached Curry and asked, "Are you Mr. Curry?" Curry responded, "Yes. Who are you?" Appellant then opened fire. Curry dropped to the ground, crawled away, and positioned himself behind a tree. Appellant pursued Curry and persisted in firing until he ran out of ammunition.

In support of his defense, appellant testified that on the morning of the shooting, he took pain medication as well as a diet pill and drank alcohol; Celnik testified that she saw her brother take pain pills. Appellant presented expert testimony that a combination of drugs and alcohol made him unable to exercise judgment concerning his actions and impaired his memory of shooting Curry.

Appellant also testified that at the time of the shooting he was living with his sister, who did not want guns in the house. That morning, he put the two firearms used to shoot Curry in the trunk of his car, intending to go to the trust hearing, then to deposit the two firearms in storage. On arriving at the courthouse, he filed papers pertaining to a different lawsuit. He then went to the trust hearing. He saw the judge throw aside his opposition papers and heard him tell Celnik that he did not accept them. Appellant testified that he left the courtroom to lie down in his car and that he had no memory of anything between the time he got into his car and the time he found himself in jail.

Daniel Diaz, a video camera operator, was at the courthouse that day to cover the Robert Blake murder trial. He recorded video footage of appellant shooting Curry. The footage was shown to the jury and entered into evidence. At trial, Diaz testified that he saw appellant place the firearms in his pockets while walking away from the scene and heard him say, "He got what he deserved for taking my money."

A sheriff's deputy, informed by Diaz of the shooter's identity, subsequently apprehended appellant. Police officers recovered various items at the scene, including two firearms, seven bullet casings, and a cell phone in a black leather bag which belonged to appellant.

## Discussion

1. The admission of the cell phone

Appellant contends that the judgment must be reversed because information in his cell phone was erroneously admitted into evidence, in violation of the hearsay rule. We find that there was no hearsay and that the trial court thus properly overruled the hearsay objection.

*Facts*

Appellant shot Curry just after 10:00 a.m. For the prosecution, Detective Luis Alarcon, who confiscated appellant's cell phone, testified that he had the same phone and knew how to operate it. He then testified that after confiscating the cell phone from appellant, he turned it on and searched the "call log" to determine if appellant had made or received any calls that morning. The call log indicated that at 9:57 a.m. appellant "received," as opposed to "missed," a call, later shown to be from a pay phone outside the courtroom where the trust hearing was held. The prosecutor instructed Alarcon to turn on the cell phone display and publish to the jury the phone number, call date and time from the phone log of "received" calls.[2] On cross-examination, Alarcon acknowledged that he was not a representative of the cell phone company and that he did not "know everything about that phone."

Celnik, who testified for the defense, also testified about the phone call. Her testimony was that after the trust hearing, she placed a call to her brother from a pay phone in the hallway outside the courtroom to find out why he was absent. Celnik testified that the call never connected and she did not speak to him.

On cross-examination, the prosecutor asked her if she spoke with appellant after the trust hearing to notify him of the fee awards and to alert him as to Curry's appearance.

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[2] After testimony concluded, appellant objected to the admission of the cell phone into evidence and argued that it contained irrelevant information that was not shown to the jury during trial. The court agreed and decided that, in the event that the jury asked to hear information concerning the cell phone evidence, it could be read back from the record.

She again testified that she tried to contact appellant but that he did not answer his phone, and that no conversation took place. Appellant similarly testified that he did not answer his phone.

The defense also presented evidence showing that appellant's cell phone "received" a call from Celnik's cell phone at 11:07 a.m. on October 31, 2003, at which time he was already in custody.

*Discussion*

Appellant contends that the court erred in admitting some of the evidence obtained from his cell phone, specifically, the evidence concerning the time of the call and the evidence that the call was answered. We see no error.

Pursuant to *People v. Fields* (1998) 61 Cal.App.4th 1063, a telephone number stored in an electronic device's memory of incoming calls is admissible evidence that a call was made from that number to the device and does not constitute hearsay. (*Fields, supra*, 61 Cal.App.4th at pp. 1067-1068.) Consequently, the presence of the telephone number of the pay phone outside the trust hearing courtroom in the call log of appellant's cell phone is not hearsay. It is admissible evidence that a call was placed from the pay phone to appellant's cell phone.

Nor do we find hearsay in the other information admitted into evidence. The call time and the log entry that the call was received are not "statements" under the Evidence Code.

*People v. Hawkins* (2002) 98 Cal.App.4th 1428 considered a similar issue. There, the hearsay objection was to a computer printout showing the time certain computer files were last accessed. (*People v. Hawkins, supra*, 98 Cal.App.4th 1428, 1446.) In its analysis, the Court cited the cases which hold that a computer printout can be admissible as a business record, but noted that the cases did not draw a distinction between those printouts which reflected information entered by human operators, and those which reflected information the computer generated on its own, such as a record of its internal operations. (*Id*. at p. 1449.) The Court found that the second category of printout is not hearsay, citing Evidence Code section 1200, subdivision (a), which defines "hearsay

evidence" as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated;" Evidence Code section 225, which defines "statement" as "(a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression;" and Evidence Code section 175, which defines person to include "a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company or public entity." *Hawkins* concluded that, "The Evidence Code does not contemplate that a machine can make a statement." (*Hawkins*, 98 Cal.App.4th at p. 1449.)

*Hawkins* went on to note that the evidentiary issues concerning this machine-generated evidence are foundational, and that the test of admissibility is whether the machine was operating properly at the time of the reading, and that the mechanical recordings of information are subject to impeachment through evidence of machine imperfections or by cross-examination of the expert who explained or interpreted the information in the device. (*Id*. at pp. 1449-1450.)

We agree with the *Hawkins* court. The phone call log and time indication were not statements input by a person, but were generated by the machine. "The essence of the hearsay rule is a requirement that testimonial assertions shall be subjected to the test of cross-examination. (Wigmore on Evidence, 3d Ed., vol. V, p. 7.) The basic theory is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of cross-examination. Wigmore, supra, p. 3." (*Buchanan v. Nye* (1954) 128 Cal.App.2d 582, 585; *Fields*, *supra*, 61 Cal.App.4th at p. 1068.) Under no possible scenario could the phone have been cross-examined. The witness who explained the data could have been, and was. That is all that is required.

2. Appellant's January 4, 2006 absence from trial

Appellant argues that the trial court committed reversible error in finding that he voluntarily absented himself from the proceedings on January 4, 2006. We see no error.

*Facts*

Testimony began on December 27, 2005. When the case was called on January 4, 2006, outside the presence of the jury, the court told counsel that appellant was not present and that it was waiting for a communication from the jail to determine whether appellant would attend trial. The court informed counsel that earlier that morning, it had received a fax from a jail physician who had examined appellant. The fax said that appellant was "medically stable" and "able to come to court" but was refusing to leave the jail.[3] In response, the court called the jail nursing staff and asked them to advise appellant that he was needed in court. A second fax subsequently arrived from the jail relating that appellant "doesn't want to come to court." The court called again and directed jail personnel to inform appellant that his failure to appear constituted a voluntary absence and that trial would continue without him. The court and counsel agreed to wait for a response, and moved on to other matters.

A third fax arrived shortly. It said that jail staff had advised appellant that he was voluntarily absenting himself from court, and that the trial would proceed without him. Defense counsel also stated that she had previously advised her client that the court could find him voluntarily absent if he chose not to attend his trial. Defense counsel made no objection to the court's finding or the decision to begin trial in appellant's absence.

Proceedings began. The court told the jury that appellant was free to attend or not to attend his own trial and advised them not to draw any inferences regarding his absence. Trial resumed with the testimony of Daniel Diaz, the video camera operator who filmed the shooting. Appellant returned to court the following day and requested a new attorney or, in the alternative, to represent himself. The court denied these requests.

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[3] During trial, appellant traveled to and from court in a wheelchair and attended all courtroom proceedings while lying on a gurney or hospital bed. The court also accommodated appellant's medical condition by limiting the proceedings to three hours a day, notifying transportation staff when appellant was ready to go back to the lock-up, and arranging for appellant to visit his private doctors.

*Discussion*

We apply a de novo standard of review to the trial court's exclusion of a criminal defendant from all or part of trial. (*People v. Gutierrez* (2003) 29 Cal.4th 1196, 1202.) If the exclusion is deemed improper, appellant bears the burden of demonstrating that proceeding in his absence resulted in prejudice or impaired his ability to receive a fair trial. (*People v. Hines* (1997) 15 Cal.4th 997, 1039-1040.)

Both the federal and state constitutions and the state legislature recognize and protect a criminal defendant's right to be present at trial. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15; Pen. Code, §§ 977, subds. (b)(1) & (2) and 1043 subds. (a) & (b).) However, this right is not absolute. (*Gutierrez, supra*, 29 Cal.4th at p. 1202.) In a non-capital, felony case, "a trial court may continue a trial in a custodial defendant's absence after the trial has commenced in the defendant's presence – without first obtaining the defendant's written or oral waiver of the right to presence – if other evidence indicates the defendant has chosen to be absent voluntarily." (*Id*. at p. 1206.) To hold otherwise would allow a voluntarily absent criminal defendant to "frustrate the orderly processes of his trial." (*Id*. at p. 1205.)

To determine whether a criminal defendant's absence is voluntary, a court must consider the totality of the facts. (*Gutierrez, supra*, 29 Cal.4th at p. 1205.) Consent to proceed in the defendant's absence does not require explicit oral or written consent; rather, it may be inferred from a defendant's actions. (*Id*. at p. 1206.) While a judge need not confront a defendant in the courtroom or move proceedings to the lock-up to secure a proper waiver, the court should take reasonable steps to confirm that the absence is a result of defendant's own choice. (*Id*. at pp. 1205-1206.) In arriving at such a conclusion, a judge may "rely on reliable information, such as statements from jail or court personnel." (*Id*. at p. 1205.) Otherwise, dragging an "unwilling and uncooperative defendant" into court could pose a risk of injury to the defendant and his handlers or result in prejudice if the defendant feels compelled to disrupt the proceedings. (*Id*. at p. 1208.)

In this case, the trial court properly relied on representations by the jail staff regarding appellant's condition and disposition and took reasonable steps to ensure that appellant's absence was voluntary. The court relied on information transmitted in writing from the jail, including the opinion of a physician who examined appellant and deemed him medically able to attend the proceedings. There is nothing to suggest that the jail staff's observations of appellant were inaccurate or that they possessed any motivation to misrepresent appellant's condition or conduct that morning. Further, the court telephoned the jail more than once to ensure that appellant understood that trial would proceed in his absence if he refused to come to court. Forcing the trial court to travel to the lock up would "frustrate the orderly processes of his trial" and constitute acquiescence to appellant's "dilatory tactics." (*Gutierrez, supra*, 29 Cal.4th at p. 1205.)

Taking into account the totality of the facts, we conclude that the trial court did not err in finding appellant to be voluntarily absent from the trial proceedings on January 4, 2006. As such, we do not reach the question of whether appellant's absence was prejudicial, but note that, in any event, appellant has made no showing of prejudice.

3. Admission of redacted exhibit 24A

Appellant asserts that the court committed reversible error and denied him due process by admitting People's exhibit 24A, a redacted version of the October 31, 2003 trust hearing transcript, in place of People's exhibit 24, a full version of the transcript. Specifically, appellant argues that the admitted version of the trust hearing transcript took comments made by Celnik out of context and misled the jury into believing that she told a "bald face lie" to the court hearing the trust matter.

We find that appellant's due process argument is waived because it was not raised in the trial court. As to the ground which was raised below, an evidentiary objection, we find any error harmless.

*Facts*

The facts concern Celnik's representation to the court hearing the trust matter about appellant's absence from that hearing. In full, the transcript of the trust hearing

establishes that the court asked Celnik, "Where is he, Mr. Strier?" Celnik answered, "He is ill and it has been over a year and he has not had any surgeries. He hasn't been able to do it because of these lack of funds by the trustee and he has been getting worse and worse -- ."

At this trial, on direct examination, Celnik testified that she expected her brother to be at the trust hearing and that she had notified the bailiff that she was waiting for him. She was asked, "Now, did you tell the court that you believed your brother was ill?" She answered, "Yes." Counsel then asked, "Did you know that was the reason why he wasn't there?" Celnik replied, "No." Finally, counsel inquired, "Why did you tell the judge that your brother was ill?" Celnik testified that she told the judge that her brother "had been ill," but that she did not remember saying that he was "ill that day."

When asked, "What do you recall saying?" Celnik testified that she asked for a postponement but that the court refused: "He said that it was going to go forward, and I said that I was waiting for my brother. And he said, well, he didn't -- he wasn't here the last time. I said, that's because he had been ill."

Prior to the cross-examination of Celnik, a full transcript of the October 31, 2003 trust hearing was marked as People's exhibit 24. On cross-examination, Celnik repeated that her brother was supposed to meet her at the courthouse for the hearing. The prosecutor then asked, "I believe you testified that you advised the judge that you believe you said he was ill?" Celnik replied, "No. I did not tell – I said I was waiting for my brother." The prosecutor inquired further, "But didn't the judge ask you, where's your brother? Do you recall him asking you that?" Celnik responded, "No."

The prosecutor subsequently approached Celnik with the full trust hearing transcript and directed her to the court's question, "Where is he, Mr. Strier?" The prosecutor asked Celnik if she remembered the court asking her this question. Celnik said, "I don't recall," and also said during her direct examination she had not testified that the judge had asked her this question. The prosecutor then asked Celnik to look at her response to the court's inquiry as it appeared in the transcript. He inquired, "In response to the court's inquiry of you, do you see, Miss Celnik, your name?" She said, "Yes." The

prosecutor added, "As a response, 'he is ill?' Was that the answer you gave to [the judge] when he asked you where your brother was?" Celnik replied, "No. I said he has been ill. I never said, 'he is ill.'" Celnik subsequently admitted that she did not tell the court that her brother was "coming" to the hearing or "on his way."

Defense counsel did not refer to People's exhibit 24 during Celnik's redirect.

At the close of trial testimony, the prosecution sought admission of a redacted version of the October 31, 2003 trust hearing transcript, marked as People's exhibit 25A, rather the full transcript of the same hearing, previously marked. Exhibit 24A limited Celnik's response to, "He is ill," and left out the remaining part of that answer, ". . . and it has been over a year and he has not had any surgeries."

The prosecutor asserted that Celnik's answer beyond, "he is ill," was irrelevant because "the key to the transcript is the fact that she told the judge Mr. Strier was ill when she knew he wasn't ill." Appellant objected, arguing that, "I believe her testimony did cover the extent of the paragraph and also there's a rule of completeness, and I'd ask that the entire paragraph be given." The court admitted People's exhibit 24A, the redacted trust hearing transcript.

*Discussion*

Generally, a criminal defendant's "'failure to make a timely and specific objection' on the ground asserted on appeal makes that ground not cognizable." (*People v. Partida* (2005) 37 Cal.4th 428, 434, quoting, *People v. Green* (1980) 27 Cal.3d 1, 22.) The objection must fairly inform the trial court as "'to the nature of the anticipated evidence and the basis on which exclusion is sought'" and "'afford the People an opportunity to establish its admissibility.'" (*Partida, supra*, 37 Cal.4th at p. 435, quoting, *People v. Williams* (1988) 44 Cal.3d 883, 906.) If the court overrules the objection, the defendant may argue on appeal that the evidence should not have been admitted for the reason asserted at trial, but the defendant may not "argue that the court erred in failing to conduct an analysis it was not asked to conduct." (*Partida, supra*, 37 Cal.4th at p. 435.)

Accordingly, a criminal defendant who objects to the admissibility of evidence at trial without asserting a due process argument, may not argue on appeal that the trial

court "failed to engage in some sort of due process analysis." (*Partida*, *supra*, 37 Cal.4th at p. 435.) However, the defendant may argue the trial court's ruling "had the additional legal consequence of violating due process." (*Ibid*.) Under this limited due process argument, the admission of the evidence in question only violates due process if it makes the trial "fundamentally unfair." (*Id*. at p. 436.) Absent fundamental unfairness, state law error in admitting evidence is subject to the *Watson* test for harmless error. (*Id*. at p. 439; *People v. Watson* (1956) 46 Cal.2d 818.)

Because appellant did not cite a due process violation in objecting to the admission of People's exhibit 24A at trial, he may not do so now on appeal. He may, however, argue that the redacted transcript should not have been admitted for the reasons given at trial and that its admission had the legal consequence of violating due process.

We do not see that admission of the redacted transcript made the trial fundamentally unfair. Celnik's testimony on direct examination was confused and ambiguous, as was her testimony on cross-examination, as was her testimony in the trust hearing. In this trial, on direct examination, she testified that she told the trust court that her brother was ill, and also testified that she did not say that, but said that he "had been ill." On cross-examination, the first of those statements was impeached with the transcript, in which she indeed told the court that "he is ill." It is true that when the statement is read in full, it could be interpreted to mean something close to "he has been ill," but the full version could also be read as confused, evasive, or even dishonest.

On both direct and cross-examination, Celnik also asserted that she told the judge she was "waiting for her brother." However, neither the full nor redacted transcripts support this contention.

Moreover, to the extent that the redacted version of the transcript could be read to unfairly impeach Celnik's credibility, we note that her testimony in this case was not entirely favorable to appellant. She largely corroborated appellant's testimony, including testimony on the drugs he consumed that morning, but she contradicted his testimony on at least one other point, his presence at the end of the trust hearing.

The admission of People's exhibit 24A did not prejudice appellant's ability to receive a fair trial and we conclude that any error was harmless.

4. Prosecutor's remarks during closing argument

Appellant contends that the prosecutor committed reversible misconduct during the closing argument by diminishing the burden of proof from beyond a reasonable doubt to a preponderance of the evidence. Specifically, appellant argues that he was prejudiced when the prosecution trivialized the reasonable doubt standard by equating it with "common sense," "simple things in life that occur" and what "makes sense" or is "reasonable." He also argues that, if the prosecutorial misconduct argument is deemed waived, defense counsel's failure to object constitutes ineffective assistance of counsel.

We find that appellant waived his argument of prosecutorial misconduct by failing to timely object and request admonishment of the jury. In addition, we find that the prosecutor's comments did not amount to prosecutorial misconduct and did not trivialize the reasonable doubt standard. As such, appellant's ineffective assistance of counsel claim lacks merit.

*Facts*

During closing argument, the prosecutor made numerous references to "common sense" and what "makes sense" or is "reasonable." For example, at the beginning of his argument, he stated to the jury, ". . . the most important thing that you have, that you're going to bring with you when you hear this case and we all have it. It's our common sense; that when you evaluate the testimony in this case . . . you do it in a common sense fashion. What's reasonable? What makes sense? That is common sense, just basic simple things in life that occur. Use your common sense."

The prosecutor also said, "What is the definition of reasonable doubt? Reasonable interpretations of the evidence because what is reasonable is what makes sense." Finally, he described the concept of "abiding conviction" as "wak[ing] up" the "next morning," "a week later," or "a month later" and having the ability to say, "I can live with that

verdict . . . never look back and question or hesitate in what you ultimately decide to do." Defense counsel made no objections to any of these statements.

After the closing arguments, the trial court instructed the jury to weigh the evidence and to apply the law as stated by the court – rather than by the attorneys – to the facts. In addition the jury received the standard instruction articulating the "beyond a reasonable doubt" standard of proof. (CALJIC 2.90.)

*Discussion*

Prosecutorial misconduct arises when a prosecutor engages in the "use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Silva* (2001) 25 Cal.4th 345, 373.) While a finding of prosecutorial misconduct does not necessitate a showing that the prosecutor acted in bad faith, it does require a demonstration that the prosecutor's conduct prejudiced the right to a fair trial. (*People v. Nguyen* (1995) 40 Cal.App.4th 28, 35, citing *People v. Bolton* (1979) 23 Cal.3d 208, 213-214.) In determining whether misconduct occurred, a prosecutor's statements must be viewed, not as isolated words or phrases, but in the context of the argument as a whole. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.)

"'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.'" (*Silva, supra*, 25 Cal.4th at p. 373, quoting, *People v. Price* (1991) 1 Cal.4th 324, 447.) In this case, appellant waived the argument of prosecutorial misconduct because defense counsel failed to object to the prosecutor's remarks during the closing argument. An objection and admonition, if indeed warranted, would have cured any potential error.

It is improper for a prosecutor to misstate the law to the jury, particularly in an effort to diminish the prosecution's burden to establish all elements of a crime beyond a reasonable doubt. (*People v. Hill* (1998) 17 Cal.4th 800, 829-830.) And, as appellant argues, jury instructions which compare reasonable doubt to doubt based on "common sense" or to doubt surrounding decisions concerning the "important affairs of life"

trivialize the concept, thereby lowering the prosecution's burden of proof to a preponderance of the evidence. (*People v. Paulsell* (1896) 115 Cal. 6, 12; *People v. Brannon* (1873) 47 Cal. 96, 97.) However, jurors are permitted to rely on "their own common sense and good judgment in evaluating the weight of the evidence presented to them." (*People v. Venegas* (1998) 18 Cal.4th 47, 80.) That is all the prosecutor asked this jury to do.

On viewing the remarks in the context of the argument as a whole, the prosecutor complied with the rule stated in *Venegas* when he advised jurors to use their "common sense" and determine what is "reasonable" when weighing the evidence, much of which was disputed in this case. The reference to "simple things in life that occur" described the use of common sense in evaluating evidence and is not analogous to the erroneous jury instruction in *Brannon* that compared a decision based on reasonable doubt to one regarding the "important affairs of life."

The facts also distinguish this case from *People v. Nguyen* (1995) 40 Cal.App.4th 28, cited by appellant. There, the prosecutor described reasonable doubt during the closing argument as "the standard that you use every day in your lives when you make important decisions, decisions about whether you want to get married, decisions that take your life at stake when you change lanes as you're driving." (*Nguyen*, *supra*, 40 Cal.App.4th at p. 35.) The Court found that the comments improperly trivialized the burden of proof by equating reasonable doubt with the "reflexive" decision to change lanes or the decision to marry, which requires "far less than reasonable doubt." (*Id*. at p. 37.)

As distinguished from *Nguyen*, the prosecutor here did not compare the process of assessing guilt to actions one might take in everyday life, such as changing lanes or deciding to get married. References to the next "morning" or "month" in the discussion of the concept of abiding conviction were at most theatrical, and did not reduce the importance of "never" questioning the decision.

Aside from *Nguyen*, all of the cases cited in appellant's argument deal with problematic descriptions of reasonable doubt articulated by the court in jury

instructions – not by the prosecutor in closing argument. However, in this case, the court properly instructed the jury in the application of the reasonable doubt standard.

Finally, we see no ineffective assistance of counsel. Appellant has the burden of proving ineffective assistance of counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) In order to establish such a claim, appellant must show that his counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's error, a different result would have been reasonably probable. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, supra,* 466 U.S. at p. 694.) "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citations.]" (*People v. Thomas* (1992) 2 Cal.4th 489, 530-531.)[4]

We note that our Supreme Court has repeatedly pointed out that "'[a]n attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel.' [Citation.]" (*People v. Avena* (1996) 13 Cal.4th 394, 442.) Counsel is not required to make futile objections. (*People v. Price* (1991) 1 Cal.4th 324, 386-387; *People v. Ochoa* (1998) 19 Cal.4th 353, 427-428, 432 [meritless motion to exclude].) In this case, defense counsel had no reason to object because the prosecution's statements were not inappropriate. Accordingly, appellant's alternative argument of ineffective assistance of counsel is meritless.

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[4] In his supplemental brief, appellant asks us to apply a different standard for assessing prejudice in this context. (*People v. Mesa* (2006) 144 Cal.App.4th 1000.) We decline the invitation to depart from the well-settled *Strickland* rule.

5. Cumulative error

In his supplemental brief, appellant contends that the cumulative impact of the errors was prejudicial. Having found no error, we reject the claim.

6. Additional days of pre-sentence credits

Appellant contends that he should have been credited with three additional days of pre-sentence credit. Respondent finds the contention well-taken, as do we. Appellant was incarcerated from October 31, 2003 to March 17, 2006, for a total of 869 actual days. Multiplied by fifteeen percent, 130.5 days is added. Appellant was entitled to 999 days, not the 996 actually awarded. The contention is one that may be raised at any time. (*People v. Karaman* (1992) 4 Cal.4th 335, 349, fn. 15.) We thus order the abstract of judgment corrected.

## Disposition

The abstract of judgment is ordered corrected to show that appellant has 869 days of actual credit and 999 days of total credit. The clerk of the superior court is instructed to prepare an amended abstract of judgment reflecting this correction and to deliver a copy to the Department of Corrections and Rehabilitation. The judgment of conviction is affirmed in all other respects.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

ARMSTRONG, J.

We concur:

TURNER, P. J.

MOSK, J.