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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Trinity)

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH CHARLES PUNCH, Defendant and Appellant.	C052350 (Super. Ct. No. 05F090A)

Defendant Joseph Charles Punch did not dispute that he struck 19-year-old Megan C. in the forehead with the butt of a pellet gun while on a camping trip with friends, but he maintained he was not guilty of robbery or false imprisonment. Because defendant, the victim, and their three friends were all regular users of methamphetamine, their recollection of the details of the camping trip was inconsistent and the trial became a classic credibility contest. In this context, defendant argues a slew of evidentiary, instructional, and

sentencing errors. We can find no prejudicial error in this record and affirm.

FACTS

Enter the world of crystal methamphetamine. The relevant facts, though simply stated, should be viewed through the distorted perspective of a drug addict. The victim, Megan C., had used methamphetamine since she was 14 years old.[1] By the time she was 19, she had been kicked out of her mother's home, lived in her truck, and befriended Jessica Ketchum, who allowed her to shower in her apartment, then to sleep on her couch, and eventually to take a vacation with her to Humboldt County. Ketchum and Megan used methamphetamine and smoked marijuana all the way from Escondido to Humboldt. Once there, they stayed with various people and ended up at defendant's house, where they irritated defendant's parents and went off camping with defendant and two others.

Megan's various accounts of what happened during the camping trip differed. But the essence of her testimony at trial included her description of a brutal assault, robbery, and false imprisonment. She testified she commingled her belongings with Ketchum's in borrowed bags and also brought a Roxy brand backpack. She claimed that while the other four smoked methamphetamine on the day of the camping trip, she smoked only marijuana. She alone had cash, $35 her father had given her for

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[1] To protect her privacy, we will refer to Megan C. by her first name. No disrespect is intended.

her birthday. Once Ketchum became romantically involved with defendant, she started to ignore Megan. Annoyed by her friend's lack of attention and the mosquitoes, Megan secluded herself in her tent. When she came out of the tent to smoke a cigarette, the others went off to collect firewood.

When they returned, defendant approached Megan, pointed a rifle at her, and demanded her money. She told him to take it out of her purse, which was in the tent. Defendant hit her forehead with the butt of the gun, knocking her unconscious. When she came to, defendant was standing over her holding the gun to her head. He shot the gun 10 to 15 times at the trees and into the fire. One of the other campers punched and kicked Megan and rubbed dirt into an open wound on her forehead. Another camper suggested duct taping her so she would not move. They began to put "zip ties" on her.

Ketchum and the other two campers took things out of the tent and put them in the truck. Defendant threw her tent on the fire and burned it up. Defendant, Ketchum, and the others drove away. After they were gone, Megan ran toward a nearby creek, screaming for help, and then ran along the highway until she eventually found a market. When the market opened, someone there called the police.

Ketchum, a codefendant at trial, corroborated most of Megan's story. Ketchum married defendant in jail and then decided she had made a mistake. She, too, told the jury that defendant struck Megan with the gun, but in her version, the assault was the culmination of a long argument. Like Megan,

Ketchum testified that defendant pointed the gun at her and said, “Give me your money.” At that moment, Megan came toward Ketchum, and Ketchum pushed her away from defendant and walked over to the truck. Because of the drug use, no one seemed to have a very accurate perception of the passage of time. Ketchum expressed remorse for driving away as her friend stood up, with blood dripping down her face, and begged for her help.

Megan was treated at a local hospital and required two layers of sutures above her eye. After she was released, she accompanied a sheriff’s deputy to the campsite. They found a piece of paper with her brother’s phone number, zip ties, her lighter, and a blanket on the ground. The phone number had been in her purse. The remains of a tent were in the fire pit.

Defendant, Ketchum, and the others were arrested a few hours later. Defendant gave nearly incoherent responses to an interrogator’s questions. The admissibility of the tape is an issue we address below, but in essence, he began by denying all involvement and ultimately admitted pushing her down and injuring her because she reneged on a drug deal. He denied taking her money or personal belongings.

Police investigators seized a green backpack, a blue and gray backpack, and the Roxy backpack from defendant’s room. Megan’s purse was never found.

A jailhouse informant testified that while he was incarcerated with defendant, defendant told him that he “robbed a girl for 20 bucks over some dope, with a pellet gun, and left her for dead on the side of the road.” Defendant also said he

hit her in the head with the gun at a campground in Helene. The informant made a deal with the prosecution for county time, rather than state prison, and the dismissal of some of the charges pending against him in exchange for his testimony.

DISCUSSION

I. Evidentiary Errors

Defendant asserts several evidentiary errors and contends they are of constitutional stature. Thus he asserts he was deprived of his rights to due process and a fair trial when the trial court permitted the jury to hear a videotape in which he mentions "probation" and "incarceration"; he was denied his constitutional right to present a defense when the court sustained the prosecutor's objections to his cross-examination of a sheriff's detective; and he was denied due process when the court failed to sanction the prosecutor for failing to comply with its discovery obligations prior to trial. As to the first and last contentions, we conclude the trial court properly exercised its discretion and committed no error. As to the second contention, we conclude any possible error was harmless beyond a reasonable doubt. Defendant was the beneficiary of an inherently fair trial as assured by the state and federal Constitutions.

A. The Videotape

Defendant's postarrest interview was videotaped. As he concedes, he appeared to be under the influence of methamphetamine. He requested the trial court to redact the first half of the tape because he mentioned at one point

something about being on probation and also stated that the last time he shot a gun was when he was incarcerated. On appeal, he contends that he was denied due process and a fair trial when the court allowed the prosecutor to play the entire tape for the jury. We disagree.

Defendant contends that the trial court, erroneously believing the tape could not be redacted if portions were admissible, failed to exercise its discretion. He misreads the record. The court did not refuse to redact the tape because portions were admissible. Our reading of the record suggests the court determined that the two rather innocuous references to probation and incarceration were integrated into the interview in such a way as to make redaction quite awkward. Because defendant appeared high on methamphetamine and much of the interview was incoherent, we agree that his responses would not have inflamed the jurors, who in all likelihood would have had enormous difficulty even understanding what he was talking about. For example, as the court pointed out, his response that the last time he shot a gun was while he was incarcerated did not make any sense.

Thus, the record belies defendant's accusation that the court failed to exercise its discretion. To the contrary, the court listened to the tape in its entirety, carefully entertained defense counsel's objections, and evaluated the admissibility of the evidence. After a lengthy and thorough hearing on the issue, the court concluded: "The tape will be played in its entirety. I reviewed the tape from beginning to

end. It includes both the denial and the admission, which are really part and parcel, the same interview. There are breaks in it. And the statements made by Mr. Punch, regarding probation and incarceration, I think they're two different things, separated by time, are insignificant when it comes to prejudicing -- make the jury biased against him in a manner to any significant degree."

It is true, as defendant suggests, that his prior criminal conduct was not relevant to the issues before the jury. But the fact that he denied all involvement at the outset of the interview and ultimately admitted the brutal assault certainly was relevant. Defendant grossly overstates the potential danger of brief, disjointed, and confusing references he made to his past just as he exaggerates the role his past played in the prosecutor's closing argument.

Defendant seems to suggest that his past criminal conduct played a predominant role at trial. Not so. In the midst of his incoherent interview he made bare mention of being on probation and later indicated that the last time he shot a gun was when he was incarcerated. As a result, the trial court was faced with a difficult challenge. With the possible exception of these two remarks, the entire tape was relevant to establishing his lack of credibility, his drug-induced condition, and to demonstrate how he initially denied all involvement and ended with a straightforward admission of assault with a deadly weapon. The court denied defendant's request to redact the entire first half of the tape, during

which his denials were so blatant, not because the court believed that it could not do so, but because it concluded that the probative value of the tape intact outweighed the miniscule risk that these remarks would unduly prejudice the jury.

Nor did the prosecutor focus on either the fact that defendant had been on probation or the fact that he had been incarcerated. Indeed, he did emphasize his monstrous behavior while high on methamphetamine. And the prosecutor berated defendant for his lifestyle and his brutality. But defendant's own admissions justified such condemnation. The prosecutor did little more than state the obvious, and he certainly did not capitalize on defendant's prior criminal conduct as defendant contends.

We cannot say the trial court abused its discretion. The risk of prejudice was indeed slight in a case where defendant himself admitted a brutal assault on the victim. Given, as the court observed, that much of the tape was incomprehensible, the two brief mentions of his probation and incarceration would have had little, if any, impact on the jury. It is not because the prosecution was entitled to play the entire tape pursuant to Evidence Code section 356, but because the trial court properly weighed the potential for prejudice against the probative value of the entire tape. We cannot say the court abused that discretion because it did not redact these two brief remarks amidst the lengthy interview.

B. Cross-examination of Detective Langston

Defendant accuses the court of denying him his constitutional right to present a defense by limiting his cross-examination of Detective Langston. We have no disagreement with his citation to venerable principles of constitutional law. There is no question that "[t]he right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.'" (*Chambers v. Mississippi* (1973) 410 U.S. 284, 295 [35 L.Ed.2d 297].)

Moreover, the right to cross-examination is particularly important when the subject of the impeaching testimony to be elicited is the complaining witness in a criminal prosecution. (*People v. Murphy* (1963) 59 Cal.2d 818, 831.) While defendant insists that curtailing his cross-examination of Langston about Megan's inability to find the campsite and the reasons she might have laughed while giving a statement constitutes an egregious trampling of his defense, we conclude that the two rulings did not result in any prejudicial error, particularly of constitutional magnitude. We review the rulings in context.

On direct examination, Detective Langston testified he interviewed Megan in the ambulance. He described her as emotionally upset. During cross-examination, defense counsel attempted to probe the detective's perception of Megan's condition. In that vein, defense counsel asked about Megan's laughing, and Langston acknowledged she might have laughed at something he said, possibly more than once. The laughing, in

the detective's assessment, could have been a sign she was emotionally upset. Defense counsel further inquired about Megan's ability to give him directions to the campsite, and Langston testified that he "probably" told her what she was saying did not make any sense. The prosecution interposed a relevancy objection. The objection was sustained.

We need not unravel the ensuing objections and rulings that somehow involved prior inconsistent statements, hearsay, and relevancy because any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705].) It is clear that defendant was attempting to discredit Megan's account of what had transpired by suggesting that her inappropriate laughing, as well as her inability to direct the detective to the campsite, demonstrated she was high on methamphetamine. But that inference was hardly news to the jury. While Megan may have denied smoking methamphetamine on the day of the assault, she candidly admitted she had been a heavy user since she was 14 years old. Moreover, she admitted smoking marijuana earlier in the day, and Ketchum testified Megan had enjoyed methamphetamine in the tent with the girls a short time before the assault. This entire story centers on Megan and her descent into the world of methamphetamine.

But more importantly, as the Attorney General points out, Ketchum and defendant himself corroborated her account, as did her injuries and the physical evidence. Defendant, in his videotaped interview, admitted he pushed Megan and she fell into some rocks. Ketchum, like Megan, testified that defendant had

demanded money before striking her. Her facial trauma was but additional evidence of the assault. Moreover, although she did not remember this at trial, Megan told a sheriff's detective that someone had rifled through her purse, and some of the contents were found on the ground by the fire. She recounted how the other two campers had threatened to tie her up with zip ties, and the zip ties were also found on the ground at the campsite. She testified that defendant had burned her tent, and the remnants of the tent were found in the fire pit.

That is not to say this young addict was entirely credible. She changed the details of the story over time. But defense counsel vigorously cross-examined Megan and exposed the weaknesses in her credibility that he sought to reemphasize through Detective Langstrom. All the percipient witnesses to the attack suffered the same disability: they were all under the influence of methamphetamine and/or marijuana. As a result, we conclude that defendant's inability to further explore the detective's observation of Megan's laughs or her confusion about the location of the campsite did not hamper his defense because at best it would have only confirmed what the jury already knew -- that Megan's ability to accurately perceive the events that transpired may have been diminished by her drug use.

C. Possible Statements to the Prosecutor

Pursuant to the principles enunciated in *Brady v. Maryland* (1963) 373 U.S. 83 [10 L.Ed.2d 215] (*Brady*), "the prosecution must disclose to the defense any evidence that is 'favorable to the accused' and is 'material' on the issue of either guilt or

punishment. Failure to do so violates the accused's constitutional right to due process. [Citation.] Evidence is material under the *Brady* standard 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" (*City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 7-8.) Defendant asks us to remand the case to the trial court to determine whether the prosecution violated the *Brady* precepts. The court's failure to order the prosecution to comply with its discovery obligations, coupled with its refusal to instruct the jury to consider the discovery violation, in defendant's view, constitutes a violation of his rights to due process and a fair trial.

For the first time at trial, Megan testified that Jasmine Stover, one of the other campers on the trip, kicked and beat her for nearly three hours, and another camper, Jason Bowland, had suggested binding her with duct tape and had removed her belongings from the tent. This testimony came as a complete surprise to the defense and, apparently, to the prosecution as well.

Megan suggested, however, she had told the prosecutor this information. The prosecutor denied it and then told the court he had no recollection of Megan's statements. Defendant's lawyer expressly stated that he did not think the prosecutor did anything wrong and put the blame on Megan, calling her a liar. Nevertheless, defense counsel insisted on putting the prosecutor on the stand and urged the court to instruct the jury in the

language of CALJIC No. 2.28 that they could consider the prosecutor's concealment in determining the believability or weight to be given to that particular evidence.

The trial court denied both requests. The court focused on the substance of the surprise testimony. Assured that the relevance of the testimony was to impeach Megan, the court decided to exclude the possible statements to the prosecutor under Evidence Code section 352. The court explained, "And as I indicated at sidebar, the record is replete with many instances of contradictions, not remembering, changing her story, if you will. Anything beyond that, anything involving these two instances with Mr. Mock is 352." For emphasis, the court pointed out that, for the longest time, Megan had not told either of the police detectives that there were two other suspects in the case. "And that seems that that would be a very important issue. So if anything, we're beating a dead horse." The court concluded the surprise testimony was "de minimus in its probative value."

Thus the court analyzed the issue under Evidence Code section 352; the Attorney General insists there is no *Brady* violation demonstrated; and defendant requests a remand to determine if there was a *Brady* violation and, if so, whether it was material. We accept defendant's assertion that even an inadvertent failure to disclose may constitute a *Brady* violation. (*Bailey v. Rae* (9th Cir. 2003) 339 F.3d 1107, 1114, fn. 5.) But even if we presuppose the prosecutor should have,

and did not, disclose the testimony about Stover and Bowland, the failure does not warrant reversal.

We need not remand the issue for an assessment of materiality or prejudice. CALJIC No. 2.28, requested by defendant, is itself instructive. Had there been a discovery violation, the jury would have been told: "If you find that the concealment and/or delayed disclosure was by the prosecution, and relates to a fact of importance rather than something trivial, and does not relate to subject matter already established by other credible evidence, you may consider that concealment and/or delayed disclosure in determining the believability or weight to be given to that particular evidence." We acknowledge that Megan's credibility was a fact of importance, but as the court concluded, her credibility had been impeached time and time again, both as it related to her ability to perceive and remember the events and as it related to her embellishment of the facts over time. As CALJIC No. 2.28 admonishes, the discovery violation is significant only if it does not relate to subject matter already established by other credible evidence, and Megan's credibility was challenged throughout the trial.

Moreover, "[e]vidence is 'material' [under *Brady*] 'only if there is a reasonable probability that, had [the evidence] been disclosed to the defense, the result . . . would have been different.'" (*In re Sassounian* (1995) 9 Cal.4th 535, 544.) Ketchum also testified that Bowland threatened Megan and Stover physically restrained her. We understand that once Bowland and

Stover were charged, the defense no longer had an opportunity to call them as witnesses. But we conclude that there is not a reasonable probability a different outcome would have resulted so as to undermine our confidence in the outcome had defendant known earlier that the involvement of Bowland and Stover was greater than had been anticipated.

D. Cross-examination of Jailhouse Informant

Defendant asserts the prosecution was allowed to convey a false impression of a jailhouse snitch's veracity to the jury by curtailing cross-examination. He acknowledges that not every restriction of cross-examination amounts to an infringement of his constitutional right to present a defense and that the trial court retains wide discretion to limit cross-examination that is repetitive, prejudicial, confuses the issues, or is of marginal relevance. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678-679 [89 L.Ed.2d 674].) But here he contends the cross-examination would have exposed "a significantly different impression" of Wilfred Mead's credibility. We disagree.

Appearing in chains and an orange prisoner uniform, Mead testified that while they were both incarcerated, defendant "told me that he robbed a girl for 20 bucks over some dope, with a pellet gun, and left her for dead on the side of the road." He also testified he had been charged with two counts of being a felon in possession of a firearm and ammunition, a felony failure to register as a sex offender, and a special allegation for having received a prior felony conviction in Shasta County. He admitted to a lengthy rap sheet including state prison time

for cruelty to a child and spousal abuse, and that he was a registered sex offender. He testified that he was facing two to three years in state prison for the charges pending against him, and consequently, he entered into a deal with the prosecution whereby in exchange for his truthful testimony, he was promised county jail time. That agreement was admitted into evidence.

Defendant hoped to impeach Mead with the testimony of an officer with the Department of Justice who would have provided the factual basis for the pending charges. He also attempted to cross-examine Mead about his failure to appear at the beginning of trial. Had he been able to impeach Mead or probe further during cross-examination, he insists the jury would have had a significantly different impression of him.

We cannot say the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner by limiting the impeachment evidence and cross-examination. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) We agree with the Attorney General that further impeachment was cumulative. The jurors were well aware of Mead's shady character. They observed him in chains and his orange jumpsuit, heard him admit a long history of criminal conduct, and realized he was testifying because he had reached a deal with the prosecution. We cannot accept defendant's proposition that knowing the details of his pending possession charges when the jury already knew he was a convicted sex offender and spousal and child abuser would have significantly changed their perception of his veracity. Nor do we believe that an examination of his failure to appear would

have made any difference in the jury's assessment of the truth of his testimony. In short, the court did not abuse its discretion and the limited curtailment of his defense did not violate the state or federal Constitutions.

II. Instructional Errors

A. Pinpoint Instruction

The trial court refused to give a special instruction offered by the defense because it was unnecessary. The court instructed the jury in the language of CALJIC No. 3.31: "[T]here must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless the specific intent exists the crime or allegation to which it relates is not committed or is not true." The jurors were further instructed that to prove the crime of robbery the prosecution must prove "[t]he property was taken with the specific intent permanently to deprive that person of the property." (CALJIC N. 9.40.) And more to the point, the court specifically told the jurors: "To constitute the crime of robbery, the perpetrator must have formed the specific intent to permanently deprive an owner of [her] property before or at the time that the act of taking the property occurred. If this intent was not formed until after the property was taken from the person or immediate presence of the victim, the crime of robbery has not been committed." (CALJIC No. 9.40.2.)

Given these clear instructions, we reject defendant's assertion that the jurors needed a special instruction to draw their attention to the necessity for a joint operation of act

and intent. The court rejected his special instruction that read as follows: "Robbery requires a showing of an intent to steal before or during the application of force, rather than merely after the application of force. If you find that a defendant drove away from the scene with the victim's property in the car without knowing that the property was in the car, he or she is not guilty of robbery."

While the court must instruct the jury on the general principles of law relevant to the issues raised by the evidence (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled on another ground in *People v. Breverman* (1998) 19 Cal.4th 142, 165), a defendant is not entitled to the phraseology he prefers or to highlight his version of the facts in the guise of a jury instruction. Here the court's instructions made clear that defendant had to entertain the requisite intent at the time he, or one of his aiders and abettors or coconspirators, took the victim's property. Thus, as the trial court concluded, the special instruction was unnecessary and the court was under no obligation to deliver it.

B. Failure to Instruct on an Element of a Lesser Included Offense

Defendant next contends that the court's failure to instruct on the elements of theft as a lesser included offense of robbery constitutes reversible error of constitutional magnitude. To make matters worse, according to defendant, the court erroneously instructed the jury that theft required a general, rather than a specific, intent. The Attorney General

insists defendant was never entitled to the lesser included offense instruction because defendant admitted the force or violence element and was therefore guilty of the greater offense or nothing. (*People v. Duncan* (1991) 53 Cal.3d 955, 969-970 (*Duncan*).) In the Attorney General's view, the instruction on theft, even if incomplete or erroneous, was more than he was entitled to and the error, if any, was harmless.

Given defendant's admission of the assault on Megan, the thrust of the defense at trial was that he did not know that Ketchum, Bowland, and Stover took Megan's property; he was not part of any conspiracy to rob her; and he did not knowingly aid and abet their theft. His revisionist defense on appeal is that the jury was misled by the erroneous instruction on larceny to believe that the mere act of taking without the larcenous specific intent required for robbery was all that was needed to find him guilty of robbery. He speculates that the effect of the erroneous instruction on the lesser offense was to withdraw elements of the greater offense from the consideration of the jury. While we will acknowledge the argument as creative appellate advocacy, we do not think it is reasonably likely that a jury would replace the one erroneous instruction on the intent required for larceny for all the proper instructions on robbery.

We agree with the Attorney General that any instructional error on theft was harmless. Defendant acknowledges that instructional error requires reversal only if it is reasonably probable that the jury would have reached a result more favorable to defendant absent the error. (*People v. Wharton*

(1991) 53 Cal.3d 522, 571-572, fn. 10.) Defendant argued vehemently that while he did assault the victim, he did not rob her. His defense was predicated on the lack of direct evidence that he personally took any of her property or that he knew her property was commingled with Ketchum's. But he continues to either ignore or minimize his codefendant's damning testimony that she heard defendant demand money from Megan, his cellmate's testimony that defendant told him he robbed a lady for $20, and the evidence that he assaulted the victim just as he returned with his four friends from collecting firewood. As the Attorney General properly concludes, on this evidence defendant, if guilty of a taking, was guilty as charged of robbery, not theft. As a result, the failure to describe each of the elements of theft and the error in telling the jury that theft was a general intent crime were harmless.

C. Sua Sponte Obligation to Instruct on Attempted Robbery

Defendant continues to insist, as he did above, that there is no evidence he took any money from Megan, had possession of her purse, knew Ketchum and the other campers were loading her property into his truck, or that the taking of the property was anything more than inadvertence. Based on his lopsided version of the evidence, he faults the court for failing to instruct on attempted robbery.

But defendant demanded Megan's money as he struck her with the butt of his pellet gun and continued to assault her as the others ransacked the tent and put all the property into the truck. It is true, as defendant suggests, that the jury had to

determine whether he entertained the specific intent to permanently deprive her of her property at the time he assaulted her, and the jury was properly instructed on this pivotal issue. There was, however, no issue as to whether or not the property was actually taken. Because there was no evidence the offense was less than charged, the trial court had no sua sponte obligation to instruct on attempted robbery. (*Duncan*, *supra*, 53 Cal.3d at p. 970.)

D. Failure to Instruct on Circumstantial Evidence

Defendant contends the trial court erred by failing to instruct sua sponte on the sufficiency of circumstantial evidence as explained in CALJIC No. 2.01. "The instruction must be given sua sponte when the prosecution substantially relies on circumstantial evidence to prove guilt." (*People v. Marquez* (1992) 1 Cal.4th 553, 577 (*Marquez*).) Defendant argues that the prosecution's conspiracy theory was entirely dependent on circumstantial evidence, and therefore he was entitled to the instruction. The trial court rejected the instruction because the prosecution's case was based on direct evidence.

The record supports the trial court's ruling. The prosecution did not substantially rely on circumstantial evidence and "the circumstantial evidence in the case was not equally consistent with a rational conclusion that the defendant was innocent." (*Marquez*, *supra*, 1 Cal.4th at p. 577.) As we have said before, defendant discounts the direct evidence he does not like. But codefendant Ketchum corroborated the victim's testimony about defendant's conduct. That is to say,

she confirmed that defendant demanded money from her and then assaulted her. Mead also provided direct evidence of defendant's complicity. He testified that defendant admitted robbing a girl for $20. As a result, the thrust of the prosecution's case rested on direct evidence.

It is true that the prosecution argued a conspiracy theory and that theory rested, in part, on circumstantial evidence that the campers devised a scheme or plan to rob Megan. However, CALJIC No. 2.01 need not be given sua sponte if there is any circumstantial evidence, but only where the prosecution's case rested substantially on circumstantial evidence. The trial court here was justified in finding the prosecution relied substantially on direct, not circumstantial, evidence. There was no error.

III. Prosecutorial Misconduct

Defendant summarizes the apt guiding principle best when he states that "[t]o rise to the level of deprivation of the Fourteenth Amendment to the federal Constitution, prosecutorial misconduct must infect the trial with such unfairness as to make the conviction a denial of due process." By isolating remarks the prosecutor made during closing argument, he concocts, as he puts it, a "veritable stew of impropriety." But when placed in context we can find no deceptive or reprehensible conduct that infected or tainted this trial with unfairness. (*People v. Price* (1991) 1 Cal.4th 324, 448, superseded by statute on other grounds as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161-1165.)

First, defendant accuses the prosecutor of arguing facts not in evidence by suggesting that Megan had testified that defendant had rifled through her wallet. The prosecutor in fact admitted that he was not sure of her testimony. He argued: "And we know that her purse was taken from the tent where her other stuff was and rifled through. I don't know if Mr. Punch actually did it or one of the others. I'm not sure. She said she saw him rifling through her purse, I think she might have. But again, I'm working from notes on this. But you recollect the testimony." Such candor is not misconduct.

Defendant next complains that the prosecutor characterized Bowland as a rough-looking character and referred to the fact he exercised his Fifth Amendment right not to testify. We agree with the Attorney General that the prosecutor's mere statement that Bowland, "a rough-looking character . . . sat on the stand and took the Fifth Amendment" was a mere reiteration of what the jury already saw and heard. Bowland appeared at trial and invoked his right not to testify. The prosecutor in no way implied that had Bowland testified, he would have inculpated defendant.

Defendant also contends the prosecutor argued without evidentiary support that Bowland had zip ties and intended to tie Megan with them. Indeed, Megan did testify that she believed Bowland was going to use the zip ties to tie her up, and zip ties were found on the ground by the fire pit. It may have been that Megan came to this conclusion after she saw the ties on the ground and her testimony was ripe for cross-

examination. But the witness's veracity does not render the prosecutor's reiteration of her testimony misconduct.

Finally, defendant asserts that the prosecutor improperly vouched for Mead's credibility. "A prosecutor may make 'assurances regarding the apparent honesty or reliability of' a witness 'based on the "facts of [the] record and the inferences reasonably drawn therefrom."' [Citation.] But a 'prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record.' [Citation.]" (*People v. Turner* (2004) 34 Cal.4th 406, 432-433.) While the prosecutor's comments might have come dangerously close to the line, in context we cannot say they constitute misconduct.

The prosecutor argued: "[Mead's testimony is] the absolute, unmitigated truth. So excuse me for saying, 'You can have local time as opposed to prison custody for being a felon in possession of a firearm.' And you don't know the gravity of that case. You don't know whether it's a good case, weak case, strong case, whatever. I do, but you don't. So we gave him a deal because what he has to say is necessary to get this gun back to this crime in this case. But what he has to say is totally, 100 percent believable and absolute truth. And that's why he got a deal."

Once again, the jury knew that the witness had reached a deal with the prosecution. The prosecutor was certainly entitled to make assurances regarding Mead's veracity, particularly by highlighting his testimony about the pellet gun.

It was his identification of the type of gun used that convinced the prosecution that his testimony was reliable, and the prosecutor emphasized this fact to the jury. That fact made the testimony, according to the prosecutor, "100 percent believable." This was proper argument based on the evidence. Perhaps the prosecutor started to veer into improper commentary when he suggested that he knew about the gravity of Mead's pending charges and suggested that he knew what the evidence was and the jury did not. But such an isolated remark hardly constitutes the kind of egregious misconduct that subverts the fairness of a trial. We have found nothing in the prosecutor's closing argument that constitutes the kind of egregious and reprehensible misconduct that violates a defendant's right to due process.

IV. Sentencing Errors

A. Upper Term

Defendant contends the trial court violated *Cunningham v. California* (2007) 549 U.S. ___ [166 L.Ed.2d 856] by imposing the upper term sentence of five years for robbery. The trial court based the upper term on the fact, among others, that defendant was on probation at the time he committed the robbery. The "imposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior

convictions." (*People v. Black* (2007) 41 Cal.4th 799, 816 (*Black*).)

"The United States Supreme Court consistently has stated that the right to a jury trial does not apply to the fact of a prior conviction. [Citations.] '[R]ecidivism . . . is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence.' [Citation.]" (*Black*, *supra*, 41 Cal.4th at p. 818.) The California Supreme Court and numerous other jurisdictions have interpreted the recidivism "exception to include not only the fact that a prior conviction occurred, but also other related issues that may be determined by examining the records of the prior convictions. [Citations.]" (*Black*, *supra*, 41 Cal.4th at p. 819; see also cases cited in *People v. McGee* (2006) 38 Cal.4th 682, 703-706.)

Defendant's probationary status necessarily arises from a prior conviction and relates to the fact of that prior conviction. The factors related to defendant's probationary status can be determined by judicial review of court records pertaining to defendant's prior convictions, sentences, and grants of probation. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 488 [147 L.Ed.2d 435].)

As with the number and increasing seriousness of a defendant's convictions, whether the defendant was on probation at the time of the offense is the type of determination "'more typically and appropriately undertaken by a court.' [Citation.]" (*Black*, *supra*, 41 Cal.4th at p. 820.) Therefore, we believe the fact that defendant was on probation at the time

of the offense is a recidivism factor arising from the fact of a prior conviction upon which the trial court may rely to impose the upper term.[2] (Cf. *United States v. Corchado* (10th Cir. 2005) 427 F.3d 815, 820 ("the 'prior conviction' exception extends to 'subsidiary findings' such as whether a defendant was under court supervision when he or she committed a subsequent crime"].)

The aggravating circumstance related to defendant's recidivism was established consistently with Sixth Amendment principles. Accordingly, the maximum sentence that *could* have been imposed was the upper term, and the court was permitted to rely upon "any number of aggravating circumstances in exercising its discretion to select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those circumstances have been found to be true by a jury. 'Judicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments.' [Citation.]" (*Black*, *supra*, 41 Cal.4th at p. 813.)

"The court's factual findings regarding the existence of additional aggravating circumstances may increase the likelihood that it actually will impose the upper term sentence, but these

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[2] We note this precise issue is currently pending before the California Supreme Court in *People v. Towne*, review granted July 14, 2004, S125677.

findings do not themselves further raise the authorized sentence beyond the upper term. No matter how many additional aggravating facts are found by the court, the upper term remains the maximum that may be imposed. Accordingly, judicial fact finding on those additional aggravating circumstances is not unconstitutional." (*Black*, *supra*, 41 Cal.4th at p. 815.)

Based on his criminal history, defendant was not legally entitled to the middle term sentence. The upper term was the statutory maximum to which he was exposed. Therefore, the court's consideration of additional aggravating circumstances, such as taking advantage of a position of trust, did not raise the authorized sentence. Rather, it was an appropriate consideration in the exercise of the court's sentencing discretion.

B. Multiple Punishment

Defendant argues that the court sentenced him on the principal count, robbery, and then improperly sentenced him to concurrent terms for assault and false imprisonment in violation of the multiple punishment ban set forth in section 654. Section 654 does not prohibit separate punishment where the false imprisonment or assault is independent of another crime. (*People v. Webber* (1991) 228 Cal.App.3d 1146, 1172.) There is abundant evidence here to support the court's implied factual finding that defendant entertained more than one criminal objective. (*People v. Saffle* (1992) 4 Cal.App.4th 434, 438.)

We accept defendant's notion that he entertained but one objective when he initially assaulted Megan with the butt of his

gun, and that was to rob her. He succeeded in knocking her unconscious, and his friends took all her property and put it into the truck. But according to Megan, defendant and Stowe kept her on the ground for several hours kicking her, shooting the gun near her, and restraining her. Thus, the additional assaults and false imprisonment were not part and parcel of the plan to rob her. The brutality was gratuitous. While Megan's testimony was subject to considerable dispute, it provided support for the trial court's conclusion that defendant either aided and abetted the others or personally participated in an assault of Megan and the restraint that amounted to false imprisonment completely divorced from his original objective to take her cash.

C. Double Jeopardy

In his reply brief, defendant acknowledges that in *People v. Sloan* (2007) 42 Cal.4th 110 (*Sloan*) and *People v. Izaguirre* (2007) 42 Cal.4th 126 (*Izaguirre*), the Supreme Court rejected his argument that enhancement allegations should be considered in determining whether a lesser offense is necessarily included in a charged offense and, therefore, that he was improperly convicted multiple times for the same offense in violation of the double jeopardy clause of the Fifth Amendment. The elements of the offense of robbery did not include proof that he personally used a dangerous and deadly weapon and inflicted great bodily injury upon Megan. In the absence of the enhancement allegations, there is no double jeopardy issue. As defendant properly notes, we are required to

follow the Supreme Court precedent set forth in *Sloan* and *Izaguirre*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

The judgment is affirmed.

RAYE, J.

We concur:

SIMS, Acting P.J.

BUTZ, J.