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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

VAN JUAN THEPSOMBANDITH,

Defendant and Appellant.

D047885

(Super. Ct. No. SCD189842)

APPEAL from a judgment of the Superior Court of San Diego County, Melinda J. Lasater, Judge. Affirmed as modified.

A jury convicted Van Juan Thepsombandith of two counts of assault with a firearm (counts 1 & 2: Pen. Code,<sup>1</sup> § 245, subd. (b)), discharging a firearm in a grossly negligent manner (count 3: § 246.3), being a felon in possession of a firearm (count 4: § 12021, subd. (a)(1)), being a felon in possession of ammunition (count 5: § 12316, subd. (b)(1)), and assault with a deadly weapon by means of force likely to cause great

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

bodily injury (count 6: § 245, subd. (a)(1).) The jury also found true allegations that: (1) as to counts 1 and 2, Thepsombandith used a firearm within the meaning of section 12022.5, subdivision (a); (2) as to count 6, Thepsombandith personally used a deadly weapon, a golf club, within the meaning of section 1192.7, subdivision (c)(23); and (3) as to count 6, Thepsombandith inflicted great bodily injury within the meaning of section 12022.7, subdivision (a). Thepsombandith admitted having two prison priors within the meaning of section 667.5, subdivision (b), and section 668. The court sentenced Thepsombandith to a prison term of 24 years.

On appeal, Thepsombandith contends (1) the prosecutor committed misconduct in closing argument by misstating the law on assault; (2) he was afforded ineffective assistance of counsel because his trial counsel failed to object to the prosecutor's misstatement of the law on assault; (3) the court's imposition of the upper term for the count 1 use of a firearm enhancement violated *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*); and (4) imposition of the gun enhancement on count 1 and the prison prior enhancements resulted from an impermissible dual use of facts. He also asserts, and the People agree, that the abstract of judgment must be corrected to reflect the proper Penal Code provision under which the one-year enhancement was imposed on count 6. We conclude that the judgment must be modified to reflect the proper Penal Code section supporting the enhancement imposed on count 6. As modified, the judgment is affirmed.

#### FACTUAL BACKGROUND

Thepsombandith began dating Kathy Sayrath in December 2004. Thepsombandith lived in a one-room "shack" located in the backyard of his parent's house. In March 2005

Sayrath and Thepsombandith were both inside the shack. Sayrath was on the telephone with a friend, stating that she wanted to end her relationship with Thepsombandith.

Thepsombandith overheard this conversation and became upset. Thepsombandith ordered Sayrath to hang up the phone, which she did. Thepsombandith yelled at Sayrath and began to act violently. He picked up a golf club and repeatedly struck Sayrath while she was on the couch. Sayrath was struck in the leg, thigh, arm, and back. When Sayrath put her arm up to defend herself from the attack, the golf club struck her arm, breaking it between her wrist and elbow. Thepsombandith also stomped on and kicked Sayrath. The beating continued until Sayrath lied and told Thepsombandith she was pregnant with his child. Sayrath was subsequently treated at the hospital emergency room for her fractured right forearm. Sayrath also suffered several bruises on multiple locations of her body.

Within a few days of the beating, Sayrath went back to Thepsombandith's residence to recover her belongings. Sayrath was accompanied by her cousins, Sherry Gonzales and Jennifer Souphy. Sayrath entered Thepsombandith's shack, while Gonzales and Souphy waited outside in the backyard. Thepsombandith was alone inside the residence when Sayrath entered. Thepsombandith told Sayrath to sit down so they could talk. Sayrath complied, and the two talked briefly. Thepsombandith had a handgun next to him underneath a towel. He moved the towel to expose the gun to Sayrath.

Thepsombandith told Sayrath that he was not afraid to shoot her and that he would shoot himself as well. Thepsombandith held the barrel of the gun to Sayrath's temple while he threatened her. Thepsombandith then pointed the gun in the air and fired one shot. Sayrath screamed and Gonzales and Souphy, who heard the commotion, came

running to the door of the residence. Gonzales opened the door and both women looked inside. Gonzales observed Sayrath in a fetal position on the couch saying, "[N]o," while Thepsombandith pointed the gun at her.

Thepsombandith then turned the gun and pointed it at Gonzales and said, "Are you going to be a fucking hero?" While the gun was pointed at Gonzales, she observed Thepsombandith cock back and release the slide. As Gonzales began to back out of the shack, Thepsombandith's father and grandfather appeared. When Thepsombandith's grandfather entered the residence, Sayrath exited, and the three women ran to their car.

While leaving the scene in their car, the women were stopped by police for not having a rear license plate. The women informed the police about what had just taken place at Thepsombandith's residence. During a search of Thepsombandith's shack later that day, police officers discovered a shell casing on top of a speaker and a bullet hole in the ceiling. Thepsombandith was not present.

That same day Thepsombandith called Gonzales and asked her why she had called the police, that he thought she was his friend. Thepsombandith asked Gonzales to pick him up from a nearby residence. Gonzales passed this information along to the police. Police officers went to the residence where Thepsombandith was reported by Gonzales to be located and found him hiding in a closet. Thepsombandith was subsequently arrested and taken into custody.

## DISCUSSION

### I. *PROSECUTORIAL MISCONDUCT*

Thepsombandith asserts that the prosecutor committed prosecutorial misconduct in closing argument as to the count 2 assault with a firearm charge by telling the jury that the gun did not have to be loaded for him to be convicted of this crime. We conclude that (1) Thepsombandith waived this claimed error by failing to object to the prosecutor's statements; and (2) even if there was no waiver, (a) there was no misconduct, (b) any misconduct was harmless as the overwhelming evidence at trial showed that the gun was in fact loaded, and (c) any misconduct was not so egregious that it denied Thepsombandith his federal right to due process.

#### A. *Background*

In closing argument defense counsel raised the fact that Sayrath was not aware the gun was loaded until after Thepsombandith fired it, misstating the law on assault: "The knowledge of the deadly capacity, such as it were of this firearm, was only known after the discharge. [¶] It never again was pointed at her. She never stated that the firearm was pointed at her again. [¶] I dare say that if the firearm had been pointed at her a second time, we'd have an assault on [Sayrath] by means of a firearm."

On rebuttal, in response to this argument by defense counsel, the prosecutor stated, "Now, here's one you've got to be real careful with. [Sayrath] didn't know the gun was loaded, so it can't be assault. Did you hear that?" The prosecutor went on to explain, correctly, that Sayrath's knowledge was not an element of the charge of assault: "The person committing the act -- that's him -- the person committing the act was aware of

facts that would lead a reasonable person to realize that a direct, natural, and probable result of this act, that physical force would be applied to another person. [¶] It doesn't matter if [Sayrath] thought the gun was loaded or not. It played no role and needs not be shown. [¶] . . . [¶] The fact is, he knew what was going on. He knew it was a gun; he knew there were bullets in there; he was the one pulling the trigger."

In further discussing the count 1 assault against Sayrath, however, the prosecutor then made the following statements: "*It doesn't matter whether the gun was loaded or not, you can still assault somebody with it. Okay? [¶] Also, there's no requirement that the gun be loaded for an assault to be carried out. That's not an element of the assault with a firearm.*" (Italics added.)

#### B. Waiver

In general, a claim of prosecutorial misconduct is waived where it has not been raised in the trial court. (*People v. Price* (1991) 1 Cal.4th 324, 447; *People v. Rowland* (1992) 4 Cal.4th 238, 274.) The only exception to this rule is where prompt admonition by the trial court would not have cured the error. (*People v. Rowland, supra*, at p. 274.) Only where the record shows misconduct, and the issue is preserved for appeal because an objection would have been futile and an admonition would not have cured the harm, must an appellate court determine whether on the total record the harm resulted in a constitutional miscarriage of justice. (*People v. Green* (1980) 27 Cal.3d 1, 33-34, overruled on another point in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3.)

There is no dispute that defense counsel did not object to the prosecutor's statements that the gun need not be loaded for Thepsombandith to be convicted of assault

with a firearm. Moreover, had defense counsel made a timely objection to the prosecutor's statements and requested an admonition, the court could have cured any harm resulting from the misstatements. The prosecutor could have then corrected any misapprehension he had left with the jury. Because the harm resulting from any misstatement could have been cured by an objection, Thepsombandith has waived the right to assert prosecutorial misconduct on appeal.

### C. *Merits*

Further, even if Thepsombandith's claim of prosecutorial misconduct was not waived and we address his claim on the merits, no reversal is required.

#### 1. *Law governing prosecutorial misconduct*

A broad scope of permissible argument is allowed: "[A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 819.) A prosecutor may not, however, misstate the law before the jury (*People v. Bell* (1989) 49 Cal.3d 502, 538) or "attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements [of the crimes charged] [citation]." (*People v. Marshall* (1996) 13 Cal.4th 799, 831.)

Federal constitutional rights are implicated by prosecutorial misconduct only if it is "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) "Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial

misconduct under state law only if it involves ""the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."" [Citation.]' [Citation.]" (*People v. Hill, supra*, 17 Cal.4th at p. 819.)

## 2. Analysis

To be convicted of assault with a firearm the defendant must either (1) point a loaded gun at another person; or (2) use a gun, loaded or unloaded, as a club or bludgeon. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 10-11 & fn. 3; *People v. Fain* (1983) 34 Cal.3d 350, 357, fn. 6.)

Thepsombandith does not assert that the prosecutor's statement that the firearm need not be loaded was error as to count 1, where the victim was Sayrath, presumably because his close proximity to the victim allowed for the opportunity to use the gun as a bludgeon. However, he attacks the prosecutor's statement as to count 2, which was based upon Thepsombandith pointing the gun at Gonzales, asserting that there is no evidence he intended to use the gun against her as a bludgeon, and therefore the gun must be loaded. Thepsombandith's assertion the prosecutor committed prejudicial attorney misconduct by these statements fails for a number of reasons.

First, it is clear from the record that the prosecutor, when he made the statements, was talking about count 1, not count 2. Thus, it is not reasonably likely that the jury would have understood that the statement applied to count 2 as well, and there was no misconduct.



Further, even if the prosecutor's statement was general enough for the jury to understand that it applied to both counts of assault, it was not prejudicial and did not violate Thepsombandith's federal constitutional rights.

The evidence was overwhelming that when Thepsombandith pointed the gun at Gonzales, it was loaded. It was loaded when he pointed it at Sayrath, as evidenced by the fact that after pointing it at her, he fired the gun. Gonzales observed Thepsombandith, after he fired the gun and while pointing it at her, pull the top of the gun back, then let it go forward. That action sounded to Gonzales like "he was putting the bullet in the barrel. I don't know what it's called. When you cock it back."

Based upon these facts, it is not reasonably probable that the jury convicted Thepsombandith on count 2 while believing that the gun was unloaded when he pointed it at Gonzales. Thus, the statement by the prosecutor, even if misconduct, was not prejudicial.

Additionally, the challenged statement was one comment by the prosecutor in his closing argument that consisted of 36 pages of transcript. It was not a pattern of misconduct or conduct ""so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."" (*People v. Gionis, supra*, 9 Cal.4th at p. 1214.)

## II. *INEFFECTIVE ASSISTANCE OF COUNSEL*

Thepsombandith asserts that even if his claim of prosecutorial misconduct was waived by virtue of trial counsel's failure to object when the statements were made, he may still raise the issue on appeal by asserting that trial counsel rendered ineffective

assistance of counsel by failing to object. Thepsombandith contends ineffective assistance of counsel is shown because there was no possible tactical reason for allowing the prosecutor to misstate the law of assault. We reject this contention.

*A. Applicable Legal Principles*

A defendant claiming ineffective assistance of counsel has the burden to show: (1) counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216, 218 (*Ledesma*).) To establish prejudice, the defendant must show it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings. (*Strickland, supra*, at pp. 693-694; *Ledesma, supra*, at pp. 217-218; *People v. Sapp* (2003) 31 Cal.4th 240, 263.)

In determining whether counsel's performance was deficient, we exercise deferential scrutiny. (*Strickland, supra*, 466 U.S. at p. 689; *Ledesma, supra*, 43 Cal.3d at p. 216.) The defendant must affirmatively show counsel's deficiency involved a crucial issue and cannot be explained on the basis of any knowledgeable choice of tactics. (*People v. Jackson* (1980) 28 Cal.3d 264, 289, disapproved on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3.) "'Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of effective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" (*People v. Weaver* (2001) 26 Cal.4th 876,

925.) "[C]ourts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight." (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.)

### B. *Analysis*

We conclude Thepsombandith has failed to sustain his appellate burden of demonstrating ineffective assistance of counsel. First, as discussed, *ante*, the statements by the prosecutor were made in reference to count 1. It was a proper recitation of the law as to that count. Defense counsel could reasonably have believed that the jury would only understand the statements as applying to count 1, and, therefore, the failure to object did not fall below an objective standard of reasonableness.

Assuming that the prosecutor's statement could only have been understood as applying to count 2, and defense counsel was deficient in failing to object to the statement, there was no prejudice sufficient to require a reversal. As discussed, *ante*, the evidence was overwhelming that the gun *was* loaded when Thepsombandith pointed it at Gonzales. Therefore it is not reasonably probable that Thepsombandith would have received a more favorable result but for counsel's failure to object to the prosecutor's statement. (*Strickland, supra*, 466 U.S. at pp. 693-694; *Ledesma, supra*, 43 Cal.3d at pp. 217-218; *People v. Sapp, supra*, 31 Cal.4th at p. 263.)

### III. *BLAKELY ERROR*

Citing *Blakely, supra*, 542 U.S. 296, Thepsombandith contends he was denied his federal Sixth Amendment constitutional right to a jury trial when the court imposed the upper term on the count 1 firearm use enhancement based on facts beyond those found by the jury.

However, as Thepsombandith acknowledges, the California Supreme Court rejected a similar contention in *People v. Black* (2005) 35 Cal.4th 1238, 1244, concluding that "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." The *Black* majority explained that "in operation and effect, the provisions of the California determinate sentence law simply authorize a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range. Therefore, the upper term is the 'statutory maximum' and a trial court's imposition of an upper term sentence does not violate a defendant's right to a jury trial under the principles set forth in *Apprendi*, *Blakely*, and *Booker*."<sup>2</sup> (*Black*, *supra*, at p. 1254.) Stare decisis requires this court to follow *Black*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Accordingly, we reject Thepsombandith's contention that the court erred by imposing the upper term on the count 1 firearm use enhancement based upon facts beyond those found by the jury.

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<sup>2</sup> *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), *Blakely*, *supra*, 542 U.S. 296, and *United States v. Booker* (2005) 543 U.S. 220 (*Booker*).

#### IV. DUAL USE OF FACTS

Thepsombandith contends the court improperly relied on his prison priors to impose the upper term on the count 1 firearm enhancement, arguing that this constituted an impermissible "dual use" of facts. We reject this contention.

##### A. Background

Thepsombandith had two prison priors (1) taking a vehicle while in possession of a gun (§§ 19851, subd. (a) & 12022, subd. (a)(1)); and (2) being in possession of a firearm while on parole (§ 12021, subd. (a)(1)). He also had several juvenile adjudications for burglary (§ 459), possession of a concealed firearm (§ 12025, subd. (b)), and two instances of possession of burglary tools. (§ 366).

At sentencing the court imposed the upper term on the gun enhancement (§ 12022.5, subd. (a)) on count 1. In doing so, the court stated:

"On the [section] 12022.5[, subdivision] (a) allegation I am going to impose the upper term of six years. [¶] Now I think this is significant. I have definite concerns about this defendant. [¶] This is his fourth time of having a gun in his possession. There were three other times. [¶] Everything that we did to convince him those three other times that you're not to have a gun, obviously, didn't have an impact, and he knew it. [¶] The gun is what makes this so dangerous. [¶] I do think he has a lack of control, and he is dangerous because of that. [¶] So, I think there is a legal basis for that. [¶] I didn't use the priors on the actual [section] 245[, subdivision (b)] count one core offense. [¶] So, it's not a double use. I'm using only the [section] 12022.5 allegation."

##### B. Analysis

Section 1170, subdivision (b) provides in part: "The court may not impose an upper term by using the fact of any enhancement which is imposed under [section

667.5]." Thus, under section 1170, subdivision (b), courts cannot use the same prior prison term as a basis to impose an enhancement under section 667.5 and as a factor in aggravation in imposing an upper term on a conviction. (*People v. St. Germain* (1982) 138 Cal.App.3d 507, 524.)

However, the court did not engage in an improper dual use of facts in imposing the upper term on the gun enhancement to count 1. In *People v. Bejarano* (1981) 114 Cal.App.3d 693, the trial court imposed an upper term sentence based upon the fact that the defendant had numerous prior convictions. (*Id.* at p. 706.) The trial court also imposed an enhancement under section 667.5 for a prior prison term. (*Bejarano, supra*, at p. 706.) The Court of Appeal held that there was no improper dual use of facts because (1) the defendant had at least six prior convictions, so the aggravated sentence could have been established without the prior prison term; and (2) the fact used for the enhancement under section 667.5 was a prior prison term, not merely a prior conviction. (*Bejarano, supra*, at p. 706; see also *People v. Hurley* (1983) 144 Cal.App.3d 706, 709 ["A trial court may use the facts of prior *conviction*, even where it underlies a prior prison term enhancement, to help show numerous convictions under [California Rules of Court,] rule 421(b)(2) because this is not the fact on which enhancement is based".])

Here, the court chose to impose the upper term on the firearm use enhancement because Thepsombandith had been in possession of a gun on three previous occasions. At no time did the court state, or even imply, that it relied on the fact that Thepsombandith had been in prison for two of those gun possessions in imposing the upper term. Therefore, the court did not rely upon Thepsombandith's prior

imprisonments to impose both the upper term on the firearm enhancement and prior prison term enhancements.

*V. CORRECTION OF ABSTRACT OF JUDGMENT*

The parties agree the abstract of judgment incorrectly reflects the Penal Code provision under which the one-year enhancement was imposed on count 6. The abstract of judgment indicates the court imposed a one-year enhancement on count 6 under section 1192.7, subdivision (c). The trial transcript, however, indicates the court imposed the one-year enhancement under section 12022.7, subdivision (a). Accordingly, the abstract of judgment must be corrected to reflect that the one-year enhancement on count 6 was imposed under section 12022.7, subdivision (a).

DISPOSITION

The court is directed upon remand to correct the abstract of judgment to reflect the fact that the one-year enhancement on count 6 was imposed pursuant to section 12022.7, subdivision (a), and to forward a certified copy of the corrected abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

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NARES, Acting P. J.

WE CONCUR:

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HALLER, J.

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McINTYRE, J.