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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. GERARDO RAMIREZ LARIOS, Defendant and Appellant.	A125388 (Marin County Super. Ct. No. SC153958)

Defendant was convicted following a jury trial of second degree murder (Pen. Code, § 187, subd. (a)), and gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subds. (a) and (d)) with prior convictions for driving under the influence (Veh. Code, § 23152, subd. (b)).[1] In this appeal defendant argues that the trial court erred by admitting lay opinion testimony and by declining to give a pinpoint instruction requested by the defense, and that the prosecutor committed misconduct by referring to facts not in evidence.

We conclude that the court properly admitted opinion testimony from witnesses present at the accident scene based on their perceptions that defendant was the driver of the vehicle, and the testimony did not impermissibly reflect on the issue of defendant's

[1] All further statutory references are to the Penal Code unless otherwise indicated. At the commencement of trial defendant admitted two additional charged offenses of driving with a suspended license (Veh. Code, § 14601.2, subd. (a)), with prior convictions of the same offense.

guilt. We also conclude that the requested pinpoint instruction was unnecessary, and prosecutorial misconduct was not committed. We therefore affirm the judgment.

STATEMENT OF FACTS

The victim of the offenses, Richard Teague, and his friend Zachary Seifert-Ponce, were both in high school and lived in Point Reyes. On the afternoon of June 12, 2007, they "were spending the day together" at Teague's house, "working on" Teague's car and listening to music. Defendant, their mutual friend, appeared at Teague's house. Seifert-Ponce thought he seemed "a little fired up." After stating that "he would be right back," defendant drove away "pretty fast" in his black Chevy pickup truck. Defendant reappeared 10 minutes later, parked his truck, then walked to the local Palace Market to purchase beer for the three of them. He returned soon thereafter with two 12-packs of Corona beer and suggested that they "go to Limantour" beach.

Seifert-Ponce testified that defendant drove "fast" on the way to the beach, at one point losing traction, and "revved up the engine really loud" as they passed the Olema Campground on Highway 1. They all drank beer in the pickup truck before they reached the beach. Defendant "slammed down" his beer and threw the bottle out the window. He also spun his tires, skidded, and "did a few doughnuts" on the dirt road.

At Limantour beach they sat on a log and drank more beers, then walked along the beach with a 12-pack. Defendant seemed "confused" and "mad at everything." They left the beach well before dark. In the parking area defendant threw a beer bottle at a car window, laughed, and drove away "real quick." Both 12-packs of beer had been consumed.

Defendant continued to drive fast and made "harder" turns into "other lanes" on the way back to Teague's house. Seifert-Ponce testified that the ride "felt kind of like a roller coaster really." He asked defendant to "slow down," and defendant did so.

They stayed at Teague's house for about half an hour, during which defendant expressed that he was "upset" about his relationship with his girlfriend "Nacole." Teague and defendant left in the truck without Seifert-Ponce. Defendant was in the driver's seat and Teague was in the passenger seat; neither one of them was wearing a seat belt.

Teague told Seifert-Ponce to wait at the house, and they would return in 20 minutes. Seifert-Ponce sat on the steps in front of the house for about 15 or 20 minutes until he "started to hear sirens."

Other witnesses observed defendant driving his black pickup truck after he and Teague left the house. Anna Kehoe testified that she was traveling northbound in her car on Highway 1 at just before 7:25 p.m. when she noticed defendant, her neighbor for many years, driving his black truck in the opposite direction directly at her in her lane of traffic at a high rate of speed. Kehoe was positive that defendant was driving the truck; she also saw "a figure" in the passenger seat. Kehoe pulled off the road to avoid defendant's truck.

Gregory and Elissa Filbrandt were traveling on Sir Francis Drake Boulevard from Point Reyes Station to Inverness, when a faded black pickup truck sped past them in the oncoming lane of traffic at a very high rate of speed, at least 65 miles per hour.[2] They both thought the driver was "crazy," and was "going to kill somebody" in a head-on accident. Gregory had seen the pickup truck many times before, and positively identified defendant as the driver. They also both observed a "young man" hanging out of the passenger side of the truck waving his arms and screaming. Gregory was angry at the danger posed by the speeding truck and unsuccessfully attempted to call 911 on his cell phone. Gregory and Elissa stopped briefly in Inverness. While standing in front of the bakery they observed "the same black pickup truck" drive through town "in excess of 65 miles per hour in a 25" mile per hour zone. Gregory was "thoroughly upset," and successfully "called 911."

Eric Johnson left Inverness for San Francisco early on the evening of June 12, 2007. As he prepared to turn from Sir Francis Drake Boulevard south onto Highway 1 Johnson observed an "older model pickup truck, silver in color," passing another car at the intersection across the double yellow line at a "very high rate of speed." The pickup

[2] For the sake of clarity and convenience we will refer to Gregory and Elissa Filbrandt by their first names.

truck "was out of control," with its tires squealing and "losing traction." Johnson thought the pickup truck "might actually hit" his vehicle, as it came within a few feet of him. The driver managed to gain control of the truck after it continued around the corner. Johnson "got a pretty good look at the person driving" the truck, and identified him as defendant. He described the passenger in the truck as a "younger man" of slight build. Both occupants of the truck were "jostling inside the cab" as the vehicle turned the corner.

After stopping momentarily, Johnson proceeded along Highway 1 until he reached an "accident scene" a minute or two later. The pickup truck he had seen previously was on fire on the right side road embankment, upside down on the roof, facing the wrong direction, and debris was strewn across the highway. The truck had apparently rolled over several times and was almost unrecognizable as a vehicle. Johnson attempted to call 911, but had no cell phone service.

Richard Mallouf, who lived near the Olema Campground on Highway 1, "saw wires shaking" and a "telephone pole across the street break and fall over" as he was pulling out of his driveway. He looked across the highway and observed debris and a black pickup truck on the side of the road, down the embankment. The truck was facing backwards, so the driver's side of the vehicle was farther down the embankment than the passenger side. Teague was in the passenger seat with his head facing the driver; he appeared to be unconscious. Defendant, whom Mallouf had seen many times before, was in the driver's seat with his hands on the steering wheel, "shaken up and kind of delirious." Defendant climbed out of the rear window into the bed of the pickup truck.

Dennis Rodoni, who also lived next to the Olema Campground, testified that he "heard a loud noise and then noticed the utility lines shaking rather badly" across the street. He ran down the road and discovered a black pickup truck off the road in a small ravine, facing backward, "smashed considerably." Defendant, the driver of the vehicle, was on his knees in the driver's seat, facing toward the rear of the truck, attempting to climb out the back window of the cab. Teague was still in the passenger seat, "unconscious with his head down."

As Rodoni ran back to his house to get a fire extinguisher he contacted Eric Johnson. Rodoni gave two fire extinguishers to Johnson, then made a "911 call." As Johnson returned to the truck to extinguish the fire defendant appeared out of the bushes on the right-hand shoulder of the road, disoriented, confused and bleeding from a cut on his forearm. Johnson also realized that defendant had been drinking; he had a "strong smell of alcohol."

Teague remained wedged in the cab of the collapsed pickup truck, intermittently conscious but severely injured and in great distress. Johnson and Rodoni tried to pry open the passenger door of the truck, but could not do so. When defendant saw Teague he repeatedly screamed, "I'm sorry, Ricky. I'm sorry."

In an apparent effort to "find a way out" of the truck, Teague continued to wiggle onto the floor of the vehicle. He ended up with his head on the driver's side floorboard near the brake.

Rescue personnel arrived soon thereafter to free Teague from the upturned pickup truck. He was "still trapped in the vehicle," partially on the passenger seat with "his feet towards the driver's pedals." He was disoriented and "twisting around," as he attempted to climb out of the cab.

The passenger side door and roof of the truck were removed to extricate Teague from the cab. At the accident scene, defendant told a paramedic that he was the driver of the truck, and had been driving "too fast." Defendant also mentioned that he was wearing his seatbelt, although an inspection of the vehicle suggested that neither of the seatbelts had been buckled when the accident occurred.

Teague was transported to the hospital by helicopter, but died soon thereafter. His death resulted from severe blunt force trauma to the head and torso that caused fatal internal injuries and bleeding. His primary injuries were to the right side of his face and torso, which indicated, according to expert testimony, that he was the passenger in the truck. The victim's blood-alcohol level at the time of his death was 0.11 percent.

Defendant was also transported to the Marin General Hospital for treatment of his injuries. During the ambulance trip to the hospital defendant apologized and indicated

that he was the driver of the truck. Defendant reached the hospital at 9:20 p.m., and was arrested at 9:44 p.m. At the hospital an officer detected "a strong odor of an alcoholic beverage emitting from [defendant's] breath and person." His "eyes were red and blurry and his speech was slow and slurred." In response to questions defendant stated that he hit his head in the collision and was not taking any medication. Defendant admitted that he drank six beers beginning at 4:00 p.m., and felt the effects of the alcohol. He became "extremely emotional" and "tearful" when informed of the death of Teague.

Preliminary alcohol screening tests with a breathalyzer just before defendant's arrest indicated a blood-alcohol level of 0.234 percent. Two samples of defendant's blood were drawn at the hospital: one taken at 9:26 p.m. specified a blood-alcohol level of 0.31 percent, or four times the legal limit; another at 10:53 p.m. measured his blood-alcohol level at 0.23 percent. Expert testimony was presented that based on the rate of elimination of alcohol per hour, defendant's blood-alcohol level at the time of the accident at 7:30 p.m. was approximately 0.28 percent, which was "too impaired to operate a motor vehicle safely."

Defendant was interviewed at 12:44 the next morning at the California Highway Patrol office. He stated that he drank a 12-pack of beer at the beach in Point Reyes the prior afternoon. Defendant freely admitted that he was the driver of the pickup truck. He denied that Teague ever drove the vehicle, although he stated that "at one point" Teague "knew he was drunk" and "took the keys away from him" briefly. Defendant did not have any memory of the collision, however, and did not recall specifically if he was driving at the time. Defendant reported to the officers that he had previously taken three DUI classes, and was aware of the dangers of driving while alcohol impaired.

Stipulations were entered that defendant suffered convictions for driving under the influence of alcohol in 2000 and 2003. Following each of those convictions defendant enrolled in and successfully completed mandatory "driving under the influence" education programs that teach the dangers of driving while intoxicated. On the date of the collision defendant was aware that his driver's license had been suspended.

Investigation of the accident scene by California Highway Patrol officers revealed that the pickup truck struck a utility pole, rotated counterclockwise, then struck a tree and fence post before coming to rest down the embankment of the road in a backward position. An officer estimated that the truck was traveling in excess of 60 miles per hour when the collision occurred.

The passenger door of the pickup truck was missing when investigating officers examined the accident scene the night of June 12, 2007, and the next day. The prosecution presented evidence of letters written by defendant to his girlfriend Nacole Borg while he was incarcerated, in which he mentioned the missing passenger door. In a letter dated November of 2007 defendant stated to Borg that he did not "know or care" where she and Rose Freeman, defendant's former wife, put the door, but requested that they "put it away where no one can find it." He emphasized to Borg that the door "must not be found." Defendant also asked Borg to "explain about the door" to his sister, but not tell his attorney "anything," and not "mention that door" to anyone else. In another letter sent to Borg in December of 2008, defendant discussed the ongoing first trial and expressed concern that the prosecutor "will find out what happened to the door."

An investigator with the district attorney's office spoke with Rose Freeman in January of 2009, in an effort to determine "where the door was." Freeman agreed to meet with the investigator, but she did not appear as arranged. The investigator subsequently learned that the door had "been thrown away," and the prosecutor never obtained possession of it.

The defense was focused on contesting the proof that defendant was driving the pickup truck when the accident occurred. A hospital physician and defense psychiatrist testified that defendant suffered a concussion, which along with his alcohol ingestion and trauma from the accident may have contributed to a permanent loss of memory of the event. Thus, while defendant made statements that he was the driver of the truck, he may have confabulated his account of the accident by "filling in the blanks" to inaccurately describe "something that occurred that did not occur."

Experts in biomechanical engineering and accident reconstruction, who reviewed the police reports and medical records, testified for the defense that when the pickup truck struck the utility pole and rotated counterclockwise, both occupants of the cab were forcibly thrown forward and to the right. The passenger, if unrestrained, would have struck the front edge of the passenger door, with the driver ending up behind the passenger. The driver's seat belt of the truck was inoperable, but the condition of the passenger seat belt after the accident indicated that it "was in use at the time of the collision." The experts offered opinions, based on the blood samples taken from the truck and the injuries suffered by both occupants, that Teague was the unrestrained driver of the vehicle and defendant was the restrained passenger when the accident occurred.

DISCUSSION

I. The Evidence of Lay Opinions that Defendant was the Driver of the Pickup Truck.

Defendant argues that the trial court erred by admitting opinion testimony from law enforcement officers and emergency response personnel. The witnesses recounted the statements made to them by defendant and their observations at the scene. The prosecutor then elicited testimony from the witnesses that defendant was the driver of the pickup truck when the accident occurred. Defendant points out that the "crucial issue" in the case was whether he was driving, so the trial court "in direct effect permitted those witnesses to testify that in their opinions [he] was guilty." He therefore claims that the trial court violated the rule that a witness may not offer an opinion on the defendant's guilt.

According to the established rule, "Opinion testimony is generally *inadmissible* at trial. (Evid. Code, §§ 800, 801.)" (*People v. Torres* (1995) 33 Cal.App.4th 37, 45.) "One of the fundamental theories of the law of evidence is that witnesses must ordinarily testify to facts, not opinions. (1 Witkin, Cal. Evidence (3d ed. 1986) § 447, p. 421.) An exception exists for expert witnesses. (Evid. Code, § 801.)" (*People v. Williams* (1992) 3 Cal.App.4th 1326, 1332.) Another exception authorizes admission of "lay testimony in limited situations. (Evid. Code, § 800.) However, when the witness is a layperson, he or

she may not testify on matters which are not proper subjects of lay opinion testimony." (*Jambazian v. Borden* (1994) 25 Cal.App.4th 836, 848–849, fn. omitted.)

Lay opinion "plays a very different role than expert opinion and is subject to different rules of admissibility. ' "Lay opinion testimony is admissible where no particular scientific knowledge is required, or as 'a matter of practical necessity when the matters . . . observed are too complex or too subtle to enable [the witness] accurately to convey them to court or jury in any other manner.' [Citations.]" [Citation.]' [Citation.] It must be rationally based on the witness's perception and helpful to a clear understanding of the witness's testimony." (*People v. Chapple* (2006) 138 Cal.App.4th 540, 547.)[3] "While *experts* can testify to opinions based on matters not admitted into evidence (Evid. Code, § 801), . . . an opinion by a nonexpert 'is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: [¶] (a) Rationally based on the perception of the witness . . . .' (Evid. Code, § 800.) In order for such an opinion to be admissible, evidence would be adduced as to the basis for the opinion, i.e., the perception that led the witness to that opinion." (*People v. Golde* (2008) 163 Cal.App.4th 101, 120.) "The meaning of subdivision (a) is clear: 'A witness who is not testifying as an expert may testify in the form of an opinion *only if the opinion is based on his own perception*.' (Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (1966 ed.) § 800, p. 376, italics added.) As the drafters acknowledge (*ibid*.), this was also the common law rule. [Citations.] In this context, moreover, the drafters define 'perception' as the process of acquiring knowledge 'through one's senses' (Evid. Code, § 170), i.e., by personal observation." (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1306.)

In addition, "A consistent line of authority in California as well as other jurisdictions holds a witness cannot express an opinion concerning the guilt or innocence

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[3] "Evidence Code section 800 provides: 'If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: [¶] (a) Rationally based on the perception of the witness; and [¶] (b) Helpful to a clear understanding of his testimony.' " (*People v. Lucero* (1998) 64 Cal.App.4th 1107, 1110–1111.)

of the defendant. (*People* v. *Brown* (1981) 116 Cal.App.3d 820, 829 [172 Cal.Rptr. 221]; *People* v. *Clay* [(1964)] 227 Cal.App.2d [87,] 98–99, citing cases.) As explained in *Brown* and *Clay* the reason for employing this rule is not because guilt is the 'ultimate issue of fact' to be decided by the jury. Opinion testimony often goes to the ultimate issue in the case. (See *Brown, supra,* 116 Cal.App.3d at pp. 827–828, and cases cited.) Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt." (*People v. Torres, supra,* 33 Cal.App.4th 37, 46–47.)

We review the trial court's admission of the opinion testimony under the deferential standard of abuse of discretion. (*People v. Thornton* (2007) 41 Cal.4th 391, 428; *People v. Benavides* (2005) 35 Cal.4th 69, 90; *People v. Mixon* (1982) 129 Cal.App.3d 118, 127.) We look at "whether the court's ruling 'exceeded the bounds of reason.' [Citations.]" (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 972.)

First, evidence that defendant was the driver of the pickup truck was a proper subject of lay opinion testimony. Under the circumstances presented, whether defendant was driving when the accident occurred was a matter of common experience which was not founded on scientific knowledge or specialized background. It helped the jury to fully appreciate the testimony of the witnesses. "Opinion testimony may be admitted in circumstances where it will assist the jury to understand the evidence or a concept beyond common experience." (*People v. Torres, supra,* 33 Cal.App.4th 37, 45.) The lay opinion testimony that defendant was driving the pickup truck conveyed relevant information to the jury more conveniently and more accurately than a detailed recital of the underlying facts. (See *People v. Kennedy* (2005) 36 Cal.4th 595, 621; *People v. McAlpin, supra,* 53 Cal.3d 1289, 1309–1310; *Jordan v. Great Western Motorway*s (1931) 213 Cal. 606, 612; *People v. Chapple, supra,* 138 Cal.App.4th 540, 547.)

The opinions were also rationally based on the perceptions of the witnesses. The officers and paramedics were present and witnessed the aftermath of the accident. They not only appraised the accident scene, but also observed defendant's conduct and

conversed with him as well as other witnesses. As we read the record, the opinions as offered by the witnesses were derived from their personal knowledge of defendant's statements, along with additional observations they made at the accident site and while transporting defendant to the hospital. Lay opinion testimony is relevant and therefore admissible "when it is based on the witness's personal observation of the defendant's course of behavior." (*People v. Felix* (1999) 70 Cal.App.4th 426, 430.) The opinions of the witnesses in the case before us were rational inferences drawn from facts they personally observed, and enhanced the ability of the jury to assess the evidence perceived by the witnesses. (*People v. Farnam* (2002) 28 Cal.4th 107, 153–154.)

Defendant further argues that the testimony was impermissible opinion testimony on the ultimate issue of his guilt. Defendant asserts that his status as the driver rather than passenger in the pickup truck was the crucial issue in the case. Therefore, his argument proceeds, "in effect" the admission of testimony from witnesses that he "was driving at the time of the collision" permitted them to express opinions that he "was guilty."

We are not persuaded that the admission of lay opinion testimony in the present case erroneously invaded the province of the jury to determine the issue of defendant's guilt. (Cf. *People v. Bejarano* (2009) 180 Cal.App.4th 583, 588; *People v. Frederick* (2006) 142 Cal.App.4th 400, 412; *People v. Torres, supra,* 33 Cal.App.4th 37, 47.) "Despite the circumstance that it is the jury's duty to determine whether the prosecution has carried its burden of proof beyond a reasonable doubt, opinion testimony may encompass 'ultimate issues' within a case. Evidence Code section 805 provides that '[t]estimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.' (See *People v. Valdez* (1997) 58 Cal.App.4th 494, 507 [68 Cal.Rptr.2d 135] [a gang expert testified that the defendant was a member of a particular gang and that his activities were undertaken on behalf of the gang].)" (*People v. Prince* (2007) 40 Cal.4th 1179, 1227.) The line is drawn not at an opinion that embraces an ultimate issue in the case, but rather at the expression by a witness of "an opinion on a defendant's guilt. [Citations.] The reason

for this rule is not because guilt is the ultimate issue of fact for the jury, as opinion testimony often goes to the ultimate issue. [Citations.] 'Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt.' [Citation.]" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 77.) " ' "[T]he true rule is that admissibility depends on the nature of the issue and the circumstances of the case, there being a large element of judicial discretion involved . . . ." ' " (*People v. Valdez, supra,* 58 Cal.App.4th 494, 507, quoting from *People v. Wilson* (1944) 25 Cal.2d 341, 349.)

Here, the witnesses did not offer opinions that defendant was guilty or even that crimes had been committed. The opinion testimony was limited to defendant's act of driving the vehicle. The witnesses did not expound on the nature of defendant's driving, the cause of the collision, or any other elements of the charged murder and gross vehicular manslaughter offenses. (See *People v. Prince, supra*, 40 Cal.4th 1179, 1227; *People v. Coffman and Marlow, supra*, 34 Cal.4th 1, 77.) The testimony did not draw an inference of guilt which was properly reserved for the jury, but rather enhanced the ability of the jury to understand and draw inferences from the remaining testimony which reflected on the issue of the driver of the pickup truck when the accident occurred. In addition, the trial court instructed the jurors that they were the sole judges of the credibility of a witness, that they should consider all the evidence on which the proof of any fact depends, and that they were free to determine the weight, if any, to accord an opinion upon considering the basis for the opinion. (See *People v. Lindberg* (2008) 45 Cal.4th 1, 49.) We conclude that the court's admission of the lay opinion testimony did not fall outside the bounds of reason. (*People v. Thornton, supra,* 41 Cal.4th 391, 429; *People v. Medina* (1990) 51 Cal.3d 870, 887.) It therefore was properly received.

II. The Trial Court's Refusal to give a Pinpoint Instruction Requested by the Defense.

Defendant also claims that the trial court erred by refusing to give a pinpoint instruction requested by the defense on the "key issue" of whether he "was driving the vehicle *at the time of the collision*." (Italics added.) Defendant's position is that the

evidence demonstrated he was "driving at various times before the collision, in an arguably reckless or dangerous way and while intoxicated," and the defense presented evidence that Teague may have been driving when the accident occurred. Therefore, his requested pinpoint instruction was necessary, he submits, to "focus the jury's attention on the fact" that a finding of his guilt must be based on his driving "at the time of the collision and not on his driving behavior at some other time that day." Defendant asserts that without the pinpoint instruction his conviction may have been improperly based on "the totality of [his] driving behavior" and his act of letting the victim "drive the pickup," rather than "on the facts relating just to the time of the collision."

The law on pinpoint instructions is established. The California Supreme Court has "suggested that 'in appropriate circumstances' a trial court may be required to give a requested jury instruction that pinpoints a defense theory of the case by, among other things, relating the reasonable doubt standard of proof to particular elements of the crime charged. [Citations.] But a trial court need not give a pinpoint instruction if it is argumentative [citation], merely duplicates other instructions [citation], or is not supported by substantial evidence [citation]. An instruction that does no more than affirm that the prosecution must prove a particular element of a charged offense beyond a reasonable doubt merely duplicates the standard instructions defining the charged offense and explaining the prosecution's burden to prove guilt beyond a reasonable doubt." (*People v. Bolden* (2002) 29 Cal.4th 515, 558–559; see also see also *People v. Harrison* (2005) 35 Cal.4th 208, 253.) A trial court may refuse a proffered instruction if it is duplicative. (*People v. Bacon* (2010) 50 Cal.4th 1082, 1112; *People v. Hartsch* (2010) 49 Cal.4th 472, 511; *People v. Gurule* (2002) 28 Cal.4th 557, 659.)

Here, the jury received accurate and complete instructions on the prosecution's burden of proof and on the elements of murder and gross vehicular manslaughter while intoxicated. Specifically, the requirement of proof that defendant committed an act, in this case driving, that caused the death of the victim, was explained in the standard instructions. The murder instruction, CALCRIM No. 520, advised the jury that the prosecution must prove defendant "committed an act that caused the death of another

person," with malice aforethought. Implied malice was defined in the murder instruction as the deliberate commission of an act with conscious disregard for human life, the consequences of which were known to defendant to be dangerous, and which was a substantial factor in causing the death of the victim.

The instruction on gross vehicular manslaughter while intoxicated, CALCRIM No. 590, stated the prosecution must prove "defendant drove under the influence of an alcoholic beverage," and that "while driving under the influence of an alcoholic beverage" and with "gross negligence" he "committed an infraction that might cause death."[4] The jury was further advised that the "combination of driving a vehicle while under the influence of an alcoholic beverage and violating a traffic law is not enough by itself to establish gross negligence," and the "level of . . . defendant's intoxication" along with "any other relevant aspects" of his conduct that causes death must be considered. Finally, the court instructed the jurors their duty was to "decide whether the defendant on trial here committed the crimes charged," which pointed the focus toward him rather than any "other persons" who may have committed criminal acts.

When read in their entirety and considered in the context of the evidence and argument presented, the instructions were adequate to notify the jury of the essential element of the case that defendant was driving at the moment of the collision that killed Teague. "In reviewing a claim that the court's instructions were incorrect or misleading, we inquire whether there is a reasonable likelihood the jury understood the instructions as asserted by the defendant. [Citation.] We consider the instructions as a whole and assume the jurors are intelligent persons capable of understanding and correlating all the instructions." (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1332.) The defense and argument of counsel focused on whether defendant was driving when the accident occurred. In his opening statement the prosecutor told the jury that implied malice and

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[4] The infractions allegedly committed by defendant were identified as speeding (Veh. Code, § 22350) and making an unsafe turning movement (Veh. Code, § 22107), and were defined in a separate instruction. Gross negligence was also defined by the court as a reckless act that creates a high risk of death or great bodily injury and amounts to disregard for human life.

vehicular manslaughter would be proved through evidence that defendant "was driving," and knew the consequences of "driving recklessly" under the influence of alcohol when Teague was killed. During closing argument the prosecutor emphasized that the jury must find beyond a reasonable doubt "defendant was the driver at the time of this collision."[5] We are convinced that the instructions were understood by the jury to require a finding that the act necessary to establish the offenses was defendant's act of driving – with conscious disregard for human life to establish murder, or with gross negligence while under the influence of alcohol to establish gross vehicular manslaughter while intoxicated. Under the circumstances, no other possible act fit the definitions of the charged offenses. We have no doubt the jury was aware the instructions did not authorize convictions on the basis of either driving infractions committed by defendant before the accident, or his act of permitting the inebriated victim to drive immediately before the collision occurred.

A "trial court is required to give a requested instruction relating the reasonable doubt standard of proof to a particular element of the crime charged only when the point of the instruction would not be readily apparent to the jury from the remaining instructions." (*People v. Bolden*, *supra*, 29 Cal.4th 515, 558–559; *People v. Assad* (2010) 189 Cal.App.4th 187, 198.) The objective of the pinpoint instruction requested by the defense – to direct attention to the element that defendant was driving – was readily apparent from the instructions given, and nothing in the particular circumstances of this case suggested a need for duplication or additional clarification. Thus, the trial court did not err in refusing to give the requested pinpoint instruction, and defendant's right to a fair trial was not violated. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1021–1022; *People v. Panah* (2005) 35 Cal.4th 395, 486–487; *Bolden*, *supra*, at p. 559.)

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[5] In determining whether instructions were deficient or prejudicially misleading we may consider the arguments of counsel. (See *People v. Crittenden* (1994) 9 Cal.4th 83, 138; *People v. Webster* (1991) 54 Cal.3d 411, 451–452; *People v. Howard* (1988) 44 Cal.3d 375, 435–436.)

III. The Prosecutor's Comments on the Missing Truck Passenger Door.

We turn to defendant's claim that the prosecutor committed misconduct by arguing "facts not in evidence." Defendant directs our attention to assertions by the prosecutor during closing argument that defendant, with the assistance of his girlfriend Nacole Borg and former wife Rose Freeman, effectuated the removal of the passenger door of the truck from the accident scene and subsequent concealment of it from law enforcement investigators. The prosecutor argued that defendant conspired with his "cohorts" to steal and "destroy" the door,[6] Defendant complains that "[t]his was improper argument," as neither any "direct evidence nor a reasonable inference from the evidence" showed that he was "involved in the taking of the door." Defendant adds that he "was deprived by this misconduct of his Fourteenth Amendment right to a fair trial."

" 'The applicable federal and state standards regarding prosecutorial misconduct are well established. " 'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " [Citation.]' [Citation.] '[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citation.]" (*People v. Smithey* (1999) 20 Cal.4th 936, 960; see also *People v. Prieto* (2003) 30 Cal.4th 226, 260.)

Reference to "facts not in evidence" by the prosecutor "is 'clearly . . . misconduct' [citation], because such statements 'tend[] to make the prosecutor his own witness—

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[6] The prosecutor also remarked during his opening statement that evidence would reveal "the defendant engaged . . . in a conspiracy to hide evidence," which demonstrated "consciousness of his guilt."

offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, "although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." [Citations.]' [Citations.] 'Statements of supposed facts not in evidence . . . are a highly prejudicial form of misconduct, and a frequent basis for reversal.' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 827–828.) " '[C]ounsel may not assume or state facts not in evidence [citation] or mischaracterize the evidence [citation].' [Citation.]" (*People v. Collins* (2010) 49 Cal.4th 175, 209.)

However, " 'The prosecution is given wide latitude during closing argument to make fair comment on the evidence, including reasonable inferences or deductions to be drawn from it.' [Citation.]" (*People v. Collins, supra,* 49 Cal.4th 175, 213.) " ' " '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.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.' [Citation.] 'A prosecutor may "vigorously argue his case and is not limited to 'Chesterfieldian politeness' " [citation], and he may "use appropriate epithets . . . ." ' " [Citation.]' [Citation.]" (*People v. Hill, supra*, 17 Cal.4th 800, 819.) "[W]e accord counsel great latitude at argument to urge whatever conclusions counsel believes can properly be drawn from the evidence. [Citation.] Such latitude precludes opposing counsel from complaining on appeal that the opponent's ' "reasoning is faulty or the conclusions are illogical." ' [Citation.]" (*People v. Cash* (2002) 28 Cal.4th 703, 732.) "Whether the inferences drawn by the prosecutor are reasonable is a question for the jury." (*People v. Tafoya* (2007) 42 Cal.4th 147, 181.)

We conclude that the prosecutor's references to defendant's efforts to facilitate the concealment of the passenger door fall within the scope of proper comment on the evidence. The evidence established that the door was removed from the truck to extract Teague, and was not present when investigating officers examined the accident scene. Evidence was also adduced that Nacole Borg lived in a trailer at the Olema Campground,

within a few hundred yards of the collision site. Borg was "in her car" at the scene when investigating officers arrived We also know from the evidence that Borg was defendant's girlfriend and Rose Freeman was his former wife. Most tellingly, while defendant was incarcerated he sent letters to Borg which specifically counseled her and Freeman to continue to conceal the door from the police, his own attorney, and anyone else. Defendant communicated apprehension to Borg that the prosecutor must not discover "what happened to the door." An investigator with the district attorney's office subsequently attempted to discuss the missing door with Freeman, but she failed to appear for an arranged meeting. The prosecution never obtained possession of the door.

A reasonable inference from the evidence is that defendant was at least complicit in a scheme to prevent the prosecution from discovering the missing passenger door, which may have been of evidentiary value in establishing or confirming the identity of the passenger when the accident occurred. Thus, the prosecutor was justified in suggesting that defendant was part of an effort to suppress evidence, which indicated his consciousness of guilt. (See *People v. Tate* (2010) 49 Cal.4th 635, 698–699; *People v. Richardson* (2008) 43 Cal.4th 959, 1020; *People v. Jackson* (1996) 13 Cal.4th 1164, 1225; *People v. Randle* (1992) 8 Cal.App.4th 1023, 1037.) A prosecutor's wide latitude to comment on the evidence includes "urging the jury to make reasonable inferences and deductions therefrom." (*People v. Coffman and Marlow*, *supra*, 34 Cal.4th 1, 95.) We find that the prosecutor did not mischaracterize the record or assume facts not in evidence, but merely commented on the evidence and offered the jury permissible inferences drawn from it. (*People v. Rowland* (1992) 4 Cal.4th 238, 278.) The closing argument was properly based on the prosecutor's understanding of the evidence. (*People v. Valdez* (2004) 32 Cal.4th 73, 134.)

Accordingly, the judgment is affirmed.

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Dondero, J.

We concur:

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Margulies, Acting P. J.

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Banke, J.