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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JESSE MOORE, Defendant and Appellant.	B236858 (Los Angeles County Super. Ct. No. GA082000)

APPEAL from a judgment of the Superior Court of Los Angeles County, Carol Williams Elswick, Judge. Affirmed.

Nixon Peabody, Michael Zweiback, Jason Gonzalez and Michael O. Azat for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

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* Under California Rules of Court, rules 8.1100 and 8.1110, only part III of the Discussion and the Disposition are certified for publication.

Defendant and appellant Jesse Moore appeals his convictions for attempted second degree robbery and misdemeanor vandalism. In the published portion of this opinion, we conclude a probation condition prohibiting Moore from owning, possessing, or using dangerous or deadly weapons is not unconstitutionally vague, and need not be modified to include a knowledge requirement. In the unpublished portions, we conclude the evidence was sufficient and the prosecutor did not commit prejudicial misconduct. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. *Facts.*

a. *People's evidence.*

On October 15, 2010, at approximately midnight, Juan Manuel Pineda Hernandez[1] was in Alhambra, walking home from work. Moore approached Pineda and asked for a cigarette. Pineda, whose first language was Spanish, spoke "a little" English and understood Moore's request. Pineda smelled alcohol on Moore's breath. Pineda told Moore he did not speak English and did not have any cigarettes. Moore became irate and raised his voice, saying " 'talk to me in English.' " Pineda reiterated that he did not speak English. Moore replied, " 'Fuck you. I'll kick your ass,' " and asked where Pineda was from. Pineda continued walking toward his home.

Moore grabbed Pineda's sleeve, and Pineda pulled away. At the same time, Pineda answered his cellular telephone. Moore grabbed the phone. When Pineda threatened to call police, Moore said " 'fuck the police' " and broke the phone. When Pineda reached for the phone, Moore swung at Pineda, landing a punch on Pineda's shoulder and face. Moore stated, " 'Do you have money,' " " 'give me money,' " or something similar. He attempted to reach inside Pineda's rear pants pocket, where Pineda carried his wallet. The men struggled and Moore tried to push Pineda to the ground. Pineda landed on his knees, stood back up, and ran toward his house, with

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[1] The parties refer to the victim as "Pineda." In the interest of clarity, we do so as well.

Moore chasing him. Moore threw the phone at Pineda, hitting him in the back. When Pineda reached his nearby home, a neighbor summoned police.

b. *Defense evidence.*

Moore testified in his own behalf. He admitted that on the night of October 15, 2010, he was drunk, approached Pineda, and asked him for a cigarette. Pineda politely told Moore he did not speak English, and Moore's efforts to strike up a conversation with Pineda were unsuccessful. Moore then thought to himself, " 'Fuck this dude. He speaks English.' " Moore ran up to Pineda, who was talking on his cellular telephone, and grabbed the phone. It broke. Pineda ran, screaming in English, " 'Call the police. Call the police.' " Moore screamed after him, " 'You speak English now, don't you, you mother f-er.' " Moore threw the phone at Pineda.

Moore denied demanding money from Pineda, reaching for Pineda's pocket, grabbing his sweater, punching him, or pushing him to the ground. He never intended to rob Pineda. His only mention of money was to inform Pineda he did not have money to pay for cigarettes.

II. *Procedure.*

Trial was by jury. Moore was convicted of attempted second degree robbery (Pen. Code, §§ 664, 211)[2] and misdemeanor vandalism (§ 594 subd. (a)). The trial court suspended imposition of sentence and placed Moore on probation for a term of three years, on condition he serve a year in jail. It imposed a restitution fine, a suspended probation restitution fine, a court security fee, a crime prevention fine, and a criminal conviction assessment, and ordered Moore to pay victim restitution. Moore appeals.

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[2] All further undesignated statutory references are to the Penal Code.

DISCUSSION

I. *The evidence was sufficient to sustain the attempted robbery conviction.*

Moore contends the evidence was insufficient to prove he attempted to rob Pineda. We disagree.

When determining whether the evidence was sufficient to sustain a criminal conviction, "we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66; *People v. Carrington* (2009) 47 Cal.4th 145, 186-187; *People v. Halvorsen* (2007) 42 Cal.4th 379, 419.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Medina* (2009) 46 Cal.4th 913, 919.) Reversal is not warranted unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Robbery is the felonious taking of personal property in the possession of another, from his or her person or immediate presence, and against his or her will, accomplished by means of force or fear, with the specific intent to permanently deprive the person of the property. (§ 211; *People v. Burney* (2009) 47 Cal.4th 203, 234; *People v. Gomez* (2008) 43 Cal.4th 249, 254; *People v. Young* (2005) 34 Cal.4th 1149, 1176-1177.) "[T]o be convicted of attempted robbery, the perpetrator must harbor a specific intent to commit robbery and commit a direct but ineffectual act toward the commission of the crime." (*People v. Lindberg* (2008) 45 Cal.4th 1, 27; *People v. Medina* (2007) 41 Cal.4th 685, 694.) Neither the commission of an element of robbery, nor the completion of a theft or assault, is required. (*People v. Lindberg, supra,* at p. 28; *People v. Medina, supra,* at p. 694; *People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 8.) "[T]he intent required for robbery . . . is seldom established with direct evidence but instead is usually inferred from all the facts and circumstances surrounding the crime. [Citations.]"

(*People v. Lewis* (2001) 25 Cal.4th 610, 643; *People v. Thomas* (2011) 52 Cal.4th 336, 355; *People v. Lindberg, supra,* 45 Cal.4th at p. 27.)

Here, the evidence was sufficient to establish the attempted robbery. The testimony of a single witness, unless physically impossible or inherently improbable, is sufficient to establish a fact. (Evid. Code, § 411; *People v. Young, supra,* 34 Cal.4th at p. 1181; *People v. Hampton* (1999) 73 Cal.App.4th 710, 722.) Pineda testified that Moore either asked if Pineda had money, demanded money from him, or said "money," and attempted to reach into Pineda's pocket. Moore physically struggled with Pineda and punched him. When Pineda fled, Moore followed. From this evidence, the jury could readily infer that Moore intended to rob Pineda and committed several direct but ineffectual acts aimed at accomplishing the robbery. The jury was not obliged to accept Moore's contrary testimony. (See generally *People v. Mar* (2002) 28 Cal.4th 1201, 1224 [trier of fact not obliged to credit defendant's self-serving version of events].)

Moore makes a variety of arguments in support of his contention that the evidence was insufficient. He urges that Pineda's testimony was not credible and was too "ambiguous" to support a finding he intended or attempted to rob the victim; Pineda had a limited grasp of English and may have misunderstood Moore, who was speaking "fast"; on cross-examination, Pineda stated only that he heard Moore say something about money, not that Moore demanded money; Pineda did not tell police Moore reached into his pocket; Moore threw the cellular telephone back to Pineda, rather than keeping it, demonstrating he did not have the intent to rob; Moore was too intoxicated to form the intent to rob; and Moore voluntarily waited for police to arrive after the crime, conduct inconsistent with a consciousness of guilt.

Moore's arguments lack merit. During direct examination, Pineda testified that Moore asked him, " 'Do you have money?' " or " 'give me money,' " or something similar. On cross-examination, Pineda stated, "I heard him say 'money' and then he attempted to stick his hand in my pocket." Under either scenario, the jury could have readily inferred Moore intended to rob Pineda. As to Pineda's statements to police, Pineda testified that he *did* tell an interviewing officer that Moore attempted to reach into

his pocket. Pineda explained: "I told it to the police officer, but I do not know whether he wrote it down on the piece of paper or not. I was very nervous when I was being interviewed by the police." Additionally, Pineda testified at the preliminary hearing that Moore had put his hand in his pocket. As to the argument he was intoxicated, Pineda is correct that evidence of voluntary intoxication may be considered on the issue of whether a defendant formed a required specific intent (§ 22, subd. (b)). However, this was clearly a question for the jury, not this court.

In short, these and Moore's remaining arguments amount to a request that this court reweigh the evidence. The points he raises "involve simple conflicts in the evidence that were for the jury to resolve. [Citation.] Of course, 'it is not a proper appellate function to reassess the credibility of the witnesses.' [Citation.]" (*People v. Friend* (2009) 47 Cal.4th 1, 41; *People v. Cortes* (1999) 71 Cal.App.4th 62, 81 [where an appellant "merely reargues the evidence in a way more appropriate for trial than for appeal," we are bound by the trier of fact's determination].) It is the exclusive province of the jury to determine the truth or falsity of the facts upon which a determination of guilt depends, and we resolve neither credibility issues nor evidentiary conflicts. (*People v. Maury* (2003) 30 Cal.4th 342, 403; *People v. Mejia* (2007) 155 Cal.App.4th 86, 98.) Because substantial evidence supported the jury's verdict, the fact the evidence might conceivably have been reconciled with a contrary finding does not warrant a reversal. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1170; *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1331.)

II. *Prosecutorial misconduct.*

Moore next complains that during argument, the prosecutor "made a total of fourteen different statements which constituted improper vouching." Moore posits that the prosecutor's use of the phrases " 'I think' " and " 'we know' " during argument, as well as her statement that the People were convinced Moore committed the robbery, improperly vouched for the strength of the People's case and amounted to expressions of personal belief in Moore's guilt. Moore also contends that the prosecutor misstated the evidence. We disagree.

a. *Purported statements of personal belief and vouching.*

(i) *Additional facts.*

Near the start of her closing argument, the prosecutor stated: "In this case, the defendant has been charged with attempted robbery and vandalism, and *the People are convinced beyond a reasonable doubt and we believe you will find this also that the defendant committed the attempted robbery* in which case, the other lesser included offenses would not be applicable. Okay. So now I'm going to explain why the defendant is guilty of attempted robbery and vandalism." (Italics added.) The prosecutor then discussed the elements of attempt, robbery, and vandalism and explained how the evidence proved each element. During this argument, the prosecutor sometimes used the phrases " 'we know' " and " 'I think,' " as reflected in the following excerpts which we set forth in the margin.[3]

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[3] The challenged portions of the argument are as follows:

"Defendant asks for a cigarette. Victim says, 'Hey, I don't speak English.' He says it in Spanish. Goes on his way. We know even from the defendant's testimony that that didn't make him very happy. Right? He said, 'Fuck that guy. He speaks English' and went after him."

"He would have taken property that was not his own because we know the money was not the defendant's money. Right? It was the victim's."

"I asked the victim, 'did you want to give him your money?' He said, 'no.' But I think everyone here realizes he didn't want to give him the money. So it was taken against his will, and we also know the victim was struggling to get away multiple times trying to get away. . . . He was chased down. So we know that it was—it would have been, if he had actually gotten the wallet, would have been taken against his will."

"[T]he defendant used force or fear to take the property. . . . The defendant is a big guy. . . . [Pineda] told you from the very beginning, when the defendant came across the street, 'I didn't want anything to do with this guy. I wanted to get away from him.' And he was attacked. Okay. We know that . . . the defendant used force on him. He chased him down. He pushed him . . . . He tried to punch him. . . . He was grabbed. The defendant tried to bind his hands so that he could then reach into the pocket. So we know this was all done by way of force. The defendant was using force against the victim in order to rob him."

"[T]he defendant intended to [permanently] deprive the person of his property. Well, he certainly wasn't attacking him and trying to take the wallet because he was going to return the money later. Right? I think that's a fairly obvious one."

"[T]he defendant intended to commit the robbery. And, once again, it goes back to all of the circumstances. Not only these direct steps, but everything we talked about here. . . . [W]e know the defendant intended to commit the robbery. . . . Because he did approach him. Once again, 'Do you have a cigarette?' [¶] 'No.' [¶] 'Okay. You don't speak English. Fuck that guy. He speaks English.' [¶] And I actually asked him on the stand. 'And you went after him?' [¶] And he said, 'Yes.' He went after him. The victim told you he was battered. He was grabbed. He was held. And actually when . . . the victim then had his phone to his ear and said . . . [he] wanted to get help, the defendant grabbed the phone to stop him. . . . To stop him from getting help. [¶] So we have several things that we know he took this direct but ineffective step, and it's clear that he intended to commit the robbery. All the circumstances point to that."

"In order for you to find the defendant guilty of vandalism, the People must prove two things. Number one, the defendant maliciously damaged personal property and the defendant did not own the property. Well, I think element two is pretty clear. It was not the defendant's cell phone. Of course, it was the victim's cell phone. You saw pictures of the broken cell phone. [¶] . . . [T]he defendant maliciously damaged the personal property. Malice has to do with the defendant intending to do this wrongful act. . . . And we know whether hearing the victim talk about it or really by the defendant talking about it, that it was a malicious act. . . . The victim says it rang. I was trying to get the phone. He grabbed it away from me. It broke. And then what did the defendant do? Victim is running down the street and the defendant throws the phone at him and hits him with it. . . . So we know it was malicious even by the defendant's own words."

"You will notice when the victim came in here he was very serious. He was very earnest. . . . He told you exactly what happened. He was not impeached by counsel's questions. He explained, 'well, yes, he did push me down, but I didn't fall all the way.' There was a lot of questioning on that. But I think he was very clear about the push."

"I find it [kind of] interesting that the defense argument seems to kind of be, well . . . it didn't really happen because the defendant said these things didn't happen. But if it did, he was too drunk to form the intent. . . . So which one is the argument? He did not do it, or was he so drunk he couldn't form the intent to do it? It's neither of those things. I think it was very clear from the testimony that these things did happen."

"The voluntary intoxication defense doesn't even go towards the vandalism. Vandalism is a general intent crime, and you will see that in there. You can consider it when looking at the attempted robbery; however, I don't think it's applicable in that case either."

(ii) *Discussion.*

"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.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841; *People v. Vines* (2011) 51 Cal.4th 830, 873; *People v. Redd* (2010) 48 Cal.4th 691, 733-734.) When a claim of misconduct focuses on comments the prosecutor made before the jury, the question is whether there is a reasonable likelihood the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Samayoa, supra,* at p. 841.) We must place the challenged statement in context and view the argument as a whole. (*People v. Cole* (2004) 33 Cal.4th 1158, 1203; *People v. Lopez* (2008) 42 Cal.4th 960, 970-971.)

When the defense fails to object to asserted prosecutorial misconduct and request that the jury be admonished, the claim ordinarily is forfeited on appeal. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1358; *People v. Souza* (2012) 54 Cal.4th 90, 122; *People v. Vines, supra,* 51 Cal.4th at p. 871; *People v. Thompson* (2010) 49 Cal.4th 79, 126.) Because defense counsel here failed to object to any of the purported instances of misconduct, Moore has forfeited his prosecutorial misconduct claim. (*People v. McKinzie, supra,* at p. 1358; *People v. Souza, supra,* at p. 122; *People v. Lopez, supra,* 42 Cal.4th at pp. 971-972; *People v. Stewart* (2004) 33 Cal.4th 425, 498.) Contrary to Moore's argument, the record does not suggest an objection would have been futile. (See generally *People v. Redd, supra,* 48 Cal.4th at p. 745.)

Moore urges that to the extent his claims were forfeited by counsel's failure to object, counsel provided ineffective assistance. To prevail on an ineffective assistance claim, a defendant must establish both that counsel's performance fell below an objective standard of reasonableness, and resultant prejudice. (*Strickland v. Washington* (1984)

466 U.S. 668, 687; *People v. Hernandez* (2012) 53 Cal.4th 1095, 1105; *People v. Bradley* (2012) 208 Cal.App.4th 64, 86-87.) Moore fails to establish either prong because the prosecutor's comments were not objectionable.

"[A] prosecutor is free to give his [or her] opinion on the state of the evidence, and in arguing [the] case to the jury, has wide latitude to comment on both its quality and the credibility of witnesses. [Citations.]" (*People v. Padilla* (1995) 11 Cal.4th 891, 945-946, disapproved on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; *People v. Martinez* (2010) 47 Cal.4th 911, 958 [prosecutor "may comment upon the credibility of witnesses based on facts contained in the record, and any reasonable inferences that can be drawn from them"].) "[E]xpressions of belief in the defendant's guilt are not improper if the prosecutor makes clear that the belief is based on the evidence before the jury[.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 782.) It is not misconduct for a prosecutor to "ask the jury to believe the prosecution's version of events as drawn from the evidence." (*People v. Huggins* (2006) 38 Cal.4th 175, 207.)

Improper vouching for the strength of the prosecution's case, on the other hand, " ' "involves an attempt to bolster a witness by reference to facts outside the record." ' [Citation.] . . . . [I]t is misconduct for prosecutors to vouch for the strength of their cases by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office . . . ." (*People v. Huggins, supra,* 38 Cal.4th at pp. 206-207; *People v. Williams* (1997) 16 Cal.4th 153, 257.) Accordingly, a prosecutor may not express a personal opinion or belief in the guilt of the accused, or vouch for the credibility of a witness, when there is a substantial danger that the jury will view the comments as based on information other than evidence adduced at trial, or when the comments will induce the jury to trust the prosecutor's judgment rather than its own view of the evidence. (*United States v. Young* (1985) 470 U.S. 1, 18-19; *People v. Lopez, supra,* 42 Cal.4th at p. 971; *People v. Mayfield, supra,* 14 Cal.4th at pp. 781-782; *People v. Martinez, supra,* 47 Cal.4th at p. 958.)

A prosecutor's use of the first person, or the phrases "I believe, " "I think, " or "we know" do not constitute improper vouching or opinion where the argument is directed to

the state of the evidence and the inferences that may be drawn therefrom. (See *People v. Cummings* (1993) 4 Cal.4th 1233, 1303, fn. 48; *People v. Frye* (1998) 18 Cal.4th 894, 1018-1019, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *U.S. v. Bentley* (8th Cir. 2009) 561 F.3d 803, 812.) Similarly, courts have found prosecutors' statements that " 'I think [the defendant] is guilty' " (*People v. Lopez, supra,* 42 Cal.4th at p. 971, italics omitted), or " 'the only reason we brought [these charges], is because they're true' " (*People v. Stewart, supra,* 33 Cal.4th at p. 498), are not improper statements of personal belief where they were based on the evidence and did not imply the prosecutor was relying on evidence not presented at trial.

Applying these authorities here, it is clear there was no misconduct. The prosecutor's argument was neither deceptive nor reprehensible, and it did not infect the trial with unfairness. Viewed in context, the prosecutor's statements were fair comment on the evidence and the inferences to be drawn therefrom. The prosecutor did not engage in improper vouching. She did not attempt to bolster her case by referencing facts outside the record or invoking the prestige or reputation of her office. As is demonstrated by our recitation of the challenged portions of the prosecutor's argument set forth in the margin *ante,* it would have been readily apparent to jurors that each time the prosecutor used the phrases "I think" and "we know," she was referencing and relying upon the evidence presented at trial. In context, these phrases were simply shorthand for "the evidence shows." Because the prosecutor's phrasing was clearly based on, and intertwined with her discussion of, the trial evidence, there was no danger jurors would have assumed she was relying on material outside the record. Nor would her comments have induced reasonable jurors to trust the prosecutor's judgment rather than their own view of the evidence. (See generally *People v. Cummings, supra,* 4 Cal.4th at p. 1303, fn. 48; *People v. Frye, supra,* 18 Cal.4th at pp. 1018-1019; *U.S. v. Bentley, supra,* 561 F.3d at p. 812.) Moore's contrary arguments take the prosecutor's comments out of context.

The statement that the People were " 'convinced beyond a reasonable doubt' " that Moore committed robbery was also unobjectionable. Moore complains that the

prosecutor failed to explicitly state this opinion was based on the trial evidence. However, because the prosecutor's comment was immediately followed by her explanation of how the evidence proved the elements of the crimes, jurors would have readily inferred that her belief in Moore's guilt was based on the evidence presented at trial. (See *People v. Lopez, supra,* 42 Cal.4th at p. 971; *People v. Stewart, supra,* 33 Cal.4th at pp. 498-499.) It was obvious the prosecutor was simply arguing inferences based on the evidence, not stating her personal belief resulting from experience or evidence outside the record.[4]

Moore relies on *U.S. v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142, and *People v. Perez* (1962) 58 Cal.2d 229, in support of his argument. In *Perez,* the prosecutor argued, in regard to a defense witness, " 'I wouldn't have called him as a witness for the People because I wouldn't have had the nerve to ask you to believe him, and when he testifies for the other side, I don't believe he deserves any more credibility. That is my opinion of his testimony and of [the witness].' " (*People v. Perez, supra,* at p. 245, italics omitted.) *Perez* concluded these expressions of personal belief suggested the prosecutor possessed information outside that presented at trial. (*Id.* at p. 246.) In *Weatherspoon,* the prosecutor argued matters outside the record by urging that police officer witnesses were credible because dishonesty would have cost them their jobs and pensions; improperly encouraged the jury to convict in order to alleviate social problems; and opined that he "did 'not believe' " a defense witness's statements were truthful. (*U.S. v. Weatherspoon, supra,* at pp. 1146-1147) Among other things, the latter comment was improper because it "skewed the jury's ability" to independently determine the credibility of the witnesses' testimony. (*Id.* at p. 1147.)

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4 To the extent Moore intends to challenge the prosecutor's comments regarding Pineda's credibility, set forth *ante,* this contention fails as well. A prosecutor is entitled to comment on a witness's demeanor and credibility during argument. (See *People v. Martinez, supra,* 47 Cal.4th at p. 958.) The prosecutor's statements about Pineda's credibility were clearly based on his demeanor at trial and his trial testimony.

In contrast, the prosecutor here did not refer to matters outside the record or urge the jury to convict to alleviate social problems. Nor did she state she believed one witness or disbelieved another in the same fashion as did the *Weatherspoon* and *Perez* prosecutors. Her comments about Pineda's credibility were not improper. She prefaced her remarks by stating that it was the jury's role to determine credibility.[5] She then argued that Pineda's demeanor suggested he was truthful, his testimony was clear, and—based on the evidence at trial—he had no motive to lie. Her comments did not skew the jury's ability to independently determine credibility.

Because the prosecutor's argument was not objectionable, defense counsel did not perform inadequately by failing to object. Defense counsel is "not required to make futile motions or to indulge in idle acts to appear competent." (*People v. Torrez* (1995) 31 Cal.App.4th 1084, 1091.)

b. *Misstating evidence.*

As discussed *ante*, on direct examination Pineda testified that after the men struggled, "that's when [Moore] asked me, although he was speaking fast, I understood that he either said, 'Do you have money?' or 'give me money.' Something like that." Pineda testified that while Moore was making these statements, the men "were struggling. He attempted to stick his hand on my right side pocket," the pocket where Pineda carried his wallet. On cross examination, defense counsel asked Pineda: "And at some point he—you said he said something about 'give me money' or asked you for money, I'm not sure which." Pineda replied: "I heard him say 'money' and then he attempted to stick his hand in my pocket." During argument, the prosecutor stated: "The victim told you that the defendant tried to punch him. . . . He tried to grab his sweater sleeves to stop him from moving his arms. . . . He tried to push him. He put his hand in

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[5] The prosecutor stated: "[G]enerally in short cases like this where you only hear from the victim and from the defendant, . . . it comes down to credibility. Right? You listen to one person. You judge their credibility. You listen to the other people, and you think which story is true. Which one makes sense? What do I believe happened?"

the back pocket. He said, 'either give me your money' or 'where is your money?' . . . He did all of these things."

Moore argues that the prosecutor misstated the evidence. In Moore's view, the prosecutor erred by failing to "clarify that Pineda testified on cross-examination that he in fact only understood Moore [to] say 'money.' " This contention lacks merit.

A prosecutor engages in misconduct by misstating facts or referring to facts not in evidence. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 95; *People v. Ellison* (2011) 196 Cal.App.4th 1342, 1353.) However, he or she "enjoys wide latitude in commenting on the evidence, including urging the jury to make reasonable inferences and deductions therefrom." (*People v. Coffman and Marlow*, *supra*, at p. 95; *People v. Ellison*, *supra*, at p. 1353.)

The prosecutor did not materially misstate the evidence. Contrary to Moore's argument, Pineda did not, on cross examination, retract his testimony that Moore asked him for money. Pineda simply reiterated that he did not recall the exact words Moore uttered. It was clear during both direct and cross examination that Moore said something about money, struggled with Pineda, and reached for Pineda's pocket. Under these circumstances, the prosecutor's argument was a fair comment on the evidence. Given Pineda's testimony, the prosecutor was entitled to argue that Moore demanded money.

The prosecutor did make a minor misstatement: Pineda testified Moore said " '[d]o you have money' " or " '[g]ive me money,' " whereas the prosecutor argued Moore had said either "give me your money" or "where is your money?" Under the circumstances, there is no material difference between "do you have money" and "where is your money." This misstep did not rise to the level of misconduct and could not have had any prejudicial effect. Contrary to Moore's argument, this case bears no resemblance to *People v. Hill*, *supra*, 17 Cal.4th at p. 837, in which the prosecutor engaged in extensive and repeated misconduct, including mischaracterizing facts and asserting facts before the jury that were not in the record.

c. *Prejudice.*

The court instructed the jury that the statements of counsel are not evidence: "Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence." It also instructed, "It is up to all of you, and you alone, to decide what happened, based only on the evidence that has been presented to you in this trial." The court's instructions, not the prosecution's argument, are determinative (*People v. Mayfield* (1993) 5 Cal.4th 142, 179; *People v. Stewart, supra,* 33 Cal.4th at p. 499), and we presume the jurors understood and followed those instructions. (*People v. Holt* (1997) 15 Cal.4th 619, 662.) Thus, even if the prosecutor's remarks had been improper, given the instructions, the nature of the challenged comments, and the evidence presented at trial, no prejudice resulted.

III. *Probation conditions.*

The trial court imposed a variety of probation conditions, including the following: "Do not own, use, or possess any dangerous or deadly weapons, including firearms, knives, and other concealable weapons." Moore contends that this condition, which lacks a scienter requirement, is unconstitutionally vague and must be modified. Relying on *People v. Freitas* (2009) 179 Cal.App.4th 747, he posits that without addition of an express knowledge requirement, he could be found in violation of probation for unwitting possession of a weapon.

Although Moore did not object to the challenged condition below, his contention is cognizable on appeal because it presents a pure question of law that may be resolved without reference to the sentencing record. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887-888 (*Sheena K.*); *People v. Kim* (2011) 193 Cal.App.4th 836, 842; *People v. Freitas, supra,* 179 Cal.App.4th at p. 750.)

Trial courts have broad discretion to prescribe probation conditions to foster rehabilitation and protect public safety. (*People v. Anderson* (2010) 50 Cal.4th 19, 26; *People v. Olguin* (2008) 45 Cal.4th 375, 379; *People v. Leon* (2010) 181 Cal.App.4th 943, 948.) A probation condition that imposes limitations upon constitutional rights must be narrowly tailored to achieve legitimate purposes. (*Sheena K., supra,* 40 Cal.4th at

p. 890; *People v. Olguin, supra,* at p. 384; *People v. Kim, supra,* 193 Cal.App.4th at p. 843.) Further, "[a] probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness. [Citation.]" (*Sheena K., supra,* at p. 890; *People v. Leon, supra,* at p. 949; *In re R.P.* (2009) 176 Cal.App.4th 562, 566.) "A probation condition which either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application, violates due process." (*People v. Freitas, supra,* 179 Cal.App.4th at p. 750; *In re R.P., supra,* at p. 566.) The "underpinning of a vagueness challenge is the due process concept of 'fair warning.' [Citation.] The rule of fair warning consists of 'the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders' . . . ." (*Sheena K., supra,* at p. 890; *In re R.P., supra,* at p. 566.)

Beginning with *People v. Garcia* (1993) 19 Cal.App.4th 97, California appellate courts have routinely added an explicit knowledge requirement to probation conditions prohibiting a probationer from associating with certain categories of persons, frequenting or remaining in certain areas or establishments, and possessing certain items. (*People v. Kim, supra,* 193 Cal.App.4th at pp. 843-845, and cases cited therein.)[6] "[T]here is now a

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[6] See, e.g., *Sheena K., supra,* 40 Cal.4th at p. 892 [association with persons disapproved of by probation]; *People v. Garcia, supra,* 19 Cal.App.4th at pp. 100, 102 [association with felons, ex-felons, and narcotics users or sellers]; *People v. Lopez* (1998) 66 Cal.App.4th 615, 628-629 [association with gang members and possession of gang clothing or paraphernalia]; *People v. Freitas, supra,* 179 Cal.App.4th at p. 751 [possession of stolen property, firearms, and ammunition]; *In re Justin S.* (2001) 93 Cal.App.4th 811, 816 [association with gang members]; *In re Victor L.* (2010) 182 Cal.App.4th 902, 911-913 [association with persons disapproved of by parents or probation officer; presence in areas where dangerous or deadly weapons, or firearms are present]; *People v. Moses* (2011) 199 Cal.App.4th 374, 377 [possession of sexually explicit materials and presence where such items are viewed or sold; association with minors]; *People v. Leon, supra,* 181 Cal.App.4th at pp. 949-952 [association with gang members, possession of gang paraphernalia, presence in areas of gang-related activity];

substantial uncontradicted body of case law establishing, as a matter of law, that a probationer cannot be punished for presence, possession, association, or other actions absent proof of scienter." (*People v. Patel*, *supra,* 196 Cal.App.4th at p. 960.)

Freitas, relied upon by Moore, modified a probation condition prohibiting the defendant from owning, possessing, or having custody or control of any firearms or ammunition to incorporate an express scienter requirement. (*People v. Freitas*, *supra*, 179 Cal.App.4th at pp. 749, 751-752.) *Freitas* acknowledged that firearms and ammunition were readily recognizable, and it was "unnecessary to specify that defendant must know a gun is a gun." (*Id.* at pp. 751-752.) However, *Freitas* agreed with the defendant that "without the addition of a scienter requirement, he could be found in violation of probation if he merely borrows a car and, unbeknownst to him, a vehicle owner's lawfully obtained gun is in the trunk." (*Id.* at p. 752.) The court observed that former section 12021 (prohibiting felons from possessing firearms, now section 29800, subdivision (a)(1)), had been construed to contain an implied knowledge requirement. Moreover, the jury instruction relevant to that offense listed knowledge as an element. *Freitas* therefore found it appropriate to modify the probation condition to add an express knowledge requirement, because "the law has no legitimate interest in punishing an innocent citizen who has no knowledge of the presence of a firearm or ammunition." (*People v. Freitas*, *supra*, at p. 752.)

The parties here do not dispute that if Moore unknowingly was to possess a weapon or firearm, he would not be in violation of probation. The parties do disagree, however, regarding whether due process requires that the probation condition be modified to include an express knowledge requirement, or whether modification is unnecessary because a knowledge requirement is already "manifestly implied." We believe the latter view is correct.

People v. Patel (2011) 196 Cal.App.4th 956, 961 [possession or consumption of alcohol and presence in places where alcohol is the chief item of sale].

Certainly the weapons prohibition at issue here is distinct from many of the associational, presence, and possession prohibitions that are often the subject of express modifications. Where a probation condition prohibits association with certain categories of persons, presence in certain types of areas, or possession of items that are not easily amenable to precise definition, "an express knowledge requirement is reasonable and necessary. The affiliations and past history of another person may not be readily apparent without some personal familiarity. Similarly, despite the presence of gang graffiti, sites of gang-related activity may not be obvious to all. And it takes some experience or training to identify what colors, symbols, hand signs, slogans, and clothing are emblematic of various criminal street gangs." (*People v. Kim, supra,* 193 Cal.App.4th at p. 845.)

In contrast, there is no ambiguity regarding what is prohibited here: as *Freitas* pointed out, it is unnecessary to specify that defendant must know a gun is a gun. (*People v. Freitas, supra,* 179 Cal.App.4th at p. 752; *People v. Kim, supra,* 193 Cal.App.4th at p. 845 ["there is no similar uncertainty about whether an item is a firearm"].) As we explained in *In re R.P.*, the term " 'dangerous or deadly weapon' " likewise has a clearly established meaning. (*In re R.P., supra,* 176 Cal.App.4th at pp. 567-568.) There, we held that the phrase " 'dangerous or deadly weapon' " was not unconstitutionally vague when used in a probation condition. (*Id.* at p. 565.) After surveying the relevant statutes, case law, jury instructions, and a legal dictionary, we explained: "legal definitions of 'deadly or dangerous weapon,' 'deadly weapon,' 'dangerous weapon,' and use in a 'dangerous or deadly' manner, consistently include the harmful capability of the item and the intent of its user to inflict, or threaten to inflict, great bodily injury." (*Id.* at p. 568.) We concluded the phrase had a plain, commonsense meaning: it prohibited possession of items specifically designed as weapons, and other items not specifically designed as weapons that the probationer intended to use to inflict, or threaten to inflict, great bodily injury or death. (*Id.* at p. 570.) The condition was therefore "sufficiently precise for [the probationer] to know what is required of him." (*Id.* at p. 568.) Likewise, the weapons prohibition here is sufficiently precise to inform

Moore of what is required of him, and for a court to determine whether the condition has been violated. Because Moore can have no doubt about what is prohibited, innocent or inadvertent violation of the condition is far less likely than in cases in which the parameters of the probation condition are imprecise.

Moore's concern that without the express addition of a scienter requirement he could be found in violation of probation for unknowing possession appears unfounded. As the People point out, a trial court may not revoke probation unless the defendant willfully violated the terms and conditions of probation. (*People v. Quiroz* (2011) 199 Cal.App.4th 1123, 1129; *People v. Cervantes* (2009) 175 Cal.App.4th 291, 295; *People v. Galvan* (2007) 155 Cal.App.4th 978, 982.) As *Patel* explained, it is now settled that a probationer cannot be punished for presence, possession, or association without proof of knowledge. (*People v. Patel, supra,* 196 Cal.App.4th at p. 960.) Thus, in the unlikely event that Moore finds himself in unknowing and inadvertent possession of a firearm or weapon, his lack of knowledge would prevent a court from finding him in violation of probation. When a probationer lacks knowledge that he is in possession of a gun or weapon, his possession cannot be considered a willful violation of a probation condition. (*People v. Patel, supra,* at p. 960.)

In re Victor L. concluded that addition of a knowledge requirement to a probation condition was necessary despite the aforementioned willfulness requirement. (*In re Victor L., supra,* 182 Cal.App.4th at pp. 912-913.) As pertinent here, *Victor L.* considered a probation condition prohibiting a juvenile from remaining " 'in any building, vehicle or in the presence of any person where dangerous or deadly weapons or firearms or ammunition exist.' " (*Id.* at p. 912.) The juvenile argued that absent a knowledge requirement, the condition was overbroad and vague: "Because other people in public places or private homes may be carrying concealed weapons without his knowledge, Victor argues that, in the absence of a knowledge requirement, he 'could easily violate the condition without even realizing it.' " (*Id.* at p. 912.) The People responded, much as they do here, that no modification was necessary because a court may not revoke probation unless the evidence supports a conclusion that the

probationer's conduct is willful. (*Id.* at p. 913.) *Victor L.* rejected this argument, reasoning: "While the requirement of proof of willfulness may save Victor from an unconstitutional finding of guilt based on an unknowing probation violation, that is cold comfort to a probationer who suffers from an unfounded arrest and detention based on the whim or vengeance of an arbitrary or mean-spirited probation officer. [Citation.] [¶] Due process requires more. It requires that the probationer be informed *in advance* whether his conduct comports with or violates a condition of probation." (*Ibid*.) Similarly, *People v. Garcia, supra,* 19 Cal.App.4th 97, found an implied knowledge requirement insufficient in a probation condition that infringed upon the defendant's freedom of association, reasoning: "[T]he rule that probation conditions that implicate constitutional rights must be narrowly drawn, and the importance of constitutional rights, lead us to the conclusion that this factor should not be left to implication." (*Id.* at p. 102.)

We do not find *Victor L.* or *Garcia* applicable here. First, both cases involved conditions that potentially infringed on constitutional rights. At least insofar as it prohibits Moore from possessing a firearm, or statutorily prohibited weapons, the challenged condition does not impact Moore's constitutional rights. (See, e.g., *People v. Freitas, supra,* 179 Cal.App.4th at p. 751 ["defendant, as a felon, has no constitutional right to bear arms"]; *People v. Kim, supra,* at p. 847 ["Because no constitutional right is at stake, *Garcia*'s concern about an implicit knowledge requirement is inapplicable"]; *People v. Mitchell* (2012) 209 Cal.App.4th 1364, 1369-1370 [statutory prohibition on carrying a concealed dirk or dagger does not violate the Second Amendment]; § 29800, subd. (a)(1) [prohibiting felons from possessing firearms]; see generally § 16590 [prohibited weapons].)

But beyond that, the primary concern in *Garcia* and in the pertinent portion of *Victor L.* was that the probation conditions at issue failed to clearly specify what conduct was prohibited, that is, what persons or areas the probationers were required to avoid. The probation conditions were therefore not narrowly drawn, and express modification was required to provide adequate notice. In contrast, as we have explained, the probation condition at issue here provides Moore with advance notice about what conduct is

prohibited, and therefore *is* narrowly drawn. The "core due process requirement of adequate notice" (*In re H.C.* (2009) 175 Cal.App.4th 1067, 1071-1072) is satisfied. Unlike in *Victor L.* and *Garcia,* Moore's concern is not that he is unable to discern what conduct is prohibited. Instead, he worries that he might accidentally possess an item he would readily recognize as prohibited by the probation condition. Under these circumstances, the requirement that a violation of the weapons condition must be willful and knowing adequately protects him from being punished for innocent possession. The addition of an express knowledge requirement would add little or nothing to the probation condition.

In regard to *Victor L.*'s concern about arbitrary enforcement, *Patel* has explained*:* "We . . . do not discern how addressing this *specific* issue on a repetitive case-by-case basis is likely to dissuade a probation officer inclined to act in bad faith from finding some *other* basis for harassing an innocent probationer." (*People v. Patel, supra,* 196 Cal.App.4th at p. 960; see also *In re R.P., supra,* 176 Cal.App.4th at p. 569 [possibility that peace officer might attempt to enforce weapons condition as a strict liability offense did not render the condition unconstitutional]; cf. *People v. Olguin, supra,* 45 Cal.4th at p. 386, fn. 5 [defendant facing revocation of probation has the right to be represented by counsel at a hearing, and may argue that a particular application of a probation condition exceeds the bounds of reason under the circumstances].)[7]

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[7] In *People v. Patel, supra,* 196 Cal.App.4th 956, the Third Appellate District concluded that "[i]n the interests of fiscal and judicial economy," and in light of the body of case law establishing that a probationer cannot be punished for presence, possession, or association absent proof of scienter, that court would no longer entertain the issue on appeal but would henceforth construe all such probation conditions to include a knowledge requirement. (*Id.* at p. 960.) *Patel* reasoned: "[a]s with contracts generally, [a scienter requirement] should be considered a part of the conditions of probation" just as if it had been expressly referenced and incorporated. (*Ibid*.)

To date, *Patel*'s approach of deeming scienter requirements to be present in all probation conditions and declining to entertain the issue has not been adopted by other courts. (See *People v. Moses, supra,* 199 Cal.App.4th at p. 381 [declining to follow *Patel* on this point, stating the court's preference to modify probation conditions, and encouraging the superior court to revise its standard probation conditions form].) While

We also do not believe *Sheena K., supra*, 40 Cal.4th 875, compels modification. There, a probation condition requiring that the defendant not associate with " 'anyone 'disapproved of by probation' " was unconstitutionally vague absent an express knowledge requirement. (*Id*. at pp. 880, 891.) The provision did not notify the probationer in advance regarding what persons she must avoid, and the probation officer had the ability to preclude her association with anyone. (*Id.* at pp. 890-891.) *Sheena K.* concluded modification to impose an explicit knowledge requirement was necessary to render the condition constitutional. (*Id.* at p. 892.) Unlike in *Sheena K.*, the weapons condition here *does* notify Moore in advance regarding what conduct is prohibited, and is not unconstitutionally vague. Moore's primary concern is that he not be found in violation of probation absent knowing possession. As we have discussed, this concern is illusory given that a trial court may not revoke Moore's probation unless his violation of the weapons condition is knowing and willful. (*People v. Patel*, *supra,* 196 Cal.App.4th at p. 960; *People v. Quiroz, supra,* 199 Cal.App.4th at p. 1129; *People v. Cervantes, supra,* 175 Cal.App.4th at p. 295.) *Sheena K.* did not have occasion to consider whether express modification of a sufficiently precise condition was required, or the significance of the principle that a probation violation must be willful. Cases are not authority for propositions not considered. (*People v. Brown* (2012) 54 Cal.4th 314, 330.)

As *Kim* observed, the "function served by an express knowledge requirement should not be extended beyond its logical limits." (*People v. Kim*, *supra*, 193 Cal.App.4th at p. 847.) Accordingly, because the probation condition, as written, is sufficiently precise to alert Moore to what conduct is prohibited and guard against arbitrary enforcement; because a knowledge requirement is implied in the condition; and because Moore cannot be found to have violated probation absent knowing possession

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we generally agree with *Patel*'s analysis, we do not follow *Patel*'s approach on this point. Among other things, certain probation conditions may require more case-specific modification if they are too vague to provide a probationer with adequate notice of what conduct is prohibited.

(*People v. Patel, supra,* 196 Cal.App.4th at p. 960), we conclude express modification of the probation condition is unnecessary.[8]

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.

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[8] The People additionally argue that modification is unnecessary under *People v. Kim, supra,* 193 Cal.App.4th 836. There, a probation condition prohibited the defendant from owning, possessing, or having within his custody or control " 'any firearm or ammunition for the rest of [his] life under [former] Section[s] 12021 and 12316[, subdivision] (b)(1) of the Penal Code.' " (*Id.* at p. 840.) *Kim* reasoned: "[W]here a probation condition implements statutory provisions that apply to the probationer independent of the condition and does not infringe on a constitutional right, it is not necessary to include in the condition an express scienter requirement that is necessarily implied in the statute." (*Id.* at p. 843.) "[T]he conduct proscribed by [former] sections 12021 and 12316 is coextensive with that prohibited by a probation condition specifically implementing those statutes. As the statutes include an implicit knowledge requirement, the probation condition need not be modified to add an explicit knowledge requirement." (*People v. Kim, supra,* at p. 847.) In contrast to *Kim,* the probation condition at issue here does not explicitly reference statutory provisions that contain a scienter requirement; it also prohibits, in addition to firearms, the use, ownership, or possession of dangerous or deadly weapons. Therefore, *Kim*'s conclusion on this point is not directly applicable.