NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JESSIE C. ROBERTS, Petitioner-Appellant, v. DANNY SAMUEL, Respondent-Appellee.	No. 20-56365 D.C. No. 2:19-cv-04002-JLS-DFM MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Josephine L. Staton, District Judge, Presiding

Argued and Submitted March 9, 2023
Pasadena, California

Before: WATFORD and COLLINS, Circuit Judges, and MURPHY,** District Judge.

Jessie Roberts appeals the district court's denial of his petition for a writ of habeas corpus. We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

I

Roberts "visited three different car dealerships" in California "over two consecutive days" and "tried, with varying degrees of success, to steal a car from each dealership." *People v. Roberts*, 2017 WL 4112240, at *1 (Cal. Ct. App. Sept.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Stephen Joseph Murphy III, United States District Judge for the Eastern District of Michigan, sitting by designation.

18, 2017). At two of the dealerships—a Toyota dealership in Glendale and a Chevy dealership in Lancaster—Roberts drove away while an employee of the dealership was still in the car with him. *Id.* at *1–*2. A jury eventually convicted Roberts on several counts, including two that required a showing of specific intent—namely, (1) carjacking in violation of California Penal Code § 215(a), for the incident at the Chevy dealership; and (2) kidnapping for carjacking in violation of California Penal Code § 209.5(a), for the incident at the Toyota dealership. After his convictions were affirmed on direct review, Roberts filed for habeas corpus relief from the California state courts, asserting, *inter alia*, that his counsel had been ineffective in failing to investigate and present a mental-state defense to the specific-intent charges. After the state courts denied relief, Roberts filed a federal habeas petition that included this ineffective assistance claim. The district court denied the petition. We granted a certificate of appealability limited to the question whether Roberts's "trial counsel was ineffective for failing to investigate and present testimony from mental health experts concerning whether appellant lacked the specific intent to commit carjacking and kidnapping during the commission of a carjacking."

II

Roberts argues that, because the various state-law procedural grounds on which his state habeas corpus petition was denied by the Los Angeles Superior

Court and the California Court of Appeal were all patently erroneous, the California Supreme Court's subsequent summary denial of his petition must be understood as resting on the merits rather than on those flawed state-law procedural grounds. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1196 (2018) (noting that the presumption that the state supreme court relied on the same ground as the lower state courts may not apply "where the lower state court decision is unreasonable"). On that basis, Roberts concedes that the deferential standards of the Antiterrorism and Effective Death Penalty Act ("AEDPA") apply to our review of the California Supreme Court's rejection of his ineffective assistance claim on the merits. The State agrees with that latter proposition, and we proceed on the same basis.

Where, as here, "a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden" under AEDPA requires him to show that "there was *no reasonable basis* for the state court to deny relief." *Harrington v. Richter*, 562 U.S. 86, 98 (2011) (emphasis added). We therefore "must determine what arguments or theories supported or, as here, *could* have supported, the state court's decision; and then [we] must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Id.* at 102 (emphasis added). We must, in other words, affirm the denial of habeas relief unless we conclude that

the California Supreme Court's summary rejection of the merits of Roberts's ineffective assistance claim was erroneous, under any possible theory, "beyond any possibility for fairminded disagreement." *Id.* at 103.

To establish an ineffective assistance claim, a criminal defendant must show that "counsel's performance was deficient" and that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Here, Roberts argues that his trial counsel's performance was deficient because counsel failed to investigate or present "a mental state defense to the specific intent requirements of the charged crimes." To establish prejudice with respect to this claim, Roberts had to show that it was "'reasonably likely' that the result would have been different" had the mental health evidence Roberts submitted with his state habeas petition been presented at trial. *Richter*, 562 U.S. at 111 (quoting *Strickland*, 466 U.S. at 696). Although the "reasonably likely" standard "does not require a showing that counsel's actions 'more likely than not altered the outcome,'" the "likelihood of a different result must be substantial, not just conceivable." *Id*. at 111–12 (quoting *Strickland*, 466 U.S. at 693). Assuming *arguendo* that Roberts's trial counsel performed deficiently in failing to investigate and present such a defense, we hold that the California Supreme Court nonetheless could reasonably have concluded that Roberts was not prejudiced thereby.

The jury instructions in this case—which no party contends were legally

erroneous—provided that "[t]he Specific Intent required for the crime of Carjacking is the intent to deprive the other person of possession of the vehicle either temporarily or permanently." *See People v. Magallanes*, 92 Cal. Rptr. 3d 751, 756 (Ct. App. 2009). The jury instructions further explained that "[t]he Specific Intent required for the crime of Kidnapping for Carjacking is the intent to facilitate the commission of Carjacking." *See People v. Medina*, 161 P.3d 187, 191–92 (Cal. 2007). The California appellate courts have held that a kidnapping "facilitate[s]" the commission of a carjacking if, *inter alia*, it "make[s] it easier to take the victim's car" or is intended "to effect [an] escape . . . or to remove the victim to another place where he might less easily sound an alarm." *People v. Perez*, 101 Cal. Rptr. 2d 376, 378–79 (Ct. App. 2000) (citation omitted). However, the intended escape need not be successful or well-planned: "An escape attempt that is poorly thought out is still an escape attempt." *Id.* at 379.

Roberts's petition presented evidence indicating that he suffered from serious mental illness, including auditory hallucinations and delusional thinking. According to this evidence, his delusions included "magical" thinking about "the physical characteristics and attributes of vehicles," which influenced "the cars that he chose to take." Although this evidence strongly supports the view that his *motivation* for committing the crime of carjacking was influenced by his mental illness, the California Supreme Court could reasonably conclude that it would not

have altered the jury's assessment of his ability to form the specific intent to deprive the Chevy dealership "of the vehicle either temporarily or permanently." That is, the state high court could reasonably conclude that Roberts's actions at the Chevy dealership demonstrated an ability to form and execute a plan to take a car—indeed, he said during that incident, "All I want is a car." *Roberts*, 2017 WL 4112240, at *1.

Likewise, with respect to the kidnapping for carjacking at the Toyota dealership, the California Supreme Court could reasonably conclude that Roberts's mental health evidence would not have altered the jury's determination that Roberts intended his kidnapping of the dealership employee to facilitate the carjacking. The trial evidence showed that Roberts requested a test drive with the Toyota employee; that once in the driver's seat, he drove away from the dealership at a high rate of speed; that he initially ignored the employee's requests to slow down, pull over, and let him out; and that it was not until they had traveled 10 blocks that Roberts finally pulled into a parking lot and allowed the employee to leave. *Roberts*, 2017 WL 4112240, at *1. The California Supreme Court could reasonably conclude that, although Roberts's delusional thinking concerning cars influenced his desire to take one, his behaviors nonetheless confirmed that he was able to form the specific intent to continue driving with the employee in the car in order to facilitate the carjacking. In reaching such a conclusion, the California

Supreme Court would not have erred "beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103.

AFFIRMED.

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JESSIE C. ROBERTS, Petitioner, v. JIM ROBERTSON, Respondent.	Case No. CV 19-04002-JLS (DFM) JUDGMENT

Pursuant to the Court's Order Accepting the Report and Recommendation of United States Magistrate Judge,

IT IS ADJUDGED that the Petition is denied, and this action dismissed with prejudice.

Date: November 17, 2020

JOSEPHINE L. STATON
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JESSIE C. ROBERTS, Petitioner, v. JIM ROBERTSON, Warden, Respondent.	Case No. CV 19-04002-JLS (DFM) Order Accepting Report and Recommendation of United States Magistrate Judge

Under 28 U.S.C. § 636, the Court has reviewed the Petition, the other records on file herein, and the Report and Recommendation of the United States Magistrate Judge. Further, the Court has engaged in a de novo review of those portions of the Report and Recommendation to which objections have been made. The Court accepts the report, findings, and recommendations of the Magistrate Judge.

IT IS THEREFORE ORDERED that Judgment be entered denying the Petition and dismissing this action with prejudice.

Date: November 17, 2020

JOSEPHINE L. STATON
United States District Judge

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JESSIE C. ROBERTS, Petitioner, v. JIM ROBERTSON, Warden, Respondent.	Case No. CV 19-04002-JLS (DFM) Report and Recommendation of United States Magistrate Judge

This Report and Recommendation is submitted to the Honorable Josephine L. Staton, United States District Judge, under 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I. BACKGROUND

In 2016, a jury convicted Jessie C. Roberts ("Petitioner") of kidnapping while carjacking, carjacking, unlawful taking or driving of a vehicle, and two counts of misdemeanor false imprisonment. See Lodged Document ("LD") 1, 2 Clerk's Transcript ("CT") 240-49.[1] The trial court sentenced Petitioner to life in prison with the possibility of parole, as well as a consecutive term totaling nine years and eight months. See 2 CT 292-95.

[1] All citations to electronically filed documents, except for the Clerk's and Reporter's Transcripts, are to the CM/ECF pagination.

Petitioner appealed, arguing that the prosecutor committed misconduct during closing argument. See LD 3. The California Court of Appeal affirmed the judgment. See LD 6. The California Supreme Court denied review. See LD 7, 8. Petitioner filed several habeas corpus petitions in the state courts, all of which were denied. See generally LD 10-18.

In May 2019, Petitioner filed in this Court a Petition for Writ of Habeas Corpus by a Person in State Custody. See Dkt. 1 ("Petition"). The Petition presents the following claims for relief: (1) prosecutorial misconduct based on use of perjured testimony; (2) Petitioner's trial counsel was constitutionally ineffective; and (3) Petitioner's appellate counsel was constitutionally ineffective. See id. at 5-6. Respondent filed an Answer. See Dkt. 16 ("Answer"). Petitioner filed a traverse. See Dkt. 22 ("Traverse").

II. STATEMENT OF FACTS

The underlying facts are taken from the California Court of Appeal's unpublished opinion on direct review.[2] Unless rebutted by clear and convincing evidence, these facts are presumed correct. See 28 U.S.C. § 2254(e)(1); Crittenden v. Chappell, 804 F.3d 998, 1011 (9th Cir. 2015).

> In February 2014, Petitioner visited three different car dealerships over two consecutive days. He tried, with varying degrees of success, to steal a car from each dealership. . . . We briefly review the facts surrounding all three incidents.
>
> **Toyota dealership**
>
> Petitioner first visited a Toyota car dealership in Glendale seeking to test drive a 2014 Camry. Salesman Jeremy Licon took Petitioner for a test drive. Once Petitioner was in the driver's seat,

[2] In quoted sections of the state court records, "Defendant" has been replaced with "Petitioner."

he ignored Licon's instructions about the normal test drive route. Instead, he drove towards the freeway at around 60 miles per hour on a 25-mile-per-hour street. Petitioner did not respond to Licon's requests to turn, pull over, or slow down. Licon said to Petitioner, "If you're planning on stealing the car, you're not going to do it with me in it. Let me -- like, stop the car and let me out." He also proposed that Petitioner "just pull the car over, we'll switch seats. I'll take you back to the dealership. None of this happened." About 10 blocks past the point where Licon first told him to stop, Petitioner drove into a restaurant parking lot, where Licon got out of the car. Licon had the key fob as Petitioner drove away with the passenger door still open.

Chevrolet dealership

The next day, Petitioner went to Antelope Valley Chevrolet in Lancaster, where he told sales associate Norma Ruiz De Maldonado he was interested in buying a Camaro. Ruiz De Maldonado showed him a 2014 SS Camaro on the dealership lot. Petitioner wanted to see the interior and the electronics, so she obtained the keys and sat in the passenger seat of the car while Petitioner sat in the driver's seat. She turned the key just enough to activate the electronics. Without warning, Petitioner turned the car on and drove it forward. Ruiz De Maldonado repeatedly told Petitioner to stop, but he did not respond. He drove the car through the dealership lot toward the street. As the car approached the street, Ruiz De Maldonado turned the car off, grabbed the keys, and got out of the car. Petitioner also got out of the car and yelled things like, "Bitch, all I wanted was the car. All I want is a car." Using the car as a barrier between herself and Petitioner,

Ruiz De Maldonado ran to the driver's side, got in, and locked the doors. Petitioner yelled obscenities as Ruiz De Maldonado drove the car back into the dealership lot, parked it, and ran inside. She saw Petitioner yelling and walking to the dealership. Petitioner entered a taxi and left. Ruiz De Maldonado reported the incident to her supervisor. She also completed a written report of the incident the next day, after she was written up for letting Petitioner drive the car.

During cross-examination, defense counsel asked Ruiz De Maldonado about her written statement. Ruiz De Maldonado confirmed she had written, "I pulled the keys out of the ignition and screamed at him to get out of the car, leaving the car in the middle of the road. He got out of the car, and I drove the car back to the lot." She also confirmed she had not written anything in the report about feeling afraid.

On redirect examination, the prosecutor asked Ruiz De Maldonado why she prepared the handwritten report for her employer. She responded that the report justified that she had followed procedures after her employer had written her up. She explained, "Because according to them, I should have never let him drive off with the vehicle."

On recross-examination, Ruiz De Maldonado testified she had been disciplined by her employer. Defense counsel asked, "Because you did not follow their instructions?" Ruiz De Maldonado responded, "According to them, yes."

Kia dealership

Isaac Rodriguez was a salesperson at Antelope Valley Mazda in Lancaster. He showed Petitioner a blue 2013 Kia

> Optima. He placed the keys in the ignition to show Petitioner the electronics as he stood outside the open driver's side door. Petitioner abruptly shut and locked the car door, and drove out of the dealership and onto a street.
>
> **Petitioner apprehended**
>
> The same day as the incidents in Lancaster, Los Angeles County Sheriff's Department Deputy Brandon Hartshorne saw Petitioner attempting to remove a car dealership sticker from the windshield of a blue Kia Optima. The Toyota Camry was parked in front of the Kia Optima. Petitioner was arrested.

LD 6 at 3-6.

III. STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a petitioner may obtain relief on federal habeas claims that were adjudicated on the merits in state court if the state court's adjudication resulted in a decision: (1) "contrary to, or involv[ing] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Under the "contrary to" clause, a federal habeas court may grant the writ if the state court "arrives at a conclusion opposite to that reached by [the U.S. Supreme] Court on a question of law or if the state court decides a case differently than [the U.S. Supreme] Court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412-13 (2000). Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court "identifies the correct governing legal principle from [the U.S. Supreme] Court's decisions but unreasonably applies that principle to

the facts of the prisoner's case." Id. at 413. In all, AEDPA "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." Hardy v. Cross, 565 U.S. 65, 66 (2011) (per curiam) (citation omitted). "If this standard is difficult to meet, that is because it was meant to be." Harrington v. Richter, 562 U.S. 86, 102 (2011).

Here, Petitioner first presented his prosecutorial misconduct claim and ineffective assistance of trial counsel claims—but not his ineffective assistance of appellate counsel claim—to the Los Angeles County Superior Court in a habeas corpus petition. See LD 10. The Superior Court denied these claims, reasoning that Petitioner raised "issues which could have been raised on appeal, but were not." LD 11. Petitioner then raised these claims plus his ineffective assistance of appellate counsel claim to the California Court of Appeal in a habeas corpus petition. See LD 12. That court denied his claims because he failed to demonstrate that he sought relief from the Superior Court before filing his petition. See LD 13. Petitioner then presented all of his claims to the California Supreme Court in a habeas corpus petition, which was summarily denied. See LD 14, 15.

Generally, if a state-court decision has rejected a claim for a stated reason, a later summary denial of the same claim is presumed to rest on the same ground. See Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991). But this "look through" presumption is rebuttable. See Wilson v. Sellers, 138 S. Ct. 1188, 1192, 1196 (2018). Respondent argues that the "look-through" presumption has been rebutted, because ineffective assistance of counsel claims are not barred on habeas review. See Answer at 17-18 n.4.

The Court agrees that the presumption has been rebutted for all but the prosecutorial misconduct claim. The Court first looks through the California Supreme Court summary dismissal to the California Court of Appeal opinion.

See Ylst, 501 U.S. at 801-06 (where last reasoned opinion on claim expressly imposes procedural bar, it should be presumed that later decision summarily rejecting claim did not silently disregard bar and consider merits). In rejecting Petitioner's claims, the California Court of Appeal cited In re Steele, 32 Cal. 4th 682, 692 (2004) (noting that reviewing court has discretion to deny without prejudice habeas corpus petition that was not filed first in proper lower court). Ordinarily, this citation to Steele would establish a procedural bar. See Chea v. Diaz, No. 12-00647, 2012 WL 4863795, at *5 (E.D. Cal. Oct. 12, 2012). But Petitioner raised three of his four claims to the Superior Court, see LD 10, and, as noted above, Respondent does not argue that a procedural bar stops Petitioner from raising these claims, see Answer at 17-18. Accordingly, the Court concludes that the "look-through" presumption has been rebutted and that the California Supreme Court's summary denial did not rest on the same grounds as the California Court of Appeal's. See Wilson, 138 S. Ct. at 1196 ("[T]he unreasonableness of the lower court's decision itself provides some evidence that makes it less likely the state supreme court adopted the same reasoning.").

The Court next looks at the Superior Court denial, which rejected Petitioner's prosecutorial misconduct and ineffective assistance of trial counsel claims. The Superior Court denied Petitioner's claims for failing to raise them on direct appeal. But as Respondent acknowledges, that court cannot have been referring to Petitioner's ineffective assistance of trial counsel claims, because such claims are not subject to that bar. See In re Robbins, 18 Cal. 4th 770, 814 n.34 (1998) ("We apply the bars of In re Dixon . . . (barring a claim that should have been raised on appeal) . . . whenever it appears that [the] bar is applicable, with one exception. We do not apply [this bar] to claims of ineffective assistance of trial counsel, even if the habeas corpus claim is based solely upon the appellate record."). The look-through presumption is therefore

also rebutted for these claims. See Wilson, 138 S. Ct. at 1196. Thus, the Court must decide whether there was any "reasonable basis" for the California Supreme Court to deny Petitioner's ineffective assistance of counsel claims. Richter, 562 U.S. at 98.

But the analysis of Petitioner's prosecutorial misconduct claim is different. The Superior Court determined that this claim was barred on habeas review because Petitioner did not raise it on direct appeal. See In re Robbins, 18 Cal. 4th at 814 n.34. This determination was correct, as the prosecutorial misconduct issue raised by Petitioner's direct appeal was limited to the prosecutor's statements about Maldonado during closing argument. See LD 3 at 12. Under the look-through analysis, this claim is procedurally barred. See Johnson v. Lee, 136 S. Ct. 1802, 1805-06 (2016) (per curiam) (holding that California's Dixon rule is adequate state procedural rule that bars federal habeas review); Insyxiengmay v. Morgan, 403 F.3d 657, 667 (9th Cir. 2005) (determining whether claims are procedurally barred on a claim-by-claim basis). However, the Court will, as discussed below, reach the merits of this claim, as those merits can be easily resolved against Petitioner. See Franklin v. Johnson, 290 F.3d 1223, 1232 (9th Cir. 2002) ("We do agree, however, that appeals courts are empowered to, and in some cases should, reach the merits of habeas petitions if they are, on their face and without regard to any facts that could be developed below, clearly not meritorious despite an asserted procedural bar."). The Court will review these claims de novo because there is no state court reasoned decision. See Cone v. Bell, 556 U.S. 449, 472 (2009) (explaining that where state courts did not reach merits of claim, deferential AEDPA standard does not apply and review is de novo).

IV. DISCUSSION

A. Prosecutorial Use of Perjured Testimony

Petitioner argues that the prosecutor knowingly elicited false testimony

from Maldonado at the preliminary hearing and at trial, because the prosecutor knew that her testimony differed from the handwritten statement she gave her employer the day after the crime. See Petition at 13-48; see also Dkt. 1-1 at 19-20 (handwritten statement). He also argues that the prosecutor should have corrected Detective Riddle's testimony that there was no operational video recording system at the Chevrolet dealership at the time of the crime, which the prosecutor knew to be false. See Petition at 48-51.

To establish a constitutional claim based on the prosecutor's introduction of perjured testimony at trial, "the petitioner must show that (1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) . . . the false testimony was material." United States v. Zuno-Arce, 339 F.3d 886, 889 (9th Cir. 2003). False testimony is material "if 'there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" Hayes v. Ayers, 632 F.3d 500, 520 (9th Cir. 2011) (quoting Hayes v. Brown, 399 F.3d 972, 984 (9th Cir. 2005) (en banc)). While this materiality standard is essentially a form of harmless error review, a far lesser showing of harm is required than under ordinary harmless error review. See Dow v. Virga, 729 F.3d 1041, 1048 (9th Cir. 2013). The Court need "determine only whether the error could have affected the judgment of the jury, whereas ordinary harmless error review requires [the court] to determine whether the error would have done so." Id.

Petitioner has not shown that Maldonado testified falsely, that the prosecutor knew that the testimony was false, or that any allegedly false testimony was material. Petitioner claims that Maldonado testified that he turned on the engine without asking but wrote in her statement that he "asked" to hear the engine and she "confirmed permission to go on a test drive." Petition at 24-26. But this mischaracterizes Maldonado's statement. She wrote

that Petitioner wanted to hear the engine, but she never wrote that he asked for permission to start the car or that she gave it. See Dkt. 1-1 at 19 ("Once [in the driver's seat] he wanted to listen to the engine. I told him . . . I would need to see his license. At this point he immediately started the car, jerking it in reverse then in drive and started to drive off the lot with the door (passenger) slamming close. I asked (screamed) at him to stop the vehicle.").

Moreover, the discrepancies that Petitioner identifies could not have been material to the jury's verdict, because the jury already knew about them. Maldonado testified at trial that Petitioner did not tell her he was taking the car for a test drive. See LD 2, 3 Reporter's Transcript ("RT") 1242. But she retracted this testimony on cross-examination after she was confronted with her preliminary hearing testimony. See 3 RT 1244. Similarly, Maldonado testified at trial that she told Petitioner that he could not test drive the car before it started to move. See 3 RT 1245. Petitioner's counsel again confronted her with her preliminary hearing testimony in which she testified that she told him that he could not take the car for a test drive after the car started moving. See 3 RT 1246. The jury was accordingly aware of Maldonado's conflicting testimony and found it immaterial. See Libberton v. Ryan, 583 F.3d 1147, 1163-64 (9th Cir. 2009) (holding that nondisclosure of oral non-prosecution agreement was immaterial, because jury already knew that witness had reached plea agreement with prosecutors).

As for Detective Riddle's allegedly false testimony, the record shows that the prosecutor represented to the trial court that the investigating officer had not obtained video from the Chevrolet dealership. See 2 RT D9. The trial court accordingly authorized Petitioner to subpoena to the dealership. See 1 CT 142-43. In response to the subpoena, the dealership's records custodian, Gina Day, appeared in court. She told the trial court that she did not have a video recording of the incident, that the cameras only stored footage for 45 days, and

"when the sheriffs came out to take the report, they looked at the monitors. I showed them where the different cameras were located, and they could see what they could see, and I said, is that going to be sufficient? They said, fine. They were going to put it in the report, and that's all we could do."[3] Dkt. 1-1 at 103-04. To her knowledge, no one downloaded the video and she was unable to do so. See id. Petitioner was not present at this hearing, but the trial court ordered that he be provided a transcript. See id. at 104.

At trial, Detective Riddle testified for the defense that in February 2014, he went to the Chevrolet dealership and was "unable to locate any working video at that time." 3 RT 1515-16. Someone at the dealership told him that the videos were not working, and he never received any video showing the crime. See 3 RT 1516. A police report reflects that "Nina Garcia" told him that they "may have video of the incident but they could not supply [him] with it until sometime next week." Petition at 59.

Petitioner has not identified any actually false testimony. Nina Garcia told Detective Riddle that the dealership "may" have video but could not provide it to him that day. This is not inconsistent with Detective Riddle's

[3] Petitioner argues that Day "made it perfectly clear that the sheriffs viewed the video footage." Traverse at 39. But in fact she only stated that the deputies had looked at the "monitors." Dkt. 1-1 at 103. Day returned at a subsequent hearing in June, at which time Petitioner asked her, "And that day when they look at the monitors, I'm quite sure they seen what was on the monitor that day?" Day answered, "Yes." He then asked, "And did the officers ever request to you to hold that video or that they were going to come pick the video up?" She answered, "No." Id. at 87-88. Petitioner's question to Day—"what was on the monitor that day"—was unclear about whether any law enforcement personnel had actually seen video footage of the incident. Indeed, Detective Riddle's contemporaneous report reflects that he had not viewed any such footage. See id. at 99 ("Nina told me they may have video of the incident but they could not supply me with it until sometime next week.").

testimony that, on the day of his visit, he was told that the video equipment was not working. Indeed, Day, the custodian, confirmed that she was unable to obtain any video. Petitioner has not established that that Detective Riddle falsely testified about the video, let alone that the prosecutor knew that such testimony was false. Last, even if the jury had learned that a video might have once existed, that would not have detracted from Maldonado's damaging testimony. See McCoy v. Holland, No. 13-3804, 2014 WL 2094314, at *15 (C.D. Cal. Apr. 21, 2014) ("Even if Petitioner has identified actual mistakes in the reporter's transcript, he has not shown that he would have received a more favorable result if appellate counsel had sought to correct these alleged errors, particularly given the substantial evidence presented at trial . . . ."); Kennedy v. Gastello, No. 16-01686, 2019 WL 1117539, at *25 (N.D. Cal. Mar. 11, 2019) ("Even if Petitioner could have met his burden as to the first two Hayes requirements, the Court finds that the state appellate court reasonably concluded that evidence here was not material—the third Hayes requirement. . . . [A]s the state appellate court noted, '. . . [t]he counts on which [Petitioner] was convicted all involved Chow, and his testimony provided ample, independent support for those convictions.'") (final alteration in original).

Even on de novo review, Petitioner's prosecutorial misconduct claim is clearly meritless. Habeas relief is not warranted on this claim of error.

B. Ineffective Assistance of Trial Counsel

Petitioner raises two separate ineffective assistance of trial claims. First, he argues that trial counsel should have moved under California Evidence Code § 402 to exclude Maldonado's testimony as "perjury." Dkt. 1-2 at 12-20. He also argues that trial counsel should have investigated and presented evidence about Petitioner's lack of specific intent to commit kidnapping and carjacking. See Dkt. 1-5 at 47-68.

1. Relevant Law

A petitioner claiming ineffective assistance of counsel must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. See Strickland v. Washington, 466 U.S. 668, 687 (1984). "Deficient performance" means unreasonable representation falling below professional norms prevailing at the time of trial. Id. at 688-89. To show deficient performance, the petitioner must overcome a strong presumption that his lawyer "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690. Further, the petitioner "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. The initial court considering the claim must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id.

To meet his burden of showing the distinctive kind of "prejudice" required by Strickland, Petitioner must affirmatively "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. A court deciding a claim alleging ineffective assistance of counsel need not address both components of the inquiry if the petitioner makes an insufficient showing on one. See id. at 697.

In Richter, the Supreme Court reiterated that AEDPA requires an additional level of deference to a state-court decision rejecting an ineffective assistance of counsel claim: "The pivotal question is whether the state court's application of the Strickland standard was unreasonable. This is different from asking whether defense counsel's performance fell below Strickland's standard." 562 U.S. at 101. The Supreme Court further explained,

> Establishing that a state court's application of Strickland was unreasonable under § 2254(d) is all the more difficult. The standards created by Strickland and § 2254(d) are both "highly deferential," and when the two apply in tandem, review is "doubly" so. The Strickland standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

Id. at 105 (citations omitted).

2. Analysis

The first claim is predicated on Petitioner's argument that Maldonado committed perjury. A petitioner claiming ineffective assistance based on counsel's failure to file particular motion must demonstrate the likelihood of prevailing on the motion. See Styers v. Schriro, 547 F.3d 1026, 1030 n.5 (9th Cir. 2008). Maldonado was an eyewitness and a victim, making her testimony extremely relevant. Petitioner argues that Maldonado's testimony should have been excluded as being "in total violation of his . . . fourteenth amendment right to due process." Petition at 12-13. But as explained above, no violation occurred. Thus, counsel's decision not to object or move to exclude Maldonado's testimony was an exercise of reasonable professional judgment, because any such objection or motion would have failed.

Petitioner next argues that his counsel should have presented testimony from mental health experts that he suffered from mental illness at the time of the crimes. See Dkt. 1-5 at 64. Counsel could have then requested a jury

instruction that the jury could consider the mental health evidence in deciding whether Petitioner acted with the required intent or mental state.

Petitioner was found incompetent to stand trial on May 7, 2014, after a doctor diagnosed him with schizophrenia. See LD 9 (Superior Court minutes) at 2-3; LD 14 at 583 (May 18, 2015 psychiatrist discharge summary). He received treatment for several weeks at a hospital, was diagnosed with schizophrenia, cannabis dependence, and antisocial personality disorder, and on August 4, 2014, was "restored to trial competency." LD 14 at 583. He was found incompetent by a different doctor, Dr. Ochoa, on August 29, 2014, and committed between October and December 2014. See LD 14 at 582. During that time, the treatment team concluded that he was malingering and also diagnosed antisocial personality disorder and "Unknown Substance Induced Psychotic Disorder, in remission." LD 14 at 583.[4] Dr. Ochoa evaluated him in January 2015 and disagreed that Petitioner was malingering. See id. at 583-84. Petitioner was again found incompetent and readmitted. See LD 9 at 6; LD 14 at 581. He was discharged in May 2015, at which point he had "sufficiently improved to qualify as being restored to trial competency." LD 14 at 581, 587. He was found competent on July 6, 2015. See LD 9 at 7-8. He represented himself between January and June 2016, and the trial court appointed counsel on June 13, 2016. See LD 9 at 13-21. Before trial, the prosecutor moved to exclude any reference to the competency proceedings. Petitioner's counsel did not object. See 2 RT J8-10.

At trial, Petitioner's counsel presented the defense that Petitioner was an "inept car thief." 3 RT 2106. He emphasized that Petitioner did not display a weapon or threaten the victims. See 3 RT 2108, 2116. Counsel also argued that

[4] See Dkt. 1-6 at 17 (Petitioner reports smoking "a blunt" every day since age 11, slowing his use in 2011, and using cocaine from age 19 until age 30).

Petitioner lacked the specific intent to carjack or kidnap, because Petitioner let the salespeople out of the vehicles. See 3 RT 2116-17.

The California Supreme Court's denial of this ineffective assistance of counsel claim was not unreasonable. Petitioner has presented little evidence that he was mentally incompetent during or in the first three weeks after the crimes. Shortly after his arrest, Petitioner "told the officer he had recently got out of prison and he moved to Las Vegas. He said ever since then he has been having people following him and watching him and there is nothing he can do without them around." Dkt. 1-6 at 8. He explained how he had visited various car dealerships and that he "wanted to get back to Vegas [and so] needed to get another car." Id. He showed the presence of mind during the interview to tell a very different story than the one told by Licon. According to Petitioner, he simply "left" the Toyota dealership after realizing that he had forgotten his ID card. Id.

The California Supreme Court had a reasonable basis for denying both of Petitioner's ineffective assistance of trial counsel claims. Accordingly, habeas relief is not warranted on either claim.

C. Ineffective Assistance of Appellate Counsel

Petitioner argues that his appellate counsel was ineffective for failing to raise on direct appeal Petitioner's prosecutorial misconduct claim. See Dkt. 1-3 at 64-66, 70, 79-80, 84. As explained above, that claim was meritless. Thus, appellate counsel could not have been constitutionally deficient for failing to raise it. See Wildman v. Johnson, 261 F.3d 832, 840 (9th Cir. 2001) ("[A]ppellate counsel's failure to raise issues on direct appeal does not constitute ineffective assistance when appeal would not have provided grounds for reversal.").

V. CONCLUSION

IT IS THEREFORE RECOMMENDED that the District Judge issue an Order: (1) accepting this Report and Recommendation; and (2) directing that judgment be entered denying the Petition and dismissing this action with prejudice.

Dated: September 10, 2020

DOUGLAS F. McCORMICK
United States Magistrate Judge

Appellate Courts Case Information

Supreme Court

Change court

Court data last updated: 06/03/2019 12:33 PM

Docket (Register of Actions)

ROBERTS (JESSIE C.) ON H.C.
Division SF
Case Number S250760

Date	Description	Notes
08/20/2018	Petition for writ of habeas corpus filed	Petitioner: Jessie C. Roberts Pro Per
08/20/2018	Exhibit(s) lodged	(Volume One beginning with A1) (Volume Two beginning with A2) (Volume Three beginning with A3)
02/13/2019	Petition for writ of habeas corpus denied	

Click here to request automatic e-mail notifications about this case.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re JESSIE C. ROBERTS	B291594
on	(Super. Ct. No. MA062199)
Habeas Corpus.	(Joel L. Lofton, Judge)

O R D E R

THE COURT:

The court has read and considered the petition for writ of habeas corpus filed July 30, 2018. The petition is denied. Petitioner fails to demonstrate he sought relief from the superior court prior to filing his petition in the court of appeal. (*In re Steele* (2004) 32 Cal.4th 682, 692.)

BAKER, Acting P.J. MOOR, J. JASKOL, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, v. JESSIE C. ROBERTS Defendant and Petitioner,	Case No. MA062199 ORDER SUMMARILY DENYING HABEAS CORPUS PETITION (Cal. Rules of Court 4.551(g))

IN CHAMBERS

Petition for Writ of Habeas Corpus by JESSIE C. ROBERTS, *pro se* ("Petitioner"). No appearance by a Respondent. Denied.

The Court has read and considered the Petition for Writ of Habeas Corpus filed by Petitioner on April 12, 2018. Petitioner contends:

1. The Sheriff's Department failed to preserve exculpatory evidence in the possession of a third party, the victim.
2. The prosecutor suborned perjury from witness
3. Ineffective assistance of trial counsel (preventing false testimony)
4. Ineffective assistance of trial counsel (mental health to negate specific intent)

For all of the foregoing reasons, the Petition for Writ of Habeas Corpus is DENIED.

The matter was affirmed on appeal, with the only issue raised being prosecutorial misconduct. The petition raises issues which could have been raised on appeal, but were not, and Petitioner has failed to allege facts establishing an exception to the rule barring habeas consideration of claims that could have been raised on appeal. (*In re Reno* (2012) 55 Cal.4th 428, 490-493; *In re Harris* (1993) 5 Cal.4th 813, 825-826; *In re Dixon* (1953) 41 Cal.2d 756, 759.)

The Clerk is ordered to serve a copy of this memorandum upon Petitioner, and upon the District Attorney's Habeas Corpus Litigation Team, 320 West Temple Street, Room 540, Los Angeles, California 90012.

Dated: June 7, 2018

/S/
F.M. TAVELMAN, Judge
Superior Court of California
County of Los Angeles

Petitioner:

JESSIE C. ROBERTS (CDCR #BB-4864)
Pelican Bay State Prison
P.O. Box 7500
Crescent City, CA 95532-7000

Court of Appeal, Second Appellate District, Division Five - No. B278185

S245408

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JESSIE C. ROBERTS, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

Filed 9/18/2017

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JESSIE C. ROBERTS, Defendant and Appellant.	B278185 (Los Angeles County Super. Ct. No. MA062199)

APPEAL from judgment of the Superior Court of Los Angeles County, Joel L. Lofton, Judge. Affirmed.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven E. Mercer, Acting

Supervising Deputy Attorney General, Zee Rodriguez, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Jessie C. Roberts of (1) carjacking (Penal Code, § 215, subd. (a), count 1);[1] (2) two counts of misdemeanor false imprisonment (§ 237, subd. (a), counts 8 and 9); (3) kidnapping during a carjacking (§ 209.5, subd. (a), count 10); and (4) unlawful taking or driving of a vehicle (Veh. Code, § 10851, subd. (a), count 11). The trial court sentenced defendant to an indeterminate term of life in prison with the possibility of parole, and a consecutive determinate term of nine years eight months.

Defendant's sole contention on appeal is that the prosecutor improperly vouched for the credibility of one witness—Norma Ruiz De Maldonado—who was the alleged victim in count 1 (charged as kidnapping during a carjacking) and count 8 (charged as kidnapping). The jury convicted defendant of the lesser included offenses of carjacking in count 1 and of misdemeanor false imprisonment in count 8. Ruiz De Maldonado was one of three salespersons from separate car dealerships defendant victimized during a two-day crime spree. We hold that defendant forfeited any claim of error by failing to make a specific objection on the ground asserted on appeal. In

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[1] All statutory references are to the Penal Code unless otherwise indicated.

addition, the prosecutor's statements did not amount to vouching, but even if they did, defendant has not shown a reasonable probability that the jury would have reached a more favorable result had the prosecutor not made the disputed argument to the jury.

FACTS

In February 2014, defendant visited three different car dealerships over two consecutive days. He tried, with varying degrees of success, to steal a car from each dealership. This appeal concerns comments made during the prosecutor's rebuttal argument about testimony by the salesperson from the second dealership. We briefly review the facts surrounding all three incidents.

Toyota dealership

Defendant first visited a Toyota car dealership in Glendale seeking to test drive a 2014 Camry. Salesman Jeremy Licon took defendant for a test drive. Once defendant was in the driver's seat, he ignored Licon's instructions about the normal test drive route. Instead, he drove towards the freeway at around 60 miles per hour on a 25-mile-per-hour street. Defendant did not respond to Licon's requests to turn, pull over, or slow down. Licon said to defendant, "If you're planning on stealing the car, you're not going to do it with me in it. Let me -- like, stop the car

and let me out." He also proposed that defendant "just pull the car over, we'll switch seats. I'll take you back to the dealership. None of this happened." About 10 blocks past the point where Licon first told him to stop, defendant drove into a restaurant parking lot, where Licon got out of the car. Licon had the key fob as defendant drove away with the passenger door still open.

Chevrolet dealership

The next day, defendant went to Antelope Valley Chevrolet in Lancaster, where he told sales associate Norma Ruiz De Maldonado he was interested in buying a Camaro. Ruiz De Maldonado showed him a 2014 SS Camaro on the dealership lot. Defendant wanted to see the interior and the electronics, so she obtained the keys and sat in the passenger seat of the car while defendant sat in the driver's seat. She turned the key just enough to activate the electronics. Without warning, defendant turned the car on and drove it forward. Ruiz De Maldonado repeatedly told defendant to stop, but he did not respond. He drove the car through the dealership lot toward the street. As the car approached the street, Ruiz De Maldonado turned the car off, grabbed the keys, and got out of the car. Appellant also got out of the car and yelled things like, "Bitch, all I wanted was the car. All I want is a car." Using the car as a barrier between herself and defendant, Ruiz De Maldonado ran to the driver's side, got in, and locked the doors. Defendant

yelled obscenities as Ruiz De Maldonado drove the car back into the dealership lot, parked it, and ran inside. She saw defendant yelling and walking to the dealership. Defendant entered a taxi and left. Ruiz De Maldonado reported the incident to her supervisor. She also completed a written report of the incident the next day, after she was written up for letting defendant drive the car.

During cross-examination, defense counsel asked Ruiz De Maldonado about her written statement. Ruiz De Maldonado confirmed she had written, "I pulled the keys out of the ignition and screamed at him to get out of the car, leaving the car in the middle of the road. He got out of the car, and I drove the car back to the lot." She also confirmed she had not written anything in the report about feeling afraid.

On redirect examination, the prosecutor asked Ruiz De Maldonado why she prepared the handwritten report for her employer. She responded that the report justified that she had followed procedures after her employer had written her up. She explained, "Because according to them, I should have never let him drive off with the vehicle."

On recross-examination, Ruiz De Maldonado testified she had been disciplined by her employer. Defense counsel asked, "Because you did not follow their instructions?" Ruiz De Maldonado responded, "According to them, yes."

Kia dealership

Isaac Rodriguez was a salesperson at Antelope Valley Mazda in Lancaster. He showed defendant a blue 2013 Kia Optima. He placed the keys in the ignition to show defendant the electronics as he stood outside the open driver's side door. Defendant abruptly shut and locked the car door, and drove out of the dealership and onto a street.

Defendant apprehended

The same day as the incidents in Lancaster, Los Angeles County Sheriff's Department Deputy Brandon Hartshorne saw defendant attempting to remove a car dealership sticker from the windshield of a blue Kia Optima. The Toyota Camry was parked in front of the Kia Optima. Defendant was arrested.

DISCUSSION

Defendant contends the prosecutor committed misconduct by vouching for Ruiz De Maldonado's credibility. We reject the contention.

"A 'prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. [Citations.] Nor is a prosecutor permitted to place the prestige of her office behind a witness by offering the

impression that she has taken steps to assure a witness's truthfulness at trial. [Citation.] However, so long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the "facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief," her comments cannot be characterized as improper vouching.' [Citations.] Misconduct arises only if, in arguing the veracity of a witness, the prosecutor implies she has evidence about which the jury is unaware. [Citations.]" (*People v. Fernandez* (2013) 216 Cal.App.4th 540, 561.) "A prosecutor is given wide latitude to vigorously argue his or her case and to make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence. [Citation.] Generally, a claim of prosecutorial misconduct is preserved for appeal only if the defendant objects in the trial court and requests an admonition, or if an admonition would not have cured the prejudice caused by the prosecutor's misconduct. [Citations.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 726.) "Furthermore, and particularly pertinent here, when 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." (*People v. Morales* (2001) 25 Cal.4th 34, 44 (*Morales*).)

During closing argument, defense counsel argued Ruiz De Maldonado's tearful and emotional testimony was not

sufficient to support a conviction because her written report did not state defendant ever threatened her or displayed a weapon. He suggested that perhaps her employer did not believe her version of events because she was sanctioned for whatever she did.

During rebuttal, the prosecutor argued: "Now, the defense tries to make a big deal out of the statement that she wrote for her employer after the incident, but let's think about that. The issue in her statement was whether she complied with the dealership's procedures for letting somebody take a test drive. The issue is not whether she was afraid or not. The dealership, simply put, wasn't concerned with determining whether she was afraid or whether she was not afraid. That wasn't really their prerogative. Instead, they rather unfairly accused her of not following the procedures, and she quite justifiably felt, 'That's not fair. He drove me in a car against my will.'" Defense counsel objected to the argument, stating it was "being advanced with respect to the state of the mind of their employee." The trial court responded, "Overruled. It's argument." Defense counsel made no further objection and did not request a jury admonition.

First, defendant has forfeited his claim. Defendant objected to the prosecutor's argument, but the only ground stated was that it related to Ruiz De Maldonado's state of mind. The actual legal basis for the objection is unclear. The objection did not put the trial court on notice that defendant was raising an objection on the grounds that the

prosecutor's comments were improper vouching and misconduct. A "'defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.' [Citation.] [Citation.]" (*People v. Stanley* (2006) 39 Cal.4th 913, 952.) Defendant only objected to the prosecutor's argument as going to the witness's state of mind. There was no assertion that the prosecutor was vouching for Ruiz De Maldonado's credibility, nor was there a request for a jury admonition. The claim of prosecutorial misconduct is therefore forfeited. (See *People v. Alfaro* (2007) 41 Cal.4th 1277, 1329; *People v. Cook* (2006) 39 Cal.4th 566, 606.)

Second, even if defendant had made a proper objection, the prosecutor's comments were a fair rebuttal to defendant's closing arguments and do not constitute personal vouching. Defense counsel's cross-examination and closing arguments focused on Ruiz De Maldonado's written statements in an attempt to undermine her testimony that she was afraid when defendant turned on the engine of the Camaro and maneuvered it to the driveway of the dealership despite her repeated requests to stop. The prosecutor offered a rebuttal to defense counsel's argument by reminding the jury of the context in which Ruiz De Maldonado gave the statement. Defendant argues the prosecutor's comments implied to the jury that the prosecutor was placing the prestige of his office behind the witness's truthfulness,

drawing attention away from the evidence. The record is not reasonably susceptible of the interpretation suggested by defendant. Having raised the matter of the post-incident report during cross-examination, and again during closing argument, defendant cannot now seek to transform the prosecutor's reasonable interpretation of Ruiz De Maldonado's testimony into prosecutorial misconduct.

Third, defendant cannot establish prejudice. "'A defendant's conviction will not be reversed for prosecutorial misconduct' that violates state law, however, 'unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.' [Citation.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1071.) To begin with, the singular disputed comment on its face is so trivial and innocuous that we see no possibility it had a prejudicial impact on the jury on the counts relating to Ruiz De Maldonado.[2] Moreover, the trial court instructed the jurors on their obligation to determine whether witnesses in the case were credible, and there is every reason to believe the jury performed its function in this case without undue influence from the prosecutor's argument. The prosecutor sought convictions for kidnapping during a carjacking (count

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[2] The disputed comment made no reference to the charges relating to the events at the Toyota and Kia dealerships. Defendant makes no argument of prejudice as to those counts, and justifiably so, as the prosecutor's argument related only to Ruiz De Maldonado and did not spill over to the other charged offenses.

1) and felony kidnapping (count 8) for the incident involving Ruiz De Maldonado, but the jury instead convicted defendant, respectively, of the lesser-included offenses of carjacking and misdemeanor false imprisonment. Considering the lesser verdicts returned by the jury, there is no "reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*Morales, supra*, 25 Cal.4th at p. 44.)

DISPOSITION

The judgment is affirmed.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

DUNNING, J.*

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.