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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA SIEGEL, Defendant and Appellant.	D068013 (Super. Ct. No. SCD248328)

APPEAL from a judgment of the Superior Court of San Diego County, Amalia L. Meza, Judge. Affirmed.

Siri Shetty, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Allison V. Hawley, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Joshua Siegel entered a restaurant, grabbed a knife, demanded money, engaged in an altercation with employees, and injured two of them with the knife. An

amended information was filed charging Siegel with attempted robbery (count 1: Pen. Code,[1] § 211), assault with a deadly weapon (counts 2 & 3: § 245, subd. (a)(1), hereafter § 245(a)(1)), and burglary (count 4: § 459). The information also alleged with respect to count 1 that Siegel personally used a deadly and dangerous weapon (a knife) within the meaning of sections 12022, subdivision (b)(1) (hereafter section 12022(b)(1)) and 1192.7, subdivision (c)(23); and, with respect to counts 1, 2, and 3, he personally used a deadly and dangerous weapon (a knife) within the meaning of section 1192.7, subdivision (c)(23), and personally inflicted great bodily injury within the meaning of sections 12022.7, subdivision (a), and 1192, subdivision (c)(8)). In addition, the information alleged that Siegel had committed seven prior serious felony offenses (§§ 667, subd. (a)(1), 668 & 1192.7, subd. (c)) and seven prior strike offenses (§§ 667, subds. (b)-(i), 668 & 1170.12).

A jury convicted Siegel of all counts and found true the weapon allegations, and Siegel admitted the prior serious felony and strike allegations. During trial the court dismissed the great bodily injury allegation with respect to count 3, and the jury returned a not-true finding on that allegation with respect to counts 1 and 2. On March 13, 2015, the court sentenced Siegel to an aggregate term of 81 years to life in prison.

Siegel appeals, contending (1) "the court prejudicially erred by failing to correctly instruct the jury on the partial defense of unconsciousness induced by voluntary intoxication as to the specific intent crimes"; (2) the court prejudicially erred by failing to

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1 All further statutory references are to the Penal Code unless otherwise specified.

instruct the jury on attempted grand theft as a lesser included offense of the count 1 offense of attempted robbery; (3) there was insufficient evidence to support his convictions of assault with a deadly weapon and the jury's findings on the related allegations he personally used a deadly and dangerous weapon; (4) the court prejudicially erred by failing to provide a unanimity instruction with respect to the two assault charges and deadly weapon use allegations; (5) his assault with a deadly weapon convictions and the true findings on the related deadly weapon use allegations must be reversed because the court prejudicially erred in failing to sua sponte instruct the jury under CALCRIM No. 3404 on the defense of accident; alternatively, reversal is warranted because his defense counsel provided ineffective assistance by failing to request such an instruction; (6) the judgment should be reversed because "[t]he prosecutor committed misconduct during closing argument by misstating the facts and the law and asserting that [Siegel's] courtroom demeanor evinced duplicity;" alternatively, such reversal is warranted because his defense counsel provided ineffective assistance by failing to object to the prosecutor's misconduct during closing arguments; (7) the judgment should be reversed because his trial counsel provided ineffective assistance by failing to move for admission of "critical exculpatory" nonhearsay state-of-mind evidence that Siegel made unsolicited statements to an arresting officer to the effect that "Steven" told him to rob the restaurant; and (8) his convictions must be reversed because "the combined effect of the multiple errors deprived [him] of a fair trial." We affirm the judgment.

FACTUAL BACKGROUND

A. *People's Case*

On May 22, 2013, Siegel, while wearing the standard uniform of a Chipotle Mexican Grill (Chipotle) manager, walked up to Chipotle in the Mission Valley area of San Diego after it had closed and banged loudly on the back door. Pablo Jimenez, who at that time was the Chipotle service manager, testified that when he opened the door, Siegel claimed he was from the Chipotle in Encinitas and told Jimenez the music inside was too loud and Jimenez should have received an e-mail about his visit. Ostensibly for the purpose of showing that e-mail to Jimenez, Siegel led him to the office in the back of the restaurant. When they got to the office, Jimenez tried to find the e-mail and then tried to call his supervisor on the phone to get more information.

While Jimenez was on the phone, Siegel picked up a 12-inch knife from the desk, told him to hang up the phone, and said, "Give me the fuckin' money," while waving the knife at Jimenez. The knife had been ordered by mistake and was on the office desk inside a plastic and cardboard cover when Siegel picked it up. Although Siegel had closed the office door behind them, other employees responded and Jimenez pushed Siegel out of the office.

Jimenez and two other employees then struggled to restrain Siegel and take the knife from him. While Jimenez was trying to loosen Siegel's grip on the knife, the packaging came off and Siegel cut Jimenez's finger. Siegel also caused a small "prick" wound to Bernave Garcia, one of the employees. Jimenez testified that Siegel appeared to be deliberately moving his arm and the knife, not just flailing his arms.

After Siegel injured them, Jimenez and Garcia began hitting him and Jimenez restrained him in a choke hold. Garcia eventually pulled the knife from Siegel's hand and threw it in the trash can. San Diego Police Officer John Larson and another officer responded to the scene while the employees were still trying to restrain Siegel. When Siegel noticed the officers, he became more aggressive. Officer Larson arrested Siegel and retrieved the knife from the trash can. He noticed a large amount of blood on the floor.

Although Garcia noticed that Siegel smelled like alcohol, Jimenez testified he did not have any trouble understanding Siegel, who spoke clearly and made eye contact with him. Officer Larson indicated at trial that although Siegel's gait was "a little off," he was not falling down or stumbling. He attributed Siegel's gait to adrenaline. Officer Larson also indicated he did not observe any signs that Siegel was under the influence of alcohol or drugs, and thus he did not conduct any further testing.

A surveillance video of the incident showing Siegel reaching for the knife was played for the jury during Jimenez's testimony.

The prosecution also played for the jury a recording of Siegel's telephone call from jail to his fiancée, Mayra Almaraz. During that conversation, Siegel told Almaraz he had been arrested for robbery and assault with a deadly weapon, and he indicated several times that he did not want to tell her what happened because the call was being recorded and it could be used against him. Siegel told her where he had left the car by saying it was at the Hooters location near "where I used to work" without giving any other information about the location. He told her that his keys, phone, and "everything" else

were in the car. During the conversation, Siegel asked Almaraz to bail him out of jail, and he told her, "I knew this was coming" and "I did something stupid." He also stated, "Too much pressure. My back was against the wall and I fucked up." Siegel explained, "I can't say anything. I got involved in something bad."

B. *Defense Case*

Almaraz testified they both had previously worked for Chipotle and she kept Chipotle clothes in the car they shared. She indicated she was responsible for making sure Siegel took various prescription medications on the morning of the incident. That morning, she saw Siegel drink six beers while he washed his car. At about 5:00 p.m., she noticed that Siegel smelled of alcohol and was slurring his speech. He left the house shortly thereafter, driving the car they shared.

When Almaraz picked up the car later that night after Siegel was arrested, she noticed five or six empty beer cans behind the front passenger seat that had not been there the previous morning.

Leo Summerhays, a forensic alcohol consultant, testified about the effects of alcohol consumption. In response to a hypothetical question based on Almaraz's testimony, Summerhays opined that at 1:30 p.m. on the day of the incident, Siegel's blood-alcohol content would have been about 0.12 percent, which was above the legal limit for driving. By 4:30 that afternoon, his blood-alcohol content would have dropped to about 0.08 percent. Summerhays also opined that, if Siegel then drank five cans of beer—a hypothetical based only on the empty beer cans Almaraz claimed she later found in the car—by about 11:30 that night Siegel's blood-alcohol content would have risen to

about 0.11 percent. At that level, Siegel's mental abilities would have been diminished and there would have been "some loss" in his judgment and inhibitions, and, although he would have been under the influence for driving purposes, he "may or may not have been drunk."

Dr. Michael Lardon, a psychiatrist, testified about the effects of the medications that Almaraz claimed Siegel took the morning of the incident. Siegel took a normal dosage of Vyvanse, a stimulant; a normal dosage of Soma, a muscle relaxant; and "a huge amount" of Roxicodone, an opiate pain medication. Based on a hypothetical mirroring Almaraz's testimony, Dr. Lardon opined that the cumulative effects of the medications that morning would have been to relax Siegel and make him less sharp, although the Vyvanse would have "amped" him up.

Dr. Lardon also discussed intoxication and withdrawal, stating that "withdrawal is the opposite of intoxication." He explained that when people are intoxicated, they tend to be mellow, whereas when they are coming off of intoxication, they "are really agitated." People who take those medications regularly "are not going to be intoxicated . . . because they are used to that much." Although the dose is high, it may be "therapeutic." They would experience withdrawal as the drugs wear off. Dr. Lardon testified that most of Siegel's drugs would not cause concern, but the opiate withdrawal "would be significant" and cause "some serious withdrawal symptoms." He added that alcohol would "disinhibit" such a person from doing things they normally would not do.

C. *People's Rebuttal*

Detective Robert Anschick testified that when he arrived at the scene and arrested Siegel, Siegel did not appear to be agitated or sweating and he was relatively calm. Siegel was not stumbling or swaying as he walked, and he did not have bloodshot, watery, or glassy eyes.

DISCUSSION

I. *CLAIM OF INSTRUCTIONAL ERROR* (*VOLUNTARY INTOXICATION*)

Siegel first contends that "the court prejudicially erred by failing to correctly instruct the jury on the partial defense of unconsciousness induced by voluntary intoxication as to the specific intent crimes." This contention is unavailing.

A. *Background*

1. *Alcohol evidence*

As discussed, *ante*, Almaraz testified Siegel drank six beers the morning of the incident. The defense expert opined the alcohol from those beers would have been eliminated by around 9:30 p.m., before the offense at 11:30 p.m.

Although Almaraz did not see Siegel drinking alcohol after he washed the car, she testified he smelled like alcohol and had slurred speech when he returned between 3 p.m. and 5 p.m. that day. The next day she found five or six empty beer cans in the car he had washed and driven the previous day.

The defense expert testified that Siegel's blood alcohol content would have hypothetically been 0.11 percent if he had consumed five beers between 5 and 10 p.m.,

but he "may or may not have been drunk" and the odor of alcohol was not an indicator as it came from flavoring agents in the beer.

2. *Siegel's defense theory of unconsciousness*

The defense asked the court to instruct the jury under CALCRIM No. 3425 on the defense of unconsciousness. During the conference on jury instructions, defense counsel clarified that his theory of the case was that Siegel was unconscious and did not know what he was doing as the result of his withdrawal from his psychotropic and pain medications. Defense counsel explained there was evidence that Siegel was "prescribed these medications not for the purpose of intoxication. They [were] prescribed for him to try to maintain normal status as . . . a normal person." Counsel reiterated that "[t]he medications aren't taken for intoxication. The fact that [Siegel] drank alcohol based on what either experts are going to say may enhance those [*sic*], but what effects here, the *unconsciousness* was the fact that he *was no longer taking the medication as prescribed*. He ended up not taking them, and that's what's causing the issue here." (Italics added.) Defense counsel added, "The unconsciousness is a result of not taking the medication."

Over the prosecutor's objection, the court found that substantial evidence supported the giving of the CALCRIM No. 3425 instruction on the defense of unconsciousness and ruled it would give that instruction to the jury. Citing the testimony of Almaraz, the court found there was substantial evidence that Siegel "went hours" without taking his prescribed medications prior to the incident.

3. *Defense counsel's tactical decision that the full standard instruction on voluntary intoxication should not be given*

The court then addressed CALCRIM No. 3426, the standard instruction on voluntary intoxication. The prosecutor objected on the grounds that this instruction contradicted both the instruction on the defense of unconsciousness, CALCRIM No. 3425, and the defense theory of the case. Specifically, she explained that "[i]f [Siegel] was taking medications, then you get the voluntary intoxication, but now they're going to try and argue withdrawal from it so it either is that you're under the influence and intoxicated or you're not."

Indicating that he did not oppose the prosecutor's objection to CALCRIM No. 3426 because the defense theory of the case was that Siegel was unconscious at the time of the charged attempted robbery, Siegel's counsel stated that "if the Court's inclined to strike that [instruction], again *our argument is that he was unconscious*." (Italics added.) Seeking clarification, the court asked defense counsel, "You're not asking for this one?" Siegel's counsel replied, "No. If [the prosecutor] wants to strike it, we can strike it."

Later, the prosecutor asked that the testimony of Dr. Lardon be limited to the effects of the prescribed medication. Specifically, the prosecutor stated that "because the defense of unconsciousness cannot be based on voluntary intoxication, the People would request that Dr. Lardon's testimony be limited to the effects of drugs only, not using any facts based on alcohol, hypothetical or real." The court asked defense counsel, "What is the relevance of the alcohol now?" Siegel's counsel replied, "The alcohol itself, Dr. Lardon will testify it just limits or lessens one's inhibition. Somebody still can have the

inhibitions while they are withdrawing from the drugs. That would still be there. The alcohol [evidence] itself isn't really based on [Siegel] being intoxicated, it is just to say it limits one's inhibitions, judgments or impairments." Indicating again that the defense theory of the case was that Siegel was unconscious during the incident, defense counsel stated that "*the true effect of all of this isn't really the alcohol, it is the withdrawal from the opiate*" (italics added). Based upon that representation, the court indicated it would permit Dr. Lardon to testify regarding the effects of alcohol for that purpose.

4. *The court's instruction under CALCRIM No. 3425*

The court instructed the jury with the standard instruction on the defense of unconsciousness, CALCRIM No. 3425. That instruction stated in pertinent part:

> "Unconsciousness may be caused by the withdrawal effects of taking psychotropic and pain medications. [¶] *The defense of unconsciousness may not be based on voluntary intoxication*. [¶] A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect." (First italics added.)

During his closing argument, defense counsel told the jury that "[unconsciousness]— and you'll see this in your jury instruction—can be caused from the withdrawal of pain medication and opiates."

5. *Siegel's new trial motion*

Siegel later claimed in a motion for new trial that the court erred by not sua sponte giving CALCRIM No. 3426, the standard instruction of voluntary intoxication, and that defense counsel had been ineffective because he acquiesced to the striking of that instruction. At the hearing on the motion, Siegel's counsel argued there was substantial

evidence that Siegel was intoxicated at the time of the incident, based upon his fiancée's claim he had been drinking earlier in the day and Garcia's testimony that Siegel smelled like beer.

In ruling on Siegel's new trial motion, the court discussed the procedural background in this case regarding this issue. The court observed that the defense had offered only "evidence of the presence of alcohol" and that "such evidence was not being used to establish intoxication but, rather, the effect it might have on withdrawal or unconsciousness." The court also observed that "the defense stated clearly it was *not relying on voluntary intoxication as the defense theory of the case*." (Italics added.) Noting that "there was scant evidence that [Siegel] had consumed alcohol the night of the attempted robbery," the court explained that "there was [an eight-to-10-hour] gap where there is no evidence of what [Siegel] was doing or what he was consuming" and that "witnesses said not that he looked intoxicated but . . . that he was accelerated or aggressive" rather than "groggy or slurring his words or stumbling." The court found "[t]here was no evidence that [Siegel] drank before the attempted robbery, that he exhibited signs of intoxication, or that he was intoxicated at the time the crime occurred."

The court denied Siegel's new trial motion, finding that there was no instructional error, that any instructional error did not result in prejudice because Siegel's theory of the case was not intoxication, and that defense counsel was not ineffective because his decision not to pursue an intoxication theory was clearly tactical.

B. *Applicable Legal Principles and Standard of Review*

A trial court is "obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request." (*People v. Blair* (2005) 36 Cal.4th 686, 744 (*Blair*).) As a corollary of its duty to sua sponte instruct on all general principles of law relevant to the issues raised by the evidence, a trial court must instruct on an affirmative defense, even in the absence of a request by the defendant, if it appears the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case. (*People v. Boyer* (2006) 38 Cal.4th 412, 468-469 (*Boyer*).)

"Unconsciousness, when not voluntarily induced, is a complete defense to a charged crime." (*People v. Rogers* (2006) 39 Cal.4th 826, 887.) "On the other hand, voluntary intoxication, even if it induced unconsciousness, is not a defense to crime as such, though it may be relevant to whether the defendant formed a specific intent necessary for its commission." (*Boyer*, *supra*, 38 Cal.4th at p. 469.)

Thus, a trial court does not have a duty to sua sponte instruct the jury regarding voluntary intoxication because it is not a defense to a crime. (*People v. Ricardi* (1992) 9 Cal.App.4th 1427, 1432-1433, citing *People v. Saille* (1991) 54 Cal.3d 1103 (*Saille*); see *Boyer, supra,* 38 Cal.4th at p. 469.) In *Saille*, a defendant convicted of murder claimed the judgment must be reversed because the trial court failed to sua sponte instruct the jury to consider that he may not have harbored malice aforethought because there was evidence the killing occurred when he was unconscious due to voluntary intoxication.

(*Saille, supra*, 54 Cal.3d at p. 1117.) In rejecting that claim, the California Supreme Court held that the abolition of the defense of diminished capacity[2] eliminated the need for sua sponte instructions relating evidence of a defendant's voluntary intoxication to an element of a crime and that such "pinpoint" instruction must be requested by the defendant. (*Id.* at p. 1120.) The *Saille* court explained:

> "[U]nder the law relating to mental capacity as it exists today, it makes more sense to place on the defendant the duty to request an instruction which relates the evidence of his intoxication to an element of a crime, such as premeditation and deliberation. This is so because the defendant's evidence of intoxication can no longer be proffered as a defense to a crime but rather is proffered in an attempt to raise a doubt on an element of a crime which the prosecution must prove beyond a reasonable doubt. In such a case the defendant is attempting to relate his evidence of intoxication to an element of the crime. Accordingly, he may seek a 'pinpoint' instruction that must be requested by him [citation], but such a pinpoint instruction does not involve a 'general principle of law' as that term is used in the cases that have imposed a sua sponte duty of instruction on the trial court. The court did not err, therefore, in failing to instruct sua sponte [on voluntary intoxication]." (*Ibid*.)

Thus, "[i]t is well settled that '[a]n instruction on the significance of voluntary intoxication is a "pinpoint" instruction that the trial court is not required to give unless requested by the defendant.'" (*People v. Verdugo* (2010) 50 Cal.4th 263, 295 (*Verdugo*), quoting *People v. Rundle* (2008) 43 Cal.4th 76, 145, which cited *Saille*, *supra*, 54 Cal.3d at p. 1120.)

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2 Section 25, subdivision (a), provides in part: "The defense of diminished capacity is hereby abolished."

1. *Standard of review*

We review de novo a claim of instructional error. (*People v. Posey* (2004) 32 Cal.4th 193, 218 ["[t]he independent or de novo standard of review is applicable in assessing whether instructions correctly state the law"].)

C. *Analysis*

As noted, Siegel contends the court prejudicially erred "by failing to correctly instruct the jury on the partial defense of unconsciousness induced by voluntary intoxication as to the specific intent crimes." In support of this contention, he asserts that "although the record disclosed ample evidence that [he] was intoxicated, and such intoxication was unquestionably relevant to [his] state of mind, the jury was not properly instructed on that issue." He further asserts that "[a]lthough the trial court agreed to provide an instruction on the unconsciousness defense based on the testimony about the potential withdrawal effects of prescription medication, it modified the standard instruction, at the prosecutor's urging, to define voluntary intoxication and advise the jury that such defense could not be based on voluntary intoxication." However, he maintains, "this partial instruction was misleading because it did not also explain either that unconsciousness induced by voluntary intoxication remained relevant to the specific intent crimes, or that the jury generally could consider such evidence in determining whether [he] acted with the requisite intent."

The California Supreme Court has explained that "'[a]n instruction on the significance of voluntary intoxication is a "pinpoint" instruction that the trial court is not required to give unless requested by the defendant.'" (*Verdugo, supra*, 50 Cal.4th at p.

295.) Here, it is undisputed that Siegel did not request such an instruction, and thus we conclude the court did not err and Siegel has forfeited his claim of instructional error. (See *ibid*.; *Saille*, *supra*, 54 Cal.3d at p. 1120 [a pinpoint instruction relating evidence of a defendant's voluntary intoxication to an element of a crime must be requested by the defendant]; see also *People v. Lee* (2011) 51 Cal.4th 620, 638 ["failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal"].)

II. *CLAIM OF INSTRUCTIONAL ERROR* (*COUNT 1 LESSER INCLUDED OFFENSE*)

Siegel also contends his count 1 conviction of attempted robbery must be reversed because the court prejudicially erred by failing to instruct the jury on attempted grand theft as a lesser included offense of attempted robbery. We reject this contention.

A. *Background*

As pertinent here, the court instructed the jury under CALCRIM No. 460 regarding attempted robbery, under CALCRIM No. 1600 regarding robbery, and under CALCRIM No. 1800 regarding theft by larceny. During the conference on jury instructions, there was no discussion of attempted grand theft.

B. *Applicable Legal Principles*

1. *Instructions on lesser included offenses*

A trial court is "obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request." (*Blair*, *supra*, 36 Cal.4th at p. 744.) "That obligation encompasses instructions on lesser included offenses if there is evidence that, if accepted by the trier of fact, would

absolve the defendant of guilt of the greater offense but not of the lesser." (*Id*. at p. 745; see also *People v. DePriest* (2007) 42 Cal.4th 1, 50 (*DePriest*) ["Such instructions are required only where there is 'substantial evidence' from which a rational jury could conclude that the defendant committed the lesser offense, and that he is not guilty of the greater offense."].)

"To justify a lesser included offense instruction, the evidence supporting the instruction must be substantial—that is, it must be evidence from which a jury composed of reasonable persons could conclude that the facts underlying the particular instruction exist." (*Blair, supra*, 36 Cal.4th at p. 745; see also *People v. Breverman* (1998) 19 Cal.4th 142, 162.) "'In deciding whether evidence is "substantial" in this context, a court determines only its bare legal sufficiency, not its weight.'" (*People v. Moye* (2009) 47 Cal.4th 537, 556.)

2. *Robbery and attempted robbery*

"Robbery is defined as 'the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.'" (*People v. Anderson* (2011) 51 Cal.4th 989, 994, quoting § 211.) Whether force or fear was used is a factual question for the trier of fact to determine. (*People v. Mungia* (1991) 234 Cal.App.3d 1703, 1707 (*Mungia*).)

"'The element of fear for purposes of robbery is satisfied when there is sufficient fear to cause the victim to comply with the unlawful demand for his property.'" (*People v. Morehead* (2011) 191 Cal.App.4th 765, 774-775 (*Morehead*).) "It is not necessary that there be direct proof of fear." (*People v. Holt* (1997) 15 Cal.4th 619, 690.) Fear may be

proved with circumstantial evidence and may be inferred from the circumstances in which property is taken. (*Ibid*.) "An unlawful demand can convey an implied threat of harm for failure to comply, thus supporting an inference of the requisite fear." (*Morehead*, at p. 775.) "All that is necessary is that the record show '"conduct, words, or circumstances reasonably calculated to produce fear."'" (*Ibid*.)

"It is the use of force or fear which distinguishes robbery from grand theft from the person." (*Mungia, supra*, 234 Cal.App.3d at p. 1707.) Where the element of force or fear is absent, a taking from the person is grand theft rather than robbery. (*People v. Morales* (1975) 49 Cal.App.3d 134, 139.)

Attempted robbery requires proof of a specific intent to commit robbery and a direct, ineffectual act toward its commission. (*People v. Medina* (2007) 41 Cal.4th 685, 694.) "Under general attempt principles, commission of an element of the crime is not necessary." (*Ibid*.) Thus, "neither a completed theft [citation] nor a completed assault [citation] is required for attempted robbery." (*Id*. at pp. 694-695.)

3. *Standard of review*

We review de novo a claim of instructional error. (*People v. Posey, supra*, 32 Cal.4th at p. 218.)

C. *Analysis*

As noted, Siegel contends his conviction of attempted robbery must be reversed because the court prejudicially erred by failing to instruct the jury on attempted grand theft as a lesser included offense of attempted robbery. In support of this contention, Siegel maintains that, based on the testimony of Jimenez, a reasonable jury could

conclude that he (Siegel) had committed the lesser offense of attempted grand theft but not the greater offense of attempted robbery. Specifically, Siegel asserts that the record discloses substantial evidence that he "did not intend to take property through force or fear" because it shows he did not threaten Jimenez when he (Siegel) entered Chipotle, and he was "unarmed when he first asked [Jimenez] for money."

Siegel distorts the evidentiary record. The record does show that Siegel did not threaten Jimenez when he *entered* Chipotle. However, this is immaterial. Jimenez testified that after Siegel led him to the office in the back of the restaurant Jimenez tried to call his supervisor on the phone to get some information. As Jimenez was calling his supervisor's number, Siegel picked up a 12-inch knife from the desk, told him to hang up the phone, and then said, "Give me the fuckin' money," while waving the knife at Jimenez. Jimenez elaborated: "I was leaning over using the phone with my tablet here on the desk. [Siegel] reached over me and grabbed the knife and told me to hang up the phone."

The prosecutor then asked Jimenez, "How did you feel at the moment? What was going through your mind?" Jimenez replied, "I'm thinking, you know, [I'm] probably in the middle of a robbery, this guy is trying to rob me, *threatening me with a knife*." (Italics added.)

The prosecutor then asked Jimenez, "What was it about what he was doing that made you feel you were getting robbed?" Jimenez answered, "*He was waving the knife at me*, kind of like *demanding money* basically, giving me orders, 'Open the safe and give me money.'" (Italics added.) The prosecutor asked, "Tell me exactly what he said[.]"

Jimenez responded, "'Give me the fuckin' money. I'm here to rob you,' basically telling me 'Give me the money.'" The prosecutor asked, "When [Siegel] said, 'Give me the fuckin' money,' where was the knife?" Jimenez indicated that Siegel was holding the knife in his right hand and he made a forward motion with it at Jimenez when Siegel said "Give me the fuckin' money."

As already discussed, "'[t]he element of fear for purposes of robbery is satisfied when there is sufficient fear to cause the victim to comply with the unlawful demand for his property.'" (*Morehead, supra*, 191 Cal.App.4th at pp. 774-775.) "All that is necessary is that the record show ""conduct, words, or circumstances reasonably calculated to produce fear."""" (*Id.* at p. 775.)

Here, Siegel's assertion that Jimenez's testimony shows he (Siegel) "did not intend to take property through force or fear" because he "remained unarmed when he first asked for money," is unsupported by the record. Because there was no substantial evidence from which a rational jury could conclude that Siegel committed the lesser included offense of attempted grand theft and not the greater offense of attempted robbery, we conclude the court had no duty to instruct on the lesser offense. (See *DePriest, supra*, 42 Cal.4th at p. 50 ["Such instructions are required only where there is 'substantial evidence' from which a rational jury could conclude that the defendant committed the lesser offense, and that he is not guilty of the greater offense."]; see also *Mungia, supra*, 234 Cal.App.3d at p. 1707 [use of force or fear distinguishes robbery from grand theft from the person].) Accordingly, we reject Siegel's claim that the court

erred by failing to instruct the jury on the lesser included offense of attempted grand theft.

III. *SUFFICIENCY OF THE EVIDENCE* (*COUNTS 2* & *3*)

Siegel next contends there was insufficient evidence to support his two convictions of assault with a deadly weapon and the jury's findings on the related allegations he personally used a deadly and dangerous weapon. We reject this contention.

A. *Applicable Legal Principles*

1. *Section 245*(*a*)(*1*)

Section 245(a)(1) provides: "Any person who commits an assault upon the person of another with a *deadly weapon or instrument other than a firearm* shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment." (Italics added.)

"As used in section 245[(a)(1)], a 'deadly weapon' is 'any object, instrument, or weapon which is used in such a manner as to be *capable of producing and likely to produce, death or great bodily injury*.'" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029 (*Aguilar*), italics added.) In *Aguilar*, the California Supreme Court explained that some objects, "while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the

nature of the object, the manner in which it is used, and all other facts relevant to the issue." (*Id*. at p. 1029.)

"Whether or not the victim is injured is immaterial because [section 245(a)(1)] focuses on use of a deadly weapon or instrument or, alternatively, on force likely to produce great bodily injury." (*People v. Russell* (2005) 129 Cal.App.4th 776, 782.)

"All that is required to sustain a conviction of assault with a deadly weapon is proof that there was an assault, that it was with a deadly weapon, and that the defendant intended to commit a violent injury on another. [Citation.] A battery, or a wounding[,] is not necessary in order to sustain a conviction for assault with a deadly weapon." (*People v. Birch* (1969) 3 Cal.App.3d 167, 177, abrogated on other grounds in *People v. Felix* (2009) 172 Cal.App.4th 1618, 1629.) "[T]he intent necessary in this type of case may be inferred from the doing of the wrongful act." (*People v. Corson* (1963) 221 Cal.App.2d 579, 582.)

2. *Standard of Review*

When assessing a challenge to the sufficiency of the evidence supporting a conviction, we apply the substantial evidence standard of review, under which we view the evidence "in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578 (*Johnson*); see *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) "The same standard of review applies to cases in

which the prosecution relies mainly on circumstantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 396.)

We do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Jones* (1990) 51 Cal.3d 294, 314.) "Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Thus, "[c]onflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment." (*People v. Maury*, *supra*, 30 Cal.4th at p. 403.)

B. *Analysis*

Siegel makes three principal assertions, none of which is availing, in support of his contention there was insufficient evidence to sustain his two convictions of assault with a deadly weapon and the true findings on related allegations he personally used a deadly and dangerous weapon.

First, he asserts that "[a] sheathed knife is simply not capable of inflicting great bodily injury or death" and, therefore, it "cannot be deemed a deadly weapon." He also states that, "although [Jimenez] asserted that [he (Siegel)] waved the sheathed knife at [Jimenez] and the other employees," the knife "was simply not capable of being used to inflict injury in that condition."

These assertions are unavailing. Siegel is essentially asking this court to weigh the evidence and draw inferences in his favor in violation of the basic principle governing application of the substantial evidence standard of review, namely that the reviewing

court must view the evidence in the light most favorable to the judgment. (See *Johnson*, *supra*, 26 Cal.3d at p. 578.) Viewing the evidence in the light most favorable to the judgment, we conclude substantial evidence shows the knife Siegel was wielding when he demanded money from Jimenez and struggled with and injured Jimenez and Garcia, was capable of producing great bodily injury and thus was a deadly or dangerous weapon within the meaning of section 245(a)(1). Jimenez testified that the knife had a 12-inch blade with "teeth" that was "sitting in a plastic cover" and was "like in a glove" with the handle "sticking out." Jimenez indicated how easily the serrated knife could slip out from the sheath when he testified that the sheath "just slides off" the blade. Jimenez's testimony shows that, during the attempted robbery and the ensuing physical struggle that Siegel instigated, the sheath did "just slide[] off" and Siegel cut Jimenez's finger with the knife as Jimenez and Garcia were trying to loosen Siegel's grip on the handle. The foregoing substantial evidence supports a reasonable inference that Siegel easily could have caused serious bodily injury or death to Jimenez and Garcia during the melee with the unsheathed serrated knife he was wielding.

Second, Siegel asserts that "no credible evidence suggested that [he] ever removed the [sheath] or intentionally wielded that uncovered [knife] at any person." Once again, Siegel is inappropriately asking this court to draw inferences in his favor in violation of the basic principle that in applying the substantial evidence standard of review we must view the evidence in the light most favorable to the judgment. (See *Johnson*, *supra*, 26 Cal.3d at p. 578.) It is immaterial whether Siegel removed the sheath. Substantial evidence already discussed shows that Siegel grabbed the loosely sheathed serrated knife,

a dangerous and potentially deadly weapon, and used it both during his attempt to commit robbery when he demanded money from Jimenez and when he wielded it against Jimenez and Garcia, injuring them. Jimenez testified that when Siegel cut his finger with the knife during the struggle after the sheath came off, Siegel was moving his hand "toward [Jimenez] with the knife" while "swivel[ling]" the knife; Siegel was not just flailing his arms. From the foregoing substantial evidence, a jury could reasonably find from the circumstances that Siegel intended to use the knife to violently injure Jimenez and Garcia knowing it was unsheathed.

Last, Siegel asserts that, "[a]lthough [Jimenez and Garcia] sustained cuts from the knife after it was unsheathed, their testimony attributing responsibility to [him] was inherently improbable." This assertion is premised on his contention that "[n]o credible evidence suggested that [he] had knowingly swung the unsheathed knife at either [Jiminez] or [Garcia]." These assertions are unavailing. We have already concluded the prosecution presented substantial evidence from which a jury could reasonably find Siegel intended to use the knife to violently injure Jimenez and Garcia knowing it was unsheathed.

IV. *FAILURE TO GIVE A UNANIMITY INSTRUCTION* (*COUNTS 2 & 3*)

Siegel also contends the court prejudicially erred by failing to sua sponte provide a unanimity instruction to the jury with respect to the two assault with a deadly weapon charges (involving alleged victims Jimenez and Garcia) and the related allegations that he personally used a deadly and dangerous weapon. We reject this contention.

A. *Applicable Legal Principles*

"[T]he requirement of jury unanimity in criminal cases is of constitutional origin." (*People v. Jones*, *supra*, 51 Cal.3d at p. 321, citing Cal. Const., art. I, § 16.) As this court explained in *People v. Muniz* (1989) 213 Cal.App.3d 1508, 1517, "[i]t is well established that the entire jury must agree upon the commission of the same act in order to convict a defendant of the charged offense."

"[W]hen the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act." (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) "The duty to instruct on unanimity when no election has been made rests upon the court sua sponte." (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.)

However, under the "continuous conduct" rule, a unanimity instruction is not required when "the acts alleged are so closely connected as to form part of one transaction [and] the defendant offers essentially the same defense to each of the acts." (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100 (*Stankewitz*); *People v. Dieguez* (2001) 89 Cal.App.4th 266, 275 (*Dieguez*).) "Neither an election nor a unanimity instruction is required when the crime falls within the 'continuous conduct' exception." (*People v. Salvato* (1991) 234 Cal.App.3d 872, 882.)

"[P]roof of a course of conduct offense will usually consist of evidence of various incidents occurring over a period of time." (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1451). A "continuous course of conduct, by its nature, may stop and start." (*People v. Rae* (2002) 102 Cal.App.4th 116, 124.)

B. *Analysis*

Siegel claims the court was obligated to sua sponte give the jury "a unanimity instruction on the assault charges and deadly weapon enhancement [because] the record disclosed and the prosecution argued the commission of more than one potential criminal act, but did not elect a specific act upon which to rely." He asserts that, with respect to the charged assaults, there was evidence of multiple criminal acts giving rise to separate defenses: (1) "[his] conduct . . . in waving a sheathed knife"; and (2) "[his] actions with the knife after the sheath was removed."

We reject Siegel's claim of instructional error. The jury found Siegel guilty of assaulting Jimenez with a deadly weapon, the knife, and also found Siegel guilty of assaulting Garcia with the knife. Both counts arose out of his threatening use of the knife when he demanded money from Jimenez and during the ensuing melee when Siegel wielded the knife against, and injured, both Jimenez and Garcia. The defense Siegel offered with respect to these assault charges involving two victims was that he was unconscious and did not know what he was doing as the result of his withdrawal from his psychotropic and pain medications. We conclude the "continuous conduct" rule applies, and thus the court did not have a duty to sua sponte give the jury a unanimity instruction, because "the acts alleged [were] so closely connected as to form part of one transaction" and Siegel "offer[ed] essentially the same defense to each of the acts" (*Stankewitz*, *supra*, 51 Cal.3d at p. 72; *Dieguez*, *supra*, 89 Cal.App.4th at p. 275.)

V. *FAILURE TO INSTRUCT ON THE DEFENSE OF ACCIDENT* (*COUNTS 2 & 3*) *AND ALTERNATIVE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL*

Next, Siegel contends his two convictions of assault with a deadly weapon and the true findings on the related deadly weapon use allegations must be reversed because the court prejudicially erred in failing to instruct the jury under CALCRIM No. 3404 on the defense of accident. Alternatively, he contends such reversal is warranted because his defense counsel provided ineffective assistance by failing to request such an instruction. We reject these contentions.

A. *Claim of instructional error*

Siegel's claim of instructional error is premised on his assertion that an instruction on the defense of accident was warranted because "the record disclosed that [he] could not have intentionally assaulted [Jiminez and Garcia with the knife] under the circumstances they described." We conclude Siegel has forfeited this claim.

"Pinpoint instructions 'relate particular facts to a legal issue in the case or "pinpoint" the crux of a defendant's case.'" (*People v. Wilkins* (2013) 56 Cal.4th 333, 348-349 (*Wilkins*).) Pinpoint instructions are required to be given *only upon request* when there is evidence supportive of the theory. (*Id*. at p. 349; see *Verdugo*, *supra*, 50 Cal.4th at p. 295 [instruction on the significance of voluntary intoxication is a "pinpoint" instruction the trial court is not required to be given unless requested by the defendant].) Here, the instruction on the defense of accident that Siegel claims the court was required to give is a pinpoint instruction because it "'relate[s] particular facts to a legal issue in the case or "pinpoint[s]" the crux of a defendant's case'" (*Wilkins*, *supra*, 56 Cal.4th at pp.

348-349). Specifically, such an instruction would have pinpointed a claimed defense of accident based on what Siegel asserts are particular "circumstances [that Jiminez and Garcia] described" in their trial testimony.

"[T]o require trial courts to ferret out all defenses that might possibly be shown by the evidence, even when inconsistent with the defendant's theory at trial, would not only place an undue burden on the trial courts but would also create a potential of prejudice to the defendant." (*People v. Barton* (1995) 12 Cal.4th 186, 197 (*Barton*).)

Here, Siegel acknowledges he did not request an instruction on the defense of accident. Such an instruction would have been inconsistent with his defense of unconsciousness. The court was not required to "ferret out all defenses that might possibly [have been] shown by the evidence" (*Barton*, *supra*, 12 Cal.4th at p. 197), such as the defense of accident. We conclude the court did not err and Siegel forfeited his claim of instructional error because he did not request the pinpoint instruction on the defense of accident he erroneously claims the court was required to give to the jury. (See *Wilkins*, *supra*, 56 Cal.4th at p. 349; *Barton*, *supra*, 12 Cal.4th at p. 197.)

B. *Claim of ineffective assistance of counsel*

Siegel alternatively contends that, "[i]f [his trial] counsel's omission forfeited [this] claim of instructional error on appeal, reversal of the assault convictions is nevertheless warranted in the context of ineffective assistance of counsel [because] there could be no plausible strategy for such omission, and it prejudiced [him]." We reject this contention.

1. *Applicable legal principles*

A criminal defendant is constitutionally entitled to effective assistance of counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *Strickland v. Washington* (1984) 466 U.S. 668, 684-685 (*Strickland*); *People v. Frye* (1998) 18 Cal.4th 894, 979.) To establish a denial of the right to effective assistance of counsel, a defendant must show (1) his or her counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance prejudiced the defendant. (*Strickland*, at p. 687, 691-692; *Frye*, at p. 979.) To demonstrate prejudice, a defendant asserting an ineffective assistance claim on appeal must show a reasonable probability he or she would have received a more favorable result had counsel's performance not been deficient. (*Strickland*, *supra*, at pp. 693-694; *Frye*, at p. 979.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland*, at p. 694.)

Strickland explained that "[j]udicial scrutiny of counsel's performance must be *highly deferential* [because] [i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." (*Strickland*, *supra*, 466 U.S. at p. 689, italics added.) *Strickland* also explained that reviewing courts "must indulge a *strong presumption* that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the

circumstances, the challenged action 'might be considered sound trial strategy.'" (*Ibid.*, italics added.)

2. *Analysis*

Here, as already discussed, the defense asked the court to instruct the jury under CALCRIM No. 3425 on the defense of *unconsciousness*. During the conference on jury instructions, defense counsel clarified that the defense theory of the case was that Siegel was unconscious and did not know what he was doing as the result of his withdrawal from his psychotropic and pain medications.

Applying a highly deferential level of scrutiny and indulging a strong presumption that defense counsel's conduct fell within the wide range of reasonable professional assistance in determining the appropriate strategy at trial, as we must (*Strickland*, *supra*, 466 U.S. at p. 689), we conclude Siegel has failed to meet his heavy burden on appeal of establishing that his counsel provided ineffective assistance by not requesting an instruction on the defense of mistake. As matter of trial strategy, defense counsel decided it was in Siegel's best interests to present the defense of unconsciousness based on the theory that Siegel was unconscious and did not know what he was doing as the result of a withdrawal from his prescribed medications, and he presented substantial evidence in support of that defense. In doing so, Siegel's counsel may have reasonably concluded he could not present a credible argument to the jury that Siegel's wielding a 12-inch knife during the struggle with Jimenez and Garcia, after deceiving Jimenez into thinking he was a Chipotle manager and then demanding money from Jimenez while threatening him with the knife, was just an accident. Defense counsel's tactical decision to not request an

instruction of the defense of mistake did not fall below an objective standard of reasonableness. Siegel has not shown, and he cannot demonstrate, that his counsel violated his Sixth Amendment right to effective assistance of counsel in making that decision.

VI. *CLAIMS OF PROSECUTORIAL MISCONDUCT AND ALTERNATIVE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL*

Siegel also claims the judgment should be reversed because "[t]he prosecutor committed misconduct during closing argument by misstating the facts and the law and asserting that [Siegel's] courtroom demeanor evinced duplicity." Alternatively, he claims reversal is required because his trial counsel provided ineffective assistance by failing to object to the prosecutor's misconduct during closing arguments. We reject Siegel's claims of prosecutorial misconduct and ineffective assistance of counsel.

A. *Claims of prosecutorial misconduct*

Siegel claims that, during closing arguments, the prosecutor engaged in four types of prejudicial misconduct: (1) misstating the law on the relevance of voluntary intoxication; (2) mischaracterizing the testimony of his fiancée Almaraz as admitted lies and perjury; (3) offering her (the prosecutor's) personal opinion that an officer who testified as a prosecution witness that he found Siegel's license on Siegel's person should not be credited because Almaraz testified she had found the wallet in the car she and Siegel shared; and (4) improperly referring to Siegel's courtroom demeanor. We reject these claims.

1. *Applicable legal principles*

"When a prosecutor's intemperate behavior is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process, the federal Constitution is violated. Prosecutorial misconduct that falls short of rendering the trial fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the trial court or the jury." (*People v. Panah* (2005) 35 Cal.4th 395, 462 (*Panah*).) "Misconduct that does not constitute a federal constitutional violation warrants reversal only if it is reasonably probable the trial outcome was affected." (*People v. Shazier* (2014) 60 Cal.4th 109, 127 (*Shazier*).)

"To preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely objection, make known the basis of his objection, and ask the trial court to admonish the jury." (*People v. Brown* (2003) 31 Cal.4th 518, 553 (*Brown*).) "If the defendant fails to object to the asserted misconduct and does not request an instruction or admonition to lessen any possible prejudice, then the asserted objection is thereby waived." (*People v. Nguyen* (1995) 40 Cal.App.4th 28, 36 (*Nguyen*).)

"There are two exceptions to this forfeiture: (1) the objection and/or the request for an admonition would have been futile, or (2) the admonition would have been insufficient to cure the harm occasioned by the misconduct." (*Panah*, *supra*, 35 Cal.4th at p. 462.) "A defendant claiming that one of these exceptions applies must find support for his or her claim in the record. [Citation.] The ritual incantation that an exception applies is not enough." (*Ibid*.)

Prosecutors "ha[ve] a wide-ranging right to discuss the case in closing argument." (*People v. Lewis* (1990) 50 Cal.3d 262, 283.) Thus, a prosecutor has wide latitude to discuss and draw inferences from the evidence presented at trial, and the question of whether the inferences the prosecutor draws are reasonable is for the jury to decide. (*Shazier*, *supra*, 60 Cal.4th at p. 127.)

Accordingly, "prosecutorial commentary should not be given undue weight." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1224, fn. 21, superseded by statute on other grounds as explained in *In re Steele* (2004) 32 Cal.4th 682, 691.) "Juries are warned in advance that counsel's remarks are mere argument, missteps can be challenged when they occur, and juries generally understand that counsel's assertions are the 'statements of advocates.' Thus, argument should 'not be judged as having the same force as an instruction from the court. And the arguments of counsel, like the instructions of the court, must be judged in the context in which they are made.'" (*Gonzalez*, at p. 1224, fn. 21, quoting *Boyde v. California* (1990) 494 U.S. 370.)

To prevail on a claim of prosecutorial misconduct based on the prosecutor's remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. (*Shazier*, *supra*, 60 Cal.4th at p. 127.)

2. *Analysis*

a. *Claim that the prosecutor committed misconduct by misstating the law on the relevance of voluntary intoxication*

Siegel first claims the prosecutor committed misconduct during her closing arguments by misstating the law on the relevance of voluntary intoxication. We reject this claim.

i. *Background*

During her rebuttal closing argument, in which she paraphrased the court's instruction on the defense of unconsciousness (CALCRIM No. 3425)[3] and argued that the evidence showed Siegel was not unconscious, the prosecutor stated:

> "In order to go with *this unconsciousness defense*, it *may not be based on voluntary intoxication*. You can't be unconscious—I mean we already know he's not unconscious . . . . Voluntary intoxication, the definition here is a person who's voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect or willingly assuming the risk of that effect. [¶] If there's proof beyond a reasonable doubt that the defendant acted as if he were conscious, you should . . . conclude that he was conscious." (Italics added.)

The prosecutor then stated: "Let's talk about *voluntary intoxication* just briefly because *if he's voluntarily taking those med*[*ications*] *and taking the alcohol, you can't*

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3 The court's instruction of the defense of unconsciousness stated in part: "Unconsciousness may be caused by the withdrawal effects of taking psychotropic and pain medications. [¶] *The defense of unconsciousness may not be based on voluntary intoxication*. [¶] A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect." (First italics added.)

use unconsciousness. Says it right in the instruction. You['ve] got to throw it out." (Italics added.)

Defense counsel objected, stating, "Your Honor, I believe that's a misstatement of the law." The court told the jury, "Just follow my instructions. You'll have four copies of the instructions to work with."

The prosecutor continued, stating:

> "When someone becomes voluntarily intoxicated, they willingly use the drug or drink knowing that it produces the intoxicating effect and assume the risk. Well, according to his fiancée [Almaraz], if you want to believe her, . . . she's been pumping these drugs into him for a couple of years now and she watches him drink all the time so he knows and he takes these drugs because he's in pain. He needs the drugs to stop the pain, so he's aware of the effects, and the logical flow from that one is that he would be aware of what happens when he's not taking those, that he starts to feel bad, that he wants to take these medications again, so again *because he's taking these medications and alcohol*[] *voluntarily*[,] *he can't be unconscious. He can't use that.*" (Italics added.)

Defense counsel again objected and asked the court again instruct the jury to follow the instructions: "Your Honor, again I would ask [you to] instruct the jury to follow your law. It's a misstatement of the law." The court again told the jury, "Just follow my instructions."

ii. *Analysis*

As noted, Siegel contends the prosecutor committed misconduct by "misstat[ing] the law on the relevance of voluntary intoxication" because "voluntary intoxication may be admissible to negate specific intent," and, "contrary to the prosecutor's argument, the jury may consider evidence of voluntary intoxication as a partial defense to a specific

intent crime." This contention is unavailing. Siegel relied on the defense of unconsciousness, not on the defense of voluntary intoxication. As shown by the foregoing excerpts, the prosecutor, in arguing that the jury should reject Siegel's defense of unconsciousness, correctly argued that Siegel's unconsciousness defense could not be based on evidence that he was voluntarily intoxicated. The court's instruction under CALCRIM No. 3425 on the defense of unconsciousness (see fn. 3, *ante*) informed the jury that "[t]he defense of unconsciousness may not be based on voluntary intoxication."

In any event, Siegel has failed to show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. (See *Shazier*, *supra*, 60 Cal.4th at p. 127.) The record shows that when Siegel's counsel objected to the prosecutor's comments, the court properly told the jury to "follow my instructions," thereby referring the jurors back to the instructions it had given under CALCRIM No. 3425 and indicating that if anything the prosecutor said conflicted with the court's instructions, the latter would control. The court also told the jurors that written copies of the instructions would be given to them to use during deliberations. The record is silent regarding any inquiry or confusion on the jury's part. Thus, we conclude Siegel has failed to show it is reasonably probable the jury was misled by any misstatements made by the prosecutor. (See *Shazier*, *supra*, 60 Cal.4th at p. 127; *People v. Medina* (1995) 11 Cal.4th 694, 760.)

b. *Claim that the prosecutor committed misconduct by mischaracterizing the testimony of Siegel's fiancée*

Siegel next claims the prosecutor committed misconduct during her closing arguments by mischaracterizing the testimony of Almaraz, a defense witness, as admitted lies and perjury. We reject this claim.

i. *Applicable legal principles*

To preserve a claim of prosecutorial misconduct for appeal, a defendant must object in a timely fashion on that ground and request a curative jury admonition unless an admonition would not have cured the harm caused by the misconduct. (*People v. Hinton* (2006) 37 Cal.4th 839, 863 (*Hinton*). A prosecutor may call witnesses liars, and accuse them of lying on the stand, if such characterizations and accusations are based upon the evidence rather than special information not provided to the jury or the prosecutor's own purported personal knowledge. (See *id.* at p. 871.) Such characterizations and accusations are "fair comment on the evidence." (*Ibid*.)

ii. *Background*

During her initial closing argument, the prosecutor made numerous statements, without a defense objection, that characterized Almaraz as an admitted liar. Specifically, the prosecutor told the jury that (1) Almaraz "admitted lying"; (2) "[s]ometimes [Almaraz] said, 'I'm lying'"; (3) "she was caught in multiple lies [about] where she worked, when she worked there, what time things happened"; (4) "[y]eah, she admitted to lying"; (5) "[w]hen she testified on cross-examination, she said she misunderstood the

question, or we misunderstood the answer, or she lied previously"; and (6) "she admit[ted] to being untruthful."

The prosecutor then told the jury, "So what you can do with [Almaraz] is say ['Y]ou know what, you got caught in lies at least half a dozen times so I'm not going to believe anything you say,['] or ['Y]ou got caught in li[es] at least half a dozen times admitting to *perjuring* yourself in court but—" (Italics added.)

At this point defense counsel, for the first time, raised an unspecified objection. The court asked him, "On what grounds?" Siegel's counsel replied, "Your Honor, it's facts not proved in evidence, and there was no admission to a perjury or lying." Defense counsel did not request a curative jury admonition. The court then told the jury, "Rely on your recollection of the evidence."

Later, during the prosecutor's rebuttal closing argument and without a defense objection, the prosecutor again characterized Almaraz as an admitted liar. For example, the prosecutor told the jury, "[Almaraz] is a liar. She admitted lying multiple times. Again don't take my word for it. Have the reporter read it back to you. [Almaraz] lied about timing, the time she gave the medication [to Siegel], the Xanax, when [Siegel] left or came home, and she was very . . . specific on her times. Very specific. [¶] She had [9:30], [11:30], [4:30] or [5:00] o'clock until she was challenged." The prosecutor also said, "I asked her on at least three occasions are you lying today to this jury, or did you lie two weeks ago to the Judge when you testified? At one point she said 'I lied.' The other times it was oh, it was a misunderstanding."

The prosecutor then pointed out numerous inconsistencies in Almaraz's testimony and told the jury, "You shouldn't believe her. She lied to you about multiple things. She admitted that she was lying about some things. She was caught in lies on other things."

iii. *Analysis*

We reject Siegel's claim of prosecutorial misconduct because he forfeited this claim, and because the prosecutor's challenged remarks were fair comments on the evidence. As the foregoing record of the prosecutor's closing and rebuttal remarks demonstrates, defense counsel objected only once to the prosecutor's numerous characterizations of Almaraz as an admitted liar. Defense counsel made that objection when the prosecutor rhetorically argued that the jury should tell Almaraz that she "got caught in li[es] at least half a dozen times admitting to perjuring [herself] in court." Defense counsel did not ask the court for a curative jury admonition. The prosecutor made most of her challenged comments before defense counsel made that sole objection, and defense counsel did not object to the prosecutor's subsequent challenged comments. By failing to object to all but one of the numerous challenged remarks made by the prosecutor during her closing arguments, and by failing to request a curative admonition, Siegel forfeited his claim of prosecutorial misconduct. (*Hinton, supra,* 37 Cal.4th at p. 863.)

Even if forfeiture does not apply, Siegel's claim of prosecutorial misconduct fails because the prosecutor's challenged remarks were "fair comment[s] on the evidence" (*Hinton, supra,* 37 Cal.4th at p. 871). For example, during the prosecutor's cross-examination of Almaraz, Almaraz provided three different accounts regarding her

attempt to contact Siegel after he left their house sometime between 3:00 and 5:00 p.m. In her testimony, she claimed that she tried to call his phone, that it rang, and that he did not answer. However, in a previous interview she said that Siegel's phone was turned off and earlier in the trial she said she spoke to him for a minute or two. When the prosecutor confronted Almaraz with the inconsistency and asked which account was true, Almaraz repeatedly tried to reconcile the statements by stating she was unable to get ahold of Siegel. Eventually, Almaraz admitted that her prior testimony about briefly speaking to Siegel that evening was not true. Siegel asserts "the prosecutor told the jury . . . that [Officer Larson] should not be credited because Almaraz had [testified] that she had found [Siegel's] wallet in their car." However, Siegel asserts, Almaraz "provided no such testimony at trial." Thus, he maintains, "[b]y explicitly referencing evidence outside the record to discredit the testimony of a prosecution witness [(Officer Larson)] who provided information helpful to the defense, the prosecutor committed misconduct." We reject this claim of prosecutorial misconduct.

i. *Background*

The prosecution played for the jury a recording of Siegel's telephone call from jail to Almaraz. During their conversation, Siegel told Almaraz that he was "in a lot of trouble" and that he left his keys, his phone, and "everything" in the car he left at Hooters.

Officer Larson, the arresting officer who testified as a prosecution witness, stated that he searched Siegel. The prosecutor asked Officer Larson, "And did you find his wallet?" Officer Larson replied, "I can't remember if it was the wallet where I found [his identification] or if I just found the [identification] loose, I can't remember, I'm sorry."

The prosecutor then asked, "Did you find any keys on him?" Officer Larson answered, "I cannot remember." Officer Larson indicated that, if he had found those items on Siegel, he would have put them into a "property bag," which is a bag in which the personal property of an arrestee is put and then forward to the jail. The prosecutor then asked, "And you didn't do a property bag with [Siegel] to go to jail, did you?" Officer Larson answered, "Not that I remember. If there was, we also keep a record on the booking sheet which keeps a record along with signatures and checkmarks of everything that's going in the property bag along with them."

Defense counsel asked Almaraz whether she remembered Siegel's key's being inside the car when she retrieved it. Almaraz replied, "No."

During closing arguments, the prosecutor told the jury during her rebuttal remarks, "[T]here was no testimony that [Siegel's] wallet was with him. Officer Larson was confused about that, but [Almaraz] told you the wallet, the keys, and the cellphone were in the car. That's what she told you. [Siegel] left those things in the car. He needs empty pockets. He needs to be able to do his business." Defense counsel did not object to the prosecutor's misstatement.

ii. *Analysis*

By failing to object at trial to the prosecutor's rebuttal remarks and failing to ask the court for a curative jury admonition, Siegel forfeited his claim of prosecutorial misconduct on appeal. (See *Brown*, *supra*, 31 Cal.4th at p. 553; *Nguyen*, *supra*, 40 Cal.App.4th at p. 36.)

Even if we were to conclude forfeiture does not apply, Siegel's claim of prosecutorial misconduct fails on the merits. The prosecutor did misstate the evidence when she told the jury, "[Almaraz] told you the wallet, the keys, and the cellphone were in the car." Almaraz testified that she did not remember seeing Siegel's car key inside the car when she retrieved it.

However, to prevail on his claim of prosecutorial misconduct based on the prosecutor's misstatement of the evidence, Siegel must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. (*Shazier*, *supra*, 60 Cal.4th at p. 127.) Siegel has not met, and cannot meet, this burden because the prosecutor presented incontrovertible evidence, apart from Almaraz's testimony, that Siegel left his keys, phone, and other personal effects inside the car he left at Hooters.

Siegel also takes issue with the prosecutor's statement to the jury that Officer Larson was "confused" about whether Siegel had his wallet on him when Officer Larson searched him. Siegel asserts that the prosecutor, by making that remark, committed misconduct "[b]y explicitly referencing evidence outside the record to discredit the testimony of [Officer Larson,] who provided information helpful to the defense." Nothing in the record shows that the prosecutor referenced any evidence outside the record. When she stated that Officer Larson was "confused" about whether Siegel had his wallet on him when Officer Larson searched him, the prosecutor herself appeared to be confused by suggesting Officer Larson had testified that he found a wallet. Officer Larson did not testify that he found a wallet on Siegel.

d. *Claim that the prosecutor committed misconduct by improperly referring to Siegel's courtroom demeanor*

Last, Siegel claims the prosecutor committed misconduct by improperly referring to Siegel's courtroom demeanor. We reject this claim.

During her closing argument, the prosecutor referred to Siegel's courtroom demeanor and appearance without a defense objection. Specifically, she stated:

> "I just want to take a minute and just point this out to you guys. The guy that you see sitting here in court today and for the past week or so, he's polished. He's wearing a suit. He's sitting quietly. A couple times he got emotional. Don't be fooled by that. Don't think that this person that's sitting over here, this polished, quiet person was polished and quiet that night. Don't think that he was emotional that night. In fact, if anything, he was unemotional. The real person, the person that he is is the guy in the video. He's tactful. He's deceitful. He's demanding. He's threatening. And he's assaultive. That's your robber. That's him and he's still sitting here. He's just wearing a different outfit today. [¶] That's your robber. The defendant is guilty of attempted robbery."

By failing to object at trial to the prosecutor's remarks and failing to ask the court for a curative jury admonition, Siegel forfeited his claim of prosecutorial misconduct on appeal. (See *Brown*, *supra*, 31 Cal.4th at p. 553; *Nguyen*, *supra*, 40 Cal.App.4th at p. 36.)

Even if we were to conclude forfeiture does not apply, Siegel's claim of prosecutorial misconduct fails on the merits. A prosecutor does not commit misconduct by pointing out to the jury the contrast between a defendant's modest courtroom behavior and his conduct under other circumstances. (*People v. Thornton* (1974) 11 Cal.3d 738, 763.) ["prosecutor certainly had a right to point out to the jury that [defendant's] modest behavior . . . in the courtroom[] is not inconsistent with depraved conduct under other

circumstances"], disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12.) Here, by noting that Siegel's courtroom demeanor was different than his behavior in the video-recording of the incident that was shown to the jury, the prosecutor fairly commented on the evidence and did not engage in misconduct. (See *Thornton*, at p. 763.) Accordingly, we reject Siegel's claim of prosecutorial misconduct.

B. *Claim of ineffective assistance of counsel*

We also reject Siegel's alternative claim that reversal of the judgment is required because his trial counsel's "failure to lodge objections to misconduct during the prosecutor's closing argument amounted to ineffective assistance of counsel." For reasons explained, *ante*, we have rejected Siegel's claims of prosecutorial misconduct.

VII. *INEFFECTIVE ASSISTANCE OF COUNSEL*

Next, Siegel contends the judgment should be reversed because his trial counsel provided ineffective assistance of counsel by failing to move for admission of "critical exculpatory" nonhearsay evidence that Siegel made unsolicited statements to the arresting officer (Officer Larson) to the effect that "Steven" told him to rob the restaurant and wield the knife. We reject this contention.

A. *Background*

Prior to trial, in his motions in limine and trial brief, Siegel asserted, "As the police were handcuffing [him], [he] stated that 'Stevie' told him to get the money. [Siegel], according to the police report, gave an unsolicited statement to [Officer Larson:] 'Steven' was going to fuck him up if he did not do what was told of him [*sic*]. Inside the restaurant, Steven told him to hang onto the knife while he (Steven) gets the money."

In one of its motions in limine, the People sought an order "prohibiting [Siegel] from introducing these statements through any of the witnesses" because the statements "would be considered hearsay if offered by [Siegel] without taking the stand to testify on his own behalf."

At the hearing on the parties' in limine motions, defense counsel indicated he did not object to the prosecution's motion to exclude Siegel's statements to Officer Larson, and the court granted that motion.

After the jury rendered their verdicts, Siegel, represented by new counsel, brought a motion for new trial in which he claimed (among other things) that his former counsel violated his constitutional right to effective assistance of counsel by not opposing the People's motion to exclude his "unsolicited statement" to Officer Larson. Siegel asserted that this evidence was relevant because it would have "corroborated [his] impairment defense."

At the sentencing hearing, the court heard and denied Siegel's new trial motion. As pertinent here, the court stated that Siegel's former counsel "really had no choice on this because such evidence of [Siegel's] statement to Officer Larson was clearly inadmissible hearsay."

B. *Applicable Legal Principles*

1. *Ineffective assistance of counsel*

To establish a denial of the constitutional right to effective assistance of counsel, a defendant must show (1) his or her counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient

performance prejudiced the defendant. (*Strickland*, *supra*, 466 U.S. at pp. 687, 691-692; *Frye*, *supra*, 18 Cal.4th at p. 979.) *Strickland* explained that"[j]udicial scrutiny of counsel's performance must be highly deferential" (*Strickland*, at p. 689), and "reviewing courts must indulge a strong presumption that [defense] counsel's conduct fell within the wide range of reasonable professional assistance." (*Ibid*.)

The California Supreme Court has explained that "'[w]hen a defendant makes an ineffectiveness claim on appeal, the appellate court must look to see if the record contains any explanation for the challenged aspects of representation.'" (*People v. Kelly* (1992) 1 Cal.4th 495, 520.) "A reviewing court will not second-guess trial counsel's reasonable tactical decisions." (*Ibid*.)

2. *Hearsay rule and the "state of mind" exception to that rule*

Hearsay evidence is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Under the hearsay rule, hearsay evidence is inadmissible "[e]xcept as provided by law." (*Id*., subd. (b).)

The "state of mind" exception to the hearsay rule is codified in Evidence Code section 1250, which provides in part: "Subject to [Evidence Code] Section 1252, evidence of a statement of the declarant's then existing state of mind . . . is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind . . . at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant." (Evid. Code, § 1250, subd. (a).) "[*E*]*vidence admitted under section 1250 is*

hearsay; it describes a mental or physical condition, intent, plan, or motive and is received for the truth of the matter stated." (*People v. Ortiz* (1995) 38 Cal.App.4th 377, 389 (*Ortiz*), italics added.)

As noted, the state of mind exception to the hearsay rule is subject to Evidence Code section 1252. Under that section, evidence of a statement of the declarant's then-existing state of mind is "inadmissible . . . if the statement was made under circumstances such as to indicate its lack of trustworthiness." (Evid. Code, § 1252.) "To be admissible under Evidence Code section 1252, statements must be made in a natural manner, and *not under circumstances of suspicion*, so that they carry the probability of trustworthiness. Such declarations are admissible *only when they are* '"*made at a time when there was no motive to deceive*."'" (*People v. Edwards* (1991) 54 Cal.3d 787, 820 (*Edwards*), italics added.)

C. *Analysis*

Applying a highly deferential standard of scrutiny and indulging a strong presumption that the conduct of Siegel's trial counsel fell within the wide range of reasonable professional assistance, as we must (*Strickland, supra,* 466 U.S. at p. 689), we reject Siegel's claim that his trial counsel violated his constitutional right to effective assistance of counsel by failing to move for admission of his unsolicited statements to Officer Larson at the time of his arrest.

Siegel's claim is premised on his unavailing contention that the evidence of his statements to Officer Larson at the time of arrest was "admissible as relevant, non-hearsay evidence of his state of mind." Contrary to Siegel's contention, the evidence of

those statements was hearsay. (See *Ortiz, supra*, 38 Cal.App.4th at p. 389 ["[state of mind] evidence admitted under section 1250 is hearsay"].) Under the hearsay rule, such evidence is inadmissible "[e]xcept as provided by law." (Evid. Code, § 1200, subd. (b).) The state of mind exception to the hearsay rule codified in Evidence Code section 1250 is subject to Evidence Code section 1252. (Evid. Code, § 1250, subd. (a).) To be admissible under Evidence Code section 1252, the statements cannot have been made under "circumstances of suspicion"; evidence of the statements is admissible only when they were """made at a time when there was no motive to deceive."""" (*Edwards, supra*, 54 Cal.3d at p. 820.)

Here, Siegel has not met, and cannot satisfy, his initial burden of showing that his counsel's performance was below an objective standard of reasonableness under prevailing professional norms. (See *Strickland, supra*, 466 U.S. at pp. 687, 691-692; *Frye, supra*, 18 Cal.4th at p. 979.) Had Siegel's counsel moved for admission under Evidence Code section 1250 of evidence of the self-serving statements Siegel made at the time of his arrest, the motion would have been denied under Evidence Code section 1252 because Siegel made those statements under suspicious circumstances when he clearly had a motive to deceive. (See *Edwards, supra*, 54 Cal.3d 787, at p. 820; Evid. Code, § 1252 [evidence of a statement of the declarant's then-existing state of mind is "inadmissible . . . if the statement was made under circumstances such as to indicate its lack of trustworthiness].) In denying Siegel's new trial motion and rejecting his claim of ineffective assistance of counsel, the court correctly ruled the evidence of Siegel's statements was inadmissible hearsay. Defense counsel's tactical decision not to seek

admission of Siegel's self-serving and inherently suspicious and untrustworthy statements did not fall below an objective standard of reasonableness, and thus Siegel's claim of ineffective assistance fails.

XIII. *CLAIM OF CUMULATIVE ERROR*

Last, Siegel contends his convictions must be reversed because "the combined effect of the multiple errors deprived [him] of a fair trial." We reject this contention.

"'[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.'" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) A defendant is "entitled to a fair trial but not a perfect one." (*Ibid*.)

Here, we have concluded there was no trial court error, prosecutorial misconduct, or ineffective assistance of counsel. Thus, there were no errors that could rise by accretion to the level of reversible prejudicial error. Siegel received a fair trial. Accordingly, we affirm the judgment, which is supported by sufficient evidence.

DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.