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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>VINCENT ANDREW GORSKI,<br><br>Defendant and Appellant. | F073263<br><br>(Super. Ct. No. BF160377A)<br><br>**OPINION** |

APPEAL from a judgment of the Superior Court of Kern County. John W. Lua, Judge.

Phillip W. Gillet, Jr., for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Peter H. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Vincent Andrew Gorski appeals his conviction of one count of exhibiting a firearm (Pen. Code, § 417, subd. (a)(2); count 2). Appellant contests the admission of certain evidence at his trial and challenges statements made by the prosecutor as evidence of prosecutorial misconduct. Finally, appellant challenges the decision not to give certain jury instructions.

For the reasons set forth below, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

Appellant is a lawyer practicing in Bakersfield. On May 20, 2015, appellant and his, now, former girlfriend arrived at appellant's office around 10:40 p.m. following a night out. Appellant and his former girlfriend had both been drinking lightly and they were returning to the office because they had shared a car while out that evening.

When they pulled up to the office, appellant noticed what appeared to be a transient near the lighted sign for the office, close to the sidewalk. He was wearing baggy clothing and had something similar to a holster attached to his body. Appellant thought the individual was vandalizing the sign and confronted him. According to appellant, the individual was immediately confrontational and the situation quickly became tense. At one point, appellant headed toward his office building, calling for his former girlfriend to follow him. She did not.

Appellant entered his office and attempted to call for help by hitting the panic button on his alarm system. He also retrieved a gun. Not hearing the alarm system responding to his prior actions, he again checked the system and, at this time, heard his former girlfriend calling for help. Appellant exited the office, pointed the gun at the transient, and told him to leave. When the individual did not leave, and according to appellant continued his aggressive behavior, appellant fired a warning shot into the air.

The victim of appellant's actions then departed the premises, although not immediately, and proceeded to flag down a passing officer and report the incident. When the police arrived, appellant, who was near a back fence, placed the gun on the ground and went to speak with them. Based on the police investigation and actions discussed further below, appellant was ultimately charged with reckless discharge of a firearm, exhibiting a firearm, and resisting arrest. As part of the investigation, police seized appellant's security system, which was connected to surveillance cameras. The victim of

appellant's actions did not testify at trial, placing additional importance on the video evidence.

***The Evidence Code Section 402 Hearing***

Based on appellant's request, the court held a foundational hearing on whether to admit the videotaped surveillance footage from appellant's office. The court heard testimony from three law enforcement members, Bakersfield Police Officer Ronnie Jeffries, Bakersfield Police Detective Nathan McCauley, and Bakersfield Police Department crime lab supervisor Jeffrey Cecil.

Officer Jeffries responded to appellant's office following contact with the victim. He spoke with appellant at the time. Reviewing still images of the surveillance tape, Jeffries stated the images depicted the front lawn area of the office, the victim that he spoke with, appellant, the officer himself, and his conduct in searching for shell casings when he arrived on scene. He further confirmed the time stamp on the video showing him looking for shell casings was consistent with his recollection of the time he conducted that activity. On cross-examination, Jeffries admitted the video was not clear enough to identify facial features, but that the clothing and scenes were recognizable.

Detective McCauley searched appellant's office. He located the surveillance system. He noted that various video wires were connected to the system and, upon crawling into the attic, viewed the direction those wires were running and confirmed that there was a camera outside pointed toward the front of the office. He photographed what he found and seized the system. On cross-examination, McCauley admitted he did not know anything relevant about the security system itself and, while he knew he had seen the video recovered, could not recall if he viewed the video off the system itself or off of a copy.

Cecil was the crime lab supervisor who retrieved a portion of the recordings contained on the security system. He testified to his extensive experience and prior training in downloading such videos. At the direction of McCauley, Cecil was asked to

obtain any video on the surveillance system for the time frame of 22:30 to 23:00 hours. Cecil downloaded this portion of the video and then viewed it. He indicated nothing unusual occurred during the process and there was no indication of any errors. He testified the video in dispute at the hearing was the same video he downloaded and reviewed. He further testified he did not manipulate the time stamp or contents of the video in any way. On cross-examination, Cecil testified he utilized the software on the surveillance system and a thumb drive to download the video, but he could not identify the programs utilized to complete those tasks. He admitted he could not say exactly what video was on the surveillance system because he did not view it directly, but confirmed he utilized the same process as he normally does and received results that were consistent with his 15 years of practice. On further cross-examination, Cecil revealed that the surveillance system was no longer functional. At some point while in police custody, the information on the system's hard drive appeared to have been lost. Cecil admitted he could not rule out the possibility that there was a malfunction in the surveillance system at the time it was seized.

Following this testimony and additional argument, the court determined the video was sufficiently authentic to be introduced into evidence. The court credited Jeffries's testimony that he could identify both himself and the alleged victim in portions of the video. More importantly, however, the court noted it had viewed the entire video when it was played and "never saw any breaks in action nor jumps in time that would suggest or intimate to the Court that the video itself, at least the portion that was shown from beginning to end, had any breaks in it that would otherwise disrupt the even flow of the video as it's played." Accordingly, the court determined the video was not manipulated in any way and appears "continuous in nature both based on the time that was shown on the screen in addition to the actual content of the video." The court thus found "that at least that portion that was extracted from the video accurately purports what it appears to depict."

***Additional Facts from the Trial and Sentencing***

The trial on appellant's charges contained many of the same witnesses as utilized at the Evidence Code section 402 hearing. Jeffries testified to his contact with the alleged victim and his subsequent response and investigation into the victim's claims. As part of this testimony, Jeffries was asked what the victim told him when initially contacted. Appellant's counsel objected to this question. The court overruled the objection, instructing the jury that the response would normally be excluded as hearsay but that the jury could consider the answer "for the nonhearsay purpose of explaining this witness's subsequent conduct." Jeffries testified the victim said that someone had fired shots at him.

Jeffries also discussed his interactions with appellant. As part of this testimony, Jeffries stated he first made contact with appellant while appellant was sitting on the curb. Jeffries recounted an incident that occurred where appellant stood up from the curb and walked away from Jeffries. Jeffries explained this conduct was improper because appellant had been detained, was told not to move, and further ignored orders to sit back down. Jeffries explained this conduct required him to physically restrain appellant, in part, because he was investigating an allegation of shots fired and allowing appellant to move freely would be a safety issue since a gun had not yet been found.

Appellant chose to testify in his own defense. He admitted to obtaining a weapon from his office and firing a warning shot to cause the victim to flee, but claimed he did so because the victim, who was threatening both appellant and his former girlfriend and refusing to leave appellant's office property, appeared to have a holster and had been rummaging through his jacket. Appellant also admitted to lying to the police both after they initially arrived, confirming he lied to them about whether he had a gun and whether he fired a shot, and during a later formal interview.

Following the trial, appellant was acquitted of resisting arrest and reckless discharge of a firearm, but was convicted of exhibiting a firearm and, ultimately, placed on probation. This appeal timely followed.

## DISCUSSION

Appellant challenges several aspects of the case against him. First, appellant contends the trial court improperly admitted the video surveillance evidence from his office security system. Appellant also challenges the admission of statements he contends are impermissible hearsay. Appellant next challenges the prosecutor's tactics at trial, alleging the prosecutor committed misconduct by asking improper questions, arguing facts not in evidence, and commenting on appellant's invocation of his right to remain silent. Finally, appellant contends the trial court erred by failing to give certain jury instructions appellant had requested. We consider each set of issues in turn.

### I. Admission of the Video Evidence

Appellant argues the trial court wrongly admitted a video captured by the surveillance system at his office. His argument raises several concerns related to whether the video was shown to be a fair and accurate depiction of what was on the security system.

#### *Standard of Review and Applicable Law*

Authentication is a foundational requirement for the admission of evidence. With respect to images and photographs, which are treated as writings, it " 'is necessary to know when [the video] was taken and that it is accurate and truly represents what it purports to show.' " (*People v. Chism* (2014) 58 Cal.4th 1266, 1303 (*Chism*).) " 'This is usually shown by the testimony of the one who took the picture. However, this is not necessary and it is well settled that the showing may be made by the testimony of anyone who knows that the picture correctly depicts what it purports to represent.' " (*Ibid.*)

Under Evidence Code section 1553, subdivision (a), we presume that "[a] printed representation of images stored on a video or digital medium is ... an accurate

representation of the images it purports to represent." This "presumption affects the burden of proof and is rebutted by a showing that the 'printed representation of images stored on [the] video or digital medium is inaccurate or unreliable.' " (*Chism, supra,* 58 Cal.4th at p. 1303.) If such a showing is made, the "burden then shifts to the proponent of the printed representation to prove by a preponderance of the evidence that it accurately represents the existence and content of the images on the video or digital medium. [Citation.] If the proponent of the evidence fails to carry his burden of showing the printed representation accurately depicts what it purportedly shows, the evidence is inadmissible for lack of adequate foundation." (*Ibid.*)

We review foundational rulings on the admission of evidence for an abuse of discretion. (*Chism, supra,* 58 Cal.4th at p. 1304.)

***Discussion***

The crux of appellant's authentication arguments is the contention that the security system was not functioning properly and, thus, required specific authentication of the contents of the system itself to be admissible. To support the conclusion the system was not functioning properly, appellant focuses on the fact that the system malfunctioned prior to trial. Based on this showing, appellant contends the prosecution was required to put on evidence demonstrating the video extracted from the security system was a true and accurate copy of what was on the security system at the time of extraction, a point which cannot be proven because no one viewed the video directly from the security system feed. Relatedly, appellant contends the video proffered was not admissible because it was edited—the portion offered into evidence was only a portion of the entire recording contained on the security system. Finally, appellant seeks to distinguish this case form *Chism*. Recognizing that *Chism* supports finding authentication when one shown on the video testifies the video is a fair and accurate representation of their actions, appellant contends that this conclusion cannot carry forward to this case because

the security system in this case was not functioning properly and nobody viewed the original recording.

Appellant's arguments fail at the first hurdle. The trial court heard the testimony from Cecil concerning his training and practice in obtaining videos from surveillance systems, including his statement that nothing unusual occurred during the extraction process and there was no indication of any errors when he obtained the video at issue in this case. It further viewed the entire proffered video and determined that there were no jumps or changes in the video's presentation that would suggest editing or other similar concerns. Finally, the court listened to Jeffries's testimony that the portion of the video depicting him searching for spent shell casings correctly depicted his actions that evening. In light of this testimony, we find no abuse of discretion in the trial court's determination that the video was properly authenticated.

Appellant's position that the statutory presumption that video recordings are accurate representations has been rebutted by the later failure of the security system misses the mark. The later failure of the system does not directly demonstrate an error in the system at the time of recording or extraction, rather it demonstrates an error with retention. The testimony heard by the trial court demonstrates that at the time of extraction, no errors were noticed and that the video extracted is both the video Cecil expected to obtain and an accurate representation of the events involving Jeffries. In light of this strong evidence of authentication, the implication that the security system had difficulty retaining data is irrelevant to whether the evidence that was removed from the system before that error arose was an accurate representation of either what was on the system at the time or what occurred at the scene.

Similarly, appellant's argument the video was edited because it only includes approximately 30 minutes of what was presumed to be a much longer video recording is unpersuasive. The proffered video was evidence of what occurred during the time frame extracted from the security system; it is thus that portion of the video which must be

authenticated. (See *People v. Gonzalez* (2006) 38 Cal.4th 932, 952-953 [noting video must be accurate representation of what it purports to show and rejecting evidence that was not an accurate representation of lighting at the time]; *People v. Mayfield* (1997) 14 Cal.4th 668, 747, overruled on other grounds in *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2 [evidence admitted to show heights of fences and sight lines even though made 18 months later due to limited purpose].) While the failure to provide the entire video provides weight to defense arguments concerning actions not shown in the extracted time frame, it does not undercut the ability to authenticate the portion of the video extracted from the surveillance system.

## II. Alleged Introduction of Hearsay Evidence

Appellant next argues his Sixth Amendment right to confront the witnesses against him was violated because the prosecutor was permitted to introduce hearsay evidence over appellant's objections. Specifically, appellant argues that Jeffries was impermissibly permitted to relate to the jury statements made by the alleged victim in this case. The trial court overruled appellant's objections, although it instructed the jury the evidence was not admissible to prove the shooting, but rather could only be considered as evidence explaining Jeffries's subsequent conduct.

" '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).) We review decisions overruling a hearsay objection for abuse of discretion. (*People v. Fields* (1998) 61 Cal.App.4th 1063, 1067.)

The People argue the victim's statements recounted by Jeffries were not offered to prove that appellant had actually fired a gun at the victim. Rather, the People contend the evidence was relevant to understanding key aspects of a separate charge, the assertion that appellant resisted arrest. We agree.

In this case, Jeffries testified that he consistently told appellant to remain seated while he conducted his investigation and that appellant resisted his lawful commands by

standing up and walking away, resulting in the need to physically restrain appellant. Appellant, to the contrary, testified he had not been told he could not stand up and believed he was being permitted to use the bathroom. Whether appellant was resisting arrest by standing up was a key issue in the resisting arrest charge. Jeffries explained the need to tell appellant to remain seated based on the information that had been provided to him regarding the crime being investigated. Thus, Jeffries's testimony that the victim had said he had been shot at was not offered to prove the shooting occurred, a point upon which the surveillance video was the sole evidence offered by the prosecution until appellant admitted to the shooting in his testimony in defense, but rather was offered to explain why Jeffries would have not allowed appellant to stand or move while the investigation was ongoing. The statement was, accordingly, not hearsay and the trial court did not abuse its discretion in admitting it.

## III. Prosecutorial Misconduct Claims

Appellant raises three issues under the rubric of prosecutorial misconduct. First, appellant claims the prosecutor impermissibly shifted the burden of proof to appellant by arguing appellant should have produced his former girlfriend as a witness. Second, appellant contends the prosecutor improperly argued facts that were not in evidence when he suggested appellant could have produced his former girlfriend as a witness and asked appellant a question about an alleged investigation into his conduct. Third, appellant posits the prosecutor committed misconduct and violated his right to remain silent by improperly arguing appellant had not made certain statements to the police when initially interviewed.

### *Standard of Review and Applicable Law*

" 'Under California law, a prosecutor commits reversible misconduct if he or she makes use of "deceptive or reprehensible methods" when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the

federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights—such as a comment upon the defendant's invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " ' [Citations.] In addition, ' "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.] Objection may be excused if it would have been futile or an admonition would not have cured the harm." (*People v. Dykes* (2009) 46 Cal.4th 731, 760.)

Prosecutors have wide latitude in their closing arguments, provided the argument "amounts to fair comment on the evidence." (*People v. Gamache* (2010) 48 Cal.4th 347, 371.) And prosecutorial misconduct will not be found unless there is a " 'reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.' " (*People v. Dykes*, *supra*, 46 Cal.4th at p. 772.)

Where properly preserved, allegations of prosecutorial misconduct are reviewed, on the merits, de novo. (See *People v. Fuiava* (2012) 53 Cal.4th 622, 681.)

***Discussion***

Appellant's first argument, and a portion of his second, relate to comments the prosecutor made during closing argument about the fact appellant's former girlfriend did not testify at trial. With respect to this fact, the prosecutor, in a soliloquy rebutting appellant's argument that the victim should have been called to testify, stated:

"And Mr. Humphrey brought up the fact that, you know, the fact [the victim] could have cleared up what happened behind the sign.

"What I want to ask you, ladies and gentlemen, is there's a third person who could have cleared up what happened behind that sign. Now, make no mistake the defense has

no obligation to put on any evidence, but if it occurred like Mr. Gorski said, where is [appellant's former girlfriend]? … [¶] … [¶]

"[Appellant's former girlfriend], was actually out there the entire time. And the defendant told you that the victim threatened to rape her, threatened to kill her, had a gun out there. You don't think that if that actually happened, [appellant's former girlfriend] would be on that stand saying that the defendant protected her because this person was threatening to rape her, that this person was threatening to kill her? And that is the defendant's girlfriend. You saw him march in some witnesses in here. He has subpoena power as well. If he wanted her in here, he could have had her in here. [¶] … [¶]

"So, ladies and gentlemen, that's something you can consider, the fact that the defense failed to call a logical witness, a witness who could absolutely corroborate the defendant's story if it happened the way he said. But [appellant's former girlfriend] wasn't willing to do what the defendant did. She wasn't willing to come in here and lie to you the way he did." (Objections and rulings omitted.)

Appellant contends the prosecutor's arguments crossed the line by "testifying" as to why the witness did not testify and what she would have testified to if she had been called. Appellant also claims the argument constitutes improper vouching and arguing facts not in evidence concerning appellant's ability to obtain his former girlfriend's testimony. We do not agree.

Although some of the prosecutor's statements came close to implying how the witness would testify or why she chose not to testify, the overall argument is directed to highlighting the fact that a logical witness, one who could have corroborated appellant's version of the facts, had not been called. Such commentaries on the evidence are generally permitted. (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1275.) We do not find appellant's comparisons to *People v. Gaines* (1997) 54 Cal.App.4th 821, 822 and *People v. Hall* (2000) 82 Cal.App.4th 813, 817 persuasive. In both of those cases, the prosecutor's comments crossed the line from permissible comments on the failure to call

a logical witness into commentary on what those witnesses would have said. Here, while the prosecutor engaged in mild speculation concerning the claim appellant's former girlfriend would not want to lie on the stand for him, he generally kept his comments within the confines of commenting on the fact the former girlfriend was a strong potential witness that was not called to support appellant's claims and, thus, was logically not a supporting witness. Likewise, we conclude the prosecutor's comments that appellant had subpoena powers, had called witnesses, and yet did not call his former girlfriend fall within acceptable commentary on the evidence.[1]

We next consider the question asked about an alleged investigation into appellant's false statements to police, the remaining portion of appellant's second argument. During appellant's cross-examination, the following exchange occurred:

"Q And it's true, as a result of your conduct in this case, you are actually under investigation by the State Bar.

"A No, that is not correct.

"Q Tell us more about that, then."

Appellant's counsel immediately objected, the parties held a sidebar discussion with the court and, upon its conclusion the court stated on the record, "that last question you asked is withdrawn. You can ask your next question whenever you are ready."

Even if we were to ascribe an improper motive to the prosecutor's request for information about a State Bar investigation, a step not mandated by a record that does not foreclose a good faith belief the line of questioning was proper, we see no conduct rising to the level of prejudicial prosecutorial misconduct. Appellant's counsel promptly

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[1] Appellant raises, but does not significantly argue, that the prosecutor also committed misconduct by stating the victim had no way to protect or defend himself, contending this statement was not supported by evidence. We also find this a fair commentary on the evidence. Jeffries testified he searched the victim on contact and found nothing of note and no witness testified they actually saw the victim with a weapon.

objected, the court heard the issue at a sidebar, and the objection was sustained. The record does not show the prosecutor returning to that line of questioning or referring to the inference of a separate investigation again. Accordingly, we do not see evidence of a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.

Finally, we consider appellant's third argument, that the prosecutor committed misconduct by commenting on his right to remain silent in the face of police questioning. Prior to trial, the court affirmed that appellant had invoked his right to remain silent when first questioned by police and that the prosecutor could not introduce any statements made to the police at that time in its case in chief. However, the court noted the prosecutor would be able to cross-examine appellant on those statements if he were to take the stand and testify. When appellant did take the stand, the prosecutor cross-examined him on differences between his explanation of the night's events and what he had told the police at the time.

Later, during closing arguments, the prosecutor then made the following argument:

"And keep in mind, when officers encountered the defendant and asked him about what happened that night, at no point did the defendant state that he was being attacked by a homeless man; at no point did he state that he was being threatened by this homeless man; at no point did he say that this homeless man had a holster at his side; at no point did he bring up the fact that the homeless man grabbed for a gun. These are all facts that we heard for the first time here on Friday. These are not any facts that [appellant], who now claims he was in self-defense, offered to police on that day."

The court overruled appellant's objection on Fifth Amendment grounds.

Again, while the prosecutor's comments are not ideally precise, we do not view them as impermissibly commenting on appellant's right to remain silent. During cross-examination, the prosecutor identified several statements that appellant made to the

police that were inconsistent with his version of events at trial, including the claim he made at the time that no gun had been involved. In the course of this questioning, the prosecutor elicited evidence that appellant had not made a self-defense claim or otherwise made statements supporting that claim immediately after the incident. Accordingly, the prosecutor's comments during closing argument are rightly viewed as a summary of the evidence adduced during cross-examination and not a comparison of appellant's story to the fact he exercised his Fifth Amendment right to remain silent. As such, the prosecutor's comments constitute a fair commentary on the evidence and are not improper.

## IV. Jury Instructions

During trial, appellant requested the court instruct the jury with CALCRIM Nos. 350 and 351. These model instructions provide additional information regarding how the jury may consider character evidence and impeachment of that evidence through knowledge of specific acts. The trial court reviewed the instructions and denied the request to utilize them, saying it was removing them "with the concern that it's going to cause great confusion to the jury recognizing that honesty is not an issue that can negate a necessary element of the substantive offenses. Additionally, it appears to the Court that *CALCRIM* Instruction 226 does accurately address the character witnesses' testimony...." Appellant contends the refusal to instruct the jury with CALCRIM Nos. 350 and 351 constituted prejudicial error.

***Standard of Review and Applicable Law***

"In the determination of probabilities of guilt, evidence of character is relevant. [Citations.] … [Citation.] Proof of the good character of the defendant may be considered as a fact tending to rebut the truth of testimony of an incriminatory character which is sufficient to establish the truth of the charge against him." (*People v. Jones* (1954) 42 Cal.2d 219, 223-224.) When a defendant takes the stand and denies his guilt, "he puts in issue his reputation for truth and honesty and subjects himself to the rules for

testing credibility," such that "evidence of defendant's reputation for truth and veracity [is] admissible at trial for the purpose of proving the truthfulness of his testimony." (*People v. Taylor* (1986) 180 Cal.App.3d 622, 632.) " '[T]he court is required to instruct sua sponte only on general principles which are necessary for the jury's understanding of the case. It need not instruct on specific points or special theories which might be applicable to a particular case, absent a request for such an instruction.' [Citations.] Alternatively expressed, '[i]f an instruction relates "particular facts to the elements of the offense charged," it is a pinpoint instruction and the court does not have a sua sponte duty to instruct.' " (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488–489.)

" 'In considering a claim of instructional error we must first ascertain what the relevant law provides, and then determine what meaning the instruction given conveys. The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights." [Citation.] We determine the correctness of the jury instructions from the entire charge of the court, not from considering only parts of an instruction or one particular instruction." (*People v. Smith* (2008) 168 Cal.App.4th 7, 13.)

***The Alleged Error is Harmless***

In this case, even assuming the trial court erred by failing to provide CALCRIM Nos. 350 and 351, we do not conclude there was a reasonable likelihood that the jury understood the instructions as a whole in a manner that violated appellant's rights. As the court noted when making its ruling, although CALCRIM Nos. 350 and 351 provided more specific instructions on how to view character evidence offered by appellant in his defense, the general instructions, such as CALCRIM No. 226, told the jury that they were free to consider and utilize evidence offered from all witnesses and that they must ultimately judge the credibility of each witness in part based on the witness's character for truthfulness. These instructions pointedly instructed the jury to consider appellant's character for truthfulness as one factor in crediting his testimony. Moreover, as the jury

acquitted appellant on the resisting arrest charge, we can reasonably conclude that they found at least some of his testimony credible and trustworthy. The resisting arrest charge turned in part on whether appellant was truthfully relating his belief that he had been told he would be permitted to use the bathroom and was unaware of a continuing requirement to remain seated. That the jury ultimately acquitted appellant on the resisting charge but still found claims on which to convict suggests they were able to reasonably consider appellant's character for truthfulness in weighing the credibility to give appellant's trial testimony.

**DISPOSITION**

The judgment is affirmed.

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DE SANTOS, J.

WE CONCUR:

_____
LEVY, Acting P.J.

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SMITH, J.