

THE PEOPLE, Plaintiff and Respondent,
v.
BORIS GEORGE GRAHAM, Defendant and Appellant.

B204863.
Court of Appeals of California, Second Appellate District, Division One
August 27, 2009.
Not to be Published in the Official Reports

Appeal from a judgment of the Superior Court of Los Angeles County, No. LA046159, Martin L. Herscovitz, Judge. Affirmed.

Peter Gold, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Michael R. Johnson and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

FERNS, J.

A jury found Boris Graham guilty of first degree murder (Pen. Code, § 187, subd. (a)),¹ kidnapping to commit robbery (§ 209, subd. (b)(1)), kidnapping for carjacking (§ 209.5, subd. (a)), robbery (§ 211), burglary (§ 459), carjacking (§ 215, subd. (a)), and evading an officer causing death (Veh. Code, § 2800.3). The jury further found true the special allegation that, as to the murder count, a principal was armed with a firearm in commission of the offense (§ 12022, subd. (a)(1)), and that, as a special circumstance, the victim was murdered while Graham was engaged in the commission of robbery, carjacking, kidnapping, and burglary (§190.2, subd. (a)(17)). On the remaining counts, the jury found true the allegation that a principal was armed with a firearm in commission of each of the offenses. (§ 12022 subd. (a)(1).) The trial court found the allegation that Graham had suffered one prior conviction within the meaning of the "Three Strikes Law" to be true. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) Graham was sentenced to life imprisonment without the possibility of parole (doubled pursuant to the Three Strikes Law) on the murder count, plus a consecutive term of one year for the principal's use of a firearm. The trial court also imposed but stayed sentences on the remaining counts pursuant to section 654.

On appeal, Graham contends the prosecutor committed prejudicial and reversible misconduct in (1) allowing one of her witnesses to give gang testimony contrary to the trial court's pretrial ruling, (2) inflaming the jurors' passions during closing argument by referring to Graham as a terrorist, and (3) during her closing argument, inappropriately attempting to shift the burden of proof to the defense. Graham further contends the trial court violated his right to confrontation in permitting the prosecution to introduce results of DNA tests without producing the analyst(s) who performed the tests and violated his constitutional right to a jury trial by using his prior juvenile adjudication to double his sentence under the Three Strikes Law. We conclude Graham's contentions lack merit and therefore affirm.

BACKGROUND

The following facts were established at trial. Graham did not testify.

Victim Christopher Rawlings (Rawlings) owned a men's clothing store with his partner, Rodney Leonard. Rawlings typically parked his white Bentley in front of the store.

After work on February 8, 1999, Rawlings stopped at the family's home in Woodland Hills, then left to do errands.

About an hour later, Rawlings's wife, who was in the kitchen, heard the automatic garage door open, the Bentley drive in, loud music, and the garage door close. The loud music did not alarm her because Rawlings "always played his music loud." She did, however, hear at least two loud, stern, unfamiliar voices, so she opened the door between the kitchen and laundry room, entered, and from there could see into the garage through an open door in the laundry room. She saw Rawlings on his knees on the ground and two men, dressed "head to toe" in black, holding or pushing Rawlings down. The trunk of the Bentley was open.

Mrs. Rawlings turned and very quietly retraced her steps back through the laundry room into the kitchen, where she grabbed the cordless phone. She dialed 911 and ran upstairs to gather their two young children. She climbed out onto the flat roof with the children, continuing to explain to the 911 operator what was happening.

The men brought Rawlings inside the house in handcuffs. They ransacked the master bedroom, taking jewelry, including Rawlings's blue-faced Rolex watch. They also took another watch, a bracelet, a wedding ring, and cash from Rawlings. In the kitchen, the contents of Mrs. Rawlings's purse were dumped out, and her wallet was taken.

From the roof, Mrs. Rawlings heard a "lot of scuffling, things getting bumped, and just a lot of movement sound." Then she heard Rawlings scream. The garage door opened, and she could see the Bentley pull out.

The men had forced Rawlings into the Bentley's trunk. A patrol car followed the Bentley. The Bentley immediately accelerated. The patrol car tried to keep pace with the Bentley, but even at 110 miles per hour, the Bentley remained well ahead of the police. The Bentley ultimately crashed into another car, then hit one or more power poles and a tree. On impact, the trunk opened, and Rawlings was thrown head first into a block wall. The Bentley engine caught fire. Both the passenger and driver escaped through the driver side door and fled in opposite directions.

Rawlings was still breathing but was otherwise nonresponsive. He died on February 10, 1999 from blunt force trauma to the head.

Officer Gabriel Suarez-Villamil responded to the 911 call the evening of February 8, 1999. The Bentley was driving in his direction, the passenger side most visible to him. He recalled hearing about a face mask. As the Bentley passed him, he saw "white eyes looking directly at [him]." He thought the person seated on the passenger side was a person with dark skin or wearing a ski mask.

On the evening of February 8th, Dani Yashouafar was making a right turn from Hatteras Street onto Tampa Avenue when he saw a police car following a white Bentley. He thought the Bentley was driving between 85 and 90 miles per hour. Mr. Yashouafar saw the Bentley hit a blue car then crash into a power pole, knocking down the power pole. He saw two African-American males climb out of the driver's side of the Bentley, then run in opposite directions. The second man was limping.

Los Angeles Police Officer Kerry Suprenant and his partner Mike Callan heard a radio broadcast the evening of February 8, 1999 that a white Bentley was headed in their direction. The car came toward them at a high rate of speed and proceeded northbound on Tampa Avenue, so Suprenant activated his lights and siren, and Callan broadcast that they were pursuing the Bentley. He saw the Bentley hit a blue vehicle, which hit a power pole, knocking it down. The Bentley's engine caught fire. "[T]here was a lot of noise, a lot of sparking coming from the pole and surrounding wires." At some point, the lights on the street went out. The trunk of the Bentley was open, but there was no one inside. Having heard there may have been a hostage in the vehicle, Officer Suprenant followed a pattern of debris on the ground from the vehicle's trunk to a block wall, where he saw an adult male on the ground next to a block wall. He saw blood on the wall, which indicated to Suprenant that the victim's head had hit the wall.

Detective Andrew Purdy was the lead investigating officer on the Rawlings case. At about 11:10 p.m. on February 8, 1999, Purdy and his partner, Detective Terrill West, went to the Rawlings home and conducted a complete survey of the property. He saw an open gallon container of orange juice sitting on the kitchen cabinet inside the home. He also saw a ladies' purse that was overturned, its contents scattered on a small table in the

kitchen. Outside the house, they recovered a roll of duct tape. Purdy testified that the absence of vehicles that appeared out of place in the area supported the view that the assailants had been dropped off at the location.

Los Angeles Detective Steve Galeria also responded to the crime scene on February 8th. He saw a ski mask on the driver's seat of the Bentley and another one on the ground next to the driver's door. He also saw a police scanner, as well as a glove on the ground. Galeria found a pair of open handcuffs against the wall. He observed blood and portions of a scalp on the wall itself.

Detective Purdy arranged for the ski masks to be sent to the Scientific Investigations Division (SID), serology division of the Los Angeles Police Department.

Witness Jerry Mather lived about a block away from the crime scene at the time of the incident. When he went to retrieve his van from the corner of Oxnard Street and Beckford Avenue the following morning, Mather found a "clump of [black] clothing." Seeing a group of police officers where the area was cordoned off on Tampa, Mather reported his finding to them.

On February 9th, witness Donna Collins drove past the intersection of Wilbur Avenue and Calvert Street and noticed a green car with a tan top parked in traffic lanes and a tall, black gentleman searching through the bushes. Collins told the police what she saw, and officers searched the location. A wallet was recovered, which the officers showed to Collins. She recalled their telling her it was Rawlings's wallet.

Detective Terrill West searched the area identified by Ms. Collins and found the wallet. Detective West arranged for the items to be booked and sent to SID. Detective West was also the one who located the items Mr. Mather had reported seeing. When he booked the sweatshirt, it had duct tape on it. Also, a pair of black leather gloves were wrapped up in the sweatshirt. To Detective West, the lack of usable fingerprints on the wallet was consistent with the suspect wearing gloves.

Evidence also was collected from the Bentley. A blue steel revolver was recovered from the passenger floorboard. In addition, Mrs. Rawlings's wallet was found in the same area. Detective Purdy testified that in the trunk they found a garage door opener with what appeared to be blood on the white button. Los Angeles Police Department Criminalist Harry Klann testified that in comparing a blood sample from the garage door opener with a sample from the victim, he determined the profiles matched.

An anonymous phone tip alerted the police to investigate Kirell Taylor as a suspect in Rawlings's death. As a result, the police conducted a surveillance of Taylor's residence at 13249 Vaughn Street in the San Fernando Valley on June 2, 1999. During the surveillance, Detective Purdy observed a green Mustang at the residence, the same type of car Collins had seen on February 9. Taylor's girlfriend, Imani Bijoux, was the registered owner of the Mustang.

On August 17, 1999, a search warrant was executed at Taylor's residence. From Taylor's bedroom, Detective Purdy recovered a Cartier bracelet and one earring from a pair of Cartier earrings belonging to Mrs. Rawlings, which had been stolen on February 8, 1999. Purdy also recovered a Koran at the foot of Taylor's bed, open to a page holding a business card for Rawlings's store, Gentleman's Quarters. A sample of Taylor's blood was taken while he was in jail for purposes of DNA comparison.

A search warrant was executed at Taylor's girlfriend's residence in Lancaster on August 17, 1999. While the search was proceeding, the green Mustang arrived. A search of the Mustang uncovered several documents in the trunk: citations written to Taylor while he was driving the Mustang and mail addressed to Taylor at the Vaughn Street location.

LAPD Field Sergeant Adrienne Hamilton testified that she conducted a traffic stop on August 19, 1999 when she saw a blue Honda that appeared to be speeding. Hamilton was on duty with two partners that day. She contacted the passenger and the driver. The driver identified himself as Bevin Graham.² She learned he was on parole. The passenger identified himself as Kato Austin and produced an Illinois driver's license. Hamilton testified that the man who identified himself as Kato Austin was in fact Boris Graham. A higher priority

call came in, and the officers terminated the investigation, but Hamilton inadvertently kept "Kato Austin's" license. She learned that Kato Austin had a minor misdemeanor outstanding warrant.

Hamilton and her partner conducted a parole check on the driver at his registered residence address. The blue Honda was parked outside. Hamilton's partner discovered Graham hiding in a bedroom. A little girl was also at the premises. Hamilton and her partner took Bevin Graham into custody, but left the person they thought was Kato Austin because his outstanding warrant was for a small amount, and they did not want to have to put the child in protective custody. Hamilton and her partner drove about a block and decided to return to the residence. By the time they returned, the vehicle was gone, as was Austin/Graham.

Detective Purdy saw the Kato Austin Illinois license on September 1, 1999 on another police officer's desk. Purdy knew the photograph of Graham did not match the name "Kato Austin" on the license.

Detectives Purdy and West traveled to Chicago on September 15, 1999 after receiving an anonymous report that Michael Parks was the suspect in the Rawlings murder. Together with Cook County Sheriff's Deputy Gregory Wing, Detectives Purdy and West interviewed Parks. Parks was not told he was a suspect, only that the detectives were investigating the murder of an individual named Christopher Rawlings in Woodland Hills, Los Angeles County. Parks identified Graham from a six-pack photographic array, stating "This is what this is all about, the mother fucker Booney." Parks also identified Kirell Taylor from a six-pack photographic array. Parks said he knew Graham as "Booney" and as Boris. Parks indicated he knew both Graham and Taylor from the neighborhood in Pacoima. Parks also stated Graham had called him at some point before the summer of 1999 and asked whether he and Shaqir Uqdah (Shack) could stay at Parks' residence in Chicago. Parks said they could.

Parks told detectives that Graham admitted his involvement in the crimes at issue here, notably, he and Taylor had committed a home invasion robbery (a lick or a jack), they believed that money stored in a safe would be in the master bedroom, they did not find money or a safe in the house, they stole a "Rolls Royce" and other items from the house, they threw the male owner of the car into the trunk, there was a police chase after they left the victim's home, they crashed the Rolls Royce into a tree, and the collision caused the victim to be "spit out the trunk." Graham also told Parks he had stolen a blue-faced Rolex watch during the robbery. Parks ultimately kicked Graham and Uqdah out of the house.

Detective West interviewed Parks' then-girlfriend, Tuesday Henderson, on September 16, 1999. She testified consistent with her witness statement from that interview.

On September 23, 1999, a warrant was issued for Graham's arrest in this case. Graham was arrested in Broward County, Florida on January 28, 2004. He was extradited to California on February 12, 2004.

Meanwhile, in 2001, a jury convicted Taylor of Rawlings's murder, kidnap for robbery, kidnap for carjacking, two counts of second degree robbery, first degree burglary, two counts of carjacking, and evading an officer causing death. Division Four of this Court affirmed Taylor's conviction in *People v. Taylor* (B153903, August 29, 2002).

After his conviction, Taylor wrote to Detective Purdy indicating he wanted to provide information about his crime partner in this case, Graham. He indicated he wanted to clear the air and to testify against Graham. He asked Detective Purdy and Deputy District Attorney Shellie Samuels to come up to the state prison to interview him. On September 21, 2006, they interviewed Taylor and taped his statement. Taylor indicated he grew up with Graham in the same neighborhood. He also said he knew Parks and Bijoux from the same neighborhood. Taylor told them Graham's nickname was "Little Booney."

Taylor told Purdy and Samuels that his then-girlfriend, Imani Bijoux dropped off Graham and Taylor at the Rawlings residence in the green Mustang on February 8, 1999. Taylor said the two men waited on the side of the garage in the planter bed. Taylor said he brought duct tape and there were two guns, one a revolver, the other a Glock 9-millimeter semi-automatic. Taylor stated he had used duct tape to tape a scanner to his sweatshirt in order to hear the police radio frequency. They brought extra duct tape for the wife. They also brought handcuffs to use on Rawlings. Taylor indicated the plan was, from the beginning, to carjack and take

the Bentley. Taylor also asked Purdy and Samuels questions about the status of the prosecution of Graham, including whether there was DNA evidence that linked Graham to the crime. Taylor indicated more than once during the interview that he thought he would get away with the crime, except for the presence of his DNA on the [ski] mask. Taylor blamed Graham for leaving the duct tape at the Rawlings residence. Purdy showed Taylor photographs of the Rawlings residence to confirm on which side of the house Graham and Taylor had waited. His response matched the location of the recovered duct tape.

Taylor and Graham approached or assaulted Christopher Rawlings when Rawlings drove the Bentley into the garage. Graham was armed with the revolver; Taylor had the Glock 9-millimeter. They handcuffed Rawlings's hands in front of him and had Rawlings direct them through the home to the master bedroom. Taylor and Graham focused on the master bedroom, looking for cash. Taylor indicated that Graham took items of jewelry belonging to Mrs. Rawlings, as well as a Rolex. On their way back out to the garage, Taylor paused in the kitchen to drink from a one-gallon container of juice.

Taylor then found Graham standing over Rawlings, pointing the revolver at Rawlings's head. Rawlings began screaming. Taylor told Purdy and Samuels that he grabbed the gun from Graham and asked him what he was doing. Taylor said that at that point, he and Graham thought only Mrs. Rawlings was still in the house, not any children. Taylor took a Rolex watch and bracelet from Rawlings, as well as about \$1,000 that Rawlings had in a money clip. Graham threw Rawlings in the trunk because they heard on the scanner that the police were at the home. Graham and Taylor got in the car, opened the garage door, and drove the Bentley out of the garage. Only the two of them were in the vehicle.

Taylor was driving, and as he pulled away from the Rawlings residence, he saw a police car at the end of the street. Taylor ended up driving down Ventura Boulevard at high rate of speed. Taylor said he crashed into a blue car and lost control of the Bentley. Taylor told Purdy and Samuels that he had planned to kill Graham and "actually reached down under his seat in order to grab his gun to shoot [Graham.]" After the car crash, Taylor and Graham removed their ski masks, then Taylor got out of the car, helping Graham so he would not be around to snitch on Taylor. Taylor told Purdy and Samuels that he ran in a northeasterly direction, climbing walls, going through backyards of homes. Taylor did not see Graham after that point.

The above facts were established at trial. In addition, Henderson testified she was present during a conversation among Graham, Shack, and Parks, during which Graham admitted his participation in a home invasion robbery with his partner, Kirell. Graham stated that he believed a safe was in the victim's home and that the robbery went awry because the victim's wife called 911 after Graham attacked the victim in the garage. Graham stated he kidnapped a wealthy man who lived in either Bel Air or Beverly Hills and placed him in the trunk of a Rolls Royce or a Bentley. Graham was then in a high-speed chase with the police and crashed into a brick wall. As a result, the kidnapped man flew out of the trunk. Either Graham or his partner hit his head in the front passenger seat of the Bentley during the high-speed chase. Graham said that he or his partner dropped a ski mask and that his partner was eventually caught by police. The police obtained Graham's partner's DNA from sweat or saliva from the ski mask. Graham also said he stole a Rolex watch during the robbery.

At trial, Michael Parks testified that he knew Graham because Parks and grown up in the same neighborhood in Pacoima with Graham's brother, Bevin. Parks knew Graham as "Boris" and as "Booney." He estimated he had known Graham for "25, 26, 27 years." In May of 1999, Parks received a phone call from Graham asking whether he and their friend Shack could come to Chicago to stay with Parks at Parks's mother's house. Parks said okay. Parks's former girlfriend, Tuesday Henderson, also stayed at the house in 1999.

Parks said Graham did not talk about a robbery he had committed in the Los Angeles County area and did not mention Taylor. Parks admitted having seen Taylor but denied knowing him. Parks denied knowing what it meant to jack somebody and denied that Graham ever told him that he and Taylor and jacked a rich guy in a Rolls Royce.

Parks denied Graham ever telling him that Graham and Taylor went to this rich guy's home to steal money and drugs from a safe, but they did not find a safe. Parks denied that Graham said he had given a blue-faced Rolex watch that he got from the robbery to a Hispanic guy named Angel. Parks denied telling the detectives that Graham had told him that he and Taylor threw the rich guy into the trunk of his car. He also denied telling

the detectives that Graham told Parks that there was a police pursuit and that they crashed the Rolls Royce (the Bentley). He denied telling the detectives that Graham told him that when the car crashed, the victim was "spit out of the trunk." Parks denied that Graham told him that the victim was killed when he was spit out of the trunk.

Parks admitted having a conversation with the Cook County Sheriff and LAPD detectives on September 16, 1999, but denied telling them any of the statements Graham supposedly made to Parks. Parks claimed they interviewed him to accuse him of committing a crime and that they told him the only way he could get out of it was to give them a DNA sample. So he did.

Parks acknowledged that Graham borrowed Parks's mother's vehicle in order to take a driver's license test. When shown the Illinois driver's license in the name of Kato Austin, Parks identified the man in the photo as Graham.

Parks denied seeing a six-pack photographic array or identifying Graham in it. He denied telling detectives he knew Taylor. Parks denied telling the detectives that Graham brought a semi-automatic weapon with him to Chicago.

At trial, Kirell Taylor testified that the letter he sent Detective Purdy was a lie. He claimed the story he told the detectives was "bogus." He testified his statements inculpatory of Graham were all lies and that he did not know Graham in 1998 or 1999. He only met Graham on the custody bus on March 6, 2007. Taylor denied being a snitch.

Evidence Relevant to Graham's Contentions

1. Gang Evidence

At the pretrial hearing, the court heard argument on the defense's request to exclude gang evidence.³ The prosecutor explained she sought to introduce evidence of Graham's gang membership "not . . . to prove a gang allegation or prove the defendant is a gang member . . ." Rather, she wanted to show that Graham obtained a false identification of a fellow gang member and to explain why gang members might change their testimony on the stand. The court ruled that "[u]nless there's a problem with the credibility of the other people testifying, I'm not going to allow gang evidence." The court added it would "possibly allow evidence of gang involvement if people who are fellow alleged . . . gang members change their testimony, as a reason why they're changing their testimony or changing their statements or refusing to testify." The court further ruled that the prosecution had to alert the court prior to offering anything that related to gang involvement to allow Graham's counsel to make her objection, "and we can have a side-bar or 402 hearing as to the relevance of gang involvement at that time." The prosecutor responded: "Perfect."

Once trial was underway, the prosecutor sought to introduce evidence that Graham and another witness were members of the same gang. The court prohibited the testimony, explaining: "I think if the witness tells a prior inconsistent statement to someone who's in custody, the jury can gather many reasons why the prior inconsistent statement is truthful, and therefore, you're not prejudiced by not bringing in the gang evidence when this case is not gang-related, there's no allegation that it's gang-related, and the highly inflammatory nature of gang testimony." With respect to the admissibility of testimony regarding the gang affiliation of the individual whose identity Graham used prior to his arrest, the court further ruled that "[t]he fact that [the] name [Graham] chose happens to be the name of someone else who's possibly also in a gang is not relevant at all. So that's not really a[n Evidence Code section] 352 issue, it's basically a relevance issue." The court added: "[P]lease instruct your witnesses, Ms. Silverman, to not mention gangs in relation to the issues that I just ruled on."⁴

The prosecution called Graham's alleged accomplice, Kirell Taylor, as a witness. During cross-examination, defense counsel asked where Taylor got the ski masks. He responded he "got them from a party." Counsel asked: "From a party?" Taylor answered: "Yes, a gang member, from Pacoima Piru Bloods." Counsel did not move to strike the statement.⁵

The prosecutor sought to introduce evidence that Taylor, Graham, Graham's brother, and several others were all members of the Pacoima Piru Bloods because Taylor's testimony made the issue "much more relevant." The court twice asked whether counsel had admonished Taylor not to refer to gang evidence, but the prosecutor failed to answer the question. The court denied the prosecutor's request, observing that Taylor's reference was "unsolicited and no more than a passing reference."

2. DNA Evidence

The police recovered a black ski mask from the driver's seat of the Bentley and another one, along with a black glove, on the ground next to the open driver's door. In October 1999, the Scientific Investigations Division (SID) of the Los Angeles Police Department sent evidence to Cellmark Diagnostics for testing. The company conducted DNA testing on samples obtained from the ski masks found in and next to the Bentley.

At trial, Charlotte Word, a Cellmark laboratory director at the time testing occurred, testified regarding the methodology and results of the tests. Dr. Word earned her bachelor's degree in science from the College of William and Mary and her doctorate in microbiology from the University of Virginia. She did her post-graduate work as an immunologist and molecular biologist at the University of Texas Southwestern Medical School in Dallas. She worked for Cellmark for fifteen years. Dr. Word explained that Cellmark had performed DNA analysis for both defense and prosecuting attorneys.

Dr. Word testified that one analyst generally performed the testing and a technical reviewer independently reviewed all of the work and data. The documents prepared in connection with the results obtained from analyzing the evidence in a particular case were prepared in the ordinary course of Cellmark's business and were prepared at or near the time the evidence was analyzed or examined. Dr. Word not only independently reviewed all of the reports and the case package that contained the reports, including actual notes made by all analysts in the case, but she also independently re-reviewed all the data in the case to see whether she agreed with the interpretation and conclusions in the reports. She testified that she agreed with all the interpretations and results.

Cellmark received Graham's reference sample from SID in May 2004. Comparing Graham's DNA profile against the ski mask found on the driver's side of the Bentley (ski mask number 4), Cellmark concluded that Graham could not be excluded as a possible source of the DNA from that ski mask.

SID sent Cellmark an additional cutting from ski mask number 4 as well as new reference swabs for Graham and two others in August 2004. Cellmark conducted independent DNA testing on the new items and generated a report dated September 10, 2004. Cellmark was able to determine a "primary DNA profile." Dr. Word testified that it was her opinion, within a reasonable degree of scientific certainty, that Graham was the source of that major DNA profile.⁶

3. Closing Argument—Home Invasion "Terrorist"

In discussing the evidence of aiding and abetting during closing argument, the prosecutor argued Graham and Taylor "came to the scene together, participated in the crimes together, fled together. They each had loaded guns during the crime and, as I told you, common sense tells us that the only reason to bring a loaded firearm to a home invasion robbery is to be able to shoot somebody, if necessary, in order to accomplish your goals" Graham, she continued, "was one of the two people who was waiting on the side of the Rawlings[es]' home . . . for . . . Rawlings to come home so that they could attack him in his garage while wearing ski masks, evidenced by the fact, as we saw, that duct tape was left on the side walkway, as you remember, next to the garage area where they were waiting for him to come home. [¶] They had the victim down on the ground. You can surmise it was at gunpoint, given the loaded gun found in the vehicle and the observations [Mrs.] Rawlings made that she repeated at the point in time, in the heat of the moment, to the dispatcher. [¶] . . . [¶] You heard [Mrs. Rawlings] testify that she heard her husband scream in the garage, which was also testified to by Kirell Taylor. That was before they unceremoniously dumped him into the trunk of his vehicle, obviously still handcuffed, before they backed out and led the police on the pursuit. [¶] And at that point, once that trunk is shut on . . . Rawlings, he was done. He had no way to escape. His life was completely in the hands of these two individuals, these two home-invasion terrorists, who decided that they could do whatever they want with the occupants of that home that night. . . ." Defense counsel did not object.

During her closing argument, defense counsel stated: "[The prosecutor] told you they're both home invasion terrorists. In this trial, the judge has told you that what counts is the evidence, so calling Mr. Graham a home invasion terrorist isn't the same thing as evidence."

In her rebuttal argument, the prosecutor responded to defense counsel on the use of the term "terrorist": "One of the things she mentioned to you was the fact that I called her client a home invasion terrorist, and she claimed that that's not evidence. If you believe that the defendant committed these crimes against the . . . family with Kirell Taylor, then he is a home invasion terrorist." Defense counsel objected to "improper argument, name calling," which the court overruled.

The prosecutor used the term again in arguing that the standard of proof instruction did not state "you must be close to being absolutely sure. You have to believe, obviously, the evidence in this case. If you believe that the people haven't proven their case, that there's some other reasonable interpretation for why all these people either said the defendant admitted the crime to them, were impeached by their prior statement where they said the defendant admitted this crime to them, or that the DNA somehow suggests something other than the fact that he was one of the two perpetrators in this crime, then, hey, find him not guilty. That's your job. If that's what you believe, we're done. That's your decision to make. [¶] However, if you don't believe that that's a reasonable interpretation of the evidence, if you believe that the only reasonable interpretation of the evidence is that the defendant was one of the two individuals who committed these horrific crimes against the . . . family, that the defendant then fled from the scene of the crime—not just made himself unavailable, but fled, hid in Chicago, hid in Nebraska, was wiring money there, fled to Chicago, came back to L.A., used a false name, fled to Florida, and that the only reason his DNA is on that mask is because he's the one that deposited it there, then he's guilty, and then he is a terrorist." Defense counsel objected again: "improper argument." The court again overruled the objection.

4. Closing Argument—Taylor's Testimony

During her rebuttal argument, the prosecutor discussed Kirell Taylor's testimony, pointing out inconsistencies and improbabilities. The prosecutor stated Taylor "claimed that he was so worried as he was fleeing from the crime scene about who else's DNA might be left behind on the mask, . . . he starts calling around to warn other Pacoima Piru gang members about who else might have had access to that mask—" Defense counsel "object[ed] to the improper argument." The court directed the prosecutor to "confine your argument to the evidence that was produced at trial." The prosecutor continued: "Mr. Taylor indicated that he called and warned another Pacoima Piru gang member, and he was then told by that Pacoima Piru gang member that the mask, in fact, belonged to the defendant . . ." Defense counsel objected again because there was no evidence that Taylor was a Pacoima Piru gang member. Defense counsel did not request a jury admonition, but the court addressed the jury as follows: "We have a record of what the evidence produced in the trial is. If you ask me for a verbatim quote of what the witnesses said or did not say, I couldn't give you it to you because I don't remember. Maybe you have it in your notes. Maybe you don't. We do have a record. [¶] When the attorneys argue the case, they are arguing from their recollections. Their recollections aren't really any better than your recollections, so please refer to the evidence that was produced. [¶] If you need to know what evidence was produced, you can request that the court reporter read back to you that relevant portion." With that, the court overruled the objection.⁷

5. Closing Argument — Defense Burden of Proof

During rebuttal argument, the prosecutor stated defense counsel "could not come up with any reasonable explanation for why all these witnesses, whether they wanted to or not, eventually pointed their finger at the defendant, if they mean to or if it was by their prior statements. [¶] She couldn't explain how [Graham's] DNA got on the mask that was left at the crime scene. She couldn't explain why her own defense expert found the defendant's DNA all over that mask." Defense counsel objected to the argument as improper argument: "Shifting the burden of proof." The court overruled the objection, stating it was proper argument.

DISCUSSION

A. PROSECUTORIAL MISCONDUCT

A prosecutor's misconduct violates due process if it infects a trial with unfairness. (People v. Farnam (2002), 28 Cal.4th 107.) Less egregious conduct by a prosecutor may nonetheless constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to attempt to persuade the court or jury. (*Ibid.*)⁸ Prosecutorial misconduct will not result in reversal of the judgment in the absence of a finding of prejudice to the fairness of a trial. (People v. Hinton (2006), 37 Cal.4th 839.)

"To prevail on a claim of prosecutorial misconduct based on 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. [Citations.] In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]" (People v. Frye (1998), 18 Cal.4th 894, disapproved of on other grounds People v. Doolin (2009), 45 Cal.4th 390, fn. 22.) A prosecutor is allowed in rebuttal argument to respond fairly to defense counsel's arguments. (People v. Bryden (1998), 63 Cal.App.4th 159.) An appellate court reviews a trial court's ruling on prosecutorial misconduct for abuse of discretion. (People v. Alvarez (1996), 14 Cal.4th 155.)

To preserve a claim of prosecutorial misconduct for appellate review, the defendant must make a timely objection in the trial court and request that the jury be admonished to disregard the impropriety. (People v. Carter, supra, 30 Cal.4th at p. 1207; People v. Ochoa (1998), 19 Cal.4th 353; People v. Montiel (1993), 5 Cal.4th 877.) Unless counsel objects and requests an admonition, "the point is reviewable only if an admonition would not have cured the harm caused by the misconduct." (People v. Price (1991), 1 Cal.4th 324; People v. Medina (1990), 51 Cal.3d 870.) "Forfeiture for failure to request an admonition will also not apply where the trial court immediately overrule[s] the objection to the alleged misconduct, leaving defendant without an opportunity to request an admonition." (People v. Panah (2005), 35 Cal.4th 395.)

Graham contends the prosecutor committed misconduct in violation of his constitutional right to a fair trial, first by allowing a prosecution witness to give gang testimony in violation of the trial court's earlier order, and then by arguing this evidence in her closing (rebuttal) argument. Respondent argues Graham forfeited the claim because counsel failed to "make a specific assignment of misconduct" and failed to request the jury be admonished accordingly.

1. Gang Evidence

When Taylor made his gang reference during trial, defense counsel did not at that point seek to minimize any damage from the statement by moving to strike it or by seeking an admonition. There is no indication, though, that an admonition would have cured the impropriety. (People v. Price, supra, 1 Cal.4th at p. 447; People v. Medina, supra, 51 Cal.3d at p. 895.) In these circumstances, we conclude the issue was not forfeited.

Taylor's statement that he got the ski masks from "a gang member, from Pacoima Piru Bloods," would appear to violate the trial court's pretrial ruling prohibiting gang evidence and quite possibly the court's ruling requiring the prosecution to instruct its witnesses. "A prosecutor has the duty to guard against statements by his witnesses containing inadmissible evidence. [Citations.] If the prosecutor believes a witness may give an inadmissible answer during his examination, he must warn the witness to refrain from making such a statement. [Citation.]" (People v. Warren (1988), 45 Cal.3d 471; People v. Leonard (2007), 40 Cal.4th 1370.) Here, the prosecutor concedes Taylor was not instructed not to mention gangs. While we believe the prosecutor was remiss, our review of this witness's entire testimony persuades us that an instruction would not have been effective.

In addition, Taylor's statement did not have anything to do with either his own or Taylor's gang membership, nor that of the individual whose identification Graham used. In context, the mention of the Pacoima Piru Bloods came out of the blue and given its lack of connection to the line of questioning, it is unlikely that it had any impact on the jury. Even if we were to find error, it was harmless in any event.

2. Statements During Closing Argument

Graham first contends the prosecutor improperly used Taylor's gang testimony during her closing (rebuttal) argument. "At closing argument a party is entitled both to discuss the evidence and to comment on

reasonable inferences that may be drawn therefrom. [Citations.]" (People v. Morales (2001), 25 Cal.4th 34.) "[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (Ibid.) A prosecutor's comments in closing argument "must be viewed in context" with the remainder of the summation. (People v. Stansbury (1993), 4 Cal.4th 1017, reversed on other grounds Stansbury v. California (1994), 511 U.S. 318 [114 S.Ct. 1526]; People v. Medina (1995), 11 Cal.4th 694; People v. Pensinger (1991), 52 Cal. 3d 1210.)

To the extent respondent maintains Graham waived this objection, the record does not quite bear this out. Each time the prosecutor mentioned the Pacoima Piru gang, defense counsel objected. During the prosecutor's rebuttal argument, she first objected to the improper argument. The court told the prosecutor to "[j]ust confine your argument to the evidence that was produced at trial." When the prosecutor repeated the statement that Taylor was told by a Pacoima Piru gang member that the mask belonged to Graham, defense counsel objected, adding there was no evidence that Taylor was a gang member. The court overruled the objection, instructing the jury to "refer to the evidence that was produced," and to request that the record be read back if needed. The claim as it relates to the prosecutor's purported arguing of facts not in evidence was not waived.

On appeal, Graham appears to argue the prosecutor committed misconduct by violating the court's ruling prohibiting all gang evidence. This was not the basis for Graham's counsel's objection during the rebuttal argument, and it was therefore forfeited. (People v. Williams (1997), 16 Cal.4th 153 [subsequent argument in new trial motion will not substitute for timely objection].)

On the merits, any misconduct in the prosecutor's statement that Taylor testified that he called another Pacoima Piru gang member (Jubali Dumas) and that Dumas said the ski mask belonged to Graham was minimal. Taylor did so testify. Additionally, in context, the prosecutor at most suggested that Taylor, not Graham, was a gang member. It is correct that the trial court's pretrial ruling barred gang evidence. And the prosecutor indeed violated this ruling, but we cannot say that it prejudiced Graham. First, the jury was instructed to refer to the evidence (which, according to Graham, merely "effectively" linked Graham to the gang because a gang member said that Graham had provided the ski masks) and was told attorney's arguments do not constitute evidence. We presume the jury follows the trial court's instructions. (People v. Smithey (1999), 20 Cal.4th 936.) Any prejudice was thus mitigated. (People v. Valdez (2004), 32 Cal.4th 73.) Considering the "wide latitude" prosecutors are given during argument (People v. Wharton (1991), 53 Cal.3d 522), and the fact the prosecutor's statements pertained to Taylor, not Graham, we conclude there was no prejudice.

Graham further contends the prosecutor improperly inflamed the jury's passions when she alleged Graham was a "home invasion terrorist." As counsel's objections were overruled, she had no opportunity to seek an admonition. (People v. Panah, supra, 35 Cal.4th at p. 462.) The issue was not forfeited.

As stated previously, argument is accorded wide latitude. It is not misconduct for a prosecutor to be a passionate advocate. He or she may even make "hyperbolic and tendentious" remarks if the inferences reasonably are drawn from the evidence and there is no substantial misstatement of the facts. (People v. Rowland (1992), 4 Cal.4th 238.) In this case, even the hyperbole of characterizing Graham (and Taylor) as "home invasion terrorists" had an evidentiary basis. They targeted Rawlings, planning ahead sufficiently so as to arrive at his home after dark, wearing black clothing, black ski masks and gloves, equipped with handcuffs, duct tape, a police scanner, and a loaded revolver. They lay in wait for Rawlings to arrive, forced him to his knees on the floor of the garage as soon as he drove in, struck him, marched him around the house to find and steal the valuables, and threw him in the trunk of the Bentley. The prosecutor never mentioned the terrorist attacks of 9/11 (People v. Zurinaga (2007), 148 Cal.App.4th 1248 [defendants not prejudiced by prosecutor's egregious misconduct in analogizing situation to attacks of September 11, 2001].) Indeed, the prosecutor cited not just the "horrific crimes" against Rawlings's family as making him a terrorist, but the facts that he fled from the scene, hid, used a false name, and used a ski mask.

Even if we were to find the prosecutor's hyperbole crossed the line, we cannot say Graham was prejudiced by it. As in People v. Zurinaga, the court instructed the jurors to decide the case based only on the evidence, that counsel's arguments were not evidence, and that they must not let bias, sympathy, prejudice, or public opinion influence their decision. We presume jurors follow the instructions given. (People v. Zurinaga, supra, 148 Cal.App.4th at p. 1260 [citing People v. Perry (1972), 7 Cal.3d 756, overruled on other grounds

People v. Green (1980), 27 Cal.3d 1].) Considering the overwhelming evidence of guilt in this case, it is not reasonably probable that Graham would have achieved a more favorable result absent the prosecutor's use of the word "terrorist." Any error here was harmless. (People v. Watson, supra, 46 Cal.2d at p. 836.)

3. Attempt to Shift the Burden of Proof

Graham contends the prosecutor committed misconduct in arguing that defense counsel's failure to offer reasonable explanations to counter the prosecution's case was an improper attempt to shift the burden of proof. Defense counsel objected, but the court overruled the objection.

"A distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence." (People v. Bradford (1997), 15 Cal.4th 1229.) Here, the prosecutor highlighted the scientific evidence produced by the prosecution and defense, both of which implicated Graham, and the lack of a reasonable explanation for testimony that "eventually pointed their finger at the defendant." The prosecutor did not cross the line. (People v. Young (2005), 34 Cal.4th 1149 [no reasonable likelihood that jurors would understand prosecutor's argument as imposing burden on defendant where prosecutor asked what "reasonable interpretation of th[e] evidence" existed other than "conjecture and insinuation" that would lead to defendant's innocence].)

We also find it unlikely that any error resulted in prejudice in the context of the court's instruction regarding defendant's constitutional right not to testify: "He or she may rely on the state of the evidence and argue that the people have failed to prove the charges beyond a reasonable doubt." Together with the numerous instructions setting forth what "the People must prove," there is not a "reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation]" (People v. Morales (2001), 25 Cal.4th 34.) Indeed, in her rebuttal argument, the prosecutor said: "My job, my burden is to prove to you the defendant's guilt beyond a reasonable doubt, and I've done just that." We conclude there was no error and no prejudice.

B. DNA EVIDENCE

Graham contends the trial court committed prejudicial error and violated his state and federal constitutional right to confront witnesses against him when it permitted the prosecution to introduce the results of DNA tests without producing the analysts who actually conducted the tests. Graham initially conceded that this Court must follow People v. Geier (2007), 41 Cal.4th 555 (Geier), in which the defendant raised the same argument. (Id. at p. 596.) Graham pointed out that the defendant in Geier had petitioned the United States Supreme Court for a writ of certiorari on the issue, Geier v. California, U. S. Supreme Court No. 07-7770, and that the Supreme Court had granted certiorari in Melendez-Diaz v. Massachusetts (Mar. 17, 2008, No. 07-591) ___ U.S. ___ [128 S.Ct. 1647], on the question of "[w]hether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is 'testimonial' evidence subject to the demands of the Confrontation Clause as set forth Crawford v. Washington, 541 U.S. 36 (2004)." After this case was submitted, the Supreme Court decided Melendez-Diaz v. Massachusetts (June 25, 2009, No. 07-591) ___ U.S. ___ [129 S.Ct. 2527] (Melendez-Diaz), and denied the petition in Geier v. California (June 29, 2009, No. 07-7770) ___ U.S. ___ [129 S.Ct. 2856]. In a letter brief filed on July 17, 2009, Graham argued that the Court's holding in Melendez-Diaz directly supported his position. We disagree.

The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The testimonial character of a statement "separates it from other hearsay that, while subject to traditional limitations upon hearsay, is not subject to the Confrontation Clause." (Davis v. Washington (2006), 547 U.S. 813 [126 S.Ct. 2266, 2273].) The Confrontation Clause prohibits the introduction at trial of testimonial hearsay against the accused unless the witness is unavailable and the accused had a prior opportunity for cross-examination. (Crawford v. Washington (2004), 541 U.S. 36 [124 S.Ct. 1354].)

In Geier, the California Supreme Court analyzed Crawford and numerous cases interpreting its application to scientific testing. The court concluded that reports of DNA test results are not testimonial under Crawford. (People v. Geier, supra, 41 Cal.4th at p. 607.) The court explained that, although the DNA report was

requested by a police agency, and it was reasonable to expect that the report might be used later at a criminal trial, the DNA analyst "recorded her observations regarding the receipt of the DNA samples, her preparation of the samples for analysis, and the results of that analysis as she was actually performing those tasks." (Id. at pp. 605-606.) The court found nothing "accusatory" in the analyst's "simply following Cellmark's protocol of noting carefully each step of the DNA analysis, recording what she did with each sample received . . ." (Id. at p. 607.) "Records of laboratory protocols followed and the resulting raw data acquired are not accusatory." (Ibid.) The circumstances under which the analyst generated her notes and report, not whether they would be available for use at trial, determined whether they were testimonial. The court thus concluded the DNA report was not testimonial for purposes of Crawford and Davis. (Ibid.)

In *Melendez-Diaz*, the U. S. Supreme Court decided a related, but not identical question. There, state law had authorized submission of a certificate in lieu of live testimony regarding the underlying results of forensic analysis as "prima facie evidence of the composition, quality, and the net weight of the narcotic . . . analyzed." (*Melendez-Diaz*, supra, 129 S.Ct. at p. 2531, quoting Mass. Gen. Laws, ch. 111, § 13.) The Court had little doubt that the certificates or affidavits fell squarely within the class of testimonial statements covered by the Confrontation Clause. The certificates, the Court explained, were "functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination." (*Melendez-Diaz*, supra, 129 S.Ct. at p. 2532, quoting *Davis*, supra, 547 U.S. at p. 830.) "Absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to be confronted with" the analysts at trial." (Id. at p. 2532, quoting *Crawford*, supra, 541 U.S. at p. 854.)

In *Melendez-Diaz*, the testimonial or nontestimonial character of the underlying analytic tests was not at issue, as it had been in *Geier*. The Court did not consider whether the forensic analysis of the seized substances, that is, the laboratory notes and test results, were contemporaneous recordings of observable events. Rather, the Court considered only whether the certificate could substitute for live testimony. The Court held the certificate could not constitutionally substitute for a live witness who could be cross-examined, consistent with the Confrontation Clause's guarantees. In contrast, in *Geier*, the very live testimony found lacking in *Melendez-Diaz* was present. The laboratory director testified both as to the laboratory and testing protocols and as an expert in her own right. Thus, as in this case, the "accusatory" opinions were reached and conveyed by a testifying expert, not through the nontestifying analyst's laboratory notes and report. We conclude that *Geier*, rather than *Melendez-Diaz*, governs the circumstances presented here and conclude *Geier*'s holding is not undermined in these circumstances by *Melendez-Diaz*. We reject *Graham*'s contention to the contrary.

C. USE OF JUVENILE ADJUDICATION UNDER THREE STRIKES LAW

Graham contended that he was deprived of his constitutional rights to a jury trial when the trial court used his prior juvenile adjudication to double his sentence under the three strikes law. As *Graham* acknowledges in his counsel's letter brief filed on July 17, 2009, the California Supreme Court decided the issue adversely to his position *People v. Nguyen* (2009), 46 Cal.4th 1007. We need not address this issue further.

DISPOSITION

The judgment is affirmed.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

Notes:

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

1. Unless otherwise indicated, all further statutory references are to the Penal Code.
2. Unless otherwise specified, all references to "Graham" are to the defendant.
3. The case was not tried as a gang case.
4. Respondent concedes the prosecutor did not admonish Taylor in accordance with the court's instructions.
5. Taylor subsequently named Jubali Dumas as the party in question.
6. The defense's DNA expert, Mehul Anjaria, laboratory director of Human Identification Technologies, a private DNA forensic consulting laboratory, reviewed all the raw data that Cellmark used to prepare its reports. He agreed with Cellmark's conclusions. He also took additional cuttings from ski mask number 4. A member of his laboratory also took new oral swabs from Graham. He obtained mixtures of DNA for at least three individuals. Using Cellmark's results and his own results, Anjaria found "there were two cuttings where there was a major profile that was consistent with Mr. Graham." With respect to a cutting from the inside nose portion of the mask, Anjaria found Graham to be the major source of the DNA mixture. He found the frequency to be one in 7.9 quadrillion African-American males and concluded it was Graham's DNA on the mask.
7. Defense counsel argued in her motion for a new trial that, despite court rulings, the prosecutor had improperly injected gang evidence into the trial and closing argument. The court said it did not think "it was ever in the jurors' minds of whether or not gangs played any part in this case. So I don't consider the prosecutor's conduct—the context in which she mentioned gangs was certainly not improper, inflammatory, or in violation of the court's orders."
8. Under this state's harmless error rule, the test of prejudice is whether it is reasonably probable a result more favorable to the defendant would have occurred had the district attorney refrained from making the challenged remark. (People v. Carter (2003), 30 Cal.4th 1166; People v. Watson (1956), 46 Cal.2d 818.) However, if federal constitutional error is involved, the burden shifts to the state "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (Chapman v. California (1967), 386 U.S. 18 [17 L.Ed.2d 705, 710].)