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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ADAM MARTINEZ,

Plaintiff and Appellant,

v.

ASPLUNDH TREE EXPERT CO.,

Defendant and Respondent.

G052490

(Super. Ct. No. 30-2010-00406671)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Mary Fingal Schulte, Judge. Affirmed.

Hall & Bailey and Donald R. Hall for Plaintiff and Appellant.

Horvitz & Levy, Bradley S. Pauley and Scott P. Dixler; Ivie, McNeill & Wyatt, Byron M. Purcell and Sherrye Scarlett for Defendant and Respondent.

* * *

Adam Martinez appeals from the trial court's entry of judgment on a jury's defense verdict in his personal injury lawsuit against Aplundh Tree Expert Company

(Asplundh). Martinez challenges the sufficiency of the evidence to support the verdict and contends misconduct by Asplundh's trial attorney also requires reversal of the judgment. As we explain, these contentions do not carry the day on appeal to countermand the jury's decision, and we therefore affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

In May 2010, Martinez and his brother, Peter, decided to trim the cypress trees under a power line in the backyard of the Villa Park home owned by Peter's in-laws (the Dupleich property).[1] The power line was around 26 feet off the ground. The brothers used a metal ladder propped against a metal fence. The fence was about 18 feet high, around a tennis court in the backyard. It is not clear from Martinez's brief whether the homeowners viewed the trees' proximity to the power lines as a reason to cut them; instead, the record suggests the homeowners' primary interests included reducing the "sagging" of the trees, presumably from their height or volume, and to level the tops of the trees into a straight line. The homeowners had not asked Peter to trim the trees, and were out of town when the brothers embarked on the task as a favor. They managed to safely trim all the trees to a distance of five or six feet from the power line.

Unfortunately, they were not satisfied with their handiwork and returned the next day. Neither brother testified, nor does the record or the parties' briefs specify why they returned, but the jury could infer they did so because the tops of the trees remained uneven. Martinez connected three metal tent poles together to a length of more than 20 feet to measure the height of the trees, apparently to gauge where to trim them level. While standing on the metal ladder about 12 feet off the ground, Martinez

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[1] We use Peter's first name to distinguish him from his brother and intend no disrespect. As required by the standard of review, we set out the facts in the light most favorable to the jury's verdict. (*Yale v. Bowne* (2017) 9 Cal.App.5th 649, 652.)

contacted the power line with his makeshift rod. Shocked, he fell to the ground, struck his head on the tennis court, and suffered "severe" but unspecified injuries.

Martinez sued Asplundh, among others. Asplundh acknowledged its role as Southern California Edison's line-clearing contractor tasked with ensuring 18 inches of "radial clearance" near Edison power lines, as required by utility regulations. In other words, trees and vegetation had to be trimmed before they grew within 18 inches below, above, or on either side of the power lines.

At trial, an Asplundh foreman testified that in August 2009, approximately nine months before the accident, he conducted an annual inspection of the power lines in the in-laws' neighborhood and determined their cypress trees did not need trimming because they were still three or four feet below the lines. An Edison employee testified he conducted a spot check of Asplundh's work about six months after Asplundh's August 2009 visit, and confirmed no trimming was required to maintain the requisite clearance before the lines' next inspection, presumably in August 2010.

To ensure 18 inches of clearance between its yearly inspections, Asplundh had to account for annual tree growth. Martinez's expert estimated the maximum growth rate of a cypress tree was as much as three feet in a year, which would have required a radial clearance of four and one-half feet in August 2009, while Asplundh's arborist testified Italian cypresses typically did not grow that fast. Asplundh's foreman answered affirmatively when counsel for Martinez asked him whether "Edison wants a clearance of 18 inches plus a maximum growth rate, and that growth rate being 3 feet for a cypress tree." Based on his experience, however, the foreman testified that the cypresses in the in-laws' neighborhood grew about six inches to a foot annually.

If trees in the in-laws' neighborhood *had* needed trimming in August 2009, an Edison supervisor explained the line clearance team would contact the homeowner directly to obtain permission, or would leave a note on the homeowner's door regarding the necessity of trimming, and in the absence of a response within 24 hours, would

presume consent and trim the trees. At trial, Martinez's counsel asked Asplundh's foreman if he generally would trim 10 feet off the top of cypress trees, and the foreman answered, "Yes." The foreman, however, did not testify that Asplundh would attempt to ensure a line of trees were trimmed level. Such aesthetic considerations were the homeowners' responsibility. Nor was there any testimony that cypress trees grow at a uniform rate.

To the contrary, the homeowner, Mr. Dupleich, testified his cypresses grew unevenly. There was "a lot of variance" and some "were a lot taller than others." For example, in 2000 he had his nephew trim them "[b]ecause they were very uneven," with some taller and some shorter, "so I told him to trim it all even." He estimated that at the time the brothers trimmed the trees, they were about 18 to 20 inches from the power lines.

In a special verdict, the jury found in favor of Martinez on Asplundh's asserted negligence by a vote of 10 to 2, but against Martinez by a vote of 9 to 3 on whether Asplundh's negligence was a substantial factor in Martinez's injuries.

After the verdict, Martinez filed motions to obtain a partial judgment notwithstanding the verdict (partial JNOV) and for a new trial. As to the partial JNOV, Martinez argued the evidence at trial "require[d] a judgment in favor of plaintiff as a matter of law that Asplundh's negligence was a substantial factor causing [his] harm." He similarly argued a new trial was required for lack of evidence to support the verdict, which he asserted was "against the law," and he also argued misconduct by Asplundh's attorney required a new trial.

After the hearing on the motions, the trial court denied the partial JNOV motion in a detailed minute order. The court observed, "The jury apparently wrestled with the first question on the verdict form as to defendant's negligence. The jury deliberated about 2 and a half hours and then had the following question[:] 'do we need to agree (9 people) on a question prior to moving on to the next question? What if we do

not get 9 people to agree? Do we stay on that question until 9 people agree?[’] After conferring with counsel, the Court sent back a note advising the jury that they needed to take each question in order. There was no indication at that time as to what question the jury was on. Two hours later, the jury then asked about question 2 on the Special Verdict form, said jury question reading in part as follows: ‘there is some question as to what substantial means. The instructions have been read but it still remains unclear.’ [¶] . . . [¶] [T]he Court, with the agreement of counsel, provided the jury with the second paragraph of the instruction which states: [¶] ‘Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.’ [¶] The Court declared a recess until 1:30 p.m., after which deliberations resumed. At 2:16 p.m. the jury reached their verdict.”

Noting that “at the time the accident occurred, the trees had already been trimmed,” and that Martinez “was using the pole to measure for evenness, not trimming,” the trial court found “the jury could have concluded that failing to trim the trees (or whatever they believed was Asplundh’s negligence) was not a substantial factor in causing Plaintiff harm.”

The trial court acknowledged Martinez’s argument “that had Asplundh trimmed the trees, there would have been no need to trim them, and therefore plaintiff would not have attempted to do so, and would not have been injured.” But the court found it was within the jury’s purview to reject “this logic” as “too speculative.” Indeed, the court concluded it was “entirely too speculative” to say the jury was *required* as a matter of law to find Asplundh caused Martinez’s injuries, as necessary to grant the JNOV. The court also added: “The jury’s verdict that defendant’s negligence was not a substantial cause of plaintiff’s injury shows that the jury believed that plaintiff was the sole cause of his injury by placing the metal pole 26 feet in the air into the overhead power line when there was at least 6’ of clearance between the trees and the power line when plaintiff was injured.”

The trial court did not issue a ruling on Martinez's new trial motion, thereby denying it as a matter of law (Code Civ. Proc., § 660), and Martinez now appeals.

II

DISCUSSION

A. *Substantial Evidence Supports the Jury's Verdict*

Martinez challenges the sufficiency of the evidence to support the jury's conclusion Asplundh did not cause his injuries. But "'the decision whether [a] breach *caused* the damage (that is, causation in fact) is . . . within the jury's domain'" (*Constance B. v. State of California* (1986) 178 Cal.3d 200, 207), which we therefore review under the deferential substantial evidence standard. (*Janice H. v. 696 North Robertson, LLC* (2016) 1 Cal.App.5th 586, 598.) "We must 'view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor . . . .'" (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1188.) Consequently, a party challenging the sufficiency of the evidence assumes a daunting burden. (*Ibid.*)

As a preliminary matter, Martinez attacks the trial court's reasoning in denying his partial JNOV motion on grounds the evidence supported the jury's verdict. He contends the trial court's inference that "the jury believed that plaintiff was the sole cause of his injury" is misplaced because he interprets the court's comment as an inference of comparative fault. He claims the inference is misplaced because the court's instructions directed the jury to assess comparative fault only if it found both negligence and that Asplundh's conduct was a substantial factor in his injuries. He also quibbles with the court's observation that "[t]here was substantial evidence the clearance requirement was met" as irrelevant in light of the jury's negligence finding.

But these challenges misfire in light of the standard of review. "'"The scope of appellate review of a trial court's denial of a motion for judgment notwithstanding the verdict is to determine whether there is any substantial evidence,

contradicted or uncontradicted, supporting the jury's conclusion and where so found, to uphold the trial court's denial of the motion."'" (*Shapiro v. Prudential Property & Casualty Co.* (1997) 52 Cal.App.4th 722, 730.) Simply put, we review the correctness of the trial court's ruling, not its reasons. (*California Service Station etc. Assn. v. American Home Assurance Co.* (1998) 62 Cal.App.4th 1166, 1171.)

Martinez employs a lengthy chain of reasoning to attack the jury's causation verdict, beginning with the jury's negligence finding. Martinez infers that unspecified finding related to Asplundh's decision that the cypress trees did not need trimming in August 2009. Assuming arguendo that Martinez is correct in making that assumption, he then argues the jury also was required to conclude that if Asplundh had determined trimming was necessary, as it should have, Asplundh then would have been successful in contacting the Dupleiches regarding the necessity of trimming the trees, and the homeowners would have granted Asplundh exclusive permission to trim rather than arranging for someone else to trim the trees to their aesthetic liking as they had in the past. He then reasons Asplundh would have trimmed the trees by 10 feet according to testimony Martinez elicited from Asplundh's foreman, leaving 13 or 14 feet of clearance from the power lines rather than the three or four feet necessary to meet the radial clearance requirement before its next inspection, and doing so would have lowered the tree height to 12 or 13 feet, which coincidentally was approximately the height to which Mr. Dupleich's nephew had trimmed the trees 10 years earlier. Because Mr. Dupleich seemed to be satisfied 10 years earlier with the height to which his nephew had trimmed the trees, Martinez concludes Dupleich also would have been satisfied with Asplundh trimming the trees to that height if they had done so in August 2009.

Martinez then reasons that Mr Dupleich, content with the height of the trees, would not have sought nine months later a recommendation from his gardener for a tree trimmer, Peter would not have overheard that conversation, nor relayed it to his brother, the brothers would have had no reason to trim Peter's in-laws' cypresses, and

therefore Martinez never would have been injured. In making this argument, Martinez relies on the first paragraph of the jury instruction defining the requisite "substantial factor" for causation (CACI No. 430), which requires only that the defendant's negligence "contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm."[2]

There are two flaws in Martinez's argument. First, in focusing solely on the height of the trees as a basis for the homeowners' projected satisfaction in May 2010, thereby preventing the ill-fated conversation Peter overheard, Martinez ignores that leveling the trees was important to Dupleiches, indeed a "primary" consideration. There was no evidence that if Aspundh had trimmed the trees in August 2009, it would have cut the tops of the trees to the same height. The jury could infer from the brothers' efforts that pruning to ensure the trees were level was a separate and additional step beyond trimming for radial clearance, and was not something Asplundh would have undertaken if it trimmed the trees in August 2009.

The jury also could infer that if Asplundh simply took 10 feet off each tree, they would have remained at different heights, just as they were when Mr. Dupleich asked his gardener to recommend a tree trimmer. Martinez focuses on the trees' height, but the jury reasonably could doubt it was the controlling factor. For instance, the jury could infer the trees were shorter when Mr. Dupleich's nephew trimmed them 10 years earlier, but the Dupleiches nevertheless had them trimmed because they were uneven. Consequently, the jury reasonably could conclude it was possible, or even likely, the Dupleiches would have wanted the unevenness addressed even if Asplundh trimmed for radial clearance in August 2009. The jury therefore may have had reservations about concluding Martinez had met *his* burden of proof to establish it was more likely than not

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[2] The instruction's second paragraph states: "Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct" (CACI No. 430).

that anything Asplundh failed to do was a substantial factor in causing his injuries. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1123 (*Jolly*) [plaintiff bears burden of proving elements of negligence cause of action, including causation].)

Second, and related, in arguing there was an inevitable chain of causation from the jury's negligence finding to determining Asplundh's conduct was a substantial factor in his injuries, Martinez assumes that in proving negligence, he proved causation. But they are distinct elements, and he bore the burden of proof on both. (*Jolly*, *supra*, 44 Cal.3d at p. 1123.) Where, as here, the party challenging the verdict shouldered the burden of proof at trial, the question for the reviewing court is whether the evidence required a verdict for the appellant as a matter of law. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 570-571; *Caron v. Andrew* (1955) 133 Cal.App.2d 402, 409.) Asplundh bore no burden to disprove the causation chain Martinez constructed. Rather, it was the jury's prerogative to conclude that any one or more asserted links was merely speculative or otherwise a step too far for Martinez to meet his burden.

As discussed, the jury reasonably could have found the unevenness of the trees undermined Martinez's ability to prove causation. Additionally, Martinez's causation argument would have been stronger if he had been injured during the initial tree trimming. The jury reasonably could infer that once the trees were safely trimmed, which was no more than Asplundh would have done, the brothers' subsequent effort to prune them level broke the causal chain Martinez attempted to establish, rendering Asplundh's initial failure to trim the trees an insignificant or incidental factor. In other words, with the tops of the trees now well outside the radial clearance zone to a distance of five or six feet, and beyond even the maximum growth rate of three feet plus 18 inches that formed the basis for Martinez's negligence theory, the jury reasonably could conclude Asplundh's failure to trim the trees in line with Martinez's theory played no substantial factor in the brothers returning to the next day, when Martinez was injured.

As sole judges of witness credibility, the jury also may have questioned whether it was likely Asplundh would cut a full 10 feet of the cypress trees when they were not required to do so. (See *Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631-633 [jury may reject even uncontradicted expert testimony].) Though Martinez elicited that number from Asplundh's foreman, the jury may have found him unreliable when he agreed with Martinez's suggestion that a cypress's annual growth rate was three feet, but also testified it was only six to 12 inches. With a trim of less than 10 feet, and thus increased tree height, the jury may have concluded it was even more likely the Dupleiches would have wanted the trees trimmed, further diluting Martinez's causation claim. Or the jury simply may have concluded the chain of events was filled with too many twists and turns to have confidence in tracing the injury to Asplundh as a substantial factor, including: an ill-fated conversation overheard by chance, a particular aesthetic or attempt to meet it, the homeowners' trip out of town on that day, an initial trimming without mishap, an ill-conceived measuring rod, etc. "[O]ur task is not to reweigh the evidence" (*Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 597), and we therefore may not disturb the jury's verdict.

B. *The Alleged Attorney Misconduct Did Not Require a New Trial*

Similarly, the trial court reasonably could conclude alleged misconduct by Asplundh's trial counsel did not require a new trial, particularly where Martinez only sought an admonition as to one of six claimed instances of misconduct. "[T]o preserve for appeal an instance of misconduct of counsel in the presence of the jury, an objection must have been lodged at trial and the party must also have moved for a mistrial or sought a curative admonition unless the misconduct was so persistent that an admonition would have been inadequate to cure the resulting prejudice. [Citation.]" (*Garcia v. ConMed Corp.* (2012) 204 Cal.App.4th 144, 148 (*Garcia*).) "Raising the issue for the first time in a posttrial motion is insufficient because the trial court has no ability to

correct the misconduct at that point." (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 295 (*Bigler-Engler*).)

Additionally, "it is not enough for a party to show attorney misconduct. In order to justify a new trial, the party must demonstrate that the error was prejudicial." (*Garcia, supra,* 204 Cal.App.4th at p. 149.) Otherwise, if any claim of "'impropriety of counsel always afforded ground for a new trial, there would be little prospect of any litigation ever becoming finally determined.'" (*Menasco v. Snyder* (1984) 157 Cal.App.3d 729, 732.) The reviewing court makes an independent determination of prejudice. (*Bigler-Engler, supra,* 7 Cal.App.5th at p. 296 & fn. 16, citing *Los Angeles v. Decker* (1977) 18 Cal.3d 860, 872.) "In determining prejudice, we evaluate the following factors: '(1) the nature and seriousness of the misconduct; (2) the general atmosphere, including the judge's control of the trial; (3) the likelihood of actual prejudice on the jury; and (4) the efficacy of objections or admonitions under all the circumstances.'" (*Id.* at p. 296.)

Martinez based his new trial motion on six instances of alleged misconduct committed by Asplundh's trial counsel: (1) improperly eliciting testimony in cross-examining Martinez's neurologist to suggest Martinez was an alcoholic; (2) suggesting Martinez violated the Penal Code by bringing metal tools close to power lines; (3) attempting to elicit testimony concerning whether Martinez failed to comply with Occupational Safety and Health Administration (OSHA) standards; (4) questioning a witness regarding the legality of Martinez's use of a metal ladder; (5) inaccurately describing Martinez's opening statement during closing argument; and (6) misstating the law regarding whether conduct is a substantial factor in causing a victim's injury. We examine each of these claims below, grouping some together for ease of reference.

First, Martinez's primary claim on appeal is that Asplundh's trial counsel committed misconduct when he cross-examined Martinez's neurologist regarding a body scan following Martinez's accident, as follows: "Doctor, didn't that ultrasound find a

fatty liver which was possibly related to alcoholism?" When the doctor answered, "I remember that the ultrasound found echogenic findings in the liver," but "I don't remember the report saying it was secondary to alcoholism," Asplundh's attorney pressed, "Or alcohol use," but the doctor responded, "I don't remember that." Counsel for Martinez objected, "Your Honor 352. Relevance. Beyond the scope," and the trial court sustained the objection, but Martinez did not request an admonition.

Instead, Martinez sought to exploit this inquiry to his advantage. Martinez opened his closing argument in the following manner: "Good morning. I believe it became clear that plaintiff . . . had proven his case two Wednesdays ago. On that Wednesday morning you may recall Dr. Florin testified. And he was plaintiff's last witness in plaintiff's case. On cross-examination of Dr. Florin, who was the last witness in the case for plaintiff, at that time the defense, Asplundh, asked Dr. Florin, 'Well, isn't Mr. Martinez an alcoholic?' No relevance to the case. No evidence to support it. *And what does that tell everybody?* It tells me that Asplundh believed plaintiff had proven its case, otherwise why ask a question that had no evidence to support it. Simply to convince the jury that he was not worthy of recovery."

Asplundh's counsel tried to rebut this argument. Specifically, Asplundh's lawyer attempted to address the issue in his closing argument, stating, "[P]laintiff argued that we tried to make him out to be some type of — or something — the issue was the doctor noted that the alcoholic use with the medications could create problems, headaches." But the trial court sustained Martinez's objection when Martinez pointed out, "That is nowhere in the record. It misstates the record." The court then immediately sustained another objection based on lack of evidence when counsel tried to claim "we were pointing to . . . couldn't these relate to his vomiting and nausea."

Martinez argues he only addressed the issue in closing argument because Asplundh's cross-examination placed him in the position of trying to "unring the bell" regarding any suggestion Martinez suffered from alcoholism. It is true the issue arose

from Asplundh's questioning, but Martinez made a tactical decision to try to turn it to his advantage, rather than seeking an admonition or other redress from the trial court. Indeed, Martinez made Asplundh's unfounded suggestion the opening topic of Martinez's closing argument. Misconduct claims furnish no basis for reversal absent a request for an admonition (*Garcia*, *supra*, 204 Cal.App.4th at p. 148).

We also find no merit in Martinez's claim that Asplundh misrepresented Martinez's opening statement. In closing argument, Asplundh's counsel told the jury that "at the beginning of this case plaintiff indicated that they were going to prove to you that there was less than 18 inches of clearance." Martinez now asserts in a cursory fashion that "Asplundh's misrepresentation of plaintiff's opening statement was misconduct" because Martinez's counsel actually had stated an intent to show "that Asplundh did not clear [the power lines] for 18 inches *plus one year maximum growth*. The maximum growth of a cypress tree is three feet. They did not clear for that growth." (Italics added.)

Viewed in light of the whole record, there is little grist for a misconduct claim in Asplundh's single statement. In particular, the governing utility regulation specified 18 inches of clearance. While the concept of 18 inches plus annual growth of a cypress tree is distinct from a bare radial clearance, by the end of the trial the jury was well-versed in both the concept and the party's competing views of the evidence. We conclude the jury reasonably would regard Asplundh's closing statement as a shorthand way of stating Martinez had not proven negligence. Moreover, we can discern no prejudice from the statement where the jury found Asplundh was negligent.

Martinez's four remaining misconduct claims all relate to the law governing the case. One is particularly troubling, precisely because the parties during trial briefed the relevance of Penal Code section 385, which makes it a misdemeanor to place or move tools or equipment within six feet of high voltage power lines. The trial court ruled it was not relevant and, accordingly, it would give the jury no instruction on

negligence per se, but Asplundh's counsel nevertheless attempted to question one of Asplundh's tree trimming experts regarding that exact code section.[3] The issue first arose in Asplundh's opening argument, when counsel asserted "the evidence is going to show," as to Martinez's actions, "not only was it unsafe, but it was unlawful to do what he did. The law does not allow you to use the equipment —," at which point Martinez objected, "Your Honor. He's instructing the jury," and the court sustained the objection.

Based on this exchange, the parties during trial briefed their dispute over whether the Penal Code had any bearing on the case, and the trial court ruled Penal Code section 385 was neither relevant nor furnished any basis for a negligence per se instruction. In the face of this ruling, however, Asplundh's counsel questioned its expert, James McNair, as follows: [Q]: "Are you aware of any rules or laws that prohibit the work around power lines within 6 feet? [Objection sustained.] [Q]: Are you aware of any rules of law that speak to working around power lines? [Objection sustained.] [¶] . . [¶] [Q]: Are you familiar with Penal Code [section] 385? [¶] Mr. Hall: Objection. Prior Order. [¶] Sustained. [¶] Mr. Purcell: Your Honor, may we approach? [¶] The Court: "No, I think it's [not] for an expert to opine on the laws. [¶] Mr. Purcell: Yes, Your Honor. [¶] The Court: I'll instruct the jury on the law."

Had Martinez sought an admonition, or had the trial court believed it was necessary sua sponte, the court would have been within its discretion to admonish Asplundh's attorney for ignoring the court's earlier order that Penal Code section 385 was irrelevant. We disapprove of the conduct of Asplundh's attorney. Ignoring trial court rulings, if intentional, is misconduct warranting sanctions. It does not necessarily

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[3] Penal Code section 385, subdivision (b), provides: "Any person who either personally or through an employee or agent, or as an employee or agent of another, operates, places, erects or moves any tools, machinery, equipment, material, building or structure within six feet of a high voltage overhead conductor is guilty of a misdemeanor."

follow, however, that *Martinez* suffered prejudice warranting reversal based on this exchange.

Applying the relevant factors, while (1) the misconduct was serious because it was in direct contradiction to the trial court's earlier order, (2) the record reflects a trial "atmosphere" in which the court exercised tight control with a series of sustained objections, (3) the likelihood of actual prejudice "on the jury" was low, particularly given the court's sua sponte admonition that it would instruct the jury on the law, and (4) the "efficacy of objections or admonitions under all the circumstances" was likely high. (*Bigler-Engler*, *supra*, 7 Cal.App.5th at p. 296; compare *Martinez v. Department of Transportation* (2015) 238 Cal.App.4th 559 [reversal where counsel ignored the trial court's pretrial rulings literally dozens of times].) In particular, in light of the court's admonition *it* would instruct the jury on the governing law, we must assume jurors followed those instructions as controlling rather than any insinuations by counsel. (*People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8 ["We presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade"].)

The same is true regarding Martinez's other three claims of misconduct in which Asplundh allegedly made insinuations or misstatements regarding the applicable law. In order, when Asplundh's counsel asked its tree trimming expert, Robert Spease, "Do you have any opinions regarding the use of an aluminum ladder," Spease answered, "Yes, in fact, it's very dangerous," and added that "[i]t's illegal" when counsel asked, "Why is that?" This was the only instance of alleged misconduct in which Martinez sought an admonition, which the trial court granted, stating, "Sustained. The jury's to disregard opinions about what's legal or not."

Later, Asplundh's attorney also asked Spease, "Now are you familiar with OSHA standards," prompting a sustained objection and a sidebar outside the jury's presence. Asplundh's attorney nevertheless than asked Spease, "Are you aware whether

OSHA has any standards —," causing Martinez to protest, "Objection, Your Honor. We just side barred on it." The trial court sustained Martinez's objection.

Last, Martinez complains Asplundh's lawyer misstated the applicable law on causation in closing argument, as follows: "Now, just to be complete, No. 2, substantial factor. Substantial factor means we can't just play a small role in this. It has to be something like in the but for cause. Something substantial we did to create this—." Martinez objected to the trial court, "It's misstating your instructions," which the trial court sustained and directed Asplundh's attorney, "[W]hy don't you show the instruction you're talking about." The attorney then recited the instruction verbatim to the jury: "You'll have this instruction with you in the jury room. 'Substantial factor in causing harm the fact of [*sic*: garbled] a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.'"

While these instances reflect that Asplundh's lawyer attempted to suggest Martinez's conduct was "illegal" or in violation of "OSHA" or defined a substantial factor as more than a "small role," we must presume the jury looked to the trial court's instructions as the law governing the case. The trial court observed during the new trial hearing that it had been "watching the jurors like a hawk" and did not believe, for instance, that references by Asplundh's counsel to alcohol "had any bearing on this jury at all." On this record, in which the trial court sustained Martinez's objections and correctly instructed the jury on the law, there is no basis to overturn the judgment.

III

DISPOSITION

The judgment is affirmed. Each side shall bear its own costs on appeal.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.