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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK BUTLER,

Defendant and Appellant.

2d Crim. No. B167710
(Super. Ct. No. MA023026)
(Los Angeles County)

Frank Butler appeals a judgment after conviction by jury verdict of corporal injury to a spouse, count I (Pen. Code,¹ § 273.5, subd. (a)) and assault with a deadly weapon (§ 245, subd. (a) (1)) with findings that he inflicted great bodily injury and personally used a deadly weapon, count II (§§ 12022.7, subd. (a), 12022, subd. (b)(1)). Butler's counsel did not object to photographs depicting blood stains on the victim and at the crime scene. Neither did he request a supplemental probation report. We conclude this does not establish ineffective assistance of counsel. The sentence was erroneous under compulsion of *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531]. The court imposed the high term of four years on count I, corporal

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

injury to a spouse, based on factual findings it made without a jury. We reverse and remand for resentencing.

FACTS

Daria Butler, Butler's wife, testified that she had an argument with Butler. While standing behind her, he struck her on the head with an iron. She said, "I was cowering down to get away from him . . . the blows kept coming." Daria called the police. She said she gave "them as much of a statement as I could before the paramedics came to bandage me up and take me to the hospital."

Butler testified that Daria attacked him with a knife. In self-defense he hit her with an iron "three or four [times] before the iron broke." He said Daria did not appear to be wounded.

In rebuttal, Laquan Butler, Butler's son, testified that he came into the room after the incident and saw no knife. Barbara Butler, Laquan's sister, testified that when she entered the room she saw blood everywhere. She did not see a knife.

Without objection, the prosecution introduced several enlarged photographs showing the trail of Daria's blood at various places at the crime scene. The photographs also depicted injuries to her hand and head.

Post Trial Proceedings

After the jury verdict William Clark, Butler's counsel, advised the court, "we have an old probation report." The court asked, "Do you want that brought up to date with an interview perhaps of your client?" Clark responded, "I think we can use the probation report that we have."

At the sentencing hearing, Clark requested that the court place Butler on probation. He said, "His entire adult record consists of a 23103 wet reckless conviction [in] 2001. He has no other adult record, no apparent juvenile record of any kind." "At the time of his arrest . . . he was gainfully employed" He said Butler was not a "threat upon the community," was a "good citizen" and the incident with Daria was "unique." He claimed that aside from the current offense, Butler had otherwise complied with his probation conditions.

The probation report stated as a mitigating factor Butler's insignificant record. It recommended no probation and a prison sentence with "a mid-base term."

The court found "this is certainly not a case for probation due to the seriousness of the crime" It found as a factor in mitigation Butler's lack of a significant prior record. It found a factor in aggravation the "vulnerability" of Daria and that Butler attacked her from behind. It imposed the high term of four years on the corporal injury to a spouse count. It imposed consecutive sentences of three years for the great bodily injury finding and one year for the deadly weapon enhancement. It stayed the sentence on the assault with a deadly weapon count.

DISCUSSION

I. *Ineffective Assistance of Counsel*

A. The Photographs

Butler states that at trial the prosecution introduced "large color printouts" depicting "blood splattered over the doors, the carpet, a fan and the wall." He contends his counsel was ineffective because he did not object to this "inflammatory and extremely graphic" evidence.

To prove ineffective assistance of counsel, Butler must show 1) his counsel's performance was deficient; and 2) there was a reasonable probability of a different result but for that performance. (*People v. Quinn* (2001) 86 Cal.App.4th 1290, 1295; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

"The decision whether to object to evidence at trial is a matter of tactics and, because of the deference accorded such decisions on appeal, will seldom establish that counsel was incompetent." (*People v. Lucas* (1995) 12 Cal.4th 415, 444.) "[T]he mere fact that counsel, had he [or she] chosen another path, "might" have convinced the court to issue a favorable evidentiary ruling, is not enough to carry defendant's burden of demonstrating [incompetence]' [Citations.]" (*Id.* at p. 445.)

Here Clark could have reasonably concluded that an objection would fail. The witnesses gave different versions of this incident. Butler testified that Daria did not appear to be wounded. The photographs rebut that testimony. (*People v. Heard* (2003) 31 Cal.4th 946, 976.)

Crime scene photographs are admissible to show the "nature of the attack." (*Ibid.*) "[T]he prosecution was not obliged to prove these details solely from the testimony of live witnesses" (*People v. Jackson* (1996) 13 Cal.4th 1164, 1216.) The prosecution also alleged great bodily injury. "[T]he photographs were probative of [those] allegations" (*People v. Heard, supra*, at p. 976.) Enlarged photographs may properly assist the jury. (*People v. Carrera* (1989) 49 Cal.3d 291, 328-329.)

Butler contends Clark should have objected on the ground that the probative value of the pictures was substantially outweighed by the undue prejudice to him. (Evid. Code, § 352.) But Butler has not shown that the photographs were unduly prejudicial. Where testimony establishes a brutal offense, courts should not presume the average juror is incapable of "dispassionately evaluating" photographs which corroborate the testimony. (*People v. Thompson* (1992) 7 Cal.App.4th 1966, 1973-1974.) The photographs also corroborated Barbara Butler's testimony that there was blood "everywhere." Moreover, we have reviewed the pictures and conclude that a reasonable juror would not be "unduly influenced by them." (*Id.* at p. 1974.)

B. The Probation Report

Butler contends that the record establishes that Clark was ineffective because he did not request a supplemental probation report.

He claims Clark failed to request the report due to neglect, not strategy. He says his lawyer "had not conducted any investigation to determine whether there was any additional mitigating factor in [Butler's] favor." Butler "believes" Clark did not "forward . . . letters of reference to the Court." But he does not cite to the record and bases his claims on matters outside of it. That is insufficient to support an argument on appeal. (*People v. Dougherty* (1982) 138 Cal.App.3d 278, 282-283.) But even so, Clark mentioned a series of favorable and mitigating factors at the sentencing hearing. The court considered that information but concluded that those factors would not change the sentence. Favorable letters do not support a reduced sentence where the "qualities spoken of in letters were contradicted by defendant's conduct in committing crimes." (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1265.) Butler has not produced the letters and therefore has not shown how they would change the result.

Butler speculates that a new probation report would have been favorable had Clark requested one. "But speculation does not support a claim of ineffective assistance." (*People v. Quinn, supra*, 86 Cal.App.4th at p. 1295.) Where the record on appeal is inadequate, as here, the defendant must raise the ineffective assistance claim in a habeas proceeding. (*People v. Mendoza Tello, supra*, 15 Cal.4th at p. 265.) Butler on this record has not shown ineffective assistance.

II. *The Sentence*

The sentence, however, is erroneous. The trial court imposed the high term of four years for the conviction of the corporal injury to a spouse, count I. It made factual findings to support the upper term sentence. But there were no jury findings on those sentencing issues. That violated Butler's constitutional right to a jury trial on the factors which supported the higher sentence. (*Blakely v. Washington, supra*, ___ U.S. ___ [124 S. Ct. 2531].)

The sentence is reversed so that Butler be resentenced consistent with *Blakely*. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

Martin L. Herscovitz, Judge
Superior Court County of Los Angeles

David R. Denis for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, William T. Harter, Supervising Deputy Attorney General, Myung J. Park, Deputy Attorney General, for Plaintiff and Respondent.