Filed 11/29/04 P. v. Gomez CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. LOUIS ANDRES GOMEZ, Defendant and Appellant.	D041699 (Super. Ct. No. CF-7199)

APPEAL from a judgment of the Superior Court of Imperial County, James Harmon, Judge. Affirmed in part; reversed in part.

Louis Gomez appeals from a judgment convicting him of second degree murder and assault with a deadly weapon by a life prisoner with malice aforethought. He argues for reversal based on: (1) a jury visit to the prison where the killing occurred; (2) the giving of CALJIC No. 2.62 regarding adverse inferences from a testifying defendant's failure to explain inculpatory evidence; and (3) improper rebuttal closing argument by the prosecutor. Finding no reversible error, we affirm the judgment as to the convictions.

As to sentencing, we find the court's imposition of an upper term sentence violated the principles set forth in the United States Supreme Court's recent decision in *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531], but that the imposition of consecutive sentences did not. We reverse the sentence and remand for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

Gomez, a life prisoner in a maximum security prison, was a student in a class taught by Gerardo Larios in the prison's education building. The morning of April 13, 1998, Gomez and prisoner Abe Mendibles engaged in an argument while in Larios's class. Because of the argument, Larios requested that Correctional Officer Lupe Cuevas pay extra attention while monitoring his classroom that day. After the inmates had returned to the classroom from an afternoon break, Officer Cuevas saw Gomez and another inmate in the restroom next to Larios's classroom and signaled to them to go to the classroom.

Shortly thereafter, Gomez ran into the classroom and repeatedly stabbed Mendibles while he was seated at his desk. According to Larios, prior to the attack Mendibles was seated with his head looking down at his desk; Mendibles did not move when Gomez came running into the classroom; and during the attack Mendibles was sitting in his chair and trying to defend himself until he fell to the ground. After the stabbing, Gomez ran out of the classroom and was apprehended by Officer Cuevas.

Gomez's version

Testifying in his own defense, Gomez stated that on April 13, Mendibles accused Gomez of being a "rat."[1] Mendibles told Gomez: "Get your shit, because I'm going to handle my business." Gomez interpreted Mendibles's statement to mean that they would have a knife fight and Mendibles would stab him. Gomez knew Mendibles had stabbed a person before; he had seen Mendibles scare other inmates with knives; and he knew that Mendibles had hidden knives in the bookcase in the classroom and in an exit sign in the hall outside the classroom.

Over the course of the day, Gomez and other inmates tried unsuccessfully to calm Mendibles. Mendibles told another inmate that Gomez should watch his back because Mendibles was going to stab him. During a morning break, Gomez tried to talk to Mendibles while they were in the restroom but Mendibles said there was nothing to talk about and he was going to "handle his business." Back in the classroom from the morning break, Gomez checked the bookcase and saw that the hidden knife was gone. Gomez did not think Mendibles would attack him in the classroom at that time because it was not a "blind spot" but was an area visible to the teacher.

Later, on his way back from lunch, Gomez stood on a trash can to check the knife hidden in the exit sign and saw it was still there. During an afternoon break in the gym, Gomez saw Mendibles take a knife out of his shoe and put it in a shower bag. When Gomez went up to Mendibles to talk to him, Mendibles repeated his threat. As the

inmates were walking back to class, Mendibles told Gomez not to return to class. Gomez interpreted this statement to mean that he should not go back to class because Mendibles would stab him. Gomez tried to stay in the gym but was told by correctional officers to go to class.

Although Gomez was not sure if Mendibles would stab him when he returned to the classroom, Gomez was afraid Mendibles would stab him at some point when he turned his back. On his way back to the classroom from the afternoon break, Gomez retrieved the knife hidden in the exit sign by the classroom. Gomez went into the restroom to avoid the classroom, but was instructed by Officer Cuevas to return to the classroom. As Gomez entered the classroom, Mendibles looked at him and "flinch[ed] up" as if he was going to stand up. Gomez thought Mendibles was going to kill him right there because Mendibles had told him not to go back to class, so, to defend himself, Gomez pulled out the knife he had retrieved from the exit sign and "went after" Mendibles. Gomez blacked out and did not remember actually stabbing Mendibles, although he knew he was in a fight with him.

Jury Verdict

The instant case was Gomez's second trial. In the first trial, the jury acquitted him of first degree murder and deadlocked between second degree murder and manslaughter. In this second trial, the jury rejected Gomez's defenses of perfect or imperfect self-

---

1 Gomez had upset Mendibles by telling other inmates that Mendibles was going to be changing cells.

defense, and found him guilty of second degree murder and assault by a life prisoner with a deadly weapon with malice aforethought. (Pen. Code,[2] §§ 4500, 187, subd. (a).)

DISCUSSION

CONVICTIONS

I. *Jury's Visit to the Prison*

A. *Background*

At the prosecution's request and over defense objection, the jury was taken to view the prison where the killing occurred. During the discussions regarding the propriety of a visit, the prosecutor asserted that it was difficult to use photographs to show various distances and areas; a site visit would give the jurors a more thorough view of the different locations; and deadlocked jurors in Gomez's first trial told her that they had questions about different prison areas. Defense counsel vigorously objected to a site visit, arguing a visit would not provide the jury with any relevant information; photographs of the scene provided the jury with adequate information; it would create prejudice if Gomez had to wear prison blues and be shackled and surrounded by correctional officers in front of the jury during the visit; there was a potential for inadvertent contact between jurors and correctional officers or inmates; and there was a potential for violence at the prison which could prejudice the jury's view of the defendant.

The court concluded a site visit would be educational; would allow the jury to see what was being referenced in the testimony; and would, for example, allow the jury to

---

2 Subsequent statutory references are to the Penal Code.

see the distance between the bathroom and the classroom. Recognizing that a visit created a risk of improper influences on the jury, the court took precautions to prevent this from occurring, including: preparing a pre-approved script about what the court would say to the jury; limiting the areas the jury would visit to the locales referred to during trial; requiring that the prison be in lockdown status so there would be no interaction between the jury and the inmates; requiring the absence of any correctional officers who were trial witnesses; and allowing Gomez to wear concealed handcuffs and to be free of leg and ankle shackles so he could walk freely and without visible restraints.

At the time of the visit, the court told the jurors that the purpose of the visit was to give them a firsthand view of certain areas that had been referred to during trial. The court advised the jurors that no attempt had been made to recreate the scene as it existed on the date of the offense and in particular they should not assume the classroom was in exactly the same configuration; rather, they should rely on their notes and the photographs and diagrams presented during trial. At the prison, the jury visited the education building, the gymnasium, and the dining hall. In the education building, they observed the exit sign, the inmates' bathroom, the classroom, and Officer Cuevas's office.

At the beginning of the visit while the jurors were in a yard outside the education building, an alarm over the education building sounded. In response to the alarm, several correctional officers moved quickly toward the education building; however, another officer signaled that it was a false alarm and yelled that the alarm should be turned off. Gomez, who was standing near the door of the education building, was ordered to "get down" as correctional officers ran towards the building. Gomez complied with the order

by squatting down against the wall of the building and using his hands to steady himself, which action made his handcuffs visible. When the alarm sounded, the trial judge, the prosecutor, and the jurors were standing a substantial distance from Gomez and his counsel.[3] From that distance, the prosecutor saw Gomez squatting but she could not hear the correctional officers direct him to get down and she could not see his handcuffs.[4]

During the visit an inmate put an 8 1/2-by-11-inch sign in the window of the prison library that read "not guilty." Defense counsel saw the sign; however, the judge and the prosecutor did not see the sign as they walked by the law library.[5] It was not known whether jurors saw the sign.

Gomez unsuccessfully moved for mistrial because of these occurrences during the site visit.[6]

On appeal, Gomez argues that the court abused its discretion (1) in allowing the visit to the prison, and (2) in failing to conduct an inquiry of the jury regarding the incidents that occurred during the visit. He asserts that because of these errors, he was denied his constitutional rights to a fair trial by an impartial jury.

---

3 Defense counsel and the prosecutor opined that the distance was 30 to 50 feet, whereas the trial judge thought it was 30 to 40 yards.

4 The trial judge did not see Gomez at all during the sounding of the alarm.

5 A bailiff informed the prosecutor of the sign and showed it to her after she had already passed the law library window.

B. *Analysis*

1. *Discretion to Allow the Visit*

Gomez contends it was an abuse of discretion to allow the visit to the prison because there were no disputed issues pertinent to the prison site, and thus the visit did not provide the jury with any relevant information. Gomez points out that there were photographs and diagrams showing the layout of the classroom and the prison, and asserts that actual observation of a maximum security prison site by the jury was unnecessary and potentially prejudicial to the defense. As to the potential for prejudice, he suggests that the "proof is in the pudding"—i.e., the unexpected incidents that did in fact occur during the visit (the alarm and the "not guilty" sign) underscore the correctness of his position that it was an abuse of discretion to allow the visit absent a compelling reason to justify it.

Section 1119 provides: "When in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, or any personal property which has been referred to in the evidence and cannot conveniently be brought into the courtroom, it may order the jury to be conducted in a body, in the custody of the sheriff or marshal, as the case may be, to the place, or to the property, which must be shown to them by a person appointed by the court for that purpose; and the officer must be sworn to suffer no person

---

6 Gomez also moved for a mistrial based on the fact that trash cans, present during the crime, had been removed from the education building at the time of the visit. On appeal, he does not reiterate this ground as a basis for reversal.

to speak or communicate with the jury, nor to do so himself or herself, on any subject connected with the trial, and to return them into court without unnecessary delay, or at a specified time."

Section 1119 gives the court specific statutory authority to permit the jury to view the scene of the crime. (See *People v. Robinson* (1970) 5 Cal.App.3d 43, 47.) The statute has been interpreted to preclude any communications during a site visit that would constitute "extraneous contact and potential tampering." (*People v. Bolin* (1998) 18 Cal.4th 297, 324.) Additionally, the courts have held that the defendant and defense counsel have the right to be present during the jury view of the scene because a site visit provides visual evidence to the jury. (*People v. Bush* (1886) 68 Cal. 623, 630-631.)

We review a trial court's decision on a motion for jury view under the abuse of discretion standard. (*People v. Lawley* (2002) 27 Cal.4th 102, 158.) When evaluating a trial court's decision *denying* a request for a site visit, appellate courts have readily found no abuse of discretion and emphasized that "'it is difficult to conceive of a case in which the facts would justify a reversal for an abuse of such discretion.'" (*People v. Wheeler* (1971) 23 Cal.App.3d 290, 312, overruled on other grounds in *People v. Wheeler* (1978) 22 Cal.3d 258, 286-287, fn. 35, quoting *People v. Wong Hing* (1917) 176 Cal. 699, 705.) However, on the issue of whether a site visit should be *permitted*, our Supreme Court long ago cautioned: "'Sending a jury out to view premises, even when clearly within section 1119 of the Penal Code, is a hazardous proceeding, and frequently leads to difficulties; and it would be well for trial courts not to make use of the power therein given except in cases which seem to imperatively call for it.'" (*People v. Wong Hing,*

supra, 176 Cal. at p. 705.) Thus, a sound exercise of trial court discretion under section 1119 requires the court to consider whether the site visit is sufficiently relevant to the issues at trial so as to warrant the risk of exposing the jury to improper outside influences.

Here, we conclude the record does not show the site visit was sufficiently relevant to justify the risk of untoward exposure.

The record here reveals that during witness testimony, various areas of the prison were described and referred to, including the education building where inmates were patted down prior to entry and the separate gymnasium and dining hall structures where inmates were escorted during the class breaks. The witnesses described the education building containing the classroom where the assault occurred; the bathroom next to the classroom where Gomez went just prior to the assault; and the exit sign purportedly hiding a knife. Additionally, the jury was presented with photographs and diagrams depicting various prison areas.

Our review of the record supports Gomez's assertion that the references to the prison layout primarily provided general background information about the crime scene and were not of any significant relevance to the sole disputed issue of whether Gomez—who essentially admitted to stabbing Mendibles—acted in self-defense. Neither the comments by the court and the prosecutor at trial, nor the People's briefing on appeal, are particularly helpful in explaining why the visit would assist the jury in resolving this disputed issue. The court's and prosecutor's comments provide no information tying the prison layout to the question of Gomez's state of mind. On appeal, the People simply

point to the court's and prosecutor's comments to justify the visit, again without explaining how the visit provided relevant information.

We have been able to glean some relevance of the site layout to witness credibility—i.e., in closing argument, the prosecutor referred to the jury's view of the site and argued that contrary to the testimony of defense witnesses, it was unlikely that an inmate would have been able to hide, check on, or retrieve a knife on top of the exit sign (which required standing on a trash can to reach the sign) without this conduct being observed by correctional officers. However, notwithstanding that the layout of the prison site may have had some relevance, this is not a case which "imperatively call[s] for [a site visit].'" (*People v. Wong Hing, supra*, 176 Cal. at p. 705.) Going to the site required that the prison be placed in lockdown to avoid contact between the jurors and inmates, and that the defendant be dressed in a prison uniform, accompanied by several correctional officers, and shackled (albeit in the least obvious manner possible) if he wanted to exercise his right to join the jurors on the visit.[7] As recognized by the court and argued by the defense, the potential existed that something could occur at the site to improperly influence the jury, and, prophetically, there were unexpected occurrences notwithstanding the diligent protective measures taken by the court. Given the potential for problems inherent in the jury's departure from the courtroom, the court abused its discretion in

---

7 Gomez was dressed in the blue prison uniform, and the chain of his handcuffs was threaded through his clothing so the restraints were not visible as long as he kept his hands in his pockets. He was accompanied by two or three correctional officers and defense counsel.

allowing the visit without a showing that there was an evidentiary need for a view of the scene.

Although we conclude the record does not show sufficient relevancy to justify the visit, reversal is not warranted unless the trial court's decision "result[ed] in a manifest miscarriage of justice." (*People v. Lawley, supra*, 27 Cal.4th at p. 158.) We see no miscarriage of justice arising from the fact of the site visit alone. We are not persuaded by Gomez's assertion that the fact that the site visit was to a maximum security prison in and of itself prejudiced the defense. The jury already knew Gomez was a life prisoner, subject to custody and restraint by the state, because he was charged with the offense of assault by a life prisoner and he testified regarding his status. The fact that the visit was to a prison did not provide the jury with any information they did not already have. Gomez's argument that the visit to the prison was comparable to excessive or unnecessary shackling of a defendant at trial (see *People v. Mar* (2002) 28 Cal.4th 1201, 1216), is unavailing. Gomez was allowed to walk without leg restraints and his handcuffs were hidden in his clothes. Thus, the site visit did not cause him to be portrayed as a prisoner particularly prone to violence. We see no prejudice arising from the mere fact of the visit.

2. *Occurrences During the Visit*

We turn next to the question of whether the actual occurrences during the prison visit require reversal of the judgment. Gomez argues reversal is required because the trial court denied his request that the jurors be questioned regarding the alarm and "not guilty"

sign incidents, and thus he contends it is impossible to determine whether any jurors were prejudiced by the incidents.

After defense counsel and the prosecutor testified to their observations of these incidents, and the court set down its own observations, the court denied the motion for mistrial. The court noted that the alarm was of short duration and quickly turned off;[8] the jury was a substantial distance from Gomez when the alarm sounded; there was nothing to connect Gomez's presence to the alarm; and there were no reactions from jurors suggesting they were affected by the alarm. The trial judge commented that he had not seen the "not guilty" sign when he walked by the law library. The court agreed to admonish the jury that the alarm incident was not planned and had nothing to do with Gomez's presence; the sign was apparently placed by mischievous inmates and Gomez had nothing to do with it; and the jury should disregard any of these observed items. The defense later requested that the admonishment not be given in order not to re-emphasize the matters. No admonishment was given.

Whenever the court is put on notice that good cause to discharge a juror may exist because of improper influences, the court must conduct whatever inquiry is reasonably necessary to determine the alleged facts. (*People v. Cleveland* (2001) 25 Cal.4th 466, 477; *People v. Davis* (1995) 10 Cal.4th 463, 547.) However, not every incident requires further investigation. (*People v. Cleveland, supra*, at p. 478.) "'The decision whether to

---

8 Defense counsel believed the alarm sounded for at least one minute; the prosecutor thought it lasted for "a matter of seconds"; and the trial judge thought it lasted for no more than 15 seconds.

investigate the possibility of juror bias, incompetence, or misconduct—like the ultimate decision to retain or discharge a juror—rests within the sound discretion of the trial court. [Citation.] [¶] As our cases make clear, a hearing is required only where the court possesses information which, if proven to be true, would constitute "good cause" to doubt a juror's ability to perform his duties and would justify his removal from the case. [Citation.]'" (*Ibid*.) A jury's impartiality may be challenged by events which are of such a character as to suggest the likelihood that one or more members of the jury were influenced by improper bias. (*In re Hamilton* (1999) 20 Cal.4th 273, 294.)

Here, we see no abuse of discretion arising from the trial court's decision not to question the jurors about the incidents occurring at the site visit. The trial judge himself was present during the visit, and thus he was capable of evaluating the occurrences based on his own personal knowledge. Both the prosecutor and defense counsel testified regarding their observations of the incidents. Given the wide discretion afforded the trial court to ascertain whether there may be good cause for discharge, we will not second-guess the trial court's observation that the sounding of the alarm did not cause any significant reaction by the jurors. Even assuming jurors saw Gomez squat to the ground and briefly saw his handcuffs, the court could reasonably conclude that this occurrence did not subject him to any significant humiliation or undue restraint which might cause jurors to draw adverse inferences against him. Likewise, even assuming that jurors noticed the sign in the window, this incident was not so egregious as to warrant disturbing the trial court's conclusion that it was not of such a character as to raise the possibility of influencing the jury. Gomez was not the one displaying the "not guilty"

sign, and the court could reasonably find it was unlikely the jurors would view the sign as operative one way or the other on the ultimate decision of his guilt.

In sum, the record supports the conclusion that the occurrences, even if noticed by jurors, were not of a character to have improperly influenced the jury, and thus they would not constitute good cause for discharge of jurors. Accordingly, the court did not err in declining to examine the jurors about the incidents and in denying the motion for mistrial. Alternatively, even assuming arguendo the trial court should have made an inquiry of the jury to determine whether the occurrences had any impact on jurors, we conclude any such error was harmless beyond a reasonable doubt given the showing in the record, set forth above, that the occurrences were innocuous. Accordingly, reversal is not warranted. (See *People v. McNeal* (1979) 90 Cal.App.3d 830, 840.)

II. *CALJIC No. 2.62*

Gomez argues there was no evidentiary basis for the trial court to instruct the jury with CALJIC No. 2.62, which allows the jury to draw adverse inferences against a testifying defendant if the jury finds the defendant failed to explain or deny evidence against him. The court instructed the jury: "In this case defendant has testified to certain matters. [¶] If you find that the defendant failed to explain or deny any evidence against him introduced by the prosecution which he can reasonably be expected to deny or explain because of facts within his knowledge, you may take that failure into consideration as tending to indicate the truth of the evidence, and as indicating that among the inferences that may reasonably be drawn therefrom those unfavorable to the defendant are the more probable. [¶] Failure of the defendant to deny or explain

evidence against him does not by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime [and] of the guilt of the defendant beyond a reasonable doubt. [¶] If the defendant does not have knowledge that he would need to deny or explain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain this evidence."

CALJIC No. 2.62 is proper when a defendant testifies but fails to deny or explain inculpatory evidence within the defendant's knowledge. (*People v. Belmontes* (1988) 45 Cal.3d 744, 783; *People v. Saddler* (1979) 24 Cal.3d 671, 682.) The instruction is also appropriate when "'the defendant tenders an explanation which, while superficially accounting for his activities, nevertheless seems bizarre or implausible . . . '" so that it could be deemed a failure to explain or deny. (*People v. Belmontes, supra,* 45 Cal.3d at p. 784; *People v. Sanchez* (1994) 24 Cal.App.4th 1012, 1029-1030.) The instruction may be given when there are logical gaps in the defendant's testimony arising from his or her failure to explain or deny inculpatory evidence. (*People v. Redmond* (1981) 29 Cal.3d 904, 911.) However, mere contradictions between the testimony of the prosecution witnesses and the defendant's testimony do not constitute a failure to explain or deny within the meaning of CALJIC No. 2.62. (*People v. Saddler, supra,* 24 Cal.3d at p. 682.) The test for the instruction is not whether the defendant's testimony is believable, but whether the defendant has failed to explain or deny matters within his or her knowledge. (*People v. Lamer* (2003) 110 Cal.App.4th 1463, 1469.) The instruction should not "'be requested by either side unless there is some specific and significant defense omission

that the prosecution wishes to stress or the defense wishes to mitigate.'" (*Id*. at p. 1470, italics omitted.)

Gomez asserts that he did not fail to explain or deny any significant evidence against him. To justify the instruction, the prosecution pointed to Gomez's failure to explain his actions during the stabbing because of his claimed blackout and his failure on cross-examination to recognize the knife he used, and also cited some specific areas where Gomez's testimony was inconsistent or contradicted by another witness. The trial court reasoned that the instruction was warranted because "the principal issue relates to the defendant's state of mind, and there may be a myriad of issues relevant thereto which the trier of fact could conclude have not been properly or adequately addressed."

On appeal, the People argue Gomez's explanations of the circumstances made no sense in terms of his claim of self-defense, so as to constitute a failure to explain warranting the instruction. The People point to the following aspects of Gomez's testimony: Gomez approached Mendibles to talk to him even after he was afraid Mendibles would stab him; Gomez had contact with the correctional officers but failed to alert them of his fears; Gomez did not think the stabbing would occur in the classroom because it was not a "blind spot" and yet he entered the classroom with a knife prepared to fight; and Gomez claimed to black out during the stabbing thus conveniently forgetting the inculpatory evidence against him.

Contrary to the People's assertion, the record reveals that Gomez provided explanations for all of these matters, and the explanations were not so implausible so as to reasonably allow a jury to construe them as a failure to explain. Gomez explained that

he was trying to talk to Mendibles to defuse the situation, and if he told the correctional officers about Mendibles's threats he would be vulnerable to attack from the entire prison population as a "snitch." He explained that he eventually became afraid the attack could occur in the classroom because Mendibles told him not to return to the classroom. His claim that he blacked out during the actual stabbing cannot be characterized as a failure to explain or deny evidence against him because he *admitted* that he pulled out a knife and attacked Mendibles, and asserted his innocence based on self-defense. Given this admission of the conduct underlying the crime, this is not a case where a defendant evades an admission or denial by saying he cannot remember. Although the jury was entitled to reject Gomez's explanations, they nevertheless indicate that the evidentiary matters cited by the People do not provide a basis to support the failure-to-explain instruction. Absent an evidentiary basis, the instruction should not have been given.

However, we find there was no prejudice from the instruction. The nature of the instruction itself indicates the lack of prejudicial effect. The instruction does not *tell* the jury that the defendant failed to explain or deny evidence, but rather leaves it to the jury to ultimately decide this question. Further, the instruction cautions the jury that any such failure to explain does not by itself warrant an inference of guilt and does not relieve the prosecution of its burden of proof. We are not persuaded by Gomez's argument that if there was no evidentiary basis for the instruction, it unfairly urged the jury to question his veracity while ignoring inconsistencies in the prosecution's evidence in violation of his constitutional rights. By the express terms of the instruction, if the jury found Gomez did not fail to explain or deny evidence against him, it would not draw any adverse inferences

against him in this regard. Any potential for prejudice was further obviated by the court's giving of CALJIC No. 17.31, stating that the applicability of some instructions depended on what the jury found to be the facts, and the jury should "[d]isregard any instruction which applies to facts determined by [the jury] not to exist."

The state of the evidence also shows no reasonable probability of prejudice from the giving of CALJIC No. 2.62. To establish perfect or imperfect self-defense, the defendant must show that he actually believed danger was immediate and present; fear of an attack even in the near future is insufficient. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082; *In re Christian S.* (1994) 7 Cal.4th 768, 783.) "Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant's fear must be of imminent danger to life or great bodily injury. '"[T]he peril must appear to the defendant as immediate and present and not prospective or even in the near future. An imminent peril is one that, from appearances, must be instantly dealt with."'" (*In re Christian S., supra*, 7 Cal.4th at p. 783, italics omitted.)

Here, even if the jury credited a substantial portion of Gomez's version of the events, the record contains a strong evidentiary inference to support a finding that Gomez did not actually believe Mendibles was going to attack him when Gomez entered the classroom. Gomez admitted that he had not expected Mendibles to stab him in the classroom because it was an area visible to the teacher. Even though Mendibles told him not to return to the classroom, Gomez testified that as he returned to the classroom he was still not sure the attack would occur there. Gomez further acknowledged that Mendibles had not tried to attack him during the breaks in the gym and the less-

supervised bathroom. Gomez stated he saw Mendibles flinch or tense up when Gomez entered the classroom, but did not claim he saw Mendibles reach for or display a knife at this time. Similarly, the teacher did not observe Mendibles make any move that might have caused Gomez to believe an attack was imminent. In short, even from Gomez's description of the incident, the record provides strong support for a conclusion that Gomez, fearful of an attack by Mendibles at some unknown point in time, engaged in a preemptive strike under circumstances where he did not actually believe an attack was *immediately* forthcoming.

We conclude it is not reasonably probable that the outcome would have been more favorable to Gomez had the instruction not been given. (*People v. Saddler, supra*, 24 Cal.3d at p. 683-684; *People v. Ballard* (1991) 1 Cal.App.4th 752, 756-757; *People v. Lamer, supra*, 110 Cal.App.4th at pp. 1471-1472.)

III. *Closing Argument*

Gomez argues that in rebuttal closing argument, the prosecutor improperly impugned defense counsel's integrity and appealed to passion and prejudice.

The prosecutor urged the jury to discredit the inmate witnesses because they were convicted felons who had committed serious crimes. Stating that only one of the inmates who was in the classroom testified, the prosecutor asserted: "They went out and handpicked their liars to come in here and to make up this story [¶] . . . [¶] to help out Mr. Gomez." The prosecutor continued by asserting that the inmates got to go on a bus ride and see their "homies" by coming to testify; that they had nothing to lose if they committed perjury given the life sentences they were already serving and they could

make up any story they wanted; and they contrived a story to get Gomez off. Later, urging the jury to discredit a particular defense witness, the prosecutor argued: "They had to find out a way to try and clean him up because he did so poorly. Look at their demeanor when they were up there testifying. Boxer stuttering. I asked him a simple question: 'What is Mr. Gomez'[s] moniker?' And he looks at me and says, 'That's not what I'm here for.' That wasn't part of the script."

It is improper for the prosecutor to suggest that defense counsel sought to deceive the jury or to otherwise attack the integrity of defense counsel. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1302; *People v. Hill* (1998) 17 Cal.4th 800, 832.) However, the prosecutor may vigorously attack the defense case based on the evidence, including using colorful language to argue defense witnesses are not credible and a defense is fabricated. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 502; *People v. Earp* (1999) 20 Cal.4th 826, 863.) We disagree with Gomez's contention that the above-delineated arguments constituted an attack on defense counsel's integrity. The part of the argument pertaining to handpicked liars was made in the context of the prosecutor's contention that that the convicts' testimony was not to be trusted. There was no suggestion that defense counsel told the inmates to lie. Similarly, the part of the argument pertaining to the stuttering witness who testified poorly and could not testify beyond the script attacked the credibility of a defense witness, not the integrity of defense counsel. Contrary to Gomez's assertion, the reference to a "script" does not suggest that defense counsel fabricated a script, as opposed to merely preparing the witness to testify. Read in context,

the arguments were permissible comment on the veracity of defense witnesses and did not impugn defense counsel's integrity.

To support his argument that the prosecutor made an improper appeal to passion and prejudice, Gomez cites to the following statement by the prosecutor during rebuttal: "Ladies and Gentlemen, please look through the smoke and the mirrors. Use your common sense. Use logic when you go into that room. Don't set some standard where we give inmates a license to kill, a license to just go in and kill because he will come back a hero and . . . they'll all know they can get their homies to come down and testify for him the next time." During closing argument, although defense counsel acknowledged that prison inmates must be judged by the same standards as everyone else, he nevertheless urged the jury to consider the nature of the prison environment, including that Mendibles was a very violent inmate, the prison was a very violent place, and that inmates were repeatedly assaulted and killed without being protected by the prison officials. By urging the jury not to give Gomez a license to kill, the prosecutor was telling the jury not to apply a different standard merely because the killing occurred in a prison. In the context of this case, the prosecutor's argument was reasonably responsive to defense counsel's argument. To the extent the prosecutor was urging a conviction in order to send a message to the inmate community, the statement was brief and not likely to have affected the verdict.

IV. *Cumulative Error*

We are not persuaded by Gomez's argument that reversal is warranted because cumulative errors resulted in an unfair trial. Although we question whether the site visit

was warranted, we see nothing in the record to undermine the trial court's conclusion that the prison visit itself, and the occurrences during the visit, did not cause the jury to draw any adverse inferences against Gomez. If anything, the visit may have made the jury more sympathetic to his claimed fear of attack by a dangerous inmate. Although the People have not cited any evidence to support the giving of CALJIC No. 2.62 based on Gomez's failure to explain evidence against him, the instruction by its terms became operative only if the jury first found a failure to explain. Moreover, the lack of prejudicial effect is supported by the strong evidentiary inferences in support of the jury's verdict arising from Gomez's own testimony. Finally, the prosecutor's rebuttal argument was within the range of permissible advocacy.

SENTENCING

Gomez's sentence included (1) life without possibility of parole for assault by a life prisoner with a deadly weapon with malice aforethought (count two); (2) 15 years to life (tripled to 45 years to life under the Three Strikes law) for second degree murder (count one); and (3) an upper term of four years for custodial possession of a knife. Additionally, five-year enhancements for a prior serious felony conviction were added to the sentences on counts one and two. All sentences were stayed except for the life without possibility of parole and five-year enhancement on count two. The life without possibility of parole sentence for count two and its five-year enhancement were ordered to run consecutive to the sentence (another life without possibility of parole) Gomez was serving at the time of the instant murder. Our court recently considered the impact of *Blakely v. Washington, supra,* 124 S.Ct. 2531 (*Blakely*) on California's sentencing

scheme. In *People v. George* (2004) 122 Cal.App.4th 419, 424-425, and *People v. Lemus* (2004) 122 Cal.App.4th 614, 620-621, we concluded that *Blakely* is applicable to upper terms and the sentencing error required reversal. As we shall explain, we adhere to this holding here. We also hold *Blakely* is not applicable to consecutive sentences.[9]

The Blakely Decision

In *Blakely,* the United States Supreme Court held the defendant's Sixth Amendment right to trial by jury was violated when a Washington sentencing court imposed an "exceptional" sentence that was three years beyond the state's "standard range" maximum for the crime. (*Blakely, supra,* 124 S.Ct. at pp. 2535-2538.) The exceptional sentence was based on the sentencing court's factual finding of an aggravated circumstance of deliberate cruelty. (*Ibid*.) *Blakely* applied the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, which provides: "'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Blakely, supra*, 124 S.Ct. at p. 2536.) The *Blakely* court defined the "'statutory maximum'" as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Id.* at p. 2537.) That is, the test to determine the unconstitutionality of a sentence derived from factual findings

---

9 A split exists in this court on the applicability of *Blakely*. In *People v. Wagener* (2004) 123 Cal.App.4th 424, this court held *Blakely* was inapplicable to California's middle/upper term sentencing scheme. We decline to follow *Wagener*. The issue of *Blakely*'s application to California's sentencing scheme is currently pending before the

by a court rather than a jury is whether the sentence is "*greater than what state law authorize[s] on the basis of the verdict alone*." (*Id*. at p. 2538, italics added.) The *Blakely* court did not, however, limit all fact-finding by a sentencing judge—rather, distinguishing determinate from indeterminate sentencing schemes, the court explained that a judge may impose a sentence based on additional facts as long as the sentence does not exceed the sentence to which the defendant has a *legal right* under the state's statutory scheme. (*Id*. at p. 2540 [facts ruled upon by court under indeterminate scheme do not violate jury trial right because the facts "do not pertain to whether the defendant has a legal *right* to a lesser sentence"].)

Applicability of Blakely to Upper Term Sentences

Under California's determinate sentencing law, where a penal statute provides for three possible terms for a particular offense, the sentencing court is required to impose the middle term unless it finds, by a preponderance of the evidence, that the circumstances in aggravation outweigh the circumstances in mitigation. (§ 1170, subd. (b); Cal. Rules of Court,[10] rule 4.420.) Because this sentencing scheme *requires* selection of the middle term unless the court finds aggravating or mitigating circumstances, the middle term is viewed as the sentence to which the defendant is presumptively entitled. (*People v. Avalos* (1984) 37 Cal.3d 216, 233; *People v. Reeder* (1984) 152 Cal.App.3d 900, 923; *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582-

---

California Supreme Court. (*People v. Towne*, review granted July 14, 2004, S125677; *People v. Black*, review granted July 28, 2004, S126182.)

1583 ["midterm is statutorily presumed to be the appropriate term"].) Further, in order to avoid punishing the defendant twice based on the same fact, a fact that is an element of the crime or the basis of an imposed enhancement may not be used to select the upper term. (§ 1170, subd. (b); rule 4.420(c) & (d); *People v. Scott* (1994) 9 Cal.4th 331, 350.)[11] Thus, the upper term cannot be based on matters included in the jury verdict—that is, the elements of the crime and imposed enhancements.

Although there are some differences between the Washington and California sentencing schemes, we conclude that for purposes of the core concerns set forth in *Blakely*, California's upper term sentencing scheme is comparable to the scheme evaluated in *Blakely*. The Washington sentencing court was authorized to impose an exceptional sentence based on a court finding of aggravating factors, which factors must be distinct from the elements of the crime used to compute the standard range sentence, and thus distinct from the matters encompassed within the jury verdict or guilty plea. (*Blakely, supra*, 124 S.Ct. at pp. 2535, 2537-2538.) Similarly, California courts are authorized to impose an upper term sentence based on a court finding of aggravating factors, which factors must be distinct from the elements of the crime and imposed enhancements encompassed within the jury verdict. In *Blakely*, the United States Supreme Court rejected the contention that the maximum term set forth in the exceptional sentence statute should be viewed as the statutory maximum, and instead concluded that

---

10 Subsequent references to rules are to the California Rules of Court.

the statutory maximum was the term set forth in the standard range statute, because the latter is the only sentence which may be imposed "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Id.* at p. 2537, italics omitted.)

Absent direction from the California Supreme Court or Legislature, we are compelled to apply *Blakely's* holding here—i.e., the statutory maximum for an offense is not the upper term but rather is the middle term, because the latter is the presumptively correct term and is the only term that does not require findings beyond the jury verdict to justify its imposition. Accordingly, because the upper term increases the penalty beyond the statutory maximum, it cannot be imposed unless it is based on the fact of a prior conviction or facts found by the jury beyond a reasonable doubt.

In sum, based on the middle/upper term sentencing scheme, we conclude that, except to the extent a sentencing court relies on the fact of a prior conviction or matters included in the jury verdict, a court's selection of the upper term is proscribed by *Blakely* because (1) it exceeds the sentence to which the defendant has a legal right under the statutory scheme, and (2) it requires fact-finding by the court beyond the facts reflected in the jury verdict. (*People v. George, supra,* 122 Cal.App.4th at p. 425; *People v. Lemus, supra*, 122 Cal.App.4th at pp. 620-621.)

---

11 A court may utilize an enhancement to impose the upper term if it can, and does, strike the enhancement. (Rule 4.420(c).)

Inapplicability of Blakely to Consecutive Sentences

However, the same conclusion does not apply to a sentencing court's selection of a consecutive, rather than concurrent, sentence. Similar to the middle term, a consecutive sentence requires the sentencing court to consider additional facts beyond the elements of the crime or imposed enhancements to justify the punishment, and absent a determination in this regard a concurrent sentence will be imposed. (§ 669; rules 4.425, 4.406(b)(5).) However, what is markedly different from an upper/middle term option for purposes of *Blakely* analysis is that there is nothing in California's sentencing scheme suggesting the defendant is *entitled* to a concurrent rather than a consecutive sentence. As explained in *People v. Reeder, supra*, 152 Cal.App.3d at p. 923: "While there is a statutory presumption in favor of the middle term . . . , there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing."[12] Absent a statutory presumption in favor of a concurrent sentence, a jury verdict finding the defendant guilty of more than one offense implicitly authorizes a consecutive sentence for each of those offenses. The lack of statutory entitlement to a particular sentence "makes all the

---

12 The distinct language used in the penal statutes regarding these sentencing choices reflects the qualitative difference between a middle term and a concurrent sentence. Section 1170, subdivision (b) states: "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." In contrast,

difference insofar as judicial impingement upon the traditional role of the jury is concerned." (*Blakely, supra*, 124 S.Ct. at p. 2540.)

Moreover, neither *Blakely* nor *Apprendi* arose in the context of sentencing for multiple offenses. *Blakely* circumscribed the court's imposition of punishment beyond the prescribed statutory maximum for a single offense, based on an underlying concern that a state not circumvent the right to trial by jury by in effect reclassifying elements of an offense as sentencing factors, or by converting a separate crime into a sentence enhancement. (*Blakely, supra*, 124 S.Ct. at pp. 2537, fn. 6, 2539-2540 & fn. 11.) When a sentencing court selects a consecutive sentence, it is simply deciding that the defendant shall separately serve the sentence authorized by the jury verdict for the particular offense, rather than exercising leniency to allow the prescribed punishment for two separate offenses to be served at the same time. This sentencing choice does not implicate *Blakely*. (Accord *People v. Jaffe* (2004) 122 Cal.App.4th 1559, 1589; *People v. Vaughn* (2004) 122 Cal.App.4th 1363, 1372.)

Analysis of Gomez's Sentence

Having concluded that *Blakely* is applicable to California's upper term, but not consecutive, sentencing scheme, we consider Gomez's challenge to the imposition of an upper term.

Preliminarily, we reject the People's argument that Gomez has waived the issue by failing to raise an *Apprendi* objection to the trial court. As a federal court aptly stated,

---

section 669 merely states that when there are multiple convictions the court shall "direct

Blakely "worked a sea change in the body of sentencing law." (*U.S. v. Ameline* (9th Cir. 2004) 376 F.3d 967, 973, & fn. 2.) Prior to *Blakely*, it was widely assumed that the upper term was the statutory maximum within the meaning of *Apprendi.* (See, e.g., *In re Varnell* (2003) 30 Cal.4th 1132, 1142 [stating, without discussion, that upper term of three years was statutory maximum under *Apprendi*]; see § 18.) Gomez was not required to anticipate an extension of *Apprendi* to California's middle/upper term sentencing scheme. The pragmatic waiver rule of *People v. Scott, supra,* 9 Cal.4th at p. 353, which applies to sentencing issues that could have been corrected by the trial court, does not apply here. (*People v. George, supra,* 122 Cal.App.4th at p. 424.)

We now turn to the merits of Gomez's sentence. Under *Blakely*, the constitution requires a jury trial on facts (other than the fact of a prior conviction) which determine whether the defendant will be given a sentence greater than the statutory maximum. Based on our conclusion that the statutory maximum is the middle term, the trial court may only impose the upper term if it utilizes the fact of a prior conviction or matters included in the jury verdict.[13]

Here, the trial court recognized that it had not stated reasons for the upper term for the knife possession conviction, and Gomez expressly agreed the court need not state its reasons. Because we do not know the sentencing factors the court relied upon, we are

---

whether the terms of imprisonment . . . shall run concurrently or consecutively."

13 For example, if a court strikes an enhancement found by the jury and then uses the enhancement to impose the upper term (rule 4.420 (c)), this procedure would comply with *Blakely*'s jury-determination requirement.

unable to ascertain whether the upper term would have been imposed under the *Blakely* constraints. Thus, regardless of whether we apply the harmless beyond a reasonable doubt standard (see *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326 [*Apprendi* error]) or reasonable probability of a different outcome standard typically applied to error in the court's delineation of reasons (see *People v. Price* (1991) 1 Cal.4th 324, 492), the sentence must be reversed and remanded for resentencing.[14]

DISPOSITION

The judgment is affirmed as to the convictions. The judgment is reversed as to the sentence and remanded for resentencing in a manner consistent with this opinion.

HALLER, J.

WE CONCUR:

McCONNELL, P.J.

McINTYRE, J.

14 For guidance on remand, we note that the record suggests the possibility that Gomez was a juvenile when he committed his prior conviction. If this is so, we direct the parties' and court's attention to *People v. West* (1984) 154 Cal.App.3d 100, 107-108 and *People v. Smith* (2003) 110 Cal.App.4th 1072, 1080, fn. 10, regarding the rule against using prior juvenile convictions to impose the five-year enhancement under section 667, subdivision (a)(1).