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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. STEVEN GUERRERO and CHARLIE ROYCE KEPHART, Defendants and Appellants.	B187943 (Los Angeles County Super. Ct. No. LA047140)

APPEAL from a judgment of the Superior Court of Los Angeles County, John S. Fisher, Judge. Affirmed as modified.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant Steven Guerrero.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant Charlie Royce Kephart.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Robert F. Katz, and Roy C. Preminger, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendants, Charlie Royce Kephart and Steven Guerrero, appeal from their convictions for battery with serious bodily injury. (Pen. Code,[1] § 243, subd. (d).) Mr. Kephart also appeals from his conviction for mayhem. (§ 203.) Mr. Kephart argues: the prosecutor improperly cross-examined Mr. Guererro; the trial court improperly excluded evidence of the violent nature of the victim, Roger Sebastian Kreszchuk; the trial court should have allowed two witnesses to testify as to the effect of a choke hold; the evidence was insufficient; and there was instructional error. Mr. Guerrero raises a sufficiency of the evidence contention and an instructional error argument. Defendants adopt each other's arguments. We affirm.

II. FACTUAL BACKGROUND

At approximately 11 p.m. on October 1, 2004, Mr. Kreszchuk was at the Le Cannon bar. Mr. Kreszchuk spoke with Mr. Kephart. Later, Mr. Guerrero motioned to Mr. Kephart. Mr. Guerrero placed his finger to his nose, and said "'We're going to get some.'" Mr. Kreszchuk understood that to mean they intended to purchase cocaine. Mr. Kephart told Mr. Kreszchuk they were going to get cocaine and asked, "'So is that okay with you?'" When Mr. Kreszchuk agreed, Mr. Kephart asked, "'How much are you looking to get?'" Mr. Kreszchuk responded, "'About $20.'" The two men continued to talk in a friendly way.

Approximately 10 minutes later, Mr. Kreszchuk and Mr. Kephart left the bar together. Mr. Kreszchuk drove Mr. Kephart to an apartment complex. They went into an apartment where a woman who seemed to know Mr. Kephart was present. The woman

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

told them: "'I just want you to leave. I just want you to leave. Just go.'" Mr. Kephart opened a beer and a large bag of marijuana. The two men smoked marijuana. Thereafter, the woman entered the room a couple of times with her arms crossed over her chest. She appeared to be annoyed with Mr. Kephart.

Mr. Kreszchuk and Mr. Kephart then left the apartment to buy cocaine. Mr. Kreszchuk drove his 1998 Toyota Tacoma truck. Mr. Kephart gave Mr. Kreszchuk directions, which caused them to drive in a "zig-zag[]" pattern. After 10 or 15 minutes, Mr. Kephart directed Mr. Kreszchuk to pull over. Thereafter, Mr. Guerrero drove up in a white Ford Explorer. Mr. Kreszchuk and Mr. Kephart got into Mr. Guerrero's Ford truck. Mr. Guerrero appeared annoyed, hostile, or mad. Mr. Guerrero drove at a high rate of speed on the freeway before exiting at Coldwater Canyon. Mr. Guerrero was drinking a Natural Light beer while driving. Mr. Kephart received a telephone call from the cocaine dealer, who directed them to a meeting point. At approximately 3 a.m., the truck stopped next to an individual on the sidewalk. Mr. Kephart got out of the truck then motioned to Mr. Kreszchuk as if to say: "'Okay. We're going to make the deal now.'" Mr. Kreszchuk gave the individual $20. In return, Mr. Kreszchuk received a small package which he put in his breast pocket.

Mr. Kephart then spoke to another person in a low voice while glancing at Mr. Kreszchuk. Mr. Kephart returned to the truck, blocking the door where Mr. Kreszchuk sat. Mr. Guerrero was glaring at Mr. Kreszchuk. Mr. Kreszchuk became frightened. Mr. Kreszchuk reached toward the left door, opened the lock, and walked quickly away from the truck. Mr. Kreszchuk heard someone say, "'Where is he going?'" Mr. Kephart, who was walking behind Mr. Kreszchuk, yelled: "'Where's the cocaine? Where's the cocaine, man?'"

Mr. Kephart grabbed Mr. Kreszchuk's shoulder. Mr. Kreszchuk pulled away from Mr. Kephart. Mr. Kephart then punched Mr. Kreszchuk repeatedly in the head. Mr. Kreszchuk returned the blows and wrestled with Mr. Kephart until they both fell to the ground. Mr. Kreszchuk was able to get up and began to walk away. Mr. Kreszchuk

heard a car speeding toward him. Mr. Guerrero drove up in his truck and flung open the door. Mr. Guerrero gave chase to Mr. Kreszchuk while yelling: "'You're dead. You're fucking dead.'"

Mr. Guerrero began fighting with Mr. Kreszchuk. Within 10 to 15 seconds, Mr. Kephart joined the altercation. Mr. Kephart pulled Mr. Kreszchuk to the ground. Mr. Guerrero continued to "pummel" Mr. Kreszchuk. Mr. Kreszchuk was repeatedly struck in his head and face. Mr. Kephart had Mr. Kreszchuk in a choke hold. Mr. Kephart then bit off Mr. Kreszchuk's ear. Mr. Kreszchuk heard Mr. Kephart say: "'Kick him. Just kick him.'" One of his assailants also bit Mr. Kreszchuk's wrist. Mr. Kreszchuk, who feared for his life, began to yell: "'Help. Help. Help. Fire. Fire. Fire. Fire.'" Mr. Guerrero said: "'We have to leave. We have to go. We have to go now.'" Mr. Kreszchuk could barely see because his eyes were swollen. Mr. Kreszchuk hid in a nearby walkway, took off his shirt, and then ran away. Approximately five minutes later, an ambulance arrived. Mr. Kreszchuk was taken to the hospital.

A physician was able to reattach the cartilage of Mr. Kreszchuk's ear but not the earlobe. At the time of trial, Mr. Kreszchuk's ear lobe was missing. Mr. Kreszchuk's watch and key ring were missing after the attack. When he was later interviewed by the police, Mr. Kreszchuk did not tell the officers about the cocaine transaction or driving Mr. Kephart's truck that evening. Mr. Kreszchuk did not want to be cited for driving under the influence. He also did not want the police to look upon him as a "bad person." Mr. Kreszchuk wore a black shirt and pants on the night of the altercation. Mr. Kreszchuk's keys, which included a blue aluminum beer opener, were missing after the attack. They were returned to him from police custody a few days after the attack. Mr. Kreszchuk found a cellular telephone in his truck a few days after the incident. Mr. Kreszchuk believed the telephone belonged to Mr. Kephart and turned it over to Detective Kevin Stogsdill.

Jason Bradley Friedman was awakened at approximately 3 a.m. on October 2, 2004, by yelling outside his window. Mr. Friedman heard someone yell, "'Get his keys,'

or 'Take his keys.'" Mr. Friedman looked out of his window, which was close to a streetlight. Mr. Friedman saw two people fighting and then realized it was a "two against one" altercation. Mr. Friedman telephoned the police while continuing to watch the fight. Mr. Friedman saw one person on the ground holding an individual wearing a black shirt, while a third man stood over them and may have punched or kicked toward the ground. The man in the black shirt was screaming: "'Help . . . My ear . . . Fire[.]'" Mr. Friedman heard the other individuals say: "'Kick his head,' or, 'Kick his face,' . . . and, 'Hold him down.'" Shortly thereafter, the two assailants drove away in a car. The third individual got up and moved out of the street. Mr. Friedman viewed the altercation from his third floor window. The altercation took place in the street directly below, which was lit by a nearby streetlight. Nothing obstructed Mr. Friedman's view.

Craig Stillman Edgerly was also awakened by the noise from the fight. Mr. Edgerly heard a man shout, "'You're fucking with your life.'" The same individual then said: "'Kick him in the head.' . . . Take his watch.'" Mr. Edgerly heard a different man yell: "'Help me. Help me.'. . . 'Fire. Fire[.]'" Mr. Edgerly believed the victim's life was at stake. Mr. Edgerly went to the balcony of his second-story apartment and saw a white man enter what appeared to be a white Ford Bronco. The white truck left quickly and swerved over. Mr. Edgerly believed the driver was trying to run over a man who was staggering. Mr. Edgerly believed the driver "wanted to kill" the victim. The man who was staggering appeared to be in pain. Mr. Edgerly could see blood on the sidewalk directly under the street light. Nothing obstructed Mr. Edgerly's view. A police car arrived immediately thereafter.

Los Angeles Police Officer Stephen Ohlrich was on patrol at approximately 3:15 a.m. on October 2, 2004, in the vicinity of Moorpark and Hazeltine Streets. Officer Ohlrich saw a silhouette of a dark shadow in the middle of the street approximately 500 feet from his police car. Officer Ohlrich saw two individuals stand up and walk northbound to what was later verified to be a Ford Explorer. The two men got into the Ford. The Ford accelerated in a "U-turn fashion." The Ford made a half U-turn and was

directed towards the victim. Officer Ohlrich then pursued the Ford. Officer Ohlrich's partner, identified only as Officer Sandoval, checked the motor vehicle records on the computer for warrants and the name of the registered owner. During that time, the officers received a radio call regarding a robbery in the area.

After requesting assistance, Officer Ohlrich was able to stop the Ford in a nearby strip mall. Mr. Guerrero, who was driving the Ford, wore a "whitish" blue shirt, and gray pants. Mr. Kephart, the passenger in the Ford, wore: a blue shirt; blue pants; and white and blue shoes. Officer Ohlrich ordered the two men out of the Ford. Officer Ohlrich noticed a 12-pack box containing numerous cans of beer on the floorboard of the front passenger area. Officer Ohlrich also noticed several open beer cans on both the front driver and passenger areas and in the back compartment. No drugs were found in defendants' possession or in the Ford. Mr. Guerrero and Mr. Kephart were arrested. A set of keys with a blue item attached was booked as Mr. Guerrero's property.

Detective Stogsdill investigated the crime. Detective Stogsdill met with an officer where the fight occurred. Detective Stogsdill observed a prominent blood stain at the location, which was later photographed. Mr. Kreszchuk's severed ear was recovered from the street near a manhole cover. A blood trail from that location proceeded to the curb, onto the sidewalk near the apartment complex, and further westbound on Moorpark Street where Detective Stogsdill found a black shirt. The black shirt was stained with blood. Photographs taken of the Ford driven by Mr. Guerrero showed blood smears on the center console and on the interior of the driver's inside door panel. A photograph of Mr. Kephart's face depicted blood stains to the right of his mouth. No cuts or scratches were found on that area of Mr. Kephart's face after the blood was removed with a sterile cotton swab. Detective Stogsdill did observe an abrasion and bruising above Mr. Kephart's right eye. Detective Stogsdill saw another smaller abrasion to the top of the left side of Mr. Kephart's forehead. There were also abrasions to Mr. Kephart's left elbow, right arm, and right elbow. Mr. Guerrero had a slight abrasion on his forehead and above his right eye, as well as one to his left elbow.

On September 26, 2005, Deputy District Attorney Hilleri Merritt and Brent Smith, a supervising investigator for the Los Angeles County District Attorney's Office, interviewed Mr. Kreszchuk. Ms. Merritt confronted Mr. Kreszchuk with the fact that there were pieces missing in the time scheme of his statements regarding the events of October 2, 2004. Mr. Kreszchuk admitted he had been untruthful with the police and during his preliminary hearing testimony. Mr. Kreszchuk acknowledged he had been intoxicated on October 2, 2004, and he had driven while under the influence of alcohol. Mr. Kreszchuk also admitted that had been untruthful concerning the purchase of cocaine and use of marijuana. Mr. Kreszchuk stated his attackers had taken his keys during the altercation.

III. DISCUSSION

A. Evidentiary Issues

1. The prosecutor's questions of Mr. Guerrero

a. alleged *Doyle* error

Mr. Kephart argues that the prosecutor improperly cross-examined Mr. Guerrero about his post-arrest silence. (*Doyle v. Ohio* (1976) 426 U.S. 610, 616-619.) Mr. Guerrero was cross-examined about the failure to tell the police that Mr. Kephart had been the victim of an assault. Mr. Kephart further argues the trial court improperly overruled defense counsel's objection to the use of Mr. Guerrero's post-arrest silence. Thus, the jury was free to thereby infer Mr. Kephart's guilt from Mr. Guerrero's post-arrest silence.

b. factual and procedural background

Both defendants testified. Each claimed the Mr. Kephart was assaulted by Mr. Kreszchuk. When the prosecutor cross-examined Mr. Guerrero, the following colloquy occurred: "[Prosecutor]: Q Mr. Guerrero, so on the evening when you had come to the aid of your best friend, Mr. Kephart, and you said you got into the car and you – the white S.U.V. and you were so concerned for Mr. Kephart's health and his safety and you thought he was seriously injured you never told the police at all, did you, that Mr. Kephart should go to the hospital and the severity of his beating, did you? [¶] [Counsel for Mr. Kephart]: Objection, Your Honor. [¶] He has a Constitutional right not to say anything to the police and that hasn't been waived. And so any question relating to that is highly prejudicial. [¶] THE COURT: Overruled. [¶] Q BY [Prosecutor]: Yes or no? [¶] A Can you repeat the question? [¶] Q Yes. [¶] You said Mr. Kephart is your best friend, your buddy in the entire world. [¶] You just witnessed him being severely beaten and you said he was in your car. You feared for his health and you were maybe going to direct him and take him to the hospital out of concern for his health and his well being, but you never told the police that they should take him to the hospital or the severity of Mr. Kephart's beating, did you? [¶] [Counsel for Mr. Kephart]: Objection. Lacking in foundation. Conclusionary in relationship to the severity and his conclusions in relationship to what counsel was just stating. [¶] THE COURT: All right. Overruled. [¶] Q [Prosecutor]: Yes or no? [¶] A With a gun pointed at you you don't say much. So no, I did not say anything. [¶] Q And at some point you were riding in the police car, correct? [¶] A Yeah. Obviously. [¶] Q And from the time that you were riding in the police car you still never said anything about Mr. Kephart's condition, did you? [¶] [Counsel for Mr. Kephart]: Objection. Assumes facts not in evidence that the police asked him about – asked Mr. Guerrero about Mr. Kephart's condition. [¶] THE COURT: Overruled. [¶] Q [Prosecutor] Yes or No? [¶] A I was instructed of my Miranda rights to remain silent and I did so. I said nothing the whole time of anything."

c. Mr. Kephart has no standing to assert any violation of Mr. Guerrero's due process rights

The United States Supreme Court has held that an accused's silence following the giving of the warnings described in the majority opinion in *Miranda v. Arizona* (1966) 384 U.S. 436, 444-445 may not be used to later impeach the defendant's testimony at trial. (*Doyle v. Ohio, supra,* 426 U.S. at pp. 616-619; see also *Anderson v. Charles* (1980) 447 U.S. 404, 407-408; *People v. Quartermain* (1997) 16 Cal.4th 600, 619.) But, the California Supreme Court has held: "The privilege against self-incrimination is, of course, personal and may be asserted only by the holder. (*Rogers v. United States* (1951) 340 U.S. 367, 370-371; *People v. Chandler* (1971) 17 Cal.App.3d 798, 803.)" (*People v. Ford* (1988) 45 Cal.3d 431, 439; see also *People v. Badgett* (1995) 10 Cal.4th 330, 343 ["It is settled that the accused has no standing to object to a violation of another's Fifth Amendment privilege against self-incrimination. [Citation.]".) Mr. Kephart does not have standing to assert Mr. Guerrero's self-incrimination privilege rights.

d. Mr. Guerrero may not raise this issue

Only counsel for Mr. Kephart objected to the prosecutor's inquiries. In order for this issue to be raised, it would have been necessary for *Miranda* based objections to be raised in the trial court. (*Rogers v. United States, supra,* 340 U.S. at p. 371*; People v. Ford, supra,* 45 Cal.3d at p. 439.) Thus, Mr. Guerrero cannot assert a violation of his Fifth Amendment rights.

e. *Doyle* does not apply to Mr. Guerrero's pre-warning statements

In any event, the application of the questioning to *Doyle* is unclear. *Doyle* does not apply when the arrestee has not been advised of his or her constitutional rights and

the accused takes the stand. Then the unwarned arrestee may be impeached with his or her silence. (*Fletcher v. Weir* (1982) 455 U.S. 603, 606-607; *People v. O'Sullivan* (1990) 217 Cal.App.3d 237, 240.) The cross-examination did not directly relate to Mr. Guerrero's statements made after he received the warnings pursuant to *Miranda v. Arizona*, *supra*, 384 U.S. at pages 444-445. There was no evidence as to when Mr. Guerrero was advised of his rights to silence and the advice of counsel. The questions focused on the events immediately after Mr. Guerrero and Mr. Kephart were arrested. For example, Mr. Guerrero responded to one question, "With a gun pointed at you don't say much." Now Mr. Guerrero did state he refused to answer any questions after being advised of his constitutional rights. But defendants presented no evidence when that advisement occurred. And no direct question was asked by the prosecutor as to any statement made by Mr. Guerrero after the advisement of rights. Under these circumstances, even if Mr. Guerrero had preserved the issue and Mr. Kephart had standing to assert the purported *Doyle* error contention, it is unclear that any violation occurred. The questions were aimed at the time when the initial detention commenced or in the immediate post arrest period where *Doyle* is inapplicable when the accused takes the stand. It was Mr. Kephart's burden as an appellant to establish error and this he has failed to do. (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573; *People v. $497,590 United States Currency* (1997) 58 Cal.App.4th 145, 152-153.) Because the record does no establish when *Miranda* warnings were given to Mr. Guerrero, the entire issue has been forfeited.

f. no prejudice resulted

In any event, any error in overruling the prosecutor's questions was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 22; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Mr. Guerrero explained his failure to explain what occurred to the police stemmed from a fear of incrimination. This testimony allowed the jurors to evaluate the

defendants' fear against the victim's similar fears if Mr. Guerrero admitted that he had been drinking while driving and purchasing cocaine. The verdicts did depend upon the jurors' assessment of the credibility of the victim and defendants' testimony and the testimony of independent witnesses. As the prosecutor argued, Mr. Edgerly and Mr. Friedman, two uninvolved witnesses, heard the words: "'Kick him in the head. You're fucking dead. You're fucking with your life. Take his keys. Get his watch.'" Mr. Edgerly testified that the white Ford driven by Mr. Guerrero was trying to run over Mr. Kreszchuk. Mr. Kreszchuk's keys were discovered in Mr. Guerrero's pocket at the time of booking. The prosecutor further argued: " . . . Mr. Kreszchuk on the other hand when he got up and when you look at the demeanor, there's a jury instruction that says you are the judge of the credibility of the witness and the character of their testimony. . . . [¶] But when you look at who's telling the truth look at who has the motive to lie. Mr. Kreszchuk had nothing to lose. He has nothing to gain by lying on the stand. [¶] . . . [¶] . . . [W]hat Mr. Kreszchuk says is supported, it's corroborated by the physical evidence and also by the statements of the witnesses, the independent witnesses." Finally, it is presumed the jurors followed the credibility instructions. (*People v. Ledesma* (2006) 39 Cal.4th 641, 725; *People v. Avila* (2006) 38 Cal.4th 491, 574; *People v. Bradford* (1997) 15 Cal.4th 1229, 1337; *People v. Osband* (1996) 13 Cal.4th 622, 714.)

2. Exclusion of evidence of Mr. Kreszchuk's violent nature

a. factual and procedural background

Mr. Kephart and Mr. Guerrero argue that the trial court improperly excluded evidence of Mr. Kreszchuk's violent behavior. Mr. Kephart's counsel called Randall Herbert, a bar manager at the Le Cannon Bar, as a witness. Mr. Herbert testified that some of his functions included providing security for the bar. Mr. Herbert recalled an

individual with a Marine tattoo had been in the bar within the previous six to eight months. Mr. Herbert did not specifically recall Mr. Kreszchuk's name. Mr. Herbert was asked the following question about the man with the Marine tattoo, "What are those reasons that you recall this particular individual?" The prosecutor then objected, "I'll object as relevance if it's after the October 2nd, '04 date." Defense counsel's offer of proof stated that Mr. Herbert had to remove Mr. Kreszchuk from the bar just prior to Halloween. This was because Mr. Kreszchuk expressed a threat. More specifically, Mr. Herbert would testify that on a prior occasion totally independent of the October 2, 2004 incident, Mr. Kreszchuk became drunk. Mr. Kreszchuk allegedly was "picking on" and making profane statements to a woman who was a bartender. Mr. Herbert then asked Mr. Kreszchuk to leave the bar. Mr. Kreszchuk then challenged Mr. Herbert to a fight. However, Mr. Herbert was able to persuade Mr. Kreszchuk to leave without further incident.

In sustaining the objection, the trial court noted: "I just don't see the relevance of this what I presume is some kind of character evidence of the victim to show some kind of conduct that might have happened on the day in question in light of the uncontradicted evidence that the victim was running from the scene and was being chased and the only issue that you have is that he swung first. [¶] So I don't see the proposed testimony being helpful to the jurors in any way relative to this case. [¶] . . . [¶] Plus there's a significant issue of a difference of when it even happened. [¶] It sounds like it happened way later after the incident. So that's neither here nor there. Even on the merits I don't see it being close."

b. the evidence could be properly excluded

The United States Supreme Court has held that a defendant is entitled to present relevant evidence in support of his defense. (*California v. Trombetta* (1984) 467 U.S. 479, 485; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) The California Supreme

Court has explained though that the right to present relevant evidence is not unlimited: "'As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense. Courts retain . . . a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice. [Citations.] . . . .'" (*People v. Cudjo* (1993) 6 Cal.4th 585, 611, quoting *People v. Hall* (1986) 41 Cal.3d 826, 834-835.) Evidence Code section 1103[2] allows the defendant to introduce evidence of the character or specific instances of conduct of the victim in limited circumstances. The California Supreme Court has held: "'The trial court has broad discretion in determining the relevance of evidence [citations] . . . .' [Citation.]" (*People v. Smithey* (1999) 20 Cal.4th 936, 973, quoting *People v. Scheid* (1997) 16 Cal.4th 1, 14.) We examine the admissibililty of the proffered evidence utilizing the deferential abuse of discretion standard of review. (*People v. Cox* (2003) 30 Cal.4th 916, 955 [Evid. Code § 352]; *People v. Rodriguez* (1999) 20 Cal.4th 1, 9; *People v. Alvarez* (1996) 14 Cal.4th 155, 201.) No abuse of discretion occurred. (*People v. Rodriguez, supra,* 20 Cal.4th at pp. 9-10; *People v. Quartermain, supra,* 16 Cal.4th at p. 626.) Here, the witness, Mr. Herbert, was uncertain whether the alleged incident occurred before or after the offense in this case. The witness told the defense investigator it occurred "just prior to Halloween . . . ." Moreover, no actual violence occurred. As a result, the trial court could reasonably find

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[2] Evidence Code section 1103 provides in pertinent part: "(a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character. . . ." Evidence Code section 1101 precludes the introduction of a person's character to prove his conduct on a specified occasion.

Mr. Kreszchuk's propensity for violence would not have been demonstrated had Mr. Herbert been allowed to testify further. No abuse of discretion occurred.

c. any error was harmless

Even if the exclusion of such evidence was in error, it is not reasonably probable defendant would have enjoyed a more favorable verdict had the testimony been admitted. (E.g., *People v. Williams* (1998) 16 Cal.4th 635, 673; *People* v. *Watson, supra,* 46 Cal.2d at p. 836.) Mr. Herbert's testimony would have demonstrated only that Mr. Kreszchuk could be reasoned with when intoxicated, thereby reducing the likelihood that he was the aggressor in the incident of October 2, 2004. There was no reasonable probability of a different result.

3. Exclusion of choke hold testimony

a. factual and procedural background

Mr. Kephart argues that the trial court improperly excluded proffered "expert" testimony regarding the effect of choke holds on a victim. On the day prior to the commencement of trial in this case, Leslie Nadasi, Mr. Kephart's attorney, expressed an intention to call an investigator and a Marine Corps combat trainer. Mr. Nadasi explained the two potential witnesses would offer opinions on the effects of choke holds on an individual's reactions. Mr. Nadasi stated the Marine's name was on Mr. Kephart's witness list. However, the prosecution had not been provided with any indication of the witness's anticipated testimony. The trial court indicated that it would allow Mr. Nadasi to present an offer of proof with respect to the anticipated testimony. At the hearing on the admissibility of the proffered opinion testimony, Robert Wachsmuth, Mr. Kephart's investigator, testified. Mr. Wachsmuth received training in the use of choke holds. That training included how victims of a choke hold react if they lose consciousness.

Mr. Wachsmuth likened the effect of a choke hold to that of a drowning individual. In both instances, individuals may become hysterical, flail their arms, shake, and quiver. The reaction is similar to an epileptic fit. John Busick, a security host for the Walt Disney Corporation, was formerly a member of the Marine Corps. In basic training, Mr. Busick learned to properly use a choke hold as well as the effects of such a technique. Mr. Busick had blacked out slightly as the result of being placed in a choke hold. Mr. Busick stated that all Marines receive this same training. The Marine Corps training manual was introduced to demonstrate the various choke holds. Mr. Busick did not testify he trained Marines on the use of choke holds.

Following their testimony, Mr. Nadasi stated the testimony would demonstrate: "[T]he choke hold was being applied by the victim, not by [Mr. Kephart] or the defense and that the victim was in such a state that he was going to die or at least both - - [¶] . . . [¶] [T]he evidence that we're going to present is that the victim had the choke hold on [Mr. Kephart] and that, in essence, it became so severe [Mr. Guerrero] obviously thought that the victim or - - excuse me - - that [Mr. Kephart] was either going to die or was in serious danger of sustaining great physical harm. [¶] As a consequence to that we want to establish what effects the choke hold has and why he reacted the way that he did at the time it was being applied to him." Mr. Nadasi stated he only became aware of the potential testimony a week prior to trial. The prosecutor argued that Mr. Busick had not demonstrated any expertise in the effects of choke holds other than basic training in the Marine Corps. She argued there was no evidence concerning the instructor, the length of training, or the nature of the skills learned by Mr. Busick. The prosecutor further argued that the effects of loss of oxygen to the brain are more akin to a medical opinion. Finally, the prosecutor indicated that she first learned of the proposed testimony concerning choke holds at the time the trial court asked for time estimates.

b. the trial court could properly exclude the proffered testimony

In ruling to exclude the proffered testimony, the trial court stated: "The request is denied to have those people testify to the subject matters offered for a lot of reasons, including what [the prosecutor] just said. Common knowledge. [¶] Experts are rendered to offer opinions on things that are not common knowledge generally. I mean, that's - - it's expert versus lay opinion. [¶] The subject matter of whoever was in the choke hold, the People are saying it's the alleged victim. You're apparently going to say it was one of the defendants. [¶] You know, the questions could be asked of them of what effects the choke hold had on them and because of the choke hold why did you do certain things if anything? [¶] It's really not a subject for expertise. So that's one of the reasons why I'm denying it. [¶] The second reason is is that I don't even feel it's relevant to have these witnesses testify to, you know, if somebody's knocked out in a choke hold. It's - - it's one witness's experience and different than the other witness that people react as being in an epileptic type seizure, thrashing around type thing. The two witnesses testified differently on that. [¶] But even if they were consistent it doesn't even matter. Who cares? I mean, that's what it really comes down to is who cares? So it's irrelevant to this case what is being proferred here. [¶] . . . [¶] 352 analysis here, I would say that the time it would take to get through all this versus the relevance, which I'm already saying there is no relevance, I would say under 352 independent of what I've said already that's another ground for me to keep it out. [¶] And then the third ground is late discovery. I don't even need to get to it, but I would say that there's just no excuse for that in my opinion assuming it would have come in. [¶] I would have had to have reached this decision - - I really don't have to reach this decision because I'm already saying it's not coming in, but as an aside it would have been a large hoop to get over for the defense for me to let it in because it's not fair to the other side if it did come in. [¶] Now they have to go find an expert in the next few days. Maybe they could. Maybe they couldn't. I haven't even asked them that. [¶] Maybe they wouldn't object because they

have an expert, but they are objecting on the timeliness basis. And, as an aside, I would say that it will be probable that I would have kept it out on that basis as well. But I don't even have to get to that point really."

Evidence Code section 720, subdivision (a) provides: "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which is testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert." In addition, the Supreme Court has held, "An expert witness's testimony in the form of an opinion is limited to a subject 'that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . .' (Evid. Code, § 801, subd. (a).)" (*People v. Catlin* (2001) 26 Cal.4th 81, 131.) The California Supreme Court has also held, """The trial court is given considerable latitude in determining the qualifications of an expert and its ruling will not be disturbed on appeal unless a manifest abuse of discretion is shown.""" (*People v. Davenport* (1995) 11 Cal.4th 1171, 1207, quoting *People v. Cooper* (1991) 53 Cal.3d 771, 813; see also *People v. Bui* (2001) 86 Cal.App.4th 1187, 1196.)

Nothing in the oral offer of proof or the testimony demonstrated any expertise on the part of either witness with regard to either choke holds or the potential to bite off an ear while rendered unconscious. Both had merely been trained in the use of choke holds. Although Mr. Wachsmuth had seen individuals react to choke holds by flailing their arms and being out of control, he did not testify that he had seen anyone biting off an ear. Neither had ever received any training by properly trained medical professionals. The trial court could reasonably conclude that neither Mr. Wachsmuth nor Mr. Busick were qualified to offer opinion testimony. Moreover, the trial court could properly rule that the testimony of these two witnesses was irrelevant. In addition, the trial court instructed the jury with CALJIC No. 4.30, "A person who while unconscious commits what would otherwise be a criminal act, is not guilty of a crime. . . ." We need not address Mr.

Kephart's argument that he was denied effective assistance of counsel based up Mr. Nadasi's failure to disclose the nature of the testimony to the prosecutor until just prior to trial. The trial court specifically noted that it did not base its ruling on that factor.

B. Sufficiency Of The Evidence

Mr. Kephart argues that there was insufficient evidence to support his convictions. Mr. Kephart reasons Mr. Kreszchuk's statements to the police and testimony at the preliminary hearing and trial were inherently incredible. This argument would also accrue to Mr. Guerrero's benefit. In reviewing a challenge of the sufficiency of the evidence, we apply the following standard of review: "[We] consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432, fn. omitted; *People v. Hayes* (1990) 52 Cal.3d 577, 631; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) Our sole function is to determine if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Marshall* (1997) 15 Cal.4th 1, 34; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Barnes* (1986) 42 Cal.3d 284, 303; *Taylor v. Stainer* (1994) 31 F.3d 907, 908-909.) The standard of review is the same in cases where the prosecution relies primarily on circumstantial evidence. (*People v. Rodriguez, supra,* 20 Cal.4th at p. 11; *People v. Stanley* (1995) 10 Cal.4th 764, 792; *People v. Bloom* (1989) 48 Cal.3d 1194, 1208; *People v. Bean* (1988) 46 Cal.3d 919, 932.) The California Supreme Court has held, "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin, supra,* 18 Cal.4th at p. 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745,

755.) Because intent can seldom be proven by direct evidence, it typically is inferred from the circumstances. (*People v. Smith* (1998) 64 Cal.App.4th 1458, 1469; *People v. Edwards* (1992) 8 Cal.App.4th 1092, 1099; *People v. Wilkins* (1972) 27 Cal.App.3d 763, 773.) There was substantial evidence to support both Mr. Kephart's and Mr. Guerrero's convictions.

Battery is defined as, "A battery is any willful and unlawful use of force or violence upon the person of another." (§ 242; see *People v. Benavides* (2005) 35 Cal.4th 69, 102-103.) In this instance, both Mr. Kephart and Mr. Guerrero were found guilty of battery with serious bodily injury. (§ 243, subd. (d).) Mr. Kephart was also convicted of mayhem for having bitten off Mr. Kreszchuk's ear. In addition to Mr. Kreszchuk's testimony that he suffered blows to his head and face and bites to his arm and ear, resulting in bleeding and swollen eyes, two other eyewitnesses testified. Mr. Friedman testified that the man in the black shirt was the one being held down while a third person punched and kicked at the victim. Mr. Friedman heard one of the assailants say "'Kick his head,' or, 'Kick his face,' . . . and, 'Hold him down.'" He saw the two assailants get into a car and drive away. Mr. Edgerly testified that he heard someone say, "'Kick him in the head.'" Mr. Edgerly saw an individual jump into the white truck. Mr. Edgerly believed the driver intended to run over the victim when driving away. Mr. Friedman and Mr. Edgerly each heard the victim yell: "'Help.'" and "'Fire.'" Mr. Kreszchuk testified that he had previously lied to police officers at the time of the incident by failing to reveal: he had been drinking while driving; he was under the influence of alcohol; and he and the defendants had purchased cocaine prior to the fight. Mr. Kreszchuk also admitted that he had lied at the time he testified at the preliminary hearing in this case. The jurors were instructed to weigh these factors in determining witness credibility in CALJIC Nos.: 2.13 [prior consistent or inconsistent statements]; 2.20 [believability of witness]; 2.21.1 [discrepancies in testimony]; 2.21.2 [witness willfully false]; 2.22 [weighing conflicting testimony]; and 2.27 [sufficiency of testimony of one witness]. Again, it is presumed the jurors followed those instructions. (*People v. Ledesma, supra,*

39 Cal.4th at p. 725; *People v. Avila, supra,* 38 Cal.4th at p. 574; *People v. Bradford, supra,* 15 Cal.4th at p. 1337.) The testimony of the eyewitnesses corroborated Mr. Kreszchuk's own account at trial as to what transpired. As a result, there was substantial evidence to support the convictions.

Also, Mr. Guerrero argues that the evidence was insufficient to support the conclusion the victim suffered serious bodily injury. Mr. Kreszchuk's ear lobe was bitten off during the fight. This constituted substantial evidence Mr. Kreszchuk suffered serious bodily injury. (§ 243, subd. (f)(4); *People v. Fosselman* (1983) 33 Cal.3d 572, 579.)

C. Instructions

1. accomplice instruction

Mr. Kephart argues that Mr. Kreszchuk was an accomplice. Mr. Kephart reasons Mr. Kreszchuk accompanied defendants to purchase cocaine and then took possession of the contraband. Mr. Kephart further argues that Mr. Kephart committed perjury at the preliminary hearing. As a result, Mr. Kephart argues that the trial court was required to instruct the jury that the testimony of Mr. Kreszchuk should be viewed with distrust. This argument accrues to Mr. Guerrero's benefit as well.

Section 1111 provides in pertinent part, "An accomplice is hereby defined as one who is liable to prosecution for the *identical offense* charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (Italics added; see also *People v. Arias* (1996) 13 Cal.4th 92, 142-143; *People v. Sully* (1991) 53 Cal.3d 1195, 1227; *People v. Felton* (2004) 122 Cal.App.4th 260, 268.) The Supreme Court has explained: "'[W]hen there is sufficient evidence that a witness is an accomplice, the trial court is required on its own motion to instruct the jury on the principles governing the law of accomplices,' including the need for corroboration." (*People v. Tobias* (2001) 25

Cal.4th 327, 331.) As Mr. Kephart concedes, defendants have the burden of proof that Mr. Kreszchuk was an accomplice. (*People v. Frye* (1998) 18 Cal.4th 894, 967-969; *People v. Fauber* (1992) 2 Cal.4th 792, 833-834; *People v. Sully, supra,* 53 Cal.3d at p. 1228.) Mr. Kephart has failed to do so here. The very language of section 1111 requires that the "identical offense" be the one "charged against the defendant on trial in the cause in which the testimony of the accomplice is given" in order for the foregoing accomplice principles to apply. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1201-1202; *People v. De Paula* (1954) 43 Cal.2d 643, 648; *People v. Felton, supra,* 122 Cal.App.4th at p. 273.) As a result, no instruction was required that Mr. Kreszchuk's testimony be viewed with distrust because he was an accomplice.

Moreover, any error in failing to give accomplice instructions was harmless because there was ample evidence corroborating Mr. Kreszchuk's testimony. (*People v. Box* (2000) 23 Cal.4th 1153, 1209; *People v. Arias, supra,* 13 Cal.4th at p. 143; *People v. Sully, supra,* 53 Cal.3d at p. 1228; *People v. Miranda* (1987) 44 Cal.3d 57, 100.) As set forth previously, Mr. Kreszchuk's testimony was corroborated by the testimony of Mr. Friedman and Mr. Edgerly. Mr. Kreszchuk testified that he was wearing a black shirt, which he removed after his assailants left. Mr. Friedman testified the victim was wearing a black shirt. Further, Mr. Kreszchuk's keys were located in Mr. Guerrero's pocket during the booking process.

2. unconsciousness instructions

Mr. Kephart argues that the trial court improperly instructed the jury with CALJIC 4.31.[3] Mr. Kephart argues the instruction's ambiguity rendered it constitutionally infirm.

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3 CALJIC No. 4.31 was given as follows: "If the evidence establishes beyond a reasonable doubt that at the time of the commission of the alleged crime the defendant acted as if he was conscious you should find that he was conscious unless from all the

Mr. Kephart argues the instruction did not designate which party had the burden of proving lack of consciousness. These contentions have no merit. (*People v. Babbitt* (1988) 45 Cal.3d 660, 689-696; see *Moss v. Superior Court* (1998) 17 Cal.4th 396, 427-428.) We are bound by those decisions. (*People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) We reject Mr. Kephart's argument that *People v. Babbitt, supra,* 45 Cal.3d at pages 689-696, was wrongly decided.

3. simple battery as a lesser included offense

Mr. Guerrero argues that the trial court improperly failed to instruct the jury on simple battery as a lesser included offense of battery with serious bodily injury. The California Supreme Court has held that a trial court must instruct on the general principles of law relevant to the issues raised by the evidence, including instructions on lesser included offenses. (*People v. Ochoa* (1998) 19 Cal.4th 353, 422; *People v. Breverman* (1998) 19 Cal.4th 142, 154.) In *People v. Montoya* (2004) 33 Cal.4th 1031, 1034, the California Supreme Court held: "In deciding whether an offense is necessarily included in another, we apply the elements test, asking whether '"'all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense.' [Citation.]"' . . . In other words, 'if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.' [Citation.]" (*Ibid.*; *People v. Lopez* (1998) 19 Cal.4th 282, 288; *People v. Birks, supra,* 19 Cal.4th at p. 118.) However, the California Supreme Court also held: "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever

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evidence you have a reasonable doubt that the defendant was, in fact, conscious at the time of the alleged crime. [¶] If the evidence raises a reasonable doubt that the defendant was, in fact, conscious you must find that he was then unconscious."

evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed." (*People v. Breverman, supra,* 19 Cal.4th at p. 162, quoting *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12, original italics, see also *People v. Birks, supra,* 19 Cal.4th at pp. 117-118.)

Section 243, subdivision (f) defines serious bodily injury thusly, "'Serious bodily injury' means a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement." (See *People v. Fosselman, supra,* 33 Cal.4th at p. 579.) For purposes of his instructional error contention, Mr. Guerrero does not dispute that the ear injury constituted serious bodily injury. However, Mr. Guerrero argues, "Since [he] was not held liable for the ear injury constituting the mayhem offense, it is reasonable to believe the jury's verdict was based on the remaining injuries."
Mr. Guerrero contends: "[T]he evidence was undisputed that [Mr.] Kreszchuk was beaten by [Mr.] Kephart and [Mr. Guerrero] joined the fray. However, the evidence also reflected that [Mr.] Kreszchuk, while hit and kicked about the body and face, did not sustain any 'serious bodily injury' from such acts. [Mr.] Kreszchuk's testimony established that he was placed in a chokehold and then pummeled about the head and face, sustaining swollen eyes as a result. [] [Mr.] Kephart later bit [Mr.] Kreszchuk's hand and he was kicked by [Mr. Guerrero]. . . . Hence, these acts, under the state of the evidence, do not qualify as aggravated battery." Mr. Guerrero further argues the evidence was clear that Mr. Kephart bit off Mr. Kreszchuk's ear. And Mr. Guerrero notes he was found not guilty of the mayhem charge. Thus, he argues, "[I]t is reasonable to believe the jury's verdict was based on the remaining injuries."

Mr. Guerrero's logic is flawed. It is undisputed Mr. Kreszchuk's ear was bitten off. Although battery is a lesser included offense of battery with serious bodily injury,

the facts of this case negate the necessity for the trial court to so instruct the jury. This is particularly true where the undisputed evidence demonstrated the victim suffered serious bodily injury. Section 954 provides in pertinent part: "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts . . . . The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged . . . . An acquittal of one or more counts shall not be deemed an acquittal of any other count." In *People v. Sanchez* (2001) 26 Cal.4th 834, 853, fn. 11, the California Supreme Court held: "'[A]n inherently inconsistent verdict is allowed to stand; if an acquittal of one count is factually irreconcilable with a conviction on another . . . effect is given to both. (*United States v. Powell* (1984) 469 U.S. 57 [citations].' (*People v. Santamaria* (1994) 8 Cal.4th 903, 911, italics added . . . .)" (See also *People v. Lara* (1996) 43 Cal.App.4th 1560, 1568, fn. 4 ["A verdict of conviction on one count which appears inconsistent with a verdict of acquittal on another count shall afford no basis for a reversal where the evidence is sufficient to support the conclusion that the defendant is guilty of the offense of which he stands convicted, regardless of how similar the facts underlying each count are. [Citation.]"]) Although Mr. Guerrero was not convicted of mayhem as an aider and abettor, the loss of Mr. Kreszchuk's ear was the end result of the aggravated battery. Mr. Guerrero was one of the assailants during the altercation when Mr. Kreszchuk's ear was irretrievably lost. No lesser included battery instruction was required.

4. flight instruction

Mr. Guerrero argues the trial court improperly instructed the jurors over defense counsel's objection with CALJIC No. 2.52 as follows: "The flight immediately after the commission of a crime is not sufficient in itself to establish guilt, but is a fact which, if

proved, may be considered by you in light of all of the proved facts in deciding whether a defendant is guilty or not guilty. [¶] The weight to which this circumstance is entitled is a matter for you to decide." This argument accrues to the benefit of Mr. Kephart as well. This contention has no merit.

The California Supreme Court has held, "In general, a flight instruction 'is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt.'" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055, quoting *People v. Ray* (1996) 13 Cal.4th 313, 345; see § 1127c; *People v. Jones* (1991) 53 Cal.3d 1115, 1145; *People v. Mason* (1991) 52 Cal.3d 909, 943; *People v. Turner* (1990) 50 Cal.3d 668, 694-695.) Mr. Guerrero argues there was no evidentiary support for the instruction. However, evidence was introduced that defendants left the scene of the incident by jogging or running to their truck and quickly driving away, almost hitting Mr. Kreszchuk in the process. Defendants did nothing to aid Mr. Kreszchuk, who was bleeding profusely. The circumstances of defendants' departure from the crime scene logically permitted an inference that their actions were motivated by guilt and delivery of the instruction was proper. (Cf. *People v. Jackson* (1996) 13 Cal.4th 1164, 1226; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1244; *People v. Mendias* (1993) 17 Cal.App.4th 195, 202; *People v. Turner*, *supra*, 50 Cal.3d at p. 694; *People* v. *London* (1988) 206 Cal.App.3d 896, 903.) Moreover, the instruction left the weight of the evidence of flight to the trier of fact. Finally, in light of other evidence of defendant's guilt and other instructions given, any error in instructing on flight was harmless. It is not reasonably probable a result more favorable to defendant would have been reached absent such an alleged error. (*People v. Crandell* (1988) 46 Cal.3d 833, 870; *People v. Silva* (1988) 45 Cal.3d 604, 628; *People v. Watson, supra,* 46 Cal.2d at p. 836.)

D. Cumulative Error

Mr. Kephart argues, and presumably Mr. Guerrero joins him in the argument, that the cumulative effect of errors committed by the trial court requires the reversal of their convictions. We disagree. There has been no showing of cumulative prejudicial error. (*People v. Seaton* (2001) 26 Cal.4th 598, 675, 691-692 [few errors identified were minor and either individually or cumulatively would not alter the outcome of the trial]; *People v. Catlin, supra,* 26 Cal.4th at p. 180 [same]; *People v. Cudjo, supra,* 6 Cal.4th at p. 630 [no cumulative error when the few errors which occurred during the trial were inconsequential].) Whether considered individually or for their cumulative effect, any of the errors alleged did not affect the process or accrue to defendants' detriment. (*People v. Sanders* (1995) 11 Cal.4th 475, 565; *People v. Cudjo, supra,* 6 Cal.4th at p. 637.) The California Supreme Court has held, "[A] [d]efendant [is] entitled to a fair trial but not a perfect one." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Mincey* (1992) 2 Cal.4th 408, 454; *People v. Miranda, supra,* 44 Cal.3d at p. 123.) In this case, defendants received more than a fair trial.

E. Sentencing

1. Imposition of upper term

Citing *Cunningham v. California* (2007) 549 U.S. ___, ___ [127 S.Ct. 856] and *Blakely v. Washington* (2004) 542 U.S. 296, 301, Mr. Kephart argues that his Sixth Amendment right to a fair and impartial jury was violated by the trial court's imposition of the upper term as to the mayhem conviction because the term was based on facts not determined to be true by a jury. Mr. Kephart argues he was entitled to a jury trial on the issue of the existence of aggravating factors. In *People v. Black* (July 19, 2007, S126182) ___ Cal.4th ___, ___, and *People v. Sandoval* (July 19, 2007, S148917) ___

Cal.4th ___, ___, the California Supreme Court examined the imposition of an upper term under the state determinate sentencing law in light of *Cunningham v. California, supra,* ___ U.S. ___ [127 S.Ct. at pp. 863-864]. Our Supreme Court held: "[A]s long as a single aggravating circumstance that renders a defendant *eligible* for the upper term sentence has been established in accordance with the requirements of *Apprendi* [*v. New Jersey* (2000) 530 U.S. 466] and its progeny, any additional fact finding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." (*People v. Black, supra,* ___ Cal.4th at p. ___, original italics.) Our Supreme Court further held: "It follows that imposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions." (*People v. Black, supra,* ___ Cal.4th. at p. ___.)

In this case, the trial court relied upon the fact that Mr. Kephart was on probation in two different cases at the time of the incident. During the prosecutor's argument, the trial court interjected: ""[H]e's on probation on two cases. It's starting to get a little more serious. Two misdemeanors recent and on probation at the time of this offense which he's now in violation of." In imposing the upper term, the trial court noted: "The factors in aggravation are that he was on probation on two cases at the time of this incident. And the nature of the crime is above and beyond, it seems to me, the seriousness normally associated with mayhem. [¶] I mean, here's a situation where this person is truly maimed for life." The trial court's comments suggest not only that defendant had failed on probation, but also that his conviction constituted increased seriousness. The trial court's reliance on defendant's failure on probation constituted one "legally sufficient aggravating circumstance" that justified the imposition of the upper term as to count 1. As a result, defendant's constitutional right to a jury trial was not violated by the trial court's imposition of the upper term sentence for his conviction of assault with a semiautomatic firearm. The "'statutory maximum'" sentence to which

defendant was exposed was the upper term. (*People v. Black, supra,* ___ Cal.4th at p. ___.)

2. Restitution fines

The trial court imposed a $200 section 1202.4, subdivision (b)(1) restitution fine and stayed the $200 section 1202.45 parole revocation restitution fine as to each defendant. These two restitution fines are not subject to section 1464, subdivision (a) and Government Code section 76000, subdivision (a) penalty assessments. (§ 1202.4, subd. (e); *People v. Sorenson* (2005) 125 Cal.App.4th 612, 617; *People v. McHenry* (2000) 77 Cal.App.4th 730, 734.) However, the Government Code section 70372, subdivision (a) state court construction penalty states in part, "[T]here shall be levied a state court construction penalty, in addition to any other state or local penalty including, but not limited to, the penalty provided by Section 1464 of the Penal Code and Section 76000 of the Government Code, in an amount equal to five dollars ($5) for every ten dollars ($10) or fraction thereof, upon every fine, penalty, or forfeiture imposed and collected by the courts for criminal offenses . . . ." The state court construction penalty applies to "every fine, penalty, or forfeiture imposed and collected by the courts for criminal offenses . . ." which includes restitution fines. Therefore, a state court construction penalty of $100 is to be added to both the section 1202.4, subdivision (b)(1) and 1202.45 restitution fines as to both Mr. Guerrero and Mr. Kephart. (Needless to note, the additions to the section 1202.45 parole revocation restitution fines are stayed.)

3. Court Security Fees

Mr. Kephart was subject to the imposition of a $20 court security fee pursuant to section 1465.8, subdivision (a)(1) for each of the two counts for which he was convicted. (See *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866.) The trial court imposed only one section 1465.8, subdivision (a)(1) fee. An additional section 1465.8, subdivision (a)(1) fee shall be imposed as to Mr. Kephart. The trial court is to personally insure the abstract of judgment is corrected to comport with the modifications we have ordered. (*People v. Acosta* (2002) 29 Cal.4th 105, 109, fn. 2; *People v. Chan* (2005) 128 Cal.App.4th 408, 425-426.)

IV. DISPOSITION

The judgments are affirmed as modified to impose the state court fee as to Mr. Kephart and the state court construction penalties as to both defendants. The trial court is to personally insure a corrected abstract of judgment is prepared and forwarded to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.