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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DANIEL MACKEY, Defendant and Appellant.	B173677 (Los Angeles County Super. Ct. No. MA025578)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael E. Pastor, Judge. Reversed and Remanded in part; Affirmed in part.

Sally P. Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lawrence M. Daniels and Susan Lee Frierson, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Daniel Mackey was convicted by a jury of two counts of corporal injury on a spouse (Pen. Code, § 273.5, subd. (a)), assault likely to cause great bodily injury (§ 245, subd. (a)(1)) and false imprisonment with the personal infliction of great bodily injury (§§ 236, 12022.7, subd. (e)). He was sentenced to 10 years, 8 months in state prison. He appeals, contending that: (1) the court erred by excluding evidence about the victim's prior misdemeanors and prior false abuse claims; (2) that the prosecutor engaged in misconduct during argument; and (3) that the court gave the jury an incorrect definition of the term "material." In a supplemental brief filed with permission of the Court, appellant also contends that pursuant to *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct 2531], his right to a jury trial was violated by the court's imposition of the upper term in count 3 and the imposition of consecutive terms in counts 5 and 6. We affirm the judgment of conviction but remand the matter for resentencing.

FACTUAL AND PROCEDURAL ARGUMENT

Appellant, his wife Michelle, and their two children lived in Lancaster. In October 2002, Michelle reported to Los Angeles County Sheriff's deputies that appellant was physically abusing her. Michelle told them that in June 2002, appellant had accused her of having an affair and tried to choke her and she passed out. When she regained consciousness, appellant continued to fight with her and choked her again. She passed out again, and when she came to, some of her clothing had been ripped off and her bra was torn. Appellant said he was sorry and Michelle did not show anyone her black eye and the mark on her neck because she was ashamed. On Friday, June 28, 2002, appellant picked up a baseball bat and swung it close to Michelle's face. He continued to accuse her of having an affair and demanded to know the name of the man. He then punched her in the nose and attempted to lock her in the closet. He slammed the door on her hand,

crushing her finger. He stuffed some socks in her throat and tied a shoestring around her head to hold the socks in. He cut a ring off her finger with some needle-nose pliers. He tied her up with neckties and shoelaces. Michelle reported that appellant then shoved a wooden stick up her rectum.[1] Michelle was able to untie herself and came out, then appellant pushed her back into the closet and hogtied her. Appellant then held up a gun and put it between her eyes. Then he backed away and kicked her in the ribs.

Two days later, Michelle told appellant's brother's wife, Lily Mackey, what happened. Lily came to pick her up and took her back to her house. Lily then took her to see their pastor and Michelle showed them her injuries on her hands, ribs, and neck. The pastor encouraged Michelle to reconcile with appellant. Michelle never moved back to her house and stayed with Lily or the pastor. In September 2002, Michelle filed for divorce. She sought medical treatment for her ribs which were still hurting her.

In November 2002, deputies went to appellant's and Michelle's house. They collected evidence from the home which included a torn bra, samples from bloodstains on the wall, and a wooden stick. Tests later confirmed that the bloodstains on the wall were Michelle's and that there was fecal matter and sperm on the stick. Appellant's DNA, but not Michelle's, was found on the stick.

Michelle moved in with a couple, Elka and Eland Tell, but moved out in February 2003, when she had a disagreement with Eland.

Michelle testified at trial that appellant had been abusing her since 1989, and that she had not told police the truth when asked about her injuries. She admitted that she and appellant had abused alcohol and used methamphetamines.

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[1] Although appellant was charged with sexual penetration with a foreign object, he was not convicted on this count.

At trial, the defense called Dinesh Rajadhayksha, Eland Tell's next door neighbor, as a witness. Rajadhayksha testified that he had observed an argument between Eland and a blond white female in the Tells' garage. He walked over to the garage and it sounded like the blond woman was talking on the phone with the Sheriff's Department, reporting that she had been assaulted by Eland. She was agitated and tried to give Eland the phone, inadvertently hitting him with it. Rajadhayksha tried to calm her down but she became more angry. The sheriff's deputies arrived at some point and Michelle moved her things out of the garage, but Michelle continued to berate Rajadhayksha. Rajadhayksha later identified the blond woman as Michelle. On re-cross, after listening to the audiotape of the phone call Michelle made, Rajadhayksha admitted that he had told the person on the phone that Michelle had hit Eland with the phone, and that Eland had gone to put his gun away.

Appellant's and Michelle's 13-year old son testified that he had never seen his father swing a bat at his mother. He did testify, however, that right about the time they moved out of the house, he heard screaming in the middle of the night and later saw bruises on his mother's ribs.

Melvin Mackey, appellant's brother, testified that when Michelle came to live with him and his wife Lily, she said she was "sore," but he did not see any signs of injury. Michelle went out with appellant at least four times while she was living with Melvin. Other people who saw Michelle at about that time did not observe any signs of injury on her.

Appellant did not testify at trial.

DISCUSSION

1. *Evidence Code Section 352 Objections*

A trial court's determination of admissibility of evidence pursuant to Evidence Code section 352 is reviewed for abuse of discretion. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) Relevant evidence may be excluded if the trial court determines that its probative value is substantially outweighed by the probability that its admission will require an undue consumption of time or create a substantial danger of undue prejudice, confusion of issues or that it will mislead the jury. (Evid. Code, § 352; *People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

a. *Michelle's Prior Misdemeanors*

The court refused to allow evidence that Michelle had been convicted in 1989 of two misdemeanors stemming from an incident in which she left a restaurant without paying for her food. The court stated: "The court will evaluate this proffer pursuant to [*People v. Wheeler* (1992) 4 Cal.4th 284, 295-296] and Evidence Code section 352. Certainly, the conduct which is alleged may be characterized as going to moral turpitude. [¶] The court has to evaluate that conduct in the context of a subsequent misdemeanor conviction which is not, in fact, admissible. [¶] The court also has to evaluate the time of the alleged incident, the year 1989, the fact that it is allegedly defrauding a restaurant. [¶] The court will rule pursuant to Evidence Code 352 that the prejudicial value of such evidence substantially outweighs its probative value. It has minimal, if any, probative value in this case, and it opens up significant issues regarding the underlying conduct, whether it is true or not, whether in fact it can be proven. [¶] And I am going to sustain the People's objection under Evidence Code section 352 and preclude defense." Appellant contends that this was reversible error because Michelle's credibility was a central issue.

The evidence of the misdemeanor convictions, would at most, prove that Michelle did not pay for a meal fourteen years earlier, something that may not have surprised the jury based upon the testimony about their lifestyle and the fact that she and appellant had drug-related problems. It would have little, if any, bearing on her credibility about the abuse, especially since her stories about the abuse were supported by physical evidence recovered from the house and by other witnesses' testimony about her injuries.

Moreover, evidence was received that Michelle had lied about her history of drug use on court documents in order to obtain sole custody of her children. Evidence was also presented that she had threatened appellant that she would call the police and lie in order to protect her children. She also testified that she had lied in 1993 to police by telling them she had been assaulted by a stranger when in fact her injuries had been inflicted by her husband. Therefore, Michelle's credibility had already been adequately tested, and any evidence about the 1989 incident would have been cumulative.

The trial court did not err in excluding this evidence. (*People v. Snow* (2003) 30 Cal.4th 43, 89; *People v. Hillhouse* (2002) 27 Cal.4th 469, 495-496.)

b. *Prior Uncharged Conduct*

Appellant unsuccessfully attempted to introduce evidence that Michelle and Eland Tell had gotten into an argument and she said to him, "I'm going to tell the police you hit me." Tell then called the police, and Michelle grabbed the phone from him, telling the police that Tell had been verbally abusive. The prosecutor stated in response to this proffer that if Tell were to testify, he would then seek to impeach Tell with a tape of the 911 call to demonstrate that it was Michelle, not Tell, who had called the police. The trial court decided to exclude the testimony from Tell, stating, "I think under Evidence Code section

352, this is a subject area which lacks very much probative value. It is an incident in February of this year involving a completely separate set of circumstances, completely separate relationship between Ms. Mackey and Mr. Tell to what may have happened from the year 2000 to the year 2002. It lacks probative value in my determination. [¶] More importantly, under Evidence Code section 352, the nature of this type of evidence from Mr. Tell and the time consumption involved, it is of a collateral nature. The need for impeachment and reimpeachment and going backwards and forwards, and the real issues involving self-incrimination as to Mr. Tell substantially outweigh the probative value. [¶] I have balanced and evaluated the probative versus prejudicial value in this case, offer of proof, and it is my determination under Evidence Code section 352 not to permit Mr. Tell to testify in this case."

On appeal, appellant contends that the exclusion of this evidence was error since it would show Michelle's propensity to make false abuse claims when she was angry at someone. We disagree.

First of all, the prosecutor offered to introduce the tape of the 911 call which would have disproved Eland Tell's alleged testimony. There was no evidentiary value to be gained by Tell's testifying. Secondly, Rajadhayksha's testimony about the incident with Tell was admitted. Tell's additional testimony would have been collateral to the main issue of appellant's guilt and would have consumed much time and possibly confused the jury. The court did not abuse its discretion in excluding the evidence. (*People v. Lewis* (2001) 26 Cal.4th 334, 374-375.)

3. *Prosecutorial Misconduct*

The prosecutor stated, at the beginning of argument, "When we opened this case, I said that you would hear evidence about a long-term

relationship, but a long-term pattern of abuse punctuated by brutal, vicious acts of domestic sexual and physical abuse. I said those things in opening. [¶] Having heard the evidence, this conduct is monstrous. It is horrible."

The defense made no objection to these statements.

The prosecutor then stated, "It's horrible what happened in that house. It's monstrous. Like I said in the beginning, this is an awful, vicious, brutal thing, and it's even worse. It's compounded by the fact there are kids there listening to their mother scream. And the little girl said she didn't know if she was going to die. [¶] But don't decide this case on emotion." At the end of argument, he said, "Folks, that says it all. This conduct is reprehensible. I've never said things like this in a criminal case, but this conduct is reprehensible. And with those children there, it is evil and cruel." At this point, the appellant objected to the remarks as inappropriate. The court responded: "Any editorial comment, if there is a motion to strike, the motion is denied. Again, jurors understand that the arguments of counsel are not evidence in this case. The jurors decide the case based on facts and upon the legal authority I'm going to be giving to them."

Appellant claims that the prosecutor's remarks were inflammatory and appealed to the jury's passion and prejudice. We disagree. The evidence in this case covered the gamut from drug use to extreme physical violence. The prosecutor's usage of the terms "reprehensible" and "evil and cruel" to apply to appellant's actions was mild compared to the evidence of sodomy with a stick, hog-tying, and beating. We find no prosecutorial misconduct. (*People v. Brown* (2004) 33 Cal.4th 382, 399-400; *People v. Welch* (1999) 20 Cal.4th 701, 752-753.)

4. *Definition of Material*

The jury was instructed, inter alia, with CALJIC No. 2.21.2 as follows: "A witness who is willfully false in one material part of his or her

testimony is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars."

During deliberations, the jury sent an inquiry to the court, asking for the definition of "material" as it was used in that instruction.

After discussing the inquiry with counsel, the prosecutor suggested that the definition contained in Black's Law Dictionary would be "appropriate and probably the safest thing we could do at this point." Defense counsel replied, "I agree, partially. [¶] I believe that the definition of 'material' in Black's is important. But material evidence, I think, should be given to the jury also, though they didn't ask for definition of material evidence. It puts the 'material' in context, and it shows how evidence is material evidence. So I would ask they both be given." The court replied: "I'm going to limit it to the definition of material, which I think is an appropriate response to the question in the context of 2.21.2. [¶] I don't want to expand the definition beyond that instruction. And I think taken in context of that instruction, that the definition of 'material' goes directly to the point at issue."

The court then told the jury: "The definition of 'material' in line 1 of 2.21.2, page 6 of jury instructions, is important, more or less necessary, and let me separate them. [¶] Important; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form."

Appellant contends that the court should have instead given the definition used in *People v. Wade* (1995) 39 Cal.App.4th 1487, 1496, that is, "'substantial, essential, relevant or pertinent.'" Appellant argues that had this definition been given, Michelle's testimony would have been rejected in its entirety.

The relevant passage from *Wade* reads in its entirety: "[R]ead in the context of CALJIC No. 2.21.2, it is clear that 'material' is not used in the sense described in [*People v. Pierce* (1967) 66 Cal.2d 53, 61], i.e., as probably influencing the outcome. It would make no sense to tell the jury that it could distrust a false witness only if the falsity influenced the outcome of the case. Rather, as used in the instruction, 'material' carries its ordinary meaning of 'substantial, essential, relevant or pertinent.' The instruction thus tells the jury it can distrust a witness who is willfully false in giving relevant or pertinent testimony." (*People v. Wade, supra,* 39 Cal.App.4th at p. 1496.)

It is apparent that appellant waived his right to object to the definition of term "material" given since his counsel agreed to that definition at trial. (*People v. Cooper* (1991) 53 Cal.3d 771, 846-847; *People v. Bohana* (2000) 84 Cal.App.4th 360, 373.) The only objection made by defense counsel was to have an additional definition given, that of "material evidence."[2] But the instruction dealt with testimony by a witness, not evidence per se.

There is little difference between the definition urged by appellant and the definition given by the court. "Relevant" or "pertinent" carry the same meaning as "having influence or effect" or "going to the merits." "Substantial and essential" are synonyms of "important." There was no error in the court's instruction.

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[2] Black's Law Dictionary (8th ed. 2004) defines "material evidence" under the definition of "evidence" as "Evidence having some logical connection with the facts of consequence or the issues."

5. *Sentencing Issues*

The trial court sentenced appellant to the upper term on count 3, four years, and the upper term on the accompanying great bodily injury enhancement, of five years. It then sentenced appellant to consecutive terms on count 5 (inflicting corporal injury on a spouse) and on count 6 (false imprisonment). It imposed the upper term on count 2, but then stayed that term pursuant to Penal Code section 654.

The imposition of the upper term in count 3 for the assault was based upon the court's decision that the offense involved great violence, great danger and threat of bodily injury, that the victim was vulnerable, and that appellant posed a serious danger to society. (Cal. Rules of Court, rule 4.421 (a), (a)(2), (a)(3).) The court noted that appellant had numerous prior convictions but remarked that none of them were particularly violent, and so considered that as a factor in mitigation. The court imposed the upper term on the great bodily injury enhancement to count 3 based on the nature and the extent of the injury. The consecutive terms in counts 5 and 6 were based upon the fact that each count had a completely separate intent and objection, was a completely separate act of violence and committed in a different time and location. (Cal. Rules of Court, rule 4.425 (a)(1)-(3).)

Appellant contends that pursuant to *Blakely v. Washington, supra,* 542 U.S. ___ [124 S.Ct. 2531], his right to a jury trial was violated when the court sentenced him to the upper term on count 3 and consecutive terms in counts 5 and 6.

The People argue that appellant waived his rights by not objecting to the sentencing at the hearing. Since *Blakely* was not decided at the time appellant was sentenced, he obviously did not have a meaningful opportunity to object, and thus no waiver of rights occurred. (See *People v. Welch* (1993) 5 Cal.4th 228, 237; *People v. Cleveland* (2001) 87 Cal.App.4th 263, 268, fn. 2.)

We agree that *Blakely* applies to the California sentencing laws. (*People v. White* (2004) 124 Cal.App.4th 1417, pet. for review filed Jan. 19, 2005.)[3] The analysis in *Blakely* was reaffirmed in *United States v. Booker* (Jan. 12, 2005) 2005 WL 50108, ___U.S. ____[125 S.Ct. 738, 756]. Because the factors on which the court relied required additional factual findings to be made by the jury, the imposition of the upper term on count 3 and the accompanying bodily injury enhancement was invalid. (*People v. White, supra*, 124 Cal.App.4th at p. 1440.) The matter must therefore be remanded for resentencing as to this count.

With respect to the imposition of consecutive sentences on counts 5 and 6, *Blakely* does not apply. The trial court is not required to make factual findings when deciding to impose consecutive terms. (Cal. Rules of Court, rules 4.425, 4.406, 4.433(c); Pen. Code, § 1170.3; *People v. White, supra*, 124 Cal.App.4th at p. 1441.) A decision to impose consecutive terms can be made only after the defendant has been found beyond a reasonable doubt to have committed two or more offenses. This complies with the guarantee to a jury trial under the Sixth Amendment and the due process rights afforded by the Fourteenth Amendment.

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[3] The California Supreme Court has granted review in two cases involving *Blakely*, *People v. Towne* (S125677) and *People v. Black* (S126182).

DISPOSITION

The matter is reversed as to sentencing and remanded for resentencing on count 3 and its enhancement in accordance with the views expressed in this opinion; in all other respects the judgment is affirmed.

NOT TO BE PUBLISHED

HASTINGS, J.

We concur:

EPSTEIN, P.J.

CURRY, J.