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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. OSCAR WILLIAM MALLORY, Defendant and Appellant.	B169815 (Los Angeles County Super. Ct. No. BA239682)
In re OSCAR WILLIAM MALLORY, on Habeas Corpus.	B174734

APPEAL from a judgment of the Superior Court of Los Angeles County, Judith Champagne, Judge. Affirmed in part, Reversed in part, Remanded and Denied.

Lynette Gladd Moore, 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,

Robert F. Katz and Louis W. Karlin, Deputy Attorneys General, for Plaintiff and Respondent.

Oscar Mallory was convicted by a jury of assault with a firearm with the personal use of a handgun (Pen. Code, § 245, subd. (a)(2); 12022.5, subd. (a)(1)). He was sentenced to 18 years in prison. He appeals, contending that the court erred in excluding certain evidence and in sentencing him to the upper term for the assault. He has also filed a petition for writ of habeas corpus (the petition), contending that there was evidence of jury misconduct. On May 11, 2004, we issued an order deferring consideration and determination of the petition so that it could be resolved in conjunction with the appeal. Following oral argument on July 16, 2004, we requested additional briefing from the parties on the effect of *Blakely v. Washington* (2004) 542 U.S. ____, 124 S.Ct. 2531. We affirm the judgment of conviction, but remand the cause to the trial court for resentencing, and deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

I. *The Appeal*

On November 17, 2002, at approximately 1:45 a.m., appellant walked up to an apartment complex on South Kenmore Avenue in Los Angeles, where his girlfriend, Lakeisha Taylor, lived. He was holding a brown bag with a bottle of liquor inside. Joshua McGinnis was sitting outside the front of the building with his brother Derrick and his cousin Jermond. Joshua asked appellant what he was drinking, but appellant did not respond. Appellant seemed "out of it." Instead, he began to argue with Joshua. When Joshua called out to Jermond, appellant pulled a handgun from his overalls. He pointed it at Joshua's head and told him to bow down. Joshua kneeled down and told Derrick to go upstairs and get Lakeisha.

Derrick ran upstairs and said, "Keisha, Keisha, your nigga has a gun at my brother." Lakeisha called down, "Don't trip. He ain't going to shoot you." She told appellant to put his gun away and appellant told her to get her "stuff." Joshua tried to run from appellant, and appellant fired at him. Joshua stumbled and passed out. Appellant and Lakeisha drove away in appellant's car.

Los Angeles police officers responded to the scene. They found a spent bullet casing but no firearm. They observed Joshua bleeding, with a wound in his chest, and in pain. Joshua was taken to the hospital and the bullet was lodged so close to his heart doctors could not remove it.

At trial, Donald Mattos, another resident of the apartment complex, said he saw a male wearing a baseball cap and black shirt pointing a gun at another male. He heard a voice say "Bow down." He later heard a female voice say "Do not shoot" or "Drop the gun." Danny Martinez testified that he was across the street and heard voices say "Get down" and "Don't shoot." He also heard the gunshot.

Appellant testified in his own behalf. He said that he was walking up to the apartment building when Joshua, standing in the building's entrance, asked for a drink. He grabbed a bottle of brandy from appellant. Joshua started arguing with appellant. Joshua then pulled out a pistol and handed it to his brother Derrick. Appellant called out to Lakeisha. A third male in a hooded sweater approached appellant, and said "Get down." He then struck appellant in the head, and the three men ran away. Appellant brushed himself off and went to Lakeisha's apartment. He told Lakeisha and the apartment manager that "the guys downstairs" were trying to "jump" him. He and Lakeisha then left. Appellant denied pulling a gun on Joshua.

Appellant's brother testified as to appellant's reputation in the community for peacefulness as well as to his opinion as to appellant's good character.

DISCUSSION

1. *Hearsay Statements*

During direct examination of Lakeisha, the prosecutor asked what happened after she opened the door for appellant. Lakeisha responded, "[Appellant] was explaining to me that some guys were trying to jump on him." The prosecutor interrupted her and defense counsel argued that the witness should have been permitted to complete her statement. The court ruled in favor of the prosecution, saying "The answer was obviously going to be hearsay, which is not allowed." Later, the prosecutor was attempting to impeach Lakeisha, and asked her what she told the police investigators about appellant's actions, and she responded, "I believe I told him that he started explaining that . . . some guys were downstairs trying to jump on him. Trying to rob him." No objection was made to this answer and no admonition was given to the jury.

On cross-examination, defense counsel said to Lakeisha: "You hit the nail on the head earlier. You said [appellant] told you the guys downstairs were trying to rob--" At that point the prosecutor objected, the court sustained the objection on hearsay grounds and warned defense counsel not to "go into the area again." Later, defense counsel asked Lakeisha, "Isn't it also true that you told that investigator that [appellant] was basically telling you to get out of there because the guy" and the prosecutor objected again, and the court stated, "We are not going to revisit that."

Appellant contends that the statements he made to Lakeisha should have been admitted under the spontaneous statement exception to the hearsay rule.

Our review of the record convinces us that any conceivable error in sustaining the prosecution's hearsay objections was utterly harmless. Appellant's defense was that Joshua and his companions threatened him first and that he told Lakeisha and the apartment manager that they were trying to rob him. Appellant testified both on direct and cross that people were trying to "jump" him. Despite the prosecutor's objections, Lakeisha's testimony that appellant had told her that he was being attacked and that people were trying to rob him came across clearly to the jury without being stricken, and supported appellant's defense. Any more elaboration on the topic would not have aided appellant.

2. *Disparaging Remarks*

Appellant contends that the court made several disparaging and sarcastic remarks to defense counsel during the rulings on the hearsay evidence. Appellant claims that the cumulative effect of these errors was to "cramp and hinder the exercise of the right to cross-examine witnesses."

We have reviewed the entire record and do not discern from it a pro-prosecution bias. In addition, most of these claimed slights did not occur in front of the jury, and furthermore, the jury was instructed with CALJIC No. 17.30, warning them against inferring the existence of any fact from either the court's instructions or statements, so any possible prejudice would be harmless. (*People v. Williams* (2000) 79 Cal.App.4th 1157, 1172.)

3. *Sentencing*

The information contained a special allegation that appellant had inflicted great bodily harm within the meaning of 12022.7, subdivision (a). The jury made a finding of "not true" on this allegation, despite the undisputed evidence that Joshua had been shot in the chest.

The court commented that this finding was not surprising, stating: "During the trial counsel had indicated there was probably going to be a stipulation as to the physician's testimony. Up until the very afternoon that it was going to be presented, the court was under that impression. I even told the jurors based on counsel's statements there was likely to be no medical testimony, but rather a stipulation. [¶] . . . The next thing I knew there wasn't going to be a stipulation. The People had the medical records, but those records were not in the court's estimation clear and concise enough to avoid the undue confusion and delays under 352 of the Evidence Code. I disallowed the medical evidence by way of reports. [¶] I don't have any question in my mind as to the verdict. I think it reflected their own confusion on what would be sufficient since there was no doctor. There was no medical report. They had basically just a description of what had occurred. [¶] However, the court can and will rely on the nature of the injury in reaching its conclusion, both as to the motion and as to an appropriate sentence."

At sentencing, the court imposed the upper term on the assault, stating, "this was a crime involving great violence and great bodily harm, disclosing a high degree of cruelty, viciousness or callousness." It then imposed the upper term for the section 12022.5 firearm use enhancement, stating, "The court is selecting the upper term noting that the defendant has previously served a sentence in the state prison or Youth Authority and that his crimes appear, though with a large interval, to be of increasing seriousness, reflecting that he continues to pose a danger to society."

Appellant contended in his opening brief that because of the jury's "not true" finding, the court was prohibited from using "great bodily harm" as a factor in sentencing and thus should not have imposed the upper term for the assault.

After the matter was briefed, the United States Supreme Court decided *Blakely v. Washington, supra,* 542 U.S. ____, 124 S.Ct. 2531. The parties submitted additional briefing on the effect of *Blakely* on this case.

Appellant contends that *Blakely* prohibits California courts from utilizing facts not determined by a jury to increase a defendant's sentence or to impose the upper term prescribed for an offense. He argues that because the jury specifically made a "not true" finding on the great bodily injury allegation, the court was precluded from using that fact to impose the upper term for the assault. He also argues that the aggravating factors used by the trial court to impose the upper term for the firearm enhancement were never presented to the jury for consideration, and thus the court had no authority to impose an upper term on that enhancement either.

The People argue that appellant forfeited his claim because he did not make a specific objection to the sentence on these grounds. Because *Blakely* was decided after appellant had been sentenced, we find no waiver. (*People v. Ochoa* ___ Cal.App.4th ___ (Sept. 2, 2004, No. D042215); see also *People v. Vera* (1997) 15 Cal.4th 269, 276-277 and *People v. Cleveland* (2001) 87 Cal.App.4th 263, 268, fn. 2.)

Pursuant to *Blakely*, "'[o]ther 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*, at p. 2536, quoting *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) We agree that pursuant to *Blakely*, consideration of the fact that the victim suffered great bodily injury and the fact that appellant's prior convictions were of increasing seriousness to enhance the sentence violates appellant's Sixth Amendment rights, and as a result the sentence is invalid. (*Blakely, supra*, 124

S.Ct at pp. 2537-2538.) Accordingly, the matter must be remanded for resentencing.

II. *The Habeas Petition*

Appellant contends in his habeas petition that during a brief recess, the prosecutor spoke with a teacher and her class in the hallway outside the courtroom, discussing the case. Appellant alleges that two of the jurors, as well as members of his family, were in the hall and heard the conversation, thus violating his right to an impartial jury. Appellant submitted the declaration of Coeita Ali who had heard the prosecutor say, "[Appellant] shot someone, and she was going to impeach [appellant's] girlfriend Lakeisha Taylor's testimony," as the prosecutor pointed at Lakeisha. Ms. Ali stated that the jurors were in close proximity and heard the statements. Appellant also submitted a portion of the record which reflects that the court received a communication from Juror No. 8, who was questioned by the court and counsel, and then allowed to return to the jury room for deliberations.

Our review of the record reveals that after both parties had rested, and just before deliberations were about to commence, Juror No. 8 had submitted a note to the court, which stated, "I am sure it was innocent, but I wanted to express my mild feeling of disagreement with the District Attorney addressing a visiting class in the lobby outside of the courtroom." The letter concluded, "I felt this is minor, but should be brought to your attention (and that of the [deputy district attorney's]) for future instances." Defense counsel did not raise a further objection nor did he request a curative admonition. Therefore, his prosecutorial misconduct claim is waived. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1000; *People v. Riel* (2000) 22 Cal.4th 1153, 1212.) Moreover, based upon the timing of the statement as well as the content, we can perceive no misconduct. No more

evidence was to be elicited and the prosecutor's comments did not mention anything that the jurors did not already know. We do not find that appellant has met his burden for habeas corpus relief. (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475.)

DISPOSITION

The judgment is reversed and remanded for resentencing in accordance with the views set forth in this opinion. In all other respects, the judgment is affirmed. The petition for writ of habeas corpus is denied.

NOT TO BE PUBLISHED

HASTINGS, J.

We concur:

EPSTEIN, Acting P.J.

CURRY, J.