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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. JOSE BERNARDIN RIVAS, Defendant and Appellant.	B171183 (Los Angeles County Super. Ct. No. BA244067)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dale S. Fischer, Judge. Affirmed in part, reversed in part.

Irma Castillo, 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, William T. Harter, Joseph P. Lee, Chung L. Mar and Kenneth N. Sokoler, Deputy Attorneys General, for Plaintiff and Respondent.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant Jose Bernardin Rivas was charged and convicted in count one of attempted willful, deliberate, premeditated murder (Pen. Code, §§ 664/187, subd. (a)); corporal injury to a spouse (§ 273.5, subd. (a)) in count two; and possession of a controlled substance in count three. With respect to count two, it was also alleged and found to be true by the jury that appellant personally used a deadly and dangerous weapon, a knife, and personally inflicted great bodily harm.

The court sentenced appellant to life plus six years for count one. The six years were imposed under section 12022.7, subdivision (e) and 122022, subdivision (b)(1).[1] The court sentenced appellant to the upper term of four years, plus six years for count two. The six years were also based on section 12022.7, subdivision (e) and 12022, subdivision (b)(1). The sentence for this count was stayed. Finally, appellant was sentenced to the midterm of two years for count three.

At trial, the prosecution announced that it could not locate the victim, Teresa Meza, and intended to proceed under Evidence Code section 1370.[2] Evidence was

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[1] Section 12022.7, subdivision (e) provides that "[a]ny person who personally inflicts great bodily injury under circumstances involving domestic violence in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three, four, or five years." Section 12022, subdivision (b)(1) provides that "[a]ny person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless use of a deadly or dangerous weapon is an element of that offense."

[2] Evidence Code section 1370 provides in pertinent part that "Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if . . . : The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant. . . . The declarant is unavailable as a witness . . . . The statement was made at or near the time of the infliction or threat of physical injury. . . . The statement was made under circumstances that would indicate its trustworthiness. . . . The statement was made . . . to a law enforcement official."

presented to establish that Meza was unavailable. The court found that reasonable efforts had been made to locate her.

Another hearing was held under Evidence Code section 402 to determine whether the statements of Meza's young daughter, Iroko M., would be admitted under Evidence Code section 1240, as a spontaneous utterance.[3] The court concluded that statements made to third parties that appellant and Meza were arguing and appellant stabbed Meza in the head would be admissible under this exception to the hearsay rule.

At trial, Maria Ruiz, a neighbor of the victim, testified that on March 1, 2003, at around 11 p.m., Iroko knocked on the door of Ruiz's apartment and asked for help because "her father had stabbed her mother." Iroko was crying at the time, and had blood on her hands. Iroko said the blood was from hugging her mom. Ruiz called the police. Ruiz then went to Meza's apartment and saw Meza lying in a lot of blood.

Maria Enriquez, the manager of the apartment complex, saw and heard Iroko going from door to door asking people to help her mother. Enriquez went into the apartment and saw Meza lying on the ground with a lot of blood on her face.

Rocael Rodriquez, a Los Angeles police officer, responded to a call concerning an assault with a deadly weapon within five minutes. He saw Meza lying on the floor, covered with blood. She was disoriented. She kept asking, "What happened" and "Who did this to me?" He then spoke to Iroko. He questioned her in Spanish. Iroko told him where she lived, that Meza was her mother, and that "Bernardin," her stepfather, has stabbed her mother several times throughout her head until she fell to the ground. Officer Rodriquez recovered a

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[3] Evidence Code section 1240 provides that a statement is admissible, without regard to the hearsay rule, if the statement: "(a) Purports to narrate, describe, or explain any act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

bent wood-handled knife near Meza. The knife had dried blood and dark hair on it. Paramedics arrived and transported Meza to the hospital.

Officer Rodriquez and his partner questioned Meza at the hospital. She told them that she had been living with "Bernardin" for approximately two years. She and he had been arguing. Bernardin became upset. He walked into the bedroom where Meza and Iroko were sleeping to continue the argument. He withdrew a knife from his rear pants pocket and attempted to stab her. She wrestled with him and pushed him into the living room. She screamed for Iroko to go get help. Bernardin began to stab her repeatedly and said several times he was going to kill her. Officer Rodriquez noted that Meza had a three-inch laceration on her thigh. He further noted that the kitchen and living room in the apartment were essentially one room. He observed other similar knives in the kitchen area on top of a counter near the sink.

Meza also told Officer Rodriguez that three days earlier, Bernardin poked or stabbed her leg with a broken beer bottle.

Julian Aispuro, Meza's nephew, knew appellant and that he had been living with Meza. Aispuro spoke with appellant after the incident by telephone. Appellant said he knew what he had done, and was ready to pay for it. Aispuro drove to where appellant said he was, and called 911. Aispuro had no knowledge of whether his aunt was afraid of appellant.

Jennifer Grasso, a Los Angeles police officer, testified that she responded to the assault with a deadly weapon call. When she arrived at the scene, it was extremely bloody. Officer Grasso responded to Aispuro's call and arrested appellant on March 3. Appellant had a picture of Meza with him.

Enrique Chavez, a Los Angeles police officer, assisted in the arrest of appellant and located a white powdery substance in his jacket pocket.

David Purdy, a criminalist for the LAPD, tested the white powder, which came contained in four "bindles," and identified cocaine. There were 1.26 grams

of white powder. Purdy did not have an opinion on whether the quantity of cocaine found was usable. For comparison's sake, he pointed out that a nickel weighs five grams.

Paul Lopez, a detective for the Los Angeles Police Department, was called by the defense. He testified he spoke to Meza on March 5. She told him she had been injured on her leg, prior to the incident, by a broken beer pull tab, not a beer bottle. The injury occurred while she was asleep. She woke up, appellant was standing over her and told her he had cut her with the pull tab.

Detective Lopez testified on cross-examination by the prosecution that he "had occasion to investigate cases involving possession and the use of controlled substances by individuals" during his tenure with LAPD. He understood the term "usable quantity" to mean "the amount of narcotics a person has for his own usage or that of others as opposed to maybe sales of narcotics in large quantities." On further questioning, he agreed that the term could also "relate to perhaps a person having an amount of cocaine or some other controlled substance that is so minute or so small that the person couldn't get high from it because it wouldn't be enough to use." Detective Lopez testified, without defense objection, that "[t]o the best of [his] knowledge," 1.26 grams of a substance analyzed and determined to be cocaine would be a usable quantity.

Dr. John Brusky testified that he was working in the trauma surgery unit when Meza was brought in. She had lacerations to the head, nose, right hand, left forearm, and left thigh. She told Dr. Brusky she had been assaulted by her husband. The wounds were described on medical records as superficial. There was no apparent motor or sensory or vascular injury. X-rays and a CT scan were normal.

In closing, the prosecution argued that evidence of premeditation and appellant's intent could be derived from the evidence he screamed he was going to kill Meza while he was stabbing her with the knife, by the nature of the attack, and

by his choice of weapon. Specifically, the prosecution emphasized the evidence that appellant "arm[ed] himself with a kitchen knife"; "t[ook] it from [his pants pocket] when he assault[ed] her"; "beg[an] the attack in the bedroom"; "continued the attack as [Meza] tried to get away from him [by leaving] th[e] bedroom"; and said, "I'm going to kill you."

The defense attorney, in closing, conceded that appellant was guilty of "assaulting his wife with a knife" and "possession of cocaine." He argued that the evidence did not support deliberation or intent to kill.

DISCUSSION

I

With respect to the first count, appellant contends that Officer Rodriguez should not have been permitted to testify concerning the out-of-court statements made to him by the victim, who was unavailable to testify at trial because she had moved outside the country. According to appellant, in the absence of these statements, substantial evidence does not support the jury's finding that the attempt on Meza's life amounted to attempted premeditated murder as opposed to attempted voluntary manslaughter or some other lesser offense. In the alternative, appellant contends that, even had the statements been properly admitted, the totality of the evidence did not support the verdict on the attempted murder charge. Although we do not agree that the verdict was unsupported by the evidence, we do agree that the United States Supreme Court's decision in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] precludes the introduction of out-of-court "testimonial" statements derived from police interrogation of witnesses such as those made by Meza to Officer Rodriguez in the hospital, and that it is not clear that the jury would have reached the same verdict of premeditated attempted murder in the absence of these statements.

The Sixth Amendment's confrontation clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Ohio v. Roberts* (1980) 448 U.S. 56, Supreme Court recognized that statements made by out-of-court declarants clashed with the confrontation clause, and that if the clause were to be read literally, it "would abrogate virtually every hearsay exception." (*Id*. at p. 63.) The court held that such approach would be too extreme and that out-of-court statements by unavailable witnesses were admissible, but only if they either fit within a "firmly rooted hearsay exception" or were supported by "particularized guarantees of trustworthiness." (*Id*. at p. 66.)

Evidence Code section 1370, obviously drafted with *Ohio v. Roberts* in mind, permits admission of out-of-court statements that "purport[] to narrate, describe, or explain the infliction or threat of physical injury upon the declarant" as long as all of the following are true: the declarant is "unavailable as a witness"; the statement was made "at or near the time of the infliction or threat of physical injury"; the statement was made "under circumstances that would indicate its trustworthiness"; and the statement was made in writing or was electronically recorded or was made to a physician, nurse, paramedic, or law enforcement official.

Crawford overruled *Ohio v. Roberts*, announcing a "categorical" rule that requires "unavailability *and a prior opportunity for cross-examination*" when the proposed evidence concerns "core testimonial statements that the Confrontation Clause plainly meant to exclude." (124 S.Ct. at pp. 1373-1374, 1371, italics added.) In *Crawford*, the prosecution had introduced a tape-recording of a statement made to police officers while interrogating the defendant's wife. The defendant was accused of assault, and the statement undermined his self-defense theory. At trial, the wife invoked the marital privilege and refused to testify. The Supreme Court specifically held that such out-of court hearsay was barred by the

confrontation clause because the defendant did not have the opportunity to cross-examine the declarant. Although the court "le[ft] for another day any effort to spell out a comprehensive definition of 'testimonial,'" the court stated that the term covered "at a minimum . . . prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . *police interrogations*." (*Id*. at p. 1374.)

Explaining its reasoning, the court stated, "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'. . . To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."

Statements resulting from police interrogation have been deemed inadmissible by numerous California courts interpreting *Crawford*. (See, e.g., *People v. Kilday* (2004) 123 Cal.App.4th 406, 419-421; *People v. Pirwani* (2004) 119 Cal.App.4th 770, 786-787; *People v. Lee* (2004) 124 Cal.App.4th 483.)

The court in *People v. Kilday*, *supra*, recognized a distinction between types of police interrogations. Out-of-court statements "obtained by an officer acting in an investigative capacity to produce evidence in anticipation of a potential criminal prosecution" were excludable under *Crawford* because "police officers who obtain a statement during an interrogation are performing investigative and evidence-producing functions formerly handled by justices of the peace" and "[t]he use of such an out-of-court statement to convict a defendant implicates the central concerns underlying the confrontation clause." (123 Cal.App.4th at p. 418.) On the other hand, questioning "incidental to other law enforcement objectives, [such as] exigent safety, security, and medical concerns" was nontestimonial, and could

be admissible. (*Id*. at p. 419.)[4] Under this analysis, the first statement made by the witness/victim who was initially confronted by officers when she was "frightened and upset" in an "unsecured" area while the situation was "uncertain" was deemed nontestimonial and therefore admissible. (*Id*. at p. 421.) However, statements made later due to the need for greater detail were not admissible because they were made to officers "acting in an investigative capacity to produce evidence in anticipation of a potential criminal prosecution." (*Id*. at pp. 419-420.)

The statements attributed to Meza obtained by Officer Rodriquez and his partner were obtained away from the scene of the attack, after Meza had been treated for her injuries. The statements were not made in the context of a victim crying out for immediate help, but were instead the result of a conscious police decision to interrogate her further despite her initial statements that she did not know what happened or who did it to her. The officers were, at that point, apprised of the identity of the suspect and could only have been acting "in an investigative capacity to produce evidence in anticipation of a potential criminal prosecution" against appellant. The statements should not have been admitted.

Respondent claims that appellant waived his opportunity to raise *Crawford* by failing to object at trial to introduction of the statement on confrontation clause grounds. An appellant cannot have forfeited or waived a legal argument that was not recognized or anticipated at the time of his trial. (*Guardianship of Stephen G*. (1995) 40 Cal.App.4th 1418, 1422-1423.) The provisions of Evidence Code section 1370 coupled with the holding in *Ohio v. Roberts*, *supra*, would have had defense counsel convinced that there was no plausible ground for objection at the time of trial.

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[4] The question of whether this is a valid distinction is currently before the California Supreme Court in the case cited in respondent's brief, *People v. Cage* (2004) 120 Cal.App.4th 770 [15 Cal.Rptr.3d 846], review granted October 13, 2004, S127344.

Respondent contends that any error was harmless because "the nature of the attack showed an unmistakable intent to kill" and "there was still abundant evidence of premeditation and deliberation based on planning, motive, and the manner of attack." We turn to the critical question of whether the error in admitting the testimony prejudiced the jury's finding on count one.

Under the harmless error test for constitutional error set forth in *Chapman* v. *California* (1967) 386 U.S. 18, 24, "[A]n appellate court may find an error harmless only if, after conducting a thorough review of the record, the court determines beyond a reasonable doubt that the jury verdict would have been the same absent the error." (*People v. Bolden* (2002) 29 Cal.4th 515, 560.)

We begin by emphasizing that the evidence that appellant was the perpetrator of the stabbing was clear: Iroko saw what happened and reported it to numerous witnesses and appellant essentially admitted it in his conversation with Aispuro. Moreover, the jury's verdict of guilt on count two confirms that appellant was guilty of attacking his wife with a knife.

To convince the jury that the stabbing involved premeditation and deliberation, the prosecution relied heavily on evidence derived from the erroneously admitted testimony. The prosecution argued in closing that appellant went into the kitchen after the argument while Meza was sleeping in the bedroom, armed himself with a knife, and then returned to the bedroom to initiate the attack, following her into the living room area when she retreated. All of this evidence was derived from Meza's statements to Officer Rodriquez. None came in through other witnesses. Without it, the jury would not have known where Meza was when the attack commenced since she was found in the living room and all the blood stains were located there. Particularly damning was the evidence that appellant went out of his way to arm himself and concealed the weapon in his back pocket as he approached the victim asleep in her bed--facts that came to light entirely as a result of Meza's out-of-court statements.

Respondent contends in its brief that, even without Meza's statements, "abundant evidence" supported the finding of premeditation. The only evidence cited to support this contention, however, is Officer Lopez's testimony that Meza told him that appellant had cut her on the leg with a beer pull tab several days before the knife attack. This may be seen as supportive of the prosecution's premeditation theory, but standing alone, it is insufficient to establish beyond a reasonable doubt that the jury would have reached the same verdict without having also heard Meza's out-of-court statements. Moreover, the record is clear that the defense called Officer Lopez to rebut Officer Rodriguez's testimony that Meza told Officer Rodriguez appellant had cut her leg with a broken beer bottle. That evidence would not have been introduced by the defense but for the need to mitigate the improperly admitted testimony.

Respondent further contends that the viciousness of the attack alone could support the verdict on premeditation and deliberation. Numerous authorities hold, however, that "'the brutality of a killing cannot in itself support a finding that the killer acted with premeditation and deliberation." (*People v. Pantoja* (2004) 122 Cal.App.4th 1, 14, quoting *People v. Anderson* (1968) 70 Cal.2d 15, 24-25; accord *People v. Alcala* (1984) 36 Cal.3d 604, 626.)

With respect to intent, the ferocity of the attack, the use of a deadly weapon, and the targeting of vital areas such as the head and face were proof of appellant's intent to kill. (See, e.g., *People v. Bolden*, *supra*, 29 Cal.4th 515, 560-561 [where victim died from a single, forceful stab wound to the back, court held that "[i]n plunging the knife so deeply into such a vital area of the body of an apparently unsuspecting and defenseless victim, defendant could have had no other intent than to kill"]; *People v. Alvarado* (1991) 232 Cal.App.3d 501, 505-506 [where defendant killed the victim with a knife stab to the head, which penetrated her skull and brain, court held that """"no further proof of malice or of intent to kill [was] required""""].) The jury could reasonably have believed based on the physical

evidence that but for the unexpected flimsiness of the knife blade, Meza would have been killed. However, the jury could just as likely have been persuaded of intent by the dramatic evidence derived from Meza's out-of-court statements to Officer Rodriguez that appellant yelled "I'm going to kill you" during the attack.

In the end, we must agree with appellant that not only were Meza's statements in response to Officer Rodriguez's questioning at the hospital inadmissible, but that their erroneous admission was prejudicial because it is not clear beyond a reasonable doubt that the jury would have reached the same verdict of attempted willful, deliberate, premeditated murder in their absence. The judgment must, therefore, be reversed as to count one.

Appellant also raised the issue of whether substantial evidence supported the verdict even with the erroneously admitted evidence. Certainly there was substantial evidence to support the jury's verdict if Meza's statements are credited for precisely the reasons argued by the prosecution: that appellant armed himself with a hidden knife, and waited until Meza went to bed to initiate the attack is substantial evidence of premeditation. Whether or not substantial evidence supported the verdict absent those statements is immaterial at this point. While ordinarily, a finding of insufficient evidence forecloses retrial under the principles of double jeopardy, "when a reviewing court determines reversal is required because evidence was erroneously admitted at trial and also concludes without that evidence there was insufficient evidence to support conviction[,] [t]he situation is treated as mere 'trial error' which does not invoke the double jeopardy clause." (*People v. Llamas* (1997) 51 Cal.App.4th 1729, 1741; accord, *People v. Harvey* (1984) 163 Cal.App.3d 90, 108 ["where reversal of a conviction is premised on trial court error in admitting evidence against the defendant, retrial is not prohibited notwithstanding that the quantum of admissible evidence at trial may have been legally insufficient to sustain a conviction"]; *People v. Rios* (1985) 163 Cal.App.3d 852, 870.) Courts recognize that the prosecution will inevitably--and

justifiably--rely on trial court rulings concerning the admissibility of evidence, engage in a "'cost-benefit balancing process . . . in deciding whether to pursue a line of testimony or introduce additional evidence,'" and decide "'not to introduce other available evidence which might be cumulative, confusing or perhaps not as persuasive.'" (*People v. Rios*, *supra*, at pp. 870-871, quoting *People v. Harvey*, *supra*, at p. 90.) "The prosecutor's desire to present a manageable case should not require him to act at his peril." (*Ibid*.) On remand, the prosecution is entitled to retry count one, and may introduce any evidence which it refrained from presenting in reliance on the admissibility of Meza's statements.

II

Appellant argues there was insufficient evidence that the cocaine found on his person after his arrest was a usable quantity. (See *People v. Rubacalba* (1993) 6 Cal.4th 62, 66.) Appellant concedes that Detective Lopez testified that the amount was usable, and that police officers experienced in drug offenses and usage may have the expertise to render an opinion on this subject. Appellant claims that Detective Lopez "was not qualified as an expert and only gave the jury conclusional [*sic*] testimony" and that the jury should have been instructed as to the definition of usable quantity under CALJIC No. 12.32.

The record reflects that Detective Lopez was an experienced police officer who claimed to have sufficient knowledge to answer the question. No objection was raised to his testimony by defense counsel. Nor was any request made to inquire further into his purported expertise, and, as appellant concedes, no request was made for CALJIC No. 12.32. Instead, defense counsel conceded the truth of the cocaine allegations in closing argument as part of an apparent strategy to dissuade the jury from convicting on the more serious offense. On this record, we believe appellant waived any objection he may have had to Detective Lopez's

qualifications to give the opinion concerning usable quantify or for error based on the failure to give CALJIC No. 12.32.

III

In a supplemental brief, appellant urges that we overturn the sentence on the corporal injury conviction because the trial court imposed the upper term after making factual findings in violation of *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531]. We agree that *Blakely* applies to California's upper term sentencing law. (*People v. White* (Dec. 15, 2004, B166502) ___ Cal.App.4th ___.) However, in this case, any error was harmless. The court justified imposing the upper term on the fact that the crime was committed in the presence of a young child, Iroko. Although the jury was not asked to make a specific finding, Iroko was found running from apartment to apartment, beseeching the occupants for help, with blood on her hands. The evidence was clear that Iroko was present during the stabbing.

DISPOSITION

The judgment is reversed as to the conviction for willful, deliberate, premeditated murder in count one. The judgment is affirmed in all other respects.

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CURRY, J.

We concur:

EPSTEIN, P.J. HASTINGS, J.