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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SYLVESTER BACON, Defendant and Appellant.	B189950 (Los Angeles County Super. Ct. No. TA080607)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary E. Daigh, Judge. Affirmed.

Shawn O'Laughlin, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary Sanchez and A. Scott Hayward, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Sylvester David Bacon appeals from the judgment entered following a jury trial that resulted in his convictions for first degree robbery and elder abuse. Bacon was sentenced to eight years in prison.

Bacon contends: (1) the trial court committed instructional error; (2) the evidence was insufficient to support the convictions; and (3) imposition of an upper term sentence violated his right to trial by jury under *Blakely v. Washington*.[1] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

Viewed in accordance with the usual rules governing appellate review (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303-1304), the evidence relevant to the issues presented on appeal established the following. On February 27, 2005, 73-year-old Lewis Green was awakened at approximately 3:45 a.m. by Bacon's knock on his front door. Green asked who was there. Bacon replied, "Mr. G., it's Sly." Green, who had known Bacon for approximately 20 years, recognized Bacon's voice. Bacon had performed work on Green's car, and Green had allowed Bacon, along with a woman named Lucille, to occasionally live in a different house he owned.

Green asked Bacon what he wanted, and Bacon replied that his son was sick and it was an emergency. Green told him to call 9-1-1, and asked him to leave. He went back to bed.

Shortly thereafter, Green was awakened by the sound of Bacon breaking in through his front door. Bacon charged Green, who had gotten out of bed, hitting him in the stomach and genitals and knocking him into a table, which broke. Bacon demanded to know where Lucille was. Green explained that Lucille was not present. Bacon, who was holding a crowbar, told Green he was upset with him and asked whether Green had any money. When Green said no, Bacon grabbed Green and took $681 from Green's

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[1] *Blakely v. Washington* (2004) 542 U.S. 296.

pocket. Bacon threatened to kill Green if he called police. He took Green's cellular telephone and left.

2. *Procedure.*

Trial was by jury. Bacon was convicted of first degree robbery (Pen. Code, § 211)[2] and elder abuse (§ 368, subd. (b)(1)). The jury also found true allegations that Bacon personally used a deadly and dangerous weapon during commission of the offenses (§ 12022, subd. (b)(1)), and that Bacon knew the victim was 65 years of age or older (§ 667.9, subd. (a)). The jury acquitted Bacon of burglary and deadlocked on whether Bacon inflicted great bodily injury on Green. The trial court sentenced Bacon to a term of eight years in prison. It imposed a restitution fine, a victim restitution award, a suspended parole revocation fine, and a court security assessment. Bacon appeals.

DISCUSSION

1. *Alleged instructional errors.*

a. *CALJIC No. 2.27.*

CALJIC No. 2.27 provides: "You should give the [*uncorroborated*] testimony of a single witness whatever weight you think it deserves. Testimony concerning any fact by one witness, which you believe, [*whose testimony about that fact does not require corroboration*] is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of that fact depends." (Italics added.)

The trial court gave the instruction with the italicized portions omitted. Bacon asserts that the omission of the italicized language was error. He posits that "the failure to alert the jury that Mr. Green's testimony was uncorroborated by other evidence and therefore required careful review, served to unfairly cloak the prosecution's witness [with] a 'false and unique aura' of veracity," thereby violating his due process and fair trial rights. We disagree.

The trial court did not err by giving CALJIC No. 2.27 in the form provided to the jury. In *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, the California Supreme Court

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[2] All further undesignated statutory references are to the Penal Code.

overruled prior caselaw requiring that juries in rape cases be instructed to view the victim's testimony with caution. (*Id.* at pp. 882-883.) *Rincon-Pineda* reaffirmed and reinforced, however, that other instructions regarding witness credibility should be given. The court explained that a new instruction "should be given in every criminal case in which no corroborating evidence is required and should read substantially as follows: 'Testimony which you believe given by one witness is sufficient for the proof of any fact. However, before finding any fact to be proved solely by the testimony of such a single witness, you should carefully review all of the testimony upon which proof of such fact depends.' " (*Id.* at p. 885; see also *People v. Turner* (1990) 50 Cal.3d 668, 696; *People v. Adames* (1997) 54 Cal.App.4th 198, 210.) CALJIC No. 2.27, as given here, complied with this mandate.

The corroboration language was properly excised. The bracketed phrases regarding corroboration contained in the standard version of CALJIC No. 2.27 should be used when corroboration of a witness's testimony is required. (See Use Note to CALJIC No. 2.27; see generally § 1111 [testimony of accomplice requires corroboration].) Here, however, no corroboration requirement applied. (See Evid. Code, § 411 ["Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact."]; *People v. Young* (2005) 34 Cal.4th 1149, 1181 [testimony of a single witness, unless physically impossible or inherently improbable, is sufficient to establish that fact]; *People v. Hampton* (1999) 73 Cal.App.4th 710, 722; *In re Corey* (1964) 230 Cal.App.2d 813, 826 [robbery victim's uncorroborated testimony is sufficient to support a conviction].) Therefore the trial court properly omitted the bracketed references to corroboration. There was no error. (See, e.g., *People v. Adames, supra,* 54 Cal.App.4th at p. 210.)

b. *CALJIC No. 2.92.*

Without objection, the trial court instructed the jury with CALJIC No. 2.92, regarding factors for the jury's consideration in evaluating eyewitness identification

testimony.[3] Bacon challenges the portion of that instruction stating that the jury may consider the "extent to which the witness is either certain or uncertain of the identification." Citing the late Justice Stanley Mosk's dissent in *People v. Wright* (1988) 45 Cal.3d 1126, 1159-1160, Bacon contends that the instruction was improper because it "was not in accord with experts in the field of eyewitness identification." He urges that scientific studies show a witness's certainty about identification is not a reliable predictor of accuracy, and therefore the instruction improperly reinforced a common misconception about eyewitness identification. The flawed instruction, he asserts, improperly lightened the People's burden of proof in violation of his due process and fair trial rights. We disagree.

Putting aside the question of waiver, the short answer to Bacon's argument is that the California Supreme Court has approved CALJIC No. 2.92 in cases in which identification is an issue. (*People v. Wright, supra*, 45 Cal.3d at pp. 1141-1144; *People v. Gaglione* (1994) 26 Cal.App.4th 1291, 1302-1303, disapproved on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 452.) *Wright* explained that "a proper

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[3] As provided to the jury, CALJIC No. 2.92 stated: "Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of the crime[s] charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness' identification of the defendant, including, but not limited to, any of the following: [¶] The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act; [¶] The stress, if any, to which the witness was subjected at the time of the observation; [¶] The witness' ability, following the observation, to provide a description of the perpetrator of the act; [¶] The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness; [¶] The cross-racial [or ethnic] nature of the identification; [¶] The witness' capacity to make an identification; [¶] Evidence relating to the witness' ability to identify other alleged perpetrators of the criminal act; [¶] Whether the witness was able to identify the alleged perpetrator in a photographic or physical lineup; [¶] The period of time between the alleged criminal act and the witness' identification; [¶] Whether the witness had prior contacts with the alleged perpetrator; [¶] The extent to which the witness is either certain or uncertain of the identification; [¶] Whether the witness' identification is in fact the product of his own recollection; and [¶] Any other evidence relating to the witness' ability to make an identification."

instruction on eyewitness identification factors should focus the jury's attention on facts relevant to its determination of the existence of reasonable doubt regarding identification, by listing, in a neutral manner, the relevant factors supported by the evidence. [¶] The instruction should *not* take a position as to the *impact* of each of the psychological factors listed." (*People v. Wright, supra*, at p. 1141.) *Wright* expressly approved CALJIC No. 2.92, commenting that when modified to fit the evidence, CALJIC No. 2.92 "will usually provide sufficient guidance on eyewitness identification factors." (*Id*. at p. 1141.) The weight to be given and effect of any particular factor is best left to "argument by counsel, cross-examination of the eyewitnesses, and expert testimony where appropriate." (*Id*. at p. 1143.) The *Wright* majority rejected the dissent's suggestion that inclusion of the certainty and other factors, without further explanation, rendered the instruction deficient. (*Id*. at pp. 1141, 1155, 1159.)

Subsequently, in *People v. Johnson* (1992) 3 Cal.4th 1183, 1230-1232, the court rejected a defendant's contention that the certainty factor should have been deleted where an expert had testified, without contradiction, that a witness's certainty does not positively correlate with accuracy. (See also *People v. Arias* (1996) 13 Cal.4th 92, 168 [level of certainty displayed by the witness at a suggestive confrontation was among the factors to be considered when evaluating whether the identification testimony should be excluded]; *People v. Clark* (1992) 3 Cal.4th 41, 135 ["the level of certainty of the identification" was a factor to be considered in determining admissibility of identification].) We are not at liberty to disregard our Supreme Court's analysis. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

In any event, Bacon cannot demonstrate inclusion of the challenged phrase was harmful under any standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18.) The instruction is neutrally phrased, and does not create or imply a presumption that certainty correlates with accuracy. Most significantly, the victim in the instant case had known Bacon for twenty years. Unlike in a case in which a stranger is tasked with identifying the perpetrator, here Bacon was well known to Green, making many of the identification factors of marginal relevance to the jury's analysis.

The "certainty factor" would likely have played little or no role in the jury's evaluation of Green's testimony. Instead, the "prior contacts" factor was no doubt the significant factor in the jury's consideration of the accuracy of Green's identification. Further, given the evidence presented at trial, the question for the jury was not so much whether Green mistakenly identified Bacon, but whether Green's account was truthful. In short, there was no reversible error.

c. *Cumulative error.*

Bacon contends that the cumulative effect of the purported instructional errors undermined the fundamental fairness of the trial. However, as we have " 'either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial,' " we reach the same conclusion with respect to the cumulative effect of any purported instructional errors. (*People v. Cole* (2004) 33 Cal.4th 1158, 1235-1236.)

2. *The evidence was sufficient to support the verdicts.*

Next, Bacon argues the evidence was insufficient to sustain his convictions. When determining whether the evidence was sufficient to sustain a criminal conviction, we review the entire record in the light most favorable to the judgment to determine " 'whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496; *People v. Carter* (2005) 36 Cal.4th 1215, 1257-1258; *People v. Palmer* (2005) 133 Cal.App.4th 1141, 1153.) "We draw all reasonable inferences in support of the judgment. [Citation.]" (*People v. Wader* (1993) 5 Cal.4th 610, 640.) Reversal is not warranted unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Bacon argues that Green's testimony was the only evidence implicating him, and was not sufficiently credible to constitute substantial evidence. In particular, Bacon points to the following evidence. (1) Green testified that his door had been knocked off its hinges and fell to the floor, in contradiction to the testimony of a police officer and a

detective who observed the door. (2) At trial, Green testified Bacon punched him in the stomach, injuring him. An officer and a detective testified, however, that Green did not report being injured or punched. (3) Green's statements and trial testimony regarding whether he and Bacon struggled over a gun, and whether Bacon took Green's gun and cellular telephone, were inconsistent and contradictory. (4) Green testified at trial that Bacon asked where Lucille was when he entered Green's residence, but Green never mentioned this fact to a detective. Bacon argues that because of these inconsistencies, Green's testimony failed to establish his guilt beyond a reasonable doubt.

Bacon also points to evidence that Green told a Deputy Alternate Public Defender that, during a surgery, one of his eyes had been replaced with a blue "white man's eye," whereas it was clear to the attorney that Green had two brown eyes. Bacon argues this evidence showed Green was prone to fabricating stories.

The People counter by pointing to evidence in the record corroborating Green's trial testimony.

Contrary to Bacon's argument, the evidence was sufficient. Green testified to the circumstances of the robbery and attack, and his testimony was sufficient to establish all elements of the charged offenses. As we have stated *supra*, the testimony of a single witness is sufficient to prove a fact. (Evid. Code, § 411; *People v. Young, supra*, 34 Cal.4th at p. 1181; *People v. Hampton, supra*, 73 Cal.App.4th at p. 722; *In re Corey, supra*, 230 Cal.App.2d at pp. 825-826.) Bacon's argument amounts to a request that this court reweigh the evidence on appeal. That is not the function of an appellate court. (*People v. Young, supra*, 34 Cal.4th at p. 1181; *People v. Maury* (2003) 30 Cal.4th 342, 403; *People v. Ceja* (1993) 4 Cal.4th 1134, 1139.) Evidence is not deemed insufficient merely because contrary evidence was also presented. A reviewing court does not resolve credibility issues or evidentiary conflicts. To the contrary, that function is the exclusive province of the trier of fact. (*People v. Young, supra*, at p. 1181; *People v. Maury, supra*, at p. 403.)

3. *Imposition of the upper term did not violate Bacon's Sixth Amendment right to jury trial.*

At sentencing, the trial court imposed the high term of six years on the robbery count, observing that Bacon had been on probation at the time of the offenses and no mitigating factors existed. Bacon urges that because the trial court imposed the upper term based on facts that were neither admitted nor found true by the jury, imposition of the upper term violated his rights to a jury trial and due process as articulated in *Blakely v. Washington*, *supra*, 542 U.S. 296.

As Bacon recognizes, our Supreme Court resolved the question adversely to him in *People v. Black* (2005) 35 Cal.4th 1238. *Black* concluded that "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*Id*. at p. 1244.) We are bound by *Black*.[4] (*Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at p. 455.) Accordingly, Bacon's *Blakely* claim lacks merit.[5]

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[4] The United States Supreme Court is currently reviewing the effect of *Blakely* on California's sentencing scheme. (*People v. Cunningham* (Apr. 18, 2005, A103501) [nonpub. opn.], cert. granted sub nom. *Cunningham v. California* (Feb. 21, 2006, No. 05-6551) ___U.S.___ [126 S. Ct. 1329, 164 L. Ed. 2d 47].)

[5] In light of our resolution of this issue, we need not reach the People's contention that Bacon's *Blakely* claim is procedurally barred.

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.