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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DAVID ALAN BRADFORD, Defendant and Appellant.	H027528 (Santa Clara County Super. Ct. No. CC438585)

A jury found defendant David Alan Bradford guilty of one count of inflicting corporal injury on a cohabitant (Pen. Code, § 273.5, subd. (a)[1] [count 1]) and of two counts of dissuading a victim or witness from testifying (§ 136.1, subd. (a)(1) [counts 3 & 4]); it found defendant not guilty of one count of false imprisonment (§§ 236-237 [count 2]). Defendant admitted the truth of an allegation that he had served a prior prison term (§ 667.5, subd. (b)). He was sentenced to five years in state prison, consisting of the aggravated term of four years for count 1, plus a one year consecutive term for the prison prior.

On appeal defendant contends one of his convictions for dissuading a witness must be reversed because section 136.1, subdivision (a) proscribes a continuing course of

[1] Subsequent statutory references are to the Penal Code unless otherwise noted.

conduct; alternatively, he claims he can only be punished for one violation of the offense. Defendant also contends the trial court erred by (1) failing to instruct on misdemeanor battery on a co-habitant as a lesser included offense of inflicting injury on a co-habitant, (2) admitting hearsay statements of the doctors who treated the complaining witness, and (3) admitting testimony that defendant was a parolee. We agree that defendant's actions constituted a continuing course of conduct and, thus, that his conviction for count 4 must be stricken. We reject defendant's additional claims of error.

In his final argument, defendant contends the trial court committed *Blakely* error[2] when it relied upon facts that had not been found by a jury beyond a reasonable doubt to impose the upper term for count 1. In our original opinion, we held that the trial court did not err under *Blakely* in imposing the upper term for count 1. (*People v. Bradford* (June 28, 2005, H027528) [nonpub. opn.].) Following the United States Supreme Court's remand to this court for further consideration in light of *Cunningham v. California* (2007) __ U.S. __ [127 S.Ct. 856] (*Cunningham*), we reverse and remand for resentencing.

I. Background

At approximately 5:00 a.m. on January 1, 2004,[3] the Campbell Police Department's dispatcher received a 911 "hang-up" call from an apartment on Nido Drive. The dispatcher called back, and a man answered the telephone. The dispatcher could hear a woman, later identified as L.,[4] repeatedly scream for "help." At the time of the 911 call, L. had lived with defendant for about six months in that apartment; he paid the rent and utilities since L. was unemployed.

Officer Kurt Melcher and his partner, Darwin Okamoto, responded to the apartment. No one answered when Melcher knocked on the door, but the officers heard a

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[2] *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*).
[3] All further calendar references are to 2004.
[4] The victim's first and last names begin with the letter "L." Because her first name is somewhat unusual, we refer to her by the initial "L." in an effort to ensure her privacy.

door slam. Through the windows, Okamoto saw a shadow move in the back of the apartment and Melcher saw an overturned chair. Melcher kept knocking while Okamoto called through a window for someone to respond. After several minutes, defendant answered the door and was detained. He had no identification on him when detained, but his wallet contained a California identification card in his name and a business card for a parole agent.

Once inside the apartment's bedroom, the officers saw "a broken TV on its face on the ground" and other items that "were broken" and "turned over, like something [had] happened." They located L. locked in the bathroom. L. testified she had locked herself in after calling 911 to avoid continuing "the fight" while she waited for the police and that she had a kitchen knife with her "for defense."[5] She appeared to be fearful and nervous as she held a bag of frozen vegetables to her head and wrist and quietly complained of bruises, abrasions, and pain on her forehead, face, neck, and arms. L. was limping, and her wrist was swollen and bleeding. While defendant was in the front of the apartment, L. spoke to the officers in a low voice. She said she threw a map in defendant's face as they argued and refused to pick it up, and defendant then grabbed her wrists, pulled her to the ground, and ordered her to pick up the map. L. said defendant had punched her "about the head and face area" during the argument and that, when she had tried to leave the apartment, he "grabbed her by her hair," "pulled her back in," and "refused to let her leave." The officers said L. did not smell of alcohol or appear to be under of influence of alcohol or drugs.

After defendant was transported to jail, he was advised that calls from the jail "may be monitored and/or recorded." Nevertheless, defendant spoke with L. from the jail over 100 times before the preliminary hearing "about what [L.] [was] going to say when [she] came to court." In the calls that were played for the jury, defendant told L. not to

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[5] English is not L.'s first language.

show up for his next court date and to recant her allegations. L. ultimately agreed to testify at the preliminary hearing to a story defendant ordered her to "[r]ehearse" regarding how she had injured herself on a barbecue grill and had falsely accused defendant of causing her injuries because she had been angry with him. In exchange for recanting her statements to Melcher and Okamoto, defendant agreed to pay off L.'s parking tickets, give her some money immediately, and eventually pay for her plastic surgery.

During the calls played to the jury, L. complained to defendant that he repeatedly kicked her head "hard" and used his fist as if he were "boxing." She said she called 911 because she "was almost dead" and that defendant had told her, "'I'm going to kill you.'" She said she was bleeding from both ears and now was "deaf" in her right ear, that they had taken a CAT scan, and "[i]t's like blood all over inside my brain and . . . skull. You keep [*sic*] kicking me, . . . wouldn't stop." L. told defendant she "can't even walk," "see," "wash my hair or comb my hair. . . [I]t's blood all in there. . . . you kicked me so hard. [¶] And my nose, my beautiful nose." L. added, "My knees, I have no knees." She said she was told to return to the hospital for a stay of "at least three days" because she had a "hematoma," that doctors wanted to "monitor" since it could "cause meningitis," which could cause "a coma." L. offered to help defendant get released if, in exchange, he would promise not to harm her again since she did not want to "be afraid that any second you will . . . kill me." After agreeing to lie for defendant, L. told him that he "will be hanging" if she went to court because her injuries "show more" than at the time of the assault. During the calls, defendant said he loved L., reminded her of their prior good times and brought up their earlier talks about "diamond rings" and "getting a house so we could have a dog in the backyard." He asked if L. needed money and then said she could use his "PIN number if you need some cash," his ATM card to get "whatever you need," and his apartment without paying rent. Defendant told L., "If you do this for me, if you pull it off," she could take a couple of hundred "bucks or whatever" to spend on presents

for her son "or whatever you need." L. suggested "a better deal," that he agree to pay her parking tickets and get her a credit card. Once he had complied with her requests, defendant said they had a "deal," he had "accept[ed] those terms," and she should "stick to the story" to get him out of jail. During the calls, defendant said he was "sorry for what happened" and suggested he "was possessed" at the time; when L. said his behavior had been "horrible," defendant agreed, saying, "I know, it was bad." When L. said she had had run to escape the attack but he would not stop, defendant responded, "[H]oney, I'm so sorry."

Defendant told L., "As long as you don't show up [in court tomorrow], [the charges are] gonna be dropped," but, "if [the prosecutor] had any idea whatsoever that I laid [*sic*] a hand on you, he would not release me." He told L., "If you don't show up tomorrow it'll be fine." Later, he said he "just wanted to confirm" that "please, whatever you do, don't even show up tomorrow." Defendant also told L. that, for him to be released, she would have to "totally rehearse your story and say, 'I'm sorry, I made it up. . . . [I]t was the heat of the moment. We were mad,'" and "'I'm sorry I said that when he really didn't do it.'" He later said, "I'm trusting you, baby" and that "[t]hey're gonna hang me unless . . . you go and you reverse your story." He told L. to go tell "the D.A. that, 'I'm sorry, . . . what I said was wrong'" and that "'I didn't touch you, I'm sorry what happened. Here's the story, okay. I thought that he had sex with my girlfriend. I got mad, okay. That's what started the fight.'" He told L. to claim she had injured herself when she lost her balance climbing over his patio fence and fell onto his barbecue and then onto the ground. L. replied, "Are you crazy? They're never going to believe that." He assured L., "Of course they will" and then said he would "be hung" "unless you change the story." He detailed what he wanted L. to tell the prosecutor and reminded her to "stick to the story," that things would work out "if you just go in there" and "change the story." She replied, "I'm going to be an actress tomorrow." While rehearsing the story, L. said defendant grabbed her during their argument; defendant then said, "[N]o.

Not even that." He worked with L. to ensure her "story" would coincide with his statement to police and ordered L. to write down what they decided upon and "[r]ehearse it . . for a day or two" before she spoke with the prosecutor. He read to L. her previous statement from the police report and, together, they fabricated an alternative explanation for each statement. When L. said defendant would "owe me big time for this," he said, "I know it." When L. then expressed concern about going to jail for lying, defendant said it was "the risk you're gonna have to take for me."

At trial, L. testified that she did not want to testify for the prosecution and that she only was in court because she had been subpoenaed. L. acknowledged she and defendant had argued on New Year's Day but denied being been drunk at the time from having celebrated on New Year's Eve with her family. L. said the New Year's Day incident began when she threw a map at defendant during an argument and he responded by grabbing her wrists and holding her head to the ground until she picked up the map. She said she pulled over furniture because she "was running from him, so I just [was] crossing [over] the bed and then going around the bedroom because . . . he's bigger than me, so I thought this was the way to slow him down." L. testified defendant punched and kicked her in the forehead and pulled her hair when she tried to leave the apartment and that she tried in vain to get help by screaming out a back window. L. said she called 911 because she was "hurt" and in pain since defendant had punched and kicked her head, bruised her wrists, and repeatedly kicked her already sore knee. L. said defendant hung up the telephone before she could speak to the 911 operator and that, although she had heard the officers knocking, she did not answer the door because she had feared being hit "harder" if she left the locked bathroom L. acknowledged she was "shaking" and "crying" when the officers came to her aid.

Asked whether defendant had refused to let her leave the apartment, L. said he had pulled her hair but "didn't hold me hostage in the apartment. He didn't want me to leave, but it's not like holding down like [a] prisoner or something." L. said defendant

repeatedly kicked her arthritic knee while she was on the ground, and she conceded she feared defendant and thought he was going to kill her because "[i]t was like he was possessed" during the assault.

L. testified that, prior to the preliminary hearing, defendant spoke to her at least once a day and had discussed the case with her about 100 times. L. said that, during the calls, he asked her not to attend the preliminary hearing, asked her to deny he ever had hit her, told her what to say if she did testify to get him released, and promised her money in exchange for testimony that would exonerate him. At trial, L. acknowledged she had told defendant that she believed he intended to kill her that night, that she had lied at the preliminary hearing when she claimed to have fallen on their barbecue, and that defendant had told her what to put in the pre-trial e-mail she sent to the prosecutor claiming that defendant did not harm her.

L. testified that, prior to January 1, she had not needed the crutches she used at defendant's trial to help her walk and that some bumps on her head and arms from defendant's assault had turned into "purple" bruises and still were painful days after defendant had been arrested.

II. Discussion

A. Propriety of Multiple Convictions and Punishment for Dissuading a Witness Counts

The information charged two counts of misdemeanor dissuading a victim from testifying (§ 136.1, subd. (a)(1)), one on January 5, the other on January 6. Each count charged defendant with "knowingly and maliciously prevent[ing] or *dissuad[ing] [L.] from attending and giving testimony at a trial, proceeding*, and inquiry authorized by law." (Italics added.) Defendant contends he was improperly convicted of more than one violation of dissuading a witness from testifying since his conduct constituted a continuing course of conduct. We agree.

On January 5, during the calls to L. charged in count 4, defendant told L. that he would spend "a lot of time in jail" unless she refused to press charges. He told L. he was "sorry for what happened" and implied that, if the charges were dismissed, he would provide for her financially in a variety of ways.

The next day, during the calls charged in count 3, defendant told L. to go to the prosecutor and say she was "'sorry, I made it up. We were mad.'" and "I'm sorry I said that when he really didn't do it.'" During these calls, defendant told L., "As long as you don't show up [in court], [the charges] are gonna be dropped" because "you didn't press charges." He added, "I just wanted to confirm the fact, please, whatever you do, don't even show up tomorrow."

During argument, the prosecutor told the jury, "Intimidation of the witness. These are Counts 3 and 4. These are pretty straightforward. [L.] was a victim; another person with the specific intent to do so, prevented or dissuaded [her] from testifying; person acted knowingly and maliciously. Court 3 is for a specific date, and Count 4 is for the other date." The prosecutor also argued, "[W]hat we did is [we] charged two days of the intimidation and played you the phone calls from those days." With regard to the calls of January 5, the prosecutor mentioned defendant's statement, "'As long as you don't show up, the charges will be dropped.'" With regard to the calls of January 6, the prosecutor mentioned defendant's statements "'They're going to hang me unless you go and reverse your story. You have to go to the D.A. and turn your story around. No, not today. *Don't go to court.*'" (Italics added.)

The People first contend, "[w]ith respect to the two [section 136.1] convictions, the issue is not preserved because [defendant] never demurred to the information or contended he was twice charged for only one crime. He neither asked the court to stay either sentence nor brought a motion for new trial on the separate convictions." Nonetheless, we consider this claim of error on its merits to avoid the possibility of a

subsequent claim of ineffective assistance of counsel for failing to preserve the issue. (*People v. Williams* (1998) 17 Cal.4th 148, fn. 6.)

In *People v. Salvato* (1991) 234 Cal.App.3d 872, the court held that "[n]either an election nor a unanimity instruction is required when the crime falls within the 'continuous conduct' exception. [Citation.] 'This exception arises in two contexts. The first is when the acts are so closely connected that they form part of one and the same transaction . . . . [Citation.] The second is when . . . the statute contemplates a continuous course of conduct of a series of acts over a period of time. [Citation.]' [Citation.] We conclude that section 136.1 falls within the latter aspect of the exception." (*Id*. at p. 882.) The *Salvato* court explained its reasoning as follows: "Decisions on the continuous course of conduct exception have focused on the statutory language in an attempt to determine whether the Legislature intended to punish individual acts or entire wrongful courses of conduct. [¶] Noting that 'certain verbs in the English language denote conduct which occurs instantaneously, while other verbs denote conduct which can occur either in an instant or over a period of time,' the court in *People v. Gunn* (1987) 197 Cal.App.3d 408, 415 [], held that the accessory statute, punishing one who "'harbors, conceals or aids'" a known felon, fell within the exception. (*Id*. at p. 415.) *People v. Thompson*, *supra*, 160 Cal.App.3d at page 225, held that spousal abuse was a continuous conduct crime because the gravamen of the offense lay in the *cumulative result* of the acts, each of which alone might not be criminal. Conversely, *People v. Neder* (1971) 16 Cal.App.3d 846, 852-853 [], held, in a somewhat different context, that in a forgery prosecution each forged document could constitute a separate offense, even if part of the same transaction, because the essence of forgery, unlike theft, lies in the *means* used rather than the *end* obtained. [¶] Subdivision (a)(1) of section 136.1 subjects to misdemeanor liability one who '[k]nowingly and maliciously prevents or dissuades any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.' Subdivision (a)(2) extends liability to attempts at prevention or

dissuasion. Subdivision (c)(1) makes the offense a felony '[w]here the act is accompanied by force or by an express or implied threat of force or violence . . . .' [¶] The language of section 136.1 focuses on an unlawful goal or effect, the prevention of testimony, rather than on any particular action taken to produce that end. 'Prevent' and 'dissuade' denote conduct which can occur over a period of time as well as instantaneously. The gravamen of the offense is the cumulative outcome of any number of acts, any one of which alone might not be criminal. [¶] Thus it falls within the continuous conduct exception, and no election or unanimity instruction was required." (*People v. Salvato*, *supra*, 234 Cal.App.3d at pp. 882-883; see also *People v. Gear* (1993) 19 Cal.App.4th 86, 92.)

In their briefing, the People claim "Count 3 charged [defendant's] attempt to dissuade [L.] by convincing her to lie to the prosecutor. Count 4 charged [defendant's] attempt to dissuade [L.] by convincing her to refuse to press charges." However, neither the record as cited above nor the information supports this alleged distinction in the two charges.

We agree with defendant that section 136.1 is a continuous course of conduct crime and there is no evidence that he committed two separate and discreet violations of section 136.1 during his calls to L. on January 5 and 6. We note that defendant was not charged with inducing L. to give false testimony or to give false material information to a prosecutor in violation of section 137, a distinct offense from section 136.1. (See, e.g., *People v. Fernandez* (2003) 106 Cal.App.4th 943, 951 [where ample evidence showed defendant intended to "influence" testimony of a witness at a hearing rather than to prevent or dissuade the witness from making a report, defendant should be charged under section 137, not 136.1].)

The People's argument that defendant could be prosecuted for two counts of section 136.1 because he "had a chance to reflect" between the offenses charged in counts 3 and 4 and because the "call on January 5 was intended to dissuade L. from filing

charges against him in order to get the charges dismissed" while "the calls on January 6 were intended to dissuade L. from telling the truth about how she received her physical injuries, i.e., to persuade her to recant" is not persuasive given our conclusion that section 136.1 is a continuous offense that does not include inducing someone to give false testimony or false material information to law enforcement (§ 137).

Since we agree with defendant that one of his section 136.1 convictions cannot stand, we need not reach his alternate claim regarding multiple punishment.

B. Failure to Instruct on Lesser Offense of Misdemeanor Battery on a Cohabitant

Defendant contends the trial court committed prejudicial error by refusing to instruct on misdemeanor battery against a cohabitant (§ 243, subd. (e)) as a lesser included offense of felony inflicting injury on a cohabitant (§ 273.5, subd. (a)).

In order to prove the crime of felony corporal injury on a cohabitant under subdivision (a) of section 273.5, "the following elements must be proved: [¶] (1) a person willfully inflicted bodily injury upon his cohabitant; and [¶] (2) the bodily injury resulted in a traumatic condition." (CALJIC No. 9.35.) Misdemeanor battery against a cohabitant under subdivision (e) of section 243 requires a finding that "(1) A person used force or violence upon [the victim];" "(2) The use was willful [and unlawful];" and, "(3) At the time of the use of force or violence, [the victim] was an individual with whom the defendant [had a dating relationship]." (CALJIC No. 16.140.1.)

In *People v. Jackson* (2000) 77 Cal.App.4th 574, 580, the court held misdemeanor battery on a cohabitant (§ 243, subd. (e)(1)) is a "lesser, necessarily included offense" of felony inflicting bodily injury on a co-habitant. The People argue that, "[b]ecause bodily injury is required for each element in the greater crime, we disagree with the conclusion in . . . *Jackson* . . . that Penal Code section 243(e) is a lesser, necessarily included offense of section 273.5(a)." We agree with defendant that the fact that "conviction of corporal injury on a co-habitant requires bodily injury resulting in a traumatic condition . . . does not alter the fact that a person cannot possibly commit the greater offense set forth in

section 273.5, subdivision (a) without also committing the offense set forth in section 243, subdivision (e)." Accordingly, we do not depart from the holding in *Jackson*.

Lesser included offense instructions are required when there is a question whether the elements of the greater offense are present and there is substantial evidence the offense was less than that charged. (*People v. Flood* (1998) 18 Cal.4th 470, 481.) On appeal, we review the record to determine if there is evidence in the record from which a rational trier of fact could find beyond a reasonable doubt the elements of the lesser offense. (*People v. Dennis* (1998) 17 Cal.4th 468, 507.)

At the hearing on instructions, defense counsel asked the trial court to instruct on the lesser offense. Noting that "battery as a misdemeanor does not need to have any injury," counsel argued that "in this case there are acts that could lead the jur[ors] to believe [defendant] may not have caused that injury but he did something. [¶] For instance, there's a hair pull which could be construed as a misdemeanor battery if they choose not to believe [L.] as far as her injuries go."

In denying the request, the trial court noted that "lesser included instructions are required" when there is substantial evidence from which "a reasonable jury could conclude that the lesser but not the greater offense had occurred, and that would be based only upon the evidence. Neither speculation nor unexplained disbelief on the part of the prosecution's case is . . . sufficient to require a lesser included offense instruction." The court then reasoned, in pertinent part, that "the victim's credibility is clearly at issue. She said one thing to the police, . . . different things apparently in an E-mail to the D.A.'s office and at the preliminary examination, and now she's testified more in line with what she told the police initially. [¶] It appears that if the jur[ors] . . . believe [L.] testified truthfully in this trial, . . . then they're going to find that the defendant hit and kicked her and caused injury to her knee and her head, possibly her wrist; or that she lied here and she testified truthfully at the preliminary examination that her injuries occurred when she . . . fell on the patio and hit the Weber or the grill, *but there isn't any evidence that would*

support a verdict that the defendant hit or kicked her but didn't cause any traumatic injury. [¶] There is corroborating evidence of her testimony; there are the phone calls, there are the photographs, the first statements to the police, the police officers' observations of her injuries, the 911 call, and then you also have the defendant's admissions on, particularly . . . the first telephone call, . . . where . . . , after [L.] says, 'You kept kicking my head and kicking,' . . . and he says, 'Honey, I know. . . . I fucked up.' . . . She tells him that he had told her that he was going to kill her, and even the defendant basically agrees that that's what happened. [¶] And then the other conversations involve his efforts to get her to change her statements and telling her what to say, so upon the evidence that's been presented here, I don't think a reasonable jury could find that the defendant attacked [L.] but didn't inflict a traumatic injury, nor that he only committed a simple battery or an assault, . . . so therefore, I don't think it would be appropriate to give either the instructions for . . . spousal battery, or simple assault." (Italics added.)

For the same reasons as the trial court, we are convinced there is no evidence in this record from which a rational trier of fact could find beyond a reasonable doubt the elements of the lesser offense. (*People v. Flood*, *supra*, 18 Cal.4th at p. 481.)

However, assuming arguendo the trial court should have instructed the jury on the lesser included offense, we are convinced the failure to so instruct was harmless since it is not reasonably probable the outcome would have been different had the jury been instructed on misdemeanor battery of a cohabitant. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Breverman* (1998) 19 Cal.4th 142, 149.) The fact that defendant hung up the telephone when L. called 911 for help, officers heard L. screaming for help when the dispatcher made the return call, the apartment's furniture was in disarray, and L. had a knife with her "for defense" when found secured in a locked bathroom all corroborate L.'s initial statements to police that defendant had kicked her head and face and had caused the multiple injuries to L.'s face and body. The officers' observations of

L.'s mental state at the scene, the photographs of L.'s injuries, L.'s first statements to police documenting the bodily injury that defendant had inflicted upon her, L.'s complaints to defendant during his calls from the jail that he had seriously injured her ears, knees, and nose and that he almost had killed her, defendant's failure during the calls to refute L.'s complaints of corporal injury resulting in a traumatic condition including deafness in one ear, his responsive apology for his "horrible" behavior in the calls, and his repeated attempts to get L. to fabricate a story that he said would save him from a lengthy term in prison, combine to provide overwhelming evidence of the greater charge.

Defendant claims failure to instruct on the lesser-included offense was prejudicial, in part, because the jurors "apparently did not believe the prosecution's case entirely, as they acquitted [him] of one of the charged offenses." However, the People convincingly respond that the acquittal on the false imprisonment charge was "based on [L.'s] consistent and emphatic denial that she had been falsely imprisoned during the assaults. She first denied being held against her will during the phone conversations . . . and later again denied the charge at trial." By contrast, during defendant's calls from the jail, L. consistently complained that he had injured her so severely that she believed she was going to die.

We conclude any error in failing to instruct on the lesser offense of misdemeanor battery on a co-habitant was harmless under state law. Our state Supreme Court has held such error harmless under state law (*People v. Earp* (1999) 20 Cal.4th 826, 886), and we are bound by its determination regarding the appropriate standard of review. (*Auto Equity Sales, Inc*. v. *Superior Court* (1962) 57 Cal.2d 450, 455.)

C. Admission of Hearsay under State of Mind Exception

During the taped jail calls played for the jury, L. stated that the hospital had taken a CAT scan, and "It's like blood all over inside my brain and my, my skull." L. also said she had been told to return to the hospital because she might go into "a coma" since she

had a "hematoma." L. said the doctor wanted her to stay "at least three days . . . to monitor . . . the hematoma . . . [¶] . . . that will cause meningitis. [¶] And the meningitis it goes to a coma." At trial, defense counsel asked that these portions of the tapes be redacted. After denying that motion, the trial court advised the jury that the statements were admitted only to show L.'s "state of mind" and not for the truth of what the doctors had said.

On appeal defendant contends the trial court erred by admitting the doctors' out-of-court statements because they "were inadmissible hearsay" since "it is unclear how the effect of the statements on [L.]'s state of mind was relevant to the case." Alternatively, he claims that, even if the statements had "minimal relevance," they should have been excluded as unduly prejudicial pursuant to Evidence Code section 352 and that the trial court's cautionary instruction did not cure the error since it is "unrealistic" to believe that jurors could "compartmentalize the use of the inflammatory hearsay evidence."

Evidence Code section 1250 provides, in part, that "[s]ubject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of . . . mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at the time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant. Evidence Code section 1252 provides that evidence of a statement is inadmissible if made under circumstances such as to indicate its lack of trustworthiness." (*People v. Edwards* (1991) 54 Cal.3d 787, 819, & fn. 4.) "'The decision whether trustworthiness is present requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception. Such an endeavor allows, in fact demands, the exercise of discretion.' [Citation.] A reviewing court may overturn the trial court's finding regarding trustworthiness only if

there is an abuse of discretion. [Citations.]" (*Id*. at pp. 819-820.) Similarly, we do not overturn a trial court's conclusion that hearsay evidence was admissible "unless the court has abused its discretion." (*In re Cindy L*. (1997) 17 Cal.4th 15, 35.) The erroneous admission of hearsay evidence or evidence that is more prejudicial than probative requires reversal only if it appears probable that the outcome would have been more favorable to the defendant absent the error. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1293.)

During trial, when defense counsel argued that L.'s statements to defendant about her medical diagnosis were inadmissible hearsay, the prosecutor commented that the statements were not being offered for their truth. After the trial court indicated that some of the statements should be redacted, the prosecutor noted that, while the transcript could be edited, the CD of the calls would require a special software program. The prosecutor suggested a limiting instruction regarding the diagnosis. The trial court agreed to instruct the jury that it could consider L.'s statements about anything the doctor said about her medical condition "for the truth. They go to her state of mind, and so I'll limit it to that extent." Before the calls were played, the court instructed the jury that there "may be times in these tapes—and I know there are some where one or the other refers to something that someone else told them, and I believe there was some mention here about maybe what a doctor had said or what someone from the police department said. Anyway, those comments are not to be taken for the truth of the matter, but just as part of the conversation. *Something that was said, perhaps, for the effect that it had either on the speaker or the listener, but they're not offered for the truth*." (Italics added.) After the parties had rested, the trial court instructed the jury that "[c]ertain evidence was admitted for a limited purpose. At the time this evidence was admitted, you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. Do not consider this evidence for any purpose except the limited purpose for which it was admitted."

Assuming arguendo the trial court erred by admitting L.'s testimony regarding statements her doctors had made about her condition, any such error was harmless. Throughout the calls in question, L. graphically described the injuries she had received as a result of defendant's attack. Specifically, she complained that defendant kept kicking her head "hard" while "boxing" with his fists, and she said she called 911 because she "was almost dead." She said she now was deaf in one ear and bleeding from both because defendant kept kicking her and "wouldn't stop." L. told defendant she "can't even walk" or "see" or "wash my hair or comb my hair. . . [I]t's blood all in there. . . . you kicked me so hard. [¶] And my nose, my beautiful nose." L. added, "My knees, I have no knees." In this context, we conclude it is not reasonably probable defendant would have obtained a more favorable result had the trial court excluded L.'s references to her doctors' statements. (*People v. Watson*, *supra*, 42 Cal.2d at p. 836.)

D. Testimony that Defendant Possessed a Parole Officer's Business Card

Defendant next claims the trial court erred by admitting prejudicial testimony that defendant was a parolee when the prosecutor elicited from Officer Melcher that defendant's wallet contained "a state parole card, or a business card for a parole agent." Defendant contends this testimony introduced "improper character evidence" that should have been excluded under Evidence Code sections 1101 and 352 and that the cumulative prejudicial impact from this error and the previously discussed hearsay error warrants reversal of his convictions.

Melcher testified that, in order to properly identify defendant after he was handcuffed, he had asked L. whether defendant had a wallet or identification in the apartment. When the prosecutor asked Melcher for L.'s response, defense counsel objected that the question called for inadmissible hearsay. After the prosecutor said the response was not being offered for its truth but only to explain what the officer did next, the trial court cautioned the jury that "[t]he officer will be allowed to testify only to show what he did next. The jury is not to accept this as the truth of the matter being asserted."

The prosecutor then elicited from Melcher that L. told him defendant's wallet was in the bathroom. The prosecutor's questioning continued: "Q. Did you find his wallet? [¶] A. Yes. [¶] Q. What did you find inside the defendant's wallet? [¶] A. A California identification card and a state parole card, or a business card for a parole agent. [¶] Q. Now, did you find the California identification card in the defendant's wallet? [¶] A. Yes. [¶] Q. And when you found the California identification card, did you notice the name? [¶] A. Yes. [¶] Q. What was the name on the California identification card? [¶] A. David Bradford."

The People claim defendant's "failure to timely object to the officer's response regarding the state parole card means the issue is not preserved here and thus it is waived." Nonetheless, we address this claim of error since the defense had filed a motion in the trial court which raised "a continuing objection" "to the admission of any information about [defendant's] parole status," and because defendant alternatively claims his trial counsel provided ineffective assistance by failing to specifically object to Melcher's testimony identifying defendant as a parolee and by failing to seek a mistrial "on the grounds that entry of the prejudicial information was an incurable error."

Assuming the trial court erred by permitting Melcher's response regarding the parole card or business card from a parole agent to remain in evidence or, alternatively, that defense counsel provided ineffective assistance by failing to object to that testimony, we reach the question of prejudice. In either case, we conclude that reversal is not required since it is not reasonably probable that, absent the introduction of the challenged testimony, defendant would have received a more favorable result. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; *People v. Price* (1991) 1 Cal.4th 324, 440; *Strickland v. Washington* (1984) 466 U.S. 668, 697.) Melcher's brief mention of the parole card was preceded by the trial court's limiting instruction, and Melcher did not testify that defendant's name was on the parole card since the prosecutor only asked if defendant's name was on the identification card. Furthermore, as discussed above, the physical

evidence, the 911 call and hang-up, and the incriminating comments during the taped calls from the jail leave virtually no doubt that defendant had inflicted corporal injury upon L., his cohabitant, and that the injuries had resulted in a traumatic condition. Accordingly, the assumed error was harmless.

E. Cumulative Error

Defendant contends the entire record shows more than one error and that they cumulatively demonstrate prejudicial error. We disagree. Defendant was entitled to a fair trial, but not a perfect one (*People v. Osband* (1996) 13 Cal.4th 622, 702), and we "will not reverse a judgment absent a clear showing of a miscarriage of justice." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) No miscarriage of justice occurred in this case. We repeatedly have noted that the evidence establishing defendant's guilt of the substantive charge in this case was overwhelming. The cumulative prejudicial effect of the previously identified errors in defendant's case does not compel reversal of defendant's convictions since we are convinced that he was not denied his right to a fair trial or his right to a reliable verdict. (*People v. Earp* (1999) 20 Cal.4th 826, 904.)

F. Rights to Jury Trial and Due Process

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), the United States Supreme Court held that "[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." The *Blakely* court considered the issue further, and determined that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Blakely*, *supra*, 542 U.S. at p. 303, italics omitted.) Relying on *Blakely* and *Apprendi*, defendant contends he had a constitutional right to a jury trial and proof beyond a reasonable doubt regarding the facts that the trial court relied on to impose the upper term for count 1.

A similar argument was rejected by the California Supreme Court in *People v. Black* (2005) 35 Cal.4th 1238, 1244 (*Black*), certiorari granted and judgment vacated in *Black v. California* (Feb. 20, 2007, No. 05-6793) __U.S.__ [2007 WL 505809], which held 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." Recently, however, the United States Supreme Court overruled *Black*, in part. (See *Cunningham*, *supra*, __ U.S. __ [127 S.Ct. 856].) The Supreme Court concluded that under California's determinate sentencing law, the middle term is the relevant "statutory maximum." (*Cunningham*, *supra*, __ U.S. __ [127 S.Ct. at p. 868].) By allowing imposition of an upper term sentence based on aggravating circumstances found solely by the judge, California's law "violates *Apprendi's* bright-line rule[.]" (*Ibid*.) Pursuant to *Cunningham*, the upper term may be imposed only if the factors relied upon comport with the requirements of *Apprendi* and *Blakely*. (See *Cunningham*, *supra*, __ U.S. __ [127 S.Ct. at p. 871].)

The trial court in this case imposed the upper term based on a number of aggravating factors, which are listed in Rule 4.421 of the California Rules of Court.[6] The court first pointed to "the nature, seriousness, and circumstances of the crime as compared to other instances of the same crime," and stressed the severity and duration of the beating and the victim's physical and emotional injuries as factors in aggravation. The court also noted the absence of two mitigating factors; defendant was not a passive participant and the crime was not committed under unusual circumstances which might indicate it was unlikely to reoccur. (See rule 4.423(a)(1), (3).) The trial court further found that the defendant suborned perjury (rule 4.421(a)(6)), that he had served a prior prison term (rule 4.421(b)(3)), that his prior convictions were numerous and increasing in seriousness (rule 4.421(b)(2)), and that his prior performance on probation or parole was

[6] All further rule references are to the California Rules of Court.

unsatisfactory (rule 4.421(b)(5)). Because the court relied on facts not tried to the jury and found beyond a reasonable doubt, imposition of the upper term violated defendant's Sixth Amendment rights. Reversal is therefore required unless the error was harmless beyond a reasonable doubt. (See *Washington v. Recuenco* (2006) __ U.S. __ [126 S.Ct. 2546, 2551-2553] [harmless error analysis applies to *Blakely* violations]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 320 [*Apprendi* error evaluated under test in *Chapman v. California* (1967) 386 U.S. 18].)

The People contend that any error was harmless because some of the factors relied upon in imposing the upper term fall under the "prior conviction" exception. (See generally *Apprendi*, *supra*, 530 U.S. 466, 490; *Blakely*, *supra*, 542 U.S. 296, 301; *Cunningham*, *supra*, __ U.S. __ [127 S.Ct. 856, 868].) Assuming, arguendo, that the recidivism factors cited by the trial court fall within the "prior conviction" exception,[7] they represent only a portion of the court's rationale for imposing the upper term. The trial court, in fact, emphasized the circumstances of the crime and the impact on the victim, not defendant's prior convictions, in choosing the aggravated term.[8] Moreover, because defendant's prior prison term was used as the basis for a sentence enhancement, this recidivism factor could not be relied on to impose the aggravated term. (See § 1170, subd. (b); rule 4.420(c), (d).)

We also reject the People's contention that any *Blakely* error was harmless because the jury would have found the aggravating factors true beyond a reasonable doubt. Even if the jury could have found the aggravating factors true based on the

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[7] The California Supreme Court is currently considering the scope and application of the "prior conviction" exception, including whether the factors listed in subsections (b)(2) through (b)(5) of rule 4.421 fall within the exception. (*People v. Hernandez*, review granted Feb. 7, 2007, S148974; *People v. Pardo*, review granted Feb. 7, 2007, S148914; *People v. Towne*, review granted July 14, 2004 & supp. briefing ordered Feb. 7, 2007, S125677.)

[8] The probation department had recommended a midterm sentence based on the factors presented.

evidence presented at trial, "we cannot conclude beyond a reasonable doubt that a jury would have done so." (See *People v. Diaz* (2007) 150 Cal.App.4th 254, 266.) Thus, we cannot conclude that the imposition of the upper term sentence constituted harmless error, and must reverse and remand for resentencing.

III. Disposition

The judgment is reversed, and the matter is remanded for resentencing. The trial court is directed to strike the conviction for count 4.

_____
Mihara, J.

WE CONCUR:

_____
Bamattre-Manoukian, Acting P.J.

_____
McAdams, J.