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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. CORNELIUS JERALD DAVIS, Defendant and Appellant.	B187094 (Los Angeles County Super. Ct. No. MA029594)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa Mangay Chung, Judge. Affirmed.

Judith Vitek, 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, Lance E. Winters and Taylor Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant contends that the prosecutor engaged in misconduct in closing argument by attacking appellant's version of the events and pointing out the

absence of corroborating witnesses. Appellant also contends that the trial court erred in sentencing him to the upper term without affording him a jury trial as to the aggravating factors justifying the greater punishment. We reject both contentions and affirm the judgment.

PROCEDURAL BACKGROUND

Appellant Cornelius Jerald Davis was convicted of assault with a deadly weapon in violation of Penal Code section 245, subdivision (a)(1).[1] The jury found true the special allegation that in the course of committing the crime, appellant inflicted great bodily injury on the victim, within the meaning of section 12022.7. Appellant was acquitted of making criminal threats against the victim.

Appellant admitted the special allegation that he had suffered five prior felony convictions resulting in prison terms, as defined in section 667.5, subdivision (b). He admitted the two prior robbery convictions alleged in the amended information to qualify as felony "strikes" pursuant to sections 667 and 1170.12. The trial court subsequently struck one of the robbery convictions, eliminating it as a third strike under section 1170.12, subdivisions (a) through (d), and section 667, subdivisions (b) through (i), but not for the purpose of imposing a five-year enhancement under section 667, subdivision (a).

On October 6, 2005, appellant was sentenced to a total prison term of 26 years, but the sentence was corrected June 5, 2006, after the trial court was notified that one of the convictions did not result in a prison term within the meaning of section 667.5, subdivision (b). The court amended the abstract of judgment to reflect that appellant was sentenced to 25 years in prison, consisting of the upper term of four years as to the assault with a deadly weapon, doubled pursuant to

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[1] All further statutory references are to the Penal Code, unless otherwise noted.

section 1170.12, subdivision (c), and the following enhancements: three years for having inflicted great bodily injury; one year for each of the four felonies as defined by section 667.5, subdivision (b); and two five-year enhancements, one for each of the two robbery convictions. Appellant timely filed his notice of appeal.

FACTS

The victim, Charles Crawford, testified that he had been employed for a short time by appellant as a welder in appellant's restaurant, argued about Crawford's wages, and appellant fired him. According to Crawford, on August 13, 2004, the two men argued and appellant fired Crawford. Crawford testified that he left the restaurant, but came back a few minutes later to ask appellant for his wages for the day, and when he appeared at the front door, the argument resumed. According to Crawford, as he stood on the sidewalk near the front door, appellant came out of the restaurant, went to his truck and retrieved a knife. When Crawford saw the knife, he tossed aside his toolbox and ran away through a nearby parking lot. The toolbox landed on appellant's truck, breaking the windshield. Appellant chased him and grabbed him, causing him to fall down, and as Crawford fell, appellant stabbed him in the leg. Once Crawford was on the ground, appellant stabbed him on the head, saying, "I will kill you."

Crawford testified that he had not been armed with a weapon or tool, and that he had made no threatening or defensive movements other than waving his hands above his head defensively. After the attack, Crawford crossed the street to the back of a retail complex and notified a business owner, who called the sheriff. After speaking with deputies and identifying appellant and the knife used in the attack, Crawford was taken to the hospital, where he was treated with staples to close gashes in his head and leg.

James Beal testified that he witnessed the incident while seated under a tree outside his dry cleaning business. He first saw Crawford as he walked from the restaurant past the nearby liquor store, then back to the restaurant, with a toolbox in his hand. Beal's attention was momentarily diverted, but brought back to the area of the restaurant when he saw appellant chasing Crawford through the parking lot. The two men ran about the distance of four or five parking stalls, when Crawford fell and appeared to "give up." Beal saw appellant leaning over him, and saw that Crawford hands were not raised as though fighting, but could not see anything in either man's hands, as his view was partially blocked by parked cars. He heard Crawford yell, "Help, help, help. He's cutting me." Beal testified that Crawford remained on the ground until appellant returned to his restaurant. Crawford then crossed the street the opposite way and lay down. Beal called the police.

Los Angeles Deputy Sheriff Guillermo Martinez was patrolling in the area when he was directed by radio to the scene. He spoke to Crawford, whom he found across the street from appellant's business, lying on the ground, bleeding from the head and leg. Crawford pointed out appellant, who was across the street, as the man who had just stabbed him. Martinez observed approximately four slice-like bleeding cuts on Crawford's head and one slice-like injury on his thigh. Martinez recovered a four-inch folding pocketknife from inside appellant's restaurant and showed it to Crawford, who identified it as the weapon used in the attack.

After Crawford was taken to the hospital, Martinez spoke to appellant, who admitted that the two had argued and that he had used a knife on Crawford. Appellant told Martinez that when Crawford broke the windshield of his vehicle with the toolbox, he retrieved his knife from the car and pursued Crawford. Appellant did not report that Crawford had a weapon, and admitted that he

punched Crawford after the latter fell to the ground, but claimed that they both threw punches at each other. Appellant denied having extended the knife blade, but claimed that he used it as a "leverage tool." Martinez had seen hundreds of stab wounds and blunt force trauma injuries in his career and was of the opinion that Crawford's injuries were more consistent with cuts from a knife blade than with blunt force.

Approximately an hour after Martinez arrived, appellant was taken to the hospital with chest pains. Deputy Sheriff Brad Feehan, the detective assigned to investigate the incident, spoke to appellant in the emergency room. Appellant told Feehan that he had been arguing with Crawford about the quality of his welding and the amount of wages to be paid, when Crawford pushed him, walked out of the restaurant, took his toolbox, and threw it at the windshield of appellant's truck. Appellant did not claim that Crawford had been armed with any type of weapon or tool, or that he had threatened him. Appellant told Feehan that Crawford "took off running" after throwing the toolbox, and that it was then that appellant took his pocketknife out of his pocket and chased him. Appellant told Feehan that when Crawford slipped and fell, appellant stood over him and attacked him, because he was upset about the broken windshield. Appellant claimed that he punched Crawford several times in the area of the face, using the knife to "'firm[]' up his fist," and that it was the bottom portion of the knife that caused Crawford's wounds.

Feehan showed appellant two knives, one of which had been recovered by Deputy Martinez from inside a drawer near the sink in the restaurant. The other was a smaller knife, which appellant identified as the knife in his fist, claiming that he kept the larger knife in his truck. Feehan observed Crawford's injuries before he was taken to the hospital, and he appeared to have three stab wounds on the top of his head and one on his left leg. Feehan had seen numerous stab wounds and

blunt force trauma in his 18 years as a peace officer, and he testified that the wounds were consistent with stab wounds, not blunt force trauma. In Feehan's opinion, the size of the wounds was inconsistent with the smaller knife.

Later in their conversation, appellant told Feehan that it was not the smaller knife that he had used, and that he had given the actual knife to another man who was at the restaurant during the incident. Feehan asked for information to help locate that person, but the only information appellant provided was that the person was a Black male adult. When Feehan told appellant that his story did not make sense, appellant became upset, saying there was no proof he caused any of the victim's injuries, that perhaps the victim caused his own injuries before the deputies arrived. Subsequently, appellant told Feehan that when Crawford returned to ask for his money, appellant had armed himself with his pocketknife because he thought Crawford was going to rob him.

Appellant testified in his own defense. He stated that he was with Crawford that day, working on upgrades to his restaurant as ordered by the health department, when Crawford became upset and they argued. Appellant claimed that Crawford put up his fists, shoved him, "came at" him with his toolbox, and then threw the toolbox at him as he was running toward the restaurant's exit. Appellant claimed that Crawford then pursued him with a screwdriver in his hand. Appellant admitted drawing his knife, but claimed that he took it from his pocket when he saw the screwdriver and that he did not have time to open it, because Crawford took him by the collar and kicked and punched him. Appellant claimed that Crawford continued to throw punches after he fell. Appellant admitted that he stood over Crawford and delivered three or four blows, but not with an open knife. Appellant denied hearing Crawford say, "Help, help, he's cutting me," or anything else.

On cross-examination, appellant admitted that Crawford ran when he saw appellant's knife, and that he chased Crawford. Then, appellant denied that he had testified that Crawford ran, claiming that Crawford walked away, and that he pursued Crawford because Crawford was bigger and appellant feared for his life. Appellant claimed that Crawford did not turn and walk away, but was "back-peddling." Appellant described his exit from the restaurant in a similar fashion -- he was "[b]ack-peddling from dodging the tool box." He claimed that Crawford threw the toolbox at him while standing inside the restaurant, from a distance of approximately 10 to 12 feet from appellant and two feet from the door. Appellant estimated that the toolbox flew approximately 14 feet, passing through the doorway, until it landed on appellant's truck, parked outside.

Appellant admitted that the knife recovered by the deputies was the knife he used, and that he told Feehan he had given the knife to an unidentified African-American man. He claimed not to have provided the man's name because the man worked at the restaurant, and was "inside the building . . . using the knife to strip the electric wire . . . ." Appellant also claimed that Feehan never asked the name of the man and was not being truthful when he testified that he had asked appellant how he could locate the man.

Appellant testified that he called 911 when the fight stopped, and was told that the police were already on their way. He claimed that he told Martinez that Crawford threw the toolbox and had a screwdriver, and that Martinez was not being truthful when he testified that appellant never said the victim had attacked or threatened him. Appellant admitted not telling Martinez that he feared Crawford. Appellant admitted that he did not give the same information to Feehan, and that he did not tell Feehan that Crawford put up his fists or came after him with a screwdriver, or that appellant backed up through the doorway and out of the building as Crawford threw the toolbox. He claimed, however, that he told both

deputies that Crawford pushed him and spun him around. Appellant explained that he did not describe the events for Feehan, as he had for Martinez, because Martinez questioned him before his heart attack occurred, while Feehan questioned him at the emergency room while he was having the attack, which caused him to be "incoherent." He claimed that even though he told Feehan that he was having a heart attack, Feehan ordered the attending nurse to step aside until he was finished.

DISCUSSION

1. *Misconduct*

Appellant contends that the prosecutor engaged in misconduct by suggesting that appellant should have provided corroborating or exculpatory evidence. He does not quote or paraphrase the disputed remarks, but refers to two pages in the record. We quote the portion of those pages that relate to appellant's argument:[2]

> "If you believe the defense story about Mr. Crawford backing up and he falls on the ground and he's no threat at that point and if you believe the defense story . . . what does the defendant do? He gets on top of the defendant [*sic*] and by his own admission he starts punching him with that knife in his hand. . . . He basically is trying to figure out [how] to try to get the story of these independent and the truthful statements he gave to [the] detective or the deputy [--] this story [he] had for over a year to review [--] into some plausible means of self-defense. But the fact is it's so unbelievable because it never happened. The evidence does not bear that out, ladies and gentlemen. The defendant himself when Detective Feehan was talking to him changed the story. [']I threw it out[,] I chased him down[,] I got my knife[,] I was mad because the victim broke my windshield[.'] [A]nd then what does he say[?] ['W]ell that knife you recovered [is] not the knife you [*sic*] used and I gave this knife, the knife to some other unidentified person who was there at the scene and who got the knife[' --] and apparently does not come into court to corroborate the

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[2] We add some punctuation and omit or add some words to make the remarks more readable.

> testimony there was a fight . . . [.] And what did the defendant say he told Detective Feehan when the victim came back the second time[?] [‘]I thought he was going to rob me.[’] Where does that come from? He’s trying to milk these stories as to what really happened [--] he lost his temper that day and that he armed himself with a knife and he went after the victim and that he cut the victim and he stabbed the victim. . . .”

According to appellant, the prosecutor’s remarks suggested, without evidentiary foundation, that a third party might have corroborated appellant’s story. By such suggestion, appellant argues, the prosecutor acted “as an unsworn witness” and “argu[ed] facts not in evidence.”

Anticipating respondent’s argument, appellant acknowledges that he did not object at trial to the prosecutor’s comments. “As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion -- and on the same ground -- the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]” (*People v. Samayoa* (1997) 15 Cal.4th 795, 841; see § 1259.) Appellant contends that we should nevertheless consider the issue, because it implicates important federal constitutional rights to due process, confrontation and cross-examination. In the alternative, appellant contends that we should consider the issue as one of ineffective assistance of counsel, because the record reveals no tactical reason for not objecting to the remarks.

A failure to object in the trial court will not preclude the assertion of the denial of certain fundamental, constitutional rights, such as a plea of once in jeopardy or the right to a jury trial. (*People v. Vera* (1997) 15 Cal.4th 269, 276-277.) A claim of ineffective assistance of counsel may be cognizable on appeal where defense counsel’s failure to object affected the defendant’s substantial rights, but only if the record affirmatively discloses no rational tactical purpose for counsel’s omission. (*People v. Frye* (1998) 18 Cal.4th 894, 979-980.) The

prosecutor's remarks in this case, however, resulted in no deprivation of fundamental, constitutional rights and the record reveals no ineffective assistance of counsel, because the remarks were not improper.

As respondent points out, a prosecutor may comment "on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses." (*People v. Szeto* (1981) 29 Cal.3d 20, 34.) "The prosecutor is permitted to urge, in colorful terms, that defense witnesses are not entitled to credence, to comment on failure to produce logical evidence, [and] to argue on the basis of inference from the evidence that a defense is fabricated. . . . [Citations.]" (*People v. Pinholster* (1992) 1 Cal.4th 865, 948.) Further, it is not misconduct to point out the defendant's failure to call a corroborating witness after testifying, as appellant did here, that such a witness exists. (*People v. Chatman* (2006) 38 Cal.4th 344, 403.)

The thrust of the prosecutor's argument was that appellant had given inconsistent and contradictory versions of the events in question, including what knife he used, how he obtained it and what he did with it after the altercation. According to one version, he claimed to have given the knife to a person who worked on the premises. Contrary to appellant's assertion on appeal, he testified at trial that the altercation took place initially inside the building, and that the third party to whom he gave the knife was working there. It requires no leap of logic to suggest that someone in the building -- to whom appellant claimed to have handed the knife after the altercation -- could have corroborated some portion of appellant's story. While appellant was under no obligation to call such a witness, and the jury was so instructed,[3] it was not error for the prosecutor to comment on

[3] As appellant concedes, the jury was instructed in accordance with CALJIC No. 2.11, that neither side was required to call as witnesses all persons who may have been present at any of the times disclosed by the evidence.

the absence of such corroboration, especially while arguing the inherent incredibility of appellant's multiple and conflicting stories.

Relying on *People v. Vargas* (1973) 9 Cal.3d 470 (*Vargas*), appellant contends he had "the right to rely on the state of the evidence at the close of the people's case," and that the prosecutor's remarks improperly shifted the burden of proof onto him. Appellant's reliance upon *Vargas* is misplaced. There, the California Supreme Court discussed "*Griffin* error," which "forbids any adverse comment upon the exercise of [a defendant's] right to remain silent at trial." (*Vargas*, at pp. 472, 475, citing *Griffin v. California* (1965) 380 U.S. 609, 613 (*Griffin*).) Under *Griffin*, the prosecution may not comment upon "a defendant's failure to take the stand in his own defense. . . ." (*Griffin, supra,* at p. 613.) However, the "rule 'does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses. [Citations.]' [Citations.]" (*Vargas*, at p. 475; *People v. Hughes* (2002) 27 Cal.4th 287, 371-372.)

Appellant did not exercise his right to remain silent, but took the stand and testified. A defendant in a criminal trial, like any other witness, places his credibility in issue when he takes the stand to testify. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1139.) A "prosecutor is entitled to comment on the credibility of witnesses based on the evidence adduced at trial. [Citation.]" (*People v. Thomas* (1992) 2 Cal.4th 489, 529.) Thus, where a defendant testifies, giving different accounts of the events, as appellant did here, it is not misconduct to suggest "that defendant was lying . . . . The prosecution may properly refer to a defendant as a 'liar' if it is a 'reasonable inference based on the evidence. [Citation.]' [Citation.]" (*People v. Wilson* (2005) 36 Cal.4th 309, 338.)

We conclude that the prosecutor's comments were not misconduct and that the absence of an objection was not counsel error, as any objection would have been groundless.

2. *Blakely/Apprendi*

Appellant was sentenced to the upper term of four years on the assault conviction. (See § 245, subd. (a)(1).) In deciding whether to impose the upper term, the trial court considered, as circumstances in aggravation, five prior convictions shown in the probation report. (See § 1170, subd. (b); Cal. Rules of Court, rule 4.421(b)(2).) No aggravating circumstances were considered by the court other than the five prior convictions, and those five prior convictions were not the same prior convictions that had been charged in the information under sections 667, 667.5 and 1170.12, which were used to impose sentence enhancements after appellant waived his right to a jury trial and admitted them.

Appellant now contends that he should have been afforded a jury trial as to the aggravating factors used by the trial court to impose the upper term. He invokes *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), which held that facts that increase the maximum penalty for a crime must be pleaded, submitted to a jury and proved beyond a reasonable doubt, unless the defendant waives a jury and admits the facts. (See also *United States v. Booker* (2005) 543 U.S. 220 (*Booker*).)

In *Cunningham v. California* (2007) 549 U.S. __ [127 S.Ct. 856] (*Cunningham*), the United States Supreme Court recently held that the middle term in California's determinate sentencing law was the relevant statutory maximum for the purpose of applying *Blakely* and *Apprendi*. (*Cunningham, supra,* 127 S.Ct. at

p. 868.)[4] However, *Cunningham* reaffirmed the exception enunciated in *Almendarez-Torres v. United States* (1998) 523 U.S. 224, and affirmed in *Apprendi*: "[T]he Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, *other than a prior conviction*, not found by a jury or admitted by the defendant. [Citations.]"[5] (*Cunningham*, at p. 860, italics added; *Apprendi*, *supra*, 530 U.S. at pp. 488 & 490; see also *Booker*, *supra*, 543 U.S. at p. 244.)

Relying on *Shepard v. United States* (2005) 544 U.S. 13, appellant contends that the exception for prior convictions has been significantly narrowed, and applies only to the fact of the conviction. Thus, he argues, it does not extend to considering an unsatisfactory performance on probation. First, the trial court did not consider facts showing an unsatisfactory performance on probation, as appellant's argument suggests, but simply noted a number of prior convictions for which he received probation. Second, the *Almendarez-Torres/Apprendi* exception is sufficiently broad to encompass all matters ascertainable from the face of the prior judgment of conviction. (*People v. McGee* (2006) 38 Cal.4th 682, 707-709 (*McGee*); *People v. Thomas* (2001) 91 Cal.App.4th 212, 222-223.) As the record

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[4] Because *Cunningham* was decided after briefing was complete, we permitted the parties to file supplemental letter briefs. As prior convictions were the only aggravating factors used by the trial court to impose the upper term in this case, we invited the parties' particular attention to the use of prior convictions in California's sentencing law.

[5] In *Cunningham*, the defendant had no prior criminal history; the sentencing judge imposed the upper term in reliance on such factors as the particular vulnerability of the victim and the violence of the crime. (*Cunningham, supra,* 127 S.Ct. at pp. 860-861.)

of sentencing would show whether probation was granted, we conclude that the exception extends to that fact as well.

The United States Constitution does not mandate a jury trial on prior convictions and any right to a jury trial would be purely statutory. (*Apprendi*, *supra*, 530 U.S. at pp. 487-490; *People v. Epps* (2001) 25 Cal.4th 19, 23; see § 1025.) By statute in California, a defendant is afforded a jury trial only as to the fact of those prior convictions alleged in the accusatory pleading as statutory sentence enhancements. (§ 1025; *Epps*, at pp. 29-30.) Prior convictions considered as aggravating factors for the purpose of imposing the upper term may be determined by the court upon facts shown in the probation report, as the trial court did here, and need be established only by a preponderance of the evidence. (§ 1170, subd. (b); Cal. Rules of Court, rule 4.420(b).) Thus, as appellant was not entitled to a jury trial, *Blakely* and *Apprendi* have no application here. (See *Epps*, at p. 23; § 1025; see also *Cunningham, supra,* 127 S.Ct. at p. 860; *Apprendi*, *supra*, at pp. 488 & 490.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.