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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. KEITH ANTWON KNOX, Defendant and Appellant.	D049600 (San Bernardino County Super. Ct. No. FSB046053)

APPEAL from a judgment of the Superior Court of San Diego County, J. Michael Welch, Judge. Affirmed in part, reversed in part, and remanded for resentencing.

Keith Antwon Knox was charged together with codefendants James Knox (James) and Mark Booker with three counts of attempted murder (Pen. Code,[1] § 187, subd. (a)). With regard to each count, Knox was also alleged to have discharged a handgun which proximately caused great bodily injury to each victim (§ 12022.53, subd. (d)). A jury

1 All statutory references are to the Penal Code unless otherwise specified.

found Knox guilty of attempted voluntary manslaughter (Pen. Code, §§ 664/192, subd. (a)), a lesser crime as to counts 1 and 2, and found him not guilty of the count 3 offense.[2]

The trial court sentenced Knox to a total prison term of six years, six months, consisting of the upper term of five years, six months on count 1 plus a consecutive one-year middle term on count 2.

Knox appeals, contending his convictions must be reversed because the trial court prejudicially erred when it required he be shackled during his jury trial, when it refused to allow him to introduce relevant character evidence for violence of the major prosecuting witness/victim, and when it refused to allow him to impeach that same witness with evidence of a recent uncharged stabbing. Knox also claims the court's imposition of the upper term for count 1 violated his federal constitutional rights to proof beyond a reasonable doubt and jury trial under *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) and *United States v. Booker* (2005) 543 U.S. 220 (*Booker*) because the aggravating factors were not found true by a jury.

During the pendency of this appeal, the United States Supreme Court in *Cunningham v. California* (Jan. 22, 2007, No. 05-6551) 549 U.S. ___ [2007 WL 135687] (*Cunningham*) determined that California's Determinate Sentencing Law (DSL), which permits a court to impose an upper term sentence based on aggravating facts not found

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2 The jury found Booker not guilty of all greater and lesser charges and acquitted James of all such charges in count 3. Although the jurors found James not guilty of the attempted murder charges in counts 1 and 2, they could not reach verdicts with regard to the lesser offenses charged against James in those counts.

true by a jury or beyond a reasonable doubt, is unconstitutional and violates the holdings in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), *Blakely*, *supra*, 542 U.S. 296, and *Booker, supra*, 543 U.S. 220.[3] Although we find no prejudicial error to reverse Knox's convictions, we reverse his sentence and remand for resentencing in light of *Cunningham*.

FACTUAL BACKGROUND

Because Knox does not challenge the sufficiency of the evidence to support his convictions, we merely summarize the facts presented at trial as background for our discussions. As of September 18, 2004, Crystal Mitchell had been dating Knox's brother James for several years, and had lived with him for months at a time. That evening when Mitchell went to the Route 66 carnival with her sisters, Ladora Broomfield (Ladora) and Latia Broomfield (Latia), and her friend Joycelyn Jeter, Mitchell was approached by a woman named Makia (also spelled Makiya), who told Mitchell that she was dating James and was the mother of his baby. When Mitchell became angry, Makia asked her if she wanted to fight.

Mitchell and the others followed Makia to a nearby park where James arrived shortly in his car with Booker and a baby. When James got out of the car holding the baby, Mitchell began yelling, confronting James about the baby. James handed the baby to Makia and continued to argue with Mitchell for 15 to 20 minutes. At some point,

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[3] We asked the parties to address the effect of *Cunningham* on Knox's upper term sentence in this case at the time of oral argument and permitted the filing of supplemental letter briefs on the issue.

Mitchell got into James's car and took his keys and an envelope containing registration papers from his glove compartment. In the meantime, Knox had driven up to the area with his girlfriend Antoinette and another girl who claimed to be James's current girlfriend. Knox approached Mitchell, telling her to give James his keys back. Mitchell refused and continued arguing with James. James then left the park in Knox's car with Knox and the third girlfriend.

Several minutes later, Knox returned to the park with a spare key that he gave to Booker who had to drive James's car forward over a grass hill to drive away because Mitchell stood behind the car so he could not back up. Mitchell and her sister Ladora's attempt to catch up with the car failed. When Mitchell, still angry, threw a purse at Knox's car, he stopped, backed up and pulled the car toward her, driving one tire up onto the curb before backing away and leaving the area.

The next morning, September 19, 2004, Booker went to Mitchell's house at 9th and G Streets in San Bernardino where she lived with her mother, sisters, and two brothers, Jonathan Broomfield (Jonathan) and Hayward Broomfield (Hayward). That morning, Mitchell's cousin John Claiborne and friend Jeter were also at the house when Booker knocked and asked for Mitchell. Booker asked Mitchell for James's papers, but she refused to give them back.

Later that afternoon, at about 2:00 p.m., Booker returned to Mitchell's home, but stood outside the front gate near the sidewalk when he asked to speak with her. As she approached the gate, James walked up and stood near Booker while other family members followed Mitchell outside. James and Booker asked Mitchell to return the

paperwork for James's car, but she refused. When the argument between James and Mitchell became heated, Claiborne, Jonathan and Hayward walked toward the front gate. When Hayward grabbed Mitchell's shoulder and told her to go back inside the house, Claiborne and Jonathan stepped in front of her and confronted James and Booker. Jonathan watched as Claiborne's argument with Booker escalated and it looked like they were going to fight. Jonathan saw James, who appeared to be scared, pull his shirt up, display a gun in his waistband, and then pull it out and fire a single shot which hit Claiborne in the shoulder.

Someone then yelled that Knox, who was standing near a brick wall on the side of the property outside the gate, had a gun. When Knox began shooting into the yard with a semi-automatic gun, everyone except Ladora ran or hit the ground. Mitchell was hit in her buttocks and fell as she tried to go up the porch stairs and into the house. Ladora was shot in the head and fell on the grass near a tree. Jeter saw Knox fire the shots that struck Ladora and Mitchell. Jonathan saw Knox shooting at everyone and estimated he fired seven to nine times. After the shooting, Knox, James and Booker ran away from the gate area in the direction of the brick wall.

Having heard eight or nine shots from his apartment, which was behind Mitchell's house, Christopher Blanton, another brother of Mitchell's, went to Mitchell's house when he heard screaming coming from that direction. When he got there, he grabbed a gun kept in the kitchen, and ran to the front porch where he saw Mitchell lying on the front steps and Ladora lying on the grass. Blanton went back in the house with the gun when their mother told him to put it away.

Several independent witnesses testified at trial about what they saw near the time of the shooting. A man driving down the street saw several men arguing in front of Mitchell's house, when one man in the middle started shooting. The man driving by then saw three men running away. When the driver returned to the area to see if anyone was hurt, he saw Mitchell down on the porch steps, a man in the front yard holding his shoulder and a girl down on the grass. He then saw a man come out of the house trying to put a clip in a gun.

Another man driving by with his children and grandchildren in the car, saw three people walk toward Mitchell's house and start arguing with people inside the fence. When the man heard three or four gunshots, he reached for the children and told them to get down. The man thought the person with the gun was standing right in front of the gate.

An off-duty deputy sheriff and his girlfriend stopped at the red light at 9th and G Streets that day, heard five or six gunshots as the light turned green. Pulling forward slowly, the deputy saw three Black males, standing on the sidewalk at the corner with another group of individuals in front of them, start running down a street and then through an alley. The deputy followed the three men in his car and then saw a black Honda with three Black men in it pull quickly out of the alley and into traffic. He then followed the Honda until he lost sight of it.

Police officers called to Mitchell's home that day found 10 bullet casings from a .22 caliber gun, including some near the brick wall outside the home. Forensic testing revealed that all 10 casings had been fired from the same gun. Officers also found a

Ruger nine-millimeter, semi-automatic handgun and a half-loaded magazine in the Mitchell house kitchen and two live rounds of ammunition, consistent with a large caliber rifle, in Jonathan's pants pocket, which he claimed he had found while helping a friend clean the backyard.

Claiborne, Mitchell and Ladora were taken to hospitals after the shooting. Claiborne suffered a gunshot wound above his left armpit, Mitchell suffered abrasions near her mouth and a shot in her buttocks, and Ladora suffered extensive head injuries, which left her paralyzed on her right side. Her mother noted that Ladora cannot see out of her right eye, cannot speak and is confined to a wheelchair.

The Defense Case

Various police officers were called in the defense case to testify about Claiborne's statement made at the hospital after the shooting that Knox, not James, had shot him, and that Knox's mother, Tina Webb, had telephoned the police the same day as the shooting about some threats being made to her family by someone from Mitchell's family.

Knox's mother then testified in the defense case. She recalled that Mitchell had called her and "cussed" her out for not telling her that James had another baby on the Saturday before the shooting. Mitchell then came by her house the next morning, cussed at her some more, picked up a crate from the front porch and threw it through her living room window before running back to a waiting car and driving off. About five minutes later, Mitchell called Webb and said, "Bitch, this is not over. I am coming back. When I come back, you going to regret it. I am bringing other people and all sorts of things [are]

going to happen." Webb called the police about the matter and also called Knox shortly before the shooting and told him what Mitchell had done and said.

None of the defendants testified in their own defense. In closing, Knox's counsel argued that Knox was misidentified as the shooter and, in the alternative, that he had fired in self defense because of Mitchell's and her family's aggression, which included one of her brothers running out of the house with a gun pointed toward James and Booker.

DISCUSSION

I

SHACKLING

Before the jury panel was brought in for voir dire, the court noted for the record that it had talked with counsel about the issues of where the three defendants would be seated during trial and whether they would have leg shackles or irons on them. The court indicated it was in favor of "keeping the leg shackles on." As reasons for doing so, the trial judge stated:

> "[A]s I look around the physical layout of the courtroom, it's a small courtroom. It's easy to move around and about. This is certainly a crime involving an allegation of some substantial violence. There are going to be a number of witnesses in the courtroom. [¶] The deputy's indicated to me that because of staffing issues as it relates to the number of people that can actually be in attendance during the course of the trial for staff security reasons, they were at a bare bones minimum, especially in view of the fact that there are now two other trials on this floor involving high-profile kind of cases that involve extra security, and yet another case going to start tomorrow in the same category. [¶] [B]ased upon those reasons . . . I would allow the sheriff to have leg shackles on the defendants, but not on their arms, et cetera. . . . [¶] Another thing has also occurred . . . as we set up the configuration of counsel and the clients around counsel table for the course of the trial. It's very difficult to seat, in

> effect, . . . seven people to eight people at counsel table . . . so that the defendants are going to have to sit back, in order that they be able to communicate with their counsel, in such a way, it seems to me, that their legs will be exposed. And the jurors would have the opportunity to see the fact that they are wearing leg irons. [¶] It's my intent that when the jury comes up, to apprise [them] of that fact. . . . But the fact that they are in custody and the fact that they do have those on them is not . . . a piece of evidence, is not something that the jurors are to consider as evidence against them during the course of the trial, that it's merely done in view of the fact that the defendants are in custody. They've been unable to make bail, that there is more than one defendant, and court security reasons . . . force me into a position of doing that. And I want to advise the jurors of that."

Knox's counsel objected to use of the leg irons based on their prejudicial nature and Knox's right to a fair trial. Although the court appreciated counsel's concern, it thought that mentioning it to the jurors at the time of voir dire, telling them such could not be considered for any purpose, and getting their promises that they would not consider such fact would prevent any prejudice. The court also stated it would admonish the jury that "wearing leg shackles does not mean that they're more likely guilty or more than likely more violent than an individual defendant who might not wear such leg irons during the course of the trial."

Although the court further noted it did not intend to deny the defendants a fair trial, it thought it had to "balance in some fashion the needs of security for the defendants, for the other participants of the trial, for the court, and for the courtroom staff."

During voir dire, the court told the prospective jurors that during the course of trial, the defendants would be seated with shackles around their legs. "And that's because

in trials with more than one individual that is in custody, we have a rule that they have shackles on them. [¶] The fact that they are in shackles, the fact that they're in custody cannot be used by you as evidence of their guilt. That's one of those things that you can't consider at all. [I]n other words, it's not evidence. It's not being produced. It's not been seen by a witness. It's not been testified to. And those are the things that you would consider evidence in the case and not their custodial status and not the fact that they have shackles on their legs. That cannot be considered by you." The court also explained that once a prospective juror from the panel was seated in the jury box, he or she would be asked whether any of these facts would affect his or her ability to be fair.

At the conclusion of the evidence, the court included in its instructions to the jurors a reminder that "[t]he fact that physical restraints have been placed on a defendant must not be considered by you for any purpose. They are not evidence of guilt or not to be considered by you as they are more likely to be guilty or not guilty. You must not speculate as to why restraints have been used. Disregard this matter entirely."

On appeal, Knox contends the trial court prejudicially abused its discretion when it improperly and unnecessarily visibly shackled Knox throughout the course of his jury trial over his trial counsel's objections. We conclude there was no prejudicial abuse of discretion.

In *Deck v. Missouri* (2005) 544 U.S. 622 (*Deck*), the United States Supreme Court held that "the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." (*Id*. at p. 629.) The high

court explained that "courts cannot routinely place defendants in shackles or other physical restraints visible to the jury. . . . The constitutional requirement, however, is not absolute. It permits a judge, in the exercise of his or her discretion, to take account of special circumstances, including security concerns, that may call for shackling." (*Id.* at p. 633.) The Supreme Court recognized the need to restrain dangerous defendants to prevent courtroom attacks or the need to give trial courts latitude in making individualized security determinations. (*Id.* at p. 632.) It advised that such determinations must be case specific: "that is to say, it should reflect particular concerns, say, special security needs or escape risks, related to the defendant on trial." (*Id.* at p. 633.) The court concluded that, "where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.' (*Chapman v. California* [1967] 386 U.S. 18, 24 [(*Chapman*)].)" (*Deck, supra,* 544 U.S. at p. 635.)

The law in California has long followed similar principles by holding that "a defendant may be physically restrained at trial only if there is a 'manifest need for such restraints.' [Citation.]" (*People v. Seaton* (2001) 26 Cal.4th 598, 651 (*Seaton*), quoting *People v. Duran* (1976) 16 Cal.3d 282, 291 (*Duran*).) "Such a ' "[m]anifest need" arises only upon a showing of unruliness, an announced intention to escape, or "[e]vidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained . . . ." ' [Citations.] 'Moreover, "[t]he showing

of nonconforming behavior . . . must appear as a matter of record . . . . The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion." ' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 841 (*Hill*).) The decision whether to shackle a defendant may not be delegated to law enforcement personnel. (*Ibid*.) Although the California Supreme Court has not ruled which harmless error standard applies when a court abuses its discretion and permits a defendant to be shackled in violation of *Duran*, the prevailing view is that where the jury saw or knew about the restraints, the error rises to the level of constitutional error to be tested under *Chapman*, *supra*, 386 U.S. at page 24, which is consistent with the standard under *Deck*, *supra*, 544 U.S. at page 635.

Here, although the trial court made a record of its reasons for requiring all the defendants to wear shackles for trial, such reasons fail to establish any " ' "violence or a threat of violence or other nonconforming conduct" ' " (*People v. Hill, supra*, 17 Cal.4th 800, 841) on Knox's part or that of any other defendant. Similar to the situation in *Seaton, supra*, 26 Cal.4th 598, the impetus for restraining all defendants appears to have originated with the sheriff's department. The courtroom deputy had advised the court that staffing was low due to other trials on the same floor of the courthouse which required extra security and that he wanted to have physical restraints on the defendants. In finding the restraints necessary for security, the court considered this low staffing fact along with the nature of the crimes charged (attempted murder with great bodily injury alleged), the number of witnesses scheduled to appear, and the small configuration of the courtroom

with its problems in accommodating multiple defendants and their counsel around the defense table. However, "[t]he circumstance that defendant was charged with a violent crime . . . does not establish a sufficient threat of violence or disruption to justify physical restraints during trial. [Citations.] Nor does the court[room] layout [or the number of potential witnesses] establish any individualized suspicion that defendant would engage in nonconforming conduct." (*Id*. at p. 652.)

Even though we recognize the trial court conducted a hearing on the matter and appears to have exercised its own discretion regarding the restraints, the record simply does not show that the court's reasoning for extra security via visible leg restraints was tied to Knox's or any other defendant's demonstrated nonconforming conduct or potential nonconforming conduct which would pose a security problem for the court. (See *People v. Mar* (2002) 28 Cal.4th 1201, 1218.) Accordingly, we conclude the trial court abused its discretion in ordering Knox physically restrained during trial.[4]

This conclusion, however, does not compel reversal. The record makes clear that any error did not impair Knox's right to a fair trial. Knox did not testify and has not claimed that he would have done so but for his restraints. In addition to the trial court properly instructing the jury sua sponte that the restraints should have no bearing on the determination of Knox's or the other defendants' guilt (see *People v. Mar, supra*, 28

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4 By the court telling the prospective jurors that the shackling was used in all multiple defendant cases, it also appears the court may have made the decision to use the physical restraints based on a general policy which is contrary to *Duran, supra*, 16 Cal.3d 282, which requires the decision be based on an individual case basis. (See *People v. Jackson* (1993) 14 Cal.App.4th 1818, 1831.)

Cal.4th 1201), it also advised the jurors during voir dire about the restraints and preinstructed them that they could not consider the restraints for any purpose, that the restraints were not evidence of guilt, and the restraints could not be considered as evidence Knox or the other defendants were more likely to be guilty than not.[5] Absent evidence to the contrary, we presume the jury complied with these admonishments and instructions made before hearing the evidence and again at the end of trial. (*People v. Roldan* (2005) 35 Cal.4th 646, 743; *People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

Further, because the jury acquitted one defendant of all charges, acquitted another defendant of the greater offenses and hung on the lessers, and certainly gave Knox the benefit of any doubts by not finding him guilty of all of the charges, we cannot find on this record that the restraints impacted the jury's deliberations on Knox's guilt or innocence of the charges. We thus conclude the People have showed " 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict[s] obtained.' " (See *Deck*, *supra*, 544 U.S. at p. 635, quoting *Chapman*, *supra*, 386 U.S. at p. 24; *People v. Anderson* (2001) 25 Cal.4th 543, 596 [applying harmless error analysis].)

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[5] Although the jury knew about the leg restraints, the record is unclear as to how visible those restraints were to the jury with Knox and his codefendants seated behind their respective counsel at the defense table.

II

CLAIMED EVIDENTIARY ERRORS

Knox filed a pretrial motion to impeach Mitchell with prior assaultive conduct and with the fact that she had not been criminally charged by the People for such conduct. Knox requested he be able to cross-examine Mitchell on her inherent bias arising from the fact that she was not prosecuted for stabbing a woman four times on April 2, 2005,[6] which "evinces moral turpitude," and on that specific instance of conduct by Mitchell to show her character for violence, which he argued was crucial to his claim of self-defense.

At the hearing on in limine matters, the court stated it was not going to allow the stabbing incident to come into evidence "at this point in time. . . ." The court found the event irrelevant to what Knox knew before the shooting as it related to his self-defense defense. However, the court made clear that if something came up at trial, such as Mitchell saying she was not a violent person, Knox could revisit the issue.

When Knox's counsel then claimed there was a conflict of interest because the prosecution had the power to decide whether to prosecute Mitchell on that stabbing case and was prosecuting this case with her as a witness, the court asked for a copy of the

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6 The part of the synopsis of the stabbing event written by a San Bernardino Police Officer relied upon by Knox stated: "The victim and suspect [(referring to Mitchell)] engaged in a fight in the courtyard of 712 W. 9th. The victim won the first fight. The suspect fled the scene and returned with a knife and stabbed the victim four times. The victim was treated at L.L.U.M.C. for four superficial stab wounds. [¶] The suspect was named by both the victim and witness. She was not located. [¶] The weapon used to stab the victim was located at 712 W. 9th. I.D. and processed the scene on 9th and took photographs of the victim's injuries."

police report and deferred the matter until the next day. At that time, the court found that based upon its review of the report, the subsequent act by Mitchell "should not be used in cross-examination of her" unless "there comes a point in time where it becomes relevant to something else, then you can always address that."

Later, during a break in trial, the court heard further argument on Knox's motion to impeach Mitchell's credibility with evidence concerning the stabbing incident. Because the jury would already be hearing evidence about Mitchell's misconduct regarding throwing a crate at the Knox residence and a purse at Knox's car which occurred before the shooting, and would not likely get to the truth in a mini-trial on what occurred subsequent to the shooting because of Mitchell's right to remain silent, the court thought it should bar the testimony under Evidence Code section 352.

Knox's counsel then asked that the prosecutor grant Mitchell immunity so there would be no Fifth Amendment problem. The prosecutor explained that even if such were done, and the testimony about the stabbing came into evidence, it would open up many other doors regarding bias because he would then seek to admit Mitchell's prior statements made at the preliminary hearing in this case that show threats were made against her and her family if she testified at the trial set originally to start before the April 2, 2005 incident. Looking at the police report, the prosecutor also argued the facts of the incident were confusing and there was no explanation (other than witness intimidation) why a "Gold Cutlass driven by a [B]lack male with three [B]lack females arrived at [Mitchell's] house and dropped off [the] three [B]lack females, [who] then got in a fight with her."

Although the court conceded that, if true, Mitchell's subsequent conduct involved moral turpitude and would be relevant on credibility, it found there were unusual circumstances in this case because there was no conviction, necessitating a trial within a trial, and it was questionable whether the alleged stabbing incident was really true. Therefore, the court found it appropriate to not allow evidence of the incident to come in under Evidence Code section 352 and denied without prejudice Knox's motion to impeach Mitchell with the subsequent stabbing incident. No further request to cross-examine Mitchell on the stabbing was made when she testified at trial.

On appeal, Knox contends the trial court erred when it refused to allow him to introduce the stabbing incident as evidence of Mitchell's character for violence because it was relevant to his theory of self-defense and thus denied him his constitutional right to present a full defense. He also claims the court prejudicially erred when it refused to allow him to impeach Mitchell with the same evidence. Neither assertion has merit.

A. Character Evidence

In general, a defendant in a prosecution for a homicide or an assaultive crime who has raised self-defense is authorized under Evidence Code section 1103 to present evidence of the violent character of the victim via the victim's subsequent acts of violence, as well as prior acts of violence, to show the victim was the aggressor. (*People v. Shoemaker* (1982) 135 Cal.App.3d 442, 446-448 (*Shoemaker*).) The trial court, however, has broad discretion under Evidence Code section 352 to exclude such character evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial

danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352; *Shoemaker, supra*, at p. 448.)

These evidentiary rules also apply to evidence sought to be admitted for impeachment purposes. (*People v. Hill* (1995) 34 Cal.App.4th 727, 738.) "Although wide latitude should be given to cross-examination designed to test the credibility of a prosecution witness, the court retains discretion to exclude collateral matters. [Citations.]" (*Ibid*.) In this regard, "a state court's application of ordinary rules of evidence--including the rule stated in Evidence Code section 352--generally does not infringe upon [a defendant's federal constitutional right to present a defense]. [Citations.]" (*People v. Cornwell* (2005) 37 Cal.4th 50, 82 (*Cornwell*).)

Similarly, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679) Because " 'the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish' " (*ibid*.), there is no violation of the Sixth Amendment right to present a defense "unless the defendant can show that the prohibited cross-examination would have produced 'a significantly different impression of [the witness's] credibility' . . . ." (*People v. Frye* (1998) 18 Cal.4th 894, 946.)

On appeal, we review the exclusion of evidence under Evidence Code section 352 for abuse of discretion. (*People v. Holloway* (2004) 33 Cal.4th 96, 134.) We will not disturb the decision of the trial court to exclude evidence under Evidence Code section 352 absent a showing that the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Ochoa* (2001) 26 Cal.4th 398, 437-438 (*Ochoa*); *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

Here, even if the trial court arguably erred in finding evidence of the stabbing by Mitchell irrelevant to what Knox knew before the shooting regarding her character for violence as it related to his claim of self-defense based on *Shoemaker*'s holding that a victim's subsequent acts of violence are relevant and admissible (*Shoemaker, supra,* 135 Cal.App.3d at p. 448), any error in this regard was harmless because the court properly exercised its discretion to exclude such incident under Evidence Code section 352.

In weighing the probative value of the stabbing incident versus the prejudicial value of its admission, the court fully considered that other acts of violence by Mitchell were going to be admitted at trial, that it was questionable whether the stabbing incident six months after the shooting as depicted in a full reading and review of the police report had actually occurred, and that a mini-trial on such matter to determine whether it had happened and showed a character trait of Mitchell's for violence and aggression would be time-consuming, confusing, and raise numerous other issues. At no time during Mitchell's later trial testimony did she claim she was not a violent person. Nor did Knox testify or present any evidence through other witnesses that he had a reasonable fear of

Mitchell due to her character for being violent or aggressive.[7] The relevance of the subsequent unproven stabbing incident on Knox's self-defense claim was thus minimal at best. The jury already knew through Mitchell's testimony that she had taken James's keys and papers from his car, and had chased Knox's car and thrown a purse at it the night before the shooting because of her angry outbursts. Although Mitchell denied tossing a crate through Knox's mother's window or threatening the Knox family, Knox was able to present evidence from other witnesses that Mitchell had committed such acts of violence shortly before the shooting and that Knox had been aware of such facts. The subsequent alleged violent act evidence was thus cumulative of other evidence.

Although a defendant has a due process right to present evidence material to his defense, "a defendant has no constitutional right 'to present all relevant evidence in his favor, no matter how limited in probative value such evidence will be so as to preclude the trial court from using Evidence Code section 352.' [Citation.]" (*Shoemaker*, *supra*, 135 Cal.App.3d at p. 450; see also *Cornwell*, *supra*, 37 Cal.4th at p. 82.) We, therefore, conclude the trial judge could reasonably find on this record that the prejudicial effect of admitting the evidence of an alleged subsequent stabbing by Mitchell far outweighed whatever minimal probative value such evidence would have.

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[7] We note the only evidence of fear by anyone before the shooting was observed in James's face when he and Booker were confronted by Mitchell's brother Jonathan and her cousin Claiborne after Mitchell had turned away from the gate to walk back to the house. Knox based much of his self-defense claim on the actions of Mitchell's family toward his brother and Booker.

Moreover, in light of the other evidence of Mitchell's violent outbreaks from which Knox was able to bolster his self-defense claim, we cannot find the failure to admit evidence of the subsequent stabbing prejudicial to him or resulted in a manifest miscarriage of justice. (*Ochoa, supra*, 26 Cal.4th at pp. 437-438.) The bulk of the case was eyewitness testimony, independent of Mitchell's testimony, identifying Knox as the shooter. The court permitted Knox, on the barest of evidence, to alternatively argue self-defense of himself and others with regard to all three counts involving different victims based on Mitchell's violent or aggressive acts of which Knox knew about before the shooting and on circumstantial evidence surrounding the confrontation between Mitchell's family and James and Booker, which included a gun being brought to the porch by one of Mitchell's brother after the shooting and bullets being found in the pants pocket of another brother. Because the jury found Knox guilty only of the lesser charge of attempted voluntary manslaughter on two of the counts and not guilty on the other, the jury must have, to some extent, taken into account Knox's alternative claim of self-defense in determining his guilt. "Thus, any conceivable error depriving [Knox] of a due process right to present this character evidence would be harmless beyond a reasonable doubt. [Citation.]" (*Shoemaker, supra*, 135 Cal.App.3d at p. 450.)

B. Impeachment of Victim/Witness

Similarly, we conclude the trial court did not prejudicially abuse its discretion in precluding evidence of the stabbing incident under Evidence Code section 352 for impeachment of Mitchell.

Since the adoption in June 1982 of article I, section 28, of the California Constitution, known as the "Truth-in-Evidence" provision, evidence of "immoral conduct [is] admissible for impeachment whether or not it produced any conviction, felony or misdemeanor." (*People v. Wheeler* (1992) 4 Cal.4th 284, 290-297 & fn. 7, p. 297 (*Wheeler*).) The admissibility of any past misconduct for impeachment, however, is "limited at the outset by the relevance requirement of moral turpitude. Beyond this, the latitude [Evidence Code] section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (*Wheeler*, *supra*, at p. 296, fn. omitted.) When a court exercises its discretion under Evidence Code section 352, it takes "into account, as applicable, those factors traditionally deemed pertinent in this area. [Citations.] But additional considerations may apply when evidence other than felony convictions is offered for impeachment. . . . [I]mpeachment evidence other than felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluation which felony convictions do not present. Hence, courts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value." (*Wheeler*, *supra*, at pp. 296-297, fns. omitted.)

The court in this case did just that. Unlike Knox's characterization that the court ruled the evidence inadmissible as impeachment evidence simply because it did not understand the law or know how to fairly admit the evidence, the record clearly shows the court consciously and soundly exercised its discretion under Evidence Code section

352 to disallow the alleged stabbing incident. In doing so, the court took into account all the appropriate, traditional factors before finding that although the evidence would be relevant on credibility if true, because the alleged felony conduct described in the police report involved moral turpitude, that the prejudice caused by its uncertainty in not being a conviction which would require a mini-trial and the possibility of jury confusion far outweighed its probative value on Mitchell's credibility.

Moreover, as in our above discussion on the exclusion of the same incident as character evidence, any conceivable error was harmless. Because Mitchell's credibility was already subject to impeachment with other aggressive, violent acts and Knox was not prevented from presenting a defense or cross-examining Mitchell on those and other matters, it is not reasonably probable that the verdicts were affected by the exclusion of the evidence. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611.)

V

BLAKELY, BOOKER AND CUNNINGHAM

At sentencing, Knox's counsel took exception to portions of the probation report that relied upon facts not found true by the jury to make him ineligible for probation except in an unusual case and to impose the upper term. Relying on *Blakely, supra*, 542 U.S. 296, counsel argued the probation report was wrong because the jury had made no findings that Knox had used a gun or had caused great bodily injury in this case because the jury had found Knox not guilty of the greater offenses charged which had included those allegations. Counsel also argued there were no jury findings on vulnerability of the victims, on planning and sophistication, or on whether Knox had engaged in violent

conduct that indicated a serious danger to society. Although counsel conceded that Knox's performance on probation had been unsatisfactory, he pointed out that Knox had not been on formal probation as his priors were all misdemeanors and that the recent ones were decreasing in seriousness, having only been "driving on a suspended license. . . ." Counsel claimed this entire case should be mitigated based on Mitchell's initiation, provocation and willingness to participate in the unfortunate incident because she refused to give James back his registration papers. The prosecutor argued *Blakely* did not preclude the upper term for this aggravated case of attempted voluntary manslaughter.

In denying probation, the trial judge stated:

> "First of all, I had the opportunity to hear the trial. So I'm well aware of the facts and circumstances of the case and I've also had the opportunity . . . to read the probation report. But, also, I had the opportunity to read the letters in support of Mr. Knox . . . . [¶] And all of those letters show me one thing, that . . . Mr. Knox does have good qualities, that he . . . doesn't have a gang history. He doesn't have a drug history and has been apparently one that has . . . been employed presumably for some period of time. [¶] [S]o I'm really impressed by those letters. I don't usually see letters like that at all. I really don't. So Mr. Knox is unique in that sense that he's not the kind of person . . . I would normally see here. [¶] But I think the problem is that the crime . . . is a horrendous one because the facts and circumstances, as the jury found true, point out a vicious attack by shooting at unarmed people in a closed area and three people are actually hit. One of them is so injured that she is alive only on life support and she can only utter sounds and probably can only do that the rest of whatever life she has left totally. [¶] So the facts of the case are substantial. The evidence that Mr. Knox . . . was the person who committed the crime, I thought was overwhelming, that he was identified by just about everyone as being the person that was the person that, in effect, empties his gun into this close proximity of people. . . . I just can't ignore that at all that this was a vicious attack. [¶] It was an aggravated crime. It was done with callousness and viciousness and has left in its wake a person that, for all

> practical purposes, is deceased because she will never ever regain any kind of life at all. [¶] And for that, it deserves punishment. . . ."

The court found that this was not the type of unusual case for which probation should be granted. In weighing the facts affecting probation in California Rules of Court, rule 4.414,[8] the court found those in favor of granting probation were overruled because of the vicious facts and circumstances of this case. It also noted that Knox's criminal history had involved weapon charges, assaults with a weapon in 2000 and a conviction for inflicting corporal injury on a spouse in 2001.

The trial judge then stated that "[w]ith respect to [count 1], the court, in weighing the circumstances in aggravation and the circumstances in mitigation, I will find that this is an offense that is aggravated by the facts and circumstances that it was created into. It was not created in a vacuum, but it was something that did not involve a single shot, but an intentional design to pull the trigger ten separate times, and that means that there's . . . a certain intent or reflection upon that physical moment of pulling the trigger ten times. That is a circumstance in aggravation. [¶] [Knox] engaged in this conduct and that indicates that he is a danger to society . . . . [¶] There are factors in mitigation, including . . . the defendant's statement to me in the letter; the close family support he has. [¶] However, the court finds that the factors in aggravation outweigh the factors in mitigation. [¶] . . . [¶] So, at this time, the court . . . sentence[s] the Defendant [on]

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8 Further references to rules are to the California Rules of Court.

Count 1 for the crime of attempted voluntary manslaughter for the aggravated term, which is one-half of the term of 11 years or five years, six months."

The court next sentenced Knox to the middle term on count 2 to run consecutive to count 1 (one-third the midterm of three years, or one year), based on its finding under rule 4.425 that this case involved separate acts of violence and there were two victims. The court noted that the total prison commitment for Knox was six years and six months.

On appeal, Knox raised the issue that the trial court's imposition of the upper term based on facts not found true by the jury violated his federal constitutional rights to proof beyond a reasonable doubt and a jury trial under *Blakely, supra*, 542 U.S. 296 and *Booker, supra*, 543 U.S. 220, even though he recognized we were bound to follow our Supreme Court's holding in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*) that *Blakely* did not invalidate the California DSL sentencing scheme as to the choice of an upper term or consecutive sentencing. (*Black, supra,* at p. 1244.)

On January 22, 2007, however, the United States Supreme Court overruled *Black, supra,* 35 Cal.4th 1238 and struck down the DSL on precisely the grounds urged by Knox in this appeal. (*Cunningham, supra*, 549 U.S. ___ [2007 WL 135687].) As that court stated, "Contrary to the *Black* court's holding, our decisions from *Apprendi* to *Booker* point to the middle term specified in California's statutes, not the upper term, as the relevant statutory maximum. Because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." (*Cunningham, supra*, 549 U.S. ___ [2007 WL 135687, at p. 14, fn. omitted].) In so holding, the high court again reaffirmed *Apprendi's*

bright-line rule, that had been reiterated in both *Blakely* and *Booker*, that "[e]xcept for 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.' [Citation.]" (*Cunningham, supra*, 549 U.S. ___ [2007 WL 135687, at p. 11].)

In their supplemental briefing, the People concede that *Cunningham* generally precludes a trial court from finding facts to impose an upper term sentence and that the middle term is the statutory maximum for a valid sentence in California in the absence of jury found aggravating facts. Nonetheless, the People argue there was no *Cunningham* violation in this case because the jury trial right does not extend to an aggravating circumstance based on Knox's criminal record, citing the *Almendarez-Torres* exception (*Almendarez-Torres v. United States* (1998) 523 U.S. 224, 246) and a single aggravating circumstance is sufficient to render Knox eligible for the upper term (*People v. Osband* (1996) 13 Cal.4th 622, 728-729) which together provides the trial court with the statutory authority to impose the upper term under the Sixth Amendment. The People thus posit that because the court had the authority to impose the upper term, it could find other aggravating facts in evaluating whether to impose the upper term regardless of whether they were found by a jury beyond a reasonable doubt without violating the holding of *Cunningham*.

In addition to finding the People's reasoning unpersuasive, we agree with Knox that the trial court improperly based its sentencing discretion to impose an upper term on facts not found by the jury and thus the sentence is violative of the holdings in *Cunningham*, *Blakely* and *Booker*. However, we decline to engage in a lengthy harmless

error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24. While the conduct in which Knox engaged is egregious, Knox had other qualities that the trial court specifically found were mitigating but outweighed based on aggravating factfinding on matters not contained within the jury verdicts. Because the sentencing record shows that the court could have properly imposed an upper term based on the *Almendarez-Torres* exception for Knox's prior convictions and his admittedly poor performance on probation, as well as on the fact of multiple victims which was necessarily found by the jury in convicting Knox on counts 1 and 2 (see *People v. Calhoun* (2007)40 Cal.4th 398 [53 Cal.Rptr.3d 539, 544-545]), in addition to the several strong mitigating factors the court found, we vacate the total sentence imposed to open up the full array of discretionary choices for resentencing because there is no way to determine whether the trial court would have imposed the same sentences had it known that the facts it had found in aggravation could not properly be used to impose the upper term on count 1. Accordingly, we vacate the sentence and remand the case for resentencing.

DISPOSITION

The sentence is reversed and the case remanded to the superior court to conduct a new sentencing hearing consistent with the views expressed in *Cunningham*, *supra*, 549 U.S. ___ [2007 WL 135687]. In all other respects, the judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

O'ROURKE, J.