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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,	
Plaintiff and Respondent,	E040818
v.	(Super.Ct.No. FSB043741)
MICHAEL SCOTT MAXEY,	OPINION
Defendant and Appellant.	

APPEAL from the Superior Court of San Bernardino County. Marsha Slough, Judge. Affirmed.

Kristin A. Erickson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Rhonda Cartwright-Ladendorf, Supervising Deputy Attorney General, and Kristen Kinnaird Chenelia, Deputy Attorney General, for Plaintiff and Respondent.

On July 1, 2005, following a jury trial, defendant Michael Scott Maxey, was found guilty of assault with a firearm (count 1; Pen. Code, § 245, subd. (a)(2)[1]) and making criminal threats (count 2; § 422). The jury also found true the allegation that defendant personally used a firearm in the commission of both counts (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a)). On September 23, 2005, the trial court dismissed count 2 under section 1385 upon motion of the People. Defendant was then sentenced to state prison for a total term of 14 years.

I. FACTS

In March 2004, Derrell Garcia sold his Chevy Blazer to Michael Acosta. Because Acosta failed to timely pay for the car, Garcia decided to repossess it. He enlisted the help of Carlos Rene Reyes.

On the evening of March 31, 2004, Garcia drove Reyes to a residence where the Blazer was parked. Without a key or notice to Acosta, Reyes got into the Blazer, started the engine and began to drive away. As he was leaving, he was being pursued by a Mustang convertible and a Camaro.

About two miles into the drive, a white car, the Mustang, was driving next to Reyes. It did not have its headlights on, the top was down and there was only one person inside, the driver. While stopped at a red light, the driver got out of the Mustang and grabbed something from the trunk. Reyes became nervous and ran the red light. He

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[1] All further references are to the Penal Code unless otherwise indicated.

continued driving and heard shots. One shot blew out the back window of the Blazer. Reyes lost control of the Blazer and hit a street light.

When Reyes tried to walk away, the Mustang cut him off. The driver of the Mustang, later identified as defendant, held a gun to Reyes's head and said, "You stole my truck." He also said, "Get on your fucking knees, or I'm going to shoot you." Reyes got down on his knees. Defendant then ordered Reyes to sit on the curb, warning him that he would be shot if he tried to run. Defendant called someone on his cell phone and said that he had the guy who had stolen the truck. Defendant then walked over to the Mustang and put the gun away.

Tracey Boynton, a resident of a group home located at the intersection, heard a knock on the door. When she looked outside, she saw a man in a black sweatshirt (Reyes) running across the street. She then saw the white Mustang swerve around a van, drive up on the curb, and stop in front of Reyes. A man wearing a red shirt (defendant) got out of the Mustang and pointed a gun at Reyes's head, telling him, "Don't move." Reyes sat down on the curb and crouched over. He started praying, saying, "Oh, God, please don't let him shoot me."

Boynton called the police. While Boynton was on the telephone, she heard defendant order Reyes to walk across the street. Reyes complied. Defendant then walked over to the Mustang and bent down near it. After he straightened up, Boynton did not see a gun.

Officer Christopher Flowers of the San Bernardino Police Department arrived and saw defendant reaching into the back seat of the Mustang, which was parked in the middle of the road facing the wrong direction. Officer Flowers also saw Reyes standing on the curb. Reyes was initially interviewed by Officer Tom Stieg. Reyes said that he was not involved in the accident and was not driving the Blazer. Reyes later explained to Officer Flowers that defendant pursued him in the Mustang and fired five rounds after Reyes tried to repossess Garcia's car. Reyes also told Officer Flowers that defendant pointed a gun at him and threatened him.

Officer Steven Lyter recovered a Glock handgun from beneath the driver's seat of the Mustang. Defendant was subsequently arrested. As defendant was being arrested, Boynton told dispatch that the man wearing the red shirt being arrested was the person with the gun. Defendant was wearing a red shirt and blue jeans when he was arrested.

Defendant offered the testimony of Patricia Wilson, the director of the group home, who said that Boynton is "a habitual liar." It was stipulated that Garcia was on probation for a misdemeanor case on the night of the incident and during the time he testified. Arthur Bustamonte, an investigator with the public defender's office, testified about an interview of Boynton by Dwight Moore of the district attorney's office. In that interview, Boynton told Moore that she got up when she first heard the noises that made her go outside, and she said that she used a cell phone to call the police.

II. FILING OF A THIRD COMPLAINT AGAINST DEFENDANT

Defendant contends the trial court erred by allowing the filing of the third complaint upon a finding of excusable neglect. He argues that the efforts made by the investigators do not demonstrate excusable neglect.

A. Background

Defendant was arraigned on the first filed complaint on April 29, 2004. Because the prosecution was unable to locate a witness, the matter was dismissed on June 24, 2004. The case was refiled the same day, proceeded to a preliminary hearing, and the matter was set for trial. On September 13, 2004, the last date possible for trial to start, the prosecution announced that it was unable to proceed. The case was dismissed a second time.

In December 2004, the prosecution sought to file the matter for the third time. The matter was continued for arraignment to January 3, 2005, in order for the defense to prepare points and authorities in opposition to the third filing. On January 4, 2005, the matter was continued because defendant had been transported to prison and was not present.

Oral argument on the prosecution's request to file the third complaint was held on March 17, 2005. The prosecution offered the affidavit of Investigator Paul Amicone, who stated his efforts to locate Reyes in June 2004. Investigator Amicone contacted friends and family members of Reyes, who reported that Reyes had moved to Los Angeles. When the investigator called Reyes's sister, she stated that Reyes did not have

a permanent address or phone number. She agreed to have Reyes contact the investigator. A week went by and Reyes did not call the investigator. More calls were made to Reyes's sister; however, the investigator had a hard time getting anyone to answer the phone. When the investigator next spoke with Reyes's sister, she said that she had left several messages for Reyes with another sister in Los Angeles and that Reyes's whereabouts were unknown. She refused to provide the number for the sister in Los Angeles.

Investigator Amicone continued making calls to Reyes's sister. On June 17, 2004, no one answered. The next day, Reyes's sister reiterated her understanding of Reyes's location. She explained that Reyes had left her house a few weeks ago on "bad terms." On June 21, the investigator had not heard back from either of Reyes's sisters. He then tried to contact Garcia but received no answer.

Following the dismissal of the case on June 24, 2004, Investigator Ronald Miller was assigned to locate Reyes. On August 3, the investigator attempted service on Reyes's last known address. He then ran a criminal history and found an address in Monterey Park. The attempted service in Monterey Park was unsuccessful because Reyes no longer lived there. The investigator then contacted Garcia, who contacted Reyes's sister. The sister said that Reyes was staying with friends in El Monte, and she would have Reyes contact Investigator Miller.

On August 31, 2004, Investigator Miller spoke with Garcia, who said that Reyes had moved to Fontana. Garcia also said that he would attempt to get the address. When

the investigator called Reyes's sister, there was no answer. Finding an address for Garcia's wife in Baldwin Park, Investigator Miller had Reyes served there. Reyes had never lived there. Checking the Los Angeles jail system on September 10, 2004, the investigator was unable to locate Reyes. The second filing was dismissed on September 13.

On October 4, 2004, Investigator Miller located Reyes in the Los Angeles jail and learned that his release date was set for December 31. Reyes was released from custody on October 24. The investigator continued to check with the Los Angeles jail system. On November 29, he learned that Reyes was staying with his sister in Colton. On December 2, Investigator Miller obtained an address for Reyes, and Reyes was served with a subpoena to appear in court the next day. Reyes said he could not testify because he would be labeled a snitch and harmed if he ever went back to jail. He also said that he was going to testify that he did not remember anything.

On December 8, 2004, the prosecution moved for a third filing of the complaint on the grounds that it was unable to locate Reyes, who had since been served and had appeared in court. The motion included the declarations of Investigators Amicone and Miller, detailing their attempts to locate Reyes. The defense opposed the motion. In reaching its decision to grant the motion, the trial court stated: "Well, I tend to agree in one regard and that is there's been a substantial amount of display by the family of the victim in this matter of uncooperativeness. However, I'm not convinced necessarily that Investigator Miller's efforts were superficial by virtue of the fact that he was essentially

misled also. [¶] According to his declaration, he ran the victim, found he was in jail in L.A. County and was not due to be released until December 31st, which would have put him within the time period of the trial. So I think his reliance on that information was sufficient. [¶] In checking back with L.A. County Jail, he finds out that the victim was released early. And again it then starts the runaround of trying to locate him again." Ultimately, the trial court found that reasonable efforts were made. Although the court did not find that such reasonable efforts satisfied due diligence, it opined that requirement was unnecessary to move forward for this purpose.

B. Standard of Review

"Section 1387, subdivision (a) provides in pertinent part: 'An order terminating an action pursuant to this chapter . . . is a bar to any other prosecution for the same offense if it is a felony . . . and the action has been previously terminated pursuant to this chapter . . . .' This [*sic*] commonly called in felony cases the two dismissal rule. [Citations.] However, section 1387.1 provides: '(a) Where an offense is a violent felony, as defined in Section 667.5 and the prosecution has had two prior dismissals, as defined in Section 1387, the people shall be permitted one additional opportunity to refile charges where either of the prior dismissals under Section 1387 were due solely to excusable neglect. In no case shall the additional refiling of charges provided under this section be permitted where the conduct of the prosecution amounted to bad faith. [¶] (b) As used in this section, "excusable neglect" includes, but is not limited to, error on the part of the court, prosecution, law enforcement agency, or witnesses.' Section 1387.1 is an

exception to the so-called two-dismissal rule. [Citations.]" (*People v. Mason* (2006) 140 Cal.App.4th 1190, 1195-1196.)

"The term 'excusable neglect' in section 1387.1 is given the same construction in criminal cases as it has been given in civil cases. [Citation.] '"Simply expressed, 'excusable neglect is neglect that might have been the act or omission of a reasonably prudent person under the same or similar circumstances.'" [Citation.]' [Citation.]" (*Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 741, quoting *People v. Massey* (2000) 79 Cal.App.4th 204, 211.) In *Massey*, "The 'neglect' under section 1387.1 was the failure of the People to have the witnesses in court on the date set for the first trial. This neglect was 'excusable' because reasonable efforts had been made to secure the witnesses' attendance." (*People v. Massey*, *supra*, at p. 211.) "'[I]f the police and prosecution had done all that could be reasonably expected to locate their witnesses and get them to court, and yet not succeeded, then, so far as concerns the construction of section 1387.1, their failure should still be labeled *excusable neglect*, despite the absence of any actual *neglect*, as commonly understood to include an element of carelessness or lack of sufficient regard or effort.'" (*Id.* at p. 211.)

The application of section 1387.1 lies within the trial court's discretion. Absent a clear abuse of such discretion, or a showing of inexcusable neglect, we will affirm the trial court's decision. (*People v. Woods* (1993) 12 Cal.App.4th 1139, 1149.)

C. Analysis

Based on the record before this court, we cannot say that the trial court abused its discretion when it found that the prosecution's failure to locate Reyes on September 13, 2004, was excusable neglect. Investigator Miller faced many obstacles in his search for Reyes. It was clear that Reyes did not want to be a witness. He told the investigator that testifying would result in his being labeled a snitch and being harmed if he ever went back to jail[2]. Reyes also indicated that he would testify that he did not remember anything. Thus, Reyes was purposefully trying to avoid being subpoenaed as a witness. Reyes's friends and family members attempted to help him avoid being found by being evasive about his location. They claimed that he did not have a permanent address, no phone, and that he moved around a lot. Outside of family and friends, Investigator Miller checked the Los Angeles jail system and Reyes's last contact address and number. Contrary to defendant's assertion, the investigator did not wait until right before trial to begin searching for Reyes. The search began 40 days prior to trial. Likewise, defendant's claim that the investigator limited his search to family members and friends is incorrect. Investigator Miller checked Reyes's criminal history and current incarceration. It is apparent that through no fault of the prosecution, the trial could not commence on the two previous dates assigned because the main witness, Reyes, avoided detection.

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[2] At oral argument, defense counsel questioned whether what was done to find Reyes after September 13, 2004, was relevant. We find that it was relevant because it provided further evidence of Reyes's determination not to be found.

Accordingly, the trial court's excusable neglect finding and subsequent order granting the prosecution's motion to file a third complaint did not amount to an abuse of discretion.

III. IMPEACHMENT OF BOYNTON

On appeal, defendant asserts the trial court violated his Sixth Amendment right to confront witnesses (the confrontation clause) by refusing to allow him to impeach Boynton with her probationary status and performance on probation.

A. Background

Prior to trial, defendant moved to impeach Boynton on her failure to perform her probationary duties following a felony drug conviction. An Evidence Code section 402 hearing was held in which Boynton testified she was unaware there was a warrant for her arrest for her failure to comply with the terms of her probation. Boynton admitted being arrested in January 2000 for possession of rock cocaine. She pled guilty, entered a diversion program, and was required to report to a parole officer. Boynton remembered attending a court hearing on May 22, 2001, but did not remember her diversion program being terminated. She said she was taken into custody for a few days and ordered to report to CALTRANS and work on the weekends. She missed some days, so she had to return to court and have the work release program reinstated. Boynton acknowledged that she did not finish her weekend duties; however, she claimed that she checked with probation in 2003 and was told that she was no longer in the system. Since then, Boynton attended the prison ministry each year. By doing so, a background check on her

was run each year. She was never informed of any problems with her probation. Boynton was a witness at trial because she called 911 on the night of the incident and reported the events to the dispatcher.

Defendant moved to impeach Boynton with her probationary status. The trial court denied the motion on the grounds there was no showing that her testimony was influenced by her probationary status. Instead, the court found that Boynton did not even know that she was still on probation and had a warrant for her arrest. Thus, the court concluded that Boynton's probationary status was irrelevant because it lacked impeachment value.

B. Analysis

A defendant's rights under the confrontation clause are violated only when the trial court's ruling prevents the defendant from engaging in """otherwise appropriate cross-examination""" designed to """'expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" [Citations.]'" (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1050-1051.) "'However, not every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. [Citation.] . . . . Thus, unless the defendant can show that the prohibited cross-examination would have produced "a significantly different

impression of [the witnesses'] credibility" [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment.'" (*Id.* at p. 1051.)

A witness's probationary status is not always admissible for the impeachment purposes. (*People v. Chatman* (2006) 38 Cal.4th 344, 374.) Rather, the defendant must show the witness's probationary status could have affected her testimony. (*Ibid.*; *Davis v. Alaska* (1974) 415 U.S. 308, 315 [witness who was on probation and in vicinity of business at time of robbery had motive to falsely identify another as a suspect to deflect suspicion from himself]; *People v. Adam* (1983) 149 Cal.App.3d 1190, 1193 [prosecution witness who was on probation, with defendant when he cashed checks allegedly stolen from the defendant's father, and apparently received funds from those checks, had motive to cooperate with police]; *People v. Espinoza* (1977) 73 Cal.App.3d 287, 291 [victim witness had motive to lie about his use of force because such use would violate the terms of his probation].)

Here, there is no evidence that Boynton's probationary status, or her performance on probation, might have influenced her testimony. First, she was ignorant of the fact that she was still on probation. Second, she had attended prison ministry each year which subjected her to a check on her status. Third, she had no connection to either defendant or Reyes. Fourth, she voluntarily called 911. If she was attempting to avoid contact with law enforcement, she would have remained silent. And finally, as the prosecution points out, the fact that her performance on probation was less than perfect could have been attributed to reasons having no bearing on her veracity.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant raises the issue of ineffective assistance of counsel based on his counsel's decision not to subpoena a witness.

A. Background

Following receipt of the jury's verdict, defendant moved for a new trial. One of the grounds was whether he had received the ineffective assistance of counsel. Defendant claimed that his counsel failed to offer the testimony of Kevin Kiibert, a witness who was interviewed by the officers on the night of the incident. Kiibert identified both defendant and Reyes. Police reports indicate that Kiibert said he saw the two men arguing in the road and that defendant was raising his right hand up and down. Kiibert was not sure if either of them had a weapon. When Kiibert asked if they needed help, defendant said they were okay and that they did not.

In response to the charge of ineffective assistance, defendant's counsel explained that he had located Kiibert in Louisiana through a family law file on day 55 of 60 of the third filing. Counsel was familiar with processing witnesses from out of state and the process is relatively slow. Because the prosecution had problems in the past with locating Reyes, and because, as of day 55, Reyes remained absent, defense counsel explained that he had made a tactical decision not to serve Kiibert. He did not want to delay the trial during the time it would take to get Kiibert to California and thus give the prosecution additional time and opportunity to bring Reyes to court. In defense counsel's mind, it was a "race for the finish line." Counsel was questioned further: "But as that

deadline that you just described was approaching, were you aware of the fact that the case had already been filed twice by the district attorney, dismissed twice by the district attorney, and if the trial didn't go this third time around, the People would never again be able to prosecute this?" Defense counsel answered, "Yes."

B. Standard of Review

To establish a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that the deficiency prejudiced his defense. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *In re Neely* (1993) 6 Cal.4th 901, 908-909.) An attorney provides deficient representation, in violation of the defendant's state and federal constitutional right to the effective assistance of trial counsel, if the attorney's performance fell below an objective standard of professional competence. (*Strickland v. Washington*, *supra*, at p. 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) To obtain reversal, the defendant must show both that counsel's performance was deficient and that the deficiency was prejudicial. In this context, prejudice means that there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. (*Strickland v. Washington*, *supra*, at p. 687.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id*. at p. 694; see also *People v. Ledesma*, *supra*, at pp. 217-218.)

C. Analysis

Here, we find neither deficient performance nor prejudice. According to defense counsel, he chose not to serve Kiibert pending the third trial for tactical reasons. Although appellate counsel claims the sole reason for not serving Kiibert was based on insufficient time, the record indicates otherwise. It was a "race for the finish line." Specifically, counsel did not want to give the prosecution more time to locate Reyes. Such strategy had worked for counsel during the first two attempts to bring the case to trial. Although it wasn't as successful during the third, the Attorney General suggests that it was "likely Kiibert was not subpoenaed because he was not an exculpatory witness." We agree. According to the record, Kiibert positively identified defendant as being at the scene and being involved in some sort of altercation with Reyes. Kiibert could not positively say that defendant did not have a weapon in his hand. However, Kiibert could confirm that defendant kept raising his hand. Such movement suggests that there was something in his hand prompting him to raise it. Moreover, the fact that defendant told Kiibert that they did not need any help indicates that defendant wanted Kiibert to leave the scene. Clearly, Kiibert's account of what happened does not qualify as exculpatory evidence. Rather, it supports the versions of the facts of Reyes and Boynton. As such, we cannot fault defense counsel for not calling a witness whose testimony might do more harm than good. (*People v. Miranda* (1987) 44 Cal.3d 57, 121.) Likewise, we find no prejudice in the omission of Kiibert's testimony. (*People v. Pope* (1979) 23 Cal.3d 412, 424-425.)

V. INSTRUCTIONAL ERROR RE: DISCOVERY VIOLATIONS

Defendant contends he was prejudiced by the prosecutor's failure to timely disclose the notes taken from his phone conversation with Boynton, Boynton's prior record, and Garcia's prior record. Defendant also asserts the trial court abused its discretion by refusing to instruct the jury that the prosecution failed to disclose evidence in a timely manner.

A. Background

1. Interview notes

Prior to voir dire, defense counsel alleged that Deputy District Attorney Dwight Moore (Moore) committed discovery violations by failing to disclose notes he had taken of a phone interview with Boynton on June 10, 2004.[3] In response, Moore acknowledged his delay in turning over the notes; however, he argued that the defense was not prejudiced. Later in the trial, the issue was revisited with a defense request to have Moore take the stand. Moore characterized his notes as one page containing the following: "Notes, phone con with Tracey Boynton, 6-10-04, at 2:00 p.m."; "Gun, hyphen, red shirt, comma, white, scribble, black pants, comma, white car"; "Gunman got on cell phone before PD arrived"; and "On phone with 911." Moore argued that he had no recollection of the interview, but his notes speak for themselves. Moore also stated

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[3] Moore did not give his notes to defense counsel until three days before trial commenced.

that he had spoken with the defense investigator, and if the investigator was called as a witness, Moore would not raise any hearsay objections.

The trial court refused to have Moore take the stand; however, defendant was allowed to call his investigator as a witness. Investigator Arthur Bustamonte testified that he had spoken with Moore about his interview with Boynton. Boynton told Moore that she was in bed when she heard a noise and called 911 on a cellular phone.

2. Boynton's prior record

At the same time that defense counsel raised the issue of Moore's notes, he also claimed that Moore failed to disclose Boynton's prior record. Moore explained that he ran Boynton through the CIA and DOJ databases and came up with no prior record. He also said he would follow up on defense counsel's belief that Boynton had a prior record in Riverside. On the first day of voir dire, Moore explained that Boynton did have a prior felony conviction for Health and Safety Code section 11350. The court found that the crime was not one for moral turpitude and thus could not be used for impeachment purposes. Defense counsel agreed; however, he requested to use Boynton's performance on probation for impeachment. As previously discussed, the trial court refused.

3. Garcia's prior record

The day after Garcia testified, defense counsel informed the court that Garcia was on probation for a prior misdemeanor drug conviction. Defense counsel requested the court impose discovery sanctions on Moore. Most of the discussion regarding Garcia's probationary status was held in chambers and is not part of the record on appeal.

However, the trial court later noted the issue of whether a bench warrant had been issued and/or entered into the system for Garcia. Defense counsel did not allege a failure to disclose Garcia's prior record, merely the fact that he was on probation. The trial court found Garcia's probationary status admissible impeachment evidence and agreed to inform the jury of this information via a stipulation. Thus, the jury was told: "Witness, Mr. Garcia — Mr. Garcia was on probation on a misdemeanor case out of Riverside County on the night of the incident and during the time that he testified during this trial."

B. Standard of Review

Section 1054 et seq., also known as the reciprocal discovery statute, requires the prosecutor to "disclose to the defendant or his or her attorney [certain] materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies: [¶] (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial. [¶] . . . [¶] (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial. [¶] (e) Any exculpatory evidence. [¶] (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial . . . ." (§ 1054.1, subds. (a), (d), (e) & (f).) In the absence of good cause, this evidence must be disclosed at least 30 days before trial, or immediately if discovered or obtained within 30 days of trial. (§ 1054.7.)

Subdivision (b) of section 1054.5 provides, in part, "Upon a showing that a party has not complied with Section 1054.1 . . . a court may make any order necessary to

enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness, or the presentation of real evidence, continuance of the matter, or any other lawful order. Further the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure." Subdivision (c) of that statute provides, however, "The court shall not dismiss a charge pursuant to subdivision (b) unless required to do so by the Constitution of the United States."

The only substantive discovery mandated by the United States Constitution is the disclosure of material exculpatory evidence under *Brady v. Maryland* (1963) 373 U.S. 83. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1132-1134.) The prosecutor's failure to fulfill this obligation is not at issue here because defendant does not claim that the prosecution withheld exculpatory evidence. Clearly, notes from a phone conversation with Boynton, Boynton's prior record, and Garcia's prior record amounted to no more than impeaching evidence. Thus, defendant is only asserting a statutory violation, and, as noted above, the sanctions available to the trial court for such discovery violation are found in section 1054.5. However, once trial is over, these sanctions do not apply. In order for defendant to prevail on appeal on the grounds of violation of the pretrial discovery right of a defendant, he must establish that the information not disclosed was exculpatory and that "it is reasonably probable, by state-law standards, that the omission affected the trial result." (*People v. Zambrano*, *supra*, at p. 1135, fn. 13; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

C. Analysis

On the record before this court, defendant is unable to establish that there is a reasonable probability of a different outcome. Regarding Moore's interview notes, at best, they showed inconsistency in Boynton's testimony at trial. In Moore's notes, Boynton said defendant was wearing black pants; at trial, she said he was wearing white pants. When shown a picture of defendant that was taken on the night of the incident, Boynton indicated the clothes in the picture appeared to be the same clothes worn by the man with the gun. In Moore's notes, Boynton claimed to be in bed. At trial, she said she was in the craft room. In Moore's notes, Boynton claimed to call 911 on a cellular phone. At trial, she testified that it was a cordless phone. These inconsistencies are trivial, at best. In any event, the defense investigator testified to them. Thus, the late disclosure did not affect defendant's impeachment of Boynton's testimony.

Regarding Boynton's prior record, as we previously stated, the trial court properly excluded its use for impeachment purposes. Accordingly, defendant was not prejudiced by the late disclosure. Regarding Garcia's prior record, defendant acknowledges, "The late discovery of the Garcia information was cured by a stipulation that he was on probation at the time of the charged incident and at the time he testified." Given the stipulation that was read to the jury, we cannot find that defendant was prejudiced. In sum, we are unable to conclude that there is a reasonable probability the outcome of the trial would have been different had the challenged evidence been disclosed in a timely manner to defense counsel prior to trial. Regarding defense counsel's request that the

trial court instruct the jury, we note that defendant was told that he could ask for a continuance; however, he declined. Because we cannot find that Moore's actions were willful, we cannot find any error in the trial court's decision not to impose section 1054.4 sanctions in the form of notice to the jury pursuant to Judicial Council of California Criminal Jury Instructions, CALCRIM No. 306. Thus, defendant's claim of material, prejudicial nondisclosure of evidence fails.

VI. CUMULATIVE ERROR DOCTRINE

Defendant contends that various errors are, taken together, prejudicial and require reversal. Having found no individual prejudicial error, we also conclude there is no cumulative prejudice. (*People v. Cook* (2006) 39 Cal.4th 566, 608.)

VII. IMPOSITION OF UPPER TERM

Defendant claims the trial court erred in imposing an upper term sentence based on facts not found by a jury beyond a reasonable doubt nor admitted by him. (*Cunningham v. California* (2007) 549 U.S. ____ [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*).)

A. Background

Defendant was convicted of assault with a firearm and criminal threats. The jury also found that defendant personally used a firearm in the commission of both crimes. At sentencing, the trial court found there were no circumstances in mitigation. As for the circumstances in aggravation, the court found that the crime involved great violence in the threat of great bodily harm and that defendant was on grant of probation at the time.

(Cal. Rules of Court, rules 4.421(a)(1) & (b)(4).) The trial court sentenced defendant to the upper term of four years for assault with a firearm and a consecutive 10-year term for the firearm enhancement.

B. Analysis

"Other than a prior conviction, [citation] . . . '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.' [Citations.]" (*Cunningham*, *supra*, 549 U.S. at p. ___ [127 S.Ct. at p. 864], quoting *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) "'The relevant "statutory maximum"' . . . "'is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.' [Citation.]" (*Cunningham*, *supra*, at p. 860, quoting *Blakely v. Washington* (2004) 542 U.S. 296, 303-304 (*Blakely*).) Thus, ordinarily, "the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum. [Citation]." (*Cunningham*, *supra*, at p. 868.)

However, "if one aggravating circumstance has been established in accordance with the[se] constitutional requirements . . . the defendant is not 'legally entitled' to the middle term sentence, and the upper term sentence is the 'statutory maximum.'" (*People v. Black* (2007) 41 Cal.4th 799, 813, fn. omitted.) "[S]o long as a defendant is *eligible* for the upper term by virtue of facts that have been established consistently with Sixth Amendment principles, the federal Constitution permits the trial court to rely upon any

number of aggravating circumstances . . . regardless of whether the facts underlying those circumstances have been found to be true by a jury." (*Ibid*.)

According to defendant, there were no properly determined aggravating factors. We disagree. In imposing the upper term, the trial court relied on defendant's criminal history, finding that he was on felony probation when he committed the current offense. Under these circumstances, with one aggravating factor established in accordance with constitutional requirements, defendant was a recidivist not "'legally entitled'" to the middle term. (*People v. Black*, *supra*, 41 Cal.4th at p. 813.) There was no *Blakely* or *Cunningham* error, and no abuse of discretion, in the trial court's decision to sentence defendant to the upper term.

VIII. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

GAUT
J.

MILLER
J.