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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KEVIN LEON MORRIS, SR., Defendant and Appellant.	A103410 (Lake County Super. Ct. Nos. CR32555 & CR5489)

Appellant Kevin Leon Morris, Sr. appeals from his conviction of assault and battery on a custodial officer and resisting a peace officer. He raises numerous issues on appeal, including ineffective assistance of counsel, errors in admission of evidence, prosecutorial misconduct, and unconstitutionality of the statutory scheme pertaining to battery on a custodial officer. He also raises a number of sentencing issues, including the claim that his sentence is unconstitutional and must be reversed pursuant to *Blakely v. Washington* (2004) __U.S. __ [124 S.Ct. 2531]. Morris also filed a petition for writ of habeas corpus alleging ineffective assistance of counsel and denial of his constitutional right to testify, which we have considered with this appeal. We remand for resentencing in light of *Blakely* and order that his sentence for the assault be stayed, and deny the petition for writ of habeas corpus. In all other respects we affirm the judgment.

I.

PROCEDURAL BACKGROUND

Morris was charged by information with assault on a custodial officer (Pen. Code, § 241.1)[1] and battery (§ 243.1), both committed on Correctional Officer Jared Bussard. The information also charged Morris with resisting a peace officer, Dennis Bierman. (§ 148, subd. (a)(1).) The information further alleged a prior conviction under the three strikes law (§§ 1170.12, subds. (a)-(d) & 667, subds. (b)-(i)) and three prior prison terms (§ 667.5).

A jury found Morris guilty of all three counts. Morris admitted the prior strike conviction and the prior prison terms. The trial court sentenced Morris to the upper term of three years on both the assault and battery convictions, and doubled each term under section 1170.12, subdivision (c)(1). The court sentenced Morris to one year for resisting a peace officer, and ordered the sentences on all three counts to run concurrently. The court imposed three one-year enhancements for each of the prior prison terms under section 667.5, for a total prison term in the underlying case (Case No. CR32555) of nine years.[2]

II.

FACTUAL BACKGROUND

On February 17, 2003, Morris was in custody in the Lake County jail. He was escorted into the multipurpose room at the jail to attend a rules violation hearing. Rules violation hearings are conducted to determine if an inmate has broken a jail rule, and are heard by two officers and one civilian employee.

Correctional Officer Jared Bussard was in charge of Morris's hearing. Morris refused to proceed with the hearing if Officer Bussard was on the panel, stating that he

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[1] Unless otherwise noted, all further statutory references are to the Penal Code.

[2] At the same time, the court also sentenced Morris in case number CR5489 to eight months for felony possession of a firearm. Morris raises no issues regarding this case on appeal.

felt Officer Bussard was biased against him. Officer Bussard told him that no one else was available to hold the hearing, and that the hearing could not be rescheduled because it was required to be held within 72 hours of the inmate being served with the paperwork. He told Morris that he would consider his actions to be a refusal of the hearing. An argument ensued, and Officer Bussard instructed Morris to return to his cell. When he did not, Officer Bussard escorted him back to his cell by taking "him by underneath the arm and lift[ing] him up a little bit to get him out of the chair." Officers Parks, Hartman, Bierman and civilian aide Effestionie followed.

Officer Bussard removed Morris's restraints outside of his cell and instructed him to proceed to his cell. When Morris refused, Officers Bussard and Bierman "took control" of his arms and escorted him to his cell. About 10 feet from his cell, Morris became more aggressive and tried to pull away. The two officers placed Morris in his cell and started to close the door. Morris "turned around quickly in an aggressive manner with his hands up in a fighting posture and started charging" towards Officer Bussard about four feet away. Because there was not enough space to close the cell door, Officer Bussard entered the cell and placed his arms around Morris's shoulders, and they both fell to the bed.

Officers Parks, Hartman and Bierman came into the cell to help restrain Morris. Morris was "thrashing around and kicking and screaming violently . . . ." Officer Parks tried to contain his legs. Morris had a "tight hold" on Officer Bussard's shirt collar and was trying to hit him. Morris hit Officer Bussard once in the face. After Morris hit Officer Bussard in the face, Officer Bussard accidentally struck Morris near his mouth while trying to gain control of his right hand, which he ultimately was able to do. Morris was bleeding from his mouth area. He tried to bite Officer Bussard's hand, and when he could not, he spit in the officer's face. The officers attempted to roll Morris onto his stomach so they could put handcuffs on him. When they did, Morris put his hands under his chest. The officers finally got his arms out and handcuffed him from behind. Officer Bussard testified that he followed the jail policy on the amount and kind of force used. He used "the minimal force necessary to gain his compliance."

Officers took Morris to the booking room. He was bleeding from around his mouth and complained of wrist and back injuries. The officers called for medical staff, and a jail nurse saw Morris.

Officers Bussard and Bierman went to a hospital and were treated for their injuries. Officer Bussard had lower back pain and some scrapes and minor cuts on his face. The doctor placed him off-duty for two days due to swelling in his back and hip area. Medical personnel drew blood at his request because he was "concerned about the blood being spit in [his] face," and he did not "know what kind of diseases [Morris] may or may not have had." Officer Bierman had a sprained ankle, a puncture wound and scrapes on his left hand, and a contusion below his left knee. He was placed on light work duty for 10 days.

III.

DISCUSSION

A. Ineffective Assistance of Counsel

1. Concession of Guilt in Closing Argument

Morris argues he was denied the effective assistance of counsel because, in closing argument, his attorney conceded he was guilty of resisting a peace officer. Morris maintains that this concession "effectively conceded [his] guilt to the felony charges [of assault and battery]" and had "no tactical value," denying him his constitutional rights.

In order to demonstrate ineffective assistance of counsel, a defendant must show that counsel's performance was inadequate when measured against the standard of a reasonably competent attorney, and that counsel's performance prejudiced defendant's case is such a manner that his representation "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*Strickland v. Washington* (1984) 466 U.S. 668, 686.) "To be entitled to relief based on ineffective assistance of counsel, [defendant] has the burden of showing counsel's performance was inadequate and of affirmatively demonstrating he was prejudiced by trial counsel's errors. [Citation.]" (*People v. Hayes* (1991) 229 Cal.App.3d 1226, 1234-1235.) " 'In determining whether counsel's performance was deficient, a court must in

general exercise deferential scrutiny [citation].' . . . 'Although deference is not abdication . . . courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight.'. . ." (*People v. Brodit* (1998) 61 Cal.App.4th 1312, 1335, citing *People v. Scott* (1997) 15 Cal.4th 1188, 1212.)

"[A] defense attorney's concession of his client's guilt, lacking any reasonable tactical reason to do so, can constitute ineffectiveness of counsel. [Citations.]" (*People v. Gurule* (2002) 28 Cal.4th 557, 611.) "[H]aving chosen to make a closing argument, counsel cannot argue against his client. [Citations.] More particularly, unless his client consents, counsel cannot expressly or impliedly argue to the jury that his client is guilty. [Citations.]" (*People v. Diggs* (1986) 177 Cal.App.3d 958, 970.) Nevertheless, there are circumstances under which it can be sound trial tactics to " 'adop[t] a more realistic approach.' . . . " (*People v. Gurule*, *supra*, 28 Cal.4th at p. 612.) "[W]here the evidence of guilt is quite strong, 'it is entirely understandable that trial counsel, given the weight of incriminating evidence, made no sweeping declarations of his client's innocence but instead adopted a more realistic approach, namely, that . . . defendant . . . may have committed [some of the charged crimes].' " (*Ibid*.) " '[G]ood trial tactics [may] deman[d] complete candor' with the jury.' [Citation.]" (*Ibid*.)

Morris relies on *People v. Diggs*, *supra*, 177 Cal.App.3d 958, in which the court found that the defense attorney's concession of the defendant's guilt in closing argument was ineffective assistance of counsel. In that case, the defendant was charged with kidnapping and a number of different sex offenses. His attorney gave a "remarkable closing argument which defies summary description and . . . is largely incoherent. To the extent it is comprehensible, it appears to argue that a 'permissive' society in general—and television and rock music in particular—produce a nihilistic attitude in young people so that society should be held responsible for defendants' conduct." (*Id*. at p. 967.) His attorney did not argue "his client's only defense supported by the evidence: denial of criminal activity. Rather, [his] argument admitted defendant's participation in the crimes and asked the jury to consider a nondefense by way of excuse." (*Id*. at p. 968.) Not surprisingly, the court held that the attorney's "closing argument effectively withdrew a

crucial defense and admitted his client's guilt without his client's consent. Moreover, in the unusual circumstances presented here, ineffective assistance of counsel is apparent on the face of the record; there is simply no plausible explanation for [counsel's] bizarre argument." (*Id*. at p. 970, fn. omitted.)

Counsel's closing argument here is in no way comparable to that made in *People v. Diggs*. Morris's attorney made a rational tactical argument that the evidence showed only that Morris had resisted a peace officer, but that there was insufficient evidence to prove that he committed the assault and battery. He argued that the prosecution had not shown that appellant "willfully either assaulted or battered Officer Bussard." Counsel asserted that appellant may have simply been spitting blood out of his mouth, rather than spitting at Officer Bussard. Counsel's argument also stressed the burden of proof, noting that "I certainly think it's way more likely than not that Mr. Morris did these things . . . [but] [t]hat's not good enough."

Moreover, contrary to Morris's assertion, his attorney's argument did not "effectively" concede his guilt of assault and battery by contradicting his "only viable defense"—that the officer used excessive force. "The long-standing rule in California and other jurisdictions is that a defendant cannot be convicted of an offense against a peace officer ' "engaged in . . . the performance of . . . [his or her] duties" ' unless the officer was acting lawfully at the time the offense against the officer was committed. . . . 'The rule flows from the premise that because an officer has no duty to take illegal action, he or she is not engaged in "duties," for purposes of an offense defined in such terms, if the officer's conduct is unlawful. . . .' " (*In re Manuel G*. (1997) 16 Cal.4th 805, 815, citing *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217.) Here, however, Morris was charged with resisting a different officer than the one he was charged with assaulting and battering. The jury could have found that Officer Bussard used excessive force even if Officer Bierman did not.

Morris's attorney made that distinction clear to the jury in his argument: "It doesn't matter at all whether Mr. Morris was resisting Ms. Parks or Officer Hartman or Officer Grammer or Officer Russell or Officer Hauff. Doesn't matter. He's not charged

with doing any of those things. He is only charged with resisting Officer Bierman and he is charged with assaulting Officer Bussard and committing a battery upon Officer Bussard. . . . [¶] Officer Bussard is the specific named victim in counts one and two. So you can't transfer what [Morris] did with somebody else to Officer Bussard. And Officer Bierman is the specifically named victim in count three." Accordingly, the concession that Morris resisted Officer Bierman did not negate his excessive force defense to the charges that he assaulted and battered Officer Bussard.

Following oral argument, we ordered additional briefing on the extent to which the recent case of *Florida v. Nixon* (2004) ___U.S___ [125 S.Ct. 551] applies to this issue. Morris filed a supplemental brief in which he argues that the case "indicates that a concession of guilt without explicit client consent in a non-death penalty case may be considered *per se* ineffective assistance of counsel, requiring automatic reversal . . . ." (Italics in original.) Morris makes the same argument in a petition for writ of habeas corpus filed concurrently, in which he claims that he did not consent to his attorney's concession in closing argument.

In *Florida v. Nixon*, the defendant was charged with first-degree murder, kidnapping, robbery and arson. The evidence against him was "overwhelming," and his attorney concluded that "the best strategy would be to concede guilt, thereby preserving his credibility in urging leniency during the penalty phase." (*Florida v. Nixon, supra*, 125 S.Ct. at pp. 556-557.) Defendant's attorney attempted to explain this strategy to him, but he remained "unresponsive . . . never verbally approv[ing] or protest[ing]." (*Id*. at p. 557.) The court held that failure to obtain the defendant's express consent to a strategy of conceding guilt in a capital trial does not automatically render counsel's performance deficient, finding that defense counsel's concession of guilt was not the " 'functional equivalent of a guilty plea,' [citation]" which would require client consent. (*Id*. at pp. 560-561, 563.) Rejecting the assertion that counsel's effectiveness should be evaluated under the *per se* prejudice standard of *United States v. Cronic* (1984) 466 U.S.

648, the court applied the *Strickland*[3] standard, and held that counsel's concession strategy in the circumstances of the case was reasonable. (*Florida v. Nixon*, *supra*, at pp. 561-562.)

Morris contends that "*Florida v. Nixon* indicates that concessions of guilt without client consent in a non-death penalty case … would constitute *per se* prejudice, requiring automatic reversal." (Italics in original.) He bases this conclusion on the court's statement that "[o]n the record thus far developed, [defendant's counsel's] concession of [his] guilt does not rank as a 'fail[ure] to function in any meaningful sense as the Government's adversary.' [Citation.] Although such a concession in a run-of-the-mine trial might present a closer question, the gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus." (*Florida v. Nixon*, *supra*, 125 S.Ct. at p. 562, fn. omitted.)

The court's statement that a concession of guilt in a "run-of-the-mine trial might present a closer question" is certainly not a mandate for automatic reversal. The charges against a defendant are one more variable in a trial counsel's strategic calculus, not the deciding factor. Had Morris's counsel conceded his guilt to *all* of the charges against him, as counsel did in *Florida v. Nixon*, this might be a closer case. In contrast, Morris's counsel only conceded his guilt to the less serious charge of resisting Officer Bierman[4], while vigorously arguing against the charges of assault and battery against Officer Bussard. Given the circumstances of this case, the concession was not a "fail[ure] to function in any meaningful sense as the Government's adversary," requiring application of the *Cronic* standard. Instead, applying the *Strickland* standard, the concession was a reasonable trial strategy which we will not second-guess on appeal. (*Strickland v.*

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[3] *Strickland v. Washington*, *supra*, 466 U.S. at page 688.

[4] We note that a violation of section 148 requires only that defendant "willfully resists, delays, or obstructs" a peace officer, not a particularly high factual bar. (§ 148, subd. (a)(1).)

Washington, *supra*, 466 U.S. at p. 686; see *Florida v. Nixon*, *supra*, 125 S.Ct. at p. 562; *People v. Brodit*, *supra*, 61 Cal.App.4th at p. 1335.)

2. Morris's Failure to Consent to Concession of Guilt in Closing Argument

In his petition for writ of habeas corpus, Morris argues that his trial counsel was ineffective because he conceded Morris's guilt to the resisting arrest charge in closing argument without obtaining Morris's consent.[5] Morris states in his declaration that "[w]hen I heard Mr. Rhoades's closing argument, I was extremely surprised and disappointed when he conceded several times that I was guilty of resisting arrest. I understood that he had effectively pleaded my guilt to all of the charges."

Morris's declaration, however, is contradicted by the record. Morris could not have been "surprised" during closing argument by his attorney's concession that the evidence showed that he resisted a peace officer, because his attorney made the same concession in his opening statement, with Morris present in the courtroom.[6] Morris does not assert that he communicated his opposition to this strategy to anyone. Consequently, it is apparent that Morris knew of the defense strategy from at least the time of his attorney's opening statement, and made no objection to it.[7] His petition does not state a prima facie case for relief. (See *People v. Duvall* (1995) 9 Cal.4th 464, 474-475.)

3. Denial of Right to Testify

Morris also argues in his habeas petition that his attorney was ineffective in that he failed to "adequately" advise him of his right to testify, "told him not to testify," and

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5 Morris's trial counsel agrees that he "did not consult specifically with [Morris] about the content or style of either my opening statement to the jury, nor my closing argument."

6 Morris's attorney conceded in his opening statement that, "We are relatively confident that the evidence will show you that there may have been a resisting of the authority of the officers but that there is no assault or battery upon any officer in this case."

7 Had he disagreed with it at the time, he could have brought a motion pursuant to *People v. Marsden* (1970) 2 Cal.3d 118, seeking new counsel, a procedure he had employed previously in this case and with which he admitted he was "very familiar."

indicated to him that he "would not put [Morris] on the stand." Consequently, Morris claims that his waiver of his right to testify was "involuntary."

"[T]he decision to place a defendant on the stand is ordinarily within the competence and purview of trial counsel . . . . [Citation.]" (*People v. Hayes*, *supra*, 229 Cal.App.3d at p. 1231.) A defendant, however, has the right to testify, even if testifying is contrary to counsel's advice. (*People v. Nakahara* (2003) 30 Cal.4th 705, 719.) "When the record fails to disclose a timely and adequate demand to testify, 'a defendant may not await the outcome of the trial and then seek reversal based on his claim that despite expressing to counsel his desire to testify, he was deprived of that opportunity.' " (*People v. Alcala* (1992) 4 Cal.4th 742, 806, citing *People v. Hayes*, *supra*, 229 Cal.App.3d at pp. 1231-1232; *People v. Guillen* (1974) 37 Cal.App.3d 976, 984-985.) The "right to testify can be waived by conduct and does not require a personal and explicit waiver . . . ." (*People v. Hayes*, *supra*, 229 Cal.App.3d at p. 1234.)

Here, Morris has failed to make a prima facie showing that he was denied the right to testify. (*People v. Duvall*, *supra*, 9 Cal.4th at pp. 474-475.) In order to demonstrate a denial of the right to testify, a defendant's declaration must assert that he communicated his or her desire to testify to trial counsel. (See *People v. Hayes*, *supra*, 229 Cal.App.3d at p. 1235.) Morris's declaration states that "I wanted to testify in my defense. [Counsel] told me not to testify, and said that he would not put me on the stand." In contrast to the defendant's declaration in *People v. Hayes*, Morris's declaration does not indicate that he told his attorney that he wanted to testify, or that his attorney, knowing of his wishes, nevertheless refused to allow him to testify. The fact that his attorney "told [him] not to testify" reflects the tactical advice of counsel, not ineffective assistance.[8]

Similarly, Morris's declaration does not indicate in what way his attorney's advice regarding his right to testify was "inadequate." While he claims in the petition that "he

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[8] While the record does not reflect his counsel's reasons for that advice, it does indicate that Morris was a defendant in16 prior cases, some resulting in conviction of more than one offense.

was not adequately advised that the decision to testify was ultimately his own," his declaration is silent in this regard. Morris's trial attorney indicates that, though he does not "specifically recall the content of any conversation with [Morris] regarding whether he would or should testify at trial[,] . . . I am certain that I did not preclude him from testifying by specific words or actions. . . . I have represented thousands of clients . . . . [I]n each [case] I have advised the client that he or she had a right to testify, and that decision was one only he or she could make, that no attorney or anyone else could make that decision for him or her. I always point out the potential benefits of testifying, and advise of the negative consequences as well [such as impeachment with prior convictions.] . . . I am confident that I had a similar conversation with [Morris]." Because Morris's declaration states nothing about what he claims was inadequate about his attorney's advice, he has failed to state a prima facie case for relief.

Morris argues that his counsel's alleged errors, some of which he claims resulted in the denial of his right to testify, require reversal per se under the standard of *United States v. Cronic*, *supra*, 466 U.S. at pp. 656-657.) Prejudice based on ineffective assistance of counsel is only presumed "[i]f counsel's deficiencies were so severe as to result in a complete breakdown of the adversary process . . . ." (*People v. McDermott* (2002) 28 Cal.4th 946, 991.) "Otherwise, the defendant must show prejudice 'in the sense that it "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ' . . ." (*Ibid*., citing *People v. Kipp* (1998) 18 Cal.4th 349, 366.) Even if Morris had been denied his right to testify, the *Chapman*[9] harmless error standard would apply. (*People v. Hayes*, *supra*, 229 Cal.App.3d at p. 1234, fn. 11; *People v. Johnson* (1998) 62 Cal.App.4th 608, 634-635, and cases cited therein.)[10]

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[9] *Chapman v. California* (1967) 386 U.S. 18.

[10] We disagree with the one older California case to the contrary. (See *People v. Harris* (1987) 191 Cal.App.3d 819, 826.)

Morris has not shown how he was prejudiced by his attorney's alleged failure to "adequately" advise him of his right to testify. Morris does not contend that he was unaware of his right to testify. The record indicates that he was advised by the court of his right to testify on his own behalf at the time his counsel was appointed. Nor has Morris shown prejudice due to his failure to testify. In his declaration, he states that: "I did nothing to provoke Officer Bussard and the other officers involved in the February 17, 2003 incident. They entered my cell and tackled me. I struggled against them in self-defense. I was punched in the mouth during the attack and was bleeding. I believe that Officer Bussard and the other officers involved in the incident used excessive force against me." There was no dispute, however, that the officers entered Morris's cell, struggled to subdue him on the bed, or that Officer Bussard hit him in the mouth during the incident, causing his mouth to bleed. His attorney vigorously argued the defense of excessive force, noting the testimony that Officer Bussard hit Morris, though it was claimed to be "accidental," and that Morris's mouth was bleeding afterwards. Morris's apparent wish to testify that he "believed" the force used against him was excessive was a determination for the jury to make based on the evidence. Accordingly, Morris has not demonstrated any prejudice based on the claimed errors.

B. Evidence of Officer Bussard's Concern About Communicable Diseases

1. Admission of Evidence

Morris argues that the "entire line of questioning" about Officer Bussard's concern about communicable diseases as a result of Morris spitting blood on him was "misleading, irrelevant and highly prejudicial." He claims that the court erred in overruling his counsel's objection to one of the questions in that regard. We review that ruling for abuse of discretion. (*People v. Benson* (1990) 52 Cal.3d 754, 786.)

Morris objects on appeal to the following line of questions:

"Q. Did the fact that the defendant spit in your face cause you any concerns for your safety?

"A. It caused me great concern for the safety of myself and my family.

"Q. Why is that?

"A. Because I don't know what kind of diseases that this person may or may not have had.

"Q. And have you during your career as a correctional officer supervised inmates known to have AIDS?

"A. Yes, many.

"Q. Hepatitis C?

"A. Yes.

"Q. Tuberculosis?

"A. Yes.

"Q. Are inmates required to be tested for transmissible diseases before they are incarcerated at the jail facility?

"A. No, they are not.

"Q. Do you know whether or not each inmate at the jail has any kind of transmissible disease?

"A. No, I don't.

"[Morris's counsel]: Objection, relevance. I'm having trouble making a connection here.

"The Court: Sustained.

"Q. On February 17th, the date of this incident, did you know whether or not the defendant had any transmissible disease?

"A. No.

"[Morris's counsel]: Same objection.

"The Court: Overruled.

"Q. On February 17th when you went to the hospital, did you get tested for transmissible diseases?

"A. Yes.

"Q. And are you going to be having any other tests for that reason in the future?

"A. Yes."

At the outset, we note that at trial, Morris's counsel did not object to the "entire line of questioning," but only to two questions, thereby waiving any objections to the others. His first objection was sustained. The court overruled his relevance objection to the following question: "On February 17th, the date of this incident, did you know whether or not the defendant had any transmissible diseases?

Morris claims that the evidence of whether Officer Bussard knew on the date of the incident whether Morris had any communicable disease "had no possible relevance" because "there is no injury requirement under Penal Code section 243.1" Both officers, however, testified regarding their injuries and medical treatments received. Officer Bussard's concern about communicable diseases explained why certain medical tests were performed. The evidence, moreover, was potentially relevant for other reasons. For example, Officer's Bussard's knowledge of whether or not Morris had a communicable disease at the time of the incident may have been a factor in determining whether Officer Bussard acted in a reasonable manner in restraining Morris. We find no abuse of discretion in admitting this evidence.

2. Prosecutorial Misconduct

Morris also maintains that the prosecutor committed misconduct because his introduction of evidence and closing argument in this regard were "misleading," "highly deceptive or outright false." The portion of the prosecutor's closing argument to which Morris objected was as follows: "This case is an extremely serious case. The case, as you heard Officer Bussard testify, the inmates are not tested for dangerous transmissible diseases that can be transferred through blood or saliva; and the defendant spit in his face. The people have AIDS, hepatitis, tuberculosis and the officers don't know who has what in there. Many times people have these diseases some time before they even know—" Morris's counsel objected at this point, and a sidebar conference was held but not reported. The prosecutor conceded that Morris had tested negative for AIDS and other

diseases before trial. The court ruled that the "argument was not relevant," and the prosecutor stated he would discontinue the line of argument.[11]

"[A] prosecutor's knowing use of false evidence or argument to obtain a . . . conviction . . . deprives the defendant of due process . . . ." (*People v. Sakarias* (2000) 22 Cal.4th 596, 633.) Similarly, a prosecutor commits misconduct not rising to the level of a due process violation if he or she uses " ' " 'deceptive or reprehensible methods to attempt to persuade . . . the jury.' " ' " (*People v. Hill* (1998) 17 Cal.4th 800, 819.) "The applicable federal and state standards regarding prosecutorial misconduct are well established. ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' . . . Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' " (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Regarding the scope of permissible prosecutorial argument, we recently noted " ' " 'a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.' [Citation.] . . ." . . .' . . ." (*People v. Hill*, *supra*, 17 Cal.4th at pp. 819-820.)

Morris claims the prosecutor here committed misconduct similar to that found in *Brown v. Borg* (9th Cir. 1991) 951 F.2d 1011. In that case, the defendant was convicted of first degree murder premised on the felony-murder rule. The prosecutor introduced evidence suggesting that the murder was committed in the course of a robbery, including

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[11] The record contains no indication that Morris objected to the argument on the basis that it was misconduct or sought that the jury be admonished to disregard the argument.

evidence that the victim's wallet and gold chains were not found, and elicited a detective's expert opinion that this demonstrated the victim was killed during a robbery. (*Id*. at pp. 1012-1013.) In closing argument, the prosecutor stated that "[t]here was no testimony presented whatsoever that there was any property of any value found on . . . the victim. No wallet, no gold chains, which the uncle indicated that he had seen on his nephew earlier that evening." (*Id.* at p. 1013.) In fact, the prosecutor knew during trial that the victim's wallet and gold chains had been given to the victim's relatives by hospital personnel, "who presumably had discovered them on [the victim's] person." (*Id*. at p. 1014.) The court found that the prosecutor's misconduct was not harmless beyond a reasonable doubt, and reversed. (*Id*. at p. 1017.)

Contrary to Morris's contention, there was no similar egregious conduct here on the part of the prosecutor. The claimed similarity is that the prosecutor in this case knew at the time of trial that, after the incident, Morris had tested negative for communicable diseases. Officer Bussard testified that he was tested for communicable diseases after the incident because he was concerned for his safety. He stated that he did not know whether or not Morris had any communicable diseases at the time of the incident. Unlike in *Brown v. Borg*, the prosecutor neither elicited testimony known to be false or argued facts known to be false.

The prosecutor's argument, in contrast to that in *Brown v. Borg, supra,* did no more than repeat evidence introduced without objection at trial. Morris has not demonstrated that any of Officer Bussard's testimony was false, or that the prosecutor knew it was false[12]. The prosecutor's actions here were not "deceptive or reprehensible,"

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[12] In regard to the prosecutor's questioning which Morris now claims was misconduct, we note that Morris did not object that the questions constituted misconduct nor did he request an admonishment. "It is, of course, the general rule that a defendant cannot complain on appeal of misconduct by a prosecutor at trial unless in a timely fashion he made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]" (*People v. Benson*, *supra*, 52 Cal.3d at p. 794.) Moreover, while Morris claims that some of the testimony introduced was "outright false," he points to no particular statement made by Officer Bussard which was not true.

but arguments based on admissible evidence which the trial court chose to curtail on relevancy grounds. We find no prosecutorial misconduct on these facts.

C. Constitutionality of Penal Code section 243.1

Morris argues that his conviction under section 243.1 violated his constitutional rights to due process and equal protection, claiming that "the sentencing scheme under . . . section 243.1 is unconstitutionally arbitrary and/or unconstitutionally vague."

Morris's complaint is with the discretion given prosecutors to charge a battery against a correctional officer under one of three statutes. A prosecutor may charge a defendant under section 243.1, which provides: "When a battery is committed against the person of a custodial officer as defined in Section 831 of the Penal Code, and the person committing the offense knows or reasonably should know that the victim is a custodial officer engaged in the performance of his or her duties, and the custodial officer is engaged in the performance of his or her duties, the offense shall be punished by imprisonment in the state prison." A prosecutor may also charge battery against a correctional officer under either subdivision (b) or subdivision (c)(1) of section 243. Section 243, subdivision (b) and section 243.1 have identical elements, while section 243, subdivision (c)(1) requires, in addition, injury requiring medical treatment. Violation of section 243.1 is punishable as a felony, violation of section 243, subdivision (b) is a misdemeanor, and violation of section 243, subdivision (c)(1) is punishable as a "wobbler." (*People v. Wilkinson* (2004) 33 Cal.4th 821, 831.)

After briefing was complete in this case, the California Supreme Court resolved the equal protection issue in *People v. Wilkinson*, *supra*, 33 Cal.4th 821. The court held that "[b]ecause a rational basis exists for the statutory scheme pertaining to battery on a custodial officer, these statutes are not vulnerable to challenge under the equal protection clause. [Citation.]" (*Id*. at p. 841.)

Appellant also maintains that the statutory scheme violates his due process rights because "there is no way to determine whether a battery on a custodial officer would be classified as a misdemeanor . . . , felony, or . . . a 'wobbler.' " "[I]t is established that due process requires a statute to be definite enough to provide (1) a standard of conduct for

those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt." (*Burg v. Municipal Court* (1983) 35 Cal.3d 257, 269.) The fact that the proscribed conduct here may be charged and punished in more than one way, however, does not render the statutory scheme unconstitutionally vague. It has long been held that a statutory scheme allowing prosecutors discretion in charging does not violate the due process clause. (*United States v. Batchelder* (1979) 442 U.S. 114, 125; see *Davis v. Municipal Court* (1988) 46 Cal.3d 64, 87.) Consequently, the statutory scheme pertaining to battery on a custodial officer does not violate Morris's constitutional rights to either due process or equal protection.[13]

D. Sentencing Errors

1. Background

As previously noted, the trial court sentenced Morris to a total prison term in the underlying case of nine years. Included in that sentence was the upper term of three years on both the assault and battery convictions. The trial court imposed the upper terms based on its findings of three aggravating factors and no mitigating factors. The aggravating factors identified by the court were: "[1] The defendant's prior convictions as an adult and sustained petitions in juvenile delinquency proceedings are numerous. [¶] [2] The defendant was on a grant of summary probation when this crime was committed. [¶] [3] [T]he defendant's prior performance on probation and parole has been unsatisfactory." The court ordered the sentences for the assault and battery convictions to run concurrently. Morris admitted the prior strike conviction and three prior prison terms. The court imposed three one-year enhancements for the prior prison terms under section 667.5.

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[13] Morris also argues that cumulative errors compel reversal of his convictions. As in *People v. Kipp*, *supra*, 18 Cal.4th 349, "[w]e have considered each of defendant's claims on the merits and neither singly nor cumulatively do they establish prejudice . . . ." (*Id*. at p. 383.)

2. Multiple Punishments

The parties agree that the court erred in imposing concurrent sentences for the assault and battery convictions. Morris asserts, and the Attorney General agrees, that the offenses were part of an indivisible course of conduct and therefore sentence on one of the counts should be stayed under section 654.

Section 654 provides in part that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) " 'The "act" which invokes section 654 may be a continuous " 'course of conduct' " . . . comprising an indivisible transaction . . . ." [Citation.] "The divisibility of a course of conduct depends upon the intent and objective of the defendant. . . . [I]f the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." [Citations.]' [Citation.]" (*People v. Nubla* (1999) 74 Cal.App.4th 719, 730, citing *People v. Akins* (1997) 56 Cal.App.4th 331, 338-339.)

The defendant's intent and objective are factual questions for the trial court. (*People v. Adams* (1982) 137 Cal.App.3d 346, 355.) Here, the trial court found that "[t]he crimes and their objectives were basically dependent on one another[;] . . . they are committed at the same time and place, so as to indicate a single period of aberrant behavior . . . ."

The statutory bar against multiple punishments for the same act is subject to the requirement that a defendant "shall be punished under the provision that provides for the longest potential term of imprisonment." (§ 654, subd. (a).) Accordingly, because section 243.1 (battery against a custodial officer) provides for the longest potential term of imprisonment, we will stay execution of Morris's sentence for assault. (See §§ 241, 243; *People v. Snow* (2003) 105 Cal.App.4th 271, 282.)

3. Blakely Issues

In a supplemental brief, Morris argues the trial court violated his constitutional rights under *Blakely v. Washington*, *supra*, ___U.S.___[124 S.Ct. 2531] (*Blakely*), by sentencing him to the aggravated term for both his assault and battery convictions based upon factors not found by a jury beyond a reasonable doubt.

At the outset, we consider the Attorney General's standard claims that any *Blakely* error is waived because Morris failed to object, and that *Blakely* does not apply to California's determinate sentencing scheme. We recently rejected the same arguments, premised on the same authorities, in an opinion in which the California Supreme Court has granted review. (*People v. Butler* (2004) 122 Cal.App.4th 910, 918-919, review granted Dec. 15, 2004, S129000.) Pending final word from the California Supreme Court, we see no reason either to depart from that holding here, or to reiterate its reasoning.[14]

We next consider Morris's claim that the trial court's findings of three aggravating factors all involved subjective determinations which were required to be made by a jury and were therefore improper under *Blakely*. Morris maintains that the determinations that his prior convictions were "numerous," his performance on probation "unsatisfactory," and the fact that he was on probation at the time of the offense are subjective ones which must be determined by a jury. He also urges that the court "improperly admitted the probation reports into evidence," and therefore erred in finding that he was on summary

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[14] The second issue is also currently pending before the California Supreme Court in *People v. Towne*, review granted July 14, 2004, S125677, and *People v. Black*, review granted July 28, 2004, S126182.

probation at the time of the underlying crimes.[15] The Attorney General maintains that all three factors on which the trial court relied were "based on the fact of [Morris's] prior convictions" and therefore involved recidivist factors which do not implicate *Blakely*.

The requirement that a fact which increases a sentence beyond the statutory maximum must be found by a jury does not apply to the fact of a prior conviction. (*Almendarez-Torres v. United States* (1998) 523 U.S. 224; *Apprendi v. New Jersey* (2000) 466, 488, 490 (*Apprendi*); *Blakely*, *supra*, 124 S.Ct at p. 2536.) This prior conviction exception to the *Apprendi* rule has been construed to apply not only to the fact of the prior conviction, but also to "a court's determination regarding recidivist-based sentencing factors." (*People v. Early* (2004) 122 Cal.App.4th 542, 550; see *People v. Thomas* (2001) 91 Cal.App.4th 212, 216-223.)

The Attorney General suggests that if even one aggravating factor is proper, any *Blakely* error is harmless because it is not reasonably probable that the trial court would have imposed the middle term. Because the *Blakely* court based its holding on *Apprendi*, we apply the standard of prejudice applicable to *Apprendi* errors, which is the "*Chapman* test."[16] (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.)

We conclude that Morris's status as a probationer at the time of his offense arose directly from the fact of his prior conviction. In contrast, the aggravating factor of

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[15] Morris claims the trial court erred in admitting the probation report in evidence, though it was admitted solely "for the purposes of this sentencing hearing," citing *People v. Beeler* (1995) 9 Cal.4th 953 and *People v. Terry* (1964) 61 Cal.2d 137, overruled on other grounds in *People v. Laino* (2004) 32 Cal.4th 878, 893. Neither case supports his assertion. *Beeler* held that, though the " 'preferable procedure is to defer reading the probation report until after ruling on the automatic application for modification of verdict [under section 190.4, subdivision (e)],' " the court did not err in reading it before the ruling. (*People v. Beeler*, *supra*, 9 Cal.4th at pp. 1000-1001.) *People v. Terry* is likewise inapposite, holding it was error to admit a "certified copy of [defendant's] conviction of armed robbery in Oklahoma" because he was subsequently pardoned and must be given the same effect of that pardon in California under the full faith and credit clause of the constitution. (*People v. Terry*, *supra*, 61 Cal.2d at pp. 147-148.)

[16] *Chapman v. California*, *supra*, 386 U.S. at page 24.

whether Morris's prior performance on probation was satisfactory, though related to his recidivism, is a subjective factual finding which must be determined by a jury under *Blakely*.[17] It is not clear whether the aggravating factor of "numerous" prior convictions is a "fact of a prior conviction" which need not be submitted to the jury (see *People v. Thomas*, *supra*, 91 Cal.App.4th at pp. 216-223), or whether it involves a sufficiently subjective analysis so as to require a jury finding under *Blakely*. We need not decide that issue here, where the record reflects that Morris was a defendant in 16 prior cases, some resulting in conviction of more than one offense. It is beyond a reasonable doubt that the jury would have found that Morris suffered "numerous" prior convictions. We cannot say, however, it is beyond a reasonable doubt that a jury would have found Morris's performance on probation was not satisfactory.

Although a single factor in aggravation is sufficient to support imposition of the upper term (*People v. Osband* (1996) 13 Cal.4th 622, 728; *People v. Cruz* (1995) 38 Cal.App.4th 427, 433), on the record before us, we cannot ascertain which aggravating factor or combination of factors the trial court found determinative. The trial court did not give any indication of the weight it accorded each aggravating factor. Consequently, we cannot determine what sentence the court would have imposed if one or more of the aggravating factors upon which it relied were not valid under *Blakely*, *supra*, ___ U.S. ___ [124 S.Ct. 2531].

IV.

DISPOSITION

The matter is remanded for resentencing in light of *Blakely*, *supra*, ___U.S.___ [124 S.Ct. 2531], and with directions to stay execution of Morris's sentence for assault, prepare an amended abstract of judgment, and forward a copy to the Department of Corrections. The petition for writ of habeas corpus is denied. In all other respects, the judgment is affirmed.

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[17] Both of these probation issues are is currently before the California Supreme Court in *People v. George*, review granted December 15, 2004, S128582.

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Ruvolo, J.

We concur:

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Kline, P.J.

_____
Lambden, J.