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CERTIFIED FOR PARTIAL PUBLICATION*

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE, Plaintiff and Respondent, v. AARON PATRICK SLOAN, Defendant and Appellant.	C042448 (Sup.Ct. No. 6221501)

APPEAL from a judgment of the Superior Court of Placer County, John L. Gosgrove, J. Reversed in part and affirmed in part.

John Doyle, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Senior Assistant Attorney General, John G. McLean and George M. Hendrickson, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts I through IV, and VI.

A jury convicted defendant of three serious felonies based on an incident in which he broke his wife's leg. He was convicted of inflicting corporal injury on a spouse (Pen. Code, § 273.5, subd. (a)), and assault with force likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(1)), both with enhancements for personally inflicting great bodily injury in circumstances involving domestic violence (Pen. Code, § 12022.7, subd. (e)), and battery with serious bodily injury (Pen. Code, § 243, subd. (d)). He was also convicted of dissuading a witness. (Pen. Code, § 136.1, subd. (b)(1).) Defendant was sentenced to nine years eight months in prison.

On appeal he contends it was error to admit evidence of battered woman's syndrome and evidence of his prior acts of domestic violence. He contends the trial court erred in ordering the defense to turn over a tape recording of messages left by the victim and in not excising references to defendant's drug use and alleged theft. Defendant contends his convictions for aggravated assault and felony battery must be vacated under principles of double jeopardy. Finally, defendant contends his sentence of the upper term on count one and a consecutive sentence on count four violates *Blakely v. Washington* (2004) 542 U.S. ___ [159 L.Ed.2d 403].

We find merit only in defendant's contention challenging his convictions for aggravated assault and felony battery. We conclude that for purposes of determining whether an offense is necessarily included within another for purposes of prohibiting

multiple convictions, enhancements should be considered. We vacate defendant's convictions for aggravated assault with a great bodily injury enhancement and battery with serious bodily injury. In all other respects, we affirm the judgment.

FACTS

In the early morning of May 13, 2001, Officer Brandon Bean was dispatched to the Roseville Kaiser Medical Center emergency room on a report of spousal abuse. There he found Sonia Sloan; she smelled slightly of alcohol and was in pain. Her right bicep and her right ankle were bruised.

Sonia had a fractured dislocation of the fibula just below the knee and the strong ligament was torn apart. The injury required surgery in which a screw was inserted. Sonia had six weeks of painful rehabilitation and still had some pain at the time of trial.

In May 2001, Sonia had been married to defendant for three years. They had two children together and she had a daughter from a previous relationship. Their marriage had a lot of friction and was often violent. At trial Sonia testified to four acts of domestic violence by defendant. In January 1999, Sonia's daughter wanted to watch television and defendant objected. He called the girl names. Sonia stood up for her daughter and defendant got angry. He choked Sonia and hit her with his fists, calling her a fat, worthless whore. Sonia called the police and defendant left. Defendant was convicted of misdemeanor spousal abuse.

Sonia got back together with defendant because she was pregnant with their second child. Defendant worked and Sonia stayed home with the children. In May 2000, Sonia was watching television with a friend. Defendant did not like the show they were watching. He grabbed Sonia and she thought he was going to kiss her. Instead, he bit through her lip, leaving a scar. Sonia did not report the incident because she was afraid of defendant.

On May 4, 2001, Sonia went to a friend's after dinner. Defendant told her to be home at 8:00 or 9:00 p.m. She got home between 10:00 and 11:00 p.m. and went to bed. At 1:00 a.m. she awoke with defendant on top of her, choking her. Sonia woke her daughter who called 911. When the police arrived, Sonia told them not to arrest defendant because she did not want to be on welfare.

The police officer who responded to the call testified Sonia was under the influence of alcohol. The closet doors were smashed. When he tried to take a statement Sonia was distracted and got up to wash dishes or check on the children, who were confused. Sonia told the officer she was fed up and wanted defendant out of there because he was screwing around on her. Defendant returned and told the officer that Sonia started the fight when she came home, accusing defendant of cheating on her. In frustration, defendant pounded the closet doors. He went to the couch and Sonia followed and hit him. He then followed her to the bedroom where he may have choked her. There was no trauma visible on Sonia's neck; she had a bruise on her arm.

Defendant had bruises, scratches and a bite mark. The officer determined defendant was the primary aggressor, but referred the case for further investigation because there might be cause to arrest Sonia.

After the May 4 incident, Sonia decided she had had enough abuse and left defendant. Defendant wanted to reconcile and called her constantly. On May 12, Sonia went to a barbeque in Roseville, where she had three or four beers. Afterwards she went to the Onyx bar.

Later defendant came in the bar and asked her, "Are you fucking this beaner now?" She told him, "screw you" and left the bar and walked towards her car. Defendant grabbed her by the arm and told her he was taking her home. He took her keys and tried to get her to drink some tequila. He threw her to the ground and kicked her. Three men came to Sonia's rescue. They got her keys and chased defendant off.

Sonia drove to a friend's house. She called another friend, who took her to the hospital. The hospital staff called the police.

After she was released from the hospital, Sonia heard from her mother and defendant that if she did not drop the charges, defendant would do things to her. She obtained a restraining order. Defendant still called her. Sometimes he said he loved her and wanted to get back together. Other times he told her she was a worthless whore who would get AIDS. He offered her money for the kids and wanted her to drop the restraining order.

On June 22, Sonia reported her car window was broken. She told the officer defendant called and said his sister broke it. He told Sonia he would fix her window if she dropped the divorce and the restraining order. He also offered to help with her bills.

On cross-examination, defense counsel attacked Sonia's credibility. Sonia did not tell Officer Bean that defendant kicked her; she told him defendant had grabbed her arm and pushed her down. Counsel questioned why Sonia's story was getting worse, now she claimed defendant stomped on her leg. Sonia's version of the May 4 incident also did not match the officer's version. Sonia said she may have "sugar coated" reports to the police.

Counsel questioned what Sonia did between midnight, when the incident occurred, and 2:00 a.m. when she went to the hospital. Counsel asked Sonia if she ever called defendant or his girlfriend, Jackie Longhoffer. At first Sonia denied ever calling or leaving messages. Then she testified she possibly pushed star 69 after a call from them and left a message. Eventually, several taped messages were played for the jury. The messages were crude, vulgar, and profanity-laced diatribes against defendant and Longhoffer. "Hey, Aaron, I know you're sucking whores, dude. And check it out, yeah, I did fuck Jeremy, so how do you like me now? Fuck off. . . . That fucking bitch is going down and so are you. . . . Hey, Aaron, I guess you better kiss your fucking freedom and your fucking kids good-bye. You stupid mother fucker." In the messages, Sonia

berated defendant for failing to provide for his children and accused him of stealing her jewelry and eating ecstasy. Sonia testified she was just being drunk and stupid; she was being mean and trying to hurt his feelings.

The defense succeeded in portraying Sonia in a negative light. Sonia denied having an affair while married and later admitted it. She admitted she drank and used drugs, including using methamphetamine after her surgery. Sonia denied making a throat-slashing motion while Longhoffer was testifying in another case. A court reporter saw it.

In an interview with the police, defendant admitted going to the Onyx Bar and talking to Sonia. He claimed Sonia was drunk and she stumbled and fell. He denied he pushed her.

Sonia's friend, Denise Connor, testified she witnessed the biting incident. She got a call from Sonia the night her leg was broken. Sonia said defendant pushed her to the ground and kicked her. Defendant was obsessive about Sonia; he would call every five minutes when she left for the store. But he did not object when Sonia and Connor went out for the evening.

Sonia's mother testified that while Sonia was in surgery, defendant called and said he did not mean to hurt her, it was an accident. He was willing to give her his paycheck if Sonia dropped the charges. The mother never told officers about defendant's call.

Larry Sheridan, a doctor of podiatry, testified about Sonia's injury. Her injury was a Maissoneau fracture, the type of injury soldiers suffer when hit with the butt of a rifle. It

was also typical in soccer, from a kick or piling on. It was not the type of injury that occurs from turning one's ankle. Dr. Sheridan testified the injury could happen if someone was drunk and fell, but in 25 years he had not seen this injury from that cause. He believed there had to be blunt trauma; there had to be a fair amount of force.

Over defense objection, Linda Barnard, a licensed marriage/family therapist, testified at length on domestic violence and the battered women's syndrome. Dr. Barnard testified domestic violence is the physical, emotional, sexual or verbal abuse between two persons in an intimate relationship. She explained various myths and misconceptions about domestic violence and battered women. Many believe the woman is masochistic and enjoys the abuse, which is not true. It is a myth that domestic violence is limited. It is very underreported, with only 10 to 25 percent of victims reporting, and 95 percent of victims are women. Only 2 percent of reports are false. According to studies, domestic violence affects 1.4 million women per year. One-third to one-half of women will be physically assaulted at some time by an intimate partner.

Women stay in abusive relationships for many reasons, including emotional dependency, financial dependency, concern for their children, religious beliefs and family pressure. The primary reasons for staying are love and fear. Many believe the violence stops if a woman leaves, but that is not true as 75 percent are abused after they leave.

Mutual combat is a myth; when women hit it is usually in self-defense and women are normally more seriously injured. It is a myth that women are quick to call the police. In fact, they do not report abuse for the same reasons they stay in abusive relationships. Also, they may be embarrassed. It is a misconception that battered women are passive. Some are but most fight back at some point and some fight back all the time. The battered woman may precipitate violence in order to have some control.

Battered women believe the myth that therapy will stop violence. Treatment programs have only a 17 percent success rate. The violence ends when the batterer stops or gets help, the woman leaves and stays away, or one of the parties dies. It is a myth that women lie about domestic violence. Domestic violence cuts across all socio-economic levels; more poorer batterers are prosecuted because people with money have other resources.

Dr. Barnard testified the cause of domestic violence is the batterer’s need for power and control. There are patterns in the power and control. Intimidation is used, which may include breaking things. Both parties may engage in emotional abuse. Batterers may use the children to control women; they also try to control women through isolation and by controlling the money. There may be coercion in the form of threats and taunts. Both parties have a tendency to minimize the violence.

The cycle of violence has three stages: tension building, an acute episode, and a honeymoon or tranquility stage. In one-

third the cases, there is no honeymoon stage, only tension and aggression.

The characteristics of a battered woman are anxiety, depression, minimizing, denial, sleep disturbances, fear, symptoms similar to posttraumatic stress disorder, hypervigilance and a high startle response. Battered women frequently self-medicate with drugs or alcohol. Dr. Barnard described "flat affect" as showing no emotion. It may be triggered by disassociation in traumatic situations. Piecemeal memory is remembering only pieces at a time.

The prosecution gave Dr. Barnard a hypothetical situation: There is a three-year relationship with numerous incidents of domestic violence, some reported and some not, culminating in a broken leg. During rehabilitation, the victim gets a restraining order and then receives calls that the batterer is wasting money on drugs. The victim then calls him, using foul language, and comments that he is not supplying diapers and food and that he is using ecstasy. Would that be surprising of a battered woman? Dr. Barnard said no. If the battered woman is safe, she may initiate serious anger.

DISCUSSION

I

The People brought a motion in limine to admit evidence of battered women's syndrome (BWS). The defense demanded that the prosecution identify the specific myth or misconception such evidence would address. The court held a hearing under Evidence Code section 402 to consider the relevancy of the evidence. The

prosecutor identified three areas of BWS the expert would address: why women stay, the myth that victims are always meek and mild, and the cycle of violence.

Dr. Barnard testified at length at the hearing. The defense identified nine points she had raised and argued all of them were irrelevant; there was either no evidence as to that issue or it was a matter of common experience and did not require expert testimony. The nine points were the three myths the prosecution identified plus: what happens when women leave, control issues, posttraumatic stress disorder, the effect of drugs and alcohol, the myth of mutual combat, and a profile of batterers. The defense further argued that evidence of control and profiling the batterer violated the purpose of Evidence Code section 1107, which permits admission of BWS testimony. The court commented the Legislature now allows propensity evidence. The trial court ruled all the BWS testimony was admissible except that relating to posttraumatic stress disorder and profiling.

Defendant contends the trial court erred in admitting the BWS testimony. He contends it was irrelevant, not supported by evidence, not beyond common experience, and contravened the purpose of Evidence Code section 1107.

Evidence Code section 1107 provided in part at the relevant time: "In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding battered women's syndrome, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or

behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts which form the basis of the criminal charge." (Evid. Code, § 1107, subd. (a).)

There are two major components of a relevance analysis in admitting BWS testimony. First, there must be sufficient evidence to support the contention that BWS applies to the woman involved. (*People v. Gadlin* (2000) 78 Cal.App.4th 587, 592.) In *People v. Gomez* (1999) 72 Cal.App.4th 405, 415-417, the court held it was prejudicial error to admit BWS testimony because there was no evidence the victim was a battered women; there was no evidence the defendant behaved violently towards or abused the victim, other than the present incident. Here, there was evidence to support a finding that Sonia was a battered woman. She testified her marriage to defendant was characterized by friction and violence. And she testified about four specific incidents of domestic violence.

Second, in order for BWS testimony to be admissible, there must be a contested issue as to which it is probative. (*People v. Gadlin, supra*, 78 Cal.App.4th 587, 592.) BWS testimony is admissible to disabuse the jury of widely held misconceptions or popular myths. (*People v. Morgan* (1997) 58 Cal.App.4th 1210, 1214.) It is often admitted to address recantation and reunion by the battered woman, especially where such actions are used to attack the victim's credibility. (*Id*. at pp. 1215-1217.) It may also be admitted where the victim cooperates with the prosecution when the defense attacks the woman's credibility

based on her state of mind at the time of charged and uncharged incidents. (*People v. Gadlin, supra*, 78 Cal.App.4th at p. 595.)

Defendant contends the trial court erred in "blithely" finding that "the wholesale introduction of BWS expert testimony is warranted in every case." This contention misreads the record. Rather than simply admit all BWS testimony, the court held a hearing and ruled which portions were admissible, excluding proffered testimony on posttraumatic stress disorder and profiling of batterers. It is not an abuse of discretion to permit some leeway in prosecution questioning of a BWS expert. "When BWS testimony is properly admitted, testimony about the hypothetical abuser and hypothetical victim is needed for BWS to be understood. To the extent that the expert testimony suggests hypothetical abuse that is worse than the case at trial, it may even work to the defendant's advantage. In any event, limiting the testimony to the victim's state of mind without some explanation of the types of behaviors that trigger BWS could easily defeat the purpose for which the expert is called, which is to explain the victim's actions in light of the abusive conduct." (*People v. Gadlin, supra*, 78 Cal.App.4th at p. 595.)

Defendant contends expert testimony as to why battered women stay was unnecessary as the financial motive to remain is common knowledge and was testified to by Sonia. The expert testimony, however, demonstrated Sonia acted in accordance with BWS and also served to explain a reason for her failure to report some of the abuse. Dr. Barnard testified the reasons for

failure to report are similar to the reasons battered women stay.

Defendant contends testimony about the myth that battered women are passive was irrelevant because the evidence showed that Sonia was not passive. Defendant misunderstands the point of the expert's testimony. Dr. Barnard testified that most battered women fight back some of the time and some do all of the time. The evidence that Sonia fought back on occasion fit into this described syndrome.

Defendant contends evidence about the cycle of violence was irrelevant as there was no evidence about such a cycle in this case. This evidence provides the type of explanation that is necessary for BWS to be understood. (*People v. Gadlin, supra*, 78 Cal.App.4th at p. 595.)

Defendant contends the testimony about power, control and dominance, and about the characteristics of the batterer violate Evidence Code section 1107, as such evidence primarily goes to showing that defendant committed the abuse. Again, some testimony about the hypothetical abuser "is needed for BWS to be understood." (*People v. Gadlin, supra*, 78 Cal.App.4th at p. 595.) To the extent Dr. Barnard's testimony went beyond this purpose and into the excluded area of profiling a batterer, defendant failed to object and preserve the contention. (Evid. Code, § 353.)

Defendant objects to the testimony about mutual combat. Dr. Barnard's testimony in the section 402 hearing on this subject was confusing as she seemed to suggest there was almost

never mutual combat because men are stronger. She testified men are the primary aggressors 95 percent of the time. At trial she testified a battered woman usually engages in serious violence, other than pushing and shoving, only to defend herself, and research has shown men are the predominant aggressors. Thus, the actual BWS testimony was less objectionable than that proffered. Moreover, any error in admitting this testimony was harmless because there was no evidence to suggest the broken leg incident was the result of mutual combat.

Defendant contends it was error to permit Dr. Barnard to testify that drug and alcohol abuse escalates domestic violence and that a batterer may encourage the victim to use drugs and alcohol. Defendant contends the first point is common knowledge and there was no evidence defendant caused Sonia to use drugs and alcohol. There was evidence that Sonia had used drugs with defendant, but there was ample evidence that she drank heavily in his absence. The most pertinent portion of Dr. Barnard's testimony on this point was that battered women often self-medicate with drugs or alcohol.

Finally, defendant contends the BWS testimony served as a testimonial to Sonia's credibility. Although the trial court excluded any testimony about posttraumatic stress disorder, Dr. Barnard used the terms "flat affect" and "piecemeal memory" to explain why Sonia did not tell anyone at the hospital about defendant "stomping" or "kicking" her leg. The record indicates there was an unreported sidebar when Dr. Barnard began this testimony. The record does not indicate a defense objection to

this evidence, so the contention is waived. (Evid. Code, § 353.)

We find no error in the admission of the BWS testimony. There was evidence Sonia was a battered woman and the testimony was relevant to explain some of her behavior, such as her failure to leave defendant sooner and to minimize some early violence. This is not a case where the BWS testimony was crucial, such as to explain the victim's recantation of the abuse. Although Sonia's credibility was effectively attacked on several points, her version of events outside the bar was corroborated by the propensity evidence of defendant's prior acts of domestic violence and the medical testimony that such an injury was unlikely to be caused by a drunken fall, but required the application of significant force. To the extent it was error to allow certain portions of the BWS testimony, such error was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

II

Defendant contends the admission of his prior acts of domestic violence under Evidence Code section 1109 to show his propensity to commit domestic violence violated due process.

In *People v. Falsetta* (1999) 21 Cal.4th 903, the California Supreme Court addressed the constitutionality of Evidence Code section 1108, a parallel statute that permits admission of prior sexual offenses to show propensity. The court upheld the statute against due process challenge. (*Id*. at pp. 910-922.) Following the reasoning of *Falsetta*, several Courts of Appeal have upheld Evidence Code section 1109 against similar due

process challenges. (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1331-1334; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1025-1030; *People v. Johnson* (2000) 77 Cal.App.4th 410, 416-420.) "In short, the constitutionality of section 1109 under the due process clauses of the federal and state constitutions has now been settled." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310.)

Defendant contends the admission of evidence of the lip-biting incident was unduly prejudicial and should have been excluded under Evidence Code section 352. Defendant failed to raise this objection below and there was no abuse of discretion in admitting the evidence of the lip-biting incident.

When the prosecution first offered the evidence of prior acts of domestic violence, this incident was described as "an incident approximately one year prior to the instant case where the defendant assaulted the victim and bit her lip." The defense objected to all the propensity evidence on the basis that it was cumulative and prejudicial because there were multiple incidents. The defense asked for a hearing under Evidence Code section 402, which was denied. The court later stated that in ruling the propensity evidence was admissible the court found its probative value outweighed its prejudicial effect under Evidence Code section 352. At no time did defendant specifically object on the basis that the particular evidence of the lip-biting incident was unduly prejudicial, so the objection is waived. (Evid. Code, § 353.)

Even if there were a proper objection, defendant cannot establish an abuse of discretion in admitting evidence of the lip-biting incident. In determining whether to admit prior uncharged acts as propensity evidence, the court must balance the probative value of the evidence against its inflammatory nature, the possibility of confusion, its remoteness in time, and the amount of time involved in introducing and refuting the evidence. (*People v. Harris* (1998) 60 Cal.App.4th 727, 737-741.) The prejudice which the exclusion of evidence under Evidence Code section 352 is designed to avoid is not damage to the defense from relevant, probative evidence, but evidence which uniquely provokes an emotional bias against defendant and which has little effect on the issues. (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

Defendant contends this evidence was particularly inflammatory because the violence was unprovoked, sadistic, and perverted. Further, the probative value of the evidence was diminished because it did not come from an independent source; although both Sonia and Denise Connor testified about the lip-biting incident and the current offense. (See *People v. Branch* (2001) 91 Cal.App.4th 274, 283, fn. 2.) Finally, since defendant was not prosecuted for the lip-biting incident, there was a danger the jury would choose to punish defendant for the prior offense.

We reject the contention the lip-biting incident was so inflammatory as to evoke an emotional bias against defendant. It was similar to the charged offense: an unprovoked attack of

extreme violence. In enacting Evidence Code section 1109, the Legislature was concerned with the escalating pattern of domestic violence. (*People v. Hoover, supra*, 77 Cal.App.4th 4th at pp. 1027-1028.) Thus, the Legislature recognized that in many, if not most, cases where evidence of prior domestic violence is offered under Evidence Code section 1109, the evidence will come from the complaining witness and will be incidents of domestic violence for which defendant was not prosecuted. In making this evidence generally admissible, the Legislature determined the policy considerations in favor of admissibility outweighed the policy considerations that favor exclusion due to the lack of an independent source or a prior prosecution. The evidence of defendant's prior domestic violence against Sonia had considerable probative value on his propensity to commit the charged offense. The trial court did not abuse its discretion in admitting this evidence.

III

Defendant contends the trial court erred in ordering defense counsel to turn over to the prosecution the tape recording of messages Sonia left on defendant's answering machine. Defendant contends the discovery statute, Penal Code section 1054.3, did not require the defense to turn over the tape.

Introduction of the tape into evidence had a strange history. During cross-examination of Sonia, defense counsel used a transcript to ask whether she had left certain specific messages for defendant. The prosecutor argued that by using the

transcript, the defense was offering the tape into evidence and discovery was required under Penal Code section 1054.3. The court ordered the tape turned over immediately. Defense counsel asked what if she did not intend to use the tape. "[I]n terms of introducing evidence, I haven't introduced anything. I am just asking her questions, and it's only to the extent that she doesn't answer truthfully, which we have had occur already, and I will make it available. I just can't tell you right now what form it's in."

On the next day of trial the defense announced it would play the tape on recross-examination. The defense wanted to exclude the references to ecstasy and Sonia's jewelry. The prosecutor did not want the tape played, arguing it was highly inflammatory. The court noted the tape was relevant both as impeachment and to show Sonia's animosity towards defendant.

During redirect-examination of Sonia, the prosecution prepared to play the tape. The defense objected because it wanted to play the tape first. The prosecution again objected to the tape, prompting the court to explain: "You can't object now if you're going to play it." The prosecution played the tape, giving Sonia an opportunity to explain each message.

Penal Code section 1054.3 provides: "The defendant and his or her attorney shall disclose to the prosecuting attorney: [¶] (a) The names and addresses of persons, other than defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any

reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial. [¶] (b) Any real evidence which the defendant intends to offer in evidence at the trial."

"Prosecutorial discovery is a pure creature of statute, in the absence of which, there can be no discovery. [Citations.]" (*Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1167.) The prosecution is only entitled to that discovery required by the discovery statute. (*Id*. at p. 1166.) "A trial court should not attempt to embroider the discovery statute to provide greater discovery rights for the prosecution." (*Id.* at p. 1169.)

The defense is required to disclose only witnesses or real evidence it intends to introduce; intends to introduce means that it reasonably anticipates it is likely to call. (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 376, fn. 11.) The defense is not required to disclose impeachment evidence unless it intends to introduce such evidence. "Following disclosure of the prosecution's witnesses, on demand the defense must disclose *only the witnesses* (and their statements) it intends to call in refutation of the prosecution's case, rather than all the evidence developed by the defense in refutation. [Citations.] Thus, the defense is not required to disclose any statements it obtains from prosecution witnesses that it may use to refute the prosecution's case during cross-examination. Were this

otherwise, we would be presented with a significant issue of reciprocity." (*Id*. at p. 377, fn. 14, italics in original.)

In *Hubbard v. Superior Court*, *supra*, 66 Cal.App.4th 1163, the court held footnote 14 in *Izazaga v. Superior Court, supra,* 54 Cal.3d 356, was not simply dicta. "Here we hold that the prosecutor is not entitled to discover notes prepared by a defense investigator that relate to an interview of a 'prosecution' witness unless or until the defense announces an intent to call the defense investigator as a witness." (*Hubbard v. Superior Court, supra*, 66 Cal.App.4th at p. 1165.) In *People v. Tillis* (1998) 18 Cal.4th 284, the court held the prosecution was not required to disclose information of drug arrests it would use to impeach a defense expert absent evidence the prosecution intended to introduce such evidence. The court rejected the suggestion that it could be inferred that if a party had impeachment evidence, it would intend to introduce it. (*Id*. at pp. 292-293.)

Here, the defense could use the messages on the tape to impeach Sonia without disclosing the tape to the prosecution. The prosecutor was wrong that using the tape for impeachment was the same as introducing it into evidence. We recognize that failing to introduce the tape would render the cross-examination about the messages meaningless, but the determination whether to call witnesses or introduce evidence is within the discretion of trial counsel. (*Sandeffer v. Superior Court* (1993) 18 Cal.App.4th 672, 678.) Once the defense intended to introduce the tape, however, it had to disclose it. Defense counsel

indicated that when Sonia failed to admit to the content of her messages, the defense intended to introduce the tape to impeach her. The trial court properly ordered disclosure of the tape.

IV

Defendant contends the trial court erred in admitting portions of the tape recording that referred to defendant using ecstasy and stealing Sonia's jewelry. He also contends the court erred in admitting other evidence of defendant's drug use. Defendant objected to the admission of this evidence.

The Attorney General contends the complete tape of Sonia's messages to defendant was necessary to evaluate Sonia's bias towards defendant and the People were entitled to introduce evidence of defendant's drug usage to show the pattern of fighting and counter the notion that the fighting was simply the escalation of mutual combat. In any event, the Attorney General contends the admission of this evidence did not prejudice defendant.

We find any error in admitting this evidence harmless. The evidence presented at trial managed to sully considerably both Sonia and defendant. The tape recorded messages marked Sonia as a crude, foul-mouthed, angry woman. It is doubtful the jury placed much emphasis on her rantings against defendant on the tapes. Evidence of defendant's drug use was countered by more extensive evidence of Sonia's drinking and drug use. The key issue in the case was whether defendant was responsible for

Sonia's broken leg. On this point the evidence against defendant was strong. It was undisputed that defendant and Sonia had an altercation outside the bar. Sonia consistently maintained that defendant caused her broken leg. Her testimony was effectively corroborated by the propensity evidence of defendant's prior acts of domestic violence and the medical testimony that the injury was caused by a blunt trauma, not simply a fall. It is not reasonably probable defendant would have been acquitted if this challenged evidence had not been admitted. (*People v. Watson, supra*, 46 Cal.2d 818, 836.)

V

Defendant's attack upon Sonia resulted in convictions for three serious felonies. In a supplemental brief, defendant contends his convictions for counts two and three, aggravated assault and battery with serious bodily injury, must be vacated under Penal Code section 654 and principles of double jeopardy because the convictions arise from the same indivisible act against the same victim as the conviction in count one for corporal injury on a spouse causing a traumatic condition with a great bodily injury enhancement.

Defendant contends he may raise this issue on appeal even though he did not raise it below. The failure to raise a meritorious defense of double jeopardy is ineffective assistance of counsel. (*People v. Belcher* (1974) 11 Cal.3d 91, 96.) Due to this potential ineffective assistance of counsel claim, courts address the double jeopardy claim even if not raised

below. (See *People v. Scott* (1997) 15 Cal.4th 1188, 1201; *People v. Marshall* (1995) 13 Cal.4th 799, 824, fn. 1.) The Attorney General does not contend the point is waived.

"The Double Jeopardy Clause 'protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.' [Citation.]" (*Brown v. Ohio* (1977) 432 U.S. 161, 165 [53 L.Ed.2d 187, 194].) Defendant contends the third type of double jeopardy is present here, multiple punishments for the same offense. "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. [Citation.]" (*Blockburger v. United States* (1932) 284 U.S. 299, 304 [76 L.Ed. 306, 309] (*Blockburger*).)

Cumulative punishment may be imposed under two statutes, even where they proscribe the same conduct under the *Blockburger* test, if the Legislature specifically authorizes cumulative punishment. (*Missouri v. Hunter* (1983) 459 U.S. 359, 368-369 [74 L.Ed.2d. 535, 543-544].) But where there is no clear legislative authority, cumulative punishment is prohibited. In *Rutledge v. United States* (1996) 517 U.S. 292 [134 L.Ed.2d 419], concurrent life sentences for a conspiracy charge and a lesser included offense of conducting a continuous criminal enterprise were held to be improper cumulative punishment unauthorized by

Congress and one of the convictions had to be vacated. The court rejected the argument that the second life sentence may not amount to punishment at all. Quoting *Ball v. United States* (1985) 470 U.S. 856 [84 L.Ed.2d 740], the court noted that a separate conviction has potential adverse consequences apart from the sentence; it may delay eligibility for parole or result in increased punishment under a recidivist statute. (*Rutledge v. United States, supra*, 517 U.S. 292, 302 [134 L.Ed.2d 419, 429].)

Here, although the sentences on counts two and three were stayed under Penal Code section 654, there is a serious potential consequence of multiple convictions. Because of the great bodily injury allegations, each of the offenses is a serious felony and will qualify as a strike in a subsequent prosecution for any felony.[1] (Pen. Code, § 1192.7, subd. (c)(8); § 667, subds. (b)-(i); § 1170.12.)

California recognizes the same double jeopardy principle involved in prosecutions for lesser included offenses. An accusatory pleading may charge two or more "different statements of the same offense" and "the defendant may be convicted of any number of the offenses charged[.]" (Pen. Code, § 954.) Although this language seems absolute, there is an exception.

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[1] The California Supreme Court has suggested it might be an abuse of discretion under Penal Code section 1385 to fail to strike a strike where two prior convictions arise from the same act. (*People v. Sanchez* (2001) 24 Cal.4th 983, 993; *People v. Benson* (1998) 18 Cal.4th 24, 36, and fn. 8.)

(*People v. Ortega* (1998) 19 Cal.4th 686, 692.) "[T]his court has long held that multiple convictions may *not* be based on necessarily included offenses. [Citation.]" (*People v. Pearson* (1986) 42 Cal.3d 351, 355, italics in original.) "To permit conviction of both the greater and the lesser offense '"'would be to convict twice of the lesser.'"' [Citation.] There is no reason to permit two convictions for the lesser offense." (*People v. Ortega, supra*, at p. 705, (conc. & dis. opn. of Chin, J.).) "The test in this state of a necessarily included offense is simply where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense.' [Citations.]" (*People v. Pearson, supra,* at p. 355.)

In count one, defendant was convicted of willfully inflicting upon his spouse "corporal injury resulting in a traumatic condition[.]" (Pen. Code, § 273.5, subd. (a).) A traumatic condition is a wound or external or internal injury, whether minor or serious. (Pen. Code, § 273.5, subd. (c).) It was alleged and found that he personally inflicted great bodily injury in circumstances involving domestic violence. (Pen. Code, § 12022.7, subd. (e).) Count two was assault "by any means of force likely to produce great bodily injury." (Pen. Code, § 245, subd. (a)(1)), with the same great bodily injury enhancement. Count three was battery "and serious bodily injury is inflicted on the person[.]" (Pen. Code, § 243, subd. (d).)

Defendant contends that by willfully inflicting corporal injury on his spouse and personally inflicting great bodily

injury, he necessarily committed aggravated assault with a great bodily injury enhancement and battery with serious injury. Count one required the willful infliction of injury and the actual infliction of great bodily injury; this mental state is sufficient for assault. "[A]ssault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*People v. Williams* (2001) 26 Cal.4th 779, 790.) "'Serious bodily injury' is the essential equivalent of 'great bodily injury' [citation]." (*People v. Otterstein* (1987) 189 Cal.App.3d 1548, 1550.)

The Attorney General contends enhancements are not considered in determining whether an offense is a necessarily included offense, relying on *In re Jose H.* (2000) 77 Cal.App.4th 1090. Without the enhancement, corporal injury on a spouse does not necessarily include aggravated assault or battery with serious bodily injury. The force necessary to cause a traumatic condition, which can be a minor injury, is not the same force that is likely to produce great bodily injury or inflict serious bodily injury, so in committing corporal injury on a spouse one does not necessarily commit aggravated assault or battery with serious bodily injury.

In *In re Jose H., supra*, 77 Cal.App.4th 1090, the juvenile punched a classmate, fracturing his cheekbone, and was found to

have committed both felony assault with a great bodily injury enhancement and battery with serious injury. On appeal the juvenile contended he could not be convicted of both offenses because battery with serious bodily injury was necessarily included in felony assault with a great bodily injury enhancement. (*Id*. at p. 1093.) The court found the enhancement could not be considered in determining whether there was a necessarily included offense. (*Id*. at p. 1095.)

The court began its analysis by observing that under *People v. Wolcott* (1983) 34 Cal.3d 92, enhancements are not considered in determining lesser included offenses for purposes of the trial court's duty to instruct sua sponte on lesser included offenses. (*In re Jose H., supra*, 77 Cal.App.4th 1090, 1094.) It next cited the language of Penal Code section 954 permitting multiple convictions and the exception set forth in *Pearson, supra,* 42 Cal.3d 351. (*In re Jose H.* at pp. 1094-1095.) The court noted "that we are not, in this case, asked to consider the burden on the court of determining sua sponte jury instructions, due process issues of notice to a defendant of what charges he or she may have to defend against at trial, double punishment upon conviction or double jeopardy following a mistrial of one count." (*Id*. at p. 1095.) Nonetheless, the consequences of permitting multiple convictions were considerable as the juvenile would have two strikes arising from a single punch. (*Ibid*.) "Because the rule recognized in *Pearson* carves out an exception to a statute that appears to specifically authorize multiple convictions based on the same

conduct, we decline to accept appellant's invitation to expand the definition of necessarily included offenses beyond its existing boundaries. Those boundaries limit our consideration of whether count I and count II are necessarily included offenses of one another to the elements of the offenses charged, not the stated offenses with their attached enhancements." (*Ibid*.)

We respectfully decline to follow *In re Jose H., supra*, 77 Cal.App.4th 1090 because we find its reasoning unpersuasive. First, by assaulting and personally inflicting great bodily injury upon his spouse, defendant necessarily committed both aggravated assault and battery with serious bodily injury. The decision in *Wolcott, supra,* 34 Cal.3d 92 that enhancements are not considered in determining lesser included offenses for purposes of sua sponte jury instructions is distinguishable because, as the *Jose H.* court noted, different considerations are at issue. The *Pearson* rule is more than an exception to Penal Code section 954, it embodies an aspect of double jeopardy protection. As Justice Chin noted, "There is no reason to permit two convictions for the lesser offense." (*People v. Ortega, supra,* 19 Cal.4th 686, 705 (conc. & dis. opn. of Chin, J.).)

Here, the result, if not the reason, of convicting defendant three times for the same act is to give him three strikes rather than one strike and thus make him eligible for a life sentence upon the future conviction of any felony. The "unambiguous purpose" of the Three Strikes law "is to provide

greater punishment for recidivists. ([Pen. Code,] § 667, subd. (b).)" (*People v. Davis* (1997) 15 Cal.4th 1096, 1099.) This purpose is not served by treating a single act as separate offenses. Nor should this result rest solely upon the charging discretion of the prosecutor. We conclude enhancements should be considered in determining whether there are necessarily included offenses and multiple convictions are improper.

VI

In a second supplemental brief, defendant contends the upper term imposed on count one and the consecutive sentence on count four violate *Blakely v. Washington, supra*, 542 U.S. ___ [159 L.Ed.2d 403] (hereafter *Blakely*).

Applying the Sixth Amendment to the United States Constitution, the United States Supreme Court held in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (hereafter *Apprendi*) that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Id.* at p. 490 [147 L.Ed.2d at p. 455].) In *Blakely, supra*, 542 U.S. ___, ___ [159 L.Ed.2d 403, 413-414], the court defined the statutory maximum as the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant. Thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional factfindings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Ibid.*)

In sentencing, the trial court selected count one, corporal injury on a spouse, as the principal term and imposed the upper term of five years. It cited as aggravating factors supporting that sentencing choice the victim's vulnerability, defendant's background that showed an increasing level of violence, his significant criminal record, that he was on probation, and that his performance on probation was unsatisfactory. The court found no factors in mitigation. The court noted that it could be said defendant had turned his life around, but most defendants do so when faced with sentencing. There was a suggestion defendant had mental problems, but no support for that assertion. Even if the court considered these two possible mitigating factors, the aggravating factors significantly outweighed them.

Defendant contends the trial court erred in considering aggravating factors that were not found by a jury beyond a reasonable doubt.

The Attorney General contends defendant has forfeited this claim by failing to raise it below. We decline to find the *Blakely* claim forfeited because *Blakely, supra,* 542 U.S.___ [159 L.Ed.2d 403] was decided after defendant's sentencing. An objection is not required to preserve an issue for appeal when it would have been futile or wholly unsupported by existing substantive law. (*People v. Welch* (1993) 5 Cal.4th 228, 237; *People v. Turner* (1990) 50 Cal.3d 668, 703.) Further, California courts have discretion to address constitutional issues raised for the first time on appeal, especially in the

area of penal law. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061; see also *People v. Saunders* (1993) 5 Cal.4th 580, 589, fn. 5 ["Defendant's failure to object also would not preclude his asserting on appeal that he was denied his constitutional right to a jury trial"].)

The Attorney General further contends that the trial court could properly consider the facts relating to defendant's recidivism, defendant's prior convictions and the fact he was on probation. The rule of *Apprendi* and *Blakely* does not apply to a prior conviction used to increase penalty for the crime. (*Apprendi, supra*, 530 U.S. at p. 488 [147 L.Ed.2d at pp. 453-454]; *Blakely, supra*, at p. ___ [159 L.Ed.2d at p. 412].) This prior conviction exception has been construed to apply broadly to facts of defendant's recidivism, not just to the fact of a prior conviction. (See *People v. Thomas* (2001) 91 Cal.App.4th 212, 216-222.) The fact of probation arises from the fact of a prior conviction and, like a prior conviction, can be established by a review of court records relating to the prior offense. Recidivism "is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." (*Almendarez-Torres v. United States* (1998) 523 U.S. 224, 243 [140 L.Ed.2d 350, 368].) The trial court properly relied on defendant's prior convictions and his probation status in imposing the upper term.

Although the trial court cited the victim's vulnerability, defendant's recidivism, expressed in several ways, was the most

powerful reason for imposing the upper term. A single factor will support imposition of the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728.) The trial court found no mitigating factors, rejecting two possible ones. Under *People v. Price* (1991) 1 Cal.4th 324, 492, when a trial court has given both proper and improper reasons for selecting a sentence, the reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper. In *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327, our Supreme Court used the harmless beyond a reasonable doubt standard (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711].) for reviewing federal constitutional error under *Apprendi*. Assuming arguendo that the stricter *Chapman* test, rather than the test utilized in *Price*, would apply, we find the court's reliance on an inappropriate aggravating factor in addition to the appropriate recidivist factor to be harmless beyond a reasonable doubt. Because we find any error harmless beyond a reasonable doubt, we need not consider what effect, if any, the recent case *United States v. Booker* (Jan. 12, 2005) ___U.S.___ [2005 D.A.R. 410] has on *Blakely* error under California's sentencing scheme.

The trial court imposed a consecutive sentence on count four, dissuading a witness, finding the offense was separate in time, motive, and actions.

Defendant contends this consecutive sentence violated *Blakely* because the trial court relied upon facts not submitted

to the jury and proved beyond a reasonable doubt. This contention fails because the rule of *Apprendi* and *Blakely* does not apply to California's consecutive sentencing scheme.

Penal Code section 669 (hereafter section 669) imposes an affirmative duty on a sentencing court to determine whether the terms of imprisonment for multiple offenses are to be served concurrently or consecutively. (*In re Calhoun* (1976) 17 Cal.3d 75, 80-81.) However, that section leaves this decision to the court's discretion. (*People v. Jenkins* (1995) 10 Cal.4th 234, 255-256.) "While there is a statutory presumption in favor of the middle term as the sentence for an offense [citation], there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing." (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.)

Section 669 provides that upon the sentencing court's failure to determine whether multiple sentences shall run concurrently or consecutively, then the terms shall run concurrently. This provision reflects the Legislature's policy of "speedy dispatch and certainty" of criminal judgments and the sensible notion that a defendant should not be required to serve a sentence that has not been imposed by a court. (See *In re Calhoun, supra*, 17 Cal.3d at p. 82.) This provision does not relieve a sentencing court of the affirmative duty to determine whether sentences for multiple crimes should be served concurrently or consecutively. (*Ibid*.) And it

does not create a presumption or other entitlement to concurrent sentencing. Under section 669, a defendant convicted of multiple offenses is entitled to the exercise of the sentencing court's discretion, but is not entitled to a particular result.

The sentencing court is required to state reasons for its sentencing choices, including a decision to impose consecutive sentences. (Cal. Rules of Court, rule 4.406(b)(5); *People v. Walker* (1978) 83 Cal.App.3d 619, 622.) This requirement ensures that the sentencing judge analyzes the problem and recognizes the grounds for the decision, assists meaningful appellate review, and enhances public confidence in the system by showing sentencing decisions are careful, reasoned, and equitable. (*People v. Martin* (1986) 42 Cal.3d 437, 449-450.) But the requirement that reasons for a sentencing choice be stated does not create a presumption or entitlement to a particular result. (See *In re Podesto* (1976) 15 Cal.3d 921, 937.)

Therefore, entrusting to trial courts the decision whether to impose concurrent or consecutive sentencing under our sentencing laws is not precluded by the decision in *Blakely.* In this state, every person who commits multiple crimes knows that he or she is risking consecutive sentencing. While such a person has the right to the exercise of the trial court's discretion, the person does not have a legal right to concurrent sentencing, and as the Supreme Court said in *Blakely*, "that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." (*Blakely, supra,* 542 U.S. at p. ___ [159 L.Ed.2d at p. 417].)

The trial court did not err in imposing a consecutive sentence on count four.

DISPOSITION

The convictions for aggravated assault with a great bodily injury enhancement (count two) and battery with serious bodily injury (count three) are vacated. In all other respects the judgment is affirmed.

_____MORRISON_____, J.

We concur:

_____DAVIS_____, Acting P.J.

_____HULL_____, J.