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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. SYLVESTER VONNER, Defendant and Appellant.	2d Crim. No. B169476 (Super. Ct. No. MA025497) (Los Angeles County)

Contrary to the numerous contentions in the deluge of supplemental briefs now being filed in the California Appellate Courts, it is not at all clear that the United States Supreme Court opinion in *Blakely v. Washington* (2004) __ U.S. ___ [124 U.S. 2531] has sounded the death knell for California sentencing laws. It remains to be seen whether the Determinate Sentencing Law has been bruised, battered, or born into a better world.[1] Here we only conclude that *Blakely* does not impact a sentencing

[1] The California Supreme Court has granted review in two cases to consider certain issues in the wake of *Blakely*. (*People v. Black,* S126182*; People v. Towne,* S125677.)

court's imposition of a full consecutive sentence for an enumerated violent sex offense. (Pen. Code, § 667.6. subd. (c).) [2]

Sylvester Vonner was convicted by jury of forcible lewd conduct on a child under the age of 14 (count 2; § 288, subd. (b)(1)) and committing a lewd act on a child under the age of 14. (§ 288, subd. (a)). The jury was unable to reach a unanimous verdict on the forcible rape charge. (Count 1.) The trial court sentenced him to serve 12 years state prison. He appeals claiming instructional error, denial of the effective assistance of counsel, and sentencing error. We affirm.

Facts and Procedural History

In July 2002, 10-year-old India P. was on a bed watching cartoons. Appellant, her grandfather, entered the room with his pants unbuckled, turned India over on her back, and pulled down her panties. Holding her hands above her head, he inserted his penis in her vagina and moved it in and out. India screamed and told appellant to "stop" and "get up." (Count 2.)

When India complained of vaginal pain and bleeding, her mother opined that she was menstruating or may have wiped herself too hard. After the family moved to Compton, India told her sister and mother about the rape. The police were notified, India explained what had happened, and was examined by a doctor. She also testified that about three weeks before the rape, appellant repeatedly touched her vaginal area while she was clothed, rubbing her "private area" with his hand. (Count 3.)

On November 5, 2002, appellant was interviewed by Detective Susan Velazquez and agreed to a polygraph examination. Appellant said that he and India were wrestling and that when India bounced on top of him, the head of his penis went inside her vagina.

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[2] All statutory references are to the Penal Code.

At trial, appellant denied putting his penis inside India. He said that Detective Velazquez told him to apologize, not because he raped India, but because India needed to hear the apology. "[T]he detective told me that my granddaughter want[ed] me to . . . admit that I had sex with her, that I raped her, and that I put my penis inside her. If I didn't do that, that [India] was going to grow up retarded."

Detective Velazquez testified that appellant gestured with his hands to demonstrate how far his penis penetrated India's vagina. Appellant, however, claimed that Detective Velazquez first used the gesture. "She put up her finger and told me how much. Like this? Like this? Like this?" Appellant said that he went along with the detective.

Polygraph Exam

Appellant argues that his statements and gestures, made during the polygraph exam conducted by Detective Delia, were improperly received and considered by the jury. Evidence Code section 351.1, subdivision (a) states in pertinent part that "the results of a polygraph examination . . . shall not be admitted into evidence in any criminal proceeding . . . unless all parties stipulate to the admission of such results." Subdivision (b) provides: "Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible."

Before trial, appellant sought admission of the polygraph exam and argued that it was admissible to shed light on Detective Velazquez's interview. Appellant claimed that the polygraph exam and interview was all one "conversation." Citing Evidence Code section 356, he argued that if the Velazquez interview was introduced by the prosecution, the polygraph videotape was admissible "to explain [appellant's] state of mind, the coerciveness of the conversation, [and] the custodial nature of the [detective's] interview . . . ."

The trial court viewed the videotape and stated that it would "exclude that portion of the tape dealing with the polygraph examiner. There was [sic, were] actually two interviews by two different people. There is the polygraph first [conducted by Detective Delia] followed by . . . the detective who I think is the investigating officer. [Detective Velazquez.]" Citing Evidence Code section 351.1, subdivision (a), the trial court found that the conversation with Detective Delia contained too many references to the polygraph exam. The trial court said that it would "revisit the issue and possibly allow some or all of . . . the interview of the defendant by the polygraph examiner depending upon the state of the evidence . . . ."

Notwithstanding the trial court's ruling, appellant himself referred to the "lie detector test" on direct and cross-examination. He denied putting his penis in India and said that Detective Velazquez was the first one to use the hand gesture to demonstrate sexual penetration.

Appellant's reference to the polygraph on direct and cross-exam was a "classic example of blurted-out testimony." (*People v. Morris* (1991) 53 Cal.3d 152, 194.) A defendant who volunteers information during testimony cannot later claim that its admission denied him a fair trial. (*People v. Lang* (1989) 49 Cal.3d 991, 1031-1032; *People v. Wilkes* (1955) 44 Cal.2d 679, 684.)

In *People v. Basuta* (2001) 94 Cal.App.4th 370, a prosecution witness was rehabilitated based on testimony that the witness implicated the defendant during a police station interview. The investigating officer, in violation of an in limine order, stated that the witness agreed to take a polygraph right after the interview. (*Id*., at p. 389.) The trial court denied defendant's motion to present expert testimony that the polygraph test was inconclusive. (*Ibid.*) The Court of Appeal held that defendant was denied a fair trial because the credibility of the witness was crucial to the People's case. Testimony about the polygraph invited the jury to speculate that the witness

"passed the polygraph examination and that she was, therefore, worthy of belief." (*Id*., at p. 390.)

Here, the jury was told about the polygraph but not the test results. Unlike *Basuta*, it was appellant who first referred to the polygraph exam. The references were volunteered and served as a premise for rebuttal evidence. The trial court did not abuse its discretion in permitting the jury to look at an edited videotape of the polygraph interview. (E.g., *People v. Hart* (1999) 20 Cal.4th 546, 653.)

Appellant now contends that his statements were inadmissible because they were uttered in the course of a polygraph exam and that the trial court ruling undermines Evidence Code section 351.1, subdivision (b). This is an impermissible change in theory. (See e.g. *People v. Borland* (1996) 50 Cal.App.4th 124, 129.) Appellant testified that the confession was coerced and that Detective Velazquez prompted him to use the hand gesture. The trial court reasonably concluded that the prosecution could impeach appellant based on the polygraph interview. (Evid. Code, §§ 351.5, subd. (b); 780, 1235.) It is well settled that a defendant who elects to testify has no right to commit perjury or create a false aura of veracity. (E.g., *People v. Douglas* (1977) 66 Cal.App.3d 998, 1005-1006 [defendant impeached by inconsistent statements at suppression hearing]; *United States v. Havens* (1980) 446 U.S. 620, 626 [64 L.Ed.2d 559, 565] [evidence seized in violation of Fourth Amendment admissible to impeach testifying defendant]; *Harris v. New York* (1971) 401 U.S. 222, 225 [28 L.Ed.2d 1, 4-5] [statements in violation of *Miranda* admissible for impeachment purposes].)

The assertion that the prosecutor committed misconduct in cross-examining appellant is without merit. The questions clarified whether appellant drank alcohol before the polygraph exam and whether Detective Velazquez promised not to arrest him after he was "hooked up" to the polygraph machine. Appellant did not object to

the questions or the prosecutor's closing argument, thereby waiving any claim of prosecutorial misconduct. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072.)

To dispel any potential for prejudice, the trial court instructed the jury that it was not to consider or speculate about the polygraph test results.[3] It is presumed that the jury understood and followed the instruction. (*People v. Morales* (2001) 25 Cal.4th 34, 47.) Having reviewed the record, we conclude there is no reasonable likelihood that the jury construed the polygraph evidence or the prosecutor's remarks in an improper manner. (*People v. Samayoa* (1997) 15 Cal.4th 795, 843-844.)

Ineffective Assistance of Counsel

Appellant claims that he was denied a fair trial because the videotaped interview contains hostile comments by the officers. He now contends that the

[3] The trial court instructed: "During the testimony you have heard references made to the administration of a polygraph or lie detector test, and to the scientist or deputy sheriff that administered that test. Polygraph examination results are not admissible as evidence in this case under California law, and the Court has ruled that the results and other aspects of the administration of the test will not be admitted as evidence. In your deliberations you are instructed not to consider the fact that such a test was administered to the defendant, and you must not speculate as to the results of that test nor allow these subjects to enter into your deliberations. [¶] The administration of the test was videotaped. The Court has allowed the playing of only selected portions of the videotape made in connection with the administration of the polygraph examination. The portions of the videotape were admitted by the Court for the limited purpose of presenting statements of the defendant and others depicted in the videotape and to show the actions of the defendant and others depicted in the videotape during various parts of the administration of the polygraph examination. You must not consider the videotape for any other purpose nor speculate as to why you are not seeing the entire videotape."

comments are hearsay and accusatory, and express sympathy for the victim.[4] Appellant's counsel, however, did not object on that ground or request that the comments be redacted. Appellant argues that this denied him the effective assistance of counsel. To prevail on the claim, appellant must show deficient representation and resulting prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 693]; *People v. Bolin* (1998) 18 Cal.4th 297, 333.) "[A] reviewing court will reverse a conviction on the ground of inadequate counsel 'only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.' [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 979-980.)

Counsel, for tactical reasons, refrained from objecting because the officers' comments supported the defense that the confession was coerced. (E.g., *People v. Kelly* (1992) 1 Cal.4th 495, 520.) Counsel argued that the officers used "third-world tactics" and cajoled appellant to confess to "make the little girl feel better." Counsel stated that that the officers had "no physical evidence . . . . So what do they do? They drag him into a room. They badger him. They berate him. Give him the psychological mumbo jumbo for hours until they get something out of him."

It was an effective defense tactic. The jury "hung" on the rape count. But for counsel's alleged errors, it is not reasonably likely that the jury would have returned a more favorable verdict. (*Strickland v. Washington, supra,* 466 U.S. at p. 694 [80 L.Ed.2d at p. 698]; *People v. Bolin, supra,* 18 Cal.4th at p. 333.)

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[4] On the videotape, Detective Velazquez tells appellant the victim "ain't lying about this," and "you know what happened. So don't go back and say she's a liar." The detective says, "You need to accept responsibility. She's only ten years old."

CALJIC 2.21.2

Appellant argues that the trial court erred in instructing that a witness willfully false in one part of his or her testimony is to be distrusted in others. (CALJIC 2.21.2.) Citing dictum in *People v. Lescallett* (1981) 123 Cal.App.3d 487, 493, appellant opines that CALJIC 2.21.2 (formerly part of CALJIC 2.21) should not be given where the instruction appears to be principally directed at a defendant's exculpatory testimony.

Our Supreme Court, in *People v. Allison* (1989) 48 Cal.3d 879, rejected a similar argument holding that " '[n]othing in the language of the instruction itself improperly singled out [defendant.] By its terms, the instruction referred only to a "witness" and not to anyone by name or legal status. (*Id*., at p. 895; see also *People v. Turner* (1990) 50 Cal.3d 668, 699.) The jury was also instructed that "every person" who testified under oath is a witness (CALJIC No. 2.20), and that no statement by the court was intended to suggest that the jury should believe or disbelieve "any" witness (CALJIC No. 17.30).' " (*Ibid.*)

Here, as in *People v. Allison*, *supra,* 48 Cal.3d 879, the trial court gave CALJIC 2.20 and 17.30 to dispel any suggestion that the CALJIC 2.21.2 instruction was directed solely to appellant's testimony. The trial court further instructed that "[d]iscrepancies in a witness's testimony or between a witness's testimony and that of other witnesses, if there were any, do not necessarily mean that a witness should be discredited. Failure of recollection is common. Innocent misrecollection is not uncommon. Two persons witnessing an incident or a transaction often see or hear it differently. You should consider whether a discrepancy relates to an important matter or only to something trivial." (CALJIC 2.21.1.)

Blakely v. Washington

Citing *Blakely v. Washington, supra,* ___ U.S. ___ [124 S.Ct. 2531] (Blakely), appellant contends that the trial court erred in imposing a full consecutive six year

term on count 2 (forcible lewd conduct) after selecting the midterm six year sentence for lewd act on a child committed several weeks before count 2.

The sentencing transcript shows that the trial court imposed a full consecutive sentence on the forcible lewd conduct conviction in count 2 because "the acts in counts 2 and 3 were on different occasions involving the same victim." The consecutive sentence was imposed pursuant to section 667.6, subdivision (c). This statute expressly authorizes a full consecutive sentence "whether or not the crimes were committed during a single transaction." It is an exception to section 654 and does not require a finding by the trier of fact or the trial court that the offenses occurred on separate occasions. (*People v. Hicks,* (1993) 6 Cal.4th 784, 792; *People v. Irvin* (1996) 43 Cal.App.4th 1063, 1072.) This statute does not define a new crime to elevate the form of the crime reflected in the verdict. It only effects the range of combined sentences where the defendant is convicted of a violent sexual offense (here forcible lewd conduct) and a second felony offense (here simple lewd conduct).

*Blakely, supra,*___ U.S. ___ [124 S.Ct. 2531] is here inapposite. There, the defendant pled guilty to second degree kidnapping with a firearm. Under Washington law, the prescribed sentence was 49 to 53 months but the trial court could impose a greater sentence if it found " 'substantial and compelling reasons justifying an exceptional sentence.' [Citation.]" (*Id*., at p. ___ [124 S.Ct. at p. 2535].) After the plea was entered, the trial court made an additional finding that defendant acted with "'deliberate cruelty'" and sentenced him to 90 months. (*Ibid.*; 124 S.Ct. at p. 2535].) Citing *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348] (*Apprendi*), the United States Supreme Court reversed on the ground that the "deliberate cruelty" finding violated defendant's Sixth Amendment right to trial by jury. (*Id*., at p. ___ [120 S.Ct. at p. 2537].) "Our precedents make clear . . . that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose s*olely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* [Citations]

. . . [¶] The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of facts admitted in the guilty plea." (*Blakely, supra* ___ U.S. at p. ___. [124 S.Ct. at p. 2537].)

Blakely and *Apprendi* simply state that a trial court may not increase the sentence above the statutory maximum based on facts not found by the jury or admitted by the defendant. In *Apprendi, supra,* 530 U.S. 466 [120 S.Ct. 2348], the trial court imposed a 10 year hate crime enhancement after the defendant was convicted of possessing a firearm, a crime that carried a 5 to 10 year sentence under New Jersey law. The United States Supreme Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id*., at p. 490 [120 S.Ct. at pp. 2362-2363].) The court stated that it was not concerned with the imposition of consecutive sentences, but with "the narrow issue" of whether the sentence for a single crime exceeded the statutory maximum. (*Id*., at p. 474 [120 S.Ct. at p. 2354].) "The constitutional question . . . is whether the 12-year sentence imposed in count 18 was permissible, given that it was the 10-year maximum for the offense charged in that count." (*Ibid.*; [120 S.Ct. at p. 2354].))

Appellant asserts that a consecutive sentence is tantamount to an *Apprendi* "enhancement." We disagree. In *People v. McPherson* (2001) 86 Cal.App.4th 527, 532 we explained that section 667.6 is an alternate sentencing scheme, not an enhancement. (See also *People v. Farr* (1997) 54 Cal.App.4th 835, 843.) It does not increase the penalty beyond the prescribed statutory maximum. "*Apprendi* is relevant only where a judge-made factual determination increases the maximum statutory penalty for the particular crime . . . ." (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 271.) That did not happen here.

Here the guilty verdicts subjected appellant to consecutive sentencing which the trial court was authorized to impose. The sentence was not based on any "fact" that

the trial court found. The decision was based on the guilty verdicts and the statutory discretion given to the trial court by the Legislature. Appellant received less than the prescribed statutory maximum. He could have received a 16 year sentence.

Assuming, arguendo, that *Blakely* has some application in this context, any assumed error is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 828]; *People v. Sakarias* (2000) 22 Cal.4th 596, 625.) The jury found appellant guilty of forcible lewd conduct and lewd conduct. Although not required, it is undisputed that the offenses were committed weeks apart. Partial reversal for some type of new trial on the question of consecutive sentences would not be authorized by law and would be an exaltation of form over substance. Moreover, we ask, what fact would the jury be instructed to find which could serve as a predicate to the imposition of consecutive sentences?

The judgment is affirmed.

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YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J

Alan S. Rosenfeld, Judge

Superior Court County of Los Angeles

Mark D. Lenenberg, under appointment by the Court of Appeal, for Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc J. Nolan, Supervising Deputy Attorney General, Lawrence M. Daniels, Deputy Attorney General, for Plaintiff and Respondent.