IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

MONTEREY COUNTY, APPELLATE DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	No. 0000000
Plaintiff,	)	
i.	)	
[INSERT NAME],	)	
Defendant.	)	

APPEAL FROM THE SUPERIOR COURT OF MONTEREY COUNTY

Hon. Jose Velasquez, Judge

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutions

Secondary Authority

CALJIC

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APPELLANT'S REPLY BRIEF

INTRODUCTION

It is clear that the prosecutor in this case acted as an unsworn witness to the prior testimony of a medical doctor concerning the alleged victim's injuries. Respondent's argument that this misconduct was not "reprehensible" belies the facts in that the misconduct was intentional and in response to the refusal by the defense to stipulate to the absent doctor's testimony.

Additionally, although the judge determined that self-defense instructions were required and incorrectly instructed on the defense, the respondent claims the instructions were not required and therefore there was no error. Appellant believes the judge got it right and self-defense instructions were required. Lastly, the respondent argues there was no duty to instruct on lesser included offenses, but misstates the law to reach this conclusion. The multiple errors contributing to the verdict in this case cannot be brushed away as harmless.

ARGUMENT

I.

PREJUDICIAL MISCONDUCT OCCURRED HERE WHERE THE PROSECUTOR ATTEMPTED TO CIRCUMVENT HIS FAILURE TO CALL A CRUCIAL WITNESS WITH QUESTIONS DESIGNED TO INSINUATE THAT THERE WAS MEDICAL TESTIMONY TO DISCREDIT THE DEFENSE.

In the first trial of this case, in order to rebut the defense claim that [INSERT NAME], sustained her injuries at the hands of appellant rather than in a car accident, the prosecutor called [INSERT NAME],boyfriend, [INSERT NAME],, to testify that he had sexual relations with [INSERT NAME], and did not observe any injuries to [INSERT NAME], after her car accident. (Transcript, Tues. Nov. 9, 2004 at p. 45.) Prior to the second trial, the prosecutor had requested the defense to stipulate to [INSERT NAME],'s testimony because his own star witness, [INSERT NAME],, had instructed [INSERT NAME], he did not have to honor his subpoena. The prosecutor made the conscious decision to proceed with the trial without [INSERT NAME], testimony rather than ask for a continuance. (Stipulated Final Statement; Declarations of [INSERT NAME], & [INSERT NAME]) However, during trial, the prosecutor resorted to striking a foul blow by attempting to introduce the testimony of his missing witness by questioning the defendant about the witness's prior testimony. (R.T. 107.)

The experienced prosecutor must have known that it was improper to question the defendant about what a witness said in a prior proceeding, but nonetheless chose to do it anyway. Respondent claims that this misconduct was not reprehensible. Although a showing of bad faith is not required to prove a claim of prosecutorial misconduct (*People* v. *Hill* (1998) 17 Cal.4th 800, 822, 829), there is evidence of bad faith in this record. The prosecutor insinuated that appellant knew [INSERT NAME], was unavailable to testify without any factual basis for believing that to be true. (R.T. 107.)

Respondent's argument is devoted less to the issue of whether misconduct occurred and more to the issue of prejudice. In assessing prejudice, the question is not whether the appellant would more likely than not have received a different verdict with the evidence supplied by the prosecutor omitted, but rather, whether in the absence of such evidence the appellant would have received a fair trial that resulted in a verdict worthy of confidence. (*Strickland* v. *Washington* (1984) 466 U.S. 668, 693-694.) A reasonable probability of a different result is accordingly shown when the error undermines confidence in the outcome of the trial. (*Williams* v. *Taylor* (2000) 529 U.S. 362.) Given the ambiguity concerning the cause of [INSERT NAME], injuries, it cannot be said with confidence that the jury would have concluded appellant was the cause of those injuries if the misconduct had not occurred.

Respondent argues that the jurors were often told that questions are not evidence implying that there were no answers to the questions. (Respondent's Brief, at p. 9.) The problem here is that the appellant answered the prosecutor's questions and there was no motion to strike, instruction by the court to disregard the answers, or mistrial

declared. (Cf. *People* v. *Fitzgerald* (1972) 29 Cal.App.3d 296, 311 [harmful effect from improper question obviated when the question is withdrawn without an answer].) The appellant responded that "Yes" he heard [INSERT NAME], testify. Appellant testified that he heard [INSERT NAME], testify that [INSERT NAME], had no injuries to her breast. Further, he "did not know" [INSERT NAME], was unavailable to testify. (R.T. 107.) The prosecutor implied that the defendant knowingly fabricated his story about [INSERT NAME], complaining about being "bruised up" in an auto accident because he knew that [INSERT NAME], was unavailable to rebut his testimony. (R.T. 107.)

Respondent claims that the fact there was a hung jury in the previous trial is irrelevant to the claim of prejudice. On the contrary, the reviewing court must examine the strength or weakness of the prosecution's case in assessing prejudice. If the prosecution's case were overwhelming, then there would have been a conviction the first time the case was tried. The case law appellant cited in his opening brief establishes that a prior hung jury is relevant to the claim of prejudice in a subsequent trial. (Opening Brief, p. 10 citing *People* v. *Brooks* (1979) 88 Cal.App.3d 180, 188.)

Respondent makes much ado about the testimony of [INSERT NAME], that she had observed many automobile accidents and the bruising she saw was not consistent with an automobile accident. (R.T. 25.) [INSERT NAME] ,testified in the first trial, as did another [INSERT NAME], who did not testify in the second trial, that the bruising they observed on Miss [INSERT NAME], did not resemble the bruising they had seen in auto accidents. (First trial, Nov. 9, 2004, pp. 56, 63.) The prosecutor did not call a medical expert to testify that the bruising observed on the photograph of Ms. [INSERT NAME],'s breast was inconsistent with a seat belt injury. The prosecutor called two nurses with whom [INSERT NAME], worked, and one of whom she socialized with. (Transcript, Nov. 9, 2004, at pp. 64-65.) Understandably, their testimony was viewed with a dose of skepticism by the jury.

Additionally, [INSERT NAME], testimony at the second trial had embellishments and contradictions. When the prosecutor asked how many people [INSERT NAME], had observed who had been injured in a car accident she first said, "several." (R.T. 24.) When asked again, she said "probably, like, 100 or more." (R.T. 25.) When asked by the prosecutor where the injuries were on Miss [INSERT NAME],'s breast she said they were on the breast and under the armpit area. (R.T. 24.) During cross-examination by defense counsel, she remembered the bruises only on the breast and not under the armpit. (R.T. 27.)

The jury could have rejected [INSERT NAME], testimony that the bruises on Ms. [INSERT NAME],'s breast and torso were inconsistent with a seatbelt injury.

[INSERT NAME], did not know how Ms. [INSERT NAME], was oriented in her seat when she rear-ended the car in front of her. Women wearing implants, such as Miss [INSERT NAME], are known to experience trauma to their breasts (as did Miss [INSERT NAME], here) due to seatbelt injuries from car accidents. (See, e.g., http://www.breastimplants4you.com/breast_augmentation_complications_faq.htm; Nordhoff, Motor Vehicle collision Injuries: Biomechanics, Diagnosis, And Management (Jones and Bartlett, 2d ed. 2005) at p. 451 [noting a case study of 25 women seen in a trauma center for breast trauma due to seatbelts].) Was it not for the prosecutor's interjection of inadmissible medical evidence in the form of [INSERT NAME],'s prior testimony, the jury may very well have been unable to conclude beyond a reasonable doubt that Ms. [INSERT NAME], sustained her injuries at appellant's hand rather than her car accident.

II.

SELF-DEFENSE INSTRUCTIONS WERE REQUIRED AND THE INSTRUCTIONS GIVEN WERE ERRONEOUS.

The jury was instructed as follows: "If it is found that Miss [INSERT NAME], struck [INSERT NAME], [INSERT NAME] is allowed to defend himself in accordance with the self-defense instructions that will be given." This is an incorrect statement of the law. The appellant was entitled to act on appearances of danger and did not have to wait for [INSERT NAME], to strike him to defend himself. (*People* v. *Minifie* (1996) 13 Cal.4th 1055, 1068.) Additionally, the instruction by its plain terms required the jury to make a finding that [INSERT NAME], struck appellant before it could consider self-defense. The instruction uses the word "if" followed by "then" so that "if" (the antecedent is true) "then" (carry out the consequent). The antecedent here was ([INSERT NAME], striking the appellant) and the consequent (you can consider self-defense). This shifted the burden of proof to the appellant because there was no antecedent to the jury considering self-defense. As respondent acknowledges, it was the prosecution's burden to disprove self-defense beyond a reasonable doubt. (Respondent's Brief, p. 13.) Respondent offers no explanation to support the claim that the above instruction was a correct statement of the law.

Respondent argues that the judge erred in giving the self-defense instructions in the first place. (Respondent's Brief, p. 13.) In making this assertion, respondent contends that appellant's testimony that he pushed Ms. [INSERT NAME], away because the "situation was getting out of hand" failed to support an inference that he feared injury if he did not take action. (Respondent's Brief, p. 13.) On the contrary,

appellant was not required to show that he feared bodily injury to take action to defend himself. Appellant's testimony that he had enough of [INSERT NAME], swatting at him and hitting him in the chest, shoulders, head, and arms and that the situation had gotten out of hand was sufficient. (R.T. 81-82.)

In *People* v. *Myers* (1998) 61 Cal.App.4th 328, the court held that "an offensive touching, although it inflicts no bodily harm, may nonetheless constitute a battery, which the victim is privileged to resist with such force as is reasonable under the circumstances. The same may be said of an assault insofar as it is an attempt to commit such a battery. To hold otherwise would lead to the ludicrous result of a person not being able to lawfully resist or defend against a continuing assault or battery, such as the act defendant alleged here." (*Id*. at p. 335, fns. omitted.)

Respondent does not address appellant's contention that the giving of a self-defense instruction which shifts the burden of proof is reversible error per se. (AOB, p. 13.) "Respondent's failure to argue the point must be viewed as a concession that if [constitutional] error occurred, reversal is required." (People v. *Adams* (1983) 143 Cal.App.3d 970, 992; see also *Troensegaard* v. *Silvercrest Industries Inc*. (1985) 175 Cal.App.3d 218, 228 [failure to discuss prejudice may be deemed a concession].)

III.

THE TRIAL COURT HAD A SUA SPONTE DUTY TO INSTRUCT ON THE LESSER INCLUDED OFFENSES OF ASSAULT AND BATTERY AND THE FAILURE TO DO SO IS REVERSIBLE ERROR.

Respondent makes several legally erroneous arguments regarding why lesser included offense instructions were not required, and does not address the issue of prejudice at all. Respondent argues that "all the elements of the charged offenses were present evidenced by the jury verdicts of guilt as to the charges." (Respondent's Brief, pp. 13-14.) However, the reason why lesser included offense instructions are given is so the jury is not presented with an all-or-nothing choice, a verdict of guilt on the greater charge or acquittal. The fact that the jury returned a verdict of guilt on the greater means that it believed appellant engaged in wrongdoing and nothing more.

Respondent argues that "there was no issue about the fact that Ms. [INSERT NAME], suffered a traumatic injury." This is true but irrelevant. The issue was when the injury occurred and whether appellant was the cause of it.

Respondent contends that "[i]f defense counsel wanted the lesser included instructions, he could have asked the court for them," and that it was somehow a strategic decision by counsel not to give the jury the option of convicting of a lesser included

offense if it found that the injury was sustained in the car accident. (Respondent's Brief, p. 14.) This argument is both legally and factually incorrect. Whether the jury should be given lesser included offense instructions is not a matter of choice for defense counsel. According to the California Supreme Court, "[a] trial court's failure to inform the jury of its option to find the defendant guilty of the lesser offense would impair the jury's truth-ascertainment function. Consequently, neither the prosecution nor the defense should be allowed, based on their trial strategy, to preclude the jury from considering guilt of a lesser offense included in the crime charged. To permit this would force the jury to make an 'all or nothing' choice between conviction of the crime charged or complete acquittal, thereby denying the jury the opportunity to decide whether the defendant is guilty of a lesser included offense established by the evidence." (*People* v. *Barton* (1995) 12 Cal.4th 186, 196.)

Additionally, there is nothing in the record to support respondent's speculation that the defense made a tactical choice to forego lesser included offense instructions. Moreover, if it such a choice had been made, it would have been unreasonable. Respondent has argued that there is no evidence in the record to support the giving of instructions on self-defense. If that is the case, then appellant had no defense to a misdemeanor battery since he admittedly pushed [INSERT NAME], away from him and lesser included offense instructions should have been offered by the defense to ensure that the jury did not convict appellant of a sexual battery because it did not have the option of convicting him of a simple battery. Further, even if the jury found that appellant had the right to push [INSERT NAME], away, the jurors may have objected to the amount of force used because appellant kept pushing her away with his hand on her breast for four to six seconds. (R.T. 83.) Under these circumstances, it was unreasonable for counsel to give the jury an all-or-nothing choice between acquittal and conviction of a sexual battery which requires lifetime sex offender registration.

Lastly, respondent concludes without discussion that "[t]he strength of the evidence as to both charges was great and did not necessitate a court giving lesser included instructions sua sponte." (Respondent's Brief, p. 14.) If as respondent states the evidence in this case of a specific intent to cause sexual abuse was so "great," then why did Ms. [INSERT NAME], attempt to bolster her case by testifying for the first time in the second trial that appellant told her he was trying to hurt her when he grabbed her breast? She failed to mention this to any police officer, any of the nurses she showed her breast to, the interrogatories in her civil case, or even to the jury in the first trial. (R.T. 57-58, 68, 71.) The inference the jury was entitled to draw was that [INSERT NAME], was lying and that appellant never said he wanted to hurt her.

The reviewing court should also consider the cumulative impact of the errors in assessing prejudice. (*People* v. *Bunyard* (1988) 45 Cal.3d 1189, 1236; *People* v. *Cardenas* (1982) 31 Cal.3d 897, 907; *People* v. *Holt* (1984) 37 Cal.3d 436, 459 [question is whether "[i]t is reasonably probable that in the absence of the cumulative effect of these errors the jury would have reached a result more favorable to appellant].) The prosecutor solicited inadmissible evidence in order to convince the jury that the injury resulting in Ms. [INSERT NAME],'s traumatic injury occurred at the hands of appellant rather than her car accident. Absent the prosecutor's misconduct, the jury would have been faced with the fact that [INSERT NAME], was in a car accident just before she allegedly suffered the injuries to her breast, that she made no complaint to the police that the appellant had injured her when he grabbed her breast (R.T. 65), that she did not see a doctor about her breast until a couple of months after the incident (Nov. 9, 2004, p. 147), and that she lied at trial about what appellant said to her when he grabbed her breast. Frankly, under these circumstances, this court cannot say with confidence that if given a choice the jury would have opted for the greater offense over the lesser. (*People* v. *Breverman* (1998) 19 Cal.4th 142, 178 [*Watson* "reasonable probability of a different result" standard governs omission of lesser included offense instructions].)

CONCLUSION

The assumption behind our adversary system of justice is that each side will have an attorney who is functioning as a reasonably competent advocate, the trier of fact will consider only relevant and non-prejudicial evidence, and the judge will correctly instruct the jury on the law to be applied to the facts. None of these assumptions came to fruition in this case. This case should be reversed so that the appellant can receive a fair trial.

DATED: October 10, 2007

Respectfully submitted,

_____

[INSERT NAME]

Attorney for Appellant