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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
DEMETRIOUS MONTRAIL MARCUS,  
  
Defendant and Appellant.

C069057

(Super. Ct. No. 10F08159)

A jury found defendant Demetrious Montrail Marcus guilty of infliction of corporal injury upon a cohabitant. The trial court found he had a prior serious felony conviction. He was sentenced to state prison for six years.

On appeal, defendant contends: (1) the prosecutor committed misconduct during opening summation by arguing matters outside the evidence; (2) the trial court abused its discretion by admitting evidence of the victim's pregnancy; and (3) he is entitled to additional presentence conduct credit. We shall affirm.

FACTS

In October 2010, Shannon Hamilton lived in an apartment near Folsom Boulevard in Rancho Cordova. Hamilton had met defendant in June of that year and shortly

thereafter they became boyfriend and girlfriend. By October, defendant was living with Hamilton and she was five weeks pregnant with his child.

During the early morning hours of October 24, 2010, Hamilton telephoned 911 from a bar on Folsom Boulevard. She reported that defendant had slammed her against the toilet in her apartment causing bruising and knots on her head. She stated her back was hurting and she needed a paramedic.

Sacramento County Sheriff's Deputy Mike Mireles was dispatched to the bar where he met Hamilton. She was shaken up, terrified, disheveled and frightened, and she appeared to be looking over her shoulder for someone.

Hamilton told Deputy Mireles she lived in an apartment within walking distance of the bar. Defendant had attacked her, punching her several times in the face and body with his fists. When she tried to get away he grabbed her, placed his hands around her throat, and squeezed. She believed he would make good on his promise to kill her and the baby. At one point he lifted her off the ground and pressed his thumbs against her throat, causing her to lose consciousness. Mireles observed horizontal indentations across both sides of her neck that looked like finger marks.

When Hamilton regained consciousness, defendant was standing over her. When she tried to roll away, he grabbed her head and banged it into the toilet bowl several times inflicting pain and causing her to cry. Deputy Mireles noticed some lumps on her head. Hamilton fought back and eventually escaped.

Hamilton told a responding paramedic she had been assaulted around 6:45 a.m. She explained that, during the assault, she fell and hit her head on the toilet causing her to blackout. She complained of severe pain in her head, neck, and right side of her back. Because Hamilton had lost consciousness, she was immobilized, placed in an ambulance, and taken to a hospital.

After the incident, Hamilton telephoned her grandmother, Sheryl Carrington. Hamilton was crying and very upset. She told Carrington she had a fight with defendant and he had jumped her. As a result, her head and back hurt.

At the hospital, Hamilton told Carrington her head and back were in pain because defendant had slammed her against the wall and then banged her head against the toilet several times. Carrington noted Hamilton's head was swollen and she had a scratch on her jaw.

Hamilton told a hospital staff member defendant had picked her up from work early that morning. He was angry because the car had no gas. At the apartment, defendant's anger grew and he used his fists to beat her in the head. He grabbed her hair and smashed her head against the wall and toilet. She went to a bar and telephoned 911.

Hamilton told Carrington the incident started when defendant became angry over a comment Hamilton had made about the car running out of gas. He hit her with his fists. She tried to cover up and at some point hit back, which angered him even more. As a result, defendant slammed Hamilton against the wall and then grabbed her head and pounded it against the toilet.

At trial, Hamilton testified to a very different version of events. She claimed she and defendant had gotten into a verbal argument about his cheating on her with other women. She claimed there had been a lot of "yelling and screaming," but there had not been any physical altercation or fight. After 10 minutes of arguing, defendant left the apartment. Hamilton claimed she ran after him but tripped and fell, striking her head on the ground. She claimed to have been assaulted because she was angry at defendant and wanted him to go to jail.

At trial, Hamilton admitted she still had feelings for defendant and wished for a future relationship with him. Prior to trial, Hamilton delivered her baby. The child was named after defendant.

A Sacramento County sheriff's deputy testified as an expert on intimate partner battery, formerly known as battered woman syndrome. He explained a victim of domestic violence may not cooperate with law enforcement or the judicial system. Victims often will recant the initial statement they had given to police in order to try to stop the prosecution of the abuser.

A Sacramento City police officer testified he responded to a prior argument between defendant and Hamilton that had escalated into a physical conflict.

The defense rested without presenting evidence or testimony.

## DISCUSSION

### I

#### *Prosecutorial Misconduct*

Defendant contends the prosecutor committed misconduct during his opening summation by arguing facts outside the evidence, specifically, that the attorneys had “ ‘streamline[d]’ ” the case in order to get it before the jury “in a timely and efficient manner,” and that the attorneys had presented the “witnesses [who] are available.”

During opening summation, the prosecutor showed the jury a slide and this exchange ensued:

“[THE PROSECUTOR]: Everything in the circle is the things that we should be looking at: The elements of the crime. As I mentioned, the judge will read the instructions and will define domestic violence for us, the physical evidence, the photographs, the testimony of the witnesses, the witnesses [who] have sat in that chair and have given us testimony. Listen to the 9-1-1 telephone call. All of these things are the things that we should be focused on in our deliberations, not speculation, not, well, gee, what would happen if we do convict? What's gonna happen to [defendant], okay? [¶] That's speculation. That's wondering about things that could happen off in the future, not was a crime committed and did [defendant] commit the crime? [¶] [W]hat would this witness say? What would that witness say? What would the bartender say?

What would the people at the apartment say? [¶] *[W]e streamline these types of cases because . . . we want to get them to you in a timely and efficient manner. The attorneys know what the issues are. We give you the . . . witnesses [who] are available.*

“[DEFENSE COUNSEL]: Your Honor, I object; improper argument.

“THE COURT: Overruled.

“[THE PROSECUTOR]: You don’t get to ask for . . . evidence that’s not received into evidence. [¶] What you need to do is deliberate on the evidence that is physically received in the evidence at trial. [¶] So if you have a doubt in your mind, you want to ask yourself, first of all, is it related to an element of the charged offense? Is it based on the evidence? Not speculation or any other improper source? And is the doubt reasonable?” (Italics added.)

The parties agree that, because defense counsel timely objected and his objection was immediately overruled, the claim of prosecutorial misconduct is preserved for appeal. (*People v. Hill* (1998) 17 Cal.4th 800, 820-821.)

“ ‘A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such “ ‘unfairness as to make the resulting conviction a denial of due process.’ ” [Citations.] Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial.’ [Citation.]” (*People v. Friend* (2009) 47 Cal.4th 1, 29.)

“A finding of misconduct does not require a determination that the prosecutor acted in bad faith or with wrongful intent. [Citation.]” (*People v. Kennedy* (2005) 36 Cal.4th 595, 618, disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 458-459.)

“ ‘To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In

conducting this inquiry, we “do not lightly infer” that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements.’ [Citations.]” (*People v. Dykes* (2009) 46 Cal.4th 731, 771-772.)

“[I]t is misconduct for the prosecutor to state facts not in evidence or to imply the existence of evidence known to the prosecutor but not to the jury. [Citation.]” (*People v. Smith* (2003) 30 Cal.4th 581, 617.) Here, the prosecutor did not state any facts of the case that had not been admitted into evidence. Defendant’s reliance on *People v. Hall* (2000) 82 Cal.App.4th 813, 816-817, in which the prosecutor implied a nontestifying police officer would have testified in same manner as the testifying officer, is misplaced.

Nor did the prosecutor imply the existence of evidence known to the prosecutor but not to the jury. Defendant’s reliance on *People v. Taylor* (1961) 197 Cal.App.2d 372, 381-382, in which the prosecutor implied the defendant had a reputation for violence, is misplaced.

As noted, the prosecutor commented that counsel had presented the case to the jury in the most efficient and timely manner possible based on the attorneys’ knowledge of the issues. The comments before and after the disputed remarks make plain the prosecutor was cautioning the jury to consider *only* the evidence presented at trial and *not* speculate what other nontestifying witnesses might have said. There is no reason to believe the jury understood the disputed remarks as inviting them to do the opposite, i.e., speculate that nontestifying witnesses had been “ ‘streamline[d]’ ” out of the case *because they would have been unhelpful to the defense*. There was no misconduct.

## II

### *Evidence Of Pregnancy*

Defendant contends the trial court abused its discretion by admitting evidence that victim Hamilton was pregnant at the time of the incident. He is wrong.

Defendant was charged with violation of Penal Code<sup>1</sup> section 273.5, subdivision (a).<sup>2</sup>

Prior to trial, defense counsel moved to exclude evidence that Hamilton was pregnant with defendant's child when the incident occurred. Defense counsel argued, "it has no relevance to the jury on whether or not she was pregnant. And it's inflammatory. [¶] In fact, . . . section 273.5 jury instructions delineate that prospective parents of unborn children do not fall under that umbrella. [¶] And my concern is the jury is going to use that to try and establish relationship, to establish this dating relationship, which they cannot do. It says so in the code." The trial court deferred its ruling in order to allow it time to consider the issue.

The next day, defense counsel again objected to admission of evidence of Hamilton's pregnancy: "It's the defense's position that it's not only irrelevant, it's highly prejudicial. This is an assault case. The fact that she's pregnant, if he knew that and the jury believes he knew that, would inflame their passion, that a person would attack a pregnant person. [¶] There is no evidence that [defendant] knew she was pregnant at the time. That's speculation. There's no evidence that would come in that he was aware that she was pregnant. [¶] So we're, in a sense, connecting dots [that], as the Court put it, seem too far apart to me. [¶] I just -- the pregnancy issue is very inflammatory. The jury instructions as to domestic violence, [section] 273.5, actually

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<sup>1</sup> Undesignated section references are to the Penal Code.

<sup>2</sup> Section 273.5 provides in relevant part: "(a) Any person who willfully inflicts upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child, corporal injury resulting in a traumatic condition is guilty of a felony . . . . [¶] . . . [¶] (c) As used in this section, 'traumatic condition' means a condition of the body, such as a wound, or external or internal injury, including, but not limited to, injury as a result of strangulation or suffocation, whether of a minor or serious nature, caused by a physical force."

indicates [*sic*] that you cannot use the fact that you're an [*sic*] prospective parent of an unborn child to show a relationship, and I think that's the very purpose it's to be used for, to show the significance of the relationship, and it's gonna [*sic*] confuse the jury as to what they think is important when her being pregnant is a peripheral issue here."

The prosecutor countered that the pregnancy evidence was relevant because it explained Hamilton's unwillingness to participate in the court process.

The trial court denied defendant's motion, finding the evidence relevant as follows: "I think that that fact that she was pregnant -- it is something she said. It does relate to her physical condition. Whether it relates to her emotional condition or her state of mind, of that I'm not sure, but it clearly relates to her physical condition. [¶] . . . [¶] So to extract that out, I think it would be inappropriate. As to how prejudicial it is, it could be, but it may not be. I don't know. I mean, I don't think it's fair to say that it's something overly inflammatory, and at the same time it -- it does -- it was a real part of her condition at the time that she was there that morning out in front of the bar and something the officer found terribly important. [¶] Beyond that, it doesn't have any significance. I don't think that it shows one way or the other anything as to why she is or is not here, but I just think that I want the jury to have some sense of what her physical condition was, and I just don't feel comfortable in extracting that out. [¶] Certainly I would not tolerate the argument that you have made, I'm sure [the prosecutor] would not make, that using the pregnancy issue could inflame the jury. That would be wrong. [¶] But now could I say that would have no impact upon the jury? No. You might well be right about that, but, again, I just want the jury to have as accurate a picture as they can, an accurate a picture as they can have about her relating to her physical condition while the officer is investigating, and that's the sole purpose for which I will admit it." At trial, evidence of Hamilton's pregnancy was admitted.

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns

of undue prejudice, confusion or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion ‘must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]’ [Citation.]” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

Defendant claims the pregnancy’s probative value is minimal because pregnancy is neither an element of the offense nor relevant to any defense. (See *People v. Ward* (1998) 62 Cal.App.4th 122, 129 [pregnant woman is not “ ‘mother’ ” and fetus is not “ ‘child’ ” within meaning of section 273.5].) Nor did the evidence suggest Hamilton suffered any corporal injury or traumatic condition related to the pregnancy.

The People counter that the evidence was relevant to the “underlying trigger” that caused defendant to attack Hamilton. We agree.

Hamilton told Deputy Mireles that, as defendant was lifting her off the ground in a choke hold, she believed “he was going to make good on his promise to kill her and her baby.”

Contrary to defendant’s argument, the pregnancy evidence could not have been sanitized to show merely that defendant and Hamilton had a child together prior to her trial testimony.

Defendant contends the evidence of Hamilton’s pregnancy was inflammatory and prejudicial because “the sensitivity our society has toward pregnant women” tends “to promote sympathy toward the complaining witness and antipathy toward [defendant].” However, the evidence showed that the attack did not injure the unborn child. Rather, just prior to trial, Hamilton delivered a healthy baby boy whom she named after defendant. Moreover, it was obvious from Hamilton’s trial testimony that she was minimizing the incident in order to benefit defendant. These circumstances neutralized whatever tendency the jury otherwise would have to sympathize with Hamilton.

Defendant acknowledges that, under Evidence Code section 352, evidence is unduly prejudicial only if it “ ‘ “uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues,” ’ not the prejudice ‘that naturally flows from relevant, highly probative evidence.’ [Citations.]” (*People v. Padilla* (1995) 11 Cal.4th 891, 925, overruled on other grounds in *People v. Hill, supra*, 17 Cal.4th at p. 823, fn. 1.)

Against a backdrop of evidence that defendant punched Hamilton several times in the face and body; grabbed her throat with his hands, squeezed, and lifted her off the ground; pressed his thumbs against her throat until she lost consciousness; and banged her head against the toilet several times, evidence that his victim was a few weeks pregnant did not tend “ ‘ “uniquely” ’ ” to evoke an emotional bias against him. (*People v. Padilla, supra*, 11 Cal.4th at p. 925.) To the extent the pregnancy evidence was damaging, it was because it was relevant to show the attack had occurred, notwithstanding Hamilton’s claim to have fabricated the entire physical assault. Admission of the pregnancy evidence was not arbitrary, capricious or patently absurd, and it did not result in a manifest miscarriage of justice. (*People v. Rodrigues, supra*, 8 Cal.4th at pp. 1124-1125.)

### III

#### *Conduct Credit*

Defendant contends prospective application of section 4019, the conduct credit provision of the Realignment Act, violates equal protection principles. Our Supreme Court recently rejected this contention in *People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9.

Defendant is not entitled to additional presentence conduct credit.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

BLEASE, Acting P. J.

DUARTE, J.