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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MARVIN EVENORLAZO AMAYA, Defendant and Appellant.	H029396 (Santa Clara County Super. Ct. No. CC476481)

On January 27, 2005, the Santa Clara County District Attorney filed an information charging appellant with assault with a deadly weapon on a peace officer (Pen. Code, § 245, subd. (c), count one), [1] battery on a peace officer (§§ 242-243, subd. (c)(2), count two), resisting or deterring an officer (§ 69, counts three, four), resisting, delaying, or obstructing an officer, a misdemeanor (§ 148, subd. (a)(l), count five), possession of burglar tools, a misdemeanor (§ 466, count six), being under the influence of a controlled substance, a misdemeanor (Health & Saf. Code, § 11550, subd. (a), count seven), and possession of a controlled substance, a misdemeanor (Health & Saf. Code, § 11377, subd. (a), count eight). The information alleged that appellant personally used a dangerous and deadly weapon, a flashlight, in counts one and two.

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

On June 9, 2005, a jury found appellant guilty of the lesser offense of misdemeanor assault on a peace officer on count one, guilty as charged on counts two, four, five, seven, and eight. However, the jury found the personal weapon use allegation in count two not true. Further, the jury found appellant not guilty on counts three and six. On September 23, 2005, the trial court sentenced appellant to a total prison term of three years eight months.

On September 26, 2005, appellant filed a notice of appeal.

On appeal, appellant raises two issues. First, with respect to counts two and five he contends the record is devoid of substantial evidence that the officer was lawfully engaged in the performance of his duties at the time he detained him. Second, appellant challenges the imposition of an aggravated term relying on *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531]. We will affirm the judgment, but remand to the trial court for resentencing.

Facts

The February 5, 2004 Incident[2]

About 1:00 a.m. on February 5, 2004, San Jose Police Officer Miri saw appellant walking down the street with a backpack. After seeing Officer Miri's patrol car, appellant made a tossing motion with his right arm. Officer Mattocks, Officer Miri's partner, pulled the patrol car over, and Officer Miri got out and made contact with appellant. Appellant agreed to talk with the officers and walked toward them. While Officer Mattocks talked to appellant, Officer Miri walked over to the area where he had seen appellant make the tossing motion. He found a bag containing a green leafy substance. Inside of this bag was a smaller bag containing a white powdery substance. Officer Miri

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[2] Counts three, four, seven and eight related to the events of February 5, 2004. Since this appeal does not present any issues relating to this incident, we summarize the facts very briefly.

thought the substances were marijuana and methamphetamine. When Officer Miri asked appellant why he threw the items away, appellant told them "he was scared." He told the officers the white powder was cocaine.

Since appellant showed symptoms of being under the influence of a controlled substance, Officer Miri arrested him. As Officer Miri was handcuffing appellant, appellant kept moving around and tried to walk away. Officer Miri grabbed the chain on the handcuffs and appellant twisted the cuffs on Officer Miri's hands so that the officer had to let go. Officer Mattocks grabbed appellant by his shoulder and upper body and took him to the ground. During the ensuing struggle, appellant kicked Officer Miri.

The June 7, 2004 Incident[3]

About 12:40 a.m. on June 7, 2004, San Jose Police Officer Diep saw a 1999 Honda Civic traveling at "a high rate of speed." The car, which did not have a license plate, did not stop at a stop sign. Officer Diep began to pursue the car with his lights and siren activated. After a short pursuit, the car stopped. After Officer Diep stopped behind the Honda, the driver got out, looked at Officer Diep, and then ran off. Officer Diep chased the suspect on foot. After a short pursuit, Officer Diep realized there was a passenger in the Honda. He returned to the car and took the passenger into custody because he suspected the car was stolen. As he did so, he noticed what appeared to be some tampering with the Honda's steering column. Dispatch confirmed that the car had been reported stolen.

Officer Diep broadcast over the radio that the driver was a Hispanic male, approximately five feet eight inches and 180 pounds, wearing a gray jacket, black jeans, and a hat. Officer Diep last saw the driver running into a school. The passenger in the Honda said the driver, Eddie Cardenas, was 22 years old and lived on Lanai. A few minutes after the initial call, another broadcast said the suspect's jacket had been found at

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[3] The June 7, 2004 incident relates to counts one, two, five and six.

the school. Officer Diep confirmed that appellant was not the person who ran from him that night.

Officer Heinrich was helping in the search for the suspect from this incident. He went to the address given for Cardenas and waited nearby, hoping he would return home. The school where the suspect was last seen was a few blocks away. Officer Heinrich waited nearly an hour while other officers continued to search the area. When he heard that his sergeant had stopped someone nearby, he went to assist him.

At 1:38 a.m., on his way to assist his sergeant, Officer Heinrich saw appellant walking down the street. Officer Heinrich thought appellant "matched the general description, that he was a male, Hispanic, 5,7, 5,8, around 170," that had been broadcast over the radio, and he was wearing dark pants. As soon as appellant saw the officer looking at him, "he basically stopped in his tracks." Appellant was about 20 feet from the edge of the pavement. Officer Heinrich could not tell how old appellant was because it was dark. Appellant had something clenched in his hands. However, Officer Heinrich could not see what it was. Officer Heinrich explained to the jury that he thought appellant might be the suspect from the stolen car incident. Appellant was walking in the "same area" that the suspect's house was located; time had passed since the incident so that there were less patrol units in the area giving the suspect an opportunity to "get off if he hunkered down."

Officer Heinrich got out of his car and stayed on the driver's side while appellant was "on the right rear passenger side" from him. He called for appellant to come over to his patrol car. Then, he directed him to put the items he had in his hands on the trunk.[4] Officer Heinrich thought appellant might have been the driver of the stolen vehicle and

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[4] Officer Heinrich testified that he called appellant over to him using the word "venga" although he said he thought the word began with a "b" not a "v." Appellant testified that Officer Heinrich told him " '[c]ome here,' "although he could not remember whether the he spoke to him in English or Spanish.

that he was possibly carrying a weapon. Appellant put a screwdriver, a pair of pliers, a stereo faceplate, a Game Boy, and a flashlight on the patrol car.

Thereafter, appellant put out his hands to show they were empty, then slapped them down on the trunk of Officer Heinrich's car. As he did so, he picked something up from the car and put his hands in his pockets. Officer Heinrich walked toward appellant and told him to take his hands out of his pockets. Officer Heinrich testified that he was concerned that appellant might have picked up the screwdriver, which he thought appellant could use as a weapon. In addition, he was concerned that the items on the trunk, the time of night, and the location, suggested that appellant might be engaged in burglary.

As Officer Heinrich approached, appellant ran off. Officer Heinrich radioed that he was in a foot pursuit and chased after appellant. He pursued appellant down the street while yelling at him to stop. Appellant ran into a very dark corner of a house where there was a fence attached to the garage. Officer Heinrich thought appellant was going to jump over the fence as he came up behind him. At the fence, appellant turned around in a fighting stance and moved back and forth. Officer Heinrich ran at him and tackled him, forcing him to the ground. As he did so, appellant hit him in the right side. Officer Heinrich continued to struggle with him as he tried to get appellant onto his stomach so he could handcuff him.

While Officer Heinrich held on to appellant's back, appellant rocked forward, causing Officer Heinrich to lose his balance. At the same time, Officer Heinrich saw the screwdriver appellant had earlier, and his own flashlight, on the ground next to appellant. Fearing that appellant would grab the items and use them as weapons against him, Officer Heinrich tried to drag appellant away from them. Officer Heinrich testified that at the same time, appellant reached up and scratched him. In addition, appellant grabbed his flashlight and hit him in the head, causing a two-inch laceration.

During the struggle, appellant had been pulling at Heinrich's gun belt, which held other items that Officer Heinrich thought appellant could use as weapons against him, including his taser and extendable baton. At one point, appellant pulled Officer Heinrich's handcuffs out of their case. In addition, appellant tried to pull Officer Heinrich's gun from the belt. Officer Heinrich punched appellant in the face to overcome his resistance, but appellant continued to struggle.

Officer Heinrich said that after appellant hit him in the head, he continued to try to gain control of appellant so he could handcuff him. He punched appellant and pushed him up against the wall of the house. He got out his taser, but appellant tried to grab it from him. Officer Heinrich was able to retain control of the taser and use it on appellant. Appellant dropped down to a squatting position and started screaming at Officer Heinrich. Appellant looked like he was trying to get up. Officer Heinrich started hitting appellant in the legs with his baton in an effort to get him to the ground. He told appellant to get on the ground. Appellant went down on his hands and knees, but he refused Officer Heinrich's order to get down on his stomach with his hands to his sides. Officer Heinrich used his taser on appellant a second time, but appellant remained on his hands and knees. After Officer Heinrich hit him in the back of the legs with his baton, appellant went down on his stomach. Appellant had his hands clenched under his chest and refused to put them down to his sides. Officer Heinrich used his taser on appellant a third time. Then, appellant finally cooperated. At that point, Officer Ferguson arrived and was able to handcuff appellant.

In addition to a cut on his head, which required staples, Officer Heinrich had cuts to his knees, and scrapes and abrasions on his hands, elbows, chin, and neck. During the struggle with appellant, Heinrich's watch and flashlight were broken, his radio earpiece and microphone were ripped from his shirt, and his uniform was damaged.

Sergeant Martin testified as an expert regarding the San Jose Police Department's policies on the use of force for detention and arrest. In addition, he testified regarding

when an officer has reasonable suspicion to detain an individual. Responding to a hypothetical question reflecting Officer Heinrich's actions, Sergeant Martin opined that he was acting consistently with departmental procedures when he attempted to contact a potential suspect regarding a stolen vehicle. Further, Sergeant Martin opined that an officer could reasonably ask the suspect to place items he was carrying on the trunk of the patrol car to ensure officer safety. Since some of the items in the hypothetical appeared to be common burglary tools, the officer could reasonably inquire further regarding the tools, and secure items, such as a screwdriver, from being used as a weapon.

Sergeant Martin told the jury that it would be reasonable for an officer to pursue an individual who grabbed an item from the patrol car, put his hands in his pockets and refused to remove them, and then fled from the officer, thereby obstructing and resisting the officer's performance of his duties. Furthermore, if the individual continued to resist the officer when cornered and turned to fight the officer, it would be reasonable for the officer to attempt to subdue him and gain control. Moreover, it would be reasonable for an officer to punch an individual if he was grabbing for the officer's gun. Likewise, it also would be reasonable for the officer to use force, including using a taser and baton, if the suspect had struck him in the head with a flashlight, causing a laceration, and continued to resist the officer's efforts to gain control. Sergeant Martin explained to the jury that the instances in which a suspect used force against an officer or attempted to use the officer's weapons against him were rare.

Defense Case

Miguel Lozano lived in the house where Officer Heinrich apprehended appellant. He looked outside on June 7, 2004, around 1:30 a.m. when he heard some noise. He saw two people wrestling on the ground a few feet from his window. He could not see what they were wearing and did not know that one of the men was a police officer. It looked as if the person on top was trying to subdue the other person, who was on his back. The man on the bottom was trying to push off the man on top. Lozano did not see any injury

to the man on top, nor did he see a flashlight or screwdriver in the area. As Lozano moved into his living room to get a better look, he saw his front door pushed in from the force of the struggle outside. He was yelling at the men to leave when he heard both the sound of his lawn chair moving, and the scuffling move away from the front door. When it became quiet, Lozano opened his door. He saw a police officer holding a taser in his hand and standing near the other man, who appeared to be trying to stand up. The officer told the man to stay down, and asked Lozano for his address. Lozano saw the man on the ground keep trying to get up. Then, the officer hit him with his baton three or four times. At that point, other officers arrived and handcuffed the man on the ground. The man did not stop resisting the officer until the officer handcuffed him. Afterward, Lozano saw a screwdriver, and what he thought was a cell phone on the ground.

Appellant testified regarding the February 5, 2004 incident that he was walking home from a friend's house where he had been smoking marijuana and using cocaine or methamphetamine. He was carrying a bag of drugs with him. However, he tossed the bag away when he saw the police officers. He explained this was because he was afraid that the officers would arrest him. Officer Miri asked appellant to stand by the patrol car while he retrieved the bag of drugs. Appellant admitted the drugs were his.

Appellant explained that when Officer Miri put handcuffs on him, they were very tight and caused him intense pain. He told the officer they were tight, but the officer just threw him onto the patrol car, picked him up by the handcuffs, and then threw him on the ground. Appellant experienced a "lot of pain" after the officer threw him to the ground. He denied that he kicked the officers. As he lay on the ground, he told the officers that he had not done anything wrong. Then, one of the officers sprayed his face. Eventually, they picked him up and put him in the patrol car. Appellant testified that he had red marks and cuts on his wrists from the handcuffs. In addition, he had bruises and pain in his jaw after his arrest.

With regard to the June 7, 2004 incident, appellant testified that at the time he was 38 years old. He went to a friend's house to work on a truck. He took a flashlight and screwdriver with him. His friend gave him the stereo faceplate, and he found the Game Boy on the street on his way there. Appellant admitted that he drank a few beers. He may have used marijuana and methamphetamine.

Appellant left his friend's house about midnight to walk home. On the way, he encountered Officer Heinrich. When Officer Heinrich asked him to come over, appellant complied. At Heinrich's request, he put the items he had in his hands on the officer's car. He denied that he picked anything up or that he put his hands in his pockets. Heinrich was standing on the driver's side of the car, and he was standing on the passenger side.

Although nothing had happened, appellant turned and ran from Officer Heinrich. He said he was afraid of San Jose police officers because they hurt him and "assaulted" him in the earlier incident. Officer Heinrich chased after him, but appellant could not recall what he was saying. Appellant said he ran into the front yard of a house and stopped by the front door, where he put his hands up to surrender. He denied that he tried to run away or turned toward the officer. Officer Heinrich came up from behind and put one arm around appellant's throat and the other arm across his neck, so that appellant could not breathe. The officer moved him back and forth while still holding onto his neck, and then threw him to the ground. When appellant fell, the officer fell down on top of him. Appellant yelled that he had done nothing wrong. Officer Heinrich stood up, then punched appellant in the face three times while he was on the ground. Officer Heinrich did not attempt to put handcuffs on appellant, but hit him in the legs even though he did not try to get up. Appellant denied that he tried to pull anything out of the officer's belt. Appellant said that while he was still on the ground, Officer Heinrich used the taser on him, which caused intense pain. According to appellant, although he had not done anything, Officer Heinrich used his taser on him two more times.

Appellant could not move and did not recall what happened after that, although he did recall being handcuffed and put in a patrol car. Appellant never saw Officer Heinrich's flashlight that night. He denied that he struck Officer Heinrich in the head with any object. On cross-examination, appellant said he had no explanation for how the screwdriver he placed on Officer Heinrich's car ended up at the house where officers arrested him. He denied that he tried to jump over a fence at the house. He may have run initially because he did not want to have any further problems after his previous arrest.[5]

Discussion

Sufficiency of the Evidence

Appellant contends that the record is devoid of substantial evidence that Officer Heinrich was lawfully engaged in the performance of his duties at the time he detained him. Accordingly, he urges this court to reverse his conviction on counts two and five.

Appellant explains that count two, battery on a peace officer engaged in the performance of his duties, and count five, resisting arrest, contain as a necessary element of the offense a requirement that the officer be discharging or performing his duty.

Appellant argues that since the record in this case does not contain sufficient evidence that Officer Heinrich lawfully detained him, Officer Heinrich was not engaged in the performance of his duties at the time he stopped him on June 7, 2004.

In a challenge to the sufficiency of the evidence on appeal, "we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence-that is, evidence that is reasonable, credible and of solid value-from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66.) We must " ' "presume in

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[5] Appellant called Jacob Carrasco to testify about an incident in October 2003, in which Officer Heinrich stopped him. The prosecutor called Officer Diep to rebut Carrasco's testimony. Neither appellant nor respondent summarize this testimony, as it is not relevant to the issues before this court.

support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." ' [Citation.]" (*People v. Rayford* (1994) 9 Cal.4th 1, 23.)

Furthermore, "it is not within our province to reweigh the evidence or redetermine issues of credibility. [Citation.]" (*People v. Martinez* (2003) 113 Cal.App.4th 400, 412.) Moreover, "all conflicts in the evidence . . . must be resolved in favor of the judgment. [Citations.]" (*People v. Mitchell* (1986) 183 Cal.App.3d 325, 329.) "Reversal . . . is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) Even if we believe the evidence might also reasonably be reconciled with the innocence of the defendant, this view "does not warrant interference with the determination of the trier of fact." (*People v. Towler* (1982) 31 Cal.3d. 105, 118.)

At the outset we agree with appellant that before a person can be convicted of a violation of section 148, subdivision (a) or section 243, subdivision (b), the prosecution must prove that the officer was acting lawfully at the time these offenses were committed. (*In re Manuel G*. (1997) 16 Cal.4th 805, 815.) " 'The rule flows from the premise that because an officer has no duty to take illegal action, he or she is not engaged in "duties" for purposes of an offense defined in such terms, if the officer's conduct is unlawful . . . .' [Citation.]" (*Ibid*.)

Accordingly, we must determine whether the prosecution presented sufficient evidence from which the jury could have concluded that Officer Heinrich's conduct in contacting appellant was lawful.

"Police contacts with individuals may be placed into three broad categories ranging from the least intrusive to the most intrusive: consensual encounters that result in no restraint of liberty whatsoever; detentions, which are seizures of an individual that are strictly limited in duration, scope, and purpose; and formal arrests or comparable restraints on an individual's liberty. [Citations.] . . . Consensual encounters do not trigger Fourth Amendment scrutiny. [Citation.] Unlike detentions, they require no articulable

suspicion that the person has committed or is about to commit a crime. [Citation.] [¶] The United States Supreme Court has made it clear that a detention does not occur when a police officer merely approaches an individual on the street and asks a few questions. [Citation.] As long as a reasonable person would feel free to disregard the police and go about his or her business, the encounter is consensual and no reasonable suspicion is required on the part of the officer. Only when the officer, by means of physical force or show of authority, in some manner restrains the individual's liberty, does a seizure occur. [Citations.]" (*In re Manuel G*., *supra,* 16 Cal.4th at p. 821; see also *Wilson v. Superior Court* (1983) 34 Cal.3d 777; *Florida v. Bostick* (1991) 501 U.S. 429 [111 S.Ct. 2382] (*Bostick*).)

A detention is initially justified "when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231; *In re Tony C*. (1978) 21 Cal.3d 888, 893.)

"[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." (*Florida v. Royer* (1983) 460 U.S. 491, 500 [103 S.Ct. 1319].)

In accordance with the foregoing, the court instructed the jury that "[a] peace officer is engaged in the performance of his duties if he is making or attempting to make a lawful arrest or lawfully detaining or attempting to detain a person for questioning or investigation and using reasonable force to effect a lawful arrest or detention."

Furthermore, the court defined lawful detention as follows: "A peace officer may lawfully detain and question a person when the circumstances are such as would indicate to a reasonable peace officer in a like position that such a course of conduct is necessary

to the proper discharge of his duties. Temporary detention for questioning permits reasonable investigation without the necessity of making an arrest. Although peace officers have the power to detain and question, there must be probable or reasonable cause to detain. Probable or reasonable cause to detain requires that there be some unusual or suspicious circumstance or other demonstrable reason warranting the investigation. Time, location, number of people, demeanor and conduct of a suspect, a recently reported crime and the gravity of the crime are among the factors that you may consider. [¶] The general grounds for a reasonable detention are: 1, there must be a rational suspicion by the police officer that some activity out of the ordinary is taking place, is occurring or is about to occur; 2, some indication must exist to connect the person under suspicion with the unusual activity; and, 3, there must be some suggestion that the activity is related to a crime."

Appellant's attack on the sufficiency of the evidence is his claim that his detention was not reasonable. In this case, we start from a different perspective than we would if this case came to us on appeal from the trial court's denial of a motion to suppress evidence.[6] Rather, in this case we need determine only if there is sufficient evidence in the record such that a reasonable trier of fact could have concluded that Officer Heinrich's detention of appellant was reasonable.

Officer Heinrich testified that he encountered appellant at approximately 1:38 a.m., less than one hour after the initial stop of the stolen car. Further, it was in an area close to where the initial car stop had taken place.[7] Officer Heinrich explained, the

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[6] The standard of review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

[7] Officer Diep pulled the Honda over at the intersection of Orlando and Everglade. Appellant was detained by Officer Heinrich at the corner of Florida Avenue and Miami

car stop suspect may have "hunkered down," waiting for an opportune moment to escape detection. Officer Heinrich thought that appellant's physical appearance and clothing matched the general description of the driver of the stolen car. As soon as appellant saw Officer Heinrich, he "stopped in his tracks." Officer Heinrich was unable to tell appellant's age because it was dark.

The description of the suspect in the stolen vehicle incident was a generalized description—Hispanic male, approximately five feet eight inches and 180 pounds, wearing a gray jacket, black jeans, and a hat. However, Officer Heinrich knew that the suspect had discarded the jacket and it would have been reasonable for him to assume the suspect did the same to the hat. Accordingly, when Officer Heinrich saw appellant, he saw a Hispanic male with the same general physical characteristics as the individual involved in the car theft. Further, appellant was wearing dark pants. Appellant's behavior in stopping "in his tracks" 20 feet from the edge of the pavement as soon as he saw Officer Heinrich could have reinforced the officer's conclusion that appellant might be the suspect from the stolen car incident.

In addition to the testimony of Officer Heinrich, Sergeant Martin testified in response to a hypothetical question. He explained that it would be reasonable for an officer, within an hour of the report of a suspect fleeing from a stolen car and in the same general neighborhood, to get out of his car to contact a person who met the general description of a suspect. He told the jury, "In this case the officer would obviously be trying to determine if this was the person that fled from the stolen car about an hour earlier . . . it's only about an hour, and the same neighborhood in proximity to where the stop took place, and then also based on the description is similar enough that I would want to inquire further."

Drive, the distance between the two places, as appellant concedes, is between .4 and .5 of a mile.

In short, there is ample evidence to support the jury's implied finding that Officer Heinrich properly detained appellant. (*People v. Marquez* (1992) 1 Cal.4th 553, 578 [police may lawfully detain for questioning person who resembles suspect]; *In re Carlos M.* (1990) 220 Cal.App.3d 372, 381-382 [vague description, coupled with presence within one-half mile of the crime site, within one hour of the crime report, supports reasonable suspicion]; *People v. Souza, supra,* 9 Cal.4th at pp. 235, 240-242 [factors such as the time of night and evasive activity may reasonably justify an officer's suspicion of criminal activity].)[8] Taking into account "the totality of the circumstances-the whole picture" (*United States v. Cortez* (1981) 449 U.S. 411, 417 [101 S.Ct. 690]) in assessing whether the particularized and objective facts known to Officer Heinrich provided him cause to detain appellant, we conclude that appellant's resemblance to the generalized description of the stolen car suspect, the location within half a mile of that incident, within one hour of the crime report and appellant's strange behavior on seeing Officer Heinrich, support the jury's implied finding that Officer Heinrich properly detained appellant.

Accordingly, we reject appellant's challenge to the sufficiency of the evidence that Officer Heinrich was lawfully engaged in the performance of his duty at the time he detained or attempted to detain appellant.

Imposition of the Upper Term

At sentencing, the trial court imposed the upper term of three years on count two, battery on a peace officer, and a consecutive eight-month term on count four, resisting a peace officer. Appellant objected to the upper term on the ground that the jury made no findings with respect to the sentence. Citing *People v. Black* (2005) 35 Cal.4th 1238, the court overruled appellant's objection.

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[8] Thereafter, Officer Heinrich was entitled to take reasonable precautions for his own safety by asking appellant to put down the things he was carrying. (See *People v. Mickelson* (1963) 59 Cal.2d 448, 454.)

In imposing the upper term, the court stated that it was imposing the upper term "because it has determined that the circumstances in aggravation outweigh the circumstances in mitigation and further because the defendant engaged in violent conduct which indicated serious danger to society and also because of the defendant's prior convictions and the fact that they are increasing in seriousness." Both the violent conduct aggravator and the prior conviction aggravator were listed in the probation report as being aggravating factors.

Appellant contends that he was "deprived of his Fifth and Fourteenth Amendment right to notice of the sentencing factors to be used against him, and was deprived of his Sixth and Fourteenth Amendment right to a jury trial and to due process and his Fifth and Fourteenth Amendment right to application of the proof beyond a reasonable doubt standard when the trial court imposed an aggravated sentence pursuant to a preponderance of the evidence standard."

Appellant argues that the trial court's imposition of the upper term was "plain error" under *Blakely v. Washington, supra,* 542 U.S. 296. Further, pursuant to *Blakely*, he was entitled to a jury trial and application of the proof beyond a reasonable doubt standard regarding the trial court's decision to impose the upper term.

Recently, the United States Supreme Court decided *Cunningham v. California* (2007) 549 U.S. —, [127 S.Ct. 856] (*Cunningham*). In *Cunningham*, the Supreme Court held that because California's Determinate Sentencing Law permits a trial court to impose an upper term based on facts found by the court, rather than by a jury beyond a reasonable doubt, it violates a defendant's Sixth and Fourteenth Amendment right to a jury trial. (*Id*. at p. ___ [127 S.Ct. at p. 871].)

In a letter brief submitted to this court shortly before oral argument, respondent argues that because the trial court relied in part on appellant's prior convictions to impose the upper term, and since only one factor is required to make a defendant eligible for the upper term, a remand for resentencing is unnecessary.

Essentially, respondent relies on three cases for the proposition that a remand for resentencing is unnecessary —*Almendarez-Torres v. United States* (1998) 523 U.S. 224 [118 S.Ct. 1219], *People v. Osband* (1996) 13 Cal.4th 622, 728-729, and *People v. Earley* (2004) 122 Cal.App.4th 542, 550.

The "fact of a prior conviction" exception derives from *Almendarez-Torres v. United States*, *supra*, 523 U.S. 224 (*Almendarez-Torres*). *Almendarez-Torres* confronted the issue whether a provision in a federal statute prohibiting the return of a deporting alien "defines a separate crime or simply authorizes an enhanced penalty." (*Id.* at p. 226.) The maximum prison term for returning was two years, unless the deportation followed a conviction of an aggravated felony, in which case the maximum prison term was 20 years. (*Ibid.*) The court realized that the provision, unlike the minimum sentence requirement in *McMillan v. Pennsylvania* (1986) 477 U.S. 79 [106 S.Ct. 2411],[9] altered the maximum penalty for the crime. (*Almendarez-Torres, supra,* 523 U.S. at p. 243.) However, the court found no constitutional significance in this difference. The court explained "the sentencing factor at issue here—recidivism—is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." (*Ibid.*) There is a longstanding tradition that recidivism is not an element, but goes only to the

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[9] In *McMillan*, the statute at issue required a mandatory minimum sentence of five years if a person " 'visibly possessed a firearm' " during the commission of certain offenses. (*McMillan*, *supra*, 477 U.S. at p. 81.) The United States Supreme Court briefly dispatched an argument "that the jury must determine all ultimate facts concerning the offense committed. Having concluded that Pennsylvania may properly treat visible possession as a sentencing consideration and not an element of any offense, we need only note that there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." (*Id.* at p. 93.) Among the indicators that firearm possession was a sentencing factor, and not an element of the underlying offenses of robbery, rape, murder, and assault was the fact that the mandatory minimum was well below the maximum sentence provided by statute for each crime. "The statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." (*Id.* at p. 88.)

punishment. (*Id.* at p. 244.) The court concluded that recidivism was not an element of the offense. (*Id.* at p. 247.) The court noted that there was no standard of proof claim "because he admitted his recidivism at the time he pleaded guilty." (*Id.* at p. 248.)

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348] (*Apprendi*), the United States Supreme Court described *Almendarez-Torres* as "at best an exceptional departure from the historic practice" of having a jury determine the facts necessary for sentencing. (*Apprendi*, *supra*, 530 U.S. at p. 487.) *Apprendi* characterized *Almendarez-Torres* as based partly on the defendant having "*admitted* the three earlier convictions for aggravated felonies—all of which had been entered pursuant to proceedings with substantial procedural safeguards of their own." (*Id.* at p. 488.) Thus, the *Apprendi* court stated, "[e]ven though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, Apprendi does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule" that the court applied. (*Id.* at pp. 489-490, fn. omitted.)

Nevertheless, *Cunningham* reiterated that "[o]ther than a prior conviction, . . . 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt.' " (*Cunningham*, *supra*, 549 U.S. at p. — [127 S.Ct. at p. 864].)

In *People v. Osband*, *supra*, 13 Cal.4th 622 (*Osband*), the trial court imposed a full consecutive sentence under Penal Code section 667.6, subdivision (c), for the rape of one of the victims "because it 'was such a vicious crime and the victim was beaten and murdered . . . .' " (*Id*. at p. 728.) In addition the court imposed the upper term for the offense "because '[t]he factors in aggravation heretofore stated are found to preponderate . . . .' " (*Ibid*.) The factors enumerated by the lower court "were the crime's violence and cruelty (Cal. Rules of Court, former rule 421(a)(1)), the victim's vulnerability (*id.*, former

rule 421(a)(3)), and defendant's dangerousness, criminal record and probationary status (*id.*, former rule 421(b)(1), (2), & (4))." (*Ibid.*)

On appeal the defendant contended that the court violated former rule 441(c) of the California Rules of Court, which provided that " '[a] fact used to enhance the defendant's prison sentence may not be used to impose the upper term,' " by relying on the same fact to impose the full consecutive sentence under Penal Code section 667.6 and to impose the upper term under the Rules of Court. (*Osband*, *supra*, 13 Cal.4th at p. 728.) The California Supreme Court agreed with defendant's assessment and noted that the trial court relied on the violent nature of the rape to impose a consecutive sentence and the upper term. The *Osband* court found this to be error. (*Ibid.*)

Nevertheless, the *Osband* court went on to say that "no prejudice appears. 'Improper dual use of the same fact for imposition of both an upper term and a consecutive term or other enhancement does not necessitate resentencing if "[i]t is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error." ' [Citation.] Only a single aggravating factor is required to impose the upper term (*People v. Castellano* (1983) 140 Cal.App.3d 608, 614-615 . . .) and the same is true of the choice to impose a consecutive sentence (*People v. Coulter* (1989) 209 Cal.App.3d 506, 516 . . . .)" (*Osband*, *supra*, 13 Cal.4th at pp. 728-729.) The *Osband* court went on to say, "the court could have selected disparate facts from among those it recited to justify the imposition of both a consecutive sentence and the upper term." (*Ibid.*) Thus, on the record before it the *Osband* court could discern no reasonable probability that the trial court would not have done so. Accordingly, resentencing was not required. (*Ibid.*)

In *People v. Earley*, *supra*, 122 Cal.App.4th 542 (*Earley*), the Fourth District Court Appeal relied on *Osband*, *supra*, 13 Cal.4th 622, to conclude that the defendant's one prior prison term was a sufficient aggravating circumstance to allow the court to impose the upper term of three years. (*Earley*, *supra*, 122 Cal.App.4th at p. 550.)

However, in *Earley*, unlike this case, the defendant acknowledged that he waived his right to a jury trial on the prior prison term allegations and submitted to a court trial in which the aggravating factor was proved beyond a reasonable doubt. (*Id.* at p. 550.)

Neither *Osband* nor *Earley* addressed the issue that this case presents, which is when the trial judge relies on several factors to impose the upper term, only one of which is a valid factor—appellant's prior convictions—and there was at least one mitigating factor, is it reasonably probable that a more favorable sentence would have been imposed. For the following reason, we believe that it is.

Pursuant to California Rules of Court, rule 4.420 (b), "[s]election of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation." Since the one remaining circumstance in aggravation and the one circumstance in mitigation are balanced, we believe that it is reasonably probable they cancel out each other.[10] Thus, we must decide the appropriate remedy in this case.

At oral argument, appellant's counsel conceded that appellant was released from prison and is on parole. Accordingly, it would seem an exercise in futility to remand this case to the trial court to resentence appellant. Nevertheless, we perceive of a collateral consequence if the trial court determines that the upper term is no longer appropriate. "A prisoner on parole is not free from legal restraint by the penal authorities [citation], but 'is constructively a prisoner of the state in the legal custody and under the control of the [Board of Parole Hearings].'[11] [Citations.]" (*People v. Denne* (1956) 141 Cal.App.2d 499, 507.) If the trial court imposes the midterm, appellant's extra time spent in prison should be credited against his parole period, which would considerably shorten the period

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[10] We have no way of knowing the weight the trial court attached to appellant's prior convictions for drug possession.

[11] The Board of Prison Terms was abolished in 2005 and replaced by the Board of Parole Hearings. (Gov. Code, § 12838.4.)

in which he would be subjected to the conditions of parole. Accordingly, we remand this case to the trial court for further proceedings.[12]

Disposition

The matter is remanded to the trial court for resentencing. In all other respects, the judgment is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.

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[12] Currently, there are no procedures in place allowing juries to be convened for deciding aggravating factors either after conviction or on remand after an appeal. Nor can we accept respondent's position based on *Washington v. Recuenco* (2006) ___ U.S. ___ [126 S.Ct. 2546], that we apply harmless error analysis "because had the jury been asked to make [the] finding" that the appellant engaged in violent conduct in the commission of the offense there is "no reasonable doubt that the jury would have done so."

In *Washington v. Recuenco*, *supra*, —U.S. at p. —, [126 S.Ct. at p. 2553], the United States Supreme Court held only that *Blakely* error is not " 'structural error' " that would always invalidate a *conviction.* (*Ibid.*)