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Opinion following remand by U.S. Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JAVIER BOCANEGRA, Defendant and Appellant.	B183267 (Los Angeles County Super. Ct. No. NA063127)

APPEAL from a judgment of the Superior Court of Los Angeles County, Arthur Jean Jr., Judge. Affirmed.

John A. Colucci for Defendant and Appellant.

Edmund G. Brown, Jr., and Bill Lockyer, Attorneys General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lawrence M. Daniels, Supervising Deputy Attorney General and Ryan B. McCarroll, Deputy Attorney General, for Plaintiff and Respondent.

Appellant Javier Bocanegra appealed from his conviction of attempted murder and possession of a firearm by a felon, contending that the trial court erred in failing to give, sua sponte, instructions on attempted manslaughter and assault with a deadly weapon and in imposing an upper term sentence based on judicial findings. We issued an opinion dated September 29, 2006 affirming the judgment.

This case is now on remand from the United States Supreme Court for reconsideration in view of its decision in *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*), which held California's determinate sentencing law (DSL) unconstitutional, disagreeing with the California Supreme Court's decision in *People v. Black* (2005) 35 Cal.4th 1238, judg. vacated and cause remanded sub nom. *Black v. California* (2007) __ U.S. __ [127 S.Ct. 1210] (*Black I*). We recalled the remittitur, vacated the opinion, and granted the parties leave to file supplemental briefs addressing the effect, if any, of *Cunningham* on the trial court's decision to impose the upper term sentence. While the case was pending, counsel for appellant sought additional time to discuss the California Supreme Court's post-*Cunningham* analysis of the DSL in *People v. Black* (2007) 41 Cal.4th 799 (*Black II*) and *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*). We afforded the parties additional time to address those decisions.[1]

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[1] Another issue raised in the original appeal was whether the trial court should have instructed the jury on assault with a deadly weapon, which appellant claimed would be a lesser included offense of attempted murder if the enhancement for use of a firearm were included as part of the charge. In our original opinion, we concluded the answer was "no" based on *People v. Wolcott* (1983) 34 Cal.3d 92. Shortly before resubmission, the California Supreme Court issued its opinion in *People v. Sloan* (2007) 42 Cal.4th 110 and the companion case *People v. Izaguirre* (2007) 42 Cal.4th 126, reaffirming the principle underlying *Wolcott*. We have updated our analysis to reflect the new Supreme Court authority, but our conclusion on that and the other non-sentencing issue remains as stated in our original opinion.

After review of *Cunningham*, *Black II*, *Sandoval*, and the parties' supplemental briefs, we conclude that the trial court's sentencing choices did not violate Supreme Court precedent, and that remand to the trial court for reconsideration of the sentence is not required.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was charged with the attempted murder of Quennie Reyna (Penal Code,[2] § 664/187) in count one of a two-count information, and of possession of a firearm by a felon (§ 12021, subd. (a)(1)) in count two. It was further alleged that appellant personally and intentionally discharged or used a handgun within the meaning of section 12022.53, subdivisions (b), (c), and (d). The information also charged that appellant had suffered two prior convictions within the meaning of sections 667.5, subdivision (b), and 1203, subdivision (e)(4) -- (1) a March 13, 2003 conviction for violation of Vehicle Code section 10851, subdivision (a), and (2) a March 10, 2004 conviction for violation of section 12021, subdivision (a).[3]

Evidence at Trial

Shanta Lucero, a friend of the victim, Quennie Reyna, testified that appellant and Reyna were dating and living together in an apartment on Canal Street in Long Beach at the time of the crime.[4] On September 24, 2004, Lucero and another friend drove by the apartment at around 8:00 p.m. to pick up Reyna. According to

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[2] Unless otherwise indicated, statutory references herein are to the Penal Code.

[3] Vehicle Code section 10851, subdivision (a) prohibits taking a vehicle without the consent of the owner and section 12021, subdivision (a) prohibits possession of a firearm by a person convicted of certain felonies.

[4] Lucero was sometimes called "Carina."

Lucero, they were planning to go "cruising" to "look[] for guys." When Lucero arrived, Reyna came out barefoot and got into the car. A few minutes later, Reyna went back into the house and came out, followed by appellant. They were arguing. Appellant told Reyna she was not going to leave, and Reyna said she was. Reyna started to get back into the car. Appellant went back into the house. He came out, pulled out a shotgun, and pointed it at Reyna's head.

Lucero went to stand between Reyna and appellant and told appellant to put the gun away. Reyna told him to stop playing around. Appellant said to Reyna: "You are not going to fucking go anywhere." He then shot Reyna. After Reyna fell to the ground, appellant took off running.[5]

On cross-examination, Lucero admitted she had a methamphetamine problem at the time and had taken enough methamphetamine that day to get high.

Reyna testified that in September 2004 she was living with appellant and his family in an apartment on Canal Street in Long Beach. They had been together for a couple of months. Around the time of the shooting, they were constantly arguing because Reyna was "always leaving" to "go hang around other guys." Just before she went out to meet Lucero on the night in question, appellant had come home and they had begun to argue about her never being home. Appellant pushed her. She told him "not to be pushing [her]" and said she was walking out so the fight would not "turn into something bigger." Appellant followed her and told her to get out of the car and go back inside. He started arguing with the woman in the passenger seat. Reyna got out of the car to "tell him off." She saw that he had a gun in his hand. He did not point it at her. She asked "what the hell he was doing with that" and said "if [you are] going to shoot me, to shoot me." Reyna was angry. She did not observe appellant pointing the gun directly at her at any time.

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[5] The following month, appellant was arrested in Texas and extradited to California.

Lucero was standing between them. Reyna received no injuries to the front of her body.

When interviewed by police and a social worker in the hospital, Reyna said she did not know who shot her. She had taken methamphetamine just prior to appellant's coming home. Appellant had been drinking.

Officer Roque Olatonji Foster, who examined Reyna at the hospital, testified that Reyna had a hole in her head that went from one side of the back of her neck to the other side. The base of her skull was missing and her brain was visible.

Detective Louie Galvan, who interviewed Reyna both at the hospital and several days later, testified that she told him appellant had raised the shotgun and pointed it at her face just before it went off. She further told the detective that appellant had the gun pointed at her chest at all times prior to that. Reyna reported to the detective that appellant said he was "not playing" anymore.

Robert Arguello, an investigator for the prosecution, testified that Reyna had told him that on the day of the shooting, appellant accused her of either "being with" men from neighboring gangs or of "seeing one particular gentleman."

Prior to instructing the jury, the court stated: "I've considered lesser included offenses. I don't think there are any." Counsel for both sides agreed. Defense counsel moved for an acquittal on the ground that the prosecution had not proved "intent to kill." In closing, defense counsel argued that there was no evidence of intent to kill because appellant was intoxicated and because the wounds Reyna suffered could have been the result of projectiles ricocheting off the car into the back of her neck.

Verdict and Sentencing

The jury found appellant guilty of both counts and found true the allegation that he had personally used a firearm within the meaning of section 12022.53, subdivision (b), personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c), and personally and intentionally discharged a firearm which proximately caused great bodily injury within the meaning of section 12022.53, subdivision (d). Appellant admitted the prior convictions and having served a prior prison term.

The probation report stated that appellant had three sustained petitions as a juvenile. As an adult, he was convicted of throwing an object at a vehicle and possession of a controlled substance in December 2000; being under the influence of a controlled substance in May 2001; taking a vehicle without the owner's consent in May 2002; possession of a controlled substance and driving with a suspended license in December 2002; taking a vehicle without the owner's consent, receipt of stolen property, and driving with a suspended license in March 2003; manufacture/possession of a dangerous weapon in May 2003; and possession of a firearm in March 2004. The report stated appellant was on parole at the time of the report's preparation with a scheduled termination date of August 27, 2007. The report concluded by stating there were no circumstances in mitigation and two circumstances in aggravation: "1. [Appellant] was on parole when the present matter occurred"; and "2. Poor performance on parole."

Based on its review of the probation report, the court found two aggravating factors: first, "[appellant] was on parole when the present matter occurred"; second, "poor performance on parole." The court imposed a sentence of nine years for attempted murder, the upper term, and 25 years to life for the section 12022.53, subdivision (d) enhancement. The court also imposed a concurrent two-year sentence on count two.

DISCUSSION

I

In his original brief, appellant contended that the trial court erred in failing to give, sua sponte, the instruction on attempted voluntary manslaughter and the related instructions defining provocation and heat of passion. Our conclusion regarding appellant's contention on this issue remains as stated in our original opinion.

It is clear that a trial court must instruct the jury on lesser included offenses whenever the evidence is substantial enough to support the instruction and merit consideration of the lesser offense by the jury. (*People v. Barton* (1995) 12 Cal.4th 186, 195, fn. 4.) "'The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to it being given. [Citations.] Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense." (*Id*. at p. 195, quoting *People v. Sedeno* (1974) 10 Cal.3d 703, 716, fn. omitted.) "'When the charged offense is one that is divided into degrees or encompasses lesser offenses, and there is evidence from which the jury could conclude that the lesser offense had been committed, the court must instruct on the alternate theory[,] even if it is inconsistent with the defense elected by the defendant under the rule obliging the court to instruct on lesser included offenses . . . .'" (*People v. Barton*, *supra*, at p. 195, quoting *People v. Sedeno*, *supra,* at p. 717, fn. 7, italics omitted.)

The question here is whether substantial evidence supported giving the attempted voluntary manslaughter instruction. Voluntary manslaughter is the unlawful killing of a human being with intent, but without malice. (*People v.*

Barton, *supra*, 12 Cal.4th at p. 199.) "Generally, an intent to unlawfully kill reflects malice. [Citations.]" (*People v. Lee* (1999) 20 Cal.4th 47, 59.) But "an intentional killing is reduced to voluntary manslaughter if other evidence negates malice." (*Ibid*.) Malice is absent "when the defendant kills in a 'sudden quarrel or heat of passion' (§ 192, subd. (a))" or "when the defendant kills in . . . the unreasonable but good faith belief in having to act in self-defense." (*People v. Barton*, *supra*, 12 Cal.4th at p. 199.) "Heat of passion arises when 'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinary reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.'" (*Id*. at p. 201, quoting CALJIC No. 8.42 (5th ed. 1995 supp.).) "The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim. [Citations.] The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*People v. Lee*, *supra*, 20 Cal.4th at p. 59.)

In *People v. Barton*, the court found the following evidence warranted instructions on voluntary manslaughter despite the defendant's objection: "Defendant testified that shortly before the killing of Sanchez, his daughter Andrea had come to him, extremely upset, and told him that [Sanchez] had threatened her with serious injury by trying to run her car off the road, and that he had spat on the window of her car. When defendant and his daughter confronted Sanchez about his conduct, Sanchez called defendant's daughter a 'bitch' and he acted as if he was 'berserk.' Defendant and Sanchez angrily confronted each other and Sanchez assumed a 'fighting stance,' challenging defendant. After defendant asked his

daughter to call the police, Sanchez attempted to get back into his car and leave; when defendant asked Sanchez where he was going, Sanchez replied, 'none of your fucking business,' and taunted defendant by saying, 'Do you think you can keep me here?' Screaming and swearing, defendant, before firing, ordered Sanchez to 'drop the knife' and to get out of his car, threatening to shoot if Sanchez did not do so." (*People v. Barton*, *supra*, 12 Cal.4th at p. 202.)

As summarized above, the evidence in *Barton* justified the voluntary manslaughter instructions. The victim provoked the defendant by threatening injury to his daughter, by challenging the defendant physically, by taunting the defendant, and by swearing at and arguing with the defendant while holding a knife. These actions supported a finding that the victim had acted in a way that would have provoked a reasonable person to act rashly or without deliberation under the circumstances. The evidence also supported a finding that the defendant was, in fact, goaded into a state of rage or extreme passion. The defendant testified that he was "screaming and swearing" when he fired the fatal shot.

Here, in contrast, the evidence demonstrates neither legal provocation by Reyna nor that appellant was in a state of rage or extreme passion. Reyna testified to a brief argument with appellant over her "never [being] home." This was followed by appellant's pushing Reyna and her decision to leave the apartment so the argument "wouldn't turn into something bigger." Lucero testified that the three women planned to go "cruising" to "look[] for guys" and Arguello testified that Reyna had said she and appellant argued about her seeing someone else or being with other men. This evidence did not, however, demonstrate that Reyna taunted appellant with other lovers in general or any one in particular.

Nor does the testimony concerning appellant's actions up to and after he obtained a gun and followed Reyna outside demonstrate that appellant was in an impassioned state. Reyna testified that *she* was angry and got out of the car to "tell

[appellant] off." Lucero testified that appellant said Reyna was not going anywhere just before he shot her, but not that he showed evidence of rage or other emotion. Nothing in the evidence suggests that appellant was in an extreme emotional state, and nothing suggests he was enraged by tales of his girlfriend's infidelity, rather than simply upset that she would not do as she was told.

Appellant asks us to find analogous the situations in *People v. Borchers* (1958) 50 Cal.2d 321 and *People v. Berry* (1976) 18 Cal.3d 509. As appellant concedes, both cases involved provocation generated by "a series of events over a considerable period of time." (*People v. Borchers*, *supra*, at p. 328.) In *Berry*, the victim, the defendant's wife, engaged in a "two-week period of provacatory conduct," including taunting the defendant with her infidelity while they were engaged in sexual activity. (*People v. Berry*, *supra*, at p. 509.) A psychiatrist gave expert testimony that the effect of the victim's conduct was to provoke the defendant to a state of "uncontrollable rage," rendering him "completely under the sway of passion." (*Id*. at p. 514.) In *Borchers*, the appellate court upheld the trial court's reduction of a jury's verdict from second degree murder to voluntary manslaughter where the evidence included the victim's admitted infidelity and transfers of defendant's money to her lover. The killing occurred immediately after the victim solicited the defendant to shoot her, her child, and himself, and pointed a gun at the defendant and herself.

The record below reveals facts substantially dissimilar from those in *Berry* or *Borchers*. At most, the underlying evidence indicates that Reyna went out with her girlfriends on occasion to "look for guys." Nothing suggests that she embarked on a series of deliberate actions designed to provoke a passionate response. Such evidence as there was suggests that, to the contrary, she attempted to avoid antagonizing appellant by staying away from him and, on the day in question, leaving the apartment when their argument was in its early stages, before it could

get out of hand. Moreover, in both *Borchers* and *Berry*, the defendants testified to their mental state, and the *Berry* court found it "significant that both defendant and [the psychiatrist] testified that the former was in the heat of passion under an uncontrollable rage when he killed [his wife]." (*People v. Berry*, *supra*, 18 Cal.3d at pp. 515-516.) Here, in contrast, appellant neither testified nor presented expert psychiatric testimony as to his mental state.

The situation in *People v. Cole* (2004) 33 Cal.4th 1158 is more to the point. There, the defendant and the victim, Mary Ann, "had a tumultuous relationship" in which "[t]hey bickered and argued, and their regular screaming matches, punctuated by profanities, were often heard by family and neighbors." (*Id.* at p. 1171.) On the day of the homicide, the defendant testified that he had been drinking heavily. He came home late and they argued about where he had been and where he would sleep. Mary Ann threatened to cut or stab him with a knife if he remained. While Mary Ann was sitting on the bed, the defendant threw a plastic container of gasoline on her, and lit her on fire with a cigarette lighter. Before she died, Mary Ann told investigators "that she and defendant had argued earlier that evening, that defendant was extremely jealous of her, that he had followed her around all day, and that he thought she was cheating on him." (*Id*. at p. 1172.)

On these facts, the defense did not ask for a voluntary manslaughter instruction, and the Supreme Court held that none was necessary because there was insufficient evidence of provocation by the victim. "While defendant and Mary Ann had argued, Mary Ann was in bed when defendant began his physical assault by pouring gasoline on her. Furthermore, between defendant and Mary Ann, bickering, yelling, and cursing were the norm. Their conduct that evening apparently was not different than on the many other occasions on which they had argued in their five-year relationship. Neither was defendant's drinking on the day

of the fire different than on any other day. Accordingly, the trial court did not err in failing to instruct on voluntary manslaughter based on heat of passion." (*People v. Cole*, *supra*, 33 Cal.4th at p. 1216.) Distinguishing *People v. Berry*, the court said: "in contrast to the facts of *Berry*, defendant and Mary Ann's five-year relationship was filled with excessive drinking and fighting, sometimes violently, and their argument on the night of the fire was nothing out of ordinary." (*Id*. at pp. 1216-1217.)

As the Supreme Court makes clear, a defendant cannot claim provocation when the evidence points to an everyday quarrel or ordinary bickering. Whatever the nature of Reyna's contacts with other men, the couple's argument on the day of the shooting was not indicative of provocative conduct on her part or escalating rage on his. As the court and trial counsel agreed, there was no basis for giving voluntary manslaughter instructions.

II

In his original appeal, appellant argued that the trial court should have instructed the jury on assault with a deadly weapon. He claimed the latter was a lesser included offense of the former *if* the enhancement for use of a firearm were included as part of the attempted murder charge.

In his original brief, appellant conceded that the Supreme Court decided this issue unfavorably to his position in *People v. Wolcott*, *supra*, 34 Cal.3d 92, which held that the determination whether one offense is necessarily included in another must be made on the basis of the elements of the offenses charged, without considering any accompanying enhancements. He contended, however, that the holding must be reexamined in light of recent United States Supreme Court decisions such as *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) holding that facts, other than

a prior conviction, that increase the maximum penalty for a crime must, if not admitted by the defendant, be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt. Appellant's contention in this regard was primarily based on the California Supreme Court decision in *People v. Seel* (2004) 34 Cal.4th 535 in which the *Apprendi/Blakely* rule led our Supreme Court to reexamine an earlier holding -- in *People v. Bright* (1996) 12 Cal.4th 652 -- that section 664, which prescribes a sentence of life imprisonment for an attempt to commit murder "willfully, deliberately, and premeditatedly," did not establish a greater degree of attempted murder but was merely a penalty provision to which jeopardy protections did not apply.[6] The defendant in *Seel* had been convicted of attempted first degree murder and the Court of Appeal, finding no substantial evidence of premeditation and deliberation, reversed and remanded for retrial on the section 664 allegation in accordance with *Bright*. (*People v. Seel, supra*, 34 Cal.4th at p. 540.) After review of the United States Supreme Court's definition of elements of a crime in *Apprendi/Blakely*, our Supreme Court concluded that *Bright* must be overturned: "*Apprendi* compels the conclusion that section 664(a) constitutes an element of the offense." (*People v. Seel*, *supra,* 34 Cal.4th at p. 549.) "By 'expos[ing] the defendant to a greater punishment than that authorized by the jury's guilty verdict' [citation], section 664(a) is 'the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict.'" (34 Cal.4th at p. 548, quoting *Apprendi*, *supra,* 530 U.S. at p. 494.) "Because the section 664(a) allegation effectively placed defendant in jeopardy for an 'offense,'" the Court of Appeal's determination of evidentiary

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6 Section 664, subdivision (a) provides in pertinent part: "If the crime attempted is willful, deliberate, and premeditated murder, . . . the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole."

insufficiency constituted an acquittal for double jeopardy purposes and barred retrial. (34 Cal.4th at p. 550.)

In his original appeal, appellant contended that *Apprendi* and *Blakely* similarly undermined the California Supreme Court's decision in *Wolcott* to treat sentence enhancing factors as qualitatively different than the elements of the underlying offense. In *People v. Sloan, supra*, 42 Cal.4th 110 and *People v. Izaguirre, supra*, 42 Cal.4th 126, the Supreme Court undertook a reexamination of authorities in this area in light of *Apprendi/Blakely* and *Seel*. It concluded that as long as "all of the enhancement allegations in question were submitted to the jury and proved true beyond a reasonable doubt[,] [t]here is no Fifth or Sixth Amendment violation within the meaning of the high court's ruling in *Apprendi*" and reaffirmed that "enhancements may not be considered as part of the accusatory pleading for purposes of identifying lesser included offenses." (*People v. Sloan*, 42 Cal.4th at pp. 114, 123.) In accordance with the views expressed by the Supreme Court, we conclude the trial court did not err in failing to instruct on assault with a deadly weapon.

III

In his original brief, appellant cited *Blakely* to support his contention that the trial court's decision to impose the upper term sentence based on judicial findings violated his Sixth Amendment and due process rights to have all facts that increase the penalty for his crimes be decided by the jury. The question whether California's DSL violated the *Apprendi*/*Blakely* rule was the issue in *Black I*. There, our Supreme Court concluded that the judicial fact-finding that occurred when a judge exercised discretion to impose an upper term sentence or consecutive terms under California's DSL did not implicate a defendant's Sixth Amendment right to a jury trial or otherwise violate *Apprendi* or *Blakely*.

In *Cunningham v. California, supra,* 549 U.S. __ [127 S.Ct. 856], the United States Supreme Court disagreed with *Black I,* holding that the DSL violated a defendant's federal constitutional right to a jury trial by permitting the trial judge to make factual findings that subjected the defendant to an upper term sentence. (*Id.* [at p. 871].) In *Apprendi*, the court had 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." (*Apprendi, supra,* 530 U.S. at p. 490, italics added.) In *Blakely,* the court explained that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" (*Blakely, supra,* 542 U.S. at p. 303.) In *Cunningham,* the court found that the middle term prescribed in California's DSL, not the upper term, was the relevant statutory maximum for purposes of determining the constitutionality of sentences imposed. (549 U.S. at p. __ [127 S.Ct. at p. 871].)

Following *Cunningham*, the California Supreme Court revisited its analysis of the DSL in *Black II.* The trial court there had sentenced the defendant to an upper term for the offense of continuous sexual abuse of a child. The court found that the defendant had forced the victim to have intercourse with him on numerous occasions, that the victim was particularly vulnerable because she was the defendant's stepdaughter, that the defendant had abused a position of trust, and that the defendant had inflicted emotional and physical injury on the victim. (41 Cal.4th at p. 807.) The court also stated it had considered other aggravating circumstances set out in the district attorney's sentencing brief, which included: "'[t]he defendant's prior convictions as an adult are numerous or of increasing seriousness'" and "'[t]he defendant has two previous felony convictions . . . .'" (*Id*. at p. 818, fn. 7.) The Supreme Court found the defendant's use of force

supported by the jury's verdict and his criminal history supported by the unchallenged assertions of the probation report. (*Id*. at pp. 816, 818, fn 7.) Noting that "[u]nder California's determinate sentencing system, the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term," the court held: "[A]s long as a single aggravating circumstance that renders a defendant *eligible* for the upper term sentence has been established in accordance with the requirements of *Apprendi* and its progeny, any additional fact finding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." (*Id*. at pp. 812, 813.) As long as a defendant is eligible for the upper term, "the federal Constitution permits the trial court to rely upon any number of aggravating circumstances in exercising its discretion to select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those circumstances have been found to be true by a jury." (*Id*. at p. 813.) Accordingly, "if one aggravating circumstance has been established in accordance with the constitutional requirements set forth in *Blakely*, the defendant is not 'legally entitled' to the middle term sentence, . . . the upper term sentence is the 'statutory maximum,'" and "judicial fact finding on . . . additional aggravating circumstances is not unconstitutional." (*Id*. at pp. 813, 815.)

Here, the court relied on the fact that appellant was on parole at the time he committed the underlying offenses and on his "poor performance" on parole to justify the upper term. Appellant concedes that under *Black II*, the existence of a single appropriate factor makes appellant's statutory maximum sentence the upper term for purposes of the *Apprendi*/*Blakely* rule. Appellant contends, however, that

(1) he was entitled to a jury trial on both of the factors used to increase his sentence and (2) the existence of these factors was not supported by the record.[7]

With respect to the first contention, the United States Supreme Court stated in both *Apprendi* and *Blakely* that the "the fact of a prior conviction" is an exception to the rule that facts used to increase a sentence must be submitted to the jury or proved beyond a reasonable doubt. (*Apprendi*, *supra*, 530 U.S. at p. 490; *Blakely*, *supra*, 542 U.S. at p. 301.)[8] In *Cunningham*, the court reiterated that the *Apprendi*/*Blakely* rule includes an exception for "a prior conviction." (549 U.S. __ [127 S.Ct. at p. 873].) Our Supreme Court has said that "the *Almendarez-Torres* exception is not limited simply to the bare fact of a defendant's prior conviction." (*People v. McGee* (2006) 38 Cal.4th 682, 704, italics omitted.) The court explained that *Apprendi* "does not preclude a court from making sentencing determinations related to a defendant's recidivism" (*id*. at p. 707), but instead permits "'"the type of inquiry that judges traditionally perform as part of the sentencing function."'" (*Id*. at p. 705, quoting *People v. Kelii* (1999) 21 Cal.4th 452, 456.) Consistent with this view, California courts have interpreted the *Almendarez-Torres* exception broadly to include all "matters relating to 'recidivism.'" (*People v. Thomas* (2001) 91 Cal.App.4th 212, 221 [applying

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[7] Appellant additionally challenges certain aspects of the Supreme Court's decisions in *Black II* and *Sandoval*, contending that *Blakely* does not support "bifurcation" of the sentencing determination, that *Black II* and *Sandoval* create ex post facto and due process problems due to their reinterpretation of the DSL, and that reviewing courts should not presume the trial court would have reached the same sentencing decision had it been aware of the *Black II* and *Sandoval* interpretation of the DSL. As appellant acknowledges, we are bound by Supreme Court precedent, and cannot reexamine issues resolved in *Black II* and *Sandoval*.

[8] This exception had it origins in the high court's decision in *Almendarez-Torres v. United States* (1998) 523 U.S. 224 and is therefore generally referred to as the "*Almendarez-Torres* exception."

exception to judicial finding that defendant had served prior prison terms]; accord *People v. Velasquez* (2007) 152 Cal.App.4th 1503, 1514-1515 [applying exception to judicial finding that defendant had served a prior prison term and that his prior adult convictions were numerous].) In *Black II*, the court agreed with this line of authority, holding that a jury need not be asked to decide whether a defendant's prior convictions were numerous or of increasing seriousness because determination of the number, dates, and relative seriousness of prior convictions was a "type of determination . . . 'quite different from the resolution of issues submitted to a jury, and . . . one more typically and appropriately undertaken by a court.'" (41 Cal.4th at pp. 819-820, quoting *People v. McGee*, *supra*, 38 Cal.4th at p. 706.)[9] In *People v. Yim* (2007) 152 Cal.App.4th 366, 371, the court specifically held that the defendant's parole status and performance on parole are recidivism-related matters and thus fall under the exception. Based on these authorities, we conclude neither appellant's status as a parolee nor his performance on parole was an issue that required a jury trial.

As to appellant's contention that the factors were not supported by the record, the probation report stated he was on parole at the time of the report's preparation with a scheduled termination date of August 27, 2007, and that he had performed poorly on parole. Appellant characterizes such reports as "incomplete" and "inaccurate" and contends they should not be relied on. Use of a probation report to support judicial findings at a sentencing hearing was approved in *Black II*, where the defendant argued that "hearsay statements" contained in the probation

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9 The court similarly rejected the defendant's contention that recidivism-related matters, "even if properly determined by the trial court, must be proved beyond a reasonable doubt": "'[I]t is well established that a court may find the fact of a prior conviction by a preponderance of the evidence.'" (41 Cal.4th at p. 820, fn. 9, quoting *U.S. v. Barrero* (2d Cir. 2005) 425 F.3d 154, 157.)

report were "insufficient as a matter of law to prove the prior convictions beyond a reasonable doubt." (41 Cal.4th at p. 820, fn. 9.) The court disagreed: "On appellate review, a trial court's reasons for its sentencing choice are upheld if 'supported by available, appropriate, relevant evidence. . . . .' [Citations.] . . . [The trial court's] conclusion that defendant's prior convictions were numerous or of increasing seriousness is supported by the probation report . . . ." (*Id.* at pp. 818-819, fn. 7, quoting *People v. Garcia* (1995) 32 Cal.App.4th 1756, 1775; see also Cal. Rules of Court, rule 4.420(b).) Moreover, when the court announced its intention to impose the upper term based on the probation report's findings concerning appellant's parole status and poor performance on parole, appellant disputed that he had performed poorly, but did not dispute that he was on parole at the time of the offense. As appellant raised no objection when the trial court announced its intention to rely on the probation report at the sentencing hearing and did not challenge the report's statement that he was on parole at the time he committed the charged offenses, any objection that might have been raised has been forfeited. (*People v. Scott* (1994) 9 Cal.4th 331, 351-353.) Assuming the trial court erred in relying on the second factor -- that appellant performed poorly on parole -- inclusion of an improper aggravating factor 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.'" (*People v. Coleman* (1989) 48 Cal.3d 112, 166, quoting *People v. Avalos* (1984) 37 Cal.3d 216, 233.) As a single aggravating factor is sufficient to justify the upper term (*People v. Osband* (1996) 13 Cal.4th 622, 728-729) and there were no mitigating factors, it is not reasonably probable that a different sentence would have been imposed had parole performance not been considered by the trial court.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.