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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>BRADLEY KISU BROWN,<br><br>Defendant and Appellant. | B187952<br><br>(Los Angeles County<br>Super. Ct. No. LA049911) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard Kirschner, Judge. Affirmed as modified and remanded with directions.

Linda Casey Mackey, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

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Bradley Kisu Brown was convicted of assault with a deadly weapon, with true findings on allegations that he had served two prior prison terms. (Pen. Code, §§ 245, subd. (a)(1), 667.5, subd. (b).)[1] Brown was sentenced to state prison for a term of five years (upper term of four years plus one year for one prior prison term). He appeals, claiming (I) the trial court should have granted his request for a continuance so that he could retain private counsel, and (II) his upper term sentence must be vacated. We agree that the upper term sentence must be vacated (*Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856]) but otherwise reject Brown's claim of error, modify the judgment, affirm as modified, and remand with directions to enter a corrected abstract of judgment.

## FACTS

Brown gave a "crumbled" $20 bill to Razia Nazir, a convenience store clerk, for a phone card, then left the store. Nazir, believing the bill was a fake, followed Brown to his car, telling him "take your money and give me back the card." When Nazir put her arm into Brown's open window to give him the bill, Brown rolled up the window (trapping Nazir's arm) and drove off, forcing Nazir to run along side the car. Brown increased his speed and drove some distance before rolling down his window so Nazir could withdraw her arm. As Nazir lay on the ground, Brown made a U-turn and drove toward her. A woman who had been watching pulled Nazir out of the way and Brown fled. When Brown was apprehended, he had a phone card similar to the one he bought from Nazir.

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[1] All section references are to the Penal Code.

## DISCUSSION

### I.

Brown contends the trial court should have granted his request for a continuance so that he could retain private counsel. We disagree.

### A.

The case was called for trial on Monday, November 14, 2005. In the morning, the court considered several motions while it awaited the arrival of a panel of prospective jurors. When the jurors arrived just before lunch, they were excused until 2:00 p.m. At 2:10 p.m., the court pre-instructed the jury, questioned the prospective jurors, then permitted defense counsel (Deputy Public Defender Michael Many) to question the jurors before adjourning for the day.

On Tuesday morning, Many moved for a mistrial, contending among other things that the court had repeatedly interrupted her voir dire, which she felt communicated to the jurors that she was "acting improperly or unprofessionally." The court explained that it had interrupted when Many's questions were "unfocused," "not well articulated," or based on misstatements of law, and noted that "there [was only] one juror who . . . expressed his concern about [Many, and] no indication that any other juror fel[t] that way."[2]

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[2] The juror who commented about Many (he said he could be fair and impartial about her but that he "would be fired in two seconds" if he acted like her in his job) assured the court he would base his decision on the evidence. Moreover, we have reviewed Many's voir dire and note that the court's interruptions were necessary and appropriate (for example, when Many began by telling the jurors she was going to ask some questions and also "address some constitutional issues that are . . . the basis of criminal prosecutions and criminal trials") or, for another example, when Many was lecturing rather than inquiring ("And so what we're asking jurors to do . . . is

The court denied the mistrial motion, stating it would instruct the panel "on that issue."

Many then informed the court that Brown wanted a continuance so he could "hire private counsel." When the court denied the request without comment, Brown said, "I want a *Marsden.*" (*People v. Marsden* (1970) 2 Cal.3d 118.) At the hearing that followed, Brown said, "I don't believe that [Many's] ineffective or anything," just that there were "certain motions, subpoenas and witnesses [he] felt . . . were vital" but she did not. He complained that the prosecutor had not turned over a videotape earlier than it was produced (although Many told the court that Brown had declined her offer to seek a continuance on that ground), and expressed concern that the jurors were "possibly prejudiced against" Many due to the manner in which she conducted voir dire. He said he wanted to retain "personal counsel."

The court acknowledged that one juror had expressed a negative response to Many's questions, then explained to Brown that the jurors would be instructed about their duties. The court denied the *Marsden* motion, and also denied Brown's renewed request for a continuance to enable him to obtain private counsel (on the grounds that it was "made at the 11th hour" during jury selection, and that there was "no basis for it"). When the jurors returned to the courtroom, the court explained that it was sometimes necessary to admonish counsel and that they were not to be prejudiced by the court's words or actions with regard to the lawyers. Brown's further request for a continuance (or *Marsden* relief) at the end of trial was also denied.

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come to the table or this process with the understanding that the prosecutor has a version of events").

**B.**

We reject Brown's contention that it was error for the court to "rely on the *Marsden* analysis" because he was seeking a continuance to obtain private counsel, not the appointment of another lawyer. The record shows that the trial court took Brown at his word -- that both issues were raised -- and gave due consideration to both requests.

Brown's first request was for a continuance to "hire private counsel." When the request was denied, he asked for a "*Marsden*" hearing, and told the court he was "requesting that Miss Many . . . be relieved as [his] attorney and that another attorney be *appointed* to represent [him.]" (Italics added.) The court then heard and denied Brown's *Marsden* motion, which is hardly surprising in light of Brown's admission that he did not believe Many was ineffective. (*People v. Cole* (2004) 33 Cal.4th 1158, 1190; *People v. Smith* (2005) 135 Cal.App.4th 914, 926; *People v. Lucky* (1988) 45 Cal.3d 259, 281-282.) The court then heard Many's renewed request for a continuance to hire private counsel and denied it as untimely, again hardly surprising in light of the fact that trial had commenced and no good cause had been shown. (*People v. Ortiz* (1990) 51 Cal.3d 975, 982-987; *People v. Courts* (1985) 37 Cal.3d 784, 789-791; *People v. Blake* (1980) 105 Cal.App.3d 619, 623-624.)

**II.**

Brown contends his upper term sentence cannot stand. (*Cunningham v. California, supra,* ___ U.S. ___ [127 S.Ct. 856].) We agree.

The trial court selected the high term sentence because Brown had "engaged in a continuing, escalating pattern of criminal conduct, which indicates a serious danger to society and [he was] also on parole at the time of this offense," neither of which was charged or found true by the jury. For this reason, the sentence cannot stand.[3]

On February 13, 2007, Brown filed a supplemental letter brief to make sure we were aware of *Cunningham* but the Attorney General has not responded and both sides waived oral argument. We treat this as a concession that Brown's sentence must be modified to mid-term.

## DISPOSITION

Brown's sentence on the assault is modified by reducing it to the mid-term of three years and, as modified, the judgment is affirmed and the cause is

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[3] We reject the Attorney General's contention (raised pre-*Cunningham* in his respondent's brief) that this issue was forfeited by Brown's failure to raise it below. (*People v. Vera* (1997) 15 Cal.4th 269, 276-278; *People v. Saunders* (1993) 5 Cal.4th 580, 589, fn. 5.)

remanded to the trial court with directions to issue a corrected abstract of judgment and forward it to the Department of Corrections.

NOT TO BE PUBLISHED.

VOGEL, Acting P.J.

We concur:

ROTHSCHILD, J.

JACKSON, J.*

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*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.