

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JULES BUCKLEY,

Defendant and Appellant.

In re JULES BUCKLEY,

on Habeas Corpus.

E039664

(Super.Ct.No. FSB047392)

OPINION

E041155

(Super.Ct.No. FSB047392)

APPEAL from the Superior Court of San Bernardino County. Brian S. McCarville, Judge. Affirmed in part and reversed in part with directions.

ORIGINAL PROCEEDING: Petition for writ of habeas corpus. Brian S. McCarville, Judge. Petition denied.

Allison H. Ting, 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, Gary W. Schons, Senior Assistant Attorney General, Jeffrey J. Koch, Supervising Deputy Attorney General, and Scott C. Taylor, Deputy Attorney General, for Plaintiff and Respondent.

Prior to trial, defendant admitted that he had suffered a prior conviction of spousal abuse within the meaning of Penal Code section 273.5, subdivision (e)¹ and that he had suffered a prior strike conviction within the meaning of sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d). A jury thereafter found defendant guilty of corporal injury to a spouse. (§ 273.5, subd. (a).) The jury also found true that defendant had personally inflicted great bodily injury on the victim within the meaning of section 12022.7, subdivision (a). As a result, defendant was sentenced to a total term of 13 years in state prison as follows: the upper term of five years on the substantive count, doubled due to the prior strike, plus three years consecutive on the great bodily injury enhancement.

In his appeal, defendant contends (1) his counsel was ineffective for failing to object to the imposition of the upper term, and (2) he was deprived of his federal and state constitutional rights to a jury trial and due process under *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*) and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] (*Apprendi*) when the trial

¹ All future statutory references are to the Penal Code unless otherwise stated.

court imposed the upper term. In his petition for writ of habeas corpus, defendant claims his counsel was ineffective for allegedly refusing to allow him to testify at his trial.

We deny defendant's writ of habeas corpus petition; however, we agree, as we must, that defendant's upper term sentence runs afoul of *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856] (*Cunningham*).²

I

FACTUAL AND PROCEDURAL BACKGROUND

On April 2, 2004, defendant and Kentrell Buckley were married, and Kentrell was six months pregnant with their first child. They were both unemployed, receiving supplemental social security funds, and living in a single motel room in San Bernardino County. They had a "loving relationship."

About 9:00 p.m., Kentrell was cooking meat in a skillet on a little stove on the floor of the motel room. While cooking the meat, she got into in argument with defendant because he accused her of cheating on him. He became very upset and kicked the skillet, causing hot grease to spill onto Kentrell's legs.³ The grease burned her legs very badly.

² Because we remand the matter for a new sentencing hearing, we need not address defendant's contention that his counsel was ineffective for failing to object to the imposition of the upper term.

³ At trial, Kentrell testified that as she uncrossed her legs to get up, she accidentally kicked the skillet with her foot and the grease spilled forward onto her legs and partially onto her feet. She claimed that she felt heat on her toes, but her toes did not get burned.

Kentrell called her mother, Samantha Sims, to pick her up and to take her to the hospital. She told Sims that she had burned her legs accidentally, because she was afraid defendant would hit her again. When her mother arrived, defendant answered the door and stated Kentrell had been burned. Kentrell's mother did not see anyone in the room but Kentrell and defendant.⁴ Kentrell looked terrible and was in excruciating pain. Kentrell's mother asked defendant to take Kentrell to the hospital, but defendant refused, stating he had "something to do." Defendant, however, helped Kentrell get into her mother's car. Kentrell told her mother that she had burned herself with hot grease while she was cooking on the floor.

On April 14, 2004, Kentrell admitted to her mother that defendant had burned her with the grease. Kentrell told her that defendant came out of the bathroom, said something about her cheating on him, and kicked the hot grease onto her legs.⁵ Sims

⁴ At trial, Kentrell testified that her friend Prince Matthews and his wife Sandra were also in the motel room. She claimed that Matthews was in the bathroom when her mother arrived, and Sandra was in the van. She further asserted that she did not ask defendant for a ride to the hospital because they did not have a car. She stated that defendant did not go to the hospital because he did not like hospitals and because she (Kentrell) wanted him to stay at home. She claimed that she was not afraid of defendant and that the incident was an accident.

⁵ Kentrell testified that she did not remember telling her mother that defendant was mad and had kicked the skillet onto her legs. She also did not remember going to the police and talking to Officer Corral on April 14, 2004. She claimed that after she discovered that defendant had a girlfriend, she (Kentrell) went to the police station and made a false report. She told the police that defendant thought she was flirting with Prince Matthews, so defendant walked past her and kicked the skillet handle. Kentrell further testified that she was being untruthful when she stated that she and defendant never argued, because she was afraid that something might happen to her. She acknowledged that she still loved defendant.

then took her daughter to the police station to report the incident. Kentrell said that she had lied earlier about what had happened because defendant told her not to tell anyone the truth. Sims testified that she had no reason to “make up a story” against defendant and that Kentrell had no reason to be afraid of her mother or to be afraid to testify.⁶

A prior incident of spousal abuse was admitted at trial. In 1999, defendant accused his then-girlfriend of cheating on him and bit her on the cheek hard enough to draw blood. She called the police, and defendant fled to a neighbor’s house.

Prince Matthews, a friend of defendant, testified on behalf of the defense. He stated that defendant was a minister and that he and defendant were rappers in a Gospel music band. On April 2, 2004, he and his ex-wife were at defendant and Kentrell’s motel room for about four hours. They had set up music equipment in the bathroom and were practicing for an upcoming concert at a church in Victorville. Defendant and Matthews were in the bathroom when he heard a scream. Defendant left the bathroom, and Matthews followed almost immediately thereafter. Matthews saw Kentrell sitting on the floor; a skillet was on top of a burner on a box, a puddle of grease was on the carpet, and it looked like Kentrell’s legs were burned. Neither Matthews nor defendant was aware that Kentrell had been cooking, although Matthews had smelled ground beef cooking. Defendant helped Kentrell into bed while she called her mother. About 20 to 25 minutes later, Kentrell went to the hospital with her mother, and defendant went back inside and continued to make music with Matthews.

⁶ Kentrell testified that her mother did not believe that Kentrell had burned her own legs and that her mother had blamed defendant because she did not like him.

Matthews stated that he did not see defendant kick the skillet and was not aware of any anger, yelling, or fighting on defendant's part during the four hours he was there. Defendant never told Matthews he was jealous of him, and defendant never accused Matthews of having anything to do with Kentrell. Matthews also claimed that Kentrell never made a pass at him.

Matthews admitted that he had prior criminal convictions for assault with a deadly weapon and giving false information to a police officer.

Robert Board, a defense investigator, also testified on behalf of the defense. He stated that when he interviewed Kentrell at her apartment on March 5, 2005, she said that she was cooking tacos on an electric hot plate that was sitting on a cardboard box. She did not know exactly how she did it, but she accidentally hit the skillet. The skillet fell over, and the grease burned her legs. She did not say that defendant had burned her. She claimed that she did not fill out a police report against defendant and did not recall ever going to the police station. She further told Board that there were three people in the room: herself, defendant, and Matthews.

II

DISCUSSION

A. *Defendant's Appeal*

Citing *Blakely* and *Apprendi*, defendant contends he was denied his federal Sixth Amendment constitutional right to a jury trial when the court imposed the upper term of five years on his substantive offense of corporal injury to a spouse. (§ 273.5, subd. (a)). In light of the United States Supreme Court's recent decision in *Cunningham*, we

conclude the court's imposition of the upper term based on judicial factfinding denied defendant his federal constitutional rights to a jury trial and proof beyond a reasonable doubt, and thus the matter must be remanded for resentencing on the substantive offense.

At the sentencing hearing the court stated: "In weighing the aggravating factors and mitigating factors, the aggravating outweigh the mitigating. In accordance with [California Rules of Court, rules] 4.421(b) subdivisions (1), (2), and (5), the Court chooses the aggravated term." The three circumstances in aggravation cited by the court, per the recommendation of the probation report, were that defendant had engaged in violent conduct, which indicated a danger to society (Cal. Rules of Court, rule 4.421(b)(1))⁷; defendant's prior convictions as an adult are of increasing seriousness (rule 4.421(b)(2)); and defendant's prior performance on summary probation was unsatisfactory (rule 4.421(b)(3)).

Under California's determinate sentencing law (DSL), where a penal statute provides for three possible prison terms for a particular offense, the sentencing court is required to impose the middle term unless it finds, by a preponderance of the evidence, that "there are circumstances in aggravation or mitigation of the crime." (§ 1170, subd. (b); see also rule 4.420(a) & (b).) "Selection 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." (Rule 4.420(b).) "Generally, determination of the appropriate term is within the trial court's broad discretion [citations]." (*People v. Lamb*

⁷ All further rule references are to the California Rules of Court.

(1988) 206 Cal.App.3d 397, 401.) “A single aggravating factor is sufficient to impose an aggravated upper prison term where the aggravating factor outweighs the cumulative effect of all mitigating factors” (*People v. Nevill* (1985) 167 Cal.App.3d 198, 202.) The sentencing court need not list all applicable aggravating factors (*ibid.*) or state reasons for rejecting mitigating factors. (*People v. Combs* (1986) 184 Cal.App.3d 508, 511.)

In *Cunningham* the United States Supreme Court held that California’s DSL, by placing sentence-elevating factfinding within the trial judge’s province, violates a criminal defendant’s right to a jury trial safeguarded by the Sixth and Fourteenth Amendments to the federal Constitution. (*Cunningham, supra*, 127 S.Ct. at p. 860.) *Cunningham* explained that because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence rather than by proof beyond a reasonable doubt, the DSL violates the bright-line rule in *Apprendi* and that any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. (*Cunningham*, at p. 868.) Quoting *Blakely, supra*, 542 U.S. at pages 303-304 for the proposition 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,” the *Cunningham* court concluded that “[i]n accord with *Blakely*, therefore, the middle term prescribed in California statutes, not the upper term, is the relevant statutory maximum.” (*Cunningham*, at p. 868.)

Here, the jury's verdict alone limited the permissible sentence on the substantive offense of spousal abuse to the middle term of four years. (See *Cunningham, supra*, 127 S.Ct. at p. 860.) The additional judicial factfinding, however, resulted in the upper term in violation of defendant's right to a jury trial safeguarded by the Sixth and Fourteenth Amendments to the federal Constitution. (*Cunningham*, at p. 860.)

The People assert that defendant forfeited his claim of *Blakely* error by failing to assert it below. Defendant responds that the claim was not forfeited because it would have been futile for his counsel to have asserted that challenge in the trial court. Until very recently, the holding of the California Supreme Court in *People v. Black* (2005) 35 Cal.4th 1238 compelled the conclusion that a criminal defendant's constitutional rights are not abridged when a court sentences him or her to the upper term under California's DSL. Our Supreme Court decided *Black* on June 20, 2005, about five months before defendant's sentencing hearing. At that time, the trial court was compelled to follow *Black*. Therefore, any *Blakely* objection that defense counsel might have made concerning the trial court's imposition of an upper term sentence would have been futile. Under these circumstances, defendant's *Blakely* challenge was not forfeited. (*People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6; *People v. Turner* (1990) 50 Cal.3d 668, 703-704.)

The People also argue that in this case we need not reverse the court's upper term sentence because the recidivism exception applies. They also assert that any *Cunningham* error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24, because the jury would have found some or all of the aggravating

factors true had they been presented to the jury for determination. These contentions are unavailing.

The court imposed the upper term sentence in this case because it found three aggravating factors and no mitigating factors. It is true that a single aggravating factor is sufficient to impose an aggravated upper prison term where the aggravating factor outweighs the cumulative effect of all mitigating factors (*People v. Nevill, supra*, 167 Cal.App.3d at p. 202); however, the court is prohibited from using the truth of the prior convictions under the prohibition against the dual use of facts. A sentencing court may not rely on the same fact to impose an aggravated term and an enhancement. (§ 1170, subd. (b); rule 4.420(c).) The court here relied on defendant's prior strike conviction and prior spousal abuse conviction to enhance his sentence; the court also imposed a consecutive three years for the great bodily injury enhancement. If the court were to use the prior convictions to aggravate defendant's sentence, this would be an impermissible dual use of facts. (*People v. Bowen* (1992) 11 Cal.App.4th 102, 105.) In addition, because we can only speculate which, if any, of the aggravating factors relied on by the court the jury would have found true and what effect those findings would have had on the court at sentencing, we cannot find the *Blakely* error to have been harmless beyond a reasonable doubt.

Accordingly, we vacate the court's imposition of the upper term sentence and remand this matter for further proceedings not inconsistent with this opinion and *Cunningham*.

B. *Defendant's Petition for Writ of Habeas Corpus*

Defendant contends he was denied effective assistance of counsel because his counsel purportedly refused to allow him to testify at trial.

1. *Additional Facts*

Attached to defendant's petition is his declaration stating that after Kentrell's mother finished testifying, he "started to raise [his] hand," so he could "get on the stand to speak [his] side of the story," but his trial counsel grabbed his hand and pulled it down, telling him that he did not have the right to speak and that he was not going to get "on the stand to speak at all" He told her that he had a right to speak, but Attorney Torres told him "no." Attached to defendant's petition is also a declaration from Attorney Torres, indicating, in relevant part, that she did not remember defendant raising his hand and asking her for the opportunity to testify. Attorney Torres further stated, "[I]f [defendant] had wanted to testify, even though it might not be in his best interest, . . . I nevertheless would have honored and respected his right to testify."

Following the testimony of Kentrell's mother, the prosecution called one more witness and then rested its case. That afternoon, the defense called one witness. Before court was adjourned, Attorney Torres indicated to the court that the defense might present one other witness and possibly the defense investigator. There was no complaint from defendant or any indication the he wanted to testify. The following morning, before the jury was brought in, the court asked defense counsel whether there was "[a]nything to take up on behalf of defense[.]" Attorney Torres indicated there was not, and again there was no complaint or objection from defendant. Thereafter, the defense completed

presenting its case and rested. Defendant still did not complain, object, or indicate that he wanted to testify.

During the discussion of jury instructions, when it was indicated that the court would be giving CALJIC Nos. 2.60 and 2.61 regarding a defendant not testifying, defendant said nothing. Throughout the remainder of the trial, defendant never told the court that he was deprived of his right to testify. It was only at the sentencing hearing, some four months later, that he claimed he never received an opportunity to testify at trial.

Because defendant asserts his counsel prevented him from testifying, his claim may be based upon ineffective assistance of counsel as well as denial of his right to testify. Construed either way, we find no error.

2. *Analysis*

In order to establish a claim of ineffective assistance of counsel, defendant must demonstrate “(1) counsel’s performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficient representation prejudiced the defendant, i.e., there is a ‘reasonable probability’ that, but for counsel’s failings, defendant would have obtained a more favorable result. [Citations.] A ‘reasonable probability’ is one that is enough to undermine confidence in the outcome. [Citations.]” (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541, citing, among other cases, *Strickland v. Washington* (1984) 466 U.S. 668 [104 S.Ct. 2052, 80 L.Ed.2d 674].) Hence, such a claim has two components: deficient performance and

prejudice. If defendant fails to establish either component, his claim fails. (*Strickland*, at p. 687; *People v. Williams* (1997) 16 Cal.4th 153, 214-215.)

In evaluating trial counsel's actions, "[a] court must indulge a strong presumption that counsel's acts were within the wide range of reasonable professional assistance. [Citation.] Thus, a defendant must overcome the presumption that the challenged action might be considered sound trial strategy under the circumstances. [Citation.]" (*People v. Dennis, supra*, 17 Cal.4th at p. 541.) Although trial counsel has the authority to control the judicial proceedings, that authority may not be used to deprive a defendant of "certain fundamental rights." (*People v. Brown* (1986) 179 Cal.App.3d 207, 215.) These rights include the right to testify at his trial, even, if necessary, against the advice of counsel. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1332; *People v. Robles* (1970) 2 Cal.3d 205, 214-215.)

It is well established that a criminal defendant's right to testify is a fundamental right; however, the right must be "timely" asserted. (*People v. Robles, supra*, 2 Cal.3d at p. 215.) That is, a defendant must apprise the court that he or she desires to testify at a time *during* the trial proceeding when the right can be accorded to him or her. (*People v. Guillen* (1974) 37 Cal.App.3d 976, 984.)

"While the defendant has the right to testify over his attorney's objection, such right is subject to one significant condition: The defendant must timely and adequately assert his right to testify. [Citation.] Without such an assertion, ' . . . a trial judge may safely assume that a defendant who is ably represented and who does not testify is merely exercising his Fifth Amendment privilege against self-incrimination and is abiding by his

counsel's trial strategy.' [Citations.] When the record fails to show such a demand, a defendant may not await the outcome of the trial and then seek reversal based on his claim that despite expressing to his counsel his desire to testify, he was deprived of that opportunity." (*People v. Hayes* (1991) 229 Cal.App.3d 1226, 1231-1232 (*Hayes*)). Unless the defendant has made a timely demand, the decision whether to permit the defendant to testify "goes to the heart of trial tactics" and therefore "rarely would support a claim of ineffective assistance of counsel." (*People v. Lucas* (1995) 12 Cal.4th 415, 444.)

In *Guillen*, defendant did not testify at trial. He was found guilty and made a motion for new trial. For the first time at the posttrial hearing on his motion, Guillen informed the court that he had wanted to testify but did not do so upon his attorney's advice. The trial court denied the motion. On appeal, the appellate court held the defendant had not timely asserted his fundamental right to testify at a time when the right could have been accorded to him. (*People v. Guillen, supra*, 37 Cal.App.3d at pp. 984-985.) The same holds true here, where defendant first apprised the court that he wanted to testify *four months* after completion of the trial.

In *Hayes*, a court trial, the defendant engaged in several outbursts during the course of the testimony of the victim, in which he expressed anger, claimed the victim was biased and untrustworthy, and attempted to cross-examine the victim directly or argue his case. During these outbursts he made several comments, such as "'Could I speak? Could I speak?'" and stated that he wanted "'to speak on [his own] behalf.'" (*Hayes, supra*, 229 Cal.App.3d at p. 1232, fns. 8 & 9.) Hayes was removed from the

courtroom, the prosecution rested, and then the defense rested without presenting any evidence. Defense counsel confirmed that he never intended to put defendant on the stand to testify. (*Id.* at p. 1231) On appeal, Hayes argued the court denied him his right to testify. The Court of Appeal held that Hayes never adequately or timely asserted his right to testify. His outbursts and statements during the trial, read in context, did not “reflect any unequivocal statement that he wished to take the stand to testify.” (*Id.* at p. 1232.)

In the present matter, the record supports Attorney Torres’s assertion that defendant did not insist he be allowed to testify. Assuming defendant did “raise his hand” and indicate a desire to “get on the stand to speak [his] side of the story” following Sims’s testimony, and assuming his attorney pulled his hand down and told him no, it is reasonable to assume she did so because he did not have the right to testify *at that time*, since the prosecution had not yet rested. As in *Hayes*, these statements by the defendant could be “construed in various ways . . . but do[] not reflect a clear and timely assertion of his desire to take the witness stand.” (*Hayes, supra*, 229 Cal.App.3d at p. 1232, fn. 9.) There is no indication, either in the record or in the writ petition, that defendant ever again indicated a desire to testify. Defendant therefore acquiesced in counsel’s tactical decision to not have him testify, and he does not show his attorney’s representation was deficient in making that tactical decision. We find there was no ineffective assistance of counsel.

III

DISPOSITION

The upper term sentence is vacated and the matter is remanded to the trial court for the limited purpose of resentencing. Consistent with this opinion, *Blakely*, and *Cunningham*, the trial court shall resentence defendant with respect to the substantive offense of spousal abuse. In all other respects, the judgment is affirmed.

The petition for writ of habeas corpus is denied.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

McKINSTER
Acting P.J.

MILLER
J.