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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER J. BYNUM, Defendant and Appellant.	A113782 (Lake County Super. Ct. Nos. CR035737 & CR034808)

Defendant and appellant Christopher J. Bynum contends the 4 year, 8 month sentence imposed following his guilty-plea convictions for petty theft with a prior (Penal Code section 666[1]), inflicting corporeal injury upon his spouse (section 273.5), and ignoring a restraining order (section 166, subdivision (c)(1)), violates his Sixth Amendment right to a jury trial. We affirm.

FACTUAL & PROCEDURAL BACKGROUND

On February 23, 2004, the People filed two Informations against appellant. In case number CR035737, the People charged appellant with one count of burglary of commercial premises (section 459) and one count of petty theft with a prior (sections 484 and 666). These charges stemmed from an incident in November 2003, when police responded to Ray's Food Place in Clearlake on report of a shoplifter. The store manager

[1] Further statutory references are to the Penal Code unless otherwise noted.

reported appellant left the premises with a shopping cart full of un-bagged groceries. The store manager confronted appellant as he was loading the groceries into his vehicle. When the store manager asked if appellant had a receipt for the items, appellant replied, "You got me, take me." Appellant was then detained and later arrested for shoplifting merchandise totaling $303.42.

Charges in the information filed in CR034808, stemmed from another incident in November 2003 when police responded to appellant's residence regarding a reported family dispute. Appellant's spouse, Jill Bynum, reported appellant punched her in the face with a closed fist after provoking an argument. Then appellant threw a coffee cup at her, which hit her on the side of the face. Jill stated she ran for the bathroom but before she was able to take refuge there appellant hit or kicked her in the lower back. The police deputy at the scene observed a laceration, swelling and bruising to the victim's cheek bone. The victim also showed the deputy a portion of her hair which appellant cut off in an earlier incident. She informed the deputy she married appellant in June 2003, and since then had been the victim of approximately thirty incidents of abuse. Appellant was charged as follows: Counts I and III — spousal abuse (section 273.5, subd. (a)); count II — felon in possession of a firearm (section 12021, subd. (a)(1)); count IV — child endangerment (section 273a, subd. (a); counts V and VII — misdemeanor violation of retraining order (section 166, subd. (c)(1)); and, count VI — spousal battery (section 243, subd. (e)(1)).

Subsequently, after various proceedings which do not concern us here, appellant entered a negotiated plea on both cases. At a change of plea hearing on February 6, 2006, appellant agreed to plead guilty to spousal abuse as alleged in count I in case number CR034808. In return the People agreed to dismissal of the balance of the charges in the information with a *Harvey* waiver.[2] In CR035737, appellant pleaded guilty to petty theft with a prior. The People also agreed to dismiss six other cases pending against appellant. The trial court advised appellant of his constitutional rights and appellant waived those

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[2] *People v. Harvey* (1979) 25 Cal.3d 754.

rights. The trial court advised appellant the determinate sentencing range for the offense of spousal abuse is two, three or four years in state prison. Also, the trial court advised appellant the maximum sentence for both offenses (spousal abuse and petty-theft with a prior) is four years and eight months. The police report concerning the incident of spousal abuse, together with its accompanying statements, were admitted without objection as a factual basis for the offense. The trial court accepted the plea and found it had been freely and voluntarily entered.

Appellant was sentenced on March 6, 2006. The hearing began with a request by appellant to withdraw his plea in order to retain and consult with private counsel. Appellant's public defender explained the request was prompted by appellant's disagreement with the probation report's description of the offense conduct, specifically that appellant had punched his wife, threw a coffee cup at her and kicked her in the lower back. Counsel requested a one or two week continuance for appellant to consult with private counsel. The prosecutor objected because the case dated back to 2003 and appellant had been allowed to withdraw a prior plea. The court found there was no good cause to continue the sentencing hearing because appellant had not retained counsel and it was "speculative on his part that one might come in the future." After the court so ruled, appellant took the stand. Appellant denied he punched his wife, threw a coffee cup at her, or kicked her in the back, and stated he "didn't do anything." Appellant stated he pleaded guilty only because he faced charges in a large number of cases and it was in his best interest to plead guilty in order to have them dismissed.

The trial court found probation would not serve the interests of justice, pursuant to section 1203, subdivision (e)(4). The prosecution argued for the upper-term of four years on the section 273.5 conviction because there were no factors in mitigation, appellant having failed to accept responsibility for his actions as indicated by "his testimony today." Additionally, the prosecutor pointed out appellant's "prior convictions as an adult are numerous and increasing in seriousness." The prosecutor also noted appellant engaged in violent conduct representing a danger to society, and that appellant's "prior performance on probation has been abysmal." Defense counsel argued appellant showed

remorse by acknowledging his behavior was caused by his addiction to methamphetamine, and that he and his spouse engaged in physical altercations during the time he was using the drug.

After hearing argument, the trial court found the following factors in aggravation: (1) "the defendant has engaged in violent conduct which indicates he's a danger to society," a finding the court based on "a review of his prior record and on the counts that were dismissed with a Harvey waiver"; (2) "the defendant's prior convictions as an adult are numerous and increasing in seriousness"; (3) "defendant was on probation when the crimes were committed and his prior performance on probation has been unsatisfactory." The trial court noted one factor in mitigation—"the defendant voluntarily acknowledged wrongdoing at an early stage of the criminal process"—but gave that factor little weight "given the number of charges that were dismissed."

Furthermore the trial court stated: "The Court would find that the conditions of the violent conduct and prior convictions are sufficient in aggravation to outweigh the circumstances in mitigation. And should the U.S. Supreme Court decide that the California sentencing scheme is not constitutional with regard to the Court's finding that he was on probation and his prior performance on probation was committed [sic] and strikes those, I would still find the circumstances in aggravation outweigh the circumstances in mitigation both in number and in weight and that the upper term should be imposed as to both cases." In accordance with its findings, the trial court imposed the upper-term of four years on the section 273.5 conviction and a consecutive term of eight months for the theft conviction.

Appellant filed a Notice of Appeal on April 26, 2006. On November 17, 2006, appellate counsel filed a *Wende*[3] brief requesting we conduct an independent review of

[3] *People v. Wende* (1979) 25 Cal.3d 436.

the record. After reviewing the record, we asked the parties on February 9, 2007, to brief the issue of whether *Cunningham*[4] affected this appeal.

DISCUSSION

The parties provided supplemental briefing on the *Cunningham* issue. Appellant contends his sentence offends the rule of *Cunningham* because the upper term was imposed "without jury findings or proof beyond a reasonable doubt." Respondent contends appellant forfeited his Sixth Amendment claim by failing to object on that basis below. Respondent also contends the upper term sentence should be affirmed because it was based in part on appellant's prior convictions. We agree with the latter contention and affirm on that basis.

In *Cunningham*, the high court noted that under California's Determinate Sentencing Law ("DSL") "an upper term sentence may be imposed only when the trial judge finds an aggravating circumstance." (*Cunningham, supra,* 127 S.Ct. at p. 868.) In this regard, "[a]n element of the charged offense, essential to a jury's determination of guilt, or admitted in a defendant's guilty plea, does not qualify as such a circumstance [in aggravation]." (*Ibid*.) "Instead, aggravating circumstances depend on facts found discretely and solely by the judge. In accord with *Blakely*, therefore, the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum." (*Ibid*.) The Court concluded: "Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt [citation], the DSL violates *Apprendi*'s[5]

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4 *Cunningham v. California* (2007) ___ U.S. ___, 127 S.Ct. 856 [holding California's Determinate Sentencing Law violates a defendant's constitutional right to trial by jury because "circumstances in aggravation are found by the judge, not the jury," and that the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum for Sixth Amendment purposes. (*Id.* at p. 868.)

5 *Apprendi v. New Jersey* (2000) 530 U.S. 466. In *Blakely v. Washington* (*Blakely*) (2004) 542 U.S. 296, the high court applied the rule of *Apprendi* to the State of Washington's DSL. The Court concluded the sentence imposed violated petitioner's Sixth Amendment right to a jury trial because he "was sentenced to more than three years

bright-line rule: Except for 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.' [citation]." (*Ibid.*)

The rule of *Apprendi*, *Blakely*, and *Cunningham, supra*, does not apply where imposition of an aggravated term is based on the defendant's prior convictions. The trial court relied on appellants' numerous prior convictions and the fact he "was on probation when the crimes were committed and his prior performance on probation has been unsatisfactory." *Apprendi*, *Blakely*, and *Cunningham* impose no requirement under the Sixth and Fourteenth Amendments that the fact of a prior conviction be admitted or found true by a jury for this factor to be used in sentencing. (*Cunningham, supra*, 127 S.Ct. at p. 868; *Blakely, supra,* 542 U.S. at p. 301; *Apprendi, supra,* 530 U.S. at pp. 488, 490.) To the contrary, in those cases the high court carved out an exception to the jury trial requirement which permits courts to use "the fact of a prior conviction" to increase the penalty for a crime beyond the prescribed statutory maximum. (*Ibid.*) As we read them, all that is required by *Blakely* and *Cunningham* is that the upper term be authorized by one or more of three types of fact: (1) facts found by the jury or reflected in its verdict, (2) facts admitted by the defendant, or (3) the fact of prior convictions. (*Blakely, supra,* 542 U.S. at pp. 301-302; *Cunningham, supra,* 127 S.Ct. at p. 868.) Plus, under well-settled California law only a single aggravating factor is required to impose the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728-729.) Consistent with these requirements, the trial court imposed the upper term based upon the fact of appellant's "numerous prior felony convictions." (California Rules of Court, rule 4.421(b)(2).) Thus, no *Cunningham* error occurred.

Even if we assume there was error because the trial court also relied on other factors in aggravation, any error was harmless beyond a reasonable doubt under

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above the 53-month statutory maximum of the standard range because he had acted with 'deliberate cruelty.' [and] [t]he facts supporting that finding were neither admitted by petitioner nor found by a jury." (*Blakely, supra*, 542 U.S. at p. 303.)

Chapman v. California (1967) 386 U.S. 18. (See *Washington v. Recuenco* (2006) 126 S.Ct. 2546, 2552-2553 [*Blakely* error not structural and is subject to *Chapman* harmless error review].) Under *Chapman* harmless-error review, reversal is required unless we can say that, beyond a reasonable doubt, the result would not have been more favorable in the absence of the error. (See *People v. Brown* (2003) 31 Cal.4th 518, 538.) Here, there is no likelihood appellant would have achieved a more favorable result absent the error. The trial court identified only one mitigating factor, which it accorded little weight given the number of other charges and cases appellant had dismissed. Moreover, anticipating the high court's decision in *Cunningham*, the trial court stated it "would still find the circumstances in aggravation outweigh the circumstances in mitigation both in number and in weight and that the upper term should be imposed as to both cases." Thus, there is no likelihood the court would have imposed a different sentence had it relied only on appellant's criminal history as the sole factor in aggravation. Accordingly, we are convinced any *Cunningham* error was harmless beyond a reasonable doubt. (Cf. *People v. Harris* (2005) 37 Cal.4th 310, 341 ["Even if we were to find the court abused its discretion in excluding . . . proffered exculpatory evidence . . . defendant has failed to establish a reasonable probability of a more favorable outcome in the absence of the error. At most, the additional evidence the jury would have heard was of marginal value. Indeed, for these reasons, we would find any error harmless beyond a reasonable doubt. [Citation]".)

DISPOSITION

The judgment and sentence imposed are affirmed.

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Parrilli, J.

We concur:

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McGuiness, P. J.

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Pollak, J.