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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL JAMES CALDERON, JR., Defendant and Appellant.	E039993 (Super.Ct.No. RIF116813) **OPINION**

APPEAL from the Superior Court of Riverside County. Douglas E. Weathers, Judge. Affirmed in part and reversed in part with directions.

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Gil Gonzalez and Barry Carlton, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant of willful cruelty to animals (Pen. Code, § 597, subd. (a))[1] (count 1), with personal use of a handgun (§§ 1192.7, subd. (c)(8), 12022.5, subd. (a)). The jury also found defendant guilty of being a felon in possession of a firearm (§ 12021, subd. (a)(1)) (count 2). Defendant thereafter admitted that he had suffered two prior prison terms (§667.5, subd. (b)) and one prior strike conviction (§§ 667, subds. (c) & (e)(1), 1170.12, subd. (c)(1).) He was sentenced to a total term of 18 years in state prison: the upper term of three years on count 1, doubled to six years for the prior strike allegation, plus a consecutive upper term of 10 years for the gun-use enhancement, plus two consecutive one-year terms for the two prior prison term enhancements, and a concurrent term of one year four months on count 2.

On appeal, defendant contends (1) the trial court relied on improper factors in aggravation to impose the upper term on count 1 and the gun-use enhancement; (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 court imposed the upper term on count 1 and the upper term on the gun-use enhancement; and (3) the trial court erred in failing to give defendant's requested jury instruction regarding the prosecution's failure to disclose specific testimony of witness Sandra Nunez. In light of the United States Supreme Court's recent decision in *Cunningham v. California* (2007) ___U .S. ___ [127 S.Ct. 856]

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

(*Cunningham*), we conclude the court's imposition of the three-year upper term sentence on count 1 based on judicial factfinding denied defendant of his federal constitutional rights to a jury trial and proof beyond a reasonable doubt, and thus the matter must be remanded for resentencing.[2]

I

FACTUAL AND PROCEDURAL BACKGROUND

In May 2004, defendant lived at 1054 Beverly Road in Corona. There were two houses on the property. Defendant lived in the front house with a woman (possibly his girlfriend or wife) named Gabriela and several children. Among the children who testified were Lucy, Martin, Blanca. Several relatives of Gabriela, including Yuliana and Ernesto Murillo, their mother, and their uncle Emmanuel Felix, lived in the back house. Martin and Lucy (of the front house) and Yuliana and Ernesto (of the back house) were all cousins; Blanca (of the front house), Lucy, and Martin were siblings, but Blanca was not related to Yuliana and Ernesto. Defendant appeared to have been relatively new to this complex.

On May 8, 2004, Yuliana owned a German shepherd named Camila. By all accounts, the dog was not a problem; the children played with her, and she was not known to chase or bite anyone.

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[2] Because we have already determined the sentence must be reversed in light of *Cunningham*, *supra*, 127 S.Ct. 856, and the matter must be remanded for further proceedings and resentencing, the issue of whether the court relied on improper factors in sentencing defendant to the upper term on count 1 is moot.

On the afternoon of May 8, 2004, Yuliana was about to take a shower when she heard a number of gunshots. She called 911 within two or three minutes of hearing the gunshots. She was told by her younger brother, Ernesto, that defendant had shot the dog.

Shortly before the shooting, 14-year-old Ernesto had seen defendant in the courtyard. He saw something black in defendant's hand but did not know exactly what it was. He heard three to four gunshots shortly after seeing defendant.

Emmanuel Felix was in the living room of the back house watching a movie with Ernesto, Ernesto's mother, and Ernesto's younger sister when he also heard gunshots. Emmanuel looked out the window and saw defendant, who was one to three feet away from the dog, turn and walk away. Emmanuel noted defendant had something black in his hand, which he put in his jacket. Emmanuel tried to keep Ernesto from looking out the window.

Lucy, Martin, and Blanca heard three to four shots, then saw defendant in the yard. They also heard the dog yelping and crying and "knew," without looking, that defendant had shot the dog. On the day of the shooting, Lucy heard defendant say he would "deal with the dog later." Blanca also remembered defendant looking toward the dog earlier that day and stating, "I'll deal with you later." She also recalled that, about three days before, defendant had said that he did not like the dog and that it had to go. Martin also recalled that on the day of the shooting defendant looked toward the dog and stated, "I'll deal with you later," and he remembered defendant stating two to three weeks before the shooting that he was going to shoot the dog.

After hearing the gunshots, Blanca, Martin, and Lucy looked out the window. They saw defendant in the yard with a black bag over something in his hand, pointing the object at the dog. The dog, tied to a post, was running in circles and "going crazy." Defendant had apparently left for work, returned, and shot the dog.

Sandra Nunez, who lived across the street, was having a barbeque with family members in her backyard when she heard three or four gunshots. She walked out in front of her house to investigate and saw defendant driving away in a dark colored van, which was identified as Gabriela's. Nunez noted that the van had been parked right in front of the fence; defendant normally parked the van in the driveway. She also pointed out that defendant was driving faster than usual. After defendant left, the kids from the house came out crying and yelling that the dog had been shot.

Responding police officers found the dog lying dead, tethered to a pole, in a bloody circle the radius of the tether. They also found four spent 9-millimeter cartridges in the yard. Defendant was later apprehended at his place of employment.

The parties stipulated that defendant had a previous felony conviction.

Defendant claimed he had an alibi and that he did not shoot the dog. His coworker testified that he had been talking to defendant on his cellular telephone at the approximate time of the shooting and that he had asked defendant to pick up additional supplies for work. Defendant's trial counsel also argued that the children all hated defendant and made up the story.

II

DISCUSSION

A. *Imposition of Upper Term/Blakely Violation*

1. *Count 1*

At sentencing, the trial court imposed the upper term of three years on count 1 based on three aggravating factors: (1) the high degree of cruelty, (2) the fact defendant used a gun in the commission of the crime, and (3) that the crime was carried out in a manner that indicated planning.

Relying on *Blakely* and *Apprendi*, defendant contends the upper term sentence on count 1 violates his Sixth Amendment rights because the sentence was based on aggravating factors not reflected in the jury verdict or admitted by defendant. The People argue that defendant forfeited the error by not objecting at the sentencing hearing.

On June 20, 2005, some eight months before defendant's sentencing hearing in this case, our state Supreme Court concluded that the imposition of an upper term sentence, as provided under California law, was constitutional and does not implicate a defendant's Sixth Amendment right to a jury trial. (*People v. Black* (2005) 35 Cal.4th 1238, 1244.) At that time, the trial court was compelled to follow *Black*. Therefore, it would have been futile for defense counsel to object at sentencing based on *Blakely*, *Apprendi*, or the United States Constitution. 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.)

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 Cal. Rules of Court, rules 4.420(a) & (b).[3]) "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 . . . ." (*People v. Lamb* (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 by placing sentence-elevating factfinding within the trial judge's province, California's DSL violates a criminal defendant's right to a jury trial safeguarded by the Sixth and Fourteenth

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[3] All further rule references are to the California Rules of Court. Rule 4.420 provides in part: "(a) When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is ordered suspended, the sentencing judge shall select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170[, subdivision](b) and these rules. The middle term must be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation. [¶] (b) Circumstances in aggravation and mitigation must be established by a preponderance of the evidence."

Amendments to the federal Constitution. (*Cunningham*, *supra*, 127 S.Ct. at p. 860.) The *Cunningham* court 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* 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* 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 count 1 to the middle term of two years (doubled to four years due to the prior strike conviction). (See *Cunningham*, *supra*, 127 S.Ct. at p. 860.) The additional judicial factfinding, however, resulted in the upper term on that count 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 argue that in this case we need not reverse the court's upper term sentence on count 1 because (1) the recidivism exception applies in this case, as defendant had engaged in past violence and had prior convictions and prison terms; and (2) 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.

Cunningham did reaffirm the exception enunciated in *Almendarez-Torres v. United States* (1998) 523 U.S. 224 and affirmed in *Apprendi* that "[*e*]*xcept 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.]" (*Cunningham*, at p. 860, italics added, quoting *Apprendi*, *supra*, 530 U.S. at p. 490.) However, the prior-conviction exception cannot apply here because the prior conviction had already been used to impose the upper term on the gun-use enhancement on count 1 (see part II.A.2, *post*). (§ 1170, subd. (b); rule 4.420(c) [cannot use same fact to impose aggravated term and enhancement].)

Moreover, based on this record we cannot say that the court's error in sentencing defendant to the upper term on count 1 based on the high degree of cruelty and the fact that the crime was carried out in a manner that indicated planning was harmless. The error would be harmless if we could say with certainty that a jury would have found these aggravating circumstances true beyond a reasonable doubt. Either of these factors, standing alone, would be sufficient to support imposing the upper term. But these questions were not submitted to the jury, and the record does not indicate that the jury necessarily would have found these factors true beyond a reasonable doubt. The matter must therefore be remanded for resentencing in light of *Cunningham*.

2. *Upper Term on Enhancement*

Defendant also argues that imposition of the upper term on the gun-use enhancement was improper. Specifically, he claims imposition of the upper term on the enhancement was not supported by adequate reasons and violated his Sixth Amendment rights under *Blakely* and *Apprendi*.

Initially, we note that *Blakely* and *Apprendi* do not apply to sentence enhancements found true by a jury. California has numerous sentencing enhancements that may increase a defendant's sentence beyond the three-tier range defined by statute, such as the use of a firearm during the commission of a crime. (See, e.g., § 12022.53.) Enhancements are required to be charged separately and proved to a jury beyond a reasonable doubt, or admitted by the defendant, thus complying with the mandates of *Apprendi* and *Blakely*.[4] (See, e.g., §§ 1170.1, subd. (e), 12022.53, subd. (j).) The gun-use enhancement here was imposed upon the jury's finding that the enhancement allegation was true beyond a reasonable doubt.

We next determine if imposition of the upper term on the gun-use enhancement violated defendant's constitutional rights and whether adequate reasons were stated by the trial court.

Defendant's 18-year prison sentence consisted of the six-year upper term for count 1, which was doubled due to the prior strike allegation, enhanced by the 10-year upper

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[4] We note *Apprendi* did not cause significant concerns for California's determinate sentencing scheme because in California enhancements are pled separately and found by the trier of fact beyond a reasonable doubt.

term for gun use under section 12022.5, subdivision (a), plus two consecutive one year terms for the prior prison term enhancements. Section 12022.5, subdivision (a) specifies three possible additional and consecutive terms of imprisonment, 3, 4, or 10 years, if the gun is personally used in the commission of a felony. (§ 12022.5, subd. (a).) Imposition of the middle term is required, unless the trial court finds aggravating or mitigating circumstances. (Rule 4.428, subd. (b).) Here, in selecting the upper term, the trial court found in aggravation (1) defendant's past violent conduct indicating a danger to society, (2) defendant's numerous convictions as an adult, and (3) the fact defendant was on parole at the time the offense was committed.

As stated in part II.A.1, *ante*, the rule of *Cunningham* does not apply to the use of prior convictions to increase the penalty for a crime. (*Cunningham*, *supra*, 127 S.Ct. at p. 868.) The *Almendarez-Torres/Apprendi* exception is sufficiently broad to encompass all matters ascertainable from the face of the prior judgment of conviction. (*People v. McGee* (2006) 38 Cal.4th 682, 707-709; *People v. Thomas* (2001) 91 Cal.App.4th 212, 222-223.) As the record of sentencing would show whether parole was granted and whether defendant was on parole when the current offense was committed or whether defendant's performance on parole was unsatisfactory, we conclude that the exception extends to these facts as well. Hence, imposition of the upper term based on defendant's criminal recidivism was proper.

To the extent the trial court relied on nonrecidivist aggravating factors, we find the error, if any, was harmless beyond a reasonable doubt. (*Washington v. Recuenco* (2006) ___ U.S. ___, ___ [126 S.Ct. 2546, 2553] ["[f]ailure to submit a sentencing factor to the

jury . . . is not structural error" and is subject to harmless error rule]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327.) Here, the trial court properly relied on defendant's prior convictions and the fact defendant was on parole at the time he committed the offense to impose the upper term on the gun-use enhancement. It is settled that only a single aggravating factor is required to impose the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728; *People v. Earley* (2004) 122 Cal.App.4th 542, 550.) Likewise, even if the trial court violated the prohibition on dual use of facts in relying on defendant's numerous convictions, the error was harmless beyond a reasonable doubt, as the court properly relied on the fact that defendant was on parole at the time the offense was committed. Though not cited by the court, the court also properly could have relied on the fact that defendant's prior performance on parole was unsatisfactory.

The United States Constitution does not mandate a jury trial on prior convictions, and any right to a jury trial would be purely statutory. (*Apprendi*, *supra*, 530 U.S. at pp. 487-490; *People v. Epps* (2001) 25 Cal.4th 19, 23; see § 1025.) By statute in California, a defendant is afforded a jury trial only as to the fact of those prior convictions alleged in the accusatory pleading as statutory sentence enhancements. (§ 1025; *Epps*, at pp. 29-30.) Prior convictions considered as aggravating factors for the purpose of imposing the upper term may be determined by the court upon facts shown in the probation report, as the trial court did here, and need be established only by a preponderance of the evidence. (§ 1170, subd. (b); rule 4.420(b).) Thus, as defendant was not entitled to a jury trial, *Blakely* and *Apprendi* have no application here as to the imposition of the upper term on

the gun-use enhancement. (See *Epps*, at p. 23; § 1025; see also *Cunningham*, *supra*, 127 S.Ct. at p. 860; *Apprendi*, at pp. 488 & 490.)

B. *Failure to Instruct CALJIC No. 2.28*

Defendant asserts the trial court prejudicially erred in giving his requested instruction (CALJIC No. 2.28) regarding the prosecution's failure to disclose that witness Sandra Nunez would testify that she saw the defendant drive away from the scene shortly after the shots were fired.

Prior to Nunez's testimony, defense counsel put on the record, outside the presence of the jury, that although Nunez had been identified as a prosecution witness all along, it was only the day before she was to testify that the prosecutor advised him she would testify to having seen the defendant leave the scene. The prosecutor, who had taken over the case in the middle of trial, advised the court that she had not discovered the scope of the witness's testimony until the day before and had promptly disclosed it to defense counsel. She had also reviewed the People's entire case file, and it contained no statement or report concerning this specific testimony. Nunez testified four days later, without objection by defense counsel.

Section 1054.1 requires the prosecution to disclose to the defendant or his attorney certain information, if that information is in the prosecution's possession, including "[r]elevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial . . . ." (*Id.*, subd. (f).) One of the remedies for failure to comply with section 1054.1 is advising the jury "of any failure or refusal to disclose and of any untimely disclosure." (§ 1054.5, subd. (b).)

The prosecutor elicited testimony from Nunez that on the date of the incident she heard gunshots and went to her front yard to see what had happened. She saw defendant sitting in the van, which was parked by the fence instead of in the driveway where it was usually parked. Defendant then drove away, a little faster than usual.

On cross-examination, Nunez indicated that she had first spoken with the original prosecutor in the case about a year earlier. There was then this colloquy:

"Q. [By defense counsel] All right. And when you talked to her a year ago, did you tell her what you're telling us here this morning?

"A. Yes, I did."

After the close of testimony, the defense requested that the court give CALJIC No. 2.28 (Failure to Timely Produce Evidence) based upon the People's failure to disclose information or reports on Nunez having seen defendant drive away from the scene shortly after the gunshots. The court denied the request, finding there was insufficient evidence that there was any delayed discovery.

Defense counsel did not specifically ask Nunez if, when she talked to the prosecutor a year earlier, she told the prosecutor she had seen defendant drive away from the scene. It is reasonable to assume that his question, "[D]id you tell her what you're telling us here this morning?" included that fact. However, it is equally reasonable to assume that when the witness answered, "Yes," she was referring only to her answers to *defense counsel's* questions, none of which concerned defendant driving away from the scene. We cannot say, in light of the record as a whole, that there was substantial evidence to support the giving of the requested instruction.

Even if we were to find error, however, any such error is not a constitutional error and is reviewed under the *Watson*[5] harmless-error standard. (*People v. Carpenter* (1997) 15 Cal.4th 312, 393.)

Defense counsel was able to cast doubt on Nunez's credibility by eliciting testimony from her that when she spoke with defense investigator Mike Robitzer in August 2004, she told Mr. Robitzer that she had seen the defendant drive away from the scene shortly after the shots were fired. Mr. Robitzer, however, testified that Nunez had talked to him about an incident where a dog had eaten one of her birds and nothing else. At the end of their conversation, he asked her if she had any other knowledge or information she thought might be important to the case, and she said she did not. Defense counsel pointed out this discrepancy in testimony to the jury during closing argument.

In any event, on this record, we find that even if the cautionary instruction had been given and the jury had given no weight to the Nunez's testimony concerning seeing defendant leaving the scene after the shooting, the testimony of witnesses Lucy, Martin, Blanca, Ernesto, and Emmanuel, set forth in detail in part I, *ante*, substantially supported the conviction. Based on the overwhelming evidence adduced at trial and defendant's incredible defense, it is not reasonably likely that the outcome of the trial would have been different if CALJIC No. 2.28 had been given.

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[5] *People v. Watson* (1956) 46 Cal.2d 818.

III

DISPOSITION

The upper term sentence on count 1 (the substantive offense of willful cruelty to animals) is vacated, and the matter is remanded to the trial court for the limited purpose of resentencing defendant consistent with this opinion, *Blakely*, and *Cunningham*. In all other respects, the judgment is affirmed.

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RICHLI
J.

We concur:

McKINSTER
Acting P.J.

MILLER
J.