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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Siskiyou)

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
GARRETT MORGAN CRANE,  
  
Defendant and Appellant.

C050495  
  
(Super. Ct. No. 050438)

A jury found defendant Garrett Crane guilty of receiving stolen property and two misdemeanor counts of resisting a peace officer. The jury also found defendant had numerous prior convictions.

The trial court sentenced him to an aggregate term of seven years in prison, which included the upper term of three years for receiving stolen property, doubled as the result of a prior strike. The trial court also sentenced him to time served in jail on each count of resisting a peace officer, "concurrently with each other" and "consecutive to the state prison sentence."

On appeal, defendant contends: (1) the evidence was insufficient to support one of his convictions for resisting a peace officer; (2) the trial court erred in failing to define the term "great bodily injury" for the jury; (3) he was denied effective assistance of counsel when his attorney failed to object to certain remarks the prosecutor made during closing argument; (4) the trial court's imposition of the upper term sentence for receiving stolen property violated his federal constitutional right to a jury trial; and (5) the trial court erred in failing to stay one of his sentences for resisting a peace officer.

We will accept the People's concession of error regarding the trial court's failure to stay one of the sentences for resisting a peace officer and will modify defendant's sentence by staying the sentence on count four (the second count of resisting a peace officer). We will also conclude the trial court erred to the extent it relied on some aggravating circumstances not found by the jury in imposing an upper term sentence, but find the error harmless beyond a reasonable doubt because the court undoubtedly would have imposed the upper term even if it had not taken those circumstances into account.

Rejecting the remainder of defendant's arguments, we will affirm the judgment as modified.

#### FACTUAL AND PROCEDURAL BACKGROUND

The facts relating to defendant's conviction for receiving stolen property are not at issue and therefore we need not recite them. For our purposes, it is sufficient to recite the

following facts underlying defendant's convictions for resisting a peace officer.

Siskiyou County Sheriff's Deputy Mack McDonald arrested defendant and took him to jail. Once inside the receiving area, defendant refused to comply with requests by Siskiyou County Jail Correctional Officer M. Lamarr to remove his watch and shoes and instead told Officer Lamarr, "How 'bout you suck my dick." Officer Lamarr placed defendant in a compliance hold and led him into a holding cell. Correctional Sergeant M. Barber followed close behind. Defendant was placed on the floor and his shoes were removed. As the two officers started to leave the holding cell, defendant jumped up and moved quickly toward them. Sergeant Barber and Deputy McDonald both drew their Tazers and pointed them at defendant. Deputy McDonald told defendant, who had reached the threshold of the cell or just before it, several times to step back. He complied, and the officers were able to close the door to the cell.

Defendant was charged with two counts of resisting a peace officer -- one for Sergeant Barber and one for Officer Lamarr. In closing argument, the prosecutor argued that defendant's refusal to comply with Officer Lamarr's requests in the receiving area and then his attempt to charge the officers in the holding cell constituted two separate acts of resisting a peace officer. The jury found him guilty of both counts.

## DISCUSSION

### I

#### *Sufficiency Of The Evidence*

Defendant contends the evidence was insufficient to support his conviction on count three -- resisting Sergeant Barber -- because Sergeant Barber was "merely present in the cell" when defendant refused to comply with Officer Lamarr's request to surrender his watch and shoes. In making this argument, defendant inexplicably ignores the later incident in the holding cell, when he jumped up from the floor and rushed toward both Officer Lamarr and Sergeant Barber. This omission is all the more inexplicable because defendant specifically notes the later incident in the statement of facts in his brief, which immediately precedes his sufficiency of the evidence argument.

We have made it clear that to prevail on an insufficiency of the evidence argument, "the defendant must set forth in his opening brief *all* of the material evidence on the disputed elements of the crime in the light most favorable to the People, and then must persuade us *that* evidence cannot reasonably support the jury's verdict. [Citation.] If the defendant fails to present us with all the relevant evidence, . . . then he cannot carry his burden of showing the evidence was insufficient because support for the jury's verdict may lie in the evidence he ignores." (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1574, second italics added.)

That is the case here. Because defendant has failed to persuade us the evidence of the incident in the holding cell

does not support his conviction for resisting Sergeant Barber, his challenge to that conviction fails.

## II

### *Jury Instruction On "Great Bodily Injury"*

The information in this case alleged defendant's prior conviction of violating Penal Code<sup>1</sup> section 4501, which makes it a felony for a "person confined in a state prison" to commit "an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury." Under the prosecutor's theory, to constitute a prior "strike" conviction that would support the doubling of the term for receiving stolen property, the section 4501 conviction had to have been based on defendant's personal use of "a dangerous or deadly weapon." (§§ 1170.12, subds. (b)(1), (c), 1192.7, subd. (c)(23).)

In a bifurcated proceeding before the jury on the prior conviction, the prosecution presented evidence that defendant was convicted of violating section 4501 based on an incident in which he used a blow gun to shoot a blow dart at two officers.

The trial court instructed the jury that "[a] deadly or dangerous weapon means any weapon, instrument, or object that is capable of being used to inflict great bodily injury or death." The court did not instruct the jury on the meaning of the term "great bodily injury." Defendant contends this was error

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

because "great bodily injury" has "a definition unique to the law," namely, "'a significant or substantial physical injury.'" (See § 12022.7, subd. (f).)

As the People point out, this court rejected an identical argument more than 20 years ago in *People v. Kimbrel* (1981) 120 Cal.App.3d 869, concluding that "[t]he substitution of 'significant' or 'substantial' for 'great,' in the context of bodily injury, makes no gains on meaning" and that given "the long acceptance of 'great bodily injury' as a term commonly understandable to jurors . . . it has not acquired a technical legal definition requiring in the absence of special circumstances a clarifying instruction." (*Id.* at pp. 873, 876.) Defendant ignored *Kimbrel* in his opening brief and did not file a reply brief. Accordingly, he has failed to give us any reason why we should depart from it.

### III

#### *Assistance Of Counsel*

In addition to the charges previously discussed, defendant was charged with -- but found not guilty of -- making criminal threats. That charge was based on statements defendant made to Deputy McDonald after the officers closed the door of the holding cell. At the time of the incident, Deputy McDonald recorded those statements on a digital recorder. Both the prosecutor and defense counsel transcribed the recording, with

different results.<sup>2</sup> Defense counsel cross-examined Deputy McDonald at length about the recording and what he thought he heard defendant say.

During his closing argument, the prosecutor told the jurors defense counsel had given them an "interesting transcript and spent a lot of time trying to confuse you and the officer. That's defense lawyer 101. Don't buy it. Don't get confused. Don't let him prevail on that. It's really freshman level defense lawyer tactic. [¶] It's on tape. Play it. Listen to it. Read it. It's all there, what happened."

Later on, the prosecutor asserted "[t]here is going to be a defense argument. [Defense counsel] is going to tell you, well, he was in jail. How could he possibly have followed through on a threat." The prosecutor then informed the jury that "the ability to immediately carry out the threat is not required" and asserted, "It doesn't matter that he didn't have present ability. If [defense counsel] tells you different, huh-uh. More defense lawyer 101 stuff. He's trying to confuse you. Don't do it."

Shortly thereafter, the prosecutor expressed concern "about the fact that there [are] two versions of the transcript of the threat." He then stated, "This places me in a bad position

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<sup>2</sup> Both sides agreed defendant told Deputy McDonald "I'll see you when I get out," but defense counsel's transcript showed Deputy McDonald calling defendant a "brat" before that, and the prosecutor's transcript showed Deputy McDonald asking defendant "Is that a threat?" to which defendant responded, "It's a promise, stupid."

because [defense counsel] is my good friend, but that transcript is rather consistent with an effort to confuse you inappropriately, and I don't accuse [defense counsel] of anything because he's my friend; however, you're entitled to be slightly troubled at the whole situation."

Defense counsel did not object to any of the foregoing argument. On appeal, defendant contends this failure to object constituted ineffective assistance of counsel because "[c]ounsel's negligence in failing to object . . . allowed the jury to deliberate [defendant's] case with a 'dirtied' view of [defense counsel], and a belief fostered by the prosecutor that [defense] counsel was dishonest, which would tend to bias the jury."

"Generally, a conviction will not be reversed based on a claim of ineffective assistance of counsel unless the defendant establishes *both* of the following: (1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.)

Where a prosecutor's remarks about defense counsel "would be understood by the jury as an admonition not to be misled by the defense interpretation of the evidence, rather than as a personal attack on defense counsel," defense counsel's failure

to object to those remarks or seek an admonition does not constitute ineffective assistance of counsel. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003.) We believe that is the case here. The jury most likely understood the prosecutor's comments as an admonition not to be "confused" by defense counsel's interpretation of the evidence, rather than as a personal attack on the integrity of defense counsel. Indeed, the prosecutor specifically told the jury that defense counsel was his "good friend" and that he was not accusing defense counsel "of anything." Under these circumstances, there was no misconduct, and defense counsel's failure to object did not fall below an objective standard of reasonableness.

Even if we were to conclude the prosecutor's remarks were improper, however, defendant's claim of ineffective assistance of counsel would fail because he has not shown a reasonable probability of a better result if his attorney had objected or asked for an admonition. On this point, it is significant to note that the prosecutor's comments related solely to the evidence on the charge of making criminal threats, and the jury *acquitted* defendant of that charge. Defendant fails to explain how it is reasonably probable an objection or request for admonition related to the prosecutor's remarks would also have led the jury to acquit him on the other charges to which the prosecutor's remarks did not relate.

IV

*Imposition Of Upper Term*

At the sentencing hearing, the trial court imposed the upper term of three years on defendant for receiving stolen property. The court relied on five aggravating factors to support its decision: (1) defendant's numerous prior convictions; (2) defendant's prior prison terms; (3) defendant's unsatisfactory performance on parole; (4) the manner in which the crime was carried out indicated planning; and (5) the crime involved a taking of great monetary value.

Relying on the United States Supreme Court's decision in *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403], defendant claims the trial court's imposition of the upper term sentence for receiving stolen property violated his federal constitutional right to a jury trial because the aggravating circumstances -- other than the prior convictions -- were not found true by a jury beyond a reasonable doubt or admitted by him. We conclude the court did err to the extent it relied on some aggravating circumstances not found by the jury, but the error was harmless beyond a reasonable doubt because the court undoubtedly would have imposed the upper term even if it had not taken those circumstances into account.

In *People v. Black* (2005) 35 Cal.4th 1238, the California Supreme Court rejected a *Blakely* claim similar to defendant's, concluding "that the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence . . . under California law does not implicate a

defendant's Sixth Amendment right to a jury trial." (*Black*, at p. 1244.) In *Cunningham v. California* (2007) 549 U.S. \_\_\_\_ [166 L.Ed.2d 856], however, the United States Supreme Court held that under *Blakely* and other decisions (including *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435]), California's determinate sentencing law does "violate[] a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments" to the extent the law allows a judge to impose an upper term sentence "based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." (*Cunningham*, at p. \_\_\_\_ [166 L.Ed.2d at p. 864].)

It has been held that the "prior conviction" exception to the rule of *Apprendi* and *Blakely* encompasses not only the fact of a prior conviction, but also whether the defendant served a prison term as a result of a prior conviction. (*People v. Thomas* (2001) 91 Cal.App.4th 212, 216-222.) Thus, the facts underlying two of the aggravating circumstances on which the trial court relied here -- defendant's numerous prior convictions and his prior prison terms -- did not have to be found by the jury for the trial court to rely on those circumstances in imposing an upper term sentence.<sup>3</sup>

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<sup>3</sup> Although it is unnecessary to our decision that the trial court's reliance on these two aggravating circumstances was proper, we note that the facts underlying these circumstances were found true by the jury beyond a reasonable doubt in a bifurcated proceeding held to determine the truth of various allegations in the information regarding defendant's criminal record. Specifically, in that proceeding the jury found

In contrast to those two aggravating circumstances, the remaining three circumstances on which the trial court relied -- defendant's unsatisfactory performance on parole, the manner in which the crime was carried out indicated planning, and the crime involved a taking of great monetary value -- did not fall within the "prior conviction" exception to the *Blakely* rule, nor were they supported by any of the jury's findings or admitted by defendant. Thus, under *Cunningham*, the trial court's reliance on those circumstances violated defendant's Sixth Amendment rights.

Defendant contends the court's error "is a structural one and requires reversal per se." He is mistaken. Recently, the United States Supreme Court held that *Blakely* error is not structural error but is reviewed under a harmless-beyond-a-reasonable-doubt standard. (*Washington v. Recuenco* (2006) 548 U.S. \_\_\_\_ [165 L.Ed.2d 466].)

We are persuaded beyond a reasonable doubt that even if the trial court had known it could not properly rely on defendant's performance on parole, the manner in which the crime was carried out, or the amount of money involved in the crime to impose the upper term on defendant, the court would have imposed the upper term nonetheless. In this regard, it is significant that before reaching its final decision, the court tentatively decided to impose the upper term based solely on defendant's prior

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defendant had nine prior felony convictions and had served a prison term in connection with each of them.

convictions, his prior prison terms, and his performance on parole, and defendant offered no argument in opposition to that proposal.<sup>4</sup> Under these circumstances, we are persuaded the court would have imposed the upper term even if it had not later included as part of its final reasons for imposing the upper term two additional aggravating circumstances the prosecutor proposed after the court's tentative ruling.

Similarly, we are persuaded the court would have imposed the upper term even if it had not relied on defendant's allegedly unsatisfactory performance on parole. The record showed (and the jury found beyond a reasonable doubt) that defendant had nine felony convictions -- three for possession of a deadly weapon in jail, three for assault on a custodial officer, one for assault with a deadly weapon by a prisoner, one for possession of a weapon by a prisoner, and one for battery of a custodial officer. Given the nature and number of these convictions, we are persuaded beyond a reasonable doubt that the trial court would have imposed the upper term of three years for receiving stolen property on defendant (rather than the middle term of two years) even if the court had known that it could not properly rely on defendant's performance on parole, the manner in which the crime was carried out, or the amount of money

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<sup>4</sup> When asked to comment on the court's tentative ruling, defendant made only a brief comment relating to a new trial motion the court had already denied, and defense counsel commented only on the issue of restitution.

involved in the crime in making that decision. Accordingly, we conclude the *Blakely* error in this case was harmless.

V

*Section 654*

Defendant contends the trial court erred in failing to stay the sentence on one of his convictions for resisting a peace officer because both counts were part of an indivisible course of conduct. The People concede the error, and we accept their concession and will modify defendant's sentence accordingly.<sup>5</sup>

DISPOSITION

The judgment is modified by staying the sentence of "time served" on count four pursuant to section 654. As modified, the judgment is affirmed.

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ROBIE, J.

We concur:

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SCOTLAND, P.J.

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HULL, J.

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<sup>5</sup> Because defendant's sentence of "time served" on these misdemeanor counts is not reflected on the abstract of judgment, no modification of that document is necessary.