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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.

BOOKER TED EMMERT,

Defendant and Appellant.

E039817

(Super.Ct.No. FVI 019468)

OPINION

APPEAL from the Superior Court of San Bernardino County. Stephen H.

Ashworth, Judge. Affirmed in part; reversed in part with directions.

Kristin A. Erickson, 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, Lilia E. Garcia, Supervising Deputy Attorney General, and Janelle Marie Boustany, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Booker Ted Emmert appeals from judgment entered following jury convictions for attempted voluntary manslaughter (Pen. Code, §§ 664, 192 subd. (a)),¹ as a lesser offense to attempted murder, charged in count 1; shooting at an inhabited dwelling (§ 246; count 2); and assault with a firearm (§ 245, subd. (a)(2); count 3). As to all three counts, the jury also found true the personal gun-use enhancement (§ 12022.5, subd. (a)). The trial court sentenced defendant to a state prison term of 13 years.

Defendant contends the trial court committed *Batson*² error by allowing the prosecution to excuse three minority jurors; the trial court erred in denying defendant's motion for mistrial or for a continuance based on the prosecution's untimely production of audible police interview tapes; and the trial court improperly imposed an aggravated term on the gun-use enhancement in violation of *Cunningham v. California* (2007) 549 U.S. ___, 127 S.Ct. 856, 864, 871 (*Cunningham*).

We affirm defendant's convictions but reverse defendant's sentence, based on *Cunningham, supra*, 127 S.Ct. at pp. 864, 871, and remand for resentencing.

1. Facts

In July 2004, Rose Jacobs was living in an apartment, in Adelanto. Before living there, she had lived with defendant for about a year and a half. Jacobs had five children from a previous relationship with Douglas Williams, Sr.

Defendant knew Williams, Sr. had fathered Jacobs's children and did not like him.

¹ Unless otherwise noted, all statutory references are to the Penal Code.

² *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*).

During defendant and Jacobs's relationship, defendant had accused Jacobs of sleeping with Williams, Sr. and threatened to harm Jacobs if she slept with Williams, Sr. again.

During the evening of July 17, 2004, Williams, Sr. returned Jacobs's two sons to Jacobs after a two-week visit. When they arrived, Jacobs went to the grocery store with Alethia Redd, the girlfriend of Williams, Sr.'s brother, Cornelius Williams. Meanwhile Williams, Sr. stayed at Jacobs's apartment with Cornelius and the boys, Douglas Williams, Jr. and Christopher Williams. When defendant called Jacobs at her apartment, Williams, Sr. told defendant that Jacobs had gone to the store and she would call back when she returned. Defendant was no longer living with Jacobs at the time but was still seeing her.

A couple hours later, after Jacobs had returned home and was sleeping, defendant called again. When Williams, Sr. answered the phone, defendant told him to meet him outside and that he was "gonna kick my ass." Williams, Sr. went outside but defendant was not there.

The next morning defendant called Jacobs and told her he was coming over to get some DVD's. Jacobs told him it was not a good time and she would call him later. A little later, Sandra Emmert, defendant's sister, arrived at Jacobs's apartment and asked for the DVD's. Jacobs and Sandra argued at the door.

As Jacobs went to get the DVD's, she saw defendant approach the door. Williams, Sr. saw defendant approach the door with a gun in his hand. When defendant reached the door, Williams, Sr. was standing in the hallway. Williams, Jr. was sitting near the front door, on the couch, watching TV with his brother, Christopher.

Cornelius yelled that defendant had a gun and to drop to the floor. Williams, Sr. asked defendant why he had a gun. Defendant fired a shot into the apartment. The bullet went into a wall near the bathroom, close to where Williams, Sr. had been standing.

The two boys testified defendant fired into the apartment toward Williams, Sr., who was standing in the apartment with nothing in his hands. Defendant then fled with Sandra. Jacobs called the police. Deputy Marsh was dispatched to the crime scene. On the way there, he stopped and apprehended defendant and Sandra, who were about a mile and a half from Jacobs's apartment.

Sheriff's Detective Hoffman interviewed defendant and Sandra. Defendant told Hoffman he aimed the gun at the ceiling and the gun immediately went off. At the time, he was mad and confused, and lost his temper. Defendant claimed he never intended to hurt anyone.

Defendant testified that while Sandra and Jacobs were arguing, he thought he saw Williams with a gun. Defendant armed himself "[j]ust in case because [Williams] was a violent man" and approached the front door. When he reached the apartment, he made eye contact with Williams, Sr. and showed Williams, Sr. his gun. As Williams, Sr. dashed for the hallway, defendant turned to get Sandra and defendant's gun accidentally discharged. Defendant saw the bullet go into the bathroom wall. No one was hurt. Defendant denied intentionally trying to kill Williams, Sr. After firing the gun, defendant and Sandra ran away.

Sandra testified Williams, Sr. started threatening her and defendant. Sandra claimed she did not know where the shot came from, that defendant had a gun, or if

defendant fired the shot.

2. Batson Error

Defendant argues that the trial court erred by denying his *Batson* motion (*Batson, supra*, 476 U.S. 79) alleging that the prosecution improperly exercised peremptory challenges to two Black jurors and one Hispanic juror. We disagree.

When this type of challenge is raised, a three-step analysis is required: First, the defendant must make a *prima facie* showing of discrimination. Second, the burden shifts to the prosecution to offer race-neutral explanations for excluding the jurors. Third, the trial court must determine whether the defendant has proven purposeful discrimination. (*People v. Silva* (2001) 25 Cal.4th 345, 384 (*Silva*); *Johnson v. California* (2005) 545 U.S. 162, 169.)

During voir dire, defendant objected twice to the People's use of peremptory strikes. The defense raised its first objection after the prosecutor exercised a peremptory challenge to juror No. 22, a Black juror. Defense counsel also objected to the People excusing the previous Black juror as well. The trial court responded that it was obvious why juror No. 22 was excused: "I don't think it raises an issue. Her son's in jail for killing somebody with a gun." The court added that the other Black juror had several relatives in prison, one of whom was in prison for robbery with a gun. The trial court concluded there were no *Batson* issues regarding the two excused Black jurors and thus denied defendant's first *Batson* objection.

Defendant complains the trial court erred in not asking the prosecutor to explain why he exercised challenges to the two Black jurors. But it was patently clear as to why

the jurors were removed and the trial court noted this.

Defendant argues that the prosecutor did not challenge four non-minority jurors who had criminal convictions and two jurors with close relatives who had criminal convictions. This does not support a prima facie case of discrimination because the offenses were nonviolent offenses, which were not similar to the instant offense and did not involve the use of a firearm. Two of the jurors were convicted of driving under the influence (DUI). One juror was charged with a DUI, but it was reduced to a reckless driving conviction. The fourth juror was convicted and fined for stopping and picking up wood on the highway. As to the relatives of two jurors, the mother-in-law of one juror was convicted of welfare fraud and the other juror's husband was convicted of an unspecified crime before the juror was married, over 20 years earlier. The convictions and related circumstances concerning the non-minority jurors significantly differed from those concerning the two Black jurors and thus did not show any evidence of discrimination.

The totality of the relevant facts did not give rise to an inference of discriminatory purpose requiring an explanation. (*Johnson v. California, supra*, 545 U.S. at p. 169.) The peremptory challenges for the two Black jurors were justified by “a neutral explanation related to the particular case to be tried” (*Batson, supra*, 476 U.S. at p. 98) and thus the challenges were permissible under *Batson*.

Defendant asserted the second *Batson* objection after the People used a peremptory challenge to strike juror No. 24, a Hispanic juror. Defense counsel stated he was asserting the objection on the ground the prosecution had once again removed a

minority juror, whom defense counsel believed was Hispanic. The trial court said the juror might be Italian, but asked the prosecutor why the juror was removed. The prosecutor said that he believed the juror was not Hispanic; he did not appear to be Hispanic and his name was Italian. Therefore the defendant had not made a prima facie case of discrimination.

The trial court responded that it did not matter whether the juror actually was Hispanic, and again asked why the prosecutor removed the juror. The prosecutor replied, “I kicked him because he did not have very good answers or explanations about his past jury service.” The trial court added, “He didn’t seem very bright.” The prosecutor agreed. The trial court noted, “He didn’t seem like he had a grasp of certain things. . . . I’m not sure the man was is [sic] Italian minority for purposes of Wheeler. [¶] . . . [¶] Maybe he was Hispanic, I don’t know. But anyway, he did not seem to be too clever of an individual for a case like this. And seems to me that it was a legitimate excusal.”

Defendant contends that although in this instance the trial court asked the prosecutor for his reason for excusing juror No. 24, the request was perfunctory since the court had already decided to deny defendant’s *Batson* motion. We do not find this argument persuasive. The record does not show that the court made up its mind before asking the prosecutor for his reason for challenging the juror. After the prosecutor stated his reason for excusing the juror, the court merely indicated it agreed and elaborated that the juror did not seem very bright, which the court believed was a valid concern due to the serious nature of the case.

Defendant also asserts that the prosecutor's reason for excusing the juror, i.e., the juror "did not have very good answers or explanations about his past jury service," did not distinguish the juror from others who were retained. But as the court noted, and the prosecutor agreed, the juror was uniquely objectionable because his ability to comprehend the proceedings was very poor. This was apparent from his responses concerning his past jury service and was a valid distinguishing factor and permissible race-neutral justification, particularly since the trial involved very serious charges.

Reviewing the prosecution's reasons independently, we conclude that defendant failed to prove discrimination under all the circumstances. (*Silva, supra*, 25 Cal.4th at p. 385.) Defendant has failed to establish *Batson* error.

3. Production of the Recording of Defendant's Police Interrogation

Defendant contends the trial court erred in denying his motion for a mistrial or a continuance due to the prosecution's late production of audible tapes of defendant's and Emmert's police interviews. The prosecution timely produced tapes of defendant's and Emmert's police interviews but the taped interviews were very difficult to hear. It was not until midtrial that the prosecutor informed the court and defense counsel that he had discovered the sheriff's department had audible tapes of the two interviews.

Defendant argues he was prejudiced by the prosecution delaying producing the audible taped interviews until midtrial because Sandra's tape was produced during her cross-examination and caught her off guard. There also was insufficient time to transcribe the two tapes and defense counsel did not have sufficient time to go over the tapes with defendant and prepare the defense, taking into account the tapes. Defendant

acknowledges that he is not claiming the prosecution acted in bad faith but notes that *Brady* does not require such a finding for a reversal on nonproduction of material evidence.

At the end of the prosecutor's cross-examination of Sandra, the prosecutor asked her if she would like to listen to her tape recorded police interview for the purpose of refreshing her memory concerning conflicts in her testimony and the police report. Sandra said no. On redirect, defense counsel asked Sandra if she was trying to cover up anything for defendant. Sandra said she had no reason to do so. On recross-examination, the prosecutor asked Sandra why she did not want to listen to the tape to see if it refreshed her memory. Sandra said she would if he wanted her to but reasserted that she had told the truth.

After the court excused Sandra subject to recall, defense counsel told the court in camera that he had not received a copy of an audible recording of Sandra's taped police interview. The prosecutor acknowledged that the tapes defense counsel and he had were very difficult to hear. The prosecutor said he also listened to the original tape and it was not much better but Detective Hoffman had told him his tape was better, although it was still difficult to hear. The prosecutor told the court he gave defense counsel the best copy he had and noted that there were ways to enhance and improve the quality of tapes but it was expensive. It was not done by his office and it had not been requested by the defense.

The trial court asked defense counsel if he would like to listen over lunch to the 20- or 30-minute long tape. Defense counsel said he wanted to listen to an audible tape.

The court said defense counsel and Sandra could listen to Hoffman's copy during the lunch recess. The court recessed at 11:20 a.m. and reconvened at 1:53 p.m.

After listening to the audible tape during the lunch recess, defendant moved for a mistrial, sanctions, or a continuance. Defense counsel noted that on April 22, 2005, the trial court ordered the prosecution to produce recordings of the police interviews in response to defendant's motion for production. The People produced inaudible tapes and told the defense there was no audible copy at that time. Defense counsel claimed that had he had audible tapes, it could have changed the entire presentation of the case. Defense counsel added that if the court denied his motion for mistrial based on improper use of discovery for impeachment purposes, defendant needed a continuance to review, transcribe, and prepare the defense based on the tape of defendant's interview.

In response, the prosecutor stated that the prosecution provided defendant with the requested discovery. Defendant's and Sandra's police interviews were recorded on mini-micro cassette tapes, as was commonly done by the prosecutor's office. The sheriff's department recorded the interviews on full-size tapes. The prosecutor was told the full-size tapes were very, very difficult to hear.

In addition, during the pretrial conference, counsel and the court discussed the poor quality of the tapes both sides had received. The prosecutor told defense counsel he could listen to the original tapes and defense counsel said he was going to come by the prosecutor's office and talk about the tapes but did not do so. The prosecutor did not listen to them until the day of defendant's motion for mistrial.

The prosecutor indicated he did not anticipate using Sandra's tape because he

expected Sandra to testify consistent with her police report statement but she did not. She was inconsistent in three areas. This was why the prosecutor asked her if she had listened to her taped interview.

During the lunch recess, defense counsel and Sandra listened to Sandra's taped interview. The court noted that defense counsel could have also listened to defendant's taped interview during the lunch recess. Defense counsel explained why he had not done so and requested to listen to it at that moment, before the jury reconvened.

The trial court rejected the request but agreed to a recess after Sandra's testimony so that defense counsel could listen to the tape before defendant took the stand the following day. The trial court stated that there appeared to be no prejudice in the delay in the prosecution producing Sandra's tape because it was consistent with her testimony. Defense counsel acknowledged during the hearing on his motion for mistrial that the tapes actually supported everything Sandra stated in her testimony and refuted Hoffman's report in many ways. The court asked if the taped interviews were consistent with Hoffman's report. The prosecutor claimed the report was consistent with the interviews but defense counsel disagreed.

Defense counsel claimed the statements were inconsistent with Hoffman's report in three ways. Hoffman's report stated Sandra saw the children inside the apartment. Sandra stated during her taped interview that she did not remember seeing the children. Hoffman's report also said Sandra saw the gun or saw it fired. Sandra stated during her taped interview that she did not see the gun. Also, Hoffman's report said Sandra stated

defendant aimed the gun at Williams. She stated during her taped interview that she did not know if defendant was aiming at him.

The trial court stated that these inconsistencies were not significant and could be easily cleared up. Defense counsel agreed the inconsistencies could be cleared up but claimed that in order to do so, he would need sufficient time to prepare the defense. The lunch recess was not enough time. The court noted he would have more time that evening. Defense counsel also argued that the inconsistencies between Sandra's statement and the report were significant because they affected her credibility as a witness.

Defense counsel complained that defendant was prejudiced by the delay in receiving the audible tapes since he still had not received an audible tape of defendant's confession and defense counsel did not know if the tapes were consistent with the police report since he had not heard the tape of defendant's interview. Defense counsel requested a continuance to transcribe the tapes for the jury. The court stated the jury could simply listen to the tapes. The inconsistencies were insignificant and there was no need to transcribe the tapes or continue the trial. Defense counsel could listen to defendant's taped interview during the next break and could play the tapes, if relevant, for the jury. The tape was about an hour long.

The trial court denied defendant's motion for a mistrial, sanctions or a continuance, noting that "the record needs to be clear, the discovery on the defendant's interview, number one, was given to you by way of a report. And, of course, you have the opportunity to talk to your client about what was said during that interview also. So

you're in a much better position really than the D.A. is regarding what your client said, it seems to me. So I don't see any discovery violations on it. These things happen, you know. You're lucky that there's any tape that's audible. Apparently there is now."

Although the court denied defendant's motion, it stated that defense counsel had a right to listen to defendant's taped interview that evening, before defendant testified the next day. The trial then resumed with counsel questioning Sandra. Sandra testified that the tape essentially said what she had stated during her earlier testimony. She explained a few instances in which there appeared to be inconsistencies between her taped interview, testimony, and the report, and concluded nothing she said during the interview was different from what she said in her testimony.

After the prosecution finished questioning Sandra, defense counsel requested the court to play Sandra's taped interview for the jury as a consistent statement. The court denied the request, finding that any inconsistencies were cleared up by Sandra's testimony or were irrelevant, and playing the tape was a waste of time.

Upon both counsel completing examination of Sandra, the court recessed at 2:50 p.m., until 9:30 a.m. the following morning. The prosecution gave defense counsel a copy of the original tape of defendant's interview. The following morning, defense counsel called defendant to the stand. Defendant did not have a chance to listen to his taped interview until the next day at lunch. By then, the prosecution was in the midst of cross-examining defendant. The court concluded it would be helpful to the jury to play defendant's taped interview for the jury since defendant was unable to remember certain information.

The court denied defense counsel's request at 11:36 a.m. to continue the trial in order to provide the jury with a transcript of the tape. But the trial nevertheless was delayed several days since the trial court did not try cases on Fridays or Monday mornings. The trial was in recess from 4:30 p.m. Thursday, October 20th, until the following Tuesday morning, October 25th.

Defendant argues that the prosecution's delay in producing the audible tapes until midtrial constituted a violation of the rule of *Brady* which “. . . requires disclosure . . . of evidence that is both favorable to the accused and “material either to guilt or to punishment.” [Citation.]” (*People v. Roberts* (1992) 2 Cal.4th 271, 330.) Defendant asserts that Sandra's taped statement was inconsistent with her testimony and therefore could have been used as impeachment evidence to impugn Sandra's credibility. As to the prosecution's delay in providing defendant's taped interview, defendant complains that he was deprived of effective representation because defense counsel only had one evening to prepare for defendant's testimony and did not have an opportunity before the trial began to prepare the defense taking into account the taped interviews.

In *Brady*, the United States Supreme Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material . . . irrespective of the good faith or the bad faith of the prosecution.” [Citation.]” (*People v. Wright* (1985) 39 Cal.3d 576, 590.) The California Supreme Court has “imposed a stricter duty on prosecutors in this state, by requiring them to disclose substantial material evidence favorable to the accused without request. [Citation.] This duty applies not only to evidence that bears directly on the question of an

accused's guilt, but also to evidence relating to the credibility of prosecution witnesses. [Citation.]" (*Ibid.*)

There are three elements of a *Brady* violation: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." (*Strickler v. Greene* (1999) 527 U.S. 263, 281-282.) "Such evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' [Citations.]" (*Id.* at p. 280.) "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" (*Kyles v. Whitley* (1995) 514 U.S. 419, 434, quoting *United States v. Bagley* (1985) 473 U.S. 667, 678.)

Here, audible tapes were provided but they were provided late, which defendant claims interfered with his defense and caught Sandra off guard because the audible tape surfaced during her cross-examination. Despite the unfortunate delay in producing the audible tapes, we cannot say that there is a reasonable probability of a different result had the tapes been provided sooner. (*Strickler v. Greene, supra*, 527 U.S. at p. 280; *Kyles v. Whitley, supra*, 514 U.S. at p. 434.) Likewise, defendant has failed to establish prejudice.

While Sandra's taped interview was relevant to her credibility, its significance was minimal since the taped interview was consistent with Sandra's testimony, with the exception of a few insignificant instances concerning relatively minor matters. Defense counsel acknowledged during the hearing on his motion for mistrial that the tape actually supported everything Sandra stated in her testimony and refuted Hoffman's report in many ways.

In addition, defense counsel had an opportunity to listen to Sandra's audible tape before completing questioning of Sandra, and thus was able to elicit testimony from her explaining the inconsistencies between her taped statement and her testimony.

As to defendant's tape, although defense counsel should have received it earlier, when the prosecutor discovered it, it was produced and defense counsel had a chance to listen to the tape the night before defendant testified. Also, after receiving the tapes, defense counsel had a four-day weekend to review and consider the tapes in preparation for closing argument. Furthermore, the tapes consisted primarily of duplicative evidence, contained in Hoffman's report and provided in witness testimony.

Defendant has not shown prejudicial error or that there was a reasonable probability of a different result had the tapes been timely produced.

Defendant argues that the late production of the audible tapes implicated his right to decide intelligently whether to testify. But defendant did not raise this objection in the trial court and defendant does not sufficiently elaborate or provide any evidence supporting such a claim. Failure to raise an issue in the opening brief waives the argument. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

4. Aggravated Term for Gun Enhancement

Defendant was sentenced to a three-year midterm on count 1 (attempted murder reduced to attempted involuntary manslaughter) and a consecutive ten-year upper term for the personal gun use enhancement.

A. Balancing Mitigating and Aggravating Factors

Defendant contends the trial court did not properly balance the mitigating and aggravating factors when imposing the upper term as the gun-use enhancement.

Defendant claims the court completely ignored the mitigating factors which outweighed any aggravating factors. The People argue defendant waived (forfeited) this objection because he did not raise it in the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 351-352.)

Defendant did not forfeit the objection because he raised it at the sentencing hearing and in his sentencing brief.

In considering defendant's challenge on the merits, we find no impropriety in the manner in which the court balanced the mitigating and aggravating factors. The trial court considered the sentencing briefs, probation report, and oral argument. The record shows that the court weighed the various factors and stated the following reasons for imposing the upper term on the enhancement: (1) defendant "did everything in his power" to shoot the victim; and (2) defendant fired a gun in an apartment, which was extremely dangerous to others; the bullet penetrated the wall and almost entered the adjoining apartment. The court rejected the vulnerability factor asserted by the People.

In imposing the upper term on the enhancement, the trial court stated “. . . Court’s going to sentence the defendant to the aggravated term of ten years. And the reason for that is: Because the defendant did everything in his power, based upon the evidence, to shoot the victim. There was no position of trust involved in this case. They did not like each other at any point that I ever heard from the evidence. The weapon the defendant used is of a nature where it’s so inaccurate that that’s the only reason the victim was not shot, the Court feels. Although, it was a valid effort by the defendant because he just missed the victim. And also, the dangerousness involved in shooting in an apartment where the bullet penetrated the walls and almost entered the adjoining apartment where it could have easily hit somebody. The defendant obviously, from the conviction by the jury, and the Court concurs with that evaluation of the evidence, had the specific intent to kill the victim when he fired at him. So for those reasons, the Court feels that the aggravated term on the enhancement is appropriate. [¶] I believe from the evidence, that the defendant thought he had . . . hit the victim because the victim immediately went down after the shot. And I believe that’s why the defendant turned and ran to the car and took off. The defendant did admit some culpability in this case, but only because he was apprehended while fleeing the location of the shooting promptly by the sheriff’s office.”

B. *Cunningham* Error

Defendant argues that, in imposing the aggravated term on the enhancement, the trial court committed *Blakely*³ and *Cunningham*⁴ error by relying on aggravating factors that were not tried by the jury, in violation of his Sixth Amendment right to a jury trial.

The People argue that because defendant failed to raise *Blakely* error in the trial court, he forfeited the challenge. (See *People v. Hill* (2005) 131 Cal.App.4th 1089, 1103 [holding that a *Blakely* challenge was forfeited by the defendant's failure to raise it in the trial court].)

We reject this argument. Unlike the defendant in *People v. Hill*, *supra*, 131 Cal.App.4th at page 1103, who waived a *Blakely* challenge by failing to raise it at his sentencing, which occurred *after Blakely* but *before People v. Black* (2005) 35 Cal.4th 1238 (*Black*), defendant was sentenced on January 27, 2006, *after Black* was decided on June 20, 2005. A *Blakely* objection would thus have been futile under the controlling law the court was compelled to follow at that time. Under such circumstances, defendant did not forfeit the issue. (*People v. Chavez* (1980) 26 Cal.3d 334, 350, fn. 5; *City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780, 784-785.)

Even if defendant forfeited the issue, to forestall any claim of ineffective assistance of counsel based on failure to raise a timely objection, we will address the issue on the merits. (*People v. Norman* (2003) 109 Cal.App.4th 221, 229-230.)

³ *Blakely v. Washington* (2004) 542 U.S. 296, 303-304 (*Blakely*).

⁴ *Cunningham v. California* (2007) 549 U.S. ___, 127 S.Ct. 856, 871 (*Cunningham*).

California's determinate sentencing law (DSL) and "the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts --whether related to the offense or the offender --beyond the elements of the charged offense." (*Cunningham, supra*, 549 U.S. at p. ___, 127 S.Ct. at p. 863; § 1170, subd. (b); Cal. Rules of Court, rule 4.420(a).) *Cunningham* rejected this procedure, holding that "under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." (*Cunningham, supra*, at pp. 863-864.)

Defendant argues that under *Cunningham*, the upper term gun-use enhancement should be reduced to the middle term because the trial court imposed an aggravated term based on facts not found by the jury. We agree the trial court improperly relied on factors which, under *Blakely* and *Cunningham*, required true findings by the jury. Therefore, under *Cunningham, supra*, 127 S.Ct. at page 871, the trial court erred in imposing the aggravated term based on factors that should have been decided by the jury. Such findings by the court were improper. As stated in *Cunningham*: "[T]he Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." (*Cunningham, supra*, at p. 860; see also *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*) and *Blakely, supra*, 542 U.S. at pp. 303-304.)

Here, the facts relied on by the trial court were not admitted by defendant or found true by the jury. Therefore, under *Cunningham*, the trial court erred in imposing an aggravated term based on factors that should have been decided by the jury.

C. Harmless error

Under *Washington v. Recuenco* (2006) ___ U.S. ___, 126 S.Ct. 2546, 2552-2553 (*Recuenco*), such error is not structural, requiring reversal per se. We must thus consider whether the error was harmless under *Chapman v. California* (1967) 386 U.S. 18, 24. (*Recuenco, supra*, 126 S.Ct. at pp. 2552-2553.) The record in this case reflects that, absent the unconstitutional fact findings by the court, the trial court could not impose the aggravated terms. There were no recidivism factors which the trial court could have relied upon in imposing the aggravated sentences.

The People argue that we need not reverse the court's upper term sentences because the error was harmless beyond a reasonable doubt under *Chapman v. California, supra*, 386 U.S. at page 24. The People claim the jury would have found at least one of the aggravating factors true had the factors been presented to the jury for determination. These contentions are unavailing.

The court imposed the upper term on the gun-use enhancement because it found two aggravating factors. While the trial court did not mention any mitigating factors, other than that defendant admitted culpability, there were numerous other possible mitigating factors which the trial court did not address due to focusing primarily on the aggravating factors, which should not have been relied on by the trial court.

We recognize 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* (1985) 167 Cal.App.3d 198, 202; *People v. Osband* (1996) 13 Cal.4th 622, 728-729.) But, 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 when weighed against the mitigating factors, we cannot find the *Blakely* error to have been harmless beyond a reasonable doubt.

In addition, it is speculative as to whether the trial court would have imposed the same aggravated term on the gun-use enhancement in the absence of either of the aggravated factors since the probation report lists several mitigating factors which the trial court might conclude outweigh any aggravated factors, particularly since the probation officer recommended a concurrent middle term on the gun-use enhancement, rather than a consecutive aggravated term.

The probation report states that defendant did not have any history of felony convictions, although he had several misdemeanor convictions, including convictions in January 1978 for exhibiting a deadly weapon/firearm, a misdemeanor (§ 417), carrying a loaded firearm in a public place, a misdemeanor (§ 12031, subd. (a)), and possession of a loaded gun in a vehicle, a misdemeanor (Fish & G. Code, § 2006), resulting in two years probation and 30 days in jail. He was also convicted in July 1982 of misdemeanor battery (§ 242), with a 60-day jail sentence and 36 months probation.

The probation report noted the following favorable factors: (1) defendant indicated a willingness to comply with terms of probation; (2) imprisonment will seriously affect defendant and his dependents; (3) a felony conviction will adversely affect defendant's life, and (4) defendant has shown remorse. The report also listed as a mitigating factor that defendant voluntarily acknowledged wrongdoing at an early stage of the criminal process.

The report listed the following aggravating facts: (1) the crime involved threat of great bodily harm; (2) the crime was carried out with planning, sophistication or professionalism; (3) defendant engaged in violent conduct, indicating a serious danger to society.

Pending further guidance from our Supreme Court, we remand this matter for resentencing, as that is the appropriate remedy in this case for erroneous imposition of the upper term. (See, e.g., *People v. Quinones* (1988) 202 Cal.App.3d 1154, 1159-1160; *People v. Young* (1983) 146 Cal.App.3d 729, 737.) We reverse as to sentencing alone, for reconsideration of the appropriate term on the gun-use enhancement appended to count 1.

9. Disposition

We affirm the judgment of conviction but reverse the sentence as to the gun-use enhancement appended to count 1, and remand this case to the superior court for resentencing, consistent with the requirements of *Cunningham*.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

s/Gaut
J.

We concur:

s/Ramirez
P. J.

s/King
J.