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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ANA M. GARIBAY,<br><br>Defendant and Appellant. | D048929<br><br><br><br>(Super. Ct. No. SCE250620) |

APPEAL from a judgment of the Superior Court of San Diego County, Charles W. Ervin, Judge. Affirmed in part, reversed in part.

A jury convicted Ana M. Garibay of two counts of gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a)) and one count of hit-and-run with injury (Veh. Code, § 20001, subd. (a)). The jury also found true allegations that Garibay fled the scene of the crime (Veh. Code, § 20001, subd. (c)) and inflicted serious bodily injury

in the course of committing a felony (Pen. Code, §§ 12022.7, subd. (a), 1192.7, subd. (c)(8)).[1] The trial court sentenced Garibay to 18 years eight months in state prison.

On appeal, Garibay challenges her convictions and sentence. She contends that her convictions are invalid because the trial court instructed the jury with Judicial Council of California Criminal Jury Instructions (2006), CALCRIM No. 224, which references the defendant's "innocence," as opposed to the "constitutionally correct terminology" of the government's failure to prove guilt beyond a reasonable doubt. Garibay contends that her sentence is invalid because the trial court: (i) relied on an inapplicable rule of court[2] in denying her request for probation; (ii) failed to strike the great bodily injury enhancement findings; and (iii) violated her Sixth Amendment right to a jury trial by relying on aggravating factors, including her "unsatisfactory" performance on probation, to impose an upper term. For the reasons discussed below, we conclude that Garibay's challenge to her convictions is without merit, but she is correct that resentencing is required.

FACTS

On May 22, 2005, at approximately 5:00 p.m., Stephanie Jensen observed two cars driving erratically, westbound on State Route 94. The two cars would repeatedly pass each other and weave in and out of their lanes "to block [the other car] from being able to pass them." In executing these maneuvers, the cars would periodically cross the double

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

2 All rule references are to the California Rules of Court.

yellow lines separating the westbound lanes from oncoming traffic. Concerned with the erratic driving of the two cars, Jensen began to dial 911 on her cell phone when she heard a loud collision from the direction of the two cars. She looked up from her cell phone to see a body flying through the air and crashing into a fence on the side of the road. As Jensen pulled over to help, she saw the two cars she had previously observed pull to the right momentarily and then "speed off." Hilary Dixon, who was traveling in the other direction (eastbound) on State Route 94 with her fiancé, Ahmed Hluz, observed one of the cars coming toward her with "severe front end damage" and a flat tire on the driver's side.[3]

After Jensen arrived at the scene of the crash, she observed an adult male (later identified as Ellis Dale Lemere) who had "sustained serious trauma" laying in a roadside ditch, as well as a 12-year-old boy (Rudy Carranza) who appeared dead. Jensen also observed the "remnants of a motorcycle." Lemere was briefly conscious and asked an off-duty paramedic (Hluz) who had stopped at the scene, "Who hit us?" and "How is the boy?" Lemere and Carranza, who had been riding together on a motorcycle eastbound on State Route 94, died as a result of their injuries.

At the time of the collision, Rudy Gomez was working as a security gate attendant at nearby Rancho Jamul Estates. Gomez observed Garibay drive up toward his security booth, make a U-turn and then turn off the road and park her car. Gomez noticed that

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[3] Both Jensen and Dixon were placed on hold when they called 911. Dixon, however, was able to dispatch paramedics directly by dialing the direct line of the local paramedics outpost, with which she was familiar.

Garibay's car was damaged and had blood on the driver's side door. Hearing sirens in the distance, he called the police. While awaiting the arrival of the authorities, Gomez observed Garibay use her cell phone and change her shirt.

California Highway Patrol Officer Jose Barraza soon arrived in response to Gomez's call and parked in front of Garibay's car. As Barraza got out of his car he noticed a strong smell of perfume and Garibay shuffling through clothing in the trunk of the vehicle. Garibay, who had "red, watery eyes" and "slurred speech," acknowledged being the driver of the vehicle. Garibay told police that she had been driving on the highway when she heard an object hit her vehicle and, when she noticed that her front tire was flat, drove further down the road until finding a place to pull off on Rancho Jamul Drive. She admitted that she had been drinking alcohol that morning as well as the night before. Approximately three hours after the crash, police administered alcohol screening tests to Garibay that indicated a blood alcohol content of .134 and .144, and two breath tests that both showed a blood alcohol content of .12.[4] After Barraza took Garibay from the scene, a man arrived and asked Gomez about the woman who had been driving the damaged car.

An accident reconstruction expert called by the prosecution testified that based on the physical evidence, including a significant debris field in the eastbound lane of State Route 94, the collision occurred when Garibay's car crossed the double yellow line and

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[4] It is unlawful "for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle." (Veh. Code, § 23152, subd. (b).)

drifted into the path of the oncoming motorcycle. A defense expert disputed certain aspects of the prosecution expert's conclusions, and opined that the accident could have occurred close to the double yellow line on either side.

## DISCUSSION

### I

### *The Trial Court's Reliance on CALCRIM No. 224 Does Not Warrant Reversal*

Garibay contends that the trial court's reliance on CALCRIM No. 224 requires reversal because the instruction discusses inferences that may point to the defendant's *innocence*, rather than the "constitutionally correct terminology" of whether the defendant is *not guilty*.[5] This challenge has been repeatedly rejected by the California courts, and we reject it as well.

We recognize, of course, that in a criminal case the prosecution must establish the defendant's guilt beyond a reasonable doubt, and the failure to do so, as opposed to an affirmative finding of innocence, is the standard for acquittal. (See *People v. Anderson*

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[5] The trial court instructed the jury, without objection, with the standard instruction regarding circumstantial evidence contained in CALCRIM No. 224:

"Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

"Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

(2007) 152 Cal.App.4th 919, 932 (*Anderson*) ["For a defendant to be found not guilty, it is not necessary that the evidence as a whole prove his innocence, only that the evidence as a whole fails to prove his guilt beyond a reasonable doubt"].) The challenged instruction, however, is not intended to define the prosecution's burden of proof. Instead, CALCRIM No. 224, like its predecessor CALJIC No. 2.01, is intended to guide the jury's consideration of particular items of circumstantial evidence, a context where the suggestion that relevant evidence will "point[]" either to guilt or innocence is entirely proper. (CALCRIM No. 224; CALJIC No. 2.01.) As explained by our colleagues in the Third District:

> "A particular item of evidence may fall into one of three categories: it may tend to prove guilt; it may tend to prove innocence; or it may have no bearing on guilt or innocence. If the evidence falls into the latter category, it does not support either a guilty or a not guilty verdict. In effect, the evidence is not relevant to the case and should be excluded. Thus, if a particular item of evidence, circumstantial or otherwise, is relevant to the jury's ultimate determination, it is relevant only because it tends to prove either guilt or innocence. [¶] CALCRIM No. 224 simply recognizes this distinction when the jury is considering the circumstantial evidence as a whole." (*Anderson, supra*, 152 Cal.App.4th at p. 934.)

Our Supreme Court has rejected a virtually identical challenge to CALCRIM No. 224's CALJIC antecedent (CALJIC No. 2.01) that claimed the instruction "relieved the prosecution of its burden of proof by implying that the issue was one of guilt or *innocence* instead of whether there was or was not a reasonable doubt about defendant's guilt." (*People v. Crew* (2003) 31 Cal.4th 822, 848.) The court explained that because other standard instructions (e.g., CALJIC No. 2.01 — and CALCRIM No. 224 *itself* in the instant case) direct the jury that a defendant must be proven guilty beyond a reasonable doubt, "it is not reasonably likely that the jury would have misapplied or

misconstrued the challenged instruction[]" as lessening the prosecution's burden of proof. (*Crew*, at p. 848; *People v. Han* (2000) 78 Cal.App.4th 797, 809 ["this court and others have consistently determined that there could be no harm" from the use of innocence in certain instructions "because the other standard instructions make the law on the point" that the defendant's guilt must be proven beyond a reasonable doubt "clear enough"].) Echoing the Third District, the Supreme Court added that the instruction uses "the word 'innocence' to mean evidence less than that required to establish guilt, not to mean the defendant must establish innocence or that the prosecution has any burden other than proof beyond a reasonable doubt." (*Crew*, at p. 848; *People v. Carey* (2007) 41 Cal.4th 109, 130 [rejecting analogous argument that CALJIC instructions "misinformed the jury that its duty was merely to decide whether defendant was guilty or innocent, rather than whether he was guilty or not guilty beyond a reasonable doubt" by asserting simply, "We have in the past rejected this argument," and citing *Crew*].)

Following our Supreme Court, and the reasoning of the courts of appeal that have addressed this issue, we reject Garibay's challenge to CALCRIM No. 224. (See, e.g., *Anderson*, *supra*, 152 Cal.App.4th at p. 932 [rejecting contention that "CALCRIM No. 224 improperly couches the jury's choices in terms of whether the circumstantial evidence points to him being guilty or innocent, rather than being guilty or not guilty"]; *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1187 [rejecting contention "that CALCRIM No. 224 improperly uses the language of 'innocence' and 'guilt' in violation of the fundamental principle of criminal law that the prosecution has the burden of proof of guilt beyond a reasonable doubt," and holding that "CALCRIM No. 224 correctly states

the law"]; *People v. Wade* (1995) 39 Cal.App.4th 1487, 1492 [rejecting contention that instructional language "regarding 'more likely to be' 'guilty' or 'innocent' undercut the burden of proof because the issue is not one of guilt or innocence but whether there is a reasonable doubt as to the state's evidence"].)[6]

II

*Garibay Must Be Resentenced*

Garibay challenges her sentence on a number of grounds. We evaluate these challenges after setting forth the various components of the sentence Garibay received.

A. *Garibay's Sentence*

Garibay was convicted of two counts of gross vehicular manslaughter while intoxicated, which is punishable by four, six, or 10 years in prison (§ 191.5, subd. (c)(1)), and one count of hit-and-run with injury, which is punishable by two, three, or four years in prison (Veh. Code, § 20001, subd. (b)(2)). The jury also found true allegations, with respect to each of the manslaughter convictions, that Garibay fled the scene of the crime (Veh. Code, § 20001, subd. (c)) and inflicted serious bodily injury (Pen. Code, §§ 12022.7, subd. (a), 1192.7, subd. (c)(8)).

At the outset of the sentencing proceeding, the trial court rejected Garibay's request for probation. In subsequently fashioning Garibay's 18-year eight-month prison sentence, the trial court imposed the upper term of 10 years in prison on the first count of

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6 As we resolve this question against Garibay on the merits, we need not address the Attorney General's contention that her failure to object to the instruction in the trial court constitutes a forfeiture of the issue on appeal.

gross vehicular manslaughter while intoxicated, and imposed an additional consecutive five-year prison term as mandated by Vehicle Code section 20001 based on the jury finding that Garibay fled the scene after committing a violation of section 191.5, subdivision (a). (Veh. Code, § 20001, subd. (c).) On the second count of gross vehicular manslaughter while intoxicated, the court imposed an additional three-year eight-month prison term.[7] The trial court determined that the sentencing enhancements based on the jury findings that Garibay "personally inflict[ed] great bodily injury" (§ 12022.7, subd. (a)) were "barred by operation of law." Finally, the trial court stayed imposition of sentence on the hit-and-run conviction under section 654.

B. *The Trial Court's Reference to Rule 4.413(c) Does Not Require Resentencing*

Garibay contends that we must remand the case for resentencing because the trial court, by referencing an inapplicable rule of court, applied an erroneous standard in denying her request for probation. We disagree.

In imposing sentence, the trial court recognized that Garibay was not "statutorily precluded from receiving" probation, but concluded that "the extremely serious nature of these crimes and the lack of any circumstance or facts which suggest this case is unusual within the meaning of [rule] 4.413(c) make probation inappropriate."

As both parties acknowledge, the trial court's reference to rule 4.413(c) was misplaced. Rule 4.413(b) refers trial courts to rule 4.413(c) when "the defendant comes

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[7] The sentence on the second count was dictated by section 1170.1 and consisted of one-third the middle term plus one-third of the five-year enhancement for fleeing the scene. (See § 1170.1, subd. (a).)

under a statutory provision prohibiting probation 'except in unusual cases where the interests of justice would best be served,' or a substantially equivalent provision." (Rule 4.413(b).) As the statutes governing Garibay's convictions did not contain such a provision, the trial court was not required to evaluate the propriety of a grant of probation under rule 4.413(c).[8]

Nevertheless, the trial court's reference to rule 4.413(c) does not necessarily demonstrate a misunderstanding of the applicable sentencing law, as the trial court's comments can reasonably be interpreted in a manner that suggests it committed no error. While the trial court was not *required* to consider rule 4.413(c), it was also not *prohibited* from considering the factors listed therein (e.g., whether the defendant committed the crime because of a mental condition) to the extent it viewed them as applicable. (See *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120 [emphasizing that "[t]he sentencing court has broad discretion to determine whether an eligible defendant is suitable for probation"].)

Here, the trial court may have simply been indicating that because of "the extremely serious nature of the[] crimes" — which resulted in the violent death of two defenseless persons, including a 12-year-old boy — the court *itself* was disinclined to grant probation, separate and apart from any statutory presumption. (See § 1202.7 [listing "the nature of the offense" and "the loss to the victim" among the "primary

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8 Rule 4.413(c), titled "Facts showing unusual case," lists a number of factors that "may indicate the existence of an unusual case in which probation may be granted if otherwise appropriate."

considerations in the granting of probation"].) The court may have then looked to the discussion of "unusual case[s]" in rule 4.413(c) *for guidance* (not because it was required to do so) as to whether, despite the "tragedy of epic proportion" brought about by Garibay's actions, probation might still be appropriate.

As the sentencing record is, thus, reasonably susceptible to a construction that indicates the trial court *did not* misunderstand the applicable sentencing laws, we cannot assume the contrary. (See rule 4.409 [sentencing judge will be "deemed to have . . . considered" the relevant criteria enumerated in the rules "unless the record affirmatively reflects otherwise"]; *People v. Mosley* (1997) 53 Cal.App.4th 489, 496 [recognizing that "the presumption of regularity of judicial exercises of discretion apply to sentencing issues"]; *People v. Burnett* (2004) 116 Cal.App.4th 257, 261 [same]; *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1517 [recognizing the "'general rule'" that "'a trial court is presumed to have been aware of and followed the applicable law,'" and that this "'presumption of regularity of judicial exercises of discretion appl[ies] to sentencing issues'"].)

In any event, even if the trial court did erroneously believe it was constrained by rule 4.413(c), remand for the court to reevaluate its denial of Garibay's request for probation would be an "idle act" because there is no reasonable probability that, upon remand, the trial court would grant Garibay's request for probation. (*People v. Coelho* (2001) 89 Cal.App.4th 861, 889 (*Coelho*) [recognizing that remand for sentencing error is unwarranted where remanding "would be an idle act that exalts form over substance because it is not reasonably probable the court would impose a different sentence"];

*People v. Sanchez* (1994) 23 Cal.App.4th 1680, 1685 [same].) The probation report recommended against a grant of probation because Garibay's "actions led directly to the deaths of two individuals, and her behavior after the accident was appalling." The trial court similarly took a dim view of a grant of probation, quickly ruling out the possibility at the outset of the sentencing discussion with the statement that it was denying Garibay's "request for probation, to the extent that she's requesting probation."

The trial court emphasized that Garibay's actions had caused "a tragedy of epic proportion" and gravely told the victims' family members, many of whom spoke of their tremendous loss at the hearing, that it could not "undo the things that were set in motion one year and two days ago by Ms. Garibay." Then, after discounting the mitigating factors suggested by the defense and highlighting numerous aggravating factors, the court imposed the *maximum* prison term permitted by law, including an *upper* term sentence of 10 years (as opposed to a presumptive middle term of six years) in state prison on the manslaughter conviction. (Cf. *People v. Black* (2007) 41 Cal.4th 799, 817 (*Black*) ["the same fact may be used both to deny probation and to support imposition of an upper term sentence"].) The court selected this sentence despite the availability of significantly less severe alternatives, including a proposal by the defense of a 12-year prison term.

In sum, the trial court's comments at sentencing and the harsh sentence ultimately imposed demonstrate that regardless of its belief as to the applicability of rule 4.413(c), the trial court would not have granted Garibay's request for probation. Consequently, even if the court erroneously believed it was constrained by rule 4.413(c), which the

record does not affirmatively reflect, remand would be unwarranted on this ground. (*Coelho, supra*, 89 Cal.App.4th at p. 889.)

C. *The Great Bodily Injury Enhancements Must Be Stricken*

As noted above, the jury made findings on both of Garibay's manslaughter convictions that she "personally inflict[ed] great bodily injury" under section 12022.7.[9] With respect to the manslaughter conviction for the death of Lemere, the jury found that Garibay inflicted great bodily injury on Carranza; and with respect to the manslaughter conviction for the death of Carranza, the jury found Garibay inflicted great bodily injury on Lemere.

In evaluating the jury findings, the probation report noted that the section 12022.7 enhancements were inapplicable because the statute authorizing the enhancements states that it "shall not apply to murder or manslaughter." (§ 12022.7, subd. (g).) Defense counsel echoed this contention at sentencing, and the trial court apparently agreed. The court stated, "I do concur with defense counsel by operation of 12022.7(g), the application of the three years to count 1 and count 2 are barred." Later, the court reiterated its agreement, stating that the enhancements were "barred by operation of law." The trial court, however, did not explicitly strike or impose the enhancements; the minute order states only that the enhancements were "*stayed* per PC12022.7(g)," (italics added)

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9 Section 12022.7 states: "Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years." (§ 12022.7, subd. (a).)

and the abstract of judgment similarly indicates that the enhancements were stayed. (See *People v. Bracamonte* (2003) 106 Cal.App.4th 704, 711 (*Bracamonte*) [emphasizing that "the trial court must either impose an enhancement or strike the underlying finding, and set forth its reasoning for such striking in the minutes. It is without authority simply to stay the enhancement"].)

On appeal, Garibay highlights the trial court's failure to *strike* the enhancements and contends that this was error. The Attorney General, while conceding that the minute order is in error (because if section 12022.7, *subdivision (g)* applies, as the minute order suggests, the findings should have been stricken not stayed), contends that section 12022.7, subdivision (g) does not apply, and the trial court "properly imposed" the enhancements.

While it is unclear from the sentencing record whether the trial court, in stating that the bodily injury enhancements were "barred by operation of law," intended to impose and stay (as the minute order and abstract of judgment reflect), or strike, the enhancements, a determination of the trial court's intent is not necessary to this appeal. The proper treatment of the enhancements is a legal question that we must resolve independently, applying the rules of statutory interpretation.

The role of the courts in construing a statute is to "'ascertain the intent of the Legislature so as to effectuate the purpose of the law.'" (*People v. Wright* (2006) 40 Cal.4th 81, 92.) "'Because the statutory language is generally the most reliable indicator of that intent, we look first at the words themselves, giving them their usual and ordinary meaning.'" (*Ibid.*) "'[I]f there is no ambiguity, then we presume the lawmakers meant

what they said, and the plain meaning of the language governs.'" (*Allen v. Sully-Miller Contracting Co.* (2002) 28 Cal.4th 222, 227 (*Allen*).) When construing a statute in the penal context, courts must also be cognizant of the rule of lenity, which counsels construction of a penal statute "'as favorably to the defendant as its language and the circumstances of its application may reasonably permit . . . .'" (*People v. Garcia* (1999) 21 Cal.4th 1, 10.)

In the instant case, there is no ambiguity in the Legislature's statement that section 12022.7 "shall not apply to murder or manslaughter." (§ 12022.7, subd. (g).) This text can only mean that where, as here, a defendant is convicted of manslaughter, a section 12022.7 enhancement "shall not apply," particularly if the enhancement is based on an injury sustained in a separate instance of *manslaughter*. As the text is unambiguous, then, we must "'presume the lawmakers meant what they said, and the plain meaning of the language governs.'" (*Allen, supra,* 28 Cal.4th at p. 227; *People v. Palacios* (2007) 41 Cal.4th 720, 728 ["'[I]f "'the statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it'"'"].) Consequently, to the extent the section 12022.7 enhancements were imposed in the instant case, this was error, and the enhancements must be stricken. (*Bracamonte, supra,* 106 Cal.App.4th at p. 711.)

The two cases relied on by the Attorney General, *People v. Verlinde* (2002) 100 Cal.App.4th 1146 (*Verlinde*) and *People v. Weaver* (2007) 149 Cal.App.4th 1301 (*Weaver*), are distinguishable. In *Weaver* and *Verlinde*, this court ruled that a section 12022.7 great bodily injury enhancement could be applied to enhance a manslaughter sentence where the enhancement was based on injuries received by victims other than the

decedent — victims who were not themselves the subject of a manslaughter (or murder) conviction. (*Verlinde*, at pp. 1168-1169; *Weaver*, at p. 1329.)[10] In the instant case, the enhancements were imposed based on injury (in fact, death) suffered by victims who were each the subject of a separate count and conviction *of manslaughter*. Thus, in the instant case, a great bodily injury enhancement was imposed on each of Garibay's *manslaughter* convictions, based on a separate instance of *manslaughter*. It is simply impossible to reconcile the imposition of these enhancements with the statutory text that unambiguously commands "[t]his section shall not apply to . . . manslaughter." (§ 12022.7, subd. (g).)[11] Consequently, even assuming that that *Weaver* and *Verlinde* (and not *Beltran*) were correctly decided — a question we do not reach — section

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10 As the decision in *Weaver* notes, this conclusion is contrary to that reached by our colleagues in the Second District on this same point. (See *People v. Beltran* (2000) 82 Cal.App.4th 693, 696; *Weaver*, *supra*, 149 Cal.App.4th at p. 1335 ["Based on our reasoning in *Verlinde*, quoted above, we disagree with that conclusion by *Beltran* and decline to apply it to this case"].)

11 At the *very least*, there is ambiguity as to whether the statutory text's statement that section 12022.7 enhancements "shall not apply to . . . manslaughter" (§ 12022.7, subd. (g)) permits application to Garibay's *manslaughter* conviction based on the separate incidence of *manslaughter*. Consequently, consistent with the rule of lenity, we must "construe the statute as favorably to the defendant as its language and the circumstance of its application reasonably permit." (*People v. Overstreet* (1986) 42 Cal.3d 891, 896 ["When language which is susceptible of two constructions is used in a penal law, the policy of this state is to construe the statute as favorably to the defendant as its language and the circumstance of its application reasonably permit. The defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of a statute"]; *In re Rottanak K.* (1995) 37 Cal.App.4th 260, 269 ["A defendant in a criminal case is entitled to the benefit of every reasonable doubt as to the true interpretation of the words or construction of a penal statute"].)

12022.7 by its terms was not applicable *in this case*, and the enhancements should have been stricken, not merely stayed.

D. *The Upper Term Sentence Violated Garibay's Sixth Amendment Rights*

Garibay contends that the trial court violated her right to a jury trial under the Sixth Amendment, as interpreted in the United States Supreme Court cases of *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*) and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), by relying on facts that were not found by the jury to impose an upper term sentence. We agree.

In *Cunningham*, the United States Supreme Court held that California's determinate sentencing law (the DSL) violated the jury trial right safeguarded by the Sixth and Fourteenth Amendments to the federal Constitution. (*Cunningham*, *supra*, 127 S.Ct. at p. 860.)[12] The court explained that, as set forth in *Apprendi*, "the 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*, 127 S.Ct. at p. 860.) In invalidating the DSL, the court concluded that the statutory framework violated "*Apprendi*'s bright-line rule" because "the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum," and

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12 The DSL has since been amended in response to *Cunningham*. (See *People v. Sandoval* (2007) 41 Cal.4th 825, 849 (*Sandoval*).) Our Supreme Court has held that where, as here, the trial court imposes an upper term sentence that is invalid under *Cunningham*, the appropriate remedy is to remand for the trial court to conduct a new sentencing proceeding under the amended DSL. (*Ibid.*)

imposition of an upper term sentence was authorized on the basis of factual findings made by the trial court, not the jury. (*Cunningham*, at p. 868.)

The Attorney General concedes that the bulk of the factors relied upon by the trial court to impose an upper term sentence were impermissible under *Cunningham*, but contends that the sentence is nevertheless constitutionally sound because the trial court relied on one permissible factor — rule 4.421(b)(5), which lists as a possible "[c]ircumstance[] in aggravation" that "[t]he defendant's prior performance on probation or parole was unsatisfactory."[13] (See *Black*, *supra*, 41 Cal.4th at p. 816 [the "imposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions"].) The Attorney General contends that this factor (Garibay's performance on probation) falls within the recognized exception for the "fact of a prior conviction" (*Apprendi*, *supra*, 530 U.S. at p. 490) because it is "based on [her] criminal record" and, like a prior conviction, "relate[s] to recidivism."[14] We disagree.

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13 The trial court also noted as aggravating factors, Garibay's minimal showing of remorse, her high blood alcohol content, the fact that she sought a "place of . . . concealment . . . essentially hiding out in an area off the main roadway, where she could avoid detection from passer[s]by[], including law enforcement responding to the scene of the crash," and her efforts to conceal guilt by splashing herself with perfume and drinking water.

14 The Attorney General does not contend that the misdemeanor theft convictions *themselves* rendered Garibay eligible for an upper term sentence. Indeed, the trial court noted as a mitigating factor that Garibay had an "insignificant record of criminal conduct."

To discern Garibay's performance on probation, the trial court relied on the report prepared by the probation office for sentencing. The report indicates that Garibay was placed on probation two times, once after being convicted of misdemeanor petty theft (§ 488) in 1993 and again after being convicted of the same offense in 1996 (§§ 666/484). A shorthand notation adjacent to the initial conviction indicates that approximately two months prior to Garibay's completion of the three-year probation term imposed on the first offense (and nine years before the instant offense), Garibay committed the second petty theft. Her probation in the 1993 case was subsequently revoked, modified and then extended for another two years (or, as stated in the notation, "Prob. Revk'd, Mod. Extended 2 yrs"). Garibay eventually completed the extended term of probation and an additional three years of probation imposed on the second case.

In a presentence filing, Garibay contended that the fact that she "successfully completed probation on both theft cases" was a mitigating factor. At sentencing, the trial court acknowledged that Garibay "successfully completed probation on [the] theft related offenses," but rejected the contention that this was a "circumstance in mitigation," because her performance on probation was "unsatisfactory" as "she was revoked prior to completing" the initial probation term.

Regardless of whether we agree with Garibay or the trial court regarding the appropriate characterization of her performance on probation, we believe reliance on that performance as an aggravating factor for the instant manslaughter conviction does not fall within the "narrow" exception for the "fact of a prior conviction." (*Apprendi*, *supra*, 530 U.S. at p. 490.)

"[T]he right to jury trial and the requirement of proof beyond a reasonable doubt do not apply to the aggravating fact of a prior conviction." (*Sandoval*, *supra*, 41 Cal.4th at pp. 836-837; *Apprendi*, *supra*, 530 U.S. at p. 490 ["Other than the fact of 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"].) Our Supreme Court has explained that "numerous decisions from other jurisdictions have interpreted" this so-called *Almendarez-Torres*[15] exception to "include not only the fact that a prior conviction occurred, but also other related issues that may be determined by examining the records of the prior convictions." (*Black*, *supra*, 41 Cal.4th at p. 819.)

In *People v. McGee*, our high court held that the *Almendarez-Torres* exception permitted a trial court's examination of an out-of-state record of a conviction to determine whether the conviction constituted a "serious felony" under California law. (*People v. McGee* (2006) 38 Cal.4th 682, 706 (*McGee*).) The court explained that "such an inquiry does not contemplate that the court will make an independent determination regarding a disputed issue of fact relating to the defendant's prior conduct [citation]," but "instead that the court simply will examine the record of the prior proceeding to determine whether that record is sufficient to demonstrate that *the conviction* is of the type that subjects the

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15 *Almendarez-Torres v. United States* (1998) 523 U.S. 224 (*Almendarez-Torres*). As Garibay notes, there is reason to believe that the United States Supreme Court may ultimately rescind the *Almendarez-Torres* exception. (See *Shepard v. United States* (2005) 544 U.S. 13, 27 (conc. opn. of Thomas, J.) ["*Almendarez-Torres* . . . has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided"].)

defendant to increased punishment under California law. This is an inquiry that is quite different from the resolution of the issues submitted to a jury, and is one more typically and appropriately undertaken by a court." (*Ibid.*) More recently, in *Black, supra*, 41 Cal.4th 799, the court explained that "whether a defendant has suffered prior convictions, and whether those convictions are 'numerous or of increasing seriousness'" also fall within the prior conviction exception because these factors "require consideration of only the number, dates, and offenses of the prior convictions alleged," and the "relative seriousness of these alleged convictions may be determined simply by reference to the range of punishment provided by statute for each offense." (*Id.* at p. 819.) Again, the court explained, "[t]his type of determination is 'quite different from the resolution of issues submitted to a jury, and is one more typically and appropriately undertaken by a court.'" (*Ibid.*)[16]

Unlike the factors recognized in *McGee* and *Black*, the question of whether Garibay's performance on probation was "satisfactory" cannot be determined by simply reviewing the type of a prior conviction, or the "number, dates, and offenses of the prior convictions alleged." (*Black, supra*, 41 Cal.4th at p. 819; *McGee, supra*, 38 Cal.4th at p. 706.) There is no notation in Garibay's criminal record that reveals whether her performance during her six years of misdemeanor probation supervision was "satisfactory." Indeed, "satisfactory" performance is an inherently subjective

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16 The precise scope of the prior conviction exception is currently pending before our Supreme Court in *People v. Towne*, S125677, review granted July 14, 2004.

consideration that requires a judgment call made by a third party observer, such as a sentencing court (or a jury). (Cf. *Sandoval*, *supra*, 41 Cal.4th at p. 840 [recognizing that many sentencing factors are phrased in "a somewhat vague or subjective" manner and can require "an imprecise quantitative or comparative evaluation of the facts," which makes it "difficult for a reviewing court to conclude with confidence that, had the issue been submitted to the jury, the jury would have assessed the facts in the same manner as did the trial court"].) While the instant trial court may not have been satisfied with Garibay's performance on probation, the original sentencing court apparently deemed her performance (ultimately) satisfactory. Despite Garibay's second petty theft conviction, that court reinstated Garibay's probation, allowing her to successfully complete two more years of probation, as well as the subsequent three years of probation imposed for the second petty theft offense.

In sum, the legally appropriate characterization of Garibay's performance on probation ("satisfactory" or "unsatisfactory") is, at least on the facts available in this sentencing record, precisely the type of "independent determination regarding a disputed issue of fact relating to the defendant's prior conduct" that our Supreme Court indicated does not fall within the prior conviction exception. (*McGee*, *supra*, 38 Cal.4th at p. 706.) As both the federal and our state supreme courts have suggested that such determinations, when relied upon to impose a sentence beyond the statutory maximum, must be made by juries not courts, we are required to remand for the trial court to conduct a new sentencing hearing as set forth in *Sandoval*, *supra*, 41 Cal.4th 825, 849.

## DISPOSITION

The matter is remanded for resentencing. In all other respects the judgment is affirmed.

IRION, J.

WE CONCUR:

NARES, Acting P. J.

HALLER, J.