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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ERIC MARTIN GEORGE, Defendant and Appellant.	B184096 (Los Angeles County Super. Ct. No. MA029954)

APPEAL from a judgment of the Superior Court of Los Angeles County, Carol Koppel, Judge. Affirmed.

Thien Huong Tran, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Eric Martin George, appeals from the judgment entered following his conviction, by jury trial, for burglary and receiving stolen property, with prior prison term and prior serious felony conviction findings (Pen. Code, §§ 459, 496, 667.5, 667, subd. (a)-(i).)[1] Sentenced to state prison for 19 years, George claims there was trial and sentencing error.

The judgment is affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206, we find the evidence established the following.

1. *Prosecution evidence.*

Defendant Eric Martin George (hereafter, Eric) and his brother Brian were acquaintances of Morgan Hardeman, who lived around the corner from the George family. On the evening of September 29, 2004, Hardeman was about to leave for the Antelope Valley Mall when she got a phone call from Brian, who wanted to know what she was doing and if he could come over. When Hardeman said she was going to the mall, Brian asked what time she would be coming back. On her way to the mall, Hardeman dropped her son off at her mother-in-law's house. Her mother-in-law, Gloria Jefferson, lived next door to the George family. Hardeman was at the mall for about two hours, from 7:00 to 9:00 p.m. When she returned to Jefferson's house to pick up her son, Hardeman saw Eric and Brian, their brother Demontre and their cousin Preston, standing in front of Luis Pedraza's garage. Pedraza lived on the other side of the George house from Jefferson.

After collecting her son, Hardeman returned to her own apartment and discovered it had been burglarized. Among the things she found missing were a big screen television, a computer, a stereo surround sound system and a backpack.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

Hardeman called Jefferson to tell her what had happened. While they were talking, Jefferson's eight-year-old granddaughter Kyra interrupted to say she had seen Eric and Brian walking down the street with a television and a computer. Hardeman returned to Jefferson's house and then went over to the George house. She saw Eric's father Hubert drive off with Eric. Hardeman went inside the George house and confronted Brian, Preston and Demontre. By the time police arrived, Brian and Preston had left. When Hubert returned, Hardeman heard him tell an officer he had helped Eric put a computer into the trunk of the car, but that he was unaware the computer had been stolen. Hardeman also heard Eric's mother, Beverly, tell an officer she had seen Brian and Preston throw a backpack over the fence into Pedraza's yard.

Hardeman testified that after the police found some of her belongings at Pedraza's house, Hubert told her "he had helped Eric put the computer in the car and that he's sorry because if he knew it was mine, he wouldn't have been involved. He . . . would have gave it back to me. That's what he said. He wouldn't have helped them."

Los Angeles County Deputy Sheriff Michael Protung arrived on the scene about 10:30 p.m. Brian and Preston were gone by this time; their whereabouts were still unknown at the time of trial. Beverly told Protung she had seen Brian and Preston throw a backpack into Pedraza's yard. Hubert told Protung he saw Eric with a computer; when he gave Eric a ride to his girlfriend's apartment, Eric put the computer into the trunk of Hubert's car.

Jefferson testified that when Hardeman called to say her apartment had been burglarized, Kyra interrupted their conversation to say she had seen Eric going down the street with a television. According to Jefferson, Kyra "said she saw . . . Eric pushing the TV and saw Brian with the computer and that . . . Eric told her to go in the house and she went in the house." Jefferson also testified she heard Hubert tell

police "he had taken Eric and the computer over to Eric's house,"[2] but that "he did not know . . . it was stolen at the time."

Kyra testified she had gone to the "candy house"[3] with Eric's siblings Kiara, Brandon and Isiah, and Eric's cousin Courtney. It was just getting dark as they were returning. They had almost reached Jefferson's house when Kyra saw Brian and Eric coming down the street. "Brian was holding a computer and Eric was pushing the TV." Eric walked up to Kyra, "gave [her] a hug and said Hi." Kyra went into the George house for a few minutes. When she left to tell Jefferson she was back from the candy house, Kyra saw Brian, Eric and the two other people she did not know standing by Pedraza's garage.

Hardeman's big screen television and her stereo surround sound system were subsequently found at Pedraza's house. Pedraza pled guilty to receiving stolen property. At Eric's trial, Pedraza testified he bought the stereo surround sound system from Brian for $50, and that he was temporarily storing the television in his garage because it was too big to fit inside the George's garage. Pedraza testified he never saw Eric with any of the stolen items, and that Eric was not one of the people who had brought these things over to Pedraza's house that night.

Beverly George testified Eric had come over to the George house with his infant son at 7:15 p.m. that night to do laundry. Right after he arrived, Hubert drove Beverly to an appointment. About 9:45 p.m., Hubert and Eric came to pick her up. After dropping Eric at his girlfriend's apartment, Beverly and Hubert drove back home to find a crowd of people in front of their house. Hardeman told Beverly about the burglary and said that Brian, among others, had been involved. With Beverly's permission, Hardeman confronted Brian, Preston and Demontre. Brian denied any involvement in the burglary. Brian and Preston ran away before the police arrived.

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[2] Eric was living at his girlfriend's apartment.

[3] The "candy house" was apparently a private home in the neighborhood from which candy was sold.

Hubert George testified he was under the impression that, just before he and Eric left to pick up Beverly, Eric put his laundry into the trunk of Hubert's car. Actually, because Hubert was inside the car at the time and the trunk lid was up, he could not see what Eric put in the trunk. Hubert denied having told police he saw Eric loading a computer into his car.

Some time after the burglary, Brian telephoned Hardeman to say he would tell her where her computer was if she dropped the charges against him.

2. *Defense evidence*.

Eric's 13-year-old brother, Brandon, testified he went to the candy house with Kyra that day. He denied having seen anything while they were walking back. He did not see Eric or anyone else pushing a big screen television. He did not see Eric with a computer. Kyra was lying when she testified she had seen Eric pushing a television down the street.

Eric's 16-year-old brother, Isiah, testified Eric came over with his son that evening to do laundry. He only saw Eric leave the house once and that was to smoke a cigarette. When Eric left to go home, he was carrying his son and a bag of clothes. Isiah did not see either Eric or Hubert with a computer.

CONTENTIONS

1. The trial court erred by denying a new trial motion.

2. The trial court improperly imposed an aggravated prison term in violation of the *Apprendi/Blakely* rule.

DISCUSSION

1. *New trial motion was properly denied*.

Eric contends the trial court erred by denying his new trial motion based on newly discovered evidence. This claim is meritless.

a. *Legal principles*.

A defendant is entitled to a new trial on grounds of newly discovered evidence only if the evidence is: newly discovered; not merely cumulative; such as

to render a different result probable on retrial; and, not reasonably available at trial. (*People v. Martinez* (1984) 36 Cal.3d 816, 821.) " 'The trial court may consider the credibility as well as the materiality of the [proffered new] evidence in its determination of whether [it] . . . would render a different result reasonably probable.'[Citation.]" (*People v. Delgado* (1993) 5 Cal.4th 312, 329.) A new trial motion should be granted if the newly discovered evidence contradicts the strongest evidence put on against the defendant. (*Ibid*.)

"A motion for a new trial on newly discovered evidence is looked upon with disfavor, and unless a clear abuse of discretion is shown, a denial of the motion will not be interfered with on appeal. [Citation.]" (*People v. McDaniel* (1976) 16 Cal.3d 156, 179.) " ' "The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." ' [Citations.] ' "[I]n determining whether there has been a proper exercise of discretion on such motion, each case must be judged from its own factual background." ' [Citation.]" (*People v. Delgado*, *supra*, 5 Cal.4th at p. 328.)

b. *Discussion*.

Defense counsel told the trial court the newly discovered evidence would consist of testimony from Eric's brother Demontre that Brian had forced Demontre to act as a lookout during the burglary and that Eric had not been involved. Eric claims this evidence warranted a new trial. We disagree. The trial court could have reasonably denied the new trial motion for any one of the following reasons.

First, section 1181, paragraph 8, requires that, "[w]hen a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given. . . ." Eric concedes he failed to furnish the statutorily required affidavit from Demontre, but he argues: "Although it appears the trial court would have been justified in denying the motion on this basis, it did not do so. Rather, the court gave defense counsel an opportunity to present the new evidence orally, after which it ruled on

the substantive merits of the new evidence presented." However, the trial court did not state its reasons on the record for denying the new trial motion, and this procedural deficiency might have been a reason.

A second possible reason for denying the motion may have been the trial court's conclusion Eric failed to demonstrate he could not, with reasonable diligence, have discovered this alleged new evidence in time for trial. Eric asserts earlier discovery of this evidence had been thwarted because "Demontre . . . was away in juvenile detention camp at the time leading up to and during appellant's trial." The Attorney General argues that, even so, "Demontre . . . was appellant's brother. Appellant or his parents knew where Demontre was and surely knew if Demontre had been present in or around the neighborhood at the time of the burglary. The record is devoid of any showing why appellant or his family could not have discussed the matter with Demontre prior to trial." The record supports the Attorney General's argument. Indeed, Hardeman testified she had gone to the George house that night and confronted Brian, Preston and Demontre, at which time Brian denied any involvement. Hence, Demontre knew right away that Brian was claiming to be innocent. It is hard to believe that, if Demontre knew Eric had not been involved, this would have remained unknown to Eric and his parents.

A third, and independent, reason for affirming the trial court is because Eric failed to demonstrate the new evidence would have rendered a different result on retrial reasonably probable. Eric acknowledges "Kyra's testimony that she saw appellant pushing a big screen TV was the strongest evidence of appellant's culpability," but he argues: "No other witness at appellant's trial testified from a first hand knowledge that appellant had nothing to do with the burglary. Given Demontre's proffered testimony that he acted as a 'lookout' during the burglary, he was a percipient witness *who would know* that appellant was not involved if indeed he was not." (Italics added.) Not necessarily. Demontre could have been acting as a lookout and still have been unaware

of Eric's involvement.[4] The vague summary of Demontre's proposed testimony, offered by defense counsel in place of a detailed written proffer, was too unspecific to demonstrate he actually knew Eric had not been involved. In addition, Demontre's testimony would not have been very credible because he was Eric's younger brother. Eric argues, "Demontre's testimony . . . required that he implicate himself in the crime, which only would have made him all the more credible." But Demontre was a juvenile, and he might have been willing to lie knowing the consequences would be much less severe for him than a conviction would be for Eric. Moreover, the evidence against Eric was strong. In addition to Kyra's testimony, Hardeman, Jefferson and Officer Protung all testified they heard Hubert say he saw Eric put a computer into the trunk of Hubert's car.

The trial court did not clearly abuse its discretion by denying Eric's new trial motion. (See *People v. Delgado, supra*, 5 Cal.4th at p. 328; *People v. McDaniel, supra*, 16 Cal.3d at p. 179.)

2. *There was no Apprendi/Blakely sentencing error.*

Eric contends the imposition of the upper term for his burglary conviction violated *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435], and *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403], because the necessary factual predicates should have been determined by the jury, not the trial court. This claim is meritless.

a. *Proceedings.*

In relation to defense counsel's objection to imposition of the upper term on the burglary conviction, the trial court and defense counsel engaged in the following colloquy:

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[4] Hence, Demontre's testimony did not *directly* contradict Kyra's testimony that she had seen Eric pushing a television set down the street. Brandon's testimony that Kyra must have been lying when she claimed to have seen this, because he was with her at the time, more directly contradicted the strongest evidence against Eric.

"[Defense counsel]: I am objecting to the high term, Your Honor. There was only one strike.

"The Court: Yeah, a [robbery]; that makes it double.

"[Defense counsel]: I understand it makes it double, but . . . other than the . . . one-strike allegation, there is no evidence of aggravated factors that were found to be true by the jury, and the one strike was from 1994.

"The Court: You mean, even the fact that he was on parole and . . . was practically fresh out of state prison at the time – I think that's enough. . . .

" . . . . . .

" . . . . . .

"The Court: I think high term is appropriate. The circumstances in aggravation include the plan and sophistication and professionalism with which the crime was carried out and involving a large quantity of contraband and that he was on parole and his prior performance on probation or parole was unsatisfactorily [*sic*]. And there are no circumstances in mitigation. . . ."

b. *Legal principles.*

Apprendi held that "[o]ther 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." (*Apprendi v. New Jersey, supra,* 530 U.S. at p. 490.) "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority." (*Blakely v. Washington, supra,* 542 U.S. at pp. 303-304.) *Cunningham v. California* (2007) 549 U. S. ___

127 S.Ct. 856,871 [166 L.Ed.2d 856], applied *Blakely* to California's Determinate Sentencing Law and held that "the middle term specified in California's statutes, not the upper term, is the relevant statutory maximum."

The *Apprendi* prior conviction exception has been broadly defined. (See *People v. Thomas* (2001) 91 Cal.App.4th 212, 222-223 ["In terms of recidivism findings that enhance a sentence and are unrelated to the elements of a crime, *Almendarez-Torres* [*v. United States* (1998) 523 U.S. 224 [140 L.Ed.2d 350]] is the controlling due process authority. *Almendarez-Torres* does not require full due process treatment of an issue of recidivism which enhances a sentence and is unrelated to an element of a crime. *Apprendi* did not overrule *Almendarez-Torres*. . . . "].) Our California Supreme Court cited *Thomas* with approval in *People v. McGee* (2006) 38 Cal.4th 682, 700-703. We therefore conclude the trial court properly imposed the upper term because Eric's parole status is a factor falling within the general category of recidivism.

Assuming, arguendo, the trial court erred by relying on the other, non-recidivism aggravating factors it mentioned, the error was harmless beyond a reasonable doubt. (See *Washington v. Recuenco* (2006) 548 U.S. ___[126 S.Ct. 2546, 2553, 165 L.Ed.2d 466] [failure to submit sentencing factor to jury is not structural error and is therefore subject to harmless error rule].) Only a single aggravating factor is required to impose an upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728; *People v. Earley* (2004) 122 Cal.App.4th 542, 550.) The trial court here found there were no mitigating factors. Hence, even in the absence of the non-recidivism factors, the trial court would still have imposed the upper term based on Eric's parole status. Thus, any error was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705].)

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.