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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JIMMY HERNANDEZ,

Defendant and Appellant.

B192616

(Los Angeles County  
Super. Ct. No. LA047375)

APPEAL from a judgment of the Superior Court for Los Angeles County,  
Martin L. Herscovitz, Judge. Affirmed.

Robert M. Sweet, 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, Lance E.  
Winters and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and  
Respondent.

Defendant Jimmy Hernandez appeals from a judgment sentencing him to 27 years in state prison after a jury found him guilty of two counts of second degree robbery (Pen. Code,<sup>1</sup> § 211) and one count of possession of a firearm by a felon (§ 12021, subd. (a)(1)), and found to be true allegations that defendant personally discharged a firearm in the commission of the robberies (§ 12022.53, subd. (c)). On appeal, defendant contends there was insufficient evidence to support the jury's finding that he personally discharged a firearm. He also contends the trial court improperly imposed the upper term sentence based upon facts not found by the jury. We affirm the judgment.

### **BACKGROUND**

Jany and Rundy Rann own the Golden Donuts doughnut shop in North Hollywood. On October 28, 2004, Jany and Rundy<sup>2</sup> were the only people in the shop when it opened for business at 5:00 a.m.; Jany was behind the counter and Rundy was in the back, making doughnuts. Two men came into the shop shortly after it opened, followed a minute later by another man. The first two men told the third man to order first, but he insisted that they order first. They asked Jany the price for a dozen doughnuts, and ordered two hot chocolates and a doughnut. Jany gave the men their order and they went outside and stood to the side of the door. The other man bought a coffee and left. The first two men then came back into the shop and ordered a dozen doughnuts. As Jany turned around to get a box, one of the men jumped over the counter, pulled a gun from his shirt and pointed it at

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

<sup>2</sup> We refer to Jany and Rundy Rann by their first names for ease of reference, and not out of disrespect.

Rundy's head. The other man, who remained on the customer side of the counter, pointed a gun at Jany.

The man pointing the gun at Rundy brought Rundy to the cash register, saying he wanted the money. Although he told Rundy to lie face down in front of the cash register, Rundy instead opened the register, pulled out the cash drawer, and put it on the counter. While the man was distracted by the cash drawer, Rundy walked to the back room and out the side exit door. Jany also walked toward the back of the shop, followed by one of the men. As they were walking, the man noticed a camera and VCR, and told Jany he wanted the tape. Jany was unable to get the tape out of the machine, so the man tried to get it out. While he was distracted with that, Jany walked into the back room and out the side door.

After Rundy left the shop through the side exit, he hid behind a newsstand along the sidewalk, and then moved to a position behind a telephone booth. From that position he could see the men inside, trying to get something from the shop. After a little while, the men exited the shop through the front door. One of them pointed a gun at Rundy. Rundy, who had a .32 caliber Barretta in his pocket, thought the man would kill him, so he fired his weapon at him. The man fired back. At one point, the man who was firing at Rundy fell to his right knee. The other man, who was not shooting at Rundy because he was carrying something in his hands (probably the VCR, which was missing when the Ranns returned to the shop), helped the first man get up and limp off.

After the men left, Rundy and Jany returned to the shop and called the police. Rundy and Jany gave descriptions of the robbers to the police, and Rundy told them that he was not sure if he hit the man who was shooting at him, but he did see him falling and limping.

In the meantime, at around 6:50 a.m., Officer Ralph Camarillo was called to Los Angeles County/USC Medical Center to take a report for a shooting

investigation. Camarillo interviewed defendant, who had a gunshot wound to his right shin or calf. Defendant gave Camarillo a false name and address, and told him that he had been the victim of a drive-by shooting while he was standing on the corner of Sixth Street and Alvarado waiting for a taxicab. Camarillo went to that location at around 8:00 a.m. to look for evidence of a shooting, such as blood or casings, but did not find anything.

One of the detectives assigned to the Golden Donuts case, Detective Christina Frus, put out an alert to area hospitals between 8:00 a.m. and 9:00 a.m., based upon the Ranns' descriptions of the suspects, notifying the hospitals that the police were looking for a male Hispanic, approximately five foot eight inches tall, 150 pounds, with a gunshot wound to the leg. Frus received one response to the alert, from Los Angeles County/USC Medical Center. She and her partner went to the hospital and interviewed defendant, who matched the description of one of the robbers and had a gunshot wound through his right calf. Defendant initially gave the detectives a false name, but later admitted his true name. He gave the detectives the same general description of the events surrounding the shooting that he had given to Officer Camarillo, although he gave the detectives two different versions of how he got to the hospital -- at first he said that a White man he did not know drove him to the hospital, but later he said that two Hispanic men drove him.<sup>3</sup>

Frus went to defendant's residence later that same day and found small amounts of what appeared to be fresh blood on the staircase leading to defendant's apartment. The blood was tested and determined to be defendant's. The following day, Frus showed each of the Ranns a photo lineup that included defendant's

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<sup>3</sup> He had told Officer Camarillo that a person he did not know drove him to the hospital. At trial, Camarillo testified that he had no further description of that person.

picture. Jany identified defendant as one of the robbers. Rundy selected two photographs, one of which was of defendant, and said that both photographs resembled one of the robbers. Neither Jany nor Rundy was able to identify defendant in a live line up that took place six months later, although Jany identified defendant at trial as the man who held a gun to Rundy's head during the robbery. Rundy testified at trial that the robber looked like defendant, but he was not sure if defendant was the robber.

The day after the robbery, Officer Michael Lopez located a Toyota 4Runner that Lopez had seen defendant driving on prior occasions. The 4Runner was parked at the curb in front of the home of defendant's girlfriend's parents. There was blood, which later was determined to be defendant's, on the driver's side floorboard beneath the gas pedal, the driver's side of the center console, the driver's seat, the exterior below the driver's side door, and the license plate. As Lopez was impounding the car, defendant's girlfriend, Vilma Pineda, came out of her parents' house. In response to Lopez's questioning, Pineda told him that she and her friend Maggie had picked up the car at Pineda's residence the previous night (Oct. 28), and Maggie drove it to Pineda's parents' house while Pineda followed her. She said the car had not been driven since then.

Defendant was charged by information with three counts: second degree robbery of Rundy (§ 211); second degree robbery of Jany (§ 211); and possession of a firearm by a felon (§ 12021, subd. (a)(1)). The information also alleged firearm enhancements under section 12022, subdivision (a)(1), and section 12022.53, subdivisions (b) and (c), and three prior prison term enhancements

(§ 667.5, subd. (b)).<sup>4</sup> Defendant was tried before a jury. After just over six hours of deliberations, the jury returned guilty verdicts on all three counts and found true the section 12022, subdivision (a)(1) and section 12022.53, subdivision (b) allegations, but was deadlocked on the section 12022.53, subdivision (c) firearm discharge allegation. The trial court asked the jurors if it would help them if they had a readback of testimony or a re-reading of the firearm discharge instruction, and one of the jurors said that it might have an effect. The jury ultimately asked for a readback of all of Rudy's testimony about what happened when he was outside the shop and the robbers came out. Twenty minutes after the readback, the jury found the section 12022.53, subdivision (c) allegation to be true.

In a bifurcated trial, the trial court found two of the prior prison term allegations to be true. The court imposed a 27-year sentence computed as follows: the upper term of five years for the first robbery count, plus 20 years for the firearm discharge enhancement, plus two one-year prior prison term enhancements; the upper term of five years for the second robbery count, plus 20 years for the firearm discharge enhancement, to run concurrent with the sentence on the first count; the upper term of three years on the firearm possession count, stayed under section 654. Defendant appeals from the judgment.

## **DISCUSSION**

### **A. Firearm Discharge Finding**

Defendant does not challenge the jury's verdicts finding defendant guilty of robbing the Ranns at the Golden Donut shop. Thus, he concedes that he was one

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<sup>4</sup> Although the information also included Three Strikes allegations, the prosecutor informed the trial court that the People were not proceeding with those allegations because defendant was a juvenile at the time of the prior violent or serious felony.

of the two robbers. He contends, however, there was insufficient evidence to support the jury's finding that he personally discharged a firearm because Rundy testified that he could not tell which robber shot at him and that he did not know if he hit the man who was shooting at him. Defendant's contention fails.

“In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- evidence that is reasonable, credible and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.]” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) The same standard also applies to challenges to the sufficiency of the evidence to support findings on enhancement allegations. (*People v. Fielder* (2004) 114 Cal.App.4th 1221, 1232.)

Defendant is correct that Rundy testified that he could not see the faces of the robbers when they were outside and that he did not know which of the men was the one who shot at him. But while Rundy testified that he did not *know* whether he hit the man who was shooting at him, he testified that he saw that man move in a way that made him *think* he had hit him: the man fell to his right knee, was helped to his feet by the other man (who did not shoot at him), and limped off. He also told the police who responded to his 911 call that he “did not know for sure” whether he had hit the man shooting at him, but that he saw that man “kind of limping, walking, and falling.”

The jury could reasonably deduce from Rundy's testimony that the robber who shot at Rundy was hit in the right leg by one of Rundy's shots. That deduction, combined with Jany's identification of defendant as one of the robbers

and evidence that defendant was treated for a gunshot wound to his right leg less than two hours after the robbery, is substantial evidence from which a reasonable jury could conclude beyond a reasonable doubt that defendant personally discharged a firearm in the commission of the robbery.

## **B. *Cunningham* Error**

The trial court sentenced defendant to the upper term on all counts based on several aggravating factors, including factors related to the crimes, factors related to defendant's recidivism, and the fact that defendant was convicted of crimes for which consecutive sentences could have been imposed.<sup>5</sup> Defendant contends the trial court violated *Cunningham v. California* (2007) 549 U.S. \_\_\_ [127 S.Ct. 856] (*Cunningham*) by relying on facts not found by a jury when it imposed those upper term sentences.

In *Cunningham*, the Supreme Court held that California's determinate sentencing law violates a defendant's right to jury trial protected by the Sixth and Fourteenth Amendments to the United States Constitution to the extent the law "allows a judge to impose a sentence above the statutory maximum [which the Court found was the mid-term sentence] 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; see also *id.* at p. 868.) The failure to submit a sentencing factor to the jury, however, is not a structural error requiring reversal

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The crime-related factors cited by the trial court were the vulnerability of the victims, and the planning and sophistication of the crime. The recidivism factors the court cited were (1) defendant's record indicates a continuing pattern of conduct with escalating violence, (2) his past performance on probation was unsatisfactory, and (3) he was on parole or just off parole when he committed the crimes in this case.



per se, but is instead subject to harmless error analysis. (*Washington v. Recuenco* (2006) 548 U.S. \_\_\_\_ [126 S.Ct. 2546].)

Although the trial court in this case imposed the upper term based on facts not found by the jury, we hold the error was harmless under any standard. At the time the court sentenced defendant, the California Supreme Court had decided *People v. Black* (2005) 35 Cal.4th 1238, and the United States Supreme Court had granted certiorari but not yet decided *Cunningham*. Acknowledging the uncertainty of the law in light of the pending *Cunningham* case, the trial court stated for the record that the aggravating factors other than the factors related to the crime were sufficient to support the upper term sentence: “Because of the present state of the law and pending action before the United States Supreme Court in that regard, I’m -- I’m going to say for the record that the factors in aggravation regarding the crimes are there. But the other factors are sufficient to support the high term without reference to the following aggravating factors, and that is the -- the vulnerability of the victims. . . . [¶] Also, the planning and sophistication [of the crime].” The court then discussed the recidivism factors, which the court found warranted imposition of the upper term.

Defendant contends, however, that the trial court’s reliance on recidivism factors also violates *Cunningham*. He argues that the “prior conviction” exception in *Cunningham, supra*, 127 S.Ct. at page 868, does not apply to recidivism factors other than the simple fact of a prior conviction.<sup>6</sup> We disagree.<sup>7</sup>

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<sup>6</sup> Defendant does not address the last factor cited by the trial court -- that defendant was subject to consecutive sentences but received concurrent sentences. (Cal. Rules of Court, rule 4.421(a)(7).) There is no *Cunningham* issue as to that factor, however, because the jury found defendant guilty of two separate violent crimes, i.e., the robberies of Jany and Rundy, and thus was subject to consecutive sentences. (*People v. Deloza* (1998) 18 Cal.4th 585, 592.)

In *People v. McGee* (2006) 38 Cal.4th 682, the California Supreme Court addressed whether a defendant had a federal constitutional right to have the jury rather than the court determine whether a prior conviction in another state subjects the defendant to an increased sentence when, due to differences between the states' laws, the record of the prior proceedings had to be examined to determine whether the prior conviction qualified as a serious felony. Concluding there was no such right, the Supreme Court cited the United States Supreme Court's discussion in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) distinguishing between recidivist conduct and other factors used to enhance punishment: "(1) recidivism traditionally has been used by sentencing courts to increase the length of an offender's sentence, (2) recidivism does not relate to the commission of the charged offense, and (3) prior convictions result from proceedings that include substantial protections." (*People v. McGee, supra*, 38 Cal.4th at p. 698.) Our Supreme Court also noted that numerous courts examining the issue have concluded that the prior conviction exception to the right to a jury determination of facts used to increase a sentence applies broadly to recidivism enhancements. (*Id.* at pp. 700-706; see also *People v. Thomas* (2001) 91 Cal.App.4th 212, 221 ["courts have held that no jury trial right exists on matters involving the more broadly framed issue of 'recidivism'"].) We find the reasoning of those cases persuasive.

Because the trial court in this case specifically found that the recidivism factors were sufficient to impose the upper term, we hold that the court's consideration of factors related to the crime was harmless error under any standard.

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We note that this issue -- whether recidivism factors found by the court rather than by a jury violates *Cunningham* -- is pending before the California Supreme Court in *People v. Towne*, review granted July 14, 2004, S125677. (Req. for additional briefing, S.Ct. dock. entry of Feb. 7, 2007.)

*(People v. Watson* (1956) 46 Cal.2d 818, 836 [state law error]; *Chapman v. California* (1967) 386 U.S. 18 [federal constitutional error].)

**DISPOSITION**

The judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.