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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Modoc)

THE PEOPLE,

Plaintiff and Respondent,

v.

CARL DEWAYNE HUGHES,

Defendant and Appellant.

C053742
(Super.Ct. No. F05026)

A jury convicted defendant Carl Dewayne Hughes of the continuous sexual abuse of Shannon D. (Pen. Code, § 288.5; undesignated section references are to this code). The court sentenced defendant to state prison for the upper term of 16 years.

Defendant appeals. He contends the trial court's imposition of the upper term contravenes *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (*Blakely*) and *Cunningham v. California* (2007) 549 U.S. ____ [166 L.Ed.2d 856] (*Cunningham*), requiring remand for resentencing. We disagree and will affirm.

A detailed recitation of the facts underlying the offense are not necessary in view of defendant's contention on appeal. Suffice it to say that between 1997 and 1999, defendant molested his girlfriend's daughter when she was 13 and 14 years old. The conduct included touching, sexual intercourse, oral copulation and one incident of sodomy. In a pretext call, the victim spoke about defendant taking her virginity and he said, "Yeah. . . well I really love you honey doll." At trial, defendant testified and denied all sexual conduct claimed by the victim.

DISCUSSION

Defendant contends that the trial court's imposition of the upper term contravened *Blakely/Cunningham* in that the court relied on aggravating factors which were neither admitted by defendant nor found true by a jury. We conclude that defendant was subject to the upper term based on his felony probationary status and his prior felony conviction so no *Blakely/Cunningham* error occurred.

Background

At sentencing, the court stated that it had considered the probation report and the report of Dr. Caruso who evaluated defendant pursuant to section 288.1. The probation report recommended that the court deny probation and impose the upper term of 16 years. In aggravation, the probation report cited the following: the crime involved numerous acts which displayed a high degree of callousness, the victim was especially vulnerable, defendant held a position of trust, defendant threatened to harm the victim's mother if the victim ever told

anyone, and defendant was on probation at the time of the offense.

The probation report reflects that "[a]ccording to the Department of Justice," defendant was convicted in Florida in 1993 of third degree burglary and theft, both felonies, granted four years probation and violated the same by leaving the state. He was convicted in California in 1997 of a misdemeanor violation of section 273, subdivision (d) (paying parent for adoption of child).

The prosecutor concurred with the probation report, adding that defendant's conduct exceeded the minimum required under section 288.5, that is, he committed more than three acts in a 90-day period. The prosecutor also noted that although defendant's prior criminal history was not lengthy, he did have a prior felony conviction in Florida and was convicted of endangering the welfare of a child.

The court noted the substantial sexual conduct and found no unusual circumstances to warrant a grant of probation. In imposing the upper term of 16 years, the court agreed with the prosecutor and the probation report's factors in aggravation, including "the victim's vulnerability, the position of trust that was violated, the fact that the defendant at the time of committing these offenses was on a felony probation, grant of felony probation[,] . . . [¶] . . . I think there is the intimidation he[re], vis-à-vis the threats made regarding harm to the victim's mother in order to elicit at least, I think, the victim [to] remain silent in terms of reporting things. I view

that as an aggravating factor. [¶] On balance, I think it is difficult here to find any significant mitigating factors. If anything, I think that the one thing that I could potentially find as mitigating, and find as mitigating, although there is a previous felony, in relative terms the defendant does have a relatively insignificant criminal record, and certainly I don't see any record having to do with the nature of the crime that we are dealing with today. But on balance I will find that the aggravating factors outweigh the mitigating factors."

Analysis

Applying the Sixth Amendment to the United States Constitution, the United States Supreme Court held in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*) that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Id.* at p. 490 [147 L.Ed.2d at p. 455].) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant. Thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional factfindings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely, supra*, 542 U.S. at p. 303-304 [159 L.Ed.2d at pp. 413-414].) *Cunningham* recently reaffirmed its holdings in *Blakely* and

Apprendi, rejecting the contrary holding in *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*). (*Cunningham, supra*, 549 U.S. at pp. ___, ___ [166 L.Ed.2d at pp. 868, 873, 876].)

People v. Black (2007) 41 Cal.4th 799 (*Black II*) held that "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." (*Id.* at p. 816.) In *Black II*, a jury convicted the defendant of continuous sexual abuse of a child and two counts of lewd and lascivious conduct with a child. In connection with the continuous sexual abuse count, the jury found true two allegations relevant to probation or a suspended sentence, that is, the offense was committed with force, violence, duress, menace and fear of injury and that the defendant had engaged in substantial sexual conduct. (*Id.* at pp. 806-807.) In imposing the upper term for the continuous abuse offense, the trial court cited the nature, seriousness and circumstances of the offense, noting the use of force on many occasions, victim vulnerability, abuse of a position of trust and the infliction of emotional and physical harm. (*Id.* at p. 807.) "The trial court stated that it considered not only the circumstances of the crime but also the other aggravating circumstances set out in the district attorney's sentencing brief" which included the factor that defendant's prior convictions were numerous and increasingly serious. The

probation report set forth defendant's criminal history. (*Id.* at p. 818.) *Black II* concluded that the "defendant's constitutional right to a jury trial was not violated by the trial court's imposition of the upper term sentence for his conviction of continuous sexual abuse" because "the 'statutory maximum' sentence to which defendant was exposed by the jury's verdict was the upper term, . . ." (*Id.* at p. 816.) The trial court's citation of the nature of the offense, specifically noting the use of force, was supported by the jury's probation ineligibility finding (force, violence, duress, menace, and fear of injury) and rendered the defendant eligible for the upper term for the continuous sexual abuse offense. (*Id.* at pp. 816-818.) *Black II* also concluded that the trial court's reliance upon the defendant's criminal history by reference to the prosecutor's sentencing brief in imposing sentence for the continuous sexual abuse offense was an additional aggravating factor which rendered the defendant eligible for the upper term. (*Id.* at pp. 818-820.)

Here, although the trial court erred in considering the victim's vulnerability, defendant's violation of a position of trust and defendant's threats to harm the victim's mother in order to maintain the victim's silence (*Cunningham, supra*, 549 U.S. ___ [166 L.Ed.2d 856]), defendant was eligible for the upper term based on the trial court's finding that defendant was on felony probation at the time of the offense. The trial court cited defendant's probationary status at the time of the offense

which qualifies as a recidivism factor. *Black II, supra*, 41 Cal.4th at pages 818 to 820 determined that the "fact of a prior conviction" broadly construed encompasses a defendant's criminal history as reflected in records of the prior convictions. Further, in finding defendant's prior criminal history to be "relatively insignificant," the trial court found that defendant had previously been convicted of a felony offense.

Defense appellate counsel questions whether defendant was on felony probation at the time of the offense, citing defendant's testimony at trial and the probation report. At trial, defendant admitted that he had been to prison in Florida. He had been on probation for "robb[ing] the motel" but later stated it was a burglary. He was uncertain whether his 1993 conviction was for a felony or a misdemeanor. He also pleaded no contest to misdemeanor corporal injury to a child. Defense appellate counsel cites a page of the probation report which recounts *defendant's explanation* of how he violated probation granted in the Florida case, that is, he left the state without permission, was arrested in Oregon in 1999, returned to Florida and served six months in prison "in lieu of additional four (4) years probation."

Defense appellate counsel fails to mention the probation report's list of defendant's criminal convictions and dispositions. By the time sentencing occurred, the probation officer clarified that defendant had two felony convictions in

1993 in Florida and he was on probation when the current offenses occurred (between 1997 and 1999).

No *Blakely/Cunningham* error occurred.

DISPOSITION

The judgment is affirmed.

MORRISON, J.

We concur:

BLEASE, Acting P.J.

ROBIE, J.