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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. HERBERT JOHNSON, Defendant and Appellant.	B193730 (Los Angeles County Super. Ct. No. NA065694)

APPEAL from a judgment of the Superior Court for the County of Los Angeles, John D. Lord, Judge. Affirmed in part, reversed in part and remanded.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Herbert Johnson of eight counts of rape and one count of sexual penetration by a foreign object and found true the special allegation he had committed the offenses during the course of a burglary. The trial court sentenced Johnson to an aggregate state prison term of 89 years to life. On appeal Johnson contends the evidence is insufficient to support his convictions on three of the rape counts. Johnson also contends the trial court's imposition of a sentence based in part on its own factual findings concerning aggravating circumstances violated his right to a jury trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. In light of the United States Supreme Court's recent decision in *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*), which invalidated portions of California's determinate sentencing law (DSL), we remand for resentencing. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

An amended information charged Johnson with 10 counts of rape by force or fear (Pen. Code, § 261, subd. (a)(2))[1] and one count of sexual penetration by a foreign object (§ 289, subd. (a)(1)). It also alleged as to each count that Johnson had committed the offense during the course of a burglary (§ 667.61, subd. (d)(4) (the "One Strike" law)). Two of the rape counts (counts 9 and 10) were dismissed at the close of the trial for insufficient evidence.

According to the evidence at trial, as 19-year-old Lillian E. prepared to go to sleep for the night, she was awakened by a male intruder who put his hand over her face, told her not to say anything, inserted his fingers in her vagina, ordered her to comply with his commands or he would kill her sister and repeatedly raped her in various positions over the course of an hour. Although Lillian E. was unable to identify her attacker and the case went unsolved for years, DNA evidence obtained in connection with another case later confirmed Johnson was the rapist.

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[1] Statutory references are to the Penal Code.

Following his conviction by a jury on all eight counts of rape and one count of sexual penetration with a foreign object and the jury's finding the offenses were committed during the course of a burglary, the trial court sentenced Johnson to a term of 25 years to life with respect to the first count of rape under the One Strike law and to full, separate and consecutive eight-year terms (the upper term) with respect to each of the remaining eight counts. (§ 667.6, subd. (c) [authorizing imposition of full, separate and consecutive terms for each violation of offense specified in subd. (e), including rape and unlawful sexual penetration by foreign object]; see §§ 264, subd. (a) [rape, as defined in section 261, punishable by imprisonment in state prison for three, six or eight years], 289 [offense of unlawful sexual penetration by foreign object punishable by imprisonment in state prison for three, six or eight years].) In accordance with the One Strike law and the DSL (see § 1170.3; Cal. Rules of Court, rule 4.401, et seq.) the court elected to impose the upper term of eight years for counts 2 through 8 and count 11 because it found by a preponderance of the evidence the crimes involved great violence and great bodily harm, as well as a high degree of cruelty and viciousness; there was a threat of great bodily harm to the victim's sister; and the 19-year old victim was particularly vulnerable and had been a virgin prior to being brutalized by Johnson. (See Cal. Rules of Court, rule 4.421 [enumerating aggravating factors allowing for imposition of upper term].)

DISCUSSION

1. *Standard of review*

In reviewing a challenge to the sufficiency of the evidence, we "consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt. [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 432; *People v. Staten* (2000) 24 Cal.4th 434, 460; *People v. Hayes* (1990) 52 Cal.3d 577, 631.) Our sole function is to determine if any rational trier of fact could have found the essential elements of the crime or the special allegation present beyond a reasonable doubt. (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Ochoa* (1993) 6 Cal.4th

1199, 1206.) The Supreme Court has held, "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the jury's finding].'" (*Bolin*, at p. 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

"Substantial evidence" in this context means "evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *People v. Hill* (1998) 17 Cal.4th 800, 848-849 ["'"When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence -- i.e., evidence that is credible and of solid value -- from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt."' [Citations.]"].) "Although the jury is required to acquit a criminal defendant if it finds the evidence susceptible of two reasonable interpretations, one of which favors guilt and the other innocence, it is the jury, not the appellate court, which must be convinced of his guilt beyond a reasonable doubt." (*People v. Millwee* (1998) 18 Cal.4th 96, 132.)

2. *Substantial Evidence Supports Johnson's Conviction for Each of the Eight Counts of Rape Under Section 261*

Rape is defined in section 261, subdivision (a)(2), as "an act of sexual intercourse accomplished with a person not the spouse of the perpetrator" "against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." "The essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. [Thus,] [a]ny sexual penetration, however slight, is sufficient to complete the crime." (§ 263.) Although penetration is a necessary element of rape, vaginal penetration is not required. Penetration, however slight, "'of the victim's external genital organs is sufficient to constitute sexual penetration and to complete the crime of rape even if the rapist does not succeed in penetrating into the vagina.'" (*People v. Quintana* (2001) 89 Cal.App.4th 1362, 1366, quoting *People v. Karsai* (1982) 131 Cal.App.3d 224, 231-232 [penetration of external

genital organs such as labia majora and labia minora sufficient] disapproved on other grounds in *People v. Jones* (1988) 46 Cal.3d 585, 600, fn. 8.)

Citing Lillian E.'s testimony that he inserted his penis into her vagina five times while she was on her back, Johnson contends the evidence is sufficient to support only five of the eight counts of conviction for rape. However, Johnson ignores Lillian E.'s additional testimony that he penetrated her external genitalia, "poking her" in the vagina "four to five" times with his penis while she was on her hands and knees but was unsuccessful in penetrating her vagina in that position and later forced Lillian E. to assume a different position. At another point in her direct examination, when asked to summarize the number of times Johnson succeeded in penetrating her vagina with his penis during her ordeal, Lillian E. testified "five times"; when asked the number of times Johnson attempted to penetrate her vagina but was unsuccessful in that effort, she testified "three times." A reasonable trier of fact could infer from Lillian's testimony that, in "poking her vagina" with his penis in an effort to effect vaginal penetration, Johnson succeeded in penetrating her external genitalia (albeit not her vagina) at least three times, if not "four or five." Accordingly, substantial evidence amply supports the jury's verdict on all eight counts of rape.

2. *The Imposition of the Upper Term for Seven of the Counts Based on Findings Not Made by a Jury Violates Johnson's Sixth Amendment Jury-trial Right as Articulated by the United States Supreme Court in Cunningham*

In *Cunningham, supra,* 127 S.Ct. 856, decided after Johnson had filed his opening appellate brief and the People had filed their respondent's brief in this case, the United States Supreme Court reaffirmed *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*) and *United States v. Booker* (2005) 543 U.S. 220 [125 S.Ct. 738, 160 L.Ed.2d 621] (*Booker*), overruled *People v. Black* (2005) 35 Cal.4th 1238,[2] and

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[2] On February 20, 2007 the United States Supreme Court vacated the judgment in *People v. Black, supra,* 35 Cal.4th 1238, and remanded the case to the California Supreme Court for further consideration in light of *Cunningham, supra,* 549 U.S. ___ [127 S.Ct. 856].)

held California's DSL violates a defendant's right to a jury trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution to the extent it authorizes the trial judge to find facts (other than a prior conviction) that expose a defendant to an upper term sentence by a preponderance of the evidence. "This Court has repeatedly held 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,* 127 S.Ct. at pp. 863-864.)

"Under California's DSL, an upper term sentence may be imposed only when the trial judge finds an aggravating circumstance. . . . [A]ggravating circumstances depend on facts found discretely and solely by the judge. In accord with *Blakely*, therefore, the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum. [*Blakely*, *supra*,] 542 U.S., at 303 ('The "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*.' (emphasis in original)). Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt [citation], the DSL violates *Apprendi's* bright-line rule: Except for 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.' [Citation.]" (*Cunningham*, *supra*, 127 S.Ct. at p. 868.)[3]

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[3] The People urge Johnson forfeited this argument by not objecting on constitutional grounds in the trial court to the imposition of the upper term sentences. Whether the People's forfeiture argument may have some merit in other circumstances (cf. *United States v. Cotton* (2002) 535 U.S. 625), here Johnson was sentenced on August 21, 2006, more than a year after the California Supreme Court had expressly held in *People v. Black, supra,* 35 Cal.4th at page 1244, "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." Following *Black* and before the United States Supreme Court's January 22, 2007 decision overruling it in *Cunningham,* any objection to the imposition of the upper term on Sixth

Under *Cunningham, supra,* 127 S.Ct. 856 the trial court's imposition of the upper term on each of the eight determinate counts (counts 2 through 8 and count 11), based on its own factual findings of aggravating circumstances in accordance with the DSL, none of which involved a prior conviction or even more broadly the defendant's recidivism, violated Johnson's constitutional right to a jury trial.[4] The only remaining question is whether imposition of the upper term sentence in this case is harmless error. (*Washington v. Recuenco* (2006) 548 U.S. __ [126 S.Ct. 2546, 165 L.Ed.2d 466] [*Apprendi/Blakely* error not "structural error" requiring automatic reversal]; see *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327 [*Apprendi* error reviewable under the harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] (*Chapman*).)

The People suggest any error is harmless because a jury convicting Johnson of such heinous crimes would have likewise found additional facts in aggravation warranting imposition of the upper term. Although we have little doubt a jury could reasonably find this brutal crime involved a high degree of cruelty and the victim was particularly vulnerable, the jury in this case was not asked to find, nor did it find, expressly or even impliedly, those facts. Applying *Chapman*'s heightened beyond-a-reasonable-doubt standard for assessing harmless error in cases involving violation of a defendant's federal constitutional rights, from this record we simply cannot conclude the jury would have found, beyond a reasonable doubt, the existence of the aggravating factors identified by the trial court. Moreover, we cannot determine from this record whether the same sentence would have been imposed by the trial court if the jury had found some but not all of the aggravating circumstances relied on by the trial court in

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Amendment grounds would have been futile. (See *People v. Hill* (1998) 17 Cal.4th 800, 820.)

[4] Johnson does not challenge any aspect of the sentence imposed other than the trial court's selection of the upper term of eight years rather than the middle term of six years in imposing the eight full, separate and consecutive terms on counts 2 through 8 and count 11.

imposing the upper term for each determinate count. (See *People v. Navarro* (2004) 124 Cal.App.4th 1175, 1182-1183 [*Blakely* requires that jury, not sentencing judge, determine underlying facts used to enhance sentence, but decision whether to use those facts to enhance sentence remains the court's].) In sum, the sentencing error is not harmless under *Chapman*.

DISPOSITION

The judgment is reversed with respect to the imposition of the upper term sentences on counts 2 through 8 and count 11, and the matter is remanded for resentencing. In all other respects the judgment is affirmed.

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PERLUSS, P. J.

We concur:

JOHNSON, J.

WOODS, J.