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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. JAMES S. JONES III, Defendant and Appellant.	B171070 (Super. Ct. No. TA069481)

APPEAL from a judgment of the Superior Court of Los Angeles County, John J. Cheroske, Judge. Reversed in part, affirmed in part.

Susan K. Keiser, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and Allison H. Chung, Deputy Attorneys General for Plaintiff and Respondent.

James S. Jones III appeals his conviction of assault with a machine gun (Pen. Code, § 245, subd. (a)(3)),[1] shooting at an inhabited dwelling (§ 246), shooting at an unoccupied vehicle (§ 247, subd. (b)), and possession of a firearm by a felon (§ 12021, subd. (a)(1)). He claims the witnesses were so inconsistent and biased that they provided no substantial evidence to prove his guilt. He also claims the witnesses had no opportunity to see the type of gun allegedly used in the crime, and hence that the evidence does not support his convictions for use of an assault weapon. He argues, and respondent agrees, that the court erred by imposing a middle term of eight years on the firearm enhancements, since the statute provides for prison terms of five, six, or 10 years. (§ 12022, subd. (b).) And in supplemental briefing, he asserts the court's imposition of the upper term violated the Sixth Amendment to the United States Constitution under *Blakely v. Washington* (2004) 124 S.Ct. 2531. We remand for correction of his sentence on the firearm enhancements and for resentencing in accordance with *Blakely*; in all other respects, we affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Appellant lived with his mother in a house next door to La Tanya Morris on Wellfleet Street in Carson. The two houses were connected by a common roof. At approximately 10 a.m. on February 10, 2003, Morris and seven of her family members, including her nephew Rodney Bagby and her son, Stephon Odom, were in front of her house. Morris was on a cordless telephone, calling 911 to report that her nephew's car had been vandalized. While on the telephone, Morris saw appellant running down the street in her direction. His hands were under his jacket, but as he neared Morris's house, he pulled out a gun. Bagby and Odom, simultaneously stated, "He got a gun." Seconds later, appellant started shooting at Bagby's car; Bagby was standing beside the driver's door at the time. Bagby, Odom and the others ran, except

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

for Morris, who just stood there, in shock. Appellant made eye contact with Morris, pointed the gun in her direction and started shooting. Morris ran into her garage. She heard more shots as she ran.

Bullet holes were found in Morris's garage wall and in her clothes dryer, which was in the garage. Windows were shot out in Morris's car and in Bagby's car. Sheriff's deputies recovered 14 nine-millimeter shell casings from the area near Morris's house, driveway, and the entrance to her garage.

Stephon Odom saw appellant's father's Lincoln Continental stop a few houses north of the Morris residence before appellant started shooting. Morris also remembered seeing the Lincoln parked to the north about seven or eight houses from hers.

Morris identified the gun as a TEC-9. She had seen appellant with the gun when he pulled it on her son Stephon on another occasion. Stephon also identified the gun as a TEC-9, and recognized it from an earlier occasion when appellant had pulled the gun on him.

Appellant was charged in counts 1 through 8 with attempted murder; count 9 charged shooting at an inhabited dwelling, counts 10 and 11 charged him with shooting at an unoccupied vehicle, and count 12 charged felon in possession of a firearm. It was alleged that appellant personally used a firearm, personally discharged a firearm, and personally used an assault weapon. Appellant's father was charged with being an accessory after the fact.

Trial was to the court. Appellant's father was found not guilty. The court found appellant not guilty of attempted murder, but guilty of the lesser offense of assault with an assault weapon in violation of section 245, subdivision (a)(3) on counts 1 and 7. The court also found him guilty on counts 9 through 12, and found true the personal use enhancement under section 12022.5. This is a timely appeal from the judgment of conviction.

DISCUSSION

I

Appellant claims the evidence was insufficient to establish his guilt because the witnesses were biased against him and provided such inconsistent testimony that it was not of solid, credible value. In considering the sufficiency of the evidence the question is whether, "'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Hatch* (2000) 22 Cal.4th 260, 272, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.) Conflicts in testimony do not justify reversal on appeal for insufficient evidence, for it is the exclusive province of the trial judge or jury to determine the credibility of witnesses and resolve conflicts or inconsistencies in their testimony. (*People v. Lewis* (2001) 26 Cal.4th 334, 361.)

The claim of bias is premised on the existence of a feud between appellant and the Morris family. Bias is a factor that can affect the credibility of a witness, but of course, the trier of fact is the final arbiter of credibility. Here, the court was aware that there was a feud between the two families and could decide how much weight to give that factor.

The inconsistencies involved the details of appellant's arrival and departure from the scene, the way in which he held the gun, precisely when he began shooting, who was where during the incident, and whether Morris's daughter was interviewed on the day of the shooting. Again, the court, as trier of fact, was aware of the inconsistencies, and was in a position to resolve them: "Well, I went over all of the testimony, inconsistencies. There were a lot of inconsistencies. Conceivably, they exist in an excited case like this. What I attempted to do was to examine each count and the evidence as it were [*sic*] related to that count, using the burden of proof of beyond a reasonable doubt." The court again addressed its resolution of credibility issues when it denied appellant's motion for new trial: "The court makes the finding that there is sufficient evidence to reach the verdicts reached. The issue of credibility

was just that and reaching the decision that I made, I based that decision not only on the testimony of that witness but testimony of other witnesses together with the physical evidence."

Accepting the court's credibility determination, as we must, we agree there is sufficient evidence that appellant committed assault with an assault weapon as to La Tanya Morris and Rodney Bagby. Morris testified that appellant first shot at Bagby. Bagby was standing at the driver's side door of his car when appellant began shooting at the car. The driver's side window was the first to be struck, and was followed by shots that struck the passenger window and the rear window. Bagby began to run as appellant started shooting. Morris also testified that after appellant made eye contact with her, she ran into her garage, with appellant firing in her direction.

The physical evidence corroborated this testimony. The windows of Bagby's car were shot out, bullet holes were found in Morris's garage wall and dryer, and 14 nine-millimeter shell casings were found near her house, driveway, and garage.

There also was evidence that the weapon was an assault weapon. According to Morris, the gun was a semi-automatic, about 15 inches long, and had a clip and a handle. Morris had seen the gun before, when appellant "pulled that same gun" on her son Stephon. On that occasion, Morris saw that the gun had a detachable magazine. She testified that the gun used by appellant was a TEC-9, a designation apparently understood by the court and counsel to refer to an Intratec TEC-9, an assault weapon. (See § 12276, subd. (b)(4).) Morris was shown photographs of two guns, and identified the Intratec .22 as the gun that looked similar to the gun used by appellant. This testimony was consistent with Morris's 911 telephone call at the time of the shooting, when she stated: "It's my neighbor, James Jones, Jr. shooting a Tec-9! Outside he's shooting at our whole family!"

Stephon Odom testified that he saw appellant run down the street toward them with a TEC-9. He was familiar with that particular gun because appellant had pulled it on him in the past. Deputy Lonergan testified that the nine-millimeter shell casings

recovered from the scene could be used in assault weapons including the TEC-9. This is substantial evidence to support appellant's conviction of section 245, subdivision (a)(3) as to Morris and Bagby.

There also was ample evidence to support his conviction for two counts of firing at an unoccupied vehicle and one count of firing at an inhabited building, based on the windows being shot out on the two cars and the bullet holes in Morris's garage wall and dryer. The same evidence supports guilt on appellant being a felon in possession, and the true finding that he personally used a firearm. Giving deference to the trial court's resolution of credibility, we find sufficient evidence supports the judgment.

II

The court stated that it had selected the middle term for the enhancements for personal use of an assault weapon on counts 1 and 7, but sentenced appellant to eight years for each. Appellant claims, and respondent concedes, that this was error. The sentencing choices for section 12022, subdivision (b) are five, six, or 10 years. Having selected the middle term, the court should have sentenced appellant to six years, not eight. Appellant's sentence must be corrected to reflect six years for these enhancements.

III

At sentencing, the court found two circumstances in aggravation -- that appellant's actions involved the threat of great bodily injury and harm to other people who were there, and that his actions showed "a high degree of cruelty in firing the weapon as he did." Finding these aggravating circumstances outweighed the mitigating circumstances, the court sentenced appellant to the high term on count 1. He now complains that, pursuant to the United States Supreme Court holdings in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, and *Blakely v. Washington*, *supra*, 124 S.Ct. 2531, he was deprived of his constitutional right to have the jury decide beyond a reasonable doubt the truth of all facts relied upon to impose the upper term.

In *Apprendi*, the Supreme Court stated: "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." (530 U.S. 466, 490.) This rule sets out two separate rights: the right to a jury determination of the truth of additional facts relied on for sentencing, and the right to have the truth of those facts determined beyond a reasonable doubt. We conclude appellant waived the first, but was denied his right to the second.

This entire case was tried to the court after appellant waived his right to jury trial. "It is settled that where a defendant waives a jury trial he is deemed to have consented to a trial of all of the issues in the case before the court sitting without a jury." (*People v. Berutko* (1969) 71 Cal.2d 84, 94.) By waiving jury trial, appellant consented to have the court sit as the trier of fact on all the issues in the case, including the additional facts related to sentencing. (See *People v. Fernandez* (2004) 123 Cal.App.4th 137, 142.)

But appellant also was entitled to have these additional facts proved beyond a reasonable doubt. (*Blakely, supra*, 124 S.Ct. at p. 2536.) This is a higher standard than that required for selection of the base term under California Rules of Court, rule 4.420 (b): "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence. Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation." We find no indication in the record that the court deviated from the preponderance standard set out in the court rules in finding two factors in aggravation. For this reason, appellant was deprived of his right to have these facts proved beyond a reasonable doubt. The case must be remanded for resentencing in accordance with *Blakely*.

DISPOSITION

The cause is remanded for correction of sentence on counts 1 and 7, and for resentencing on count 1 in accordance with the views expressed in this opinion. In all other respects, the judgment is affirmed.

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EPSTEIN, P.J.

I concur:

HASTINGS, J.

GRIMES, J., Concurring and Dissenting.

I concur in parts I and II of the majority opinion. Respectfully, I dissent with respect to the discussion in part III which addresses the issue of whether *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), and *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*) mandate that sentencing factors be proved beyond a reasonable doubt, and the part of the disposition that remands for resentencing on appellant's conviction of assault with an assault weapon in count 1.

Until our Supreme Court concludes otherwise,[1] I am of the opinion that *Apprendi* and *Blakely* do not apply to the tripartite prison scheme (upper, middle, and low term) of the California determinate sentencing law (Pen. Code, § 1170, subds. (a)(3) & (b); see also, Cal. Rules of Court, rules 4.420(a)-(c), 4.421 & 4.423). (Accord, *People v. Picado* (Nov. 5, 2004, A102251) ___ Cal.App.4th ___ [20 Cal.Rptr.3d 647, 664] ["our California sentencing scheme is the type of discretionary sentencing to which *Blakely* does not apply"]; *People v. Wagener* (2004) 123 Cal.App.4th 424, 430 ["California's sentencing scheme is consistent with and does not offend the constitutional concerns addressed in *Apprendi* and its progeny, *Blakely*," fn. omitted]; see also, *People v. Lemus* (2004) 122 Cal.App.4th 614, 625 (dis. opn. of Benke, J.) [California's scheme is unlike the Washington scheme, which *Blakely* found to be unconstitutional in that "it allowed for the imposition of a term greater than the range authorized by law for the offense to which Blakely pled guilty based on a fact not found by a jury or admitted by [him]".)

In view of the foregoing, I would affirm the trial court's imposition of the upper term on appellant's conviction for assault with an assault weapon in count 1.

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[1] The issue of whether *Blakely* applies to the upper term choice is pending before our Supreme Court in *People v. Black*, S126182 and *People v. Towne*,

GRIMES, J.*

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*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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