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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. STEVEN ANDREW LOCKMAN, Defendant and Appellant.	D048492 (Super. Ct. No. SCD191799)

APPEAL from a judgment of the Superior Court of San Diego County, Melinda J. Lasater, Judge. Affirmed.

A jury convicted Steven Andrew Lockman of two counts of assault with a deadly weapon (Pen. Code,[1] § 245, subd. (a)(1); counts 1 & 5), vandalism over $400 (§ 594, subd. (a)(b)(1); count 2), hit and run (Veh. Code, § 20002, subd. (a); count 3), and two

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

counts of reckless driving (Veh. Code, § 23103, subd. (a); counts 4 & 6).[2] The jury also found true allegations as to counts 1 and 5 that Lockman had personally used a deadly weapon in those crimes (§ 1192.7, subd. (c)(23)). Lockman then admitted allegations he had previously suffered a prior conviction for a serious or violent felony (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)), which also constituted a strike under the Three Strikes law (§§ 667, subd. (b)-(i); 1170.12).

After denying Lockman's motion for a new trial and granting his motion to strike his prior strike, the trial court sentenced Lockman to prison for a total of 10 years, consisting of an upper four-year term for the count 1 assault with a deadly weapon, one year consecutive for the count 5 deadly weapon assault (one-third the midterm), plus five years for the serious prior.

Lockman appealed, contending there was insufficient evidence to support his count 5 assault with a deadly weapon conviction, the trial court abused its discretion in denying his new trial motion directed to count 5 based on modifying a previously submitted jury instruction at the People's request after the jury had already been instructed, and he was denied a fair trial by the jurors being given a transcript of a 911 call containing a prejudicial statement, which the trial court had ordered redacted before the playing of the call.

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2 The counts 3 and 4 convictions were lesser offenses of those charged respectively for hit and run with injury (Veh. Code § 20001, subd. (a)) and reckless driving with bodily injury (Veh. Code § 23104, subd. (a)).

Subsequent to the filing of his opening brief, the United States Supreme Court in *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*) determined that California's Determinate Sentencing Law (DSL), which permits a court to impose an upper term sentence based on aggravating facts not found true by a jury or beyond a reasonable doubt, is unconstitutional and violates the holdings in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), and *United States v. Booker* (2005) 543 U.S. 220 (*Booker*). Lockman has filed a supplemental brief claiming the imposition of his upper term sentence for count 1 is unconstitutional under *Cunningham*. We affirm Lockman's convictions and sentence.

FACTUAL AND PROCEDURAL BACKGROUND

Lockman was arrested after an investigation into a road rage incident on May 24, 2005. During the investigation it was discovered that Lockman had also been involved in a similar incident on August 19, 2004, which was then pending further proceedings. After additional examination of police reports and interviews with witnesses and Lockman, Lockman was charged with the offenses in this case stemming out of those two incidents. The following evidence was presented at Lockman's trial.

A. The August 2004 Incident (Counts 1, 2, 3 and 4)

On August 19, 2004, as Marsha Norquist, a Filipino woman, was driving through Clairemont with her 11-year-old son, a white truck abruptly stopped in front of her, about 30 to 40 feet before an upcoming stop sign. After stopping behind the truck, Norquist waited about a minute for the white truck to move before honking. In the meantime, another car that had pulled up behind Norquist, proceeded around both her and the white

truck. When the truck did not move, Norquist drove around the truck, and stopped at the stop sign. While she was stopped, the driver of the white truck bumped into her. Because she was not hit very hard, Norquist dismissed the tap as an accident and proceeded through the intersection.

Then while Norquist was crossing the intersection, the white truck rear-ended her again, only this time much harder. As Norquist sped up and proceeded driving toward her home along a curved road, the man in the white truck followed her and kept hitting her car from behind. She believed the truck hit her five or six times really hard and lightly bumped her about 15 times. Although each hit was mostly directly from behind, sometimes the truck would swerve a little to the side when hitting her. Norquist was scared to pull over and her son told her, "no mommy. I think he's crazy. Don't pull over." Norquist said she was afraid for her life and afraid that the truck hitting her car would push and jolt her forward into oncoming traffic. When the truck rear-ended Norquist the final time right before she turned onto her street, the driver leaned out the window and yelled a racial slur, calling her a "stupid brown fucking gook bitch," as he drove by. Norquist identified Lockman in court as the man driving the white truck during the incident which lasted about a fifth of a mile.

After the incident, Norquist ran inside her home, called her husband and then dialed 9-1-1. She gave the 911 dispatcher a description of Lockman's truck, including its license plate number which her son had jotted down, and noted that there was a sticker on the truck that said, "Don't trash California." Norquist also initially told the dispatcher that there was no damage to her car and that there were no injuries.

When San Diego Police Officer Alejandro Diaz responded to Norquist's call, he found her crying and that both she and her son were visibly shaking. Norquist and her son separately talked with Diaz about the incident. Diaz looked at Norquist's car and noticed damage to her bumper. Norquist then went outside and saw the damage. She called the dispatcher back and reported that there were scratches and white paint chips on her car's bumper. Both of Norquist's calls to 911 were played for the jury.

Norquist testified that it was not until the next day that she had a sore and stiff neck. She subsequently was treated by her chiropractor. She also saw a psychologist to address her fears resulting from the incident. Norquist paid $500 to have her bumper replaced.

On cross-examination, Norquist explained that she had suffered a lower back injury in 1989, and had also been in an accident about six months before the incident for which she had also seen her chiropractor. She had not disclosed this information about her prior injuries at the preliminary hearing because she had not understood the questions.

Although Norquist's son's testimony was consistent with both Norquist's testimony and with what he had told Diaz about the incident, he was not able to recognize the truck's driver in court.

The claims representative processing Norquist's accident report for Geico Insurance Company testified that the adjustor who inspected Norquist's car estimated the damage to her bumper was $574.76. When the Geico representative spoke with Lockman, he denied any involvement in the accident.

B. The May 2005 Incident (Counts 5 and 6)

At about 2:30 p.m., on May 24, 2005, as Billie DeWitt was driving from her home in Point Loma to the uptown area of San Diego to pick up her elderly mother for an appointment, a man in a white truck without a camper shell drove in the lane next to her on Nimitz Boulevard. When the two lanes eventually merged, DeWitt's car was in front of the man's truck. At the intersection of Nimitz Boulevard and Rosecrans Street, the man, whose face was bright red, pulled up next to De Witt who had stopped at the light, rolled down his window, and screamed obscenities at her. He called her a "fucking bitch," asked her "where did you learn to drive?" and told her to "get the hell off the road."

As soon as the light turned green, DeWitt proceeded on Nimitz Boulevard, made a left turn onto North Harbor Boulevard, and headed toward downtown. Meanwhile, the man, whom De Witt identified at trial as Lockman, weaved in and out of traffic in an attempt to catch up to DeWitt and get beside her. When DeWitt stopped at a light on Harbor Island Drive, Lockman continued through the intersection but pulled over to the side of the road, waving cars around him while he waited for DeWitt to catch up to him. As DeWitt drove forward, Lockman cut across two lanes of traffic and got alongside of her, still yelling and cussing at her.

When DeWitt moved into the left hand turn lane to turn onto West Laurel Street without using her turn signal in hopes of losing Lockman, he cut across Harbor Boulevard to the turn lane and got behind her. As she then turned onto West Laurel Street, continuing forward in the right hand lane, Lockman cut over to the left hand lane,

crossing over double yellow lines into oncoming traffic to pass a slower car to catch up with DeWitt. Driving on her left hand side, Lockman pulled his truck closer and closer to DeWitt's car, crossing the lane divider, and forcing her toward the curb. DeWitt said her car was right up against the curb, and her rear view mirror was almost touching Lockman's truck's side mirror. If she had gone up onto the curb, she would have hit a light post or one of the palm trees lining the street. Lockman tried to run her into the curb for about two and a half very long blocks.

When DeWitt stopped at the intersection of West Laurel Street and India Street, she was in the far right lane which is the only lane that can proceed straight ahead, and Lockman was next to her in the "left turn only" lane. At this point, DeWitt called 911 on her cellular phone and held the phone out the window so the dispatcher could hear Lockman yelling at her, "You're a stupid fucking bitch, you ain't talking to nobody." When the light turned green, Lockman cut through the intersection so he was driving in front of DeWitt. As they drove up West Laurel Street hill, he repeatedly slammed on his brakes, almost causing DeWitt to run into the back of his truck. When West Laurel Street divided into two lanes, Lockman got into the left lane next to DeWitt.

DeWitt then quickly turned right on Fourth Avenue and tried to pull into a parking space. As she did so, Lockman came roaring by and swerved his truck toward her car as if he were trying to clip or hit her. Because the space she was trying to park in was too small, DeWitt pulled out of that spot and into a crosswalk, where she locked her car and waited on the phone with the dispatcher for police officers to arrive. During this time, Lockman drove by DeWitt several more times and she exclaimed at least twice to the

dispatcher, "Oh, my god, here he comes again." When a parking enforcement officer came by and asked DeWitt to move her car, DeWitt explained the situation and asked the officer to stay with her. When Lockman noticed the parking enforcement officer standing next to DeWitt, he stopped driving by. This second incident lasted over a four and half mile distance. DeWitt said she had never been so scared in her life.

On cross-examination, DeWitt explained that she was referring to the fact her husband worries about her whenever she is out of his sight, and not about her ability to drive, when she told the dispatcher during her 911 call that, "My husband's going to be so upset; I told him I could handle this by myself." DeWitt also noted that when she told the dispatcher she had just taken her medication, she was referring to her Premarin which she takes for hot flashes and the change of life. She explained that such medication tends to upset her stomach.

The redacted CD of DeWitt's 911 call to police regarding the incident was played for the jury over defense objection.

The San Diego Police Department investigator assigned to the DeWitt case testified that when she ran the license plate number of the white truck, it was learned that the truck was registered to Lockman and that he had been involved in the earlier Norquist case. When the investigator later talked with Lockman about the two incidents, she determined that Lockman lived about two miles from Norquist's home, and worked about eight blocks from the DeWitt incident. He also told the investigator that he had owned the truck for five years, he was its only driver, and his job required him to run errands and make deliveries in the truck.

When asked about the incident with Norquist, Lockman replied, "Oh, over on Mt. Aguilar, well, this woman was tailgating me, and so I just stopped at the stop light, stop sign; and I just sat there and stared at her in my rear-view mirror and she was so stupid. And then she went around me and that was it." Lockman later denied any knowledge about the Norquist incident when questioned further about the matter.

When the investigator then asked Lockman if he had been involved in the DeWitt incident, he said, "Why, I have no idea. Is that against the law?" He then said, "Well, she's stupid if she says that was me." He asked the investigator if there had been any contact between the vehicles, and noted that although he may shake his fist at other drivers, he did not think that was against the law. Lockman also commented on how ignorant other drivers were, explaining that "if they were following him, he would pull over to the side of the road and they were so stupid, they would just pull along behind him." After the interview, the investigator arrested Lockman on warrants for both incidents.

C. The Defense Case

Lockman did not testify. Stephen Plourd, an accident reconstructionist and licensed private investigator, testified in Lockman's defense as an expert regarding both alleged incidents of road rage. Plourd's testimony was based on his review of the police reports of both incidents, the preliminary hearing transcript involving the Norquist incident, photographs, including laser photographs of the damage to Lockman's truck and Norquist's car, and damage estimates from Geico regarding Norquist's car as well as a repair estimate for Lockman's truck in 2000. Plourd opined that the evidence only

showed Lockman's truck had made contact with Norquist's car once, not five times, and that the contact occurred when Lockman was braking and traveling between one to two miles per hour at the time of impact. Plourd commented that if Lockman's truck had had a camper shell on the back, such would have changed the height of his truck.

As to the DeWitt incident, Plourd was of the opinion that if DeWitt's car was right along the curb while driving up West Laurel Street and Lockman's truck was only a few inches away, Lockman would have had to move between six and seven feet into DeWitt's lane. On the other hand, if his truck had just crossed over the line, there would have been eight or nine feet between the two vehicles. Plourd further opined that a car traveling at 30 miles per hour would have to brake at the bottom of West Laurel Street hill to prevent it from bottoming out.

On cross-examination, Plourd conceded that a truck or car can be used as a deadly weapon because vehicular accidents can lead to death or serious injury. He also agreed there were sturdy palm trees along West Laurel Street, that would not move if hit by a car, and opined that if a car was forced into one of the trees while traveling between 40 and 45 miles per hour, it could cause serious injury or death.

DISCUSSION

I

SUFFICIENCY OF THE EVIDENCE

Lockman contends the evidence was insufficient to support his count 5 conviction for assault with a deadly weapon on DeWitt because the evidence that he used his car in a way that was capable of causing and likely to cause great bodily injury or death was

lacking. He thus asserts his count 5 conviction and the true finding on the allegation of personal use of the weapon for that conviction must be reversed. We disagree.

In reviewing the sufficiency of the evidence to support a conviction, we determine " 'whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged.' [Citations.]" (*People v. Crittenden* (1994) 9 Cal.4th 83, 139, fn. 13.) Under such standard, we review the facts adduced at trial in full and in the light most favorable to the judgment, drawing all inferences in support of the judgment to determine whether there is substantial direct or circumstantial evidence the defendant committed the charged crime. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496; *People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) The test is not whether the evidence proves guilt beyond a reasonable doubt, but whether substantial evidence, of credible and solid value, supports the jury's conclusions. (*People v. Arcega* (1982) 32 Cal.3d 504, 518; *In re Nathaniel C*. (1991) 228 Cal.App.3d 990, 996.)

In making the determination, we do not reweigh the evidence; the credibility of witnesses and the weight to be accorded to the evidence are matters exclusively within the province of the trier of fact. (Evid. Code, § 312.) We simply consider whether " ' "*any* rational trier of fact could have found the essential elements of [the charged offenses] beyond a reasonable doubt." ' [Citations.]" (*People v. Rich* (1988) 45 Cal.3d 1036, 1081.) Unless it is clearly shown that "on no hypothesis whatever is there sufficient substantial evidence to support the verdict" the conviction will not be reversed. (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.)

With regard to the crime of assault "with a deadly weapon or . . . by any means of force likely to produce great bodily injury" (§ 245, subd. (a)(1)), it is immaterial whether the victim is actually physically contacted or injured "because the statute focuses on *use* of a deadly weapon or instrument or, alternatively, on force *likely* to produce great bodily injury. . . . [Citation.]" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028 (*Aguilar*); original italics.)

Under section 245, subdivision (a)(1), "a 'deadly weapon' is 'any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.' [Citation.]" (*Aguilar, supra*, 16 Cal.4th at pp. 1028-1029.) A vehicle operated in a manner to attempt to injure another person has been held to be a "deadly weapon" for purposes of committing an assault with a deadly weapon. (*People v. Russell* (2005) 129 Cal.App.4th 776, 782 (*Russell*); see also *People v. Wright* (2002) 100 Cal.App.4th 703, 706 (*Wright*); *People v. Finney* (1980) 110 Cal.App.3d 705, 716.)

" 'Likely' [under section 245, subdivision (a)(1)] means 'probable' or . . . 'more probable than not.' " (*People v. Savedra* (1993) 15 Cal.App.4th 738, 744.) Although the results of an assault are highly probative of the amount of force used, they are not conclusive. (*Russell, supra*, 129 Cal.App.4th at p. 782.)

With these rules in mind, we review the record before the jury in light of Lockman's assertion there was insufficient evidence he committed assault with a deadly weapon on DeWitt with his truck. Lockman essentially concedes that his truck could be used as a deadly weapon. He argues, however, that because he never actually hit

DeWitt's car and did not directly aim his truck at her car, there was no credible evidence, only DeWitt's implausible testimony, he was driving his truck in a manner that was likely to cause great bodily injury or death. Lockman asserts DeWitt's testimony was incredible because at the time she said she feared he was trying to push her off the road into the curb, she was talking to the 911 dispatcher on her cell phone, and his expert testified a person would have had to brake on the hill to avoid bottoming out at the time DeWitt claimed he was trying to cause her to run into him. Lockman thus argues DeWitt's version of the incident was exaggerated, unbelievable and cannot support the jury's verdict.

Lockman simply fails to appreciate that we do not reweigh the evidence. The credibility determination regarding DeWitt's testimony and that of Lockman's expert was solely for the jury. Under the facts presented at trial, a jury could have reasonably believed DeWitt's testimony that Lockman drove his truck in a manner to try to push her off the road into the curb, trees or other objects along a two and a half block stretch of West Laurel Street and that he pulled his truck in front of her car and abruptly braked to try to force her to run into him. In addition, the jury could also have believed that Lockman drove his truck toward DeWitt as she tried to park her car in such a manner "that it [was] capable of causing and likely to cause death or great bodily injury" if the truck had actually hit her. (See CALCRIM No. 875.)

Lockman's attempt to distinguish this case from others in which a vehicle has been used as a deadly weapon because it was utilized against a "pedestrian" and not a person in another car is unavailing. Lockman's own expert witness testified that vehicular

accidents can lead to death or serious injury, and that if DeWitt had been forced off the road into a palm tree along West Laurel Street, such could have caused her serious injury or death. Further, Lockman's arguments appear to rely on the fact that DeWitt was not actually hit, which, as noted above, is not a prerequisite for finding the capability of causing or being likely to cause, great bodily injury or death. (*Aguilar, supra*, 16 Cal.4th at p. 1028.) It is enough that a person uses their vehicle in a manner that could foreseeably cause injury or death. (*Wright, supra*, 100 Cal.App.4th at pp. 724-725.)

In sum, we conclude there was substantial evidence from which a jury could find Lockman drove his truck in a manner that was capable of causing, and likely to cause, death or great bodily injury to DeWitt. The count 5 conviction for assault with a deadly weapon is therefore supported by sufficient evidence.

II

NO ABUSE OF DISCRETION IN DENIAL OF NEW TRIAL MOTION BASED ON MODIFICATION OF JURY INSTRUCTION

During jury instruction discussions, the trial court noted that, using its checklist, it would be giving CALCRIM No. 3145, which is the instruction for "personal, personally use deadly weapon, the allegation."[3] The next morning, the court read the instructions to

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[3] CALCRIM No. 3145 provides in pertinent part: "If you find the defendant guilty of the crimes charged in Count[s] ______[,] you must then decide whether[for each crime,] the People have proved the additional allegation that the defendant personally used a deadly weapon . . . during the commission . . . of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.] [¶] A *deadly. . . weapon* is any object, instrument, or weapon that is inherently deadly . . . or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury. [¶] [In deciding whether an object is a deadly

the jury, including the CALCRIM No. 3145 provided to the court by the prosecutor for counts 1 and 5, which stated in part that "someone personally uses a deadly weapon if he or she intentionally does any of the following: Hits someone with a weapon." At a sidebar after the initial instructions were read, the prosecutor advised the court that something had been left off CALCRIM No. 3145, i.e., "use [the weapon] in a menacing manner as well. So I'd ask the court to read that either now or before [the jury goes] back." Lockman's counsel objected, saying that the prosecutor had prepared the instructions which had been given to defense counsel at the beginning of trial, that such constituted an election of theories on which the defense had relied to prepare all questions for trial and argument, and that the defense would now be prejudiced because without the modified instruction, the People could not prove count 5 involving DeWitt. Counsel noted he had not raised the issue on his motion to dismiss after the prosecution case because he did not want to bring the matter to the prosecutor's attention so that he could change it at that time.

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weapon, consider all the surrounding circumstances, including when and where the object was possessed, . . . [where the person who possessed the object was going], . . . [whether the object was changed from its standard form] [and any other evidence that indicates whether the object would be used for a dangerous, rather than a harmless, purpose.]] [¶] *Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm. [¶] Someone *personally uses* a deadly weapon . . . if he or she intentionally does any of the following: [¶] [1]. Displays the weapon in a menacing manner(./;) [¶] [OR] [¶] [2. Hits someone with the weapon (./;)] [¶] [OR [¶] (3/2). Fires the weapon.] [¶] The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved."

In response, the prosecutor explained that he had physically changed the instructions on his computer but had just realized that the printed version had not been similarly changed due to not properly saving the changes. He also pointed out that such was an element of the crime the People had to prove with regard to DeWitt as well as being part of the CALCRIM instruction. The prosecutor further noted that although he had made a mistake, it had always been the People's theory that Lockman had used a deadly weapon in a menacing manner against DeWitt because, unlike Norquist, she had not been hit by Lockman's truck.

Commenting that everyone had notice based on opening statement, the court agreed to reread CALCRIM No. 3145 to the jury as corrected to also include the theory that a deadly weapon could be used by displaying it in a menacing manner. Although the court also noted that elections of theories could be made up until the time a case was submitted to the jury as long as such election was not prejudicial to the defense, it stated it was reserving the right to reconsider the matter on a new trial motion if there were a guilty verdict. The court then provided the jury with the revised CALCRIM No. 3145 which included both theories. After argument and deliberation, the jury returned guilty verdicts on, among other things, the allegations to counts 1 and 5 that Lockman had personally used his truck as a deadly weapon in the assaults against Norquist and DeWitt, respectively.

During the subsequent court trial on Lockman's prior, defense counsel asked the court to reconsider its jury instruction ruling on CALCRIM No. 3145 and to grant judgment not withstanding the verdict (JNOV) on count 5 regarding DeWitt. The court

deferred the matter to sentencing. At that time, the court considered Lockman's motion for new trial on count 5 on grounds the court had "misdirected the jury in a matter of law" (§ 1181, subd. (5)) by modifying CALCRIM No. 3145 before argument in light of the defense reliance on the original instruction the prosecutor had provided at the start of trial.[4] After discussion and argument on the matter, the trial judge denied the motion, stating:

> "I don't think counsel on either side can assume during your presentation of your case, either by direct or cross-examination, that any jury instructions that are being offered are the instructions that will finally be given. I can see where you might have had an issue from the defense perspective of having prepared your argument. [¶] As far as impacting your . . . cross-examination of witnesses, that is a risk you took, and there were other reasons, potentially, as to why different tactics were used with the particular witnesses. So I don't believe at this point that the cross-examination issue is a valid one for purposes of granting a new trial, and I did re-instruct before the argument occurred so both sides had an adequate opportunity to modify their arguments. I don't believe that there is prejudice that would necessitate the granting of a new trial in this particular instance as to count 5."

On appeal, Lockman contends the trial court erred in denying his new trial motion on count 5 on grounds his constitutional rights to a fair trial, to confront witnesses against him and to the effective assistance of counsel were violated by modifying CALCRIM No. 3145, defining the use of a deadly weapon. He specifically argues the late modification of the instruction violated section 1093.5 and denied him due process. We disagree.

When a verdict has been rendered or a finding made against the defendant, he may move for a new trial on various statutory grounds, including that the trial court

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4 Neither counsel nor the court referred to or acted upon the deferred JNOV motion.

"misdirected the jury in a matter of law. . . ." (§ 1181, subd. (5).) "A trial court may grant a motion for new trial only if the defendant demonstrates reversible error. [Citation.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1159 (*Guerra*).) "On appeal, a trial court's ruling on a motion for new trial is reviewed for abuse of discretion. [Citation.] Its ruling will not be disturbed on appeal ' "unless a manifest and unmistakable abuse of discretion clearly appears." [Citation.]' [Citation.]" (*Id*. at pp. 1159-1160.)

We conclude the trial court did not abuse its discretion in denying Lockman's new trial motion. The record reflects that the trial court independently considered Lockman's arguments in light of the entire record and the timing of the People's request for a modification of the standard CALCRIM instruction which defined the elements for proving the personal deadly weapon use allegation. Contrary to Lockman's assertion made for the first time on appeal that the timing of the revised instruction was in violation of section 1093.5,[5] the prosecutor requested the instruction be revised before the commencement of argument. Thus it was determined before argument what instructions the court planned to give and the parties were given the opportunity to intelligently argue

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5 Section 1093.5 provides that, "In any criminal case which is being tried before the court with a jury, all requests for instructions on points of law must be made to the court and all proposed instructions must be delivered to the court before commencement of argument. Before the commencement of the argument, the court, on request of counsel, must: (1) decide whether to give, refuse, or modify the proposed instructions; (2) decide which instructions shall be given in addition to those proposed, if any; and (3) advise counsel of all instructions to be given. However, if, during the argument, issues are raised which have not been covered by instructions given or refused, the court may, on request of counsel, give additional instructions on the subject matter thereof."

the case to the jury based on those instructions. (See *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 341 (*Kronemyer*).)

Although material modifications and departures from agreed upon instructions may in certain circumstances deprive a defendant of a fair trial (*Kronemyer, supra*, 189 Cal.App.3d at p. 341), such as where the trial judge interrupts a defense counsel's closing argument in front of the jury to change or correct the law, which in turn requires counsel to change the thrust of his argument without time to reflect on the court's ruling (see *People v. Sanchez* (1978) 83 Cal.App.3d Supp. 1, 5-7), this is not one of those occasions. As the trial court noted, all parties were on notice that CALCRIM No. 3145 was to be given for the personal use of a deadly weapon allegations for counts 1 and 5, and that the prosecution theory for use of a deadly weapon with regard to DeWitt was that Lockman used his truck in a menacing manner against her. Although the prosecutor did not discover his computer error in the written instruction he had originally provided the court and defense counsel until after the court had read the instruction to the jury, such discovery and request for the reading of the additional theory for use of a deadly weapon was a correct statement of law based on the trial evidence and, as already noted, was timely requested before closing argument.

Defense counsel's statements made at the time the court permitted the modification to CALCRIM No. 3145 and at the new trial motion hearing demonstrate his awareness that the prosecutor intended to rely on the theory that Lockman used his truck in a menacing manner against DeWitt to prove his guilt for the count 5 allegation. As the court below recognized, counsel made a tactical decision not to bring the mistake or

omission of the proper theory in the instruction to the prosecutor's attention in hopes it would not be caught and the prosecutor would then be bound by the instruction which did not include his intended theory regarding count 5. Because jury instructions are always subject to change during trial depending on the evidence presented, we agree with the trial court's assessment that counsel's reliance on the prosecutor's mistake or omission in the originally submitted CALCRIM No. 3145 to not fully cross-examine DeWitt was invalid and unpersuasive on the issue of prejudice.

On this record, Lockman has failed to show that the trial court misdirected the jury in a matter of law or that there was reversible error caused by its modification of CALCRIM No. 3145. Consequently, the trial court's ruling in denying Lockman's new trial motion on count 5 was not an abuse of discretion. (*Guerra, supra,* 37 Cal.4th at pp. 1159-1160.)

III

READING OF UNREDACTED 911 TRANSCRIPT

In limine, Lockman's counsel noted he had no objection to the admission of the 911 calls regarding the Norquist incident, but objected on relevancy grounds to the admission of DeWitt's 911 call. After the trial court overruled the objection, noting the call was ongoing during the incident, was a contemporaneous/spontaneous statement, and included some of Lockman's own statements which were admissible on the issue of his state of mind, the prosecutor brought to the court's attention that DeWitt had made one comment during the call that, "He's been in prison." Unable to determine the context of the statement because DeWitt did not know Lockman and he had not been to prison, the

prosecutor offered to bring the statement's inaccuracies out in cross or on direct. The court stated it would not allow that statement to be admitted and asked counsel to relisten to the CD of the 911 call and have that page "redone."

During trial when Norquist testified about calling 911, the trial judge told the jury:

> "Ladies and Gentlemen, when we have audio recordings, the recording is the evidence, not the transcript. The transcript is provided as an aid, but that's not the evidence; and you may hear things differently than you see it in the transcript. It's what you hear that controls, not what you see in the transcript. [¶] So although we give you a transcript as an aid, I don't admit them into evidence; and I'm going to ask that you not mark on them. It's just we're going to collect it as soon as it's played."

After confirming that the voice on the 911 call was Norquist's, the prosecutor played the first tape in full for the jury. After confirming that the second 911 tape contained Norquist's voice, the court reminded the jury before it was played in full that "the evidence is in the tape and what you hear, not in the transcript. It will be collected again afterwards."

Subsequently, during DeWitt's testimony, when the prosecutor asked to play the CD of her 911 call for the jury, the court stated, "Okay. Would the bailiff please give the jury the transcripts with the understanding that it's . . . what they hear that's the evidence, not what you see in the transcript." After confirming it was DeWitt's voice on the CD, the prosecutor played a second portion of the CD and then stopped it to ask DeWitt some questions about what had been played. When the prosecutor noticed jurors were continuing to read the transcript while the CD was stopped, defense counsel asked that the CD be played at that time in its entirety. The prosecutor then asked for and the court

granted a break so both counsel could listen to the CD before it was played in full to be sure that there was nothing on it that would cause any problems.

After the break, counsel noted that there was no problem with the CD, and the remainder of the CD was played for the jury. Subsequently, the court admitted into evidence the redacted CD of DeWitt's 911 call. The transcript of the 911 call was made a part of the court record, but not admitted into evidence.

Apparently, during review of the court record for appeal, it was discovered that the transcript of DeWitt's 911 call had not been redacted in the same manner as had the CD. Lockman thus contends on appeal that his Sixth Amendment right to a fair trial and impartial jury was denied when the trial court inadvertently provided the jury with a transcript of DeWitt's 911 call that included the statement he had been to prison which was supposed to have been redacted. In light of this record, we conclude the inadvertent inclusion of the purportedly redacted statement was harmless.

" 'When, as in this case, a jury innocently considers evidence it was inadvertently given, there is no misconduct.' [Citation.] Rather, all that appears is ordinary error. . . . [¶] [W]ith ordinary error, prejudice must be shown and reversal is not required unless there is a reasonable probability that an outcome more favorable to the defendant would have resulted." (*People v. Clair* (1992) 2 Cal.4th 629, 668.) In this case, there was no reasonable probability of a more favorable outcome. Although the transcript given the jury to aid it in listening to DeWitt's 911 call contained the statement, "He's been to prison," such statement had been deleted from the CD before being played for the jury. Thus, the jurors never heard the statement and merely may have seen it in the transcript

that was in their possession while the CD was played. In addition, before the CD was played, the jurors were reminded by the court of its earlier admonishments regarding the playing of the two Norquist 911 tapes that it was what they heard in the recording that was evidence and not what they saw in the transcript being passed out to aid them in following along with the DeWitt CD.[6] We presume the jury followed such instructions. (*People v. Horton* (1995) 11 Cal.4th 1068, 1121.)

Moreover, even if the jurors viewed the unredacted statement, it is not probable that they would have given it any credence because there was no evidence presented at trial from which to put the statement in context. DeWitt testified she had never seen Lockman or his truck before the incident and there was no evidence before the jury that Lockman had any prior convictions or that he had ever been in custody. The mere reference to prison was brief, not emphasized, and "overshadowed by the considerable evidence" against Lockman. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1214 [passing reference to defendant's probationary status and prior conviction was harmless error].) Such evidence here included Norquist's and her son's testimony regarding Lockman rear-ending them with his truck numerous times, physical evidence of damage to Norquist's car bumper, DeWitt's testimony regarding Lockman's attempts to run her off the road, his slamming on his brakes in front of her and his pretending to swipe her car, and Lockman's own incriminating statements overheard on the DeWitt 911 call as well as

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6 It appears that all three 911 calls were replayed, without the use of the transcripts, for the jury during their deliberations.

those made to the investigator of the two road-rage incidents. Therefore, it is not reasonably probable that the jury's verdicts would have been any different had they not inadvertently received the unredacted transcript. Lockman has shown neither prejudicial or federal constitutional error on this record.

IV

CUNNINGHAM/BLAKELY CLAIM

In his supplemental briefing, Lockman contends that the trial court's imposition of an upper term for his count 1 conviction based on facts not found true by the jury violated his federal constitutional rights to proof beyond a reasonable doubt, a jury trial, and due process under *Blakely, supra*, 542 U.S. 296 and *Cunningham, supra*, 127 S.Ct. 856. He argues his failure to object at sentencing to the imposition of an upper term does not forfeit his claim because an objection would have been futile in light of our Supreme Court's holding in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*) that *Blakely* did not invalidate the California DSL sentencing scheme as to the choice of an upper term (*id*. at p. 1244), and it was only while his appeal was pending that the high court of the land issued its decision in *Cunningham*, which overruled *Black* and struck down the DSL on precisely the grounds he now urges. (*Cunningham, supra*, 127 S.Ct. 856.) Lockman asserts this court must review such constitutional error to determine whether it was harmless beyond a reasonable doubt (*Washington v. Recuenco* (2006) ___ U.S. ___, [126 S.Ct. 2546, 2549] (*Recuenco*)), and that under such standard, the error cannot be found harmless because the factors used by the court to impose the upper term were susceptible to dispute and "had a 'substantial and injurious effect or influence' " on the court's

sentencing decision. (*Hoffman v. Arave* (9th Cir. 2001) 236 F.3d 523, 541-542; see also *Neder v. United States* (1999) 527 U.S. 1, 19.)

In *Cunningham*, the United States Supreme Court stated, "Contrary to the *Black* court's holding, our decisions from *Apprendi* to *Booker* point to the middle term specified in California's statutes, not the upper term, as the relevant statutory maximum. Because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." (*Cunningham, supra*, 127 S.Ct. at p. 871, fn. omitted.) In so holding, the high court again reaffirmed *Apprendi's* bright-line rule, that had been reiterated in both *Blakely* and *Booker*, that "[e]xcept 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.)

Although conceding that *Cunningham, supra,* 127 S.Ct. 856, generally precludes a trial court from finding facts to impose an upper term sentence and that the middle-term is the statutory maximum for a valid sentence in California in the absence of jury found aggravating facts, the People contend Lockman forfeited his *Cunningham/Blakely* claim because he failed to object under *Apprendi*, *Blakely* or the right to a jury trial at the time he was sentenced on April 19, 2006, long after *Blakely* had been decided. The People assert that even if the issue is reached, there was no *Cunningham* violation in this case because the trial court's findings fell under the recidivism exception of *Almendarez-*

Torres v. United States (1998) 523 U.S. 224 (*Almendarez-Torres*), or were based on facts the jury necessarily found and Lockman admitted.

We agree with the People that Lockman has forfeited his *Cunningham/Blakely* issue on appeal for several reasons. First, *Blakely, supra,* 542 U.S. 296, was filed on June 24, 2004, almost two years before Lockman's sentencing, which occurred about two months after *Cunningham* had been granted certiorari. (*People v. Cunningham* (April 18, 2005, No. A103501 [nonpub. opn.]), cert. granted *sub nom. Cunningham v. California* (Feb. 21, 2006, No. 05-6551) 126 S.Ct. 1329.) Lockman's counsel did not object on *Blakely* grounds at sentencing. Generally, issues not raised in the trial court are waived on appeal. (*People v. Saunders* (1993) 5 Cal.4th 580, 590 & fn. 6; *People v. Hill* (2005) 131 Cal.App.4th 1089, 1103.)

Secondly, and more importantly, Lockman is arguing constitutional error based on a selective reading of the sentencing hearing in which he isolates the court's statement of reasons for the upper term from the entire context of the hearing in which his counsel took an active part in the total sentence imposed. In addition to the probation report, two psychological evaluations, statements in aggravation and mitigation, the court considered Lockman's motion to dismiss his strike prior. Essentially, defense counsel requested the court strike Lockman's strike and impose a total eight year term, while the prosecutor asked for 11 years and the probation officer recommended 15 years which included the effect of the strike. Lockman's father addressed the court, opining that this case should not have been charged as a felony and that his son's prior case was really not as serious as it seemed because he only hit that victim three or four times and the victim was out of the

hospital the very next day. Referring to Lockman's count 1 conviction involving Norquist, Lockman's father said he could not believe "that a scratch on the bumper could be boosted to a felony."

The court explained to him that Lockman's behavior was felonious conduct and that he was enabling Lockman to minimize such conduct and the potential danger to other people on the road caused by Lockman's angry behavior behind the wheel of a vehicle. The court also noted that Lockman was "parroting back to the psychologist and everybody else" the same thing that his father was saying which showed that Lockman was "not accepting responsibility for what he did; he's not understanding how significant it is. This is felony conduct. [¶] Anybody who is out on the road, who's angry and intentionally bumps another car . . . or even acts as if they're going to do it is endangering everybody else who is out there on the road. That's felony conduct because people can be killed by it." Nonetheless, the court did not think that 15 years in prison was appropriate in this case.

After questioning counsel about how to arrive at different sentences and about earlier plea agreements in the case, the court struck the strike prior and imposed a ten year total prison term. In doing so, the sentencing judge stated:

> "I think this is an extremely serious situation. . . Although there are times where people do silly things by going to trial, I think in [Lockman's] position he has a mental condition that is causing him . . . to not accept responsibility for his behavior. [¶] I'm a little bit in between on this one. I think I'm going to strike the strike, give him ten years. He'll do five. That's more my comfort level with what I see available. . . . It's a lot of time, but it is serious. He needs to understand that, because unfortunately his family will not always be there to support him and he is going to have to operate on his [own.]

> [¶] Mr. Lockman needs to understand that no matter how angry he is, he cannot use physical action to try to get even with somebody and show his anger. It's just not acceptable in society. He can't afford to do it because of his history. . . . [¶] The way I'm going to do it is, is strike the strike. The basis for striking the strike is this: he did successfully complete probation. He had a period of time where he did stay out of trouble. I think he probably just got a little complacent about being careful, but for whatever reason, he obviously got back into this type of a situation which is totally unacceptable. [¶] For that period of time that he was out of trouble, he should get credit for that. I'm going to strike that strike. Also, because I'm required to impose the five-year nickel prior, he's getting penalized for that in any event. So under that rationale, I'm comfortable striking the strike. . . . [¶] Second of all, the way I got to ten years was I have five . . . for the nickel [prior]. And so I have to come up with five other years. . . ."

With the help of defense counsel, who suggested four years on count 1, and the prosecutor who agreed it would be an aggravated term on count 1 "and then [one-third] the midterm on count 5," which defense counsel noted was one year, the court imposed sentence. The sentencing judge then stated:

> "The basis for the upper term has to do with his prior history, that I think he's not accepted the responsibility. It was extremely dangerous. The people were vulnerable. Frankly, because there were two of them and there's a pattern of behavior, there's a certain sophistication in how he expresses his anger and his frustration. Although [the psychologist] does explain a lot . . . it's also a negative. I considered the fact that he was successful on probation in the past. [¶] I think one of the biggest things is that I think he is a danger to society because normal everyday stress causes him to do things he shouldn't be doing, and he acts out violently. I am looking at the fact that he has a supportive family. I've considered that, frankly, when striking the strike. In balance, I think that the upper term is the appropriate term to impose. . . . [¶] I have considered those factors that the probation officer provided, and then I'm required to do the second one consecutive. If I wasn't, I still would. And I would do that because they're separate victims, two separate instances, and two separate actions on defendant's part, and both

> were quite dangerous. . . . [¶] Thus it's the judgment of this Court that [Lockman] will be imprisoned . . . for a period of ten years."

Because the totality of this sentencing record reveals that defense counsel worked with the court to have it strike Lockman's strike and impose only a 10-year sentence, we find it somewhat incongruent for Lockman to now be able to challenge such sentence.

Moreover, even if we concluded Lockman had not forfeited the issue, we would find no prejudicial *Cunningham* error. The trial court's statement of aggravating circumstances reflects great reliance on Lockman's prior criminal history which was the fact of his prior conviction and falls under the *Almendarez-Torres* exception as well as *Apprendi*. This factor alone is sufficient to impose an upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728-729.) Further, other factors the court used regarding the multiple victims involved in count 1 and the dangerousness of Lockman's conduct in both incidents were facts inherent in the jury's verdicts due to their finding that he used his truck against Norquist and her son in the first incident and against DeWitt in the second in a manner capable of causing and likely to cause great bodily injury or death. (See *People v. Calhoun* (2007) 40 Cal.4th 398, 405-407.) In addition, the court's finding that Lockman had not accepted responsibility for his crimes was evident in his statements to the case investigator before his arrest and his statements made to the psychologist and probation officer after his convictions. The court fully acknowledged Lockman's mitigating factors and used them to strike his strike. Under these circumstances, any conceivable *Cunningham/Blakely* error was harmless. (*Recuenco, supra*, 126 S.Ct. 2546, 2549.)

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

I CONCUR:

McINTYRE, J.

Aaron, J., concurring and dissenting:

I agree with the majority that the evidence was sufficient to support Lockman's conviction for assault with a deadly weapon, that the trial court did not abuse its discretion in denying Lockman's motion for a new trial, and that the fact that jurors saw the unredacted transcript of the 911 call does not require reversal. However, I disagree with the majority's conclusion that Lockman has forfeited his right to challenge on appeal the trial court's imposition of an upper term sentence. In addition, contrary to the majority's holding, I would conclude that the trial court erred in relying on factors that were neither admitted by Lockman nor found by the jury in imposing the upper term.

1. *Lockman has not forfeited his right to challenge his sentence*

a. *Forfeiture of a claim of* Blakely[1] *error*

The essence of an allegation of *Blakely* error is that the defendant was deprived of his constitutional right to a jury trial on the factors on which the trial court relied in imposing an upper term sentence. A defendant is not precluded from asserting on appeal that he was denied his constitutional right to a jury trial, despite a failure to raise the issue in the trial court. (*People v. Saunders* (1993) 5 Cal.4th 580, 589, fn. 5; see also Cal. Const. art. I, § 16; *People v. Holmes* (1960) 54 Cal.2d 442, 443-444 [waiver of the right to a jury trial must be expressed].) While a claim of *Blakely* error involves a claim of only a partial deprivation of the right to a jury trial, I see no reasonable basis for distinguishing the right to a jury trial on aggravating factors from the right to a jury trial

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1 *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*).

in general, for purposes of determining whether the appellant has forfeited that right. I would conclude that Lockman's challenge to his upper term sentence is cognizable on appeal despite his failure to raise the issue in the trial court.

Further, prior to Lockman's sentencing, the California Supreme Court concluded in *People v. Black* (2005) 35 Cal.4th 1238, 1244, 1254, 1261 (*Black*), certiorari granted, judgment vacated, and cause remanded *sub nom. Black v. California* (2007) ___U.S.___ [127 S.Ct. 1210], that the imposition of an upper term sentence under California law was constitutional. In light of *Black*, any objection Lockman might have made at sentencing based on *Blakely*, *Apprendi*,[2] or the United States Constitution would have been futile, even in view of the fact that the United States Supreme Court granted certiorari in *Cunningham v. California* (2007) 549 U.S. ____ [127 S.Ct. 856] (*Cunningham*) prior to Lockman's sentencing.

b. *Other possible grounds for forfeiture*

The majority suggests that Lockman might have forfeited his right to challenge his sentence because his attorney "worked with the court to have it strike Lockman's strike and impose only a 10-year sentence." (Maj. opn., *ante*, at p. 29.) However, at the sentencing hearing, Lockman's attorney requested that the trial court strike Lockman's prior strike conviction and impose a sentence of eight years. The prosecutor requested an 11-year sentence, and the probation officer recommended 15 years. It was only after the court indicated that it intended to impose a sentence of 10 years that defense counsel

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2 *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*).

"worked with the court" to figure out how the court could arrive at that term. In my view, this would not constitute a forfeiture of the right to challenge the sentence in this case.

2. *The trial court relied on impermissible factors to impose an upper term sentence*

In imposing the upper term for assault with a deadly weapon, the trial court stated,

> "The basis for the upper term has to do with [Lockman's] prior history, that I think he's not accepted the responsibility. It was extremely dangerous. The people were vulnerable. Frankly, because there were two of them and there's a pattern of behavior, there's a certain sophistication in how he expresses his anger and his frustration . . . I think one of the biggest things is that I think he is a danger to society because normal everyday stress causes him to do things he shouldn't be doing, and he acts out violently."

The majority asserts that "[t]he trial court's statement of aggravating circumstances reflects great reliance on Lockman's prior criminal history *which was the fact of his prior conviction* and falls under the *Almendarez-Torres* [v. *United States* (1998) 523 U.S. 224 (*Almendarez-Torres*)] exception as well as *Apprendi*." (Maj. opn., *ante*, at p. 29, first italics added.) In my view, far from relying on the narrow exception in *Almendarez-Torres* to impose the upper term, the trial court's statement of factors in aggravation includes a virtual cornucopia of factors –most of which are *not* related to a prior conviction – that were neither admitted by Lockman nor found by the jury. The trial court erred in relying on such factors to increase Lockman's sentence, under *Cunningham*.

In *Cunningham*, *supra*, 127 S.Ct. 856, the United States Supreme Court held that the imposition of an upper term sentence under California's determinate sentencing law, based on neither a prior conviction nor facts found by the jury or admitted by the

defendant, violates the Sixth and Fourteenth Amendments of the United States Constitution:

> "California's determinate sentencing law (DSL) assigns to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence. The facts so found are neither inherent in the jury's verdict nor embraced by the defendant's plea, and they need only be established by a preponderance of the evidence, not beyond a reasonable doubt. The question presented is whether the DSL, by placing sentence-elevating factfinding within the judge's province, violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments. We hold that it does." (*Cunningham*, *supra*, 127 S.Ct. at p. 860.)

The *Cunningham* court reasoned:

> "As this Court's decisions instruct, the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) [*Ring*]; *Blakely* [, *supra*,] 542 U.S. 296; *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) [*Booker*]. '[T]he relevant "statutory maximum," ' this Court has clarified, 'is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.' *Blakely*, 542 U.S., at 303-304, 124 S.Ct. 2531 (emphasis in original)." (*Cunningham*, *supra*, 127 S.Ct. at p. 860.)

The *Cunningham* court reversed the defendant's upper term sentence because "the four-year elevation based on judicial factfinding denied petitioner his right to a jury trial." (*Cunningham*, *supra*, 127 S.Ct. at p. 860.)

a. *None of the aggravating factors on which the trial court relied is a constitutionally permissible ground for exceeding the statutory maximum*

In this case, as in *Cunningham*, the trial court imposed an upper term sentence based on factors that were neither found by the jury nor admitted by Lockman. These included Lockman's "prior history," that Lockman had not accepted responsibility for his criminal acts, that his actions were "extremely dangerous," that the victims were vulnerable, that Lockman exhibited a "pattern of behavior," that the offenses demonstrated "a certain sophistication," and that Lockman poses a danger to society. (See *Cunningham*, *supra*, 127 S.Ct. at p. 860.) The majority concludes that the sentence may stand because the trial court relied in large part on Lockman's criminal history in selecting the upper term, and that this falls within the "*Almendarez-Torres* exception," pursuant to which a court may impose a sentence that exceeds the statutory maximum on the basis of a defendant's prior conviction. In reaching this conclusion, the majority construes the *Almendarez-Torres* exception broadly, to encompass, in my view, far more than the mere fact of a prior conviction.[3]

Prior to *Cunningham*, many courts, including the California Supreme Court, had construed the *Almendarez-Torres* exception to apply to more than the mere the fact of a prior conviction. (E.g., *People v. Thomas* (2001) 91 Cal.App.4th 212, 221 [agreeing with

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3 In imposing the upper term, the trial court referred to Lockman's "prior history," *not* to a prior *conviction*. However, because the majority asserts that the trial court relied on Lockman's criminal history, and that this was within the *Almendarez-Torres* exception to *Apprendi*, in this section I discuss the applicability of that exception to this case.

"courts [that] have held that no jury trial right exists on matters involving the more broadly framed issue of 'recidivism'"]; *People v. McGee* (2006) 38 Cal.4th 682, 708 [concluding Court of Appeal erred in "narrowly constru[ing] the *Almendarez-Torres* exception for recidivist conduct as preserved by *Apprendi*"]; accord *Black*, *supra*, 35 Cal.4th at p. 1269 [construing *Apprendi* and its progeny only to apply to "offense-based facts"] (conc. & dis. opn of Kennard, J.).)

However, in *Cunningham*, the United States Supreme Court clarified the narrow scope of the *Almendarez-Torres* exception, and rejected the notion that recidivism related factors pertaining to a defendant need not be proved to a jury. In his dissent in *Cunningham*, Justice Kennedy wrote:

> "The Court could distinguish between sentencing enhancements based on the nature of the offense, where the *Apprendi* principle would apply, and sentencing enhancements based on the nature of the offender, where it would not. California attempted to make this initial distinction. Compare Cal. Rule of Court 4.421(a) (Criminal Cases) (West 2006) (listing aggravating "[f]acts relating to the crime"), with Rule 4.421(b) (listing aggravating "[f]acts relating to the defendant"). The Court should not foreclose its efforts." (*Cunningham*, *supra*, 127 S.Ct. at p. 872 (dis. opn. of Kennedy, J).)

Nearly all of the "facts relating to the defendant" that Justice Kennedy mentions, to which California Rules of Court, rule 4.421 (b) refers, are recidivism related factors. Rule 4.421 (b) provides:

> "Facts relating to the defendant include the fact that:
>
> "(1) The defendant has engaged in violent conduct that indicates a serious danger to society;

> "(2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness;
>
> "(3) The defendant has served a prior prison term;
>
> "(4) The defendant was on probation or parole when the crime was committed; and
>
> "(5) The defendant's prior performance on probation or parole was unsatisfactory."

The *Cunningham* majority concluded that, pursuant to *Apprendi's* "'bright-line rule'" (*Cunningham*, *supra*, 127 S.Ct. at p. 869, quoting *Blakely*, *supra*, 542 U.S. at p. 308), such factors *are* subject to *Apprendi's* jury trial requirement:

> "Justice KENNEDY urges a distinction between facts concerning the offense, where *Apprendi* would apply, and facts concerning the offender, where it would not. *Post*, at 872 (dissenting opinion). *Apprendi* itself, however, leaves no room for the bifurcated approach Justice KENNEDY proposes. See 530 U.S., at 490, 120 S.Ct. 2348 ('*[A]ny* 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.' (Emphasis added.))" (*Cunningham*, supra, 127 S.Ct. at p. 869, fn. 14, quoting *Apprendi, supra*, 530 U.S. at p. 490.)

Before it issued its decision in *Cunningham*, the United States Supreme Court had repeatedly referred to the "narrow exception" to *Apprendi,* provided in *Almendarez-Torres*, and did so in a manner that excluded recidivism related factors from its scope. (*Booker*, *supra*, 543 U.S. at p. 244 ["[W]e reaffirm our holding in *Apprendi*: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt"]; *Blakely*,

supra, 542 U.S. at p. 301 [stating that case requires court to "apply the rule we expressed in [*Apprendi*]: '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'"]; *Ring, supra*, 536 U.S. at p. 597, fn. 4 [describing *Almendarez-Torres* as holding "that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence"].)

There is nothing in *Booker*, *Blakely*, or *Ring* that would warrant expanding the "exceptional departure" (*Apprendi*, *supra*, 530 U.S. at p. 487) established in *Almendarez-Torres* from the "historic practice" outlined in *Apprendi*, which prohibits the imposition of a term of punishment greater than that authorized by the jury's verdict. (*Apprendi*, *supra*, 530 U.S. at p. 487.) Accordingly, I would conclude that the United States Supreme Court's statement that, "[e]xcept 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'" (*Cunningham*, *supra*, 127 S.Ct. at p. 868, quoting *Apprendi, supra*, 530 U.S. at p. 490), means that courts may consider *only* the fact of the defendant having incurred a prior conviction, and not other factors related to the defendant's prior convictions, in imposing an upper term sentence.

Many of the reasons the Supreme Court offered in *Apprendi* for distinguishing *Almendarez-Torres* apply with equal force to the factors on which the trial court relied to impose the upper term sentence in this case. (See *Apprendi*, *supra*, 530 U.S. at p. 488 ["Both the certainty that procedural safeguards attached to any 'fact' of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that 'fact' in his

case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range"].) Unlike the bare, and admitted, prior convictions at issue in *Almendarez-Torres*, Lockman has neither admitted the aggravating factors on which the trial court relied in this case, nor has a jury determined any of those factors to be true beyond a reasonable doubt.[4]

Since none of the aggravating factors on which the trial court relied is the mere fact of a prior conviction, I would conclude that the court improperly relied on these factors in imposing an upper term sentence.

b. *Even if there is evidence in the record that would provide a constitutionally permissible ground for exceeding the middle term, this would not authorize the trial court to rely on other improper factors in imposing an upper term sentence*

The majority asserts that there are other aggravating factors in the record that are "inherent in the jury's verdicts" (Maj. opn., *ante*, at p. 29) and also, that "the court's finding that Lockman had not accepted responsibility for his crimes was evident in his statements to the case investigator before his arrest and his statements made to the psychologist and probation officer after his convictions." (Maj. opn., *ante*, at p. 29.) The majority concludes that the trial court could properly have relied on such factors to

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4 Further, the *Cunningham* court rejected a primary rationale underlying the *Almendarez-Torres* decision, — that "recidivism 'does not relate to the commission of the offense' itself" (*Apprendi*, *supra*, 530 U.S. at p. 496, quoting *Almendarez-Torres*, *supra*, 523 U.S., at p. 244) — as a basis for creating an exception to its holding. (*Cunningham*, *supra*, 127 S.Ct. at p. 869, fn. 14.)

impose an upper term sentence, and that we may therefore affirm the upper term sentence in this case.

The difficulty with the majority's position is that it implicitly assumes that the upper term is the "statutory maximum" (*Cunningham*, *supra*, 127 S.Ct. at p. 868) in cases in which the record reflects the existence of a constitutionally permissible aggravating factor. (See also *Black*, *supra*, 35 Cal.4th at p. 1270 ["the jury's findings pertaining to defendant's probation eligibility, and the trial court's findings pertaining to defendant's criminal record, were each sufficient to satisfy this statutory requirement [that there be at least one aggravating circumstance], thereby making the upper term the statutory maximum for the offense"] (conc. & dis. opn of Kennard, J.).) However, as *Cunningham* makes clear, at the time Lockman was sentenced,[5] the statutory maximum under the DSL was the middle term in all cases, (*Cunningham*, *supra*, 127 S.Ct. at p. 868 ["In accord with *Blakely*, therefore, the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum"]), because facts inherent in a jury's verdict, a defendant's admission, or a defendant's prior conviction, were never sufficient under the DSL to authorize an upper term sentence. Rather, the DSL required that the trial court specifically *find* that such facts constituted a circumstance in aggravation before the court could impose an upper term. (*Cunningham*, *supra*, 127 S.Ct. at p. 862 ["In sum, California's DSL, and the rules governing its application, direct the sentencing court to

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[5] The Legislature has amended the DSL in response to *Cunningham*. (Stats. 2007, ch. 3, § 2, eff. Mar. 30, 2007.)

start with the middle term, and to move from that term only when *the court itself* finds and places on the record facts ─ whether related to the offense or the offender ─ beyond the elements of the charged offense"], italics added.) Yet, such judicial fact finding is precisely what *Cunningham* prohibits.

The existence of a prior conviction, or the existence of a fact found by the jury or admitted by the defendant upon which the trial court was authorized under the DSL to impose an aggravated term, did not raise the statutory maximum. Rather, in such a case, the trial court could sentence a defendant *beyond* the statutory maximum, and impose an upper term sentence. (*Cunningham*, *supra*, 127 S.Ct. at p. 868, quoting *Apprendi, supra*, 530 U.S. at p. 490 ["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'"], italics added.) For this reason, I disagree with the majority's implicit conclusion that under former Penal Code section 1170, subdivision (b), the upper term became the statutory maximum when the record reflected the existence of a constitutionally permissible aggravating factor.

3. *The error requires reversal*

In *Washington v. Recuenco* (2006) 548 U.S. ____ [126 S.Ct. 2546] (*Recuenco*), the United States Supreme Court considered whether a court's imposition of an enhanced sentence on the basis of a fact not found by the jury, in violation of *Blakely*, constitutes structural error necessitating automatic reversal. The *Recuenco* court held, "Failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error." (*Recuenco*, *supra*, 126 S.Ct. at p. 2553.) Rather, a reviewing court

must determine whether the prosecution can establish beyond a reasonable doubt that the jury would have found the fact supporting the enhanced sentence if it had been asked to do so. (*Id*. at pp. 2550-2552, citing *Chapman v. California* (1967) 386 U.S. 18 and *Neder v. United States* (1999) 527 U.S. 1.) Since *Cunningham* is an application of *Blakely*, *Recuenco* governs the determination whether each of the supporting facts upon which the trial court relied would have been found by the jury.

The majority concludes that the jury would have found beyond a reasonable doubt both that there were multiple victims and that Lockman's conduct was dangerous.[6] It is clear that the jury would have found beyond a reasonable doubt that there were multiple victims. However, it is not clear to me that the jury would have found – or that it would have had any evidentiary basis to find – that Lockman committed the offenses in a manner that evinced a greater degree of dangerousness than is present in the "usual" case of assault with a deadly weapon.

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6 The majority does not suggest that the jury would have found true the other factors on which the trial court relied in imposing the upper term sentence. For this reason, I limit my discussion to the two factors the majority cites.

4. *Conclusion*

In imposing the upper term sentence, the trial court relied on a number of aggravating factors that were neither admitted by Lockman nor found by the jury. Because it is possible that if the court had not relied on impermissible factors in imposing the upper term, it might have sentenced Lockman to a different term, I would remand the case to give the trial court the opportunity to reconsider the sentence in this case.

AARON, J.