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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND MARTINEZ, Defendant and Appellant.	B187947 (Los Angeles County Super. Ct. No. KA067426)

APPEAL from a judgment of the Los Angeles Superior Court. George Genesta, Judge. Affirmed.

Patricia A. Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., Lawrence M. Daniels, and April S. Rylaarsdam, Deputy Attorneys General, for Plaintiff and Respondent.

Raymond Martinez was convicted of the first degree murder of Cesar Delatorre (count 1), with an enhancement for personal discharge of a firearm, causing death. He also was convicted of possession of a controlled substance (count 2), because methamphetamine was found in his pocket when he was arrested. He was sentenced to prison for 50 years to life on count 1, plus the upper term of three years on count 2. He contends: (1) The trial court should not have refused to instruct that a felony murder does not occur when a felony is committed in the course of an intentional murder. (2) Imposition of the upper term on count 2 violated his Sixth and Fourteenth Amendment rights to a jury trial, under *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) and *Cunningham v. California* (2007) 549 U.S. __ [127 S.Ct. 856] (*Cunningham*).

At our request, both sides have provided supplemental briefing on the effect of *Cunningham*, which was decided after the initial briefing was completed.

We reject appellant's instructional error, find no error from imposition of the upper term on count 2, and affirm.

FACTS

1. Prosecution Evidence

Delatorre was killed shortly before midnight on August 5, 2004.[1] His best friend, Gerardo R., was present just before and just after the shooting. Gerardo was the prosecution's primary witness.

At the time of the crime, Gerardo had known appellant for about six weeks. They met because Gerardo was dating Suzette G. (Suzette), and appellant was dating Suzette's cousin, Melissa G. (Melissa). Gerardo was on parole for auto burglary, grand theft auto, and possession of cocaine. He and Suzette had purchased drugs from appellant. Appellant possessed a gun and was usually high on methamphetamine. He was living at the home of his friend, Anthony Valdez. Valdez was the codefendant below, but is not involved on this appeal.

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[1] All subsequent events occurred in 2004 unless otherwise stated.

Gerardo was with Delatorre when Delatorre first met appellant on the night of August 4. Appellant and Delatorre discussed methamphetamine at that time.

Around 5:30 a.m. the next day, August 5, Gerardo heard a gunshot outside his house, as he was dressing for work. When he went outside, he discovered that appellant had "accidentally" fired a bullet into a wall, while showing his gun to Gerardo's brother. Appellant then rode in the car, while Gerardo's brother took Gerardo to work.

That afternoon, a group of people used methamphetamine at Gerardo's house. The group included Gerardo, Gerardo's brother, appellant, Delatorre, Melissa, and Melissa's brother. Appellant and Delatorre left separately. After Delatorre left, a person telephoned, from whom Delatorre was supposed to obtain methamphetamine. Delatorre returned to Gerardo's house about 10 minutes later, and then left.

That evening, between 9:30 and 10:00 p.m., appellant told Melissa that "[h]e was going to go with some friends and just take care of some business."

Later that evening,[2] Gerardo and Suzette sat in Suzette's car in front of Gerardo's house. Suzette's toddler daughter was with them in the car. Delatorre drove up alone in his Jeep Cherokee. He stopped briefly behind Suzette's car, and then drove away.

About 10 minutes later, Delatorre returned in the Jeep, and parked it behind Suzette's car. This time, appellant and Valdez were with him.

Valdez got out of the Jeep and stood by a wall. Appellant left the Jeep and walked towards Suzette, who left her car. Appellant hugged Suzette, while whispering in her ear that she and her daughter should "get out of there." She told him that she was going to the home of a friend named Benny. He told her "that he was with [her] at Benny's house the whole time."

Gerardo got out of Suzette's car and joined Valdez by the wall. Suzette drove off with her daughter. Delatorre got out of the Jeep and talked to appellant. Appellant appeared to be upset with Delatorre. Delatorre got back into the Jeep and drove away, alone.

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[2] Some of Gerardo's time estimates are confusing.

Appellant and Valdez whispered to each other. Gerardo asked appellant what was wrong. Appellant angrily said that Gerardo's friend had "better come up with something." Gerardo offered to pay for anything that Delatorre owed. Appellant answered, "It's not even about the money any more." Gerardo told appellant "not to do anything stupid." Appellant told Gerardo not to get involved or he would kill him. Valdez and appellant resumed whispering to each other.

From inside the house, Gerardo's father told him to come inside. Appellant said he would wait for Delatorre. Gerardo went into the house. Thirty or 40 minutes later, around 11:30 p.m., he went outside again, when he heard Delatorre drive up.[3] He knew Delatorre had returned because Delatorre was loudly playing something on the "huge" speakers of his Jeep's "good" stereo system.

Once outside, Gerardo saw that Delatorre was in the driver's seat of the Jeep, appellant was in the front passenger seat and Valdez was in the backseat, directly behind Delatorre. Gerardo got into the back seat, behind appellant. Delatorre was nervous. He told Gerardo that "they" had pulled a gun on him. He also said that he had given appellant and Valdez what they wanted, but they would not leave the Jeep. Delatorre activated his cell phone. Gerardo then saw that appellant was holding a .45-caliber automatic weapon against Delatorre's stomach. Also, appellant was "stoned on meth." Appellant ordered Delatorre to turn off the phone. Delatorre complied.

Gerardo said that he had to leave the Jeep to take out the trash. Nobody tried to stop him. He got out of the Jeep and stood beside it. Appellant repeatedly ordered Delatorre to turn on the vehicle and drive it down the street. The ignition switch on the Jeep was broken so it could be started only by a special method that Delatorre used, involving his fingers. He did not start it, and obviously did not want to start it. Appellant asked Gerardo to tell Delatorre to start the Jeep. Gerardo told appellant to calm down

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[3] According to Suzette, while she was at Benny's house, Delatorre drove up there, stayed for about five minutes, and left.

and put the gun away. He used the name "Ray" for appellant, as that was the name he had used in the past. Appellant angrily said that his name was "Rico," and not "Ray." He continued to point the gun at Delatorre, but no longer held it against his stomach.

Gerardo went into the house and dialed 911. He told the operator that people in a car had pulled out a gun on his best friend. While talking on the telephone, he heard the Jeep start. He and the operator both then heard a gunshot.

Gerardo ran outside. He heard a second shot, about 10 seconds after the first one. He saw appellant pull Delatorre out of the driver's side of the Jeep, and drop him to the ground. Appellant then entered the Jeep, which was still running, and drove it away, with Valdez inside.[4]

When the police arrived, Delatorre's body was lying in the street. His wallet and cell phone were missing. Gerardo suggested places where appellant and Valdez might be found, including Melissa's house.

Shortly before 4:00 a.m., an unknown person dropped off appellant and Valdez at the home of Melissa and Suzette. Appellant and Valdez looked frightened. Appellant asked Suzette whether she thought anybody who lived near Gerardo would recognize him. He requested different clothing. Both he and Valdez had blood on their clothes. The police soon arrived. They took appellant and Valdez into custody. In his pants pocket, appellant had a baggie that contained a usable quantity of methamphetamine. Laboratory tests later showed that both appellant and Valdez had Delatorre's DNA on their clothing.

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[4] Gerardo's testimony was verified both by the 911 call and by testimony from a neighbor. From inside his house, the neighbor heard two gunshots, "separated by a few seconds, maybe less than a minute." "The first one was more muffled," while "[t]he second one was louder and deeper." The neighbor looked outside. Although his view was partly obstructed, he saw that a sports utility vehicle was stopped in the middle of the street. A man walked around the vehicle's back end, towards the driver's side. A minute or two later, the vehicle drove off.

According to the pathologist, Delatorre was killed by a .45-caliber bullet that entered his head at his right upper cheek. The muzzle of the gun was pressed against his face before the weapon was fired. He also suffered a flesh wound, from a bullet that entered on the left side of his chest and exited on the right side of his lower abdomen. He tested positive for methamphetamine.

Delatorre's Jeep was subsequently found, submerged in a 40-foot ditch, at a construction site near the home of appellant's mother. The Jeep's stereo and front and rear speakers were missing.

On August 26, 2004, the day before the preliminary hearing was scheduled, a friend of appellant's visited him at the jail. Their conversation was recorded. They spoke in a kind of code. The friend later told a detective what the code words meant, although he repudiated that translation at the trial. Appellant asked the friend to kill the witness, before the hearing the next day. He said that the gun used in the crime was gone, but he could have another gun delivered to the friend, that night. He had already asked somebody else to do this for him, but he did not trust that person. He said that he "liked it," and "[i]t felt good," when he committed the crime.

2. Defense Evidence

Dr. Ronald Markman testified regarding the general effects of methamphetamine use.

DISCUSSION

1. The Refused Instruction

Appellant maintains that the trial court committed reversible error when it refused to give a special defense instruction on felony murder. We do not agree.

The evidence showed that appellant was angry because Delatorre failed to give him something, probably money or drugs. Delatorre returned and handed over whatever had been lacking. Appellant then forced Delatorre to start the Jeep, shot him in the head, and drove off in the Jeep.

The jury was instructed, and the prosecutor argued, that a finding of first degree murder could be based on either of two theories: (1) a willful, deliberate and

premeditated murder, or (2) a felony murder, based on the underlying uncharged felonies of robbery, carjacking, or kidnapping. The prosecutor further argued that appellant simultaneously intended to kill, rob, carjack, and kidnap.

In connection with the felony-murder theory, the jury was correctly instructed, via CALJIC No. 8.21, that "[t]he unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission or attempted commission of the crime of a Kidnapping, Carjacking, or Robbery is murder of the first degree when the perpetrator had the specific intent to commit that crime." The jury was also instructed on the elements of the underlying felonies.

However, the trial court refused to give an instruction that read: "If you find that the defendant or co-defendant's primary intent was to kill the victim and he or the co-defendant commits or attempts to commit another felony during the commission of the murder there is no felony-murder because the killing was not committed during the perpetration of the underlying felony."

The requested instruction was properly refused, as it was a confusing and incorrect statement of law. Appellant could commit an intentional killing out of anger over a drug dispute, and simultaneously be guilty of a felony murder, if he also killed while attempting to commit kidnapping, carjacking, or robbery.

The requested instruction was derived from *People v. Green* (1980) 27 Cal.3d 1, 58-59, disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, footnote 3. *Green* found insufficient evidence for a robbery murder special circumstance, on the ground that the murder did not occur during the commission of a robbery, as the victim was killed out of jealousy or revenge, and the robbery of her purse, rings and clothes was "merely incidental" to the murder, to avoid identification of her body. (*People v. Green*, *supra*, 27 Cal.3d at p. 61.)

The facts here were entirely different. The jury found that appellant intentionally discharged his firearm, causing death. He held a gun at Delatorre's stomach while ordering him to start the Jeep and drive it down the street. After that, he pressed the gun against Delatorre's cheek, fired it as soon as Delatorre started the Jeep, and immediately

took the Jeep. He killed while perpetrating a carjacking, with the goal of taking the Jeep. There was therefore no issue over whether the underlying crime was merely incidental to the murder. (*People v. Green*, *supra*, 27 Cal.3d at p. 61; see *People v. Marshall* (1997) 15 Cal.4th 1, 41.)

Although we find that the requested instruction was correctly refused, we also find there was no prejudice, assuming that there was any error. The evidence overwhelmingly established that appellant intended both to commit a premeditated murder and to kill Delatorre to obtain his property, based on the following facts:

(1) Appellant knew the gun was operable, as he had fired it into a wall, earlier that day. (2) Appellant was planning something that night, as he told Melissa that "[h]e was going to go with some friends and just take care of some business." (3) The plan involved dangerous behavior, as appellant instructed Suzette to leave with her child when he saw her outside of Gerardo's house. (4) Appellant tried to create an alibi in advance, as he told Suzette "that he was with [her] at Benny's house the whole time." (5) Appellant argued with Delatorre, complained to Gerardo that Delatorre had "better come up with something," and said, "It's not even about the money any more." (6) Appellant and Valdez had a whispered conference while Delatorre was gone. (7) Delatorre told Gerardo, inside the Jeep, that he had given "them" what they wanted, but they would not leave the Jeep, and were holding a gun on him. (8) Only Delatorre could start the Jeep, and appellant shot Delatorre in the head, as soon as the Jeep was started. (9) After the shooting, appellant immediately pulled Delatorre's body from the Jeep and drove off in it. (10) Delatorre had his cell phone when Gerardo was inside the Jeep, and presumably had a wallet, but his cell phone and wallet were missing after he was shot. (11) When the Jeep was recovered, its stereo system and speakers were gone. (12) Appellant admitted the crime when his friend visited him at the jail.

Based on the foregoing evidence of guilt, we conclude that there was no possible prejudice from the absence of the requested instruction.

2. The Sentencing Issue

On count 2, possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)), the trial court imposed the upper term of three years, rather than the midterm of two years. As a circumstance in aggravation, it found that appellant had previously been granted probation and failed on probation, and he was not a person who would complete or who would be successful on probation. The court apparently chose the circumstance in aggravation of former rule 4.421(b)(5) of the California Rules of Court, which states, "[t]he defendant's prior performance on probation or parole was unsatisfactory." For simplicity, we will refer to it here as the "failure on probation circumstance."

Appellant maintains that under *Blakely, supra,* 542 U.S. 296, and *Cunningham, supra,* 127 S.Ct. 856, he was entitled to a jury determination on the failure on probation circumstance. Respondent counters that (a) appellant forfeited the claim by failing to object on this ground below, (b) the failure on probation circumstance fell within the recidivism exception of *Almendarez-Torres v. United States* (1998) 523 U.S. 224, and (c) assuming any error under *Blakely* and *Cunningham*, the error was harmless.

Blakely, *supra*, 542 U.S. 296 was decided on June 24, 2004. It held that the statutory sentencing scheme of the State of Washington violated the defendant's Sixth Amendment right to a have a jury determine the facts that are essential to punishment, as the scheme permitted an increase in the sentence based on a finding by the judge at the sentencing hearing, even though that fact had neither been admitted by the defendant nor found true by a jury. (*Blakely, supra,* 542 U.S. at pp. 298-305.) *Blakely* relied on this language from *Apprendi v. New Jersey* (2000) 530 U.S. 466: " '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.' " (*Blakely*, *supra*, at p. 301, quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490.) It further held "that 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.*" (*Blakely*, *supra*, at p. 303, original italics.)

Subsequent to *Blakely*, in *People v. Black* (2005) 35 Cal.4th 1238, 1254 (*Black*), the California Supreme Court held that California's determinate sentencing law (DSL) does not violate the Sixth Amendment, because under the California scheme, the upper term is the " 'statutory maximum.' " *Black* was decided on June 20, 2005. It was overturned by the United States Supreme Court on January 22, 2007, in *Cunningham*, *supra*, 127 S. Ct. 856, 871.

Cunningham ruled that it is the midterm of a DSL sentence, and not the upper term, that constitutes the statutory maximum sentence. (*Cunningham*, *supra*, 127 S.Ct. at p. 871.) It further held that the DSL violates a defendant's Sixth Amendment right to a jury trial, because it gives the trial judge, and not the jury, the authority to find the facts that permit an upper term sentence. (*Ibid.*)

Before considering whether appellant's sentence complied with the requirements of *Blakely* and *Cunningham*, we first turn to the question of waiver.

A "waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464.) "If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty." (*Blakely*, *supra*, 542 U.S. at p. 310.) Here, however, there was no "appropriate waiver" of the right to a jury trial. Appellant was sentenced on December 2, 2005, after *Blakely* and *Black*, but before *Cunningham*. Nobody mentioned *Blakely* at the sentencing hearing. A request for a jury trial on the aggravating circumstances at that time would have been futile, given the California Supreme Court's holding in *Black*. The circumstances do not justify a finding of a knowing and intelligent waiver of the right to jury, as to the circumstance in aggravation.

As to the merits of appellant's argument: The jury trial principles discussed in *Blakely* and *Cunningham* apply to facts that increase the penalty, "[o]ther than the fact of a prior conviction." (*Blakely*, *supra*, 542 U.S. at p. 301, see also *Cunningham*, *supra*, 127 S.Ct. at p. 868.) The parties dispute whether a failure on probation falls within "the fact of prior conviction" exception to the right to jury. (*Almendarez-Torres v. United States*, *supra*, 523 U.S. 224; *People v. Thomas* (2001) 91 Cal.App.4th 212; *People v. McGee*

(2006) 38 Cal.4th 682; but see *People v. McGee*, *supra,* 38 Cal.4th at pp. 709-716 (dis. opn. of Kennard, J.); *Shepard v. U.S.* (2005) 544 U.S. 13, 28 (conc. opn. of Thomas, J.).)

The previous grant of probation is part of appellant's sentencing history, as shown by the summary of his record in the probation report. It is an outgrowth of the "[o]ther than the fact of a prior conviction" exception, which also has been called the "recidivism" sentencing factor. (See *Almendarez-Torres v. United States*, *supra*, 523 U.S. at pp. 243-244; *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 488.) Recidivism is distinguishable from other matters that are used to enhance punishment, "because (1) recidivism traditionally has been used by sentencing courts to increase the length of an offender's sentence, (2) recidivism does not relate to the commission of the charged offense, and (3) prior convictions result from proceedings that include substantial protections." (*People v. McGee*, *supra,* 38 Cal.4th at p. 698.) We therefore conclude that appellant's failure on probation was not the type of fact for which a jury trial was required, as the Sixth Amendment has been interpreted by the United States Supreme Court.

DISPOSITION

The judgment is affirmed.

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FLIER, J.

We concur:

RUBIN, Acting P. J. BOLAND, J.