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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

HARRY THOMAS MITCHELL II,

Defendant and Appellant.

F050550

(Super. Ct. No. CRF20339)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tuolumne County. Eleanor Provost, Judge.

Rex Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, J. Robert Jibson and Jesse Witt, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Ardaiz, P.J., Dawson, J. and Kane, J.

On January 17, 2006, appellant Harry Thomas Mitchell II stole approximately $3,500 from two women who were preparing to make a night deposit at a bank in Tuolumne County. As a result, a jury convicted him of second degree robbery (Pen. Code, § 211), and he was sentenced to the upper term of five years in prison. He now appeals, claiming imposition of the upper term violated his constitutional rights.[1] For the reasons that follow, we will affirm.

DISCUSSION[2]

At the sentencing hearing, the trial court denied probation, in large part due to appellant's record and the fact he was on probation at the time of the instant offense. In aggravation, the court found that the crime involved a threat of great bodily harm, as the victims believed appellant was armed, although it turned out there was no weapon (Cal. Rules of Court,[3] rule 4.421(a)(1)); the victims were particularly vulnerable, as the crime took place at a bank at night (rule 4.421(a)(3)); appellant threatened a witness (rule 4.421(a)(6)); the manner in which the crime was carried out indicated planning and premeditation (rule 4.421(a)(8)); the crime involved a taking of great monetary value (rule 4.421(a)(9)); appellant was a serious danger to others in society (rule 4.421(b)(1)); appellant had "lots of prior stuff" (rule 4.421(b)(2))[4]; and appellant was on probation when the present crime was committed (rule 4.421(b)(4)). The only circumstance the court found even arguably mitigating was the fact appellant was under the influence of methamphetamine when the present crime was committed (rule 4.423(a)(4)). As a result,

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1 Appellant also received a consecutive eight-month term in an unrelated case. Neither that case nor the appeal of his codefendant in the robbery is before us at this time.

2 As appellant does not challenge his conviction, we dispense with a summary of the evidence adduced at trial with respect to the underlying offense.

3 All references to rules are to the California Rules of Court.

4 The probation officer's report (RPO) revealed appellant had sustained one misdemeanor conviction in 2004 and another in 2005, and a felony conviction in 2005.

the court concluded that the factors in aggravation "far outweigh[ed]" anything it could find in mitigation, and it imposed the upper term.

Relying on *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), appellant now contends the trial court violated his Sixth Amendment right to trial by jury by imposing the upper term based on factors not admitted by appellant or found by the jury to be true beyond a reasonable doubt.

Prior to appellant's sentencing, the California Supreme Court undertook an extensive analysis of these cases (and *United States v. Booker* (2005) 543 U.S. 220) and concluded that the imposition of an upper term sentence, as provided under California law, was constitutional. (*People v. Black* (2005) 35 Cal.4th 1238, 1244, 1254, 1261 (*Black*).)[5] Recently, however, the United States Supreme Court overruled *Black* in part and held that California's determinate sentencing law "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' [Citation.]" (*Cunningham v. California* (2007) 549 U.S. ___, ___ [127 S.Ct. 856, 868] (*Cunningham*).) The middle term prescribed under California law, not the upper term, is the relevant statutory maximum. (*Ibid*.)

In the present case, however, the RPO revealed that appellant had suffered three prior convictions, and appellant did not challenge the accuracy of this account. Two of the factors in aggravation cited by the trial court – that appellant had "lots of prior stuff" and that he was on probation at the time he committed the present offense – presuppose one or more prior convictions. Thus, when the court relied on those factors, it necessarily

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5 In light of *Black*, any objection by appellant at sentencing based on *Blakely*, *Apprendi*, or the United States Constitution almost certainly would have been futile. Accordingly, we reject respondent's claim appellant waived the issue by failing to object.

was also relying on the fact of appellant's prior convictions. Multiplicity of prior convictions and probationary status are so closely related to the prior convictions themselves that they come within the exceptions for such convictions contained within *Blakely* and *Apprendi*. This means the upper term was supported by factors that, under those cases, need not be found by a jury beyond a reasonable doubt. (See *Blakely*, *supra*, 542 U.S. at p. 301; *Apprendi*, *supra*, 530 U.S. at p. 490.) It follows that reliance on those factors was not error under *Cunningham* (see *Cunningham*, *supra*, 549 U.S. at p. ___ [127 S.Ct. at p. 868]), and, hence that imposition of the upper term was constitutionally permissible.

In light of the foregoing, the propriety of the trial court's consideration of other factors need not detain us. Under the circumstances of this case, assuming consideration of non-prior-conviction-related factors was error, it was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24; furthermore, there was no abuse of discretion under *People v. Watson* (1956) 46 Cal.2d 818, 836. A single factor in aggravation suffices to support imposition of the upper term (*People v. Osband* (1996) 13 Cal.4th 622, 730); in light of the trial court's comments at sentencing, the presence of two valid factors in aggravation, and the absence of virtually any mitigation, the record amply establishes that the trial court would have imposed the upper term even if the factors not related to appellant's prior convictions had been excluded from consideration.

DISPOSITION

The judgment is affirmed.