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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. LANDU MICHAEL MVUEMBA, Defendant and Appellant.	B186622 (Los Angeles County Super. Ct. No. SA 056090)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert P. O'Neill, Judge. Affirmed.

Stephen Temko, 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, Victoria B. Wilson and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Landu Michael Mvuemba appeals from his conviction of forcible rape and sodomy, attempted forcible oral copulation, and committing a lewd act upon a child. He contends that his federal constitutional rights were violated under *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) when the trial court, following *People v. Black* (2005) 35 Cal.4th 1238 (*Black*), sentenced him to the upper terms on two counts, imposed sentence enhancements, and ordered that his sentences run consecutively without jury findings to support these sentencing arrangements. We affirm.

BACKGROUND

On April 17, 2005, Mvuemba encountered a 15-year-old female in the parking lot of a Chuck-E-Cheese restaurant, gave her his phone number, and then invited her to his car to smoke marijuana and drink alcohol. She entered his car, and he then drove to another location while they smoked and drank. During the time the victim was in his car, Mvuemba penetrated her vaginally and anally and tried to force her to engage in oral copulation. Soon thereafter, while the victim was still in his car, a police officer pulled Mvuemba over for making an illegal left turn while driving without license plates. The victim told the officer some of what had happened and was taken to a rape treatment center. Mvuemba was arrested.

Mvuemba was charged and tried by jury for two counts of kidnapping and three counts of committing a lewd act upon a child, of which he was acquitted, in addition to the four counts for which he ultimately was convicted: forcible rape (Pen. Code, § 261, subd. (a)(2)),[1] forcible sodomy (§ 286, subd. (c)(2)), attempted forcible oral copulation (§ 664 and § 288a, subd. (c)(2)), and one count of committing a lewd act upon a minor. (§ 288, subd. (c)(1).) The charging information also alleged that Mvuemba had suffered a prior felony "strike" conviction in 1997 for attempted robbery pursuant to section 1170.12, sudivisions (a) through (d) and section 667, subdivisions (b) through (i), as well as a prior serious felony conviction under section 667, subdivision (a)(1) and a

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1 All other statutory references are to the Penal Code.

prior prison term under section 667.5, subdivision (b). The trial court sentenced Mvuemba to a total term of 45 years and 4 months, based upon the upper terms of 8 years apiece for the rape and sodomy counts and middle or lesser terms for the other two counts, with each separate term doubled because of the prior "strike," all terms ordered to run consecutively, an additional consecutive 5-year term for the prior serious felony conviction, and an added one-year term for the prior prison term. Mvuemba timely appealed.

DISCUSSION

Mvuemba contends the court erred in imposing upper and consecutive terms without a jury finding aggravated sentencing factors, in violation of *Blakely*, *supra*, 542 U.S. 296. He acknowledges that in *Black, supra*, 35 Cal.4th 1238, the California Supreme Court upheld the sentencing system used at his trial, but he argues that California's sentencing regime is unconstitutional under *Blakely* and notes that the United States Supreme Court is currently reviewing a constitutional challenge to that regime.[2]

Mvuemba recognizes that "*Black* is controlling at this time within the California courts[.]" So do we. As such, we reject his arguments. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) His invocations of out-of-state authorities are unavailing.

We also reject the Attorney General's contention that Mvuemba waived his *Blakely* arguments by not raising them in the trial court. Unlike the defendant in *People v. Hill* (2005) 131 Cal.App.4th 1089, 1103 (upon which the Attorney General relies), who waived a *Blakely* challenge by failing to raise it at his sentencing which occurred *after Blakely* but *before Black*, Mvuemba was sentenced *after Black,* at which point a *Blakely* objection would have been futile under controlling law that the court was compelled to follow. Under these circumstances, Mvuemba did not waive the issue.

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[2] The United States Supreme Court has granted certiorari in a case presenting this issue. (*Cunningham v. California*, cert. granted Feb. 21, 2006, No. 05-6551, ___ U.S. ___ [126 S.Ct. 1329, 164 L.Ed.2d 47].)

(*People v. Chavez* (1980) 26 Cal.3d 334, 350, fn. 5; *City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780, 784-785.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

VOGEL, Acting P.J.

JACKSON, J.*

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* (Judge of the L. A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)