

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS ANGEL ORTIZ,

Defendant and Appellant.

D047556

(Super. Ct. No. SCD186547)

APPEAL from a judgment of the Superior Court of San Diego County, Laura P. Hammes, Judge. Affirmed in part and reversed in part.

A jury found Jesus Ortiz guilty of first degree robbery, assault with a deadly weapon, criminal threats, unlawfully taking/driving a vehicle, and evading the police with reckless driving. The jury also found true an enhancement allegation that Ortiz personally used a deadly and dangerous weapon in committing the criminal threats offense. Ortiz waived a jury trial on the alleged priors, and the court found that Ortiz had

previously suffered two prison priors (Pen. Code,¹ §§ 1203, subd. (e)(4) & 667.5, subd. (b)), and a serious felony prior, which qualified as a strike prior (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)). The court imposed a sentence of 18 years and 4 months, which included a six-year upper term for the robbery conviction (doubled because of the strike).

On appeal, Ortiz contends his conviction for evading the police with reckless driving should be reversed because the trial court's modification of the necessity instruction amounted to a directed verdict and deprived him of his constitutional right to present an affirmative defense. We conclude the evidence did not support a necessity defense, and therefore there was no prejudicial error in modifying the necessity instruction. Ortiz also challenges his sentence on the robbery conviction because he was sentenced to the upper term without a jury trial and without a finding of proof beyond a reasonable doubt on the aggravating factors. We conclude the sentence must be reversed because of *Blakely/Cunningham*² error. We remand for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Case

Ortiz and his girlfriend lived with Miguel Montoya, who had previously been Ortiz's Bible instructor. One evening, Ortiz left the apartment after an argument with his

¹ Unless otherwise specified, all further statutory references are to the Penal Code.

² *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856] (*Cunningham*); *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*).

girlfriend. When Ortiz returned later that evening, Montoya told him he had driven Ortiz's girlfriend to her cousin's house. Ortiz became angry and told Montoya he "disrespected" him. Ortiz said he was going to kill Montoya and that Montoya was going to "die tonight." Ortiz then punched Montoya in the face and kicked him. Montoya covered his face with his hands and Ortiz stabbed him twice in the shoulder with a knife. Ortiz told Montoya he would "slit [his] throat, [and] put [him] in the trunk." Ortiz asked Montoya for the pink slip to his white Chevy Cavalier and \$1,000. Montoya grabbed his car keys, threw them on the floor and told Ortiz to leave.

After Ortiz left, Montoya went to his neighbor's house and called the police. When the officers arrived, Montoya described the attack and said he thought Ortiz took his Chevy Cavalier to the Chicano Park area because that was where he dropped off Ortiz's girlfriend.

Later that evening, San Diego police officers were on duty in a marked patrol car in the parking lot at Chicano Park. The officers heard a radio broadcast that a possible suspect involved in a stabbing might be in that area, driving a car taken from the victim. Shortly after, they observed a white Chevy Cavalier driven by a male, later identified as Ortiz, heading towards them. The officers followed the car onto Interstate 5 and performed a records check. They discovered the vehicle was registered to Montoya.

Based on this information, the officers initiated a stop by activating the red lights and siren, but Ortiz did not stop. Ortiz exited the freeway, went through a stop sign, made a left turn, and accelerated away from the police car. A chase ensued and three

additional police cars and a police helicopter became involved in the pursuit. Ortiz ran five to six stoplights, did not stop for at least 10 stop signs, and drove approximately 50 to 60 miles per hour on residential streets. The officers saw Ortiz almost hit other cars, including a police car, and witnessed two to three near collisions with pedestrians. Police officers deployed a spike strip and the rear two tires of Ortiz's vehicle deflated after he drove over the strip. Once the car stopped, officers arrested Ortiz and took him into custody. The police officers denied drawing a weapon at any time until after the stop.

Defense Case

Ortiz testified on his own behalf. He stated Montoya inappropriately touched him on two different occasions and Ortiz was discussing these incidents with his girlfriend when Montoya arrived home from church. Ortiz's girlfriend wanted Ortiz to talk about the touching with church pastors, but Ortiz initially refused. Ortiz finally agreed and left to talk to the pastors. On the way there, he changed his mind and walked back to the apartment. When he walked through the door, Montoya hit him with a sharp object on his right temple. Montoya told him that if he could not have him, nobody could. Ortiz saw a knife in his hand and they fought as Montoya tried to move the knife towards Ortiz's chest. Ortiz stated Montoya stabbed himself as they were fighting. Ortiz punched him in the face about three times so Montoya would let go of the knife. Montoya started crying and told Ortiz he loved him. He dropped the knife to the ground. The men then sat on the couch and talked for about two hours. Montoya told Ortiz not to go to the police. After some time, Ortiz told Montoya he was going to the store to get supplies to

fix the wound. Montoya told Ortiz that he could use Montoya's car to go to the store. Montoya told Ortiz to be careful.

Ortiz said he then took the car and "went cruising around," not knowing where to go. While driving, Ortiz saw police officers and a patrol car parked in the parking lot at Chicano Park. One of the police officers, standing about 25 feet away, pulled out a gun and pointed it at Ortiz while he was in his vehicle.³ Ortiz became scared because this was an "area they've killed people before." He drove on the freeway and started driving towards a police station. However, he was "going in circles," knowing the location of the police station but not getting any closer. Ortiz was fearful because he "ha[d] seen [police officers] shoot a lot of people." He drove around so people would "come outside"; he believed that the police would not shoot him if people were outside. Ortiz testified that while he was "trying to flee" from the officers, he went through only one traffic light that was yellow and obeyed all traffic signs. He eventually came to a stop when there were about 70 people outside. Ortiz was then arrested.

Necessity Defense Instruction

During the jury instruction conference, Ortiz's counsel requested the court to instruct on necessity and duress as affirmative defenses to the crime of driving recklessly while evading a police officer. (Veh. Code, § 2800.2.) Counsel asserted that the evidence supported the defense because Ortiz testified he felt he was in imminent danger

³ During direct examination, Ortiz said that the person he saw with a gun was a police officer. However, at one point during cross-examination, Ortiz identified this person as "[a man] wearing dark clothes."

from being shot by the police officer who was holding a gun near Chicano Park. The court initially stated it was not inclined to give this instruction because an individual does not have a right to evade police officers merely because of a subjective fear of the officers. However, after several lengthy discussions with counsel, the court decided to give the necessity instruction, but to condition the defense on the jury finding the officer's alleged use of the gun (pointing it at Ortiz's vehicle near Chicano Park) was "unlawful." As given to the jury, the instruction stated that before the jury could rely on the necessity defense, it must find the prosecution had not met its burden to show the police officer's "use of the weapon was lawful."⁴

⁴ The instruction read: "A defendant is not guilty of the crime of evading a peace officer if he attempts to escape because of necessity based on an unlawful use of a deadly weapon to effect an arrest or detention, and if certain other conditions are met. [¶] If a deadly weapon is used to effect an arrest or detention, the people bear the burden of proof that the use of the weapon was lawful. [¶] If the jury finds credible evidence that an officer used a deadly weapon to effect an arrest or detention, and if the [jury] has reasonable doubt as to the legality of the attempt of detention or arrest with a weapon, then it may consider the defense of necessity to the crime of evading a peace officer."

"[A] person is not guilty of the crime when he or she engages in an act, otherwise criminal, through necessity. The defendant has the burden of proving by a preponderance of the evidence all of the facts necessary to establish the elements of this defense. [¶] Namely, one, the act charged was criminal, was done to prevent a significant and imminent evil, namely a threat of bodily harm to himself. Two, there was no reasonable legal alternative to the commission of the act. Three, the reasonably foreseeable harm likely to be caused by the act was not disproportionate to the harm avoided. Four, the defendant entertained a good-faith belief that his act was necessary to prevent the greater harm. Five, that belief was objectively reasonable under all of the circumstances. And, six, the defendant did not substantially contribute to the creation of the emergency."

Neither party was satisfied with the court's compromise solution. The prosecutor asserted that the facts did not warrant a necessity defense and the court's modification of the instruction did not alter this conclusion. Defense counsel objected to the court's modification of the instruction, stating that she did not "think that the issue of whether or not police officers were acting lawfully is even part of this."

DISCUSSION

I. *Necessity Defense*

Ortiz contends the court erred in modifying the necessity defense instruction by conditioning the defense on the legality of the police officer's claimed weapon use. He claims the court's modification of the instruction prevented him from fairly presenting the necessity defense to the jury. This contention is unavailing. The facts presented did not support a necessity defense, and therefore there was no prejudicial error in instructing the jury that the defense was conditional.

A defendant is entitled to a requested instruction on an affirmative defense if the defense is supported by substantial evidence. (*In re Christian S.* (1994) 7 Cal.4th 768, 783.) In determining whether the evidence supports the instruction, a court must view the evidence in the light most favorable to the defense, and assume the truth of the defendant's evidence. (*People v. Wilson* (1967) 66 Cal.2d 749, 762.) "'Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused.'" (*People v. Flannel* (1979) 25 Cal.3d 668, 685.) However, a trial court need not give an instruction where the supporting evidence is minimal and insubstantial. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1145.)

Necessity is an affirmative defense based on public policy considerations. (*In re Eichorn* (1998) 69 Cal.App.4th 382, 389.) The scope of the defense "is very limited and depends on the lack of a legal alternative to committing the crime. It excuses criminal conduct if it is justified by a need to avoid imminent peril and there is no time to resort to the legal authorities or such resort would be futile." (*People v. Beach* (1987) 194 Cal.App.3d 955, 971.) "Necessity does not negate any element of the crime, but represents a public policy decision not to punish such an individual despite proof of the crime." (*People v. Heath* (1989) 207 Cal.App.3d 892, 901.) The necessity defense is inappropriate if its "recognition would encourage rather than deter violence" or other forms of dangerous conduct. (*People v. Kearns* (1997) 55 Cal.App.4th 1128, 1135; see *People v. Slack* (1989) 210 Cal.App.3d 937, 943-944.) Additionally, the defendant must have a good faith belief that the criminal act was necessary to prevent the greater harm, and this belief must be "objectively reasonable." (*People v. Kearns, supra*, 55 Cal.App.4th at p. 1135.)

Under these principles, Ortiz's evidence was insufficient to support a necessity defense. First, there was no objective basis for a belief that the officers would commit an unjustified shooting if Ortiz complied with the officers' demands to stop his vehicle. The sole basis for Ortiz's claimed concern was his testimony that he saw a uniformed police officer near Chicano Park with a gun and the fact that he had previously "seen police officers kill people" and "shoot a lot of people." This testimony is insufficient to show a reasonable basis for concluding that *these particular police officers*, who were following Ortiz's vehicle in a marked police vehicle with their sirens on, were intending to shoot

him for no reason. Absent some particular facts to support a reasonable belief that a specific police officer intends to commit a crime against a citizen, it is contrary to the public policy of this state to suggest that a citizen may flee from an officer because of a generalized fear of police officers. (See *People v. Slack*, *supra*, 210 Cal.App.3d at p. 943; cf. *People v. Pena* (1983) 149 Cal.App.3d Supp. 14, 25-26.)

Additionally, the necessity defense is inappropriate if the defendant's actions create a danger greater than the evil the defendant was attempting to prevent. (*People v. Kearns*, *supra*, 55 Cal.App.4th at p. 1135; *People v. McKinney* (1986) 187 Cal.App.3d 583, 586-587.) In allegedly attempting to protect his own safety from a potential risk, Ortiz drove in a reckless and erratic manner in a residential neighborhood, endangering the lives of the police officers and numerous other drivers and pedestrians. Ortiz had near collisions with several other vehicles and pedestrians. By engaging in this conduct, Ortiz created a greater danger than the one he sought to avoid. The potential risk of physical harm to Ortiz was far outweighed by the danger he created to others by his reckless driving. (*People v. Slack*, *supra*, 210 Cal.App.3d at p. 943.)

In *Slack*, an intoxicated defendant evaded Tijuana police officers and drove while intoxicated across the border because he believed he would be assaulted by the officers if he complied with their demands to stop. (*People v. Slack*, *supra*, 210 Cal.App.3d at p. 943.) He based this belief on his previous contacts with the Tijuana police and his claim that he was once assaulted by a Tijuana police officer. This court held these facts were insufficient to justify a necessity defense because "the threat of physical assault from law enforcement officials significantly outweighed the threat of public mayhem and property

destruction to which he exposed those in his wake." (*Ibid.*) Similarly, in this case, Ortiz's belief that he needed to avoid the police officers for his own safety cannot justify his conduct of driving in a reckless manner.

On this record, the evidence was insufficient to support a necessity defense. Thus, there was no prejudice to Ortiz in the court's giving a modified version of the instruction. Moreover, any instructional error was not prejudicial. (See *Chapman v. California* (1967) 386 U.S. 18; *People v. Molina* (2000) 82 Cal.App.4th 1329, 1332-1335.) Viewing the record and the jury's findings on the other charged offenses, there is no possibility that the jury would have found in Ortiz's favor on the necessity defense. No reasonable juror would have believed that after violently assaulting the person with whom he was living and then taking his vehicle, Ortiz evaded the police officers merely because he subjectively believed the officer would shoot him for no reason, rather than in an attempt to flee to avoid arrest.

II. Sentencing

Ortiz contends the trial court committed reversible error in sentencing him to the upper term of six years on the robbery count based on facts not found by the jury.

A. Background Information

Ortiz waived his jury trial right on the charged prior convictions. After the jury verdict, the court held a trial on the alleged priors. Based on the evidence presented, the court found Ortiz: (1) had at least two felony convictions precluding a grant of probation (§ 667, subd. (c)); (2) served two prior prison terms within the meaning of sections 667.5, subdivision (b), and 667; and (3) had a prior strike conviction (§§ 667, subds. (b)-(i),

1170.12), which also qualified as a prior serious felony conviction (§ 667, subd. (a)). The underlying convictions proved at this hearing included: (1) corporal injury on a spouse or cohabitant in 1991 (§ 273.5); (2) assault with a deadly weapon in 1994 (§ 245, subd. (a)(1)); and (3) assault by force in 2001 (§ 245, subd. (a)(1)).

Before the sentencing hearing, the probation officer prepared a report identifying these and other prior convictions, and describing the underlying facts with respect to two of those convictions. First, with respect to the 1994 assault with a deadly weapon conviction (§ 245, subd. (a)(1)), which served as the basis for the first prison prior, the strike prior, and the serious felony prior, the report stated: "The defendant and his girlfriend were in a motel room drinking alcohol when the defendant got angry because the television would not work. The defendant began pulling his girlfriend's hair and demanding \$200.00. When the victim told the defendant she did not have the money, the defendant pushed her against the wall and began choking her. The defendant tore an empty beer can in half and threatened to use it to kill her. The defendant continued to punch and bite his girlfriend. At one point, the defendant used a full can of beer to strike her in the face. When she fell to the ground, the defendant began kicking her. The victim was finally able to get out the door and yell for help. When police arrived, the victim was soaking wet from being thrown in the shower, was bleeding and sustained injuries to her nose and face."

Second, with respect to the 2001 assault conviction that served as the basis for the second prison prior (§ 667.5, subd. (b)), the probation report stated: "The victim was sitting on a bench at a trolley stop eating a bowl of soup when the defendant approached

and asked him for [25] cents. The victim told the defendant he did not have [25] cents. The defendant then punched the victim in the face causing the victim to fall backward off the bench and spill his soup. The victim suffered a black eye."

The probation report also noted that Ortiz: (1) had "two summary grants and one formal grant of probation"; (2) violated each grant of probation by failing to comply with conditions and by failing to remain law abiding; (3) was on state parole when he committed the current offense; and (4) has violated state parole on several occasions over the years, and was sent back to finish the term. The report states that the source for this information was "Criminal Records; Probation File."

Ortiz's statement in mitigation focused primarily on Ortiz's claims that the victim contributed to the crime. The statement also asserted that: Ortiz was suffering from a mental condition that reduced his culpability; he would have been granted probation had he been eligible; and his performance on parole was satisfactory until this incident. The prosecutor's statement in aggravation identified several aggravating factors relating to the current conviction, including that the crimes involved great violence, weapon use, and a vulnerable victim. The prosecutor also identified aggravating factors relating to Ortiz's prior criminal history, including that Ortiz previously engaged in violent conduct, had numerous prior convictions, served two prior prison terms, was on parole when he committed this offense, and his performance on previous parole sentences was unsatisfactory.

B. *Sentencing Hearing*

At the beginning of the sentencing hearing, the court stated it tentatively intended to: (1) impose the upper term on the first degree robbery count, doubled for the prior strike (12 years); (2) impose a consecutive middle term (one year and four months) on the evading officer count; (3) stay the remaining counts under section 654; (4) impose five years on the serious felony prior (§ 667, subd. (a)); and (5) strike both prison priors (§ 667.5, subd. (b)).

In challenging this tentative sentence, Ortiz's counsel urged the court to strike the strike and to impose the lower or middle term on the robbery count. With respect to the upper term, counsel argued that "[t]he factors involved in the robbery itself in this case are actually very minimal," and did not involve the use of the knife or violence because the victim admitted he gave Ortiz the keys and told him to leave. When Ortiz addressed the court, he blamed numerous other individuals for his current and prior convictions and denied that he used a beer can as a weapon in one of the prior convictions. In response, the prosecutor emphasized Ortiz's violent past, and reiterated the facts of his prior convictions set forth in the probation report, i.e., Ortiz's assault on his girlfriend with the beer can in the hotel room and his assaulting the man at the trolley stop for no reason.

The court took a brief recess and then confirmed the tentative sentence. The court explained its reasoning as follows:

"I have given [this case] a great deal of thought. And my view is still that the upper term is appropriate in this case. I'm looking at Count 1, which is the residential robbery, as the principal term. I believe that upper term should be imposed because of the following aggravation factors: The defendant took advantage of a position of

trust; he used a knife to cut the victim and to terrorize him, which was unnecessary; all previous probations on which he had been granted terms without custody or with limited custody ended up being revoked; he has shown a continuing pattern of violence throughout his life that is violence against the weak and in situations where there was no provocation; and he was on parole when he committed the instant offense. [¶] [I]t seems to me that Mr. Ortiz has never come to grips with the fact that his violence comes from him. There are no excuses. He has taken advantage of his family."

[¶] . . . [¶]

"[T]his case was overwhelming in its strength. There was no question of his guilt nor was there any question in these prior cases. [¶] And when you look at this pattern of unprovoked violence, horrible violence; when you look at him punching a woman with a beer can, kicking her, throwing her in a shower; going up to a man at a trolley stop, because the man won't give him some money, he then punches him out; there's no excuse for that kind of behavior, none. Absolutely none. . . ."

"He had a loving sister. He's got a loving wife. He's got a fiancée here to support him. He did it. And now he blames everybody else for it—the lawyers, the judges, the police—whoever didn't give him what he needed to have. And it all revolves right back to him. He's violent, and he has taken advantage of other people."

[¶] . . . [¶] . . .

"And it's his remorselessness that also gets into the Court to say he is a dangerous man because he will never take responsibility for his own actions. He will always blame it on someone else. It will always be someone else's problem."

C. Analysis

In *Cunningham*, the United States Supreme Court held 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. (*Cunningham, supra*, 127

S.Ct. at p. 860.) "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.]" (*Id.* at p. 868; *Blakely, supra*, 542 U.S. 296.)

Ortiz contends the upper term sentence on the robbery count violates the *Blakely/Cunningham* rule. We agree.

In selecting the upper term, the trial court identified five aggravating factors: (1) Ortiz took advantage of a position of trust; (2) he used a knife to cut the victim and to terrorize him; (3) all previous probations on which he was granted terms without custody or limited custody were revoked; (4) Ortiz has shown a continuing pattern of violence throughout his life toward the weak and in situations without provocation; and (5) Ortiz was on parole when he committed the instant offense.

The court's reliance on several of these factors was improper because the facts had not been proved beyond a reasonable doubt in the current case. For example, the jury did not find that Ortiz took advantage of a position of trust in committing the offenses against Montoya, nor could this finding be necessarily implied from the verdict. The evidence at trial was conflicting, and the jury could have found Ortiz guilty of the charged offenses, without also agreeing with the prosecutor's evidence that Montoya was a particularly vulnerable victim or that Ortiz committed the crime by taking advantage of his relationship with Montoya. Likewise, Ortiz did not admit, and the court did not find in the bifurcated proceeding, the facts reflecting Ortiz's history of unprovoked violence toward the weak. The specific facts underlying his prior convictions were set forth in the current probation report, but were not alleged, or proved, as part of the alleged priors.

The sentence was improper because the trial court imposed an upper term based on facts that were neither found by the jury nor admitted by Ortiz. (See *Cunningham*, *supra*, 127 S.Ct. at p. 860; *Blakely*, *supra*, 542 U.S. at pp. 303-304.) We reject each of the Attorney General's arguments that we should nevertheless affirm the sentence.

First, the Attorney General argues Ortiz waived this issue by failing to raise it below. Unlike the defendant in *People v. Hill* (2005) 131 Cal.App.4th 1089, upon which the Attorney General relies, Ortiz was sentenced *after People v. Black* (2005) 35 Cal.4th 1238. At this point a *Blakely* objection would have been futile under controlling law. (*Hill*, *supra*, at p. 1103.) "Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence." (*People v. Welch* (1993) 5 Cal.4th 228, 237.) Ortiz did not waive his claim of *Blakely* error by failing to object at the sentencing hearing.

The Attorney General alternatively contends several of the court's findings fall within "the recidivism exception" to the *Blakely/Cunningham* rule. The Attorney General relies on *Almendarez-Torres v. United States* (1998) 523 U.S. 224, which held a court may impose a sentence that exceeds the statutory maximum based on a defendant's prior convictions.

We need not determine the precise scope of this exception in this case because it is inapplicable to several factors relied upon by the court. First, the court relied on unproven facts related to the current crime (e.g., Ortiz took advantage of a position of trust), which clearly do not fall within the prior conviction exception. Additionally, even

with respect to the prior conviction related factors, the court did not merely rely on the fact of the prior convictions, but it went beyond the face of the convictions to consider the underlying evidence. The truth of this evidence was not necessary to the trial court's findings on the alleged priors or proved beyond a reasonable doubt in the current proceeding. Instead, the evidence was merely described in the probation report.

Additionally, even assuming that some of the aggravating factors fell within the scope of the prior convictions exception or were proper for another reason (i.e., the use of the knife found by the jury⁵), the record does not support that the court would have imposed the upper term based solely on these factors. Although a single aggravating circumstance is sufficient to render a defendant eligible for the upper term, where a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence based solely on the proper factors. (See *People v. Osband* (1996) 13 Cal.4th 622, 728-729; *People v. Price* (1991) 1 Cal.4th 324, 492.) Based on our review of the sentencing hearing, it appears that the court's selection of the upper term was based largely on the evidence of Ortiz's history of unprovoked violence toward vulnerable victims and his continued refusal to take responsibility for these actions, a history that was not alleged or proved in this case. Because we are unable to determine whether the trial court would have imposed the upper term had it not relied on this

⁵ Ortiz argues that his knife use was an improper factor to impose an upper term on the robbery count because the jury's enhancement finding was made solely in connection with the criminal threats count. We do not reach this issue on this appeal.

evidence, it is necessary to remand. (See *People v. Avalos* (1984) 37 Cal.3d 216, 233; *People v. Young* (1983) 146 Cal.App.3d 729, 737.)

Finally, we reject the Attorney General's argument that the *Cunningham/Blakely* error was harmless. *Blakely* error requires reversal unless the People prove beyond a reasonable doubt that the jury would have found the facts supporting the enhanced sentence if it had been asked to do so. (*Washington v. Recuenco* (2006) 126 S.Ct. 2546, 2549-2553.) On our review of the evidence, we conclude that the Attorney General did not satisfy this burden.

We also reject the Attorney General's argument that we judicially reform section 1170 to eliminate any fact-finding requirement.

DISPOSITION

The judgment of conviction is affirmed. We reverse the sentence and remand for resentencing under *Cunningham v. California, supra*, 127 S.Ct. 856 and *Blakely v. Washington, supra*, 542 U.S. 296.

HALLER, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.