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COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JUAN PACHECO, Defendant and Appellant.	B189441 (Los Angeles County Super. Ct. No. BA291350)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert Perry, Judge. Affirmed as modified.

Alan Stern, 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, Steven D. Matthews and G. Tracey Letteau, Deputy Attorneys General, for Plaintiff and Respondent.

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Juan Pacheco appeals from the judgment entered following his conviction by jury on two counts of attempted second degree robbery and two counts of attempted extortion, with findings the offenses were committed for the benefit of, at the direction of or in association with a criminal street gang. Pacheco contends that he was sentenced in violation of his right to jury trial under *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*) and *Cunningham v. California* (2007) 549 U.S. __ [127 S.Ct. 856] (*Cunningham*). We agree with Pacheco and impose a midterm sentence instead of the upper term on one count for a reduction of one year in his aggregate sentence.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Charges*

Pacheco was charged by amended information with two counts of attempted second degree robbery (Pen. Code, §§ 211, 664)[1] (counts 1 and 2) and two counts of attempted extortion (§§ 518, 664) (counts 3 and 4) against Maria Tzintzun (counts 1 and 3) and Carlos Bermejo (counts 2 and 4). The amended information specially alleged with respect to the attempted robbery charges in counts 1 and 2 a firearm enhancement under Penal Code section 12022.53, subdivisions (b) and (e)(1), and with respect to the attempted extortion charges in counts 3 and 4 a firearm enhancement under section 12022.5, subdivision (a)(1). A criminal street gang enhancement was alleged as to all counts (§ 186.22, subd. (b)(1)(A)).

2. *Summary of the Evidence Presented at Trial*

a. *The People's Evidence*

Maria Tzintzun, her husband Juan Bermejo, and their family lived in the Del Rio Housing Project in Los Angeles. On the night of March 26, 2005, Tzintzun and Bermejo heard a loud noise on the street and went to investigate what they thought was a traffic collision near their house. They came upon two damaged cars and a group of men, including Pacheco, beating a lone man. Tzintzun attempted to stop the assault by

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[1] Statutory references are to the Penal Code.

standing between the assailants and the victim. Pacheco demanded to know why Tzintzun was protecting the victim and who would pay for the damages resulting from the traffic collision. To prevent further harm to the victim, Tzintzun agreed to pay for the damages. The victim fled before police arrived. Officers arrested the driver of the other car on outstanding warrants and Tzintzun returned home with Bermejo.

At around 1:00 a.m. the next day, Tzintzun, Bermejo, and some family members answered a knock on the front door. At the door were Pacheco and Ratha Chhuk, who had also been at the scene of the traffic collision. Chhuk spoke in English, demanding to know the whereabouts of the beating victim. Pacheco translated what Chhuk was saying to Tzintzun and Bermejo into Spanish. Tzintzun explained that the beating victim did not live with them. Chhuk produced a gun, pointed it at the couple and their family, and said that "everybody was going to die that night." Chhuk and Pacheco demanded $5,000. Tzintzun told them that she did not have any money. Pacheco, still translating for Chhuk, told them to "[b]eware of the consequences." Chhuk and Pacheco left, but when Pacheco was about 40 feet from the front door, he pointed a gun at her. Tzintzun reported the incident to police.

Tzintzun and Bermejo independently identified Pacheco and Chhuk as the men who threatened them with harm and demanded money at gunpoint. Police were subsequently involved in a high speed chase of a car that nearly struck a police unit. Pacheco was a passenger in the car. He along with the driver and another passenger were taken into custody.

Los Angeles Police Department Officer Anthony Saenz testified as a gang expert that Pacheco had identified himself to Saenz as a member of the Oriental Boys gang and was in the car with self-admitted gang members when he was arrested. Saenz confirmed that the Pueblo Del Rio Housing Project was rife with gang activity and was claimed by the Five Duece Pueblo Bishops and the Oriental Boys, who coexist as Blood Gangs. The primary activities of the Oriental Boys gang were vandalism, robbery, narcotics sales, extortion and instilling fear in the community. After a hypothetical based on the facts of

the case, Saenz opined the attempted robbery and extortion were committed to benefit the gang.

b. *The Defense Evidence*

Pacheco testified in his defense that he had never been a gang member and had never told police that he belonged to a gang. In the afternoon of March 26, 2005, he was across the street from the Pueblo Del Rio Housing Project after visiting a friend when he saw Ratha Chhuk. Pacheco agreed to accompany Chhuk to the home of a Spanish-speaking family and to translate into Spanish that Chhuk wanted the family to repay a debt. Pacheco translated Chhuk's request for money and was told there was no money to pay off the debt. After some additional conversation, Pacheco and Chhuk left. Pacheco denied that either he or Chhuk had possessed or pointed a gun at anyone or that he knew Chhuk was a gang member, or that Pacheco had been at the scene of the traffic collision.

3. *The Jury's Verdict and the Trial Court's Sentence*

The jury convicted Pacheco of the attempted second degree robbery charges in counts 1 and 2 and the extortion charges in counts 3 and 4. It found true the specially alleged criminal street gang enhancement as to all counts, but found not true the specially alleged firearm enhancements as to all counts.

At sentencing the trial court considered Pacheco's probation report and identified two aggravating factors – Pacheco's pattern of increasingly serious conduct based on his prior arrests and apparent "convictions" (Cal. Rules of Court, rule 4.421(b)(2)),[2] and the victims' particular vulnerability (rule 4.421(a)(3)) – and no mitigating factors.[3]

Defense counsel argued Pacheco should receive probation or, in the alternative, he should be sentenced to the lower term based on his insignificant criminal history and his limited involvement in the current offenses. Following argument, the trial court stated it

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[2] References to rule or rules are to the California Rules of Court.

[3] The probation report reflects a juvenile petition alleging the offense of carrying a concealed firearm and two adult criminal cases charging narcotics possession that were pending at the time.

would use the attempted second degree robbery offense of count 1 as the principal term and would impose the upper term due to Tzintzun's particular vulnerability and the absence of mitigating factors. The court sentenced Pacheco to an aggregate state prison term of eight years, eight months: The upper term of three years on count 1 for the attempted second degree robbery of Tzintzun, plus five years for the criminal street gang enhancement, plus eight months on count 2 (one-third the middle term of two years) for the attempted second degree robbery of Bermejo. (§§ 213, subd. (2)(b), 18.) Sentences were stayed pursuant to section 654 on counts 3 and 4 for the attempted extortion of the same victims.

DISCUSSION

In this appeal, Pacheco contends the trial court's imposition of an upper term sentence for attempted second degree robbery (count 1) based on facts neither found by a jury to be true beyond a reasonable doubt nor admitted by Pacheco violated his right to a jury trial under *Blakely, supra*, 542 U.S. 296, and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435] (*Apprendi*).

After briefing in this case was completed, the United States Supreme Court issued its opinion in *Cunningham v. California* (2007) 549 U.S. __ [127 S.Ct. 856]. We requested that the parties submit letter briefs addressing the impact of *Cunningham* on this case. Pacheco contends that his upper term sentence is improper under *Apprendi, supra,* 530 U.S. 466, *Blakely, supra,* 542 U.S. 296, and now *Cunningham, supra,* 549 U.S. __ [127 S.Ct. 856], because the trial court's use of an aggravating factor identified in rule 4.421(b)(2) exceeded the scope of the *Apprendi* exception for a prior conviction and further the trial court relied on other aggravating factors in violation of the Sixth Amendment. The Attorney General argues that any *Apprendi/Blakely/Cunningham* objections have been forfeited and that Pacheco's sentence is constitutionally valid.

According to the Attorney General, Pacheco forfeited his claim of error because he did not object on *Apprendi* or *Blakely* grounds in the trial court even though his sentencing hearing took place more than a year after the United States Supreme Court issued its decision in *Blakely*. We disagree. At the time of Pacheco's sentencing hearing

(February 15, 2006), the California Supreme Court had already decided *People v. Black* (2005) 35 Cal.4th 1238 (*Black*). In light of *Black*'s conclusion that the judicial factfinding incident to a judge's exercise of discretion to impose an upper term sentence under California law does not implicate a defendant's Sixth Amendment right to a jury trial (*id.* at p. 1244), Pacheco's objection in this regard would have been futile. Accordingly, he has not forfeited his claim that the sentencing procedure in his case violated the Sixth Amendment. (*People v. Boyette* (2002) 29 Cal.4th 381, 432; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648.)

Under *Apprendi, supra,* 530 U.S. at page 490, "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." In *Blakely,* the United States Supreme Court emphasized 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* . . . . In other words, the relevant statutory 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority." (*Blakely, supra,* 542 U.S. at pp. 303-304, original italics.)

Then, in considering California's Determinate Sentencing Law on the record before it, the *Cunningham* court observed: "[A]n upper term sentence may be imposed only when the trial judge finds an aggravating circumstance. [Citation.] An element of the charged offense, essential to a jury's determination of guilt, or admitted in a defendant's guilty plea, does not qualify as such a circumstance. [Citation.] Instead, aggravating circumstances depend on facts found discretely and solely by the judge. In accord with *Blakely,* therefore, the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum. [Citation.] Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a

preponderance of the evidence, not beyond a reasonable doubt . . . , the [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, supra,* 127 S.Ct. at p. 868.)

Citing *Almendarez-Torres v. United States* (1998) 523 U.S. 224, the Attorney General argues that there was no *Cunningham* violation in this case because "a defendant does not have a right to a jury trial for a sentence *based on the fact of a prior conviction*." (Italics added.) We disagree. The trial court indicated its "tentative" to find as an aggravating circumstance (in addition to the victim's vulnerability) the fact that Pacheco "has a pattern of increasingly serious conduct" in light of "some prior narcotics *arrests* and *apparent* convictions." (Italics added.) However, as summarized above, the probation report indicated that the narcotics matters were pending, and the trial court heard argument in this regard.

The prosecutor did not refer to the narcotics arrests, and, although defense counsel referred to one case as "on Prop 36," the trial court ultimately stated it would impose the upper term sentence on count 1 based on the absence of mitigating circumstances and the victim's vulnerability: "I find the vulnerability of the victim is sufficient to warrant the imposition of a high term of three years." Because this record falls short of establishing the fact of a prior conviction, we reject the Attorney General's contention that the imposition of the upper term sentence in this case was authorized and, as a result, unassailable.

Under the Supreme Court's decision in *Cunningham, supra,* 127 S.Ct. at page 869, "If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied." Accordingly, imposition of the upper term in this case violated the Sixth Amendment because the aggravating factor on which it was purportedly based—the victim's vulnerability—was neither admitted by Pacheco nor found true beyond a reasonable doubt by the jury.

As stated in *Washington v. Recuenco* (2006) 548 U.S. __, 126 S.Ct. 2546, 2551-2553, the failure to submit a sentencing factor to the jury is subject to harmless error analysis under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18. (See also *People v.Sengpadychith* (2001) 26 Cal.4th 316, 327 [*Apprendi* error evaluated under *Chapman* standard].) While a jury reasonably could have made a true finding beyond a reasonable doubt as to the "particular vulnerability" of the victim involved in count 1, we cannot conclude beyond a reasonable doubt that a jury would have done so. Therefore, we cannot say that the constitutional error was harmless, and the upper term sentence on count 1 must be modified.

We conclude that there is no need to remand this matter to the trial court. If we were to remand the matter for a new sentencing hearing, the trial court would have no discretion to impose an upper term sentence because Pacheco did not admit to any aggravating factors and none were found true by the jury beyond a reasonable doubt. Instead, the trial court could only consider whether to impose a midterm sentence or lower term sentence on count 1. However, having reviewed the record including the trial court's comments at sentencing, we find it beyond a reasonable doubt that the trial court in exercising its discretion would not have imposed the low term under any circumstances. Accordingly, we modify the judgment to impose the middle term of two years on count 1, for a decrease of one year in Pacheco's aggregate prison term.

DISPOSITION

The judgment is modified to impose the middle term of two years (instead of the upper term of three years) on count 1, but in all other respects, Pacheco's sentence remains unchanged. The clerk of the superior court is ordered to prepare a new abstract of judgment reflecting the imposition of the two-year term on count 1 (plus five years for

the criminal street gang enhancement, plus eight months on count 2, with sentences on counts 3 and 4 stayed). The clerk of the superior court shall forward a copy of the new abstract of judgment to the Department of Corrections.

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WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.