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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TONY PEREZ, Defendant and Appellant.	E034462 (Super.Ct.No. FSB 038094) OPINION

APPEAL from the Superior Court of San Bernardino County. Kenneth R. Barr, Judge. Affirmed in part; reversed in part.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Lynn G. McGinnis and David Delgado-Rucci, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Tony Perez appeals from judgment entered following a jury conviction for assault with a deadly weapon, a knife (Pen. Code, § 245, subd. (a)(1).)[1] The court also found true that defendant had two prior prison term convictions (§ 667.5, subd. (b).) The jury found not true the allegation that defendant inflicted great bodily injury (§ 12022.7, subd. (a)). The trial court sentenced defendant to six years in prison.

Defendant contends there was insufficient evidence to support his conviction for assault with a deadly weapon. He also asserts that the trial court erred in admitting a photograph of him handcuffed at the time of his arrest. In addition, he complains the trial court erred in not sua sponte instructing the jury that, when determining guilt, it must disregard the image of defendant handcuffed when arrested.

We conclude there was no error and affirm the judgment.

1. Background Facts

On February 7, 2003, at 8:00 p.m., police officer Outlaw responded to a dispatch call to investigate a stabbing at apartment C in the Meadowbrook Towers apartment complex in San Bernardino. The police located the victim, Gabriel Perez, who is defendant's brother, in the park across the street from the apartment complex. Outlaw approached Gabriel in the park and noticed he had a cut over his eyebrow and blood on his forehead, hands, and sweatshirt. Gabriel also had a puncture wound in his chest.

Outlaw was notified that two security guards at Meadowbrook Towers had detained defendant in the parking structure. Outlaw went to the parking structure and

[1] Unless otherwise noted, all statutory references are to the Penal Code.

spoke to defendant, who gave a false name. Outlaw noticed dried blood on defendant's hands but did not see any injuries on defendant. Defendant denied knowing anything about a stabbing or knowing anyone in apartment C.

Outlaw went to apartment C. He saw a trail of blood droplets from the base of the stairs leading to the entrance of the apartment complex. Gina Perez, defendant and Gabriel's sister, answered the door at apartment C. She refused to give Outlaw and other officers permission to enter until she was advised that, if she was hiding something, she could be charged with a crime. Gina reluctantly permitted the officers to enter her apartment.

When Outlaw entered Gina's kitchen, he found a white polo shirt soaking in the sink among some dishes. The shirt had blood stains on the front of the shirt. At the bottom of the sink, Outlaw found a knife handle with a missing blade.

Other police officers arrived at the crime scene and spoke to defendant. Defendant told Officer Sandoval he had been visiting a friend at Meadowbrook Towers but claimed he was unable to recall the friend's name or address. When asked about the blood on his hands, defendant said he cut himself on glass. Sandoval did not see any cuts on defendant or glass nearby.

At trial Gabriel testified he was stabbed on February 7, 2003, by "two Chinese dudes." As he was walking down the street, four Chinese men asked him for money. When Gabriel said he did not have any, two of the men attacked him. Gabriel walked toward Gina's apartment after the stabbing. When he got to the landing in front of her apartment, defendant noticed Gabriel was wounded and tried to help him. Defendant

insisted he go to the hospital but, since Gabriel was a fugitive from parole, he did not want to go to the hospital. Gabriel fled to the park. He repeatedly testified that defendant did not stab him.

Officer Combado testified that he contacted Gabriel in the park after the stabbing and asked Gabriel what had happened. Gabriel told him a Chinese man had jumped out of the bushes, yelled "fuck you," and stabbed him. Combado took Gabriel to the hospital. While at the hospital, Sergeant Filson called Combado and told him defendant was in custody. When Combado told Gabriel defendant was in custody, Gabriel said, "How did you know it was him?" When Combado asked Gabriel how the stabbing occurred, Gabriel said, "He should have never done this." Gabriel refused to say anything else about the stabbing.

Gina testified she did not hear or see the stabbing. She also did not know why the shirt was soaking in the sink or who put it there. She said defendant had been in her apartment earlier in the evening and later on had walked in but she did not see him there within an hour or two before the police arrived. Sometime during the evening, he had walked inside while she was looking the other way, eating. Defendant walked straight to the sink and then out without saying anything. Gina admitted telling officers she was "sick and tired" of everything, including her brothers.

Outlaw testified that Gina told him Gabriel was stabbed in the corridor outside her apartment and that she saw her brothers fighting out there the night of the stabbing. She also said she heard Gabriel cry out that defendant had stabbed him. Gina told Outlaw

that when Gabriel got drunk, he started fights with defendant. Gina also said that defendant had taken off the white shirt and put it in the sink of water.

2. Sufficiency of Evidence

Defendant contends there was insufficient evidence to support his conviction for assault with a deadly weapon under section 245, subdivision (a)(1). We disagree.

Our review of an insufficiency of evidence claim is limited. "In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--that is, evidence that is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11, citing *People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *People v. Bolin* (1998) 18 Cal.4th 297, 331.)

If the verdict is supported by substantial evidence, we are bound to give due deference to the trier of fact and not retry the case ourselves. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, 326; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) It is the exclusive function of the trier of fact to assess the credibility of witnesses and draw reasonable inferences from the evidence. (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Hale* (1999) 75 Cal.App.4th 94, 105.) The standard of review applies even "when the conviction rests primarily on circumstantial evidence." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) Here, the record discloses ample evidence to support the trial court's verdict.

Defendant argues the People failed to establish that he was the one who stabbed Gabriel and there is evidence establishing someone else was the perpetrator. Gabriel testified that defendant did not stab him. Rather, two Chinese men did. Gina also testified she did not see or hear the stabbing incident.

Defendant asserts that, even assuming the jury did not find Gabriel and Gina credible witnesses, the People failed to meet their burden of proving defendant committed the stabbing offense. We disagree. Although there was no direct evidence, there was ample circumstantial evidence from which a reasonable juror could infer defendant stabbed Gabriel. Such evidence included Officer Combado's testimony that, when he told Gabriel defendant was in custody, Gabriel exclaimed, "How did you know it was him" and "He should have never done that." Officer Outlaw testified Gina said she saw defendant and Gabriel fighting in the corridor outside her apartment and heard Gabriel cry out that defendant had stabbed him.

Outlaw also testified that shortly after arriving at Gina's apartment to investigate the stabbing, he saw a trail of blood leading to Gina's apartment and found a knife handle and white shirt with blood stains in Gina's sink. In addition, defendant fled the scene, gave the police an alias, denied knowing anyone in Gina's apartment, and had blood on his hands.

This evidence is more than sufficient to support defendant's conviction for stabbing his brother with a knife in a fit of rage, despite his brother and sister's denial that he did it.

3. Admissibility of Photograph of Defendant Handcuffed

Defendant contends the trial court abused its discretion in admitting into evidence, over defendant's objection, a photograph of defendant handcuffed, with bloody hands. The photograph was taken at the time of defendant's arrest. Defendant argues the photograph unfairly portrayed him as a violent and lawless man thereby undermining any notion of his innocence. Defendant argues the photograph should have been excluded under Evidence Code section 352 as being more prejudicial than probative.

The admission of photographs of defendant lies within the broad discretion of the trial court. (*People v. Smithey* (1999) 20 Cal.4th 936, 974; see also *People v. Crittenden* (1994) 9 Cal.4th 83, 134.) "The court's exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs clearly is outweighed by their prejudicial effect. [Citations.]" (*Crittenden, supra,* at p. 134.) The evidence is prejudicial in the context of the Evidence Code section 352 analysis when it has only slight probative value but tends to create an undue emotional bias against the defendant. (*Ibid*.)

Here, the trial court's admission of the photographs into evidence did not amount to a manifest abuse of discretion. The probative value of the photographs was great. The photographs corroborated the officers' testimony that defendant had blood on his hands and provided circumstantial evidence that defendant was involved in the stabbing.

Defendant argues the photograph was highly prejudicial because it showed defendant handcuffed and this infringed his presumption of innocence. But the jury was

well aware that defendant had been arrested and thus showing a photograph of defendant in handcuffs at the time of his arrest was not highly prejudicial.

In addition, the jury was instructed on the presumption of innocence (CALJIC No. 2.90) and was aware that, even though the defendant had been arrested, handcuffed, charged with a crime, and tried, he was presumed innocent unless proven guilty. It must be presumed, there being no evidence to the contrary, that the jury followed CALJIC No. 2.90 and did not find defendant guilty based on the photograph showing defendant handcuffed at the time of his arrest. (*Weeks v. Angelone* (2000) 528 U.S. 225, 234; *People v. Green* (1980) 27 Cal.3d 1, 29.)

Defendant cites several cases holding that the trial court committed reversible error by requiring the defendant to appear in court in shackles or in jail clothes. (*Estelle v. Williams* (1976) 425 U.S. 501, 512, 518-519; *People v. Taylor* (1982) 31 Cal.3d 488, 494; *People v. Duran* (1976) 16 Cal.3d 282, 288, fn. 5; *People v. Bradford* (1997) 15 Cal.4th 1229, 1336.) The courts reasoned in those cases that requiring a defendant to wear jail clothes or handcuffs at trial constituted a constant reminder to the jury that the defendant was in custody.

In *Duran* the court reasoned that shackling a defendant during his trial "is likely to lead the jurors to infer that he is a violent person disposed to commit crimes of the type alleged. [Citations.] The removal of physical restraints is also desirable to assure that 'every defendant is . . . brought before the court with the appearance, dignity, and self-respect of a free and innocent man.' [Citations.]" (*People v. Duran* (1976) 16 Cal.3d 282, 290.) The *Duran* court added that physical restraints should be used only as a last

resort during a trial because shackling a defendant is an affront to the dignity and decorum of judicial proceedings. (*Ibid.*)

The instant case is not analogous in that defendant was not required to appear in front of the jury in jail garb or handcuffs throughout the trial.

Here, showing the photograph of defendant handcuffed during his arrest did not establish that defendant was violent nor was the photograph a constant reminder to the jury that defendant was a dangerous, violent individual. Furthermore, admitting the photograph into evidence did not affront the dignity and decorum of the judicial proceedings. It is commonly known that a defendant tried for a crime is oftentimes handcuffed at the time of his arrest regardless of whether he is violent or dangerous and the fact an individual is handcuffed is not evidence of guilt.

Defendant argues that the photograph constituted unnecessary cumulative evidence that should have been excluded since there was less prejudicial evidence available establishing that defendant had blood on his hands. Officers Outlaw and Combado testified defendant had blood on his hands. Nevertheless, the court was not required to exclude the photographic evidence since it provided probative evidence and corroborated the officers' testimony. (*People v. Sims* (1993) 5 Cal.4th 405, 452; *People v. Price* (1991) 1 Cal.4th 324, 441.) The trial court had broad discretion in determining the admissibility of the photograph and there was no abuse of discretion in admitting it into evidence.

4. Cautionary Instruction

Defendant contends the trial court committed reversible error in failing to instruct the jury sua sponte to disregard that the photograph showed defendant handcuffed at the time of his arrest. We conclude there was no instructional error.

Defendant relies on *People v. Duran, supra,* 16 Cal.3d at pages 291-292, in which the California Supreme Court held that, when a defendant is tried in visible restraints, the court has a sua sponte duty to instruct the jury that the restraints have no bearing on the determination of the defendant's guilt. Defendant argues that this instruction is also required when the jury is shown a photograph of the defendant in handcuffs. We disagree. The circumstances in *Duran* are not analogous to those in the instant case.

Here, defendant was not in restraints at trial and the photograph showed him handcuffed only at the time of his arrest, which is generally known to occur regardless of whether a suspect is violent. Because of the benign nature of the photograph, there was no requirement the court sua sponte instruct the jury to disregard the fact the photograph showed defendant handcuffed during his arrest. A photograph of defendant in handcuffs at the time of arrest is by no means analogous to shackling a defendant throughout the defendant's trial. The trial court thus was not required sua sponte to instruct the jury to disregard that defendant was handcuffed when arrested.

5. *Blakely* Error

Defendant contends that his upper-term sentence for assault, which was based on factors that were neither tried nor found true by a jury, violated his Sixth Amendment

right to a jury trial and Fourteenth Amendment due process right to a verdict based on proof beyond a reasonable doubt.

While this appeal was pending, defendant obtained leave of this court to file a supplemental brief alleging sentencing error based on *Blakely v. Washington* (2004) ___ U.S. ____, 124 S.Ct. 2531. Defendant contends the trial court violated *Blakely* by imposing an upper-term sentence for his assault conviction. The People filed a supplemental response, and both parties waived oral argument.

A. Waiver

The People argue that defendant forfeited his *Blakely* sentencing objection by failing to raise it in the trial court during sentencing. We find no waiver or forfeiture for the reasons succinctly stated in *People v. Butler* (2004) __ Cal.App.4th __ [2004 WL 2153559, *12]: "Because of the constitutional implications of the error at issue, we question whether the forfeiture doctrine applies at all. (See *People v. Vera* (1997) 15 Cal.4th 269, 276-277 [claims asserting deprivation of certain fundamental, constitutional rights not forfeited by failure to object].) Furthermore, there is a general exception to this rule where an objection would have been futile. [Citation.] We have no doubt that, at the time of the sentencing hearing in this case, an objection that the jury rather than the trial court must find aggravating facts would have been futile. (See Pen. Code, § 1170, subd. (b); rules 4.409 & 4.420-4.421.) In any event, we have discretion to consider issues that have not been formally preserved for review. [Citation.] Since the purpose of the forfeiture doctrine is to 'encourage a defendant to bring any errors to the trial court's attention so the court may correct or avoid the errors,' [citation], we find it particularly

inappropriate to invoke that doctrine here in light of the fact that *Blakely* was decided after Butler was sentenced." (See also *People v. George* (2004) __ Cal.App.4th __ [18 Cal.Rptr.3d 651, 654] and *People v. Barnes* (2004) __ Cal.App.4th __ [2004 WL 2137361, *19]; *People v. Lemus* 2004 WL 2093427, *1.)

Here, also, *Blakely* was decided after defendant was sentenced. There was thus no waiver of defendant's *Blakely* objection.

B. Application of *Blakely*

Relying on *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the United States Supreme Court in *Blakely v. Washington* (2004) ___ U.S. ___, [124 S.Ct. 2531, 2537], held that sentencing factors, other than a prior conviction, that increased a sentence for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.

The *Blakely* court defined the term "statutory maximum" as the maximum sentence imposed based on the facts specifically found by the jury or admitted by the defendant. (*Blakely, supra,* ___ U.S. at p. ___, [124 S.Ct. at p. 2537].) The *Blakely* court explained that "the relevant '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,* ___ U.S. at p. ___, [124 S.Ct. at p. 2537].)

Whether *Blakely* precludes the sentencing judge from making the required findings on aggravating factors supporting an upper-term sentence is an issue under review by the California Supreme Court in *People v. Towne,* review granted July 14, 2004, S125677. In the meantime, we follow recent case law holding that *Blakely* requires a jury determination of aggravating factors, other than those arising out of a prior conviction. (*People v. Barnes, supra,* __ Cal.App.4th at p. ___ [2004 WL 2137361, *20]; *People v. Lemus, supra,* ___ Cal.Rptr.3d at p. ___; *People v. George, supra,* __ Cal.App.4th at p. __ [18 Cal.Rptr.3d 651, 655]; *People v. Butler, supra,* __ Cal.App.4th at p. __ [2004 WL 2153559, *12].)

In the instant case, the trial court imposed an upper-term sentence of four years for defendant's assault conviction, plus two years for his two prison priors. Citing California Rules of Court, rule 4.421, which enumerates various aggravating factors, the trial court imposed the upper term based on the following five aggravating factors: (1) the crime involved GBI, (2) defendant engaged in violent conduct which indicates a serious danger to society, (3) defendant's prior convictions are numerous and of increasing seriousness, (4) defendant was on parole when the crime was committed, and (5) defendant's prior performance on probation or parole was unsatisfactory. The sentencing judge did not find any mitigating factors.

We conclude that the trial court violated *Blakely* by relying on the first two factors listed above to impose the upper term for defendant's assault conviction. As to the GBI factor, the jury found the special GBI allegation was not true. (§ 12022.7, subd. (a).)

Under *Blakely*, the trial court's reliance on that factor was improper since the jury rejected the GBI allegation.

The second aggravated factor, that defendant engaged in violent conduct indicating a serious danger to society, also required a jury finding under *Blakely*. Since there was no such finding, the trial court erred in relying on this factor.

As to the three remaining aggravating factors, we conclude a jury finding was not required since they fall within the prior conviction exception mentioned in *Blakely*. Those three recidivism factors are: (1) defendant's prior convictions are numerous and of increasing seriousness, (2) defendant was on parole when the crime was committed, and (3) defendant's prior performance on probation or parole was unsatisfactory.

Although these three factors are not based solely on defendant's prior convictions, as explained in *People v. George, supra,* 18 Cal.Rptr.3d 651, this does not preclude them from falling within the prior conviction exception. In applying *Blakely* to the defendant's aggravated sentence in *George*, the court concluded a jury finding was not required as to the aggravating factor that the defendant was on probation at the time of the charged offense. The *George* court reasoned that, "Because this fact arises out of the fact of a prior conviction and is so essentially analogous to the fact of a prior conviction, we conclude that constitutional considerations do not require that matter to be tried to a jury and found beyond a reasonable doubt. As with a prior conviction, the fact of the defendant's status as a probationer arises out of a prior conviction in which a trier of fact found (or the defendant admitted) the defendant's guilt as to the prior offense. [Citations.] As with a prior conviction, a probationer's status can be established by a

review of the court records relating to the prior offense. Further, like a prior conviction, the defendant's status as a probationer 'does not [in any way] relate to the commission of the offense, *but goes to the punishment only* . . . .' (*Almendarez-Torres v. U.S.* (1998) 523 U.S. 224, 244, italics in original.) Thus, in accordance with the analysis of *Blakely*, the trial court was not required to afford George the right to a jury trial before relying on his status as a probationer at the time of the current offense as an aggravating factor supporting the imposition of the upper term." (*George, supra,* __ Cal.App.4th at p. ___ [18 Cal.Rptr.3d 651, 656].) Likewise, in the instant case, a jury finding was not required as to the aggravating factor that defendant was on parole when he committed the assault.

Although the court in *George* assumed the aggravating factor, that defendant's unsatisfactory probation or parole performance, required a jury finding, the court did not address the matter. We conclude, however, this factor, as well as the other two recidivism factors, falls within the prior conviction exception based on the reasoning stated above in *George*. Since defendant's three recidivism factors are premised on defendant's prior convictions and verifiable by means of the court record, which includes defendant's criminal history, a jury trial is not required as to these three factors. (*Almendarez-Torres v. U.S.* (1998) 523 U.S. 224, 246; *People v. Thomas* (2001) 91 Cal.App.4th 212, 216-223; *People v. George, supra,* __ Cal.App.4th at p. __ [18 Cal.Rptr.3d 651, 656]; *People v. Butler, supra,* __ Cal.App.4th at p. __ [2004 WL 2153559, *13].)

C. Prejudicial Error

Although under *Blakely* the trial court erred in relying on the two "non-recidivist" factors to impose an aggravated sentence for defendant's assault conviction, such error is not reversible per se. We must determine whether there was harmless error.

As concluded in *Butler*, the *Chapman* error analysis applies as to whether the jury would have made the two "non-recidivist" findings: (1) the crime involved GBI and (2) defendant engaged in violent conduct which indicates a serious danger to society. The *Butler* court explained: "Since the *Blakely* court rested its holding on *Apprendi*, we apply the standard of prejudice applicable to *Apprendi* errors which is the '*Chapman* test.' [Citation.] Applying that test, we must determine whether the failure to obtain jury determinations as to the aggravating factors discussed above was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)" (*People v. Butler, supra,* __ Cal.App.4th at p. __ [2004 WL 2153559, *12].)

Certainly, in the instant case, as to the first non-recidivism factor, the jury, in fact, did reject the finding of GBI. As to the second factor, we do not find that, beyond a reasonable doubt, a jury would have found defendant's assault on his brother indicated he was a danger to society.

Next we must determine whether the trial court would have imposed the aggravated sentence even in the absence of these two factors. As explained in *Butler*, in making this determination, we apply the *Watson* harmless error test: "Although *Blakely* error is evaluated under the *Chapman* test, under California law, '[w]hen 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 the lesser sentence had it known that some of its reasons were improper.' [Citations.]" (*People v. Butler, supra,* __ Cal.App.4th at p. __ [2004 WL 2153559, *13].) A single aggravating factor is sufficient to support an upper-term sentence. (*People v. Osband* (1996) 13 Cal.4th 622, 728; *People v. Butler, supra,* __ Cal.App.4th at p. __ [2004 WL 2153559, *13].)

Applying the *Watson* harmless error standard, we cannot say it is reasonably probable that, had the court not relied on the GBI and serious danger to society factors, the court would have imposed the upper term, rather than the middle term, based solely on the recidivism factors. Although in *Butler* the court found that the trial court's improper reliance on four out of the five aggravating factors was harmless error, *Butler* is distinguishable. In *Butler*, the trial court expressed its intent to impose the upper term even if only one aggravating factor was proper. Here, the trial court did not make such a statement and we cannot assume it. We thus cannot say it is reasonably probable the trial court would have imposed the upper term, as opposed to the middle term, based on defendant's recidivism factors.

6. Disposition

The judgment is affirmed in part and reversed in part. Defendant's assault conviction is affirmed and his sentence is reversed. The matter is remanded solely for

resentencing to enable the trial court to exercise its discretion in determining whether to impose an aggravated sentence based on proper aggravating factors.

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s/Gaut
J.

I concur:

s/Ward
J.

HOLLENHORST, J.

I dissent from part 5. of the opinion and from the partial reversal.

In *People v. Wagener* (Oct. 22, 2004, D042896) __ Cal.App.4th __ [2004 WL 2368025], Division One of this court held that "California's sentencing scheme is consistent with and does not offend the constitutional concerns addressed in *Apprendi* [*v. New Jersey* (2000) 530 U.S. 466, 483 [120 S.Ct. 2348]] and its progeny, *Blakely* [*v. Washington* (2004) 542 U.S. __ [124 S.Ct. 2531]]." (*Id.* at __ [2004 WL 2368025, at *__, fn. omitted].) Thus, the court held, California's sentencing scheme, unlike Washington State's that was under review in *Blakely*, does not require jury findings of aggravating factors before the defendant may be sentenced to the upper term for an offense.

I find the reasoning and conclusion of the majority in *Wagener* compelling, and I would adopt that position to affirm the conviction. I therefore dissent in part.

HOLLENHORST
Acting P. J.