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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RICKY LEE REIBSTEIN, Defendant and Appellant.	E039559 (Super.Ct.Nos. INF050125, INF047073, & INF043523) OPINION

APPEAL from the Superior Court of Riverside County. Richard A. Erwood, Judge. Affirmed.

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, and Scott C. Taylor, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Ricky Lee Reibstein of one count of elder abuse. (Pen. Code, § 368, subd. (b)(1).)[1] The jury did not find true the allegation that, in the commission of the elder abuse, defendant personally inflicted great bodily injury upon the victim. The trial court sentenced defendant to the upper term of four years in state prison.

On appeal, defendant contends that: 1) there was insufficient evidence to support the finding that he committed elder abuse; 2) the court erred in imposing the upper term based upon the vulnerability of the victim; and 3) the court erred in imposing the upper term, pursuant to *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*). Defendant has submitted a supplemental brief asserting that *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*) requires that a jury find aggravating factors before a trial court may impose the upper term. We affirm.

FACTUAL BACKGROUND

On February 25, 2005, defendant's mother (mother or the victim), who was approximately 72 years old at the time, and was five feet two inches tall and weighed 110 pounds, had a laser procedure performed on her right eye. Defendant knew that mother was having laser surgery that day, so he met her at the doctor's office after the surgery was finished. Around noon, mother left the doctor's office and took the bus home. Defendant also went to her house. Defendant did not live with mother.

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[1] All further statutory references will be to the Penal Code unless otherwise noted.

Mother testified that that evening, defendant became angry with her and hit her on her forehead and face, below her eyes. She tried to call 911 on her cell phone, but defendant took her phone away. Defendant then told the person on the line that there was no problem and that mother had been drinking. As a result of being hit, mother had a lump on her forehead, bruising around her eyes, and pain in her right eye. Mother believed defendant had been drinking alcohol that day, and she admitted to drinking alcohol that day, as well. Mother was also taking Welbutrin for depression at the time.

On March 2, 2005, mother returned to the doctor's office, complaining of significant eye pain, as a result of being hit by defendant. Mother told Dr. Dariusz Tarasewicz that defendant hit her multiple times with his fists. Dr. Tarasewicz examined her, noted that she had moderate to severe bruising in the area around her eyes, and concluded that there had been a history of trauma around her eyes. Dr. Tarasewicz testified that mother's injuries were consistent with her story of how she sustained the injuries. He was concerned that there was more underlying damage, such as bone fractures around the eyes, and requested that a computerized axial tomography (CAT) scan be performed on her. He asked her if she wanted to contact the police, but she said no. Dr. Tarasewicz reported his findings to Riverside County Adult Protective Services.

On March 3, 2005, Officer Gregory Jackson was dispatched to investigate the elder abuse call from adult protective services. He met with mother at her home and noted that she had severe bruising on her face (around her eyes), the side of her head, her shoulder, and her leg. He also noticed a lump and a contusion on mother's forehead. The

bruises appeared to be several days old. Mother told Officer Jackson that when defendant drinks, he becomes violent toward her.

On March 4, 2005, Ellen Mary McGuire, who worked for the Riverside County Department of Social Services, interviewed mother. McGuire observed that mother had bruises and swollen eyes. McGuire was so concerned about mother's welfare that she advised mother to get a restraining order against defendant and encouraged her to move into a shelter. Mother adamantly told McGuire that she did not want to obtain a restraining order because defendant was her son.

Defendant testified on his own behalf. Defendant said that mother had been drinking alcohol that day, and that she fell on the front of her head when she got up from the couch. He said that he took away a bottle of vodka that was sitting on the table, and then mother attacked him, biting him and banging her head into his belt. Defendant also testified that he was six feet tall and weighed 220 pounds.

When called to testify by the defense, mother said that she did not recall telling the doctor that defendant punched her. She said that defendant hit her with an open hand.

ANALYSIS

I. There Was Sufficient Evidence to Establish That Defendant Committed Elder Abuse

Defendant contends that there was insufficient evidence to support his conviction for elder abuse. He argues that, although the evidence showed that mother sustained injuries, it did not establish that he inflicted those injuries. We disagree.

A. *Standard of Review*

"To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128.)

B. *The Evidence Was Sufficient*

Section 368, subdivision (b)(1), imposes criminal liability on "[a]ny person who knows or reasonably should know that a person is an elder or dependent adult and who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult to suffer, or inflicts thereon unjustifiable physical pain or mental suffering."

Here, the evidence presented at trial established that defendant punched his elderly mother multiple times in the face. Mother testified that, several hours after she underwent laser eye surgery, defendant became angry with her and hit her on her forehead and face, below her eyes. She tried to call 911, but defendant took her phone away from her. Furthermore, Dr. Tarasewicz, who examined mother five days after defendant hit her, testified that mother told him that defendant hit her multiple times with his fists, several hours after her eye surgery. Dr. Tarasewicz observed moderate to severe bruising in the area around mother's eyes that was consistent with her story of how she sustained the injuries. Similarly, Officer Jackson testified that he observed severe bruising around mother's eyes, as well as on the side of her head, her shoulder, and her

leg. He also noticed a lump and a contusion on mother's forehead. In addition, Ellen Mary McGuire testified that when she interviewed mother, she observed that mother had bruised and swollen eyes. Further, we reasonably infer that mother told McGuire that defendant caused her injuries, because McGuire recommended that mother obtain a restraining order against him. Mother adamantly refused to obtain a restraining order because defendant was her son.

Defendant argues that the evidence did not prove that he inflicted the injuries upon mother since mother drank alcohol on the day of the incident and took Welbutrin, ignoring the recommendation on the prescription that she not drink alcohol while taking the medication. He further asserts that mother did not seek medical treatment until five days after the incident, that mother failed to inform Dr. Tarasewicz of her history of alcohol, and that Dr. Tarasewicz testified that any injury to the back of the head could cause the type of condition seen on mother's face. Defendant concludes that this evidence suggests that mother could have received her injuries by her own fall, as a result of her drinking. Defendant's argument is simply a self-serving and speculative theory. The jury properly evaluated the direct evidence presented at trial and determined that defendant hit mother, thereby causing her injuries.

Defendant further argues that the evidence was equivocal, since Dr. Tarasewicz testified that mother told him that defendant hit her with his fists, whereas, when she was called as a witness by the defense, she testified that defendant hit her with an open hand. He argues that her injuries were not consistent with being hit with an open hand. In view of such evidence, defendant argues that it was more likely that mother sustained her

injuries when she got up from the couch and fell. Mother was clearly reluctant to pursue any action against defendant, as evidenced by her declining to report the incident to the police and her adamant refusal to obtain a restraining order against defendant. Moreover, at trial, she conveniently testified that she did not recall telling Dr. Tarasewicz that defendant punched her with his fists, but rather testified that defendant hit her with an open hand. We note that mother consistently and unequivocally testified that defendant hit her. We further note Dr. Tarasewicz's testimony that mother said defendant punched her with his fists, and that her injuries were consistent with that history. The jury apparently simply believed the evidence that supported the version of facts that defendant hit mother, rather than that mother fell on her own accord.

Viewing the evidence in the light most favorable to the prosecution, as we must, we conclude that there was sufficient evidence that defendant inflicted unjustifiable pain on his elderly mother.

II. The Court Properly Sentenced Defendant to the Upper Term

Defendant contends that his Sixth Amendment right to a jury trial, as defined in *Blakely*, *supra*, 542 U.S. 296, and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), was violated when the trial court imposed the upper term sentence. We disagree and conclude that the present sentence may be affirmed based on defendant's recidivism.

A. *The Upper Term Was Supported by a Factor That Did Not Need to Be Found by a Jury*

In *Blakely*, the U.S. Supreme Court affirmed that "'[o]ther 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.'" (*Blakely*, *supra*, 542 U.S. at p. 301, quoting *Apprendi*, *supra*, 530 U.S. at p. 490.) In *Cunningham*, *supra*, 127 S.Ct. at page 860, the United States Supreme Court held that the imposition of an upper term sentence under California's determinate sentencing law, based solely on a judge's factual findings, violates a defendant's Sixth and Fourteenth Amendment right to a jury trial.

At the outset, the People assert that defendant forfeited his *Blakely* claim by failing to raise it at the sentencing hearing. We disagree. At the time of defendant's sentencing, the decision in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*) was the controlling precedent. *Black* held that *Blakely* did not apply to California's determinate sentencing law. (*Black*, *supra*, at p. 1244.) In light of that holding, it would have been futile for defendant to raise a *Blakely* objection at sentencing. "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, 237-238.) Thus, defendant did not waive his claim of *Blakely* error by failing to object in the trial court. Nonetheless, his contention fails.

A single factor in aggravation suffices to support the imposition of the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 730.) Here, the court based the upper term on

the aggravating factors that the victim was particularly vulnerable and that defendant was on probation when he committed the current offense. Both *Blakely* and *Apprendi* recognize that "the fact of a prior conviction" can be found by a judge, even though any other fact that increases the maximum statutory penalty for a crime must be found by a jury. (*Blakely*, *supra*, 542 U.S. at p. 301; *Apprendi, supra*, 530 U.S. at p. 490.) The *Apprendi* exception for prior convictions has been broadly interpreted by California courts. (*People v. Thomas* (2001) 91 Cal.App.4th 212, 221-223.) Because the factor of defendant's probation status at the time of the current offense arises out of the fact of a prior conviction, and so is closely related to the prior conviction itself, it comes within the prior conviction exception. Also, as with a prior conviction, this fact can be established by a review of court records. (*Id*. at p. 223.) Thus, the upper term was supported by a factor that did not need to be found by a jury. (*Blakely*, *supra*, at p. 301; *Apprendi*, *supra*, at p. 490.)

B. *Any Error Was Harmless*

In defendant's opening brief, he contends that the trial court's use of the victim's vulnerability as an aggravating factor in sentencing was improper since the victim's vulnerability was an element of the crime. In his supplemental brief, he contends that the court improperly relied on this factor since it was not submitted to a jury.

The People effectively concede that the court erred in relying on the vulnerability factor since it was not found true by a jury, but argue that any error was harmless beyond a reasonable doubt. The record shows that defendant, who was six feet tall and weighed 220 pounds, attacked his five-foot two-inch elderly mother, who weighed 110 pounds, in

her home, where he could take advantage of her isolation. While we find that the record supported the court's determination, it would be speculative for us to say that a jury would have found this factor true beyond a reasonable doubt. Nonetheless, in view of the court's proper reliance on the recidivist factor, any error in relying on the vulnerability factor was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Price* (1991) 1 Cal.4th 324, 492, superseded by statute on other grounds as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161-1164.)

DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P.J.

We concur:

McKINSTER
J.

RICHLI
J.