Filed 4/25/07 P. v. Rivera CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JESUS RIVERA, Defendant and Appellant.	B187176 (Los Angeles County Super. Ct. No. BA281996)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael E. Pastor, Judge. Affirmed in part, reversed in part.

Joanna McKim, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves and Dane R. Gillette, Chief Assistant Attorneys General, Pamela C. Hamanaka, Assistant Attorney General, Lawrence M. Daniels, Lance E. Winters, Stephanie C. Brenan and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

Jesus Rivera appeals from his conviction of attempted murder, assault with a firearm, and shooting from a motor vehicle. He argues that his conviction for assault with a firearm should be reversed because that crime is a lesser included offense to the offense charged in count 3, discharging a firearm from a motor vehicle, and to the offense charged in count 1, attempted murder. Appellant also argues that the imposition of the upper terms on counts 2 and 3 and the enhancement on count 2 violated his right to jury trial under *Blakely v. Washington* (2004) 542 U.S. 296. We find merit in appellant's argument that assault is a lesser included offense to discharging a firearm from a motor vehicle, but conclude that it is not a lesser included offense to attempted murder as charged. We also conclude that any error in the imposition of the upper terms on counts 2 and 3 and the enhancement was harmless beyond a reasonable doubt in light of the factors relating to appellant's recidivism, as to which there is no right to jury trial.

FACTUAL AND PROCEDURAL SUMMARY

Appellant does not challenge the sufficiency of the evidence to support his convictions. Accordingly, we provide only a brief factual summary, viewing the record in the light most favorable to the judgment. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) On April 2, 2005, Isadore Sotelo was in his apartment in Los Angeles. At 2:00 p.m., he heard someone yelling, "Run. Run as fast as you can." Sotelo looked out his window and saw a silver Expedition turn the corner. He saw his cousin, Robert Garcia, try to get in the front door of his apartment. When Garcia could not get in the door, he jumped onto some scaffolding and ran down the side of the building. Sotelo recognized the driver of the silver Expedition as appellant. Sotelo knew that appellant is a member of the Fraser Maravilla gang.

Sotelo saw appellant pull out a black handgun, point it out of the driver's window, and shoot once toward the driveway where Garcia had run. He saw Garcia fall down. Sotelo came downstairs and found that Garcia had been shot. Appellant drove away. Garcia suffered a bullet wound to the middle of his back, through his lung. The bullet

was very close to major blood vessels, the spine, and nerves. He was near death when he arrived at a hospital, and would have died but for the emergency surgery he received.

Appellant was convicted as charged with attempted premeditated willful, and deliberate murder (Pen. Code, §§ 187, subd. (a); 664[1] (count 1)); assault with a firearm (§ 245, subd. (a)(2) (count 2)); and discharge of a firearm from a motor vehicle (§ 12034, subd. (c) (count 3)). The jury found true allegations that appellant committed all three offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)) and that in the commission of these offenses he personally inflicted great bodily injury (§ 12022.7, subd. (a)). The jury also found true firearm use allegations under sections 12022.5, subdivision (a) and 12022.53, subdivisions (b)-(d). As to each offense, the jury found not true allegations that appellant personally inflicted great bodily injury which caused the victim to suffer permanent paralysis under section 12022.7, subdivision (b).

Appellant's motions for new trial and to dismiss the gang allegations were denied. He was sentenced to an aggregate sentence of 40 years to life in state prison. This timely appeal followed.

DISCUSSION

I

Appellant argues that he was wrongly convicted of assault with a firearm because that crime is a necessarily included lesser offense to discharge of a firearm from a motor vehicle. He contends that he could not have fired his gun from his car at Garcia without also committing an assault with a firearm, citing *In re Edward G.* (2004) 124 Cal.App.4th 962 (*Edward G.*).

"In California, a single act or course of conduct by a defendant can lead to convictions 'of *any number* of the offenses charged.' (§ 954, italics added; *People v. Ortega* (1998) 19 Cal.4th 686, 692 [80 Cal.Rptr.2d 489, 968 P.2d 48].) But a judicially created exception to this rule prohibits multiple convictions based on necessarily included

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[1] All Statutory references are to the Penal Code unless otherwise indicated.

offenses. [Citations.]" (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034.) California courts "have applied two tests in determining whether an uncharged offense is necessarily included within a charged offense: the 'elements' test and the 'accusatory pleading' test. Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former. Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former. (*People v. Lopez* [(1998)] 19 Cal.4th [282,] 288-289.)" (*People v. Reed* (2006) 38 Cal.4th 1224, 1227-1228.)

Appellant invokes the statutory elements test in arguing that the assault charge is a necessarily included lesser offense to discharging a firearm from a motor vehicle.[2] Section 12034, subdivision (c) provides: "Any person who willfully and maliciously discharges a firearm from a motor vehicle at another person other than an occupant of a motor vehicle is guilty of a felony punishable by imprisonment in state prison for three, five or seven years." Section 245, subdivision (a)(2) provides: "Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment . . . ." Section 240 defines assault: "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."

In *Edward G.*, *supra*, 124 Cal.App.4th 962, the appellant fired two shots at the victim from a car. The juvenile court found appellant had violated section 12034, subdivision (c) (discharging a firearm from a vehicle) and section 245, subdivision (a)(2) (assault). The Court of Appeal reversed the assault charge on the ground that it is a necessarily included lesser offense to the section 12034 violation under the statutory elements test. The court examined the two statutes and concluded: "These provisions show that a violation of section 245, subdivision (a)(2), is necessarily included in a violation of section 12034, subdivision (c). It is not possible to 'willfully and maliciously

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[2] This issue is pending before the Supreme Court in *People v. Licas*, S140032, review granted March 1, 2006, and *People v. Darling*, S148460, review granted February 14, 2007.

[discharge] a firearm' 'at another person' (§ 12034, subd. (c)) without attempting 'to commit a violent injury on the person of another' 'with a firearm' while having a 'present ability' to do so (§§ 240, 245, subd. (a)(2))." (*Edward G.*, *supra*, 124 Cal.App.4th at p. 968.)

Edward G. followed *People v. Valdez* (1985) 175 Cal.App.3d 103 in determining that the "present ability" element of assault did not change its conclusion. In *Valdez*, the defendant was convicted of assault with a firearm after he fired three shots at a gas station cashier who, unknown to defendant, was protected by a bulletproof window. The *Valdez* court rejected the defendant's argument that the present ability element was not established because of the bulletproof glass. It concluded: "Nothing suggests this 'present ability' element was incorporated into the common law to excuse defendants from the crime of assault where they have acquired the means to inflict serious injury and positioned themselves within striking distance merely because, unknown to them, external circumstances doom their attack to failure." (*Id*. at p. 112.) Based on the reasoning in *Valdez*, *Edward G.* held: "We find the reasoning of *Valdez* persuasive. We conclude that it follows from *Valdez* that a person who violates section 12034, subdivision (c), necessarily has the present ability to commit a violent injury on the person of another. A violator of section 12034, subdivision (c), has 'willfully and maliciously discharge[d] a firearm . . . at another person . . . .' If a perpetrator is in a position to fire 'at' a person, his or her gun is loaded, and he or she actually discharges it at the person, then the perpetrator necessarily has 'maneuvered himself into such a location and equipped himself with sufficient means that he appears to be able to strike immediately at his intended victim.' (*People v. Valdez*, *supra*, 175 Cal.App.3d at p. 112 [220 Cal.Rptr. 538].)" (*Edward G.*, *supra*, 124 Cal.App.4th at p. 969.)

Respondent argues that present ability, "cannot be an element of section 12034, subdivision (c), because it is possible to willfully and maliciously discharge a firearm from a motor vehicle at another person without having the present ability to injure that other person." It cites *In re Daniel G.* (1993) 20 Cal.App.4th 239. In that case, the court concluded that assault with a deadly weapon (§ 245, subd. (a)(1)) is not a lesser and

necessarily included offense of willfully and maliciously discharging a firearm at an occupied vehicle (§ 246). Unlike section 12034, subdivision (c), which requires shooting at a "person," section 246 punishes shooting at an inhabited dwelling, or occupied building, vehicle, or other occupied forms of transport or dwelling.[3] Section 246 defines "inhabited" as being used for dwelling purposes, whether occupied or not. The *Daniel R.* court concluded that section 246 could be violated by firing into an inhabited but temporarily unoccupied dwelling, in which case there is no threat of harm to a person. (20 Cal.App.4th at p. 244.) *Daniel G.* is distinguishable because both section 12034, subdivision (c) and section 245 require shooting "at" a person, an element absent from section 246.

Respondent contends that *Edward G.* incorrectly analyzed *People v. Valdez, supra,* 175 Cal.App.3d 103 and argues: "[A] shooter may intend to shoot a victim, and may believe he can strike that victim, but it does not follow that the shooter is able to do so. It is possible to shoot 'at' someone without also having an ability to strike the person." In support of this argument, respondent posits a situation where a perpetrator is too far from the intended victim to strike him. It provides an alternative hypothesis based upon the facts in *Valdez* in which Valdez, now aware of the bulletproof barrier protecting the gas station cashier, returns and from his vehicle fires at the cashier to vex or annoy that person. According to respondent, under this scenario, Valdez would have violated section 12034, subdivision (c) because he shot "at" the cashier, but would not have violated section 245, subdivision (a)(2) because he lacked the "present" ability to strike or inflict injury on the victim.

The *Valdez* court's analysis undermines respondent's reasoning. It distinguished between "ability" and "possibility," concluding that ability connotes "a personal attribute—what a given individual has the capacity to do in contrast with those who lack

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[3] Section 246 provides in pertinent part: "Any person who shall maliciously and willfully discharge a firearm at an inhabited dwelling house, occupied building, occupied motor vehicle, occupied aircraft, inhabited housecar, . . . or inhabited camper, . . . is guilty of a felony, . . ."

this quality—not an environmental factor." (175 Cal.App.3d at p. 111.) "Thus, it appears quite different in character from the notion of 'impossibility' which is defined as '[t]he condition or quality of being impossible' which, in turn, is defined as '[n]ot capable of existing or happening.'" (*Ibid.*) The court concluded: "The real function of this 'present ability' element in common law assault as incorporated in the California statute is to require the perpetrator to have gone beyond the minimal steps involved in an attempt." (*Id*. at p. 112.) In light of the present ability element, "to be guilty of assault a defendant must have maneuvered himself into such a location and equipped himself with sufficient means that he appears to be able to strike immediately at his intended victim." (*Ibid.*) As we have discussed, *Valdez* concluded that the "present ability" element of assault does not excuse defendants where they fail to inflict serious injury merely because of external circumstances. (*Ibid.*)

We agree with the reasoning of the court in *Edward G.*, *supra*, 124 Cal.App.4th 962 and conclude that the assault conviction must be reversed because that offense is a lesser included offense to section 12034, subdivision (c).

II

Appellant also argues the assault conviction should be reversed because assault is a lesser included offense to attempted murder. He invokes the accusatory pleading rather than the statutory elements test. Appellant argues that *People v. Seel* (2004) 34 Cal.4th 535 (*Seel*) implicitly overruled earlier authority that held that assault with a firearm is not a lesser included offense to attempted murder. (*People v. Wolcott* (1983) 34 Cal.3d 92; *People v. Parks* (2004) 118 Cal.App.4th 1.)

Appellant's reasoning is as follows. The firearm allegation under section 12022.53 put appellant in jeopardy for an offense greater than the underlying attempted murder charge, increasing the sentence from a term of 15 years to life to a term of 40 years to life. Since the allegation exposes appellant to a greater punishment, under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Seel*, *supra*, 34 Cal.4th 535, it is the functional equivalent of an element of the offense of attempted murder. To prove attempted murder as alleged, the district attorney had to prove a specific intent to kill, a

direct but ineffectual act toward accomplishing the killing, and that appellant personally and intentionally discharged a firearm causing great bodily injury. To prove the assault charge, the district attorney had to prove general intent to commit a battery, a foreseeable consequence of which is the infliction of great bodily injury. From this, appellant argues that the attempted murder could not have been committed without also committing the assault with a firearm. This leads to the conclusion that the attempt was a lesser included offense of the attempted murder as charged, and appellant could not be convicted of both offenses.

The linchpin of appellant's analysis is language in *Apprendi* and *Seel* that an enhancement or special allegation that increases a defendant's exposure to punishment beyond the maximum sentence for the underlying offense is the functional equivalent of an element. But neither case arose in the context of lesser included offense analysis. *Apprendi* applied the Sixth Amendment to the United States Constitution, holding that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Apprendi, supra*, 530 U.S. at p. 490.) *Seel* applied *Apprendi* to conclude that an allegation of attempted premeditated murder increases the sentence for attempted murder from a determinate term of five, seven, or nine years to an indeterminate life term with possibility of parole, and relates to the commission of the offense. As a result, under *Apprendi*, it was the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. (*Seel, supra*, 34 Cal.4th at pp. 548-549.) Because the premeditation allegation placed the defendant in jeopardy of that greater offense, the Court of Appeal's determination of evidentiary insufficiency for the premeditation finding barred retrial of the allegation under the federal double jeopardy clause. (*Id*. at p. 550.)

Seel did not address an extension of this analysis to overturn established California law prohibiting the consideration of enhancements for the accusatory pleading test for lesser included offenses. Appellant argues that it did so by implication. We find no such implication. Significantly, two years after *Seel* was decided, the Supreme Court

concluded in *People v. Reed*, *supra*, 38 Cal.4th 1224 that the accusatory pleading test for lesser included offenses does not apply in deciding whether multiple convictions are allowable for single course of conduct. The defendant in that case contended that he was improperly convicted of being a felon in possession of a firearm in addition to being convicted for carrying a concealed firearm *and* carrying a loaded firearm in a public place because, as charged, the felon in possession charge was a lesser included offense of the two other charges. The information for each of the three offenses alleged that the defendant was a convicted felon. As charged, therefore, the defendant could not commit the other crimes without also being a felon in possession of a firearm.

The *Reed* court identified the various contexts in which courts must determine whether one offense is necessarily included in another. A common test is whether a defendant may be convicted of a lesser uncharged crime. The notice required by due process is provided as to any lesser offense necessarily committed when the charged offense is committed. (*People v. Reed*, *supra*, 38 Cal.4th at p. 1227.) The court concluded that the accusatory pleading test "arose to ensure that defendants receive notice before they can be convicted of an uncharged crime." (*Id*. at p. 1229.) "But this purpose has no relevance to deciding whether a defendant may be convicted of multiple charged offenses." (*Ibid.*) The *Reed* court concluded: "We see no reason to prohibit multiple convictions that section 954 permits simply because of the way the offenses are charged." (*Id*. at p. 1230.) It stated "a straightforward overall rule: Courts should consider the statutory elements and accusatory pleading in deciding whether a defendant received notice, and therefore may be convicted, of an *uncharged* crime, but only the statutory elements in deciding whether a defendant may be convicted of multiple *charged* crimes." (*Id*. at p. 1231.)[4]

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[4] The Supreme Court granted review June 8, 2005 in *People v. Sloan,* S132605, to consider "For purposes of the ban on conviction of necessarily included offenses (see *People v. Pearson* (1986) 42 Cal.3d 351), should enhancement allegations be considered in determining when a lesser offense is necessarily included in a charged offense as pled in the information or indictment?" (Minute, June 8, 2005.)

We follow *Reed, supra*, 38 Cal.4th 1224, and conclude that we may not apply the accusatory pleading test to determine whether assault was a lesser included offense of attempted murder. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Appellant concedes that it was not a lesser included offense under the statutory elements test. He has demonstrated no basis for reversal of the assault charge on this ground.

III

Appellant argues that imposition of the high term on counts 2 and 3, and the upper term on the section 12022.5, subdivision (a) enhancement deprived him of his constitutional right to have the factors which justify these sentencing choices be determined by a jury beyond a reasonable doubt. In his opening brief, appellant cited *Blakely v. Washington, supra*, 542 U.S. 296 (*Blakely*) in support of his argument. He acknowledged that the California Supreme Court in *People v. Black* (2005) 35 Cal.4th 1238, held that *Blakely* does not apply to California's sentencing scheme, but asserted that *Black* was wrongly decided. In supplemental briefing, appellant argues that the recent opinion in *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*) compels reversal of those upper terms.[5]

The trial court imposed the upper term on counts 2 and 3 based on the same aggravating factors: appellant's extensive criminal history involving crimes of violence and guns; a number of offenses of increasing seriousness; appellant's danger to society; his failure to perform well on probation in the past; his prior prison term; the premeditation and planning of the present offense; and the callous and vicious nature of the attempted execution of the present offense. As to the gun allegation under section 12022.5, subdivision (a) on count 2, the court chose the upper term because appellant not only displayed a firearm, but fired it at a vulnerable area of the victim.

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[5] On February 7, 2007, the Supreme Court granted review in five cases to address the impact of *Cunningham*. (*People v. Sandoval*, S148917; *People v. Mvuemba*, S149247; *People v. French*, S148845; *People v. Hernandez*, S148974; and *People v. Pardo*, S148914.)

In *Cunningham*, the Supreme Court held that California's determinate sentencing law, which gives the trial court judge rather than the jury the authority to find facts which expose a defendant to an elevated upper term sentence, violates a defendant's right to jury trial protected by the Sixth and Fourteenth Amendments to the United States Constitution. (*Cunningham, supra*, 549 U.S. __, [127 S.Ct. at pp. 860, 868].) It held that the California 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.'" (*Id*. at p. 868, quoting *Apprendi v. New Jersey, supra*, 530 U.S. 466, 490.)

Appellant argues the trial court's imposition of the upper term based on facts not found by a jury constituted error. He also contends the trial court's findings were made under an incorrect standard of proof—a preponderance of the evidence—rather than the beyond a reasonable doubt standard mandated by *Cunningham* and *Apprendi*. He acknowledges that the United States Supreme Court has not yet determined whether this error is subject to harmless error analysis. Appellant argues that under the harmless error test set forth in *Chapman v. California* (1967) 386 U.S. 18, reversal is required since the jury did not find beyond a reasonable doubt all facts relied upon by the trial court in imposing the upper terms. He contends that it cannot be concluded that the jury would have found true all the factors relied upon by the trial court judge. He asks that we reverse the sentence and impose the middle term on counts 2 and 3 and on the enhancement under section 12022.5, subdivision (a). Alternatively, he asks us to remand the case to the superior court for resentencing to the midterm on these counts and the enhancement.

We asked respondent to submit a letter brief in response to the supplemental brief from appellant. Respondent did so and contends that the point was forfeited because appellant failed to raise a *Blakely* issue at sentencing, although he was sentenced nearly 18 months after that case was decided. In anticipation of this argument, appellant argues that an objection would have been futile since he was sentenced after the California

Supreme Court decision in *People v. Black, supra,* 35 Cal.4th 1238, that *Blakely* does not apply to California upper term sentencing. We need not decide the forfeiture issue. Assuming, without deciding, that it does not apply, *Blakely* does not aid appellant.

Respondent argues that there was no error because appellant's prior prison term established recidivism, a proper basis for imposition of the upper term without a jury determination, citing *Almendarez-Torres v. United States* (1998) 523 U.S. 224 and *Cunningham*, 127 S.Ct. at pages 860, 864. In addition, respondent cites a line of California cases for the proposition that no jury trial right exists on matters involving issues of recidivism.[6]

In *People v. McGee* (2006) 38 Cal.4th 682, the Supreme Court decided that a defendant does not have a federal constitutional right to have the jury rather than the court examine the record of a prior criminal proceeding to determine whether an earlier conviction subjects the defendant to an increased sentence. (*Id*. at p. 686.) The issue in *McGee* was whether the defendant's Nevada robbery convictions qualified as serious felony convictions for purposes of California's "Three Strikes" law. Because of differences between California and Nevada law as to the elements of robbery, the record

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[6] The Supreme Court granted review July 14, 2004 in *People v. Towne,* S125677. After *Cunningham* was decided, the Supreme Court requested additional briefing on the following issues: "(1) Do *Cunningham v. California*, *supra*, and *Almendarez-Torres v. United States*[,*supra*,] 523 U.S. 224, 239-247, permit the trial judge to sentence defendant to the upper term based on any or all of the following aggravating factors, without submitting them to a jury: the defendant's prior convictions as an adult are numerous and of increasing seriousness; the defendant has served a prior prison term; the defendant was on parole when the crime was committed; the defendant's prior performance on probation or parole was unsatisfactory ([Cal.] Rules of Court, rule 4.421[(b)(2)-(b)(5)])? [¶] (2) Is there any violation of the defendant's Sixth Amendment rights under *Cunningham v. California*, *supra*, if the defendant is eligible for the upper term based upon a single aggravating factor that has been established by means that satisfy the governing Sixth Amendment authorities—by, for example, a jury finding, the defendant's criminal history, or the defendant's admission—even if the trial judge relies on other aggravating factors (not established by such means) in exercising his or her discretion to select among the three sentences for which the defendant is eligible?" (S.Ct. dock. entry of 2/7/07.)

of the Nevada proceedings had to be examined in order to determine whether they were qualifying convictions.

The *McGee* court cited the following discussion in *Apprendi* distinguishing recidivism from other factors used to enhance punishment: "(1) recidivism traditionally has been used by sentencing courts to increase the length of an offender's sentence, (2) recidivism does not relate to the commission of the charged offense, and (3) prior convictions result from proceedings that include substantial protections. (*Apprendi*, *supra*, 530 U.S. 466, 487-488, citing *Jones v. United States* (1999) 526 U.S. 227 [143 L.Ed.2d 311, 119 S.Ct. 1215], and *Almendarez-Torres*, *supra*, 523 U.S. 224; see also *Monge v. California* (1998) 524 U.S. 721, 728 [141 L.Ed.2d 615, 118 S.Ct. 2246] [the question whether the defendant's prior conviction for assault with a deadly weapon involved personal use was a sentencing determination that fell within the *Almendarez-Torres* exception for recidivist behavior and therefore was not subject to double jeopardy protections]; *People v. Seel*, *supra*, 34 Cal.4th 535, 548 [21 Cal.Rptr.3d 179, 100 P.3d 870] ['The high court has made clear that recidivism is different for constitutional purposes.'].)" (*People v. McGee*, *supra*, 38 Cal.4th at pp. 698-699.)

The *McGee* court distinguished "between sentence enhancements that require fact-finding related to the circumstance of the current offense, such as whether a defendant acted with the intent necessary to establish a 'hate crime'—a task identified by *Apprendi* as one for the *jury*—and the examination of *court records* pertaining to a defendant's *prior conviction* to determine the nature or basis of the conviction—a task to which *Apprendi* did not speak and 'the type of inquiry that judges traditionally perform as part of the sentencing function.'" (*People v. McGee*, *supra*, 38 Cal.4th at p. 709, quoting *People v. Kelii* (1999) 21 Cal.4th 452, 456.)

People v. Thomas (2001) 91 Cal.App.4th 212 is instructive. Thomas did not personally waive jury trial on two prior prison term allegations. The trial court found the prior term allegations true and imposed an increased sentence based on those enhancements. Thomas argued he was denied a jury trial on the prior prison term allegations in violation of *Apprendi* because the prior prison term was beyond the

language in *Apprendi*, which held that other than the fact of a prior conviction, the jury must determine the basis for an increase in sentence beyond the statutory maximum. The *Thomas* court rejected this argument, citing cases from other jurisdictions interpreting *Apprendi* as applying to matters relating to recidivism beyond the precise fact of a prior conviction. (*Id*. at p. 221.) It concluded that *Apprendi* had not overruled *Almendarez-Torres*, which is controlling. It reasoned that the *Apprendi* language refers "broadly to recidivism enhancements which include section 667.5 prior prison term allegations." (*Id*. at p. 223.) There were documents in *Thomas* that demonstrated without dispute that he had served two separate prison terms. (*Id*. at p. 223.)

Here, the trial court imposed the upper terms based on a number of factors, nearly all of which relate to appellant's recidivism. A review of the probation report establishes that appellant's adult history began with a misdemeanor conviction for theft in 1994 for which he received probation. The next year he was convicted of giving false identification to the police (§ 148.9) and was given probation. In 1998, he served six days in jail for possession of marijuana. The same year, he was convicted of corporal injury on a spouse for which he served time in jail and was placed on probation. Also in 1998, appellant twice was arrested and later convicted for driving with a suspended license and placed on probation. In 1999, appellant again was convicted of driving with a suspended license. He violated probation on that offense. (Veh. Code, § 14601.1, subd. (a).) In 1999, he was convicted of being intoxicated in public. Attempted murder charges were dropped when appellant was convicted of a firearm offense and sentenced to state prison in 2000.

Appellant's adult record established his extensive criminal history involving crimes of violence and guns, a number of offenses of increasing seriousness, his failure to perform satisfactorily on probation, and his prior prison term. These factors all relate to his recidivism. The trial court also relied on appellant's danger to society. In light of appellant's criminal history, we conclude that this factor did not require additional factfinding by the trial court. Under *Apprendi* and *McGee*, factors relating to recidivism do not require a jury determination.

The trial court also relied upon factors related to the present crime: premeditation and planning, and the callous and vicious nature of the present offense. Any error in relying on these factors is harmless in this case. We are satisfied beyond a reasonable doubt that the court would have sentenced defendant to the upper terms based solely on its findings concerning appellant's criminal record. (*Washington v. Recuenco* (2006) __ U.S. __ [126 S.Ct. 2546].)

We note that the abstract of judgment reflects enhancements on count 2 for section 12022.53, subdivision (a)(1) and section 12022.7, subdivision (a). Appellant was not charged with an enhancement pursuant to section 12022.53 on count 2. But the point is moot in light of our reversal of the conviction on that count.

DISPOSITION

The conviction for assault in count 2 is reversed and the trial court is directed to correct the abstract of judgment on that count. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.