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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JESSIE RODRIGUEZ, Defendant and Appellant.	B194159 (Los Angeles County Super. Ct. No. BA295740)

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

Stephen Temko, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson and Juliet H. Swoboda, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Jessie Rodriguez guilty of the second degree murder of Cynthia Portillo in violation of Penal Code section 187, subdivision (a),[1] and the attempted murder of Manuel Penaloza in violation of sections 664 and 187, subdivision (a). The jury also found that defendant personally and intentionally discharged a handgun in connection with both offenses (§ 12022.53, subd. (d)) and that he committed the offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). For the murder conviction, defendant received a prison term of 15 years to life, plus 25 years for the firearm use enhancement with a 15-year minimum parole eligibility due to the gang enhancement. Defendant received a consecutive sentence for the attempted murder, consisting of the upper term of 9 years, plus 25 years for the firearm enhancement and 10 years for the gang enhancement.

In his timely appeal, defendant contends (1) his written confession was admitted in violation of the Fifth Amendment privilege against self-incrimination and the related protections afforded to defendants under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) and (2) imposition of his upper term sentence for attempted murder violated his Sixth Amendment jury trial right to have a jury finding on the aggravating factors pursuant to *Cunningham v. California* (2007) 549 U.S. ___, ___ [127 S.Ct. 856] (*Cunningham*) and *Blakely v. Washington* (2004) 542 U.S. 296, 301 (*Blakely*). We affirm.

STATEMENT OF FACTS

Defendant's claims do not directly implicate the facts of the underlying offenses. The necessary procedural background and facts adduced during the suppression motion and in connection with sentencing will be set forth as part of our discussion of defendant's appellate claims.

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[1] All statutory references are to the Penal Code, unless stated otherwise.

On February 23, 2005, at approximately 6:00 p.m., Miguel Ruelas was working at Gabanzo Park in Los Angeles. He saw the victims, boyfriend and girlfriend Manuel Penaloza and Cynthia Portillo, walking on the sidewalk. A brown, older model minivan slowed and approached them. Someone in the van asked the victims, "Where are you from"? Shots were fired, and the van drove off. When Ruelas approached the victims, Penaloza, who had been wounded, asked Ruelas to help his girlfriend, who was lying on the ground. Portillo had suffered a fatal gunshot wound to her head. Ruelas called the 9-1-1 operator for assistance and gave aid to Portillo.

Penaloza testified that he and Portillo had been walking to the market at the time of the shooting. When the van's passenger asked "where he was from," Penaloza understood it as a gang challenge—a demand to know what gang Penaloza was affiliated with. Penaloza truthfully replied that he was from the Drifters gang. He saw two persons in the van, the driver and a person in the passenger seat. The shots were fired immediately after Penaloza identified himself. He was wounded in the shoulder. When he saw that his girlfriend had been shot in the head, Penaloza panicked and fled. He went to a hospital where he was treated for his gunshot wound. The bullet was not removed from his lung.

Penaloza identified Richard Powell from a photograph. Powell was an "old friend" Penaloza knew as "Away." He also identified the van from a photograph. At trial, Penaloza said it was too dark to identify the van's driver and passenger, except as being males and less than 30 years old. He testified that he could not remember telling a detective that the shooter was one of two persons he picked out of a photographic lineup. Penaloza would not voluntarily testify in this case; he had been subpoenaed and forced to appear.

Officer Carlos Langarica of the Los Angeles Police Department testified that at 8:30 p.m., he saw a brown van driving in Highland Park. By that time, he had received

reports of the Portillo/Penaloza drive-by shooting and another such shooting that night.[2] As the van matched the description of the shooter's vehicle, the officer followed in his patrol car. He saw a driver and passenger. The van stopped next to a pickup truck, and the van's driver shouted, "Where you from?" to the occupants of the pickup truck. Officer Langarica activated the patrol car's lights and stopped the van. He saw the van's passenger lean forward as if he were trying to hide something under his seat. Angel Gomez was the driver; Richard Powell was the passenger. Two fully loaded handguns were recovered from the van, a .22 caliber revolver and a .25 caliber semi-automatic. Ammunition for those weapons was also recovered, along with an expended cartridge case and a leather glove. A live bullet was found in Powell's pocket. Neither gun was registered to Gomez, Powell, or defendant.

Detective Luis Rivera testified that no expended cartridge cases were found at the scene of the Portillo/Penaloza shooting, indicating that the weapon fired was a revolver. The detective interviewed Gomez and Powell after the shooting and identified defendant as suspect, based on his gang moniker of "Husky." Detective Rivera obtained a photograph of defendant and placed it in a six-pack photographic lineup, which he showed to Penaloza, who was very uncooperative. He pointed to two photographs—one of them being defendant's—and said, "One of those two is the person who shot me. There. Now you know."

Gomez had an "HLP" tattoo behind his left ear. Defendant had the same kind of tattoo on his arm.

Ami Adams, a police department forensic fingerprint analyst, testified that she found no fingerprints on the .22 caliber revolver, the .25 caliber semi-automatic, or the ammunition. If the shooter had worn a glove, no prints would have been left on the gun. Stella Chu, a police department criminalist, testified that the bullet that killed Portillo

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[2] On the night of February 23, 2005, there were three drive-by shootings reported involving the brown van, beginning with the Portillo/Penaloza shooting.

could have been fired from the .22 caliber revolver, but not the .25 caliber semi-automatic.

Detective Rivera and his partner Jose Carrillo arrested defendant on March 28, 2005, and took him to the police station, picking up some lunch for defendant on the way. Defendant was advised of his rights and then interviewed. The interview was videotaped.[3] When defendant asked to speak to an attorney, the detectives stopped the interview. Defendant was transported to the central station for fingerprinting and photographing. He was then returned to the local station, while the detectives completed their reports. After doing so, they took defendant to a juvenile facility.

Shortly after their arrival, while in the intake area of the juvenile facility, defendant asked Detective Rivera, "what's going to happen?" The detective replied that the case was going to be presented to the prosecutor's office. Defendant then requested the detective's business card, explaining that he might want "to talk" to the detective. In response, Detective Rivera explained that because defendant had invoked his right to counsel, the detective could not speak to him until defendant had spoken to an attorney, unless defendant "changed his mind" about exercising his right to counsel. Defendant replied that he wanted to talk to the detective.

Detective Rivera requested an interview room and a tape recorder, but no such device was available. Once inside the interview room, defendant narrated what happened during the shooting incident. At the detective's request, defendant wrote his own statement, which was admitted in evidence. In that statement, defendant related how Gomez and Powell picked him up and got some beer. They dropped off Powell in front of a friend's house and parked nearby. Gomez saw a male he believed to be a member of the Drifters gang and told defendant to "hit him up."[4] As they pulled the van alongside

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[3] An edited version of the videotaped interview was played to the jury, which was given a written transcript to assist the jurors' understanding.

[4] In gang parlance, the phrase means to issue a challenge to a rival gang member.

the male, a female who had been tying her shoe walked up to the male. Defendant asked the male "where he was from," and when the latter identified himself as being "with Drifters," Gomez urged defendant to "shoot him." Defendant fired a .22 caliber handgun three times. As part of defendant's statement, there was a map of the scene drawn by Detective Rivera, which defendant annotated to explain the circumstances of the shooting. The detective also read from his notes of defendant's oral statement during the second interview, in which defendant said that Gomez threatened to hit defendant with his handgun if defendant refused to shoot at Penaloza. Detective Rivera also explained how, after defendant was arrested, the detective and his partner transported defendant to a juvenile facility. Defendant asked the detective for a business card. Detective Rivera told defendant that the case against defendant would be presented to the prosecutor the next day.

Officer Robert Morales testified as a gang expert. The Highland Park gang has approximately 150 members. Its primary activities consist of committing a variety of crimes, including murders, robberies, and narcotics sales. "HLP" is one of the gang's identifying symbols. Defendant is an active member of the gang with the moniker, "Husky." So are Gomez and Powell. The former's moniker is "Vamps"; the latter's is "Away." The HLP tattoo signifies allegiance to the gang, as well as having committed crimes for the gang. The Portillo/Penaloza shootings occurred in Highland Park gang territory and were committed to benefit the Highland Park gang.

DISCUSSION

Admission of Defendant's Written Statement

Defendant contends his written confession was admitted in violation of the Fifth Amendment privilege against self-incrimination and the related protections under *Miranda*. We disagree. As we explain, the trial court's rejection of defendant's

argument that his statement was involuntary due to defendant's juvenile status and the police officers' investigative tactics, as well as the trial court's finding that defendant voluntarily reinitiated the interrogation after having invoked his right to counsel, depended on the lower court's credibility findings. As those findings are supported by substantial evidence, we must defer to them, and on that basis we hold the trial court properly denied defendant's motion to suppress his confession.

The Suppression Motion Hearing

The trial court held a pretrial hearing on defendant's motion to suppress his written statement. Detective Rivera testified for the prosecution that defendant was arrested on March 28, 2005, taken to the Northeast station, and given his *Miranda* warnings at the start of the initial interview by Detectives Rivera and Carrillo. That interview began around noon and continued for approximately an hour, when defendant invoked his right to counsel and the detectives stopped questioning him. Defendant was transferred to the central police station for fingerprinting and photographing. He was returned to the local station sometime between 3:30 and 4:00 that afternoon and placed in the interview room while the detectives prepared the arrest report and related documents. Those documents were completed at approximately 5:30 p.m., at which time the detectives drove defendant to the juvenile facility. Detective Rivera testified that he and Detective Castillo made no attempt to interview defendant from the time he invoked his right to counsel. However, the detectives did check on defendant periodically to make sure he was comfortable.

When they arrived at the juvenile facility, defendant asked Detective Rivera for a business card in the event defendant wanted to talk to him. The detective "told him that since he wanted to speak to an attorney [the detectives] could not initiate a conversation . . . or any further contact" unless defendant first spoke to an attorney "or if he changed his mind." When defendant responded by asking to speak to the detectives without an

attorney, Detective Rivera inquired again whether defendant wanted to speak first to an attorney or whether he wanted "to talk to us now without an attorney." Defendant repeated that he wanted to talk to the detectives "to give . . . his side of the story." They retired to an interview room, but when they found no tape recorder available, Detective Rivera asked defendant "if he wouldn't mind just writing out a statement." Defendant wrote out a statement in his own words, adding—at the detective's specific request—a statement expressing defendant's willingness to speak to the police. Defendant wrote: "No one's promised me anything. I chose to tell what happened without a lawyer and I am really sorry about what happened."

Defendant testified in contradiction of the detective's testimony on various points. According to defendant, the detectives repeatedly questioned defendant after he had invoked his right to counsel. While transporting him to the central station, the detectives pressured him to confess, asserting that Powell and Gomez had told "everything" to the police. Later, when they arrived at the juvenile facility, defendant did not ask to speak to the detectives, nor did he ask for a business card. Instead, Detective Rivera gave defendant his card and took him to an interview room. The detectives told defendant what to write in his statement, including the statement that he received no promises and wanted to speak without a lawyer.

On cross-examination, defendant admitted that the detectives did not tell him to write every statement in his confession. Some of the statements were defendant's own. With regard to the interview, the detectives never drew their guns or used physical force—at most, they were "a little bit rough" when they pulled him into the interview room. Defendant, nevertheless, felt threatened by the officers, perhaps because they referred to the possibility of a long prison term. During the prosecutor's examination, defendant for the first time asserted that the detectives had promised him that if he wrote the statement, he would "stay in juvenile hall" and not go to prison. Defendant would not have written the statement absent that promise.

The prosecution recalled Detective Rivera, who denied making a promise to defendant in connection with the statement. He did not use "any type of physical force" to obtain the statement. Apart from the detective's request that defendant include a final statement about choosing to speak without counsel, defendant used his own words in writing the statement, not words given to him by the detectives.

The trial court denied the suppression motion based on its credibility findings in favor of Detective Rivera and against defendant. It found defendant "less than credible on many things," but most importantly concerning his explanation of the circumstances in which he wrote the statement—that is, defendant's testimony that the detective instructed him on what to write about the shooting incident. The court found it unbelievable that the detective told defendant to write specific, exculpatory details, such as "how [defendant] shot at the direction of others and . . . that [Gomez] told [defendant] shoot him, shoot him." "And the fact that [defendant] made statements that are difficult for the court to accept regarding what was said in that document . . . colors all of his testimony." In contrast, the court "found the detective's testimony to be believable." The court concluded that the detectives honored defendant's invocation of his *Miranda* right to counsel at the police station during the initial interview, but defendant's written statement at the juvenile facility was made voluntarily and not in response to police interrogation—defendant initiated the discussion in the juvenile facility.

The Admission of Defendant's Written Statement Did Not Violate Federal Constitutional Voluntariness or *Miranda* Standards

Our Supreme Court has recently set forth the governing federal constitutional standards for assessing claims concerning the admission of a defendant's pretrial inculpatory statements in terms both of alleged *Miranda* violations and due process protections against the admission of involuntary statements. In *People v. Guerra* (2006) 37 Cal.4th 1067 (*Guerra*), the court explained that in *Miranda*, the United States Supreme Court recognized that statements obtained by the police during custodial

interrogation have the potential to be involuntary because of the possibility that the questioning was coercive, holding that such a statement may be admitted in evidence "'only if the officer advises the suspect of both his or her right to remain silent and the right to have counsel present at questioning, and the suspect waives those rights and agrees to speak to the officer.' [Citation.]" (*Guerra, supra,* at p. 1092.)

In the *Miranda* refinement most pertinent to this appeal, the federal Supreme Court has held that "after the right to counsel had been asserted by an accused, further interrogation of the accused should not take place 'unless the accused himself initiates further communication, exchanges, or conversations with the police.' [Citation.] This was in effect a prophylactic rule, designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in *Edwards* [*v. Arizona* (1981) 451 U.S. 477] was. We recently restated the requirement in *Wyrick v. Fields,* 459 U.S. 42, 45-46 (1982) (*per curiam*), to be that before a suspect in custody can be subjected to further interrogation after he requests an attorney there must be a showing that the 'suspect himself initiates dialogue with the authorities.'" (*Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1044 (*Bradshaw*).)

Apart from *Miranda*, "[a] defendant's statements challenged as involuntary are inadmissible at trial unless the prosecution proves by a preponderance of the evidence that they were voluntary. [Citations.] 'The due process [voluntariness] test takes into consideration "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation."' (*Dickerson v. United States* (2000) 530 U.S. 428, 434, quoting *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226.) This test 'examines "whether a defendant's will was overborne" by the circumstances surrounding the giving of a confession.' [Citation.] We make the same inquiry to determine the voluntariness of a *Miranda* waiver. (*Colorado v. Connelly* (1986) 479 U.S. 157, 169-170 ['There is obviously no reason to require more in the way of a "voluntariness" inquiry in the *Miranda* waiver context than in the Fourteenth Amendment confession context'].) '[C]oercive police activity is a necessary predicate to

the finding that a confession is not "voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment.' (*Id.* at p. 167; see also *People v. Williams* (1997) 16 Cal.4th 635, 659.) Coercive police activity, however, '"does not itself compel a finding that a resulting confession is involuntary." [Citation.] The statement and the inducement must be causally linked. [Citation.]' [Citation.]" (*Guerra, supra,* 37 Cal.4th at p. 1093.)

The standards of review for *Miranda* and voluntariness challenges are similar: For the former: "[W]e review independently a trial court's ruling on a motion to suppress a statement under *Miranda.* [Citation.] In doing so, however, 'we accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence.' [Citation.]" (*Guerra, supra,* 37 Cal.4th at pp. 1092-1093.) For the latter: "We review independently a trial court's determinations as to whether coercive police activity was present and whether the statement was voluntary. [Citation.] We review the trial court's findings as to the circumstances surrounding the confession, including the characteristics of the accused and the details of the interrogation, for substantial evidence. [Citation.] '[T]o the extent the facts conflict, we accept the version favorable to the People if supported by substantial evidence.' [Citation.]" (*Id.* at p. 1093.)

Here, the trial court's ruling was premised on its factual findings as to an absence of coercion by the police and that it was defendant who initiated the police interview in which he made the challenged statement. On the first point, regarding voluntariness, defendant relies primarily on the detectives' interrogation techniques in the first interview. More specifically, based on the interview transcript, defendant contends the detectives downplayed the importance of his *Miranda* rights and threatened him with implied promises of leniency to the point where defendant's will was overborne when he subsequently waived his *Miranda* right to counsel and wrote out his confession at the juvenile facility.

We disagree. As the trial court found, the evidence as a whole did not support a finding that defendant's will was overborne, and defendant's testimony concerning an express threat by Detective Rivera was found not credible. The evidence in support of coercive conduct was meager at best. Not only did the detectives begin the first interview with an accurate statement of the *Miranda* warnings, but they honored defendant's invocation thereof. As such, it is highly dubious that defendant was led to believe his rights were inconsequential. Moreover, the fact that defendant did not make any inculpatory statements during that interview strongly supports the finding that the detectives' interviewing techniques were not coercive. In any event, there was no substantial—much less any compelling—evidence of a causal linkage between the challenged interview techniques in the first interrogation and the statement defendant made in the subsequent one at the juvenile facility. (See *Guerra, supra,* 37 Cal.4th at p. 1093 [coercive police activity does not compel a finding that a resulting confession is involuntary; the statement and the inducement must be causally linked].)

Additionally, relying on *People v. Neal* (2003) 31 Cal.4th 63, 84 (*Neal*), defendant argues the trial court failed to inquire adequately into all the circumstances bearing on the statement's admission, "including 'evaluation of [defendant's] age, experience, education, background, and intelligence'"—most particularly, defendant's status as a minor and lack of experience in criminal matters.[5] Again, we disagree. "The admissibility of a confession depends upon the totality of the circumstances existing at the time the confession was obtained. [Citation.] A minor can effectively waive his constitutional rights [citation], but age, intelligence, education and ability to comprehend the meaning and effect of his confession are factors in that totality of circumstances to be weighed along with other circumstances in determining whether the confession was a product of free will and an intelligent waiver of the minor's Fifth Amendment rights."

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5 As evidence of his claimed lack of experience, appellant improperly attempts to rely on information in the Probation Officer's Report. That document was not referred to or admitted into evidence at the suppression motion.

(*In re Frank C.* (1982) 138 Cal.App.3d 708, 711-712; see also, e.g., *Fare v. Michael C.* (1979) 442 U.S. 707, 725.)

Here, defendant presented little, if any, evidence to cast doubt on his ability to understand and to intelligently invoke his *Miranda* rights. Indeed, the interview transcript tends to show the opposite—defendant successfully resisted the detectives' attempts to elicit an inculpatory statement during the first interviewing session, before choosing to invoke his right to counsel. The evidence of defendant's interrogations and statement is materially indistinguishable from that found sufficient to support the admission of the minor's confession in *In re Frank C., supra*, 138 Cal.App.3d at pages 715-716 ("It is evident that [the minor] not only had the capacity to understand his rights but knew and understood them when initially he invoked them and later waived them by freely and voluntarily initiating a spontaneous statement to [the officer] and thereafter following through with his confession.").

Defendant's reliance on *Neal* is misplaced. The circumstance in *Neal* bearing most heavily on the finding of involuntariness—the interrogating officer's blatant, repeated violations of *Miranda* by refusing to honor the defendant's invocations of his right to silence and counsel—was not present here. Unlike the facts in *Neal*, there was no evidence that defendant was "confined incommunicado" in such a way as to coerce defendant's will. (*Neal, supra*, 31 Cal.4th at p. 84 ["following the first interview, he was placed in a cell without a toilet or a sink, he did not have access to counsel or to any other noncustodial personnel, he was not taken to a bathroom or given any water until the next morning, and he was not provided with any food until some time following the third interview, after more than 24 hours in custody and more than 36 hours since his last meal."].)

We note that defendant makes no independent argument as to the existence of a *Miranda* violation. As the trial court understood, the critical question concerning whether the prosecution made an adequate showing that defendant himself initiated the

second dialogue with the detective[6] hinged on a credibility assessment—whether Detective Rivera or defendant was believable concerning the manner in which the two interrogations unfolded. The trial court's finding in favor of the detective was well supported by the record and reasonable. As such, we defer to its findings that the detectives ceased questioning upon defendant's invocation in the first interview, engaged in no coercive conduct, and made no effort to question defendant about the shooting until defendant initiated that discussion at the juvenile facility. (E.g., *Guerra*, *supra*, 37 Cal.4th at pp. 1092-1093.) Defendant's *Miranda* challenge must therefore fail. (See *Bradshaw*, *supra*, 462 U.S. at pp. 1045-1046.)

Imposition of Upper Term

Defendant contends the imposition of an upper term sentence for attempted murder violated his Sixth Amendment jury trial right to have a jury finding on the aggravating factors pursuant to *Cunningham v. California*, *supra*, 549 U.S. at page __ [127 S.Ct. 856] and *Blakely*, *supra*, 542 U.S. at page 301. We disagree.

In *People v. Black* (2007) 41 Cal.4th 799, 805 (*Black II*) and *People v. Sandoval* (2007) 41 Cal.4th 825, 831 (*Sandoval*), the California Supreme Court examined the imposition of an upper term under the state determinate sentencing law in light of *Cunningham*. Our Supreme Court held: "[A]s long as a single aggravating circumstance that renders a defendant *eligible* for the upper term sentence has been established in accordance with the requirements of *Apprendi* [*v. New Jersey* (2000) 530 U.S. 466] and its progeny, any additional fact finding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." (*Black II*, *supra*, 41 Cal.4th at p. 812.) Our Supreme Court further held: "It follows that imposition of the upper term does not infringe upon the defendant's

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6 See *Bradshaw*, *supra*, 462 U.S. at page 1044.

constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions." (*Id.* at p. 816.)

Black II made it clear that "'[r]ecidivism . . . is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence.' [Citation.]" (*Id.* at p. 818.) *Black II* held the prior conviction exception includes "not only the fact that a prior conviction occurred, but also other related issues that may be determined by examining the records of the prior convictions." (*Id.* at p. 819.) "The determinations whether a defendant has suffered prior convictions, and whether those convictions are 'numerous or of increasing seriousness' (Cal. Rules of Court, rule 4.421(b)(2)), require consideration of only the number, dates, and offenses of the prior convictions alleged. The relative seriousness of these alleged convictions may be determined simply by reference to the range of punishment provided by statute for each offense. This type of determination is 'quite different from the resolution of issues submitted to a jury, and is one more typically and appropriately undertaken by a court.' [Citation.]" (*Id.* at pp. 819-820, fn. omitted.)

Here, the trial court found no circumstances in mitigation and noted its agreement with the aggravating circumstances listed in the prosecution's sentencing memorandum, adverting particularly to defendant's criminal history as showing defendant to be a "danger to society" and that his arrest record showed his criminal activities to be "of increasing seriousness." Our review of the sentencing memorandum and the probation officer's report demonstrates the existence of two recidivism factors.[7] Not only was defendant on probation at the time he committed the underlying offenses, but he had performed inadequately on probation, having run away from the "suitable placement" imposed by the juvenile court and having been convicted by a jury of murder and

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[7] "The trial court is presumed to have read and considered the probation report." (*Black II, supra,* 41 Cal.4th at p. 818, fn. 7.)

attempted murder. "These factors can be determined by reference to 'court records' pertaining to appellant's prior convictions, sentences and paroles." (*People v. Yim* (2007) 152 Cal.App.4th 366, 371.) The probation report's criminal history entries revealed, as a matter of law, that defendant committed new offenses while on probation. (See *ibid.*)

Because defendant's "criminal history" established aggravating circumstances which independently satisfied Sixth Amendment requirements and rendered him eligible for the upper term, "he was not legally entitled to the middle term, and his Sixth Amendment right to a jury trial was not violated by imposition of the upper term sentence . . . ." (*Black II, supra*, 41 Cal.4th at p. 820.)

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.