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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DARRYL GEORGE ROSEN, Defendant and Appellant.	C048139 (Super. Ct. No. 02F04042) ORDER MODIFYING OPINION AND DENYING REHEARING; CHANGE IN THE JUDGMENT

THE COURT:

It is ordered that the opinion filed in this case on March 27, 2007, be modified in the following particulars:

1. Delete the paragraph--beginning with the words, “We disagree with the People’s claim that the third factor”--on lines 22 through

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts III through VII.

27 of page 35 and continuing on lines 1 through 4 of page 36, and replace the deleted paragraph with the following:

We cannot say, as the People do, that if those two aggravating facts had been submitted to the jury, it unquestionably would have found them to be true and, thus, the *Apprendi/Blakely/Cunningham* error was harmless beyond a reasonable doubt. However, the court cited a third reason for imposing the upper term on count two--it could have imposed a consecutive sentence for the misdemeanor conviction on count six, but did not do so. (Cal. Rules of Court, rule 4.421(a)(7) [factors in aggravation include that the "defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed"]; further rule references are to the California Rules of Court.) In response to the prosecutor's inquiry, the court said it would impose the upper term based on this fact alone. Thus, we turn to whether the use of this fact to impose the upper term ran afoul of *Apprendi*, *Blakely*, and *Cunningham*.

To qualify for a consecutive sentence, the count six conviction had to involve either (1) a criminal act and objective that were "predominantly independent of" the other crimes, or (2) a criminal act that was committed at a different time or in a separate place than the other crimes, "rather than being committed so closely in time and place as to indicate a single period of aberrant behavior." (Rule 4.425(a)(1) & (a)(3).) Because the fact that defendant could have been given a consecutive term for count six was instead used to impose the upper term on count two, *Apprendi*, *Blakely*, and *Cunningham* require that at least one of the factors necessary to impose the

consecutive sentence was submitted to the jury and found true beyond a reasonable doubt.

Defendant was convicted of three offenses involving victim S.D. Count six, misdemeanor sexual battery, was based on defendant touching S.D.'s breasts with his hand, over her clothing, while they were in the kitchen of her home. Count seven, felony sexual battery, was based on defendant taking S.D. into the garage of her home, lifting up her T-shirt, grabbing the nipples of her breasts with his hands, and pinching them while telling her how big her breasts were and saying that he wanted to suck them. Count eight, felony assault by a public officer, was based on defendant taking S.D. into her mother's bedroom, telling S.D. that he wanted to "suck [her] big titties," grabbing her hand, and rubbing it across his penis over his clothing while saying that he wanted to "fuck" her.

S.D. testified that each offense occurred on a separate day in a separate place in her home. Consequently, by convicting defendant of all three offenses, the jury necessarily found that the crimes were independent of each other and that they were committed at different times and in separate places, rather than during a single period of aberrant behavior. (Rule 4.425(a)(1) & (a)(3).) In other words, the facts justifying a consecutive sentence for count six were submitted to the jury and were found to be true beyond a reasonable doubt. Thus, the fact that the court could have imposed a consecutive sentence on count six, but did not do so, could be used by the court to impose the upper term on count two, a crime against victim D.C., without violating the holdings of *Apprendi*, *Blakely*, and *Cunningham*.

Nevertheless, defendant argues that the decision not to impose a consecutive sentence for the misdemeanor conviction "cannot count as a reason to impose the upper term" for the felony count two conviction because, in his view, rule 4.421(a)(7) "was only intended to justify the imposition of an upper term where there is a consecutive state prison term available, but not utilized." This is so because, in defendant's view, "consecutive county jail time could not have been imposed to a state prison term of this length (eight years, eight months without the upper term)" or, at least, "would be highly unusual[.]" The contention fails because it is unsupported by any legal authority (*People v. Gurul*e (2002) 28 Cal.4th 557, 618; *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1159) and the language and purpose of the rule do not compel such an interpretation. That the upper term for the felony resulted in a longer period of confinement than would have occurred if the court imposed a consecutive sentence for the misdemeanor does not aid defendant. "Neither case law nor statutory authority restricts or precludes a sentencing judge from exercising discretion to impose a concurrent rather than a consecutive sentence for the purpose of lengthening a defendant's term of incarceration." (*People v. Lepe* (1987) 195 Cal.App.3d 1347, 1351.)

For the reasons stated above, imposition of the upper term for the count two felony conviction, based on the fact that the court could have imposed a consecutive sentence for the count six misdemeanor conviction but did not do so, did not run afoul of *Apprendi*, *Blakely*, and *Cunningham*.

Because the trial court indicated that this single factor in aggravation was sufficient to impose the upper term, the fact that

other factors were not submitted to the jury is necessarily harmless. (See *People v. Cruz* (1995) 38 Cal.App.4th 427, 433 [single valid factor sufficient to justify upper term].)

2. Delete the paragraph on lines 6 through 17 on page 36, under the heading DISPOSITION, and replace the deleted paragraph with the following:

The judgment is affirmed.

These modifications change the judgment.

The petition for rehearing is denied.

FOR THE COURT:

SCOTLAND, P.J.

SIMS, J.

BUTZ, J.