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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

LO KUAN SAECHAO,

Defendant and Appellant.

F050431

(Super. Ct. No. 29810)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Merced County. Ronald W. Hansen, Judge.

John Ward, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Brian Alvarez and Kathleen A. McKenna, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Cornell, J. and Hill, J.

A jury convicted defendant Lo Kuan Saechao of attempted sexual battery (Pen. Code,[1] § 243.4, subd. (a); count 1), corporal injury to a spouse or cohabitant (§ 273.5, subd. (a); count 2), unlawful taking or driving a vehicle (Veh. Code, § 10851, subd. (a); count 3), and false imprisonment (§ 236; count 4). In a bifurcated proceeding, the court found true the enhancement allegation in each count that defendant suffered a prior juvenile adjudication for a serious or violent felony (i.e., robbery) on April 3, 1993. Subsequently, the court granted defendant's motion to strike the prior adjudication, and sentenced defendant to a total prison term of five years two months as follows: the upper term of four years on count 2, plus six months on count 1 (one-third the middle term), and eight months on count 3. Defendant's sentence on count 4 was stayed under section 654.

On appeal, defendant contends: (1) the trial court erred by admitting evidence of prior acts of domestic violence under Evidence Code section 1109 because the statute is unconstitutional; and (2) the trial court erred by imposing the upper term based on facts not found by a jury. We affirm.

FACTS

On the night of September 20, 2005, defendant approached his former girlfriend, Muang Saeturn, in the parking lot as she was leaving her place of work. Defendant asked to talk to her and for a ride home. Saeturn initially declined, but when she unlocked the door of her car, defendant got into the back seat. Feeling bad for defendant because it was cold outside, Saeturn decided to give him a ride home. During the drive, defendant moved up to the front passenger seat and the two argued. Defendant asked Saeturn who her boyfriend was and told her he wanted to have sex with her. Saeturn told defendant she was not going to have sex with him because they were not together.

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[1] Further statutory references are to the Penal Code unless otherwise specified.

When they arrived at defendant's apartment, they stayed in the car and argued for about 20 to 30 minutes. Saeturn testified that defendant wanted to continue talking about having sex and Saeturn's relationships with other guys. During this time the argument became physically violent. Defendant took Saeturn's car keys out of her hands, forced himself into the driver's seat, and threw Saeturn into the passenger's seat. He also bit Saeturn on the arm a couple times.

Eventually, defendant exited the car and went inside his house. Saeturn followed him inside because she wanted to get her keys back. Once inside, defendant locked the door and pushed Saeturn onto the couch. He got on top of her and tried to unbutton her pants. Defendant told Saeturn he wanted to have sex with her. Saeturn, who was crying and screaming, told defendant no. At some point as Saeturn was struggling to get away from defendant, he bit her on the back.

Saeturn eventually was able to get up and open the front door. Defendant followed her outside and told her he would throw her keys in the bushes. Saeturn told him, "'Go ahead. I['d] rather be outside looking than be inside the house with you.'" Saeturn then went to a neighbor's house and called 911. Without Saeturn's permission, defendant got into Saeturn's car and drove away. While Saeturn was speaking with the 911 dispatcher, defendant returned and asked her if she wanted her car back. Saeturn replied, "'…no … it's not a joke.'" Defendant then drove away again.

Merced City Police Corporal Allen Ward responded to the 911 call. When he arrived, Saeturn was standing outside on the sidewalk crying. Initially, Saeturn told Corporal Ward that her ex-boyfriend had just stolen her car. As Saeturn kept talking, it became evident that more than a car theft had occurred, and he started asking her questions about domestic violence. Officer Ward also saw bite marks on Saeturn's arm and photographed them. But the digital photographs were accidentally lost during the process of transferring them to a computer. Officer Ward understood that the bites had occurred inside defendant's apartment.

The prosecution offered evidence of prior acts of domestic violence against defendant's ex-wife, Maily Moua, during an incident in November 2002. Moua testified that after their relationship ended, she was staying at a friend's house, when defendant unexpectedly arrived at the house early in the morning. An argument ensued, during which defendant pushed Moua around. The responding police officer observed bruises on one of Moua's arms.

The defense

According to defendant's version of what occurred on September 20, 2005, he saw Saeturn at the store where she worked and she agreed to his request to give him a ride home. They did not argue on the ride home. When they arrived, Saeturn parked her car and came inside with defendant. They went to his bedroom, watched television for a while, and then started kissing and "making out."

Defendant undressed Saeturn and himself. As he was undressing Saeturn, he bit her on the elbow. She asked him to bite her again and he did. They then started having sex. Defendant was behind Saeturn, when she told him to bite her on the back. Defendant bit her back on her bare skin. Defendant claimed Saeturn liked "rough sex" and that biting was part of "normal sex" for them.

After they had sex, Saeturn asked defendant why he had not come over or called her. He told her had had been "busy working" and "kicking it" with his friends. Saeturn became angry when he admitted that he had been hanging around with a girl. She then asked defendant if he had any money for her, and he said no because he had been shopping a lot recently. After they argued about money, Saeturn became violent and started hitting defendant. Defendant asked Saeturn for her car keys, so he could take a drive while she calmed down. Saeturn gave him her keys, and he drove away in her car with her permission.

Defendant drove to his sister's house, where he stayed for a while, watching a movie. He tried to call Saeturn's cell phone but was unable to reach her. He eventually

called her at her mother's house. Because Saeturn was still mad at him, he dropped her car off at a McDonald's restaurant for her to pick up. After dropping off the car, defendant's sister picked him up and he spent the night at her house.

The next morning, defendant's sister drove him back to his apartment. He realized he had Saeturn's cell phone when it started ringing. Saeturn then came over to pick up her phone and told defendant she was going shopping. Saeturn was nice to defendant and he did not think anything was wrong. He did not know she had called the police or made any reports against him.

Defendant acknowledged he had problems in the past with his ex-wife, Maily Moua, and had been arrested. During the incident in 2002, Moua was staying with a friend when defendant came to see her. When he arrived, he saw one of his male friends jumping over the fence. He confronted Moua, held her wrists, and caused her bruising. Defendant acknowledged a second incident occurred in June 2003, but claimed not to have a clear memory of that incident. On cross-examination, he denied that in the summer of 2003, he took Moua's cell phone or bit her on the arm.

Rebuttal

Moua testified that in June 2003, she reported her cell phone had been stolen. The circumstances were that defendant had showed up at her house and after he left, the phone was gone. She also reported an incident, which had occurred a few days earlier. Moua testified that defendant "came to the house and then questioning my whereabouts and then he was biting me." Moua testified that defendant bit her on the right arm, leaving a large bruise.

Saeturn denied defendant's version of what occurred on the night of September 20, 2005. She also disputed defendant's claim that she enjoyed rough sex, and testified she never allowed defendant to bite her during their relationship.

DISCUSSION

I. Evidence Code section 1109

Defendant contends the trial court erred by admitting evidence of his prior acts of domestic violence against Maily Moua under Evidence Code section 1109.[2] Defendant argues that Evidence Code section 1109, on its face, violates constitutional due process guarantees. We disagree.

The appellate courts have repeatedly rejected challenges to Evidence section 1109 on due process grounds. (*People v. Hoover* (2000) 77 Cal.App.4th 1020, 1025-1029; *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095-1096; *People v. James* (2000) 81 Cal.App.4th 1343, 1353; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1309-1310; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1331-1334; *People v. Johnson* (2000) 77 Cal.App.4th 410, 416-419.) These cases relied on *People v. Falsetta* (1999) 21 Cal.4th 903, in which the Supreme Court concluded that a similar statute, Evidence Code section 1108, did not violate due process because the trial court's discretion to exclude evidence under Evidence Code section 352 provides a procedural safeguard against prejudice. We likewise conclude *Falsetta's* analysis is applicable to Evidence Code section 1109 and, for the reasons explained in these cases, reject defendant's due process challenge to the statute.

II. Imposition of the upper term

Defendant contends the upper-term sentence imposed on count 2 violates his Sixth Amendment and Fourteenth Amendment rights to a jury trial and proof of all facts beyond a reasonable doubt rights because the sentence was based on aggravating factors not reflected in the jury verdict or admitted by defendant. (*Blakely v. Washington* (2004)

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2 Evidence Code section 1109 provides: "(a)(1) Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352."

542 U.S. 296 (*Blakely*); *Cunningham v. California* (Jan. 22, 2007, No. 05-6551) 546 U.S. __ [127 S.Ct. 856] (*Cunningham*).).

The trial court explained its decision to impose the upper term as follows:

> "The Court selects the upper term because the factors in aggravation that the Court relies upon that he took advantage of a past relationship. He took advantage of a position of trust. He also – the fact that he hasn't learned. He had a prior misdemeanor DV, attended the class and still engages in similar violent behavior with his significant other whether it's a spouse or girlfriend. [¶] And under those factors – there are no factors in mitigation the Court finds meaningful and, therefore, the Court selects the upper term and sentences him to four years on Count 2."

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), a five-justice majority of the United States Supreme Court held, "Other 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." (*Id.* at p. 490.) *Blakely* held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. [Citations.]" (*Blakely*, *supra*, 542 U.S. at p. 303, italics omitted.) In *Cunningham*, the court held that, under California's determinant sentencing scheme, the upper term can only be imposed if the factors relied upon comport with the requirements of *Apprendi* and *Blakely*. (*Cunningham*, *supra*, 546 U.S.___ [127 S.Ct. 856].)

Blakely describes three types of facts that a trial judge can properly use to impose an aggravated sentence: (a) "'the fact of a prior conviction'" (*Blakely*, *supra*, 542 U.S. at p. 301); (b) "facts reflected in the jury verdict" (*id.* at p. 303, italics omitted); and (c) facts "admitted by the defendant" (*ibid.*, italics omitted). The first type is at issue here. As *Apprendi* states, and *Blakely* agrees, prior recidivist conduct may be used by a sentencing judge, even absent a jury finding, to increase a defendant's term. (*Apprendi*, *supra*, 530 U.S. at pp. 488, 490; *Blakely*, *supra*, 542 U.S. at p. 301.)

In this case, the trial court clearly relied on defendant's recidivism in making its sentencing decision. The probation officer's report reflects that in 2003, defendant was convicted of misdemeanor corporal injury to a spouse or cohabitant and received a probationary sentence. The trial court specifically noted defendant's prior conviction, his apparent failure to learn from that conviction, and his repetition in the instant offense of the same type of conduct underlying his prior conviction. Because the court expressly relied on defendant's prior conviction and recidivism to impose the upper term, defendant's sentence does not violate *Apprendi*, *Blakely*, or *Cunningham*. (See *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 243 [recidivism is traditional, if not most traditional, basis for increasing offender's sentence].)

Assuming arguendo that the trial court erred in relying on other aggravating factors, the error was harmless. It is settled that only a single aggravating factor is required to impose the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728.) Here, the trial court relied on defendant prior conviction and recidivism to impose the upper term, as permitted by *Cunningham* and *Blakely*. Thus, even if we were to assume error under *Cunningham* based on the trial court's reference to other aggravating factors, the error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24; furthermore, there was no abuse of discretion under *People v. Watson* (1956) 46 Cal.2d 818, 836. The factors chiefly relied upon by the trial court in choosing the upper term flowed from defendant's prior conviction, strongly suggesting the trial court would have imposed the upper term based on the prior conviction even in the absence of any impermissible factors. Under these circumstances, remand for resentencing is unnecessary.

DISPOSITION

The judgment is affirmed.