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Opinion following remand by United States Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. SAMUEL SALDANA, Defendant and Appellant.	H027313 (Santa Clara County Super. Ct. No. CC325179)

Defendant Samuel Saldana was convicted after jury trial of two counts of carjacking (Pen. Code, § 215; counts 1 & 4),[1] and three counts of second degree robbery (§§ 211, 212.5, subd. (c); counts 2, 3 & 5). The jury also found true allegations that defendant was armed with a handgun (§ 12022, subd. (a)(1)) during the commission of all the offenses, and that he personally used a handgun (§ 12022.53, subd. (b)) during the commission of counts 1, 2, 4 and 5. Defendant admitted having served a prior prison term. (§ 667.5, subd. (b).) The trial court sentenced defendant to 26 years, four months in state prison.

[1] All further statutory references are to the Penal Code.

On appeal defendant contended that (1) the trial court erred in failing to honor his timely request to proceed in propria persona, (2) the court misinstructed the jury on the use of evidence of uncharged offenses, (3) the court prejudicially erred when it gave CALJIC No. 2.03, (4) the cumulative effect of the above errors denied him due process, (5) the court's imposition of an upper term on the one count and consecutive terms on two others violated *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), (6) the order to pay attorney's fees is not supported by substantial evidence, and (7) clerical errors in the abstract of judgment should be corrected. On August 18, 2005, we struck the order to pay attorney's fees, ordered the abstract of judgment corrected to accurately reflect the trial court's sentence, and affirmed the judgment as so modified. Our Supreme Court denied review, but the United States Supreme Court granted defendant's petition for a writ of certiorari, vacated our opinion, and remanded the matter back to us for reconsideration in light of *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*).

Upon reconsideration of the *Blakely* issue following *Cunningham*, we find that the matter must be reversed and remanded for resentencing.[2]

BACKGROUND

Defendant was charged by information with two counts of carjacking (§ 215, counts 1 & 4), and three counts of second degree robbery (§§ 211, 212.5, subd. (c); counts 2, 3 & 5). The information also alleged that defendant was armed with a handgun (§ 12022, subd. (a)(1)) during the commission of all of the offenses, that he personally

[2] Our discussion of the other issues raised by defendant, with the exception of the issues of attorney's fees and clerical error, is identical to our original opinion in this case. We include the discussion here because our original opinion was vacated. We have not revisited the issues that were not impacted by our determination of the need to remand the matter for resentencing.

used a handgun (§ 12022.53, subd. (b)) during the commission of counts 1, 2, 4 and 5, and that he had served a prior prison term (§ 667.5, subd. (b)).

The Prosecution's Case

Uncharged offenses

On August 27, 2003, around 3:50 a.m., Brenda Bass was sitting in her green Cadillac with the windows rolled up outside her apartment complex in Sacramento, waiting for somebody to open the security gate. Defendant walked up to her car and asked her the time. She looked at him but pretended that she could not hear him. She then looked down to start her ignition and heard something metal tap her window. When she looked up she saw a gun pointed at her face. Defendant told her to open her car door. She was afraid and did so. She reached for her briefcase but he told her to leave it. She asked if she could get her paperwork and he let her take it. She got out of the car and noticed that there was another man standing by her car with a sweatshirt tied in such a way that she could not see his face. This man told her that he would bring her car back the next day. The two men drove off in Bass's Cadillac and she ran into her apartment complex.

Bass called the police from her apartment and they arrived after about 10 minutes. About three or four days later, Bass picked up her Cadillac at the Concord Police Department. The car had been abandoned and was found by Concord police at 12:38 a.m. on August 29, 2003. Bass's purse, briefcase, CD cases, and several other items from the car were all missing and the car's brakes were not working. Some time later Bass got a call from the San Jose Police Department, who asked her to describe her keys. She was able to do so and then got her keys back in the mail. She identified defendant's picture in a photo lineup presented to her at the Sacramento Police Department.

Counts 4 & 5

Around 2:00 p.m. on August 28, 2003, Amy Garcia was walking to her silver Honda Civic, which was parked across the street from her sister's home in Concord, when she saw a green car driving slowing down the street. The five men inside the car looked at her. They then drove to the end of the block and turned around. Because she was concerned, Garcia quickly got into her car and locked the doors. The green car drove up and blocked Garcia's car from leaving. Defendant got out of the back of the green car, tapped on Garcia's car window, and asked her to get out of her car. She tried to ignore him but he continued to bang on the window. When she looked over she saw that defendant had a gun in his right hand. Defendant told Garcia that he would not hurt her as long as she got out of her car. He then swung the car door open and Garcia got out. She tried to take her purse and cell phone, but defendant told her to leave them in the car. She did so. Defendant got into Garcia's car and the green car moved. Defendant drove off with the four men in the green car following him.

Garcia ran back to her sister's house and her sister called 911. The police arrived within a few minutes. Her Honda was found at 8:30 p.m. that same day abandoned in San Jose. Garcia was shown a photo lineup on September 3, 2003, at the Concord Police Department and positively identified defendant as the carjacker. Garcia got her car and her purse back, but her credit cards and ATM card were not in her purse.

Count 3

Around 5:40 p.m. on August 28, 2003, Sandra Sialaris was sitting in her white Dodge Caravan in the parking lot of a McDonald's in San Jose with the driver's side window rolled down. A man approached her on the driver's side. He told her to give him her money and that he was going to kill her. She looked at him, shocked. He nodded to his hand, which he was waving. Sialaris looked over and saw that the man held a gun. Sialaris was afraid and gave the man her money, about $35 to $40. The man then turned and walked away, towards a silver Honda. He got in the passenger side of

the Honda and it drove away. Sialaris then drove home and called the police. She was able to get the license plate number of the Honda, and reported it. The license plate belongs to Garcia's Honda. Sialaris was later shown a photo lineup and identified Carlos Freelong as the man who robbed her.

Counts 1 & 2

On August 28, 2003, Jeannie Hylkema and her toddler arrived home around 6:00 p.m., and Hylkema drove her GMC Yukon up to the mailbox at her condominium complex in San Jose. A silver car pulled up parallel to her, and defendant approached her. Defendant flashed a gun and said, " 'Get out of the car.' " He told Hylkema that he wanted her purse and her money. Hylkema said that all she cared about was her child in the back seat. Defendant let Hylkema get the child out but told her to leave her purse. When Hylkema grabbed a black bag, defendant grabbed the straps of the bag and told her again that she was to leave her purse. Hylkema said that the bag was not her purse, but was a diaper bag. Defendant looked through the diaper bag and then let Hylkema take it. She then walked around the vehicle and opened the front passenger door in order to show defendant her purse.

Defendant got into the car, grabbed Hylkema's purse, and pulled out her wallet. He looked through the wallet and asked where the money was. Hylkema told him and said that it was all she had. After defendant took the money Hylkema asked if she could have her wallet back, and defendant returned it. Hylkema was also able to take her house keys. When she attempted to take her cell phone, defendant asked for it, saying that he did not want her to call the police. Hylkema gave defendant her cell phone. She then ran with her child to a neighbor's home where she called 911. An officer arrived within a few minutes. The LoJack and OnStar equipment in Hylkema's car was activated immediately.

Later that night, Hylkema was told that she could pick up her car in Tracy. She drove to the California Highway Patrol (CHP) substation, where she identified defendant during an in-field viewing. She picked up her car the next day. Inside the car were several items that did not belong to her: a portable CD player with a CD, Cadillac keys, a Wells Fargo ATM card for Amy Garcia, and a lighter. When Hylkema got her cell phone back, she found that one call had been made on it minutes after her car was taken. She saved the phone number called on the phone: 916-295-4281.

CHP Officer Joe Whitlock was notified around 7:48 p.m. on August 28, 2003, to be on the look out for a stolen Yukon heading eastbound toward Tracy. He stationed his motorcycle on an on-ramp to eastbound I-205, then pulled in behind a marked CHP car that was following the Yukon. The Yukon exited at Macarthur Boulevard. After turning into a residential neighborhood, the Yukon's occupants jumped out, leaving the car rolling in the middle of the road. Whitlock first detained the woman passenger. When a Tracy police officer arrived, Whitlock drove after the male driver, defendant. A canine officer had chased defendant "into some backyards." Whitlock detained defendant after Whitlock saw defendant jump back over a concrete wall.

Whitlock put defendant in a patrol car and headed back to where the Yukon had been abandoned. On his way there, a man flagged him down. The man told Whitlock that somebody had thrown a gun out of the Yukon. Whitlock followed the man back and retrieved a loaded revolver wrapped in a white washcloth from a dirt area next to the sidewalk. The gun and the Yukon were taken to the Tracy CHP office. Inside the Yukon were purses, credit cards, and Hylkema's cell phone.

A statement was taken from the female passenger who was arrested. Carlos Freelong was identified as being a third occupant of the Yukon, and an all points bulletin was issued for his arrest. Freelong was arrested on August 29, 2003, at 1:08 a.m., outside a 7-Eleven store in Tracy, eight-tenths of a mile from where the Yukon had been abandoned. He was carrying no weapons at the time he was arrested.

San Jose Police Sergeant Lawrence Ryan and Detective Mitchell accompanied defendant back to San Jose. They informed him of his *Miranda* rights[3] and defendant waived his rights. He said that he lived in Rancho Cordova and that he was picked up in Castro Valley at 7:00 p.m. by a friend and two others in the Yukon. He then drove the Yukon to Tracy on his way back to Sacramento. When he saw the CHP car following him, one of the Yukon's occupants told him that the car was stolen. The man pointed a gun at him and told him to keep driving. He tried to evade the officers. After he stopped the car, he and everybody else inside the car got out and ran. He denied being in either Concord or San Jose that day.

The Cadillac keys found in the Yukon belonged to Brenda Bass and were returned to her. The phone number 916-295-4281 is a cell phone registered to Hoa Brothers in Rancho Cordova. Brothers testified that she has known defendant for 15 years and that they are friends. She does not personally know Freelong, but knows that he is also defendant's friend. Defendant has used Brothers' cell phone in the past, and she has received calls for him on the phone.

Admission of Prior Allegation, Verdict and Sentencing

After the court received word that the jury had reached their verdicts, and outside the presence of the jury, defendant admitted the prison prior allegation. The jury found defendant guilty of all charges, and found all arming allegations to be true. The trial court sentenced defendant to 26 years, four months in state prison as follows: the aggravated term of nine years on count 1, with a consecutive 10-year term for the section 12022.53, subdivision (b) enhancement; a consecutive sentence of five years on count 4 (one third of the total of middle term of five years plus the 10-year section 12022.53, subdivision (b) enhancement); a consecutive term of one year,

[3] *Miranda v. Arizona* (1966) 384 U.S. 436.

four months on count 3 (one-third of the total of the middle term of three years plus the one-year section 12022, section (a)(1) enhancement); and a consecutive term of one year for the prison prior. Terms on all other counts and enhancements were ordered stayed pursuant to section 654. The court also ordered: "Attorneys fees not to exceed $2,000. If the defendant wants a hearing, he can ask for it."

DISCUSSION

Request for Self-Representation

On January 21, 2004, defendant made a motion for substitution of appointed counsel. (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).) The court heard and denied the motion. On the afternoon of February 17, 2004, the court heard and granted defense counsel's motions in limine, including his request for bifurcation of trial on the prison prior. It then made orders regarding jury voir dire to be held the following morning, bench conferences, the dates of trial, and the use of projection equipment. At that point, defense counsel informed the court that defendant wished to represent himself. The court stated, "It's too late now to represent himself unless he's ready to go to trial right now." Defendant responded, "I'm ready to go to trial right now." The court asked defendant, "You want to take this on yourself?" Defendant responded, "Yes, sir." Defendant then explained why he wished to represent himself, including that he had witnesses he wanted subpoenaed and that he wished to impeach the officers and to file a *Pitchess* motion[4] as to them. The prosecutor stated that the two people defendant wished to subpoena were in state prison and that an order to produce them could be made if necessary. The court asked defendant, "If I let you represent yourself, are you going to be ready to go into jury selection tomorrow morning and begin examining witnesses tomorrow afternoon?" When defendant responded, "No, your Honor, I'm not," the court

[4] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

ruled: "Then you're not going to represent yourself. Because this is a trial department. It was assigned here this morning. [¶] . . . [¶] The D.A. has his witnesses lined up. [Defense counsel] is ready. You're not -- " After being interrupted by defendant the court continued: "All right. Anyway, for the record, this matter was assigned here on the trial calendar this morning. There was no indication in front of [the master trial calendar judge] that the defendant wanted to represent himself. The D.A. is ready for trial. [Defense counsel] is ready for trial. If the defendant was to represent himself, as of today he would not be ready for trial based on what he's told me. And what he has told me would not be grounds for a continuance. So his motion to represent himself is denied at this time."

Defendant contends that his request for self-representation the day before trial was timely and should have been granted. He further contends that, even if the request was untimely, the trial court abused its discretion by denying it without conducting an adequate inquiry.

It is settled that a defendant must assert the right to self-representation "within a reasonable time prior to the commencement of trial." (*People v. Windham* (1977) 19 Cal.3d 121, 128, fn. omitted.) "The 'reasonable time' requirement is intended to prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice." (*People v. Burton* (1989) 48 Cal.3d 843, 852 (*Burton*).) When a request for self-representation is timely made and otherwise proper, the trial court must grant the request and the refusal to grant it is reversible error per se. (*People v. Joseph* (1983) 34 Cal.3d 936, 946-948; *McKaskle v. Wiggins* (1984) 465 U.S. 168, 177, fn. 8.)

California courts have declined to establish a bright line-rule for determining when a motion is timely. (*People v. Clark* (1992) 3 Cal.4th 41, 99.) However, requests made on or after the scheduled trial date are routinely deemed untimely. (*Burton*, *supra*, 48 Cal.3d at p. 853; *People v. Moore* (1988) 47 Cal.3d 63, 78-81; *People v. Horton*

(1995) 11 Cal.4th 1068, 1110-1111; *People v. Perez* (1992) 4 Cal.App.4th 893, 903-904; *People v. Hall* (1978) 87 Cal.App.3d 125, 132-133; see also *People v. Ruiz* (1983) 142 Cal.App.3d 780, 790, fn. 5.)

When the request is not timely made, self-representation is no longer a matter of right but is subject to the trial court's discretion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 959.) The trial court should consider the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion. (*People v. Windham*, *supra*, 19 Cal.3d at p. 128; *Burton*, *supra*, 48 Cal.3d at p. 853.) On appeal, we do not lightly disturb the trial court's exercise of such discretion. (*Burton*, *supra*, 48 Cal.3d at p. 852.)

In this case, defendant did not request self-representation until after the case had been called for trial, both counsel had indicated that they were ready for trial, and the trial court had heard pretrial motions and had made other orders regarding trial procedures. Defense counsel had been representing defendant for a number of months and defendant's request to substitute counsel had been denied about one month prior to the request for self-representation. Voir dire was to begin the next morning. Under the circumstances, the request was clearly directed to the sound discretion of the trial court. (See *Burton*, *supra*, 48 Cal.3d at p. 853.)

The trial court gave defendant ample opportunity to inform the court of the reasons for his dissatisfaction with counsel, and defendant told the court that his previous *Marsden* motion had been denied. The trial court had also heard and ruled on defense counsel's motions in limine. The court was therefore familiar with the quality of defense counsel's representation of defendant as well as defendant's prior request to substitute counsel. The prosecutor told the court that both of defendant's proposed witnesses were in state prison, so that an order to produce them could be filed. Defendant told the court

that he would not be ready to go to trial the next day, so that a disruption or delay of some unspecified time would be expected to follow the granting of the motion. On this record we cannot say that the trial court abused its discretion in denying defendant's request for self-representation.

CALJIC No. 2.50

Defendant did not raise an objection when the court informed the parties that it intended to give the amended version of CALJIC No. 2.50 proposed by the prosecutor. The court instructed the jury pursuant to the proposed instruction that: "Evidence has been introduced for the purpose of showing that the defendant committed a crime other than that for which he is on trial. [¶] This evidence, if believed, may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show: [¶] A characteristic method, plan, or scheme in the commission of criminal acts similar to the method, plan, or scheme used in the commission of the offense in this case, which would further tend to show the existence of the intent which is a necessary element of the crimes charged or the identity of the person who committed the crime, if any, of which the defendant is accused, or a clear connection between the other offense and the one which the defendant is accused so that it may be inferred that if a defendant committed the other offense, defendant also committed the crimes charged in this case; [¶] Or a motive for the commission of the crimes charged; [¶] Or the defendant had knowledge of the nature of the things found in his possession; [¶] The defendant . . . had knowledge or possessed the means that might be useful or necessary for the commission of the crimes charged; [¶] The crimes charged is part of a larger continuing plan, scheme, or conspiracy[.] [¶] For the limited purpose for which you may consider this evidence, you must weigh it in the same manner as you would all other evidence."

Defendant contends that the uncharged Sacramento offenses were not sufficiently similar to the charged offenses to show identity, and thus the trial court erred in instructing the jury that they could consider whether the other crimes evidence tended to show a similar plan or scheme which would further show identity. Defendant contends that the identity of the perpetrator was the entire defense in the case and that the instruction lowered the prosecution's burden of proof on the issue of identity in violation of his constitutional rights to due process and trial by jury.

Evidence of uncharged offenses is admissible to prove the identity of the perpetrator of the charged offenses or the existence of a common design or plan. (Evid. Code, § 1101.) However, "[t]o be relevant to prove identity, the uncharged offenses must be highly similar to the charged offenses, while a lesser degree of similarity is required to establish relevance to prove common design or plan, . . ." (*People v. Lenart* (2004) 32 Cal.4th 1107, 1123 (*Lenart*); *People v. Kipp* (1998) 18 Cal.4th 349, 369.) " 'On appeal, the trial court's determination of this issue, being essentially a determination of relevance, is reviewed for abuse of discretion.' [Citation.]" (*Lenart, supra*, 32 Cal.4th at p. 1123.)

We believe that the uncharged Sacramento offenses were sufficiently similar to the charged offenses to support admission of the evidence of the uncharged offenses to show identity as well as the existence of a common design or plan. In each of the two charged carjackings defendant pulled up to the victims' cars in another car which had been the subject of a previous carjacking. The victims were women who each appeared to be alone in her own car in an area and at a time nobody else was around. Defendant brandished a gun and told the women to get out of their cars. When the victims did so, he prevented them from taking their purses and cell phones. He then drove off in their cars.

In the uncharged carjacking defendant approached a woman who appeared to be alone in her car in an area and at a time nobody else was around, brandished a weapon and told her to get out of her car. When she did so, he prevented her from taking her

purse and he drove off in the car. The car was then used by defendant in a subsequent charged carjacking. We conclude that the trial court did not err by admitting the evidence of the uncharged offenses on the issue of identity or by instructing the jury that it could consider the evidence on the issue of identity as well as on the issue of common plan or scheme.

We also find that CALJIC No. 2.50 did not lower the prosecution's burden of proof on the issue of identity. In reviewing a purportedly erroneous instruction, " 'we inquire "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.' [Citations.] In conducting this inquiry, we are mindful that ' "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." ' [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 957.)

In addition to CALJIC No. 2.50, the trial court instructed the jury pursuant to CALJIC No. 1.01 to consider the instructions as a whole and each in light of all the others. It instructed the jury pursuant to CALJIC No. 2.90 that defendant was presumed innocent and that the prosecution had the burden of proving defendant's guilt beyond a reasonable doubt. In addition, the court instructed the jury pursuant to CALJIC No. 2.50.1 that before it could consider the uncharged offense evidence for any purpose it must find by a preponderance of the evidence that defendant committed the uncharged offense, but that even if it finds that the uncharged crimes were committed by a preponderance of the evidence it must still find defendant guilty of a charged crime beyond a reasonable doubt. Lastly, the court also instructed the jury pursuant to CALJIC No. 2.01 that each fact necessary to establish defendant's guilt must be proved beyond a reasonable doubt. There is no reasonable likelihood that the jury applied CALJIC No. 2.50 in a way that lowered the prosecution's burden of proving defendant's identity beyond a reasonable doubt.

CALJIC No. 2.03

Defendant did not raise an objection when the court informed the parties that it intended to give CALJIC No. 2.03. The court instructed the jury pursuant to CALJIC No. 2.03 that: "If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide."

Defendant contends that the court prejudicially erred by giving CALJIC No. 2.03 because his statement to police was "just as likely to have been in good faith as to have been deliberately false or misleading." "Instructing this jury on deliberate falsehoods indicative of consciousness of guilt just because [defendant's] statements of alibi conflicted with prosecution eyewitness identifications was quite unfair." He contends the error was prejudicial because the instruction deprived him of his only defense and diluted the presumption of innocence.

Defendant did not testify at trial. When interviewed after being arrested on August 28, 2003, defendant told the police that he did not know that the Yukon was stolen until he saw a CHP officer following him near Tracy, and he denied being in either Concord or San Jose that day. The victims' testimony directly contradicts defendant's statement. One victim testified that defendant carjacked her silver car that day in Concord, and another victim testified that later that same day in San Jose defendant drove up to her Yukon in a silver car then carjacked the Yukon. If the jury believed the victims' testimony it could reasonably have found defendant's statement to the police was willfully false and deliberately misleading. From this, the jury could have inferred a consciousness of guilt. Accordingly, the trial court properly instructed the jury with CALJIC No. 2.03. (*People v. Edwards* (1992) 8 Cal.App.4th 1092, 1103-1104; *People v. Arias* (1996) 13 Cal.4th 92, 141.)

Cumulative Error

Defendant contends that the cumulative effect of the errors discussed above deprived him of his constitutional right to due process and a fair trial, requiring reversal of the judgment. As we have found no error or abuse of discretion, we reject this contention.

Blakely issues

Defendant contends that the trial court's imposition of the upper term on count 1 and consecutive terms on counts 3 and 4 violated his right to a jury trial as found by the United States Supreme Court in *Blakely*. We originally rejected defendant's contentions based on our Supreme Court's decision in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*), overruled in part by *Cunningham, supra*, 459 U.S. ___. Following the United States Supreme Court's remand order, we asked the parties to submit supplemental briefing regarding the application of *Cunningham* to this case. In his supplemental brief, defendant argues that "the decision in *Cunningham* overruling *Black* squarely supports [his] sentencing claims, notably his challenge to the upper term under Count 1."

Respondent argues in the supplemental brief that the decisions in *Blakely* and *Cunningham* do not apply to the imposition of consecutive sentences, and that our Supreme Court's decision in *Black* that *Blakely* is inapplicable to the decision whether to run individual sentences consecutively or concurrently remains binding on this court. Respondent further argues that any error by the trial court in imposing the upper term on count 1 is harmless beyond a reasonable doubt "because all of the facts upon which the trial court relied were overwhelming established by the evidence at trial and were undisputed."

We agree with respondent that the decision in *Cunningham* did not address consecutive sentencing, and therefore we remain bound by the California Supreme Court's ruling in *Black*, *supra*, 35 Cal.4th at page 1262, that a defendant's Sixth

Amendment right to a jury trial is not violated when the trial court exercises its discretion under section 669 to determine whether to impose sentences consecutively or concurrently. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Before imposing the aggravated term on count 1, the trial court stated: "As far as the circumstances in aggravation and mitigation are concerned, the following would apply: [¶] Under California Rule of Court [rule] 4.421, the circumstances in aggravation, the Court finds as applicable (a)(1) [that the crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness]; [¶] (a)(8), and that one is the manner in which the crime was carried out, indicating planning, sophistication, or professionalism, as shown by the evidence during the course of the trial, the areas and the times that the crimes were committed, and the fact that the defendant and his cohorts picked on female victims shows planning; [¶] (a)(9), the crime involved an attempt or actual taking or damage of great monetary value. While, obviously, a vehicle is of great monetary value, at least two of the cars here, whether you want to call them inflated prices or not, were of more than normal value; [¶] (b)(1) would be applicable[, that the defendant engaged in violent conduct which indicates a serious danger to society]. [¶] And, in addition, the evidence showed that the victim in . . . Counts 1 and 2 had a baby in the car when he picked on her. [¶] . . . [¶] And the Court finds that any one of these . . . circumstances in aggravation would be sufficient to aggravate the offenses . . . ."

Defendant challenges the trial court's imposition of an upper term on count 1 based on factors that were neither admitted by him nor found true beyond a reasonable doubt by a jury. In *Cunningham*, the United States Supreme Court held that California's sentencing scheme violates the Sixth Amendment to the extent that it does not require jury findings beyond a reasonable doubt on the aggravating circumstances that are necessary to support the imposition of an aggravated term. Here, all of the five circumstances in aggravation that the trial court found as to count 1 were facts that were

not found true by the jury beyond a reasonable doubt. Therefore, the imposition of the aggravated term on count 1 violates the Sixth Amendment, and reversal is required unless the error was harmless beyond a reasonable doubt. (*Washington v. Recuenco* (2006) 548 U.S. ___ [126 S.Ct. 2546].) We cannot find this error harmless beyond a reasonable doubt, so we must reverse and remand for resentencing.[5]

Attorney's fees

"In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, . . . the court may, after notice and a hearing, make a determination of the present ability to pay all or a portion of the cost thereof." (§ 987.8, subd. (b).) "If the court determines that the defendant has the present ability to pay all or a part of the cost, the court shall set the amount to be reimbursed and order the defendant to pay the sum to the county . . . ." (§ 987.8, subd. (e).)

" 'Ability to pay' means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, and shall include, but not be limited to, all of the following: [¶] (A) The defendant's present financial position. [¶] (B) The defendant's reasonably discernable future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant's reasonably discernable future financial position. Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernable future financial ability to reimburse costs of his or her defense. [¶] (C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing. [¶] (D) Any other factor or factors which may bear upon the defendant's

[5] As defendant must be resentenced, we need not address defendant's contention regarding clerical errors in the abstract of judgment.

financial capability to reimburse the county for the costs of the legal assistance provided to the defendant." (§ 987.8, subd. (g)(2).)

Defendant contends that the order that he pay $2,000 in attorney's fees was imposed without even minimal compliance with statutory procedures, as there was no prior notice of his hearing rights and no hearing before the fees were imposed. Defendant's due process right to notice was protected when the probation officer's report included attorney fees in its recommendation for issues to be considered at the sentencing hearing, even though the report did not include a recommended amount. (*People v. Phillips* (1994) 25 Cal.App.4th 62, 66, 74 (*Phillips*).) "[S]ection 987.8 does not contain any language either mandating a separate hearing or prohibiting consideration of reimbursement for legal costs as part of the sentencing process." (*Id*. at p. 76.) As defendant did not request a separate hearing, even when invited to do so by the trial court, the court was not compelled to hold one. (*Ibid*.)

Defendant further contends that the attorney's fees order is unsupported by substantial evidence of his present ability to pay or evidence of the actual amount of the fees. An attorney's fees order is not mandatory under section 987.8, and a determination that a defendant has the ability to pay need not be express, but may be implied through the content and conduct of the hearings. (*Phillips*, *supra*, 25 Cal.App.4th at p. 71.) While the finding of a present ability to pay may be implied, the attorney's fees order cannot be upheld on appeal unless it is supported by substantial evidence. (*People v. Nilsen* (1988) 199 Cal.App.3d 344, 347; *People v. Kozden* (1974) 36 Cal.App.3d 918, 920.)

In this case, defendant was sentenced to prison for 26 years, four months. After sentencing defendant to state prison, the trial court did not expressly find unusual circumstances warranting its implied finding that defendant, nevertheless, had a reasonably discernable future financial ability to pay the ordered attorney's fees.

(§ 987.8, subd. (g)(2)(B).) The probation report states that defendant last worked in 2002, but does not otherwise state defendant's "present financial position." (§ 987.8, subd. (g)(2)(A).) Respondent does not dispute the absence of evidence to support an implied finding of ability to pay the ordered fees. As there is nothing in the record to support a finding that defendant had the ability to pay the ordered fees, upon remand the court must either strike the order to pay $2,000 in attorney's fees or conduct a hearing to determine whether there are unusual circumstances warranting a finding that defendant has the ability to pay attorney's fees. (Cf. *People v. Flores* (2003) 30 Cal.4th 1059, 1068-1069.)

DISPOSITION

The judgment is reversed, and the matter is remanded for resentencing and a hearing on defendant's ability to pay attorney's fees.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MIHARA, J.

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MCADAMS, J.