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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. PIETRO G. SARTORESI, Defendant and Appellant.	E040119 (Super.Ct.No. FVI 018458) OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin, Judge. Affirmed.

Rodger Paul Curnow, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Rhonda Cartwright-Ladendorf, Supervising Deputy Attorney General, and Christine Levingston Bergman, Deputy Attorney General, for Plaintiff and Respondent.

1. Introduction[1]

A jury convicted defendant of one count of attempted murder against Joseph Mooyman; three counts of assault with a firearm against Mooyman, Hilda Franson, and Susan Rios; and two counts of criminal threats against Franson and Rios. (§§ 664/187; 245, subd. (a)(2); 422.) The jury also found true various other special allegations and the court found true the alleged prior convictions. (§§ 667.5, subds. (b)-(i); 1107.1, subds. (a)-(d); 12022.5, subd. (a); 12022.53, subd. (d); 12022.7, subd. (a).) The court sentenced defendant to state prison for a determinate sentence of 31 years eight months, and a consecutive indeterminate term of 25 years to life.

On appeal, defendant contends the court erred by not instructing the jury on attempted voluntary manslaughter based on the heat of passion. Defendant also challenges the sufficiency of the evidence for convictions on counts 3 and 4, making criminal threats to Franson and Rios. Finally, defendant urges there was sentencing error and section 12022.53, subdivision (d) is facially unconstitutional.

We hold there was no evidence to support a voluntary manslaughter instruction; the evidence was sufficient that defendant made criminal threats to Franson and Rios; the aggravated and consecutive sentencing was proper under *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] and section 12022.53 is not unconstitutional. We affirm the judgment.

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

2. Facts

Armed with a shotgun or rifle, defendant went to a house in Hesperia. Upon entering, he pointed the firearm at Jason, one of the occupants. Defendant was shirtless and the word "Redlands" was tattooed across his chest. He then knocked over a computer in the dining room where another person, Julian was working. He went up to a third person, Phillip, pointed the gun at him, then looked at Susan Rios and said, "You better do your homework." He pointed the gun at Rios from about six feet away and then lowered it.

About 11:15 p.m., Franson, the owner of the house, came home from work. She yelled at everyone to get out. Defendant raised the gun and pointed it at her from about seven feet and asked who she was. Franson said she was the owner and kept yelling at defendant. Defendant lowered the gun and approached Franson. Grabbing both her hands, he apologized and walked backwards out of the house. He also warned, "Anyone calling the police I will come back and kill you." About half an hour later, Franson was in her bedroom when she heard gunfire.

Later that night, Mooyman had come to the Hesperia residence to see Franson. Mooyman was engaged in conversation in the front of the house with Franson's daughter and John Hanson. Julian and Jason passed by and ran in the house. John told Mooyman some problems were happening. Someone said, "Oh, no, there he is." A small, gray hatchback car cruised by with several people occupying it. A person in the car and a person in the yard yelled at one another. The car stopped just past the house and defendant got out.

Mooyman walked toward the back of the car to avoid a fight. Someone cried, "He's got a gun." Mooyman saw muzzle flashes and heard gun fire. Mooyman took shelter behind a Pontiac Firebird in the driveway. Near him, a number of shots spattered a white Ford Bronco. Mooyman heard a second set of shots that was return fire from the house. When Mooyman tried to get up, he realized he had been wounded. Defendant, not the person returning fire, was the person who shot him. The shots directed at the white Ford Bronco came from the house (the west) shattering the window and from the street (the east) hitting the side of the vehicle.

Defendant was also wounded by gunfire. Both men were taken to the same hospital. The bullet that hit Mooyman could not be removed because of its risky location on top of the muscle between the heart and chest plate.

As defense evidence, Ronny Garcia testified that he was Mooyman's friend and Mooyman told him he had been shot by another friend, "Julian or some other guy." On cross-examination, Garcia said defendant had told him he had retaliated against "Jason or John" for "pinn[ing] his kids up against the fence with a car or something like that."

3. Instructional Error

Defendant first asserts it was reversible error for the trial court not to give an instruction sua sponte on attempted voluntary manslaughter as a lesser included offense of attempted murder against Mooyman. The only evidence defendant relies upon is Garcia's brief testimony about defendant's children. Based on this evidence, we do not agree with defendant that an attempted voluntary manslaughter instruction was clearly supported by evidence.

Two elements of heat of passion/voluntary manslaughter are not present in this case: "First, the provocation which incites the killer to act in the heat of passion case must be caused by the victim or reasonably believed by the accused to have been engaged in by the [victim.] [Citations.]" (*People v. Lujan* (2001) 92 Cal.App.4th 1389, 1411-1412.) There was no evidence at all Mooyman, an innocent bystander, had threatened defendant's children or that defendant reasonably believed he had done so.

Second, there was no evidence to show provocation was "such as to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citation.]" (*People v. Lujan, supra*, 92 Cal.App.4th at p. 1412.) Based on Garcia's bare statement, there is nothing in the record about when defendant's children were purportedly threatened and when defendant subsequently confronted Mooyman on the street. The threat could have occurred days or weeks before the shooting, meaning defendant did not act rashly and instead had time to deliberate and reflect. In the absence of evidence to support an attempted voluntary manslaughter instruction, no instruction should have been given. (*People v. Kelly* (1990) 51 Cal.3d 931, 959.)

Furthermore, in view of the overwhelming evidence against defendant, we deem any error harmless under any standard of review. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Breverman* (1998) 19 Cal.4th 142, 178; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

4. Sufficiency of Evidence

Defendant next challenges the sufficiency of the evidence on counts 3 and 4, making criminal threats against Franson and Rios. (§ 422.) The reviewing court

considers the evidence in the light most favorable to the judgment. (*People v. Gaut* (2002) 95 Cal.App.4th 1425, 1430; *People v. Perez* (1992) 2 Cal.4th 1117, 1124.)

The five elements of the crime of making a criminal threat are set forth in *People v. Toledo* (2001) 26 Cal.4th 221, 227-228: "In order to prove a violation of section 422, the prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances. [Citation.]"

It is not disputed that the first three elements were established by the evidence. Defendant's omnibus promise to kill anyone who called the police was made as a serious death threat. Instead, defendant focuses on whether defendant's threat caused sustained and reasonable fear to the two victims. (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1140; *People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.)

We deem the evidence sufficient under the circumstances of this case. (*People v. Bolin* (1998) 18 Cal.4th 297, 339-340; *In re George T.* (2004) 33 Cal.4th 620, 635;

People v. Martinez (1997) 53 Cal.App.4th 1212, 1218.) Defendant broke into the subject residence late in the evening. His tattoo advertised a gang affiliation. He brandished a gun at all the occupants. As he left, he warned he would return to kill anyone who called the police. The victims were frightened and believed defendant was serious. The victims did not call the police and Rios subsequently moved out.

Even though the threat was conditioned on the victims calling the police, it was made under circumstances conveying "gravity of purpose and immediate prospect of execution." (*People v. Bolin, supra,* 18 Cal.4th at p. 340; *People v. Dias* (1997) 52 Cal.App.4th 46, 49, 51-53 [victim would be killed if she called the police].) The threats made while brandishing a gun constituted sufficient evidence to support defendant's convictions for making criminal threats.

5. Upper-Term and Consecutive Sentencing

In calculating defendant's sentence, the court imposed the upper term on count 1, consecutive middle terms on counts 5 and 6, and the upper term for the section 12022.5, subdivision (a), enhancement appended to counts 5 and 6. Defendant challenges the upper terms and the consecutive sentences under *Cunningham v. California, supra*.

At the sentencing hearing, the court reviewed the probation report identifying the following aggravating circumstances (Cal. Rules of Court, rule 4.421): "(a) Facts relating to the crime include: [¶] (1) The crime involved great violence, great bodily harm, and threat of great bodily harm. [¶] (2) The defendant was armed with or used a weapon at the time of the offense. [¶] (b) Facts relating to the defendant include:[¶] (1) The defendant has engaged in violent conduct, which indicates a serious danger to

society. [¶] (2) The defendant's prior convictions as an adult are numerous and of increasing seriousness. [¶] (3) The defendant has served prior prison terms. [¶] (4) The defendant was on a grant of parole when the crime was committed. [¶] (5) The defendant's prior performance on probation and parole was unsatisfactory." There were no mitigating circumstances. (Cal. Rules of Court, rule 4.423.)

As to the facts pertaining to consecutive rather than concurrent sentences, the probation report identified these facts: "The crimes and their objectives were predominantly independent of each other. (2) The crimes did involve separate acts of violence or threats of violence. (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior."

In pronouncing sentence, the court expressly commented on defendant's past history of violent, criminal, and escalating behavior. The court found defendant had served prior prison terms and was on parole at the time of the present offenses, justifying a harsher, rather than a more lenient, sentence.

a. Forfeiture

The People contend that because defendant failed to object in the trial court on the basis now urged on appeal, he has forfeited any challenge based on *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*). (See *People v. Hill* (2005) 131 Cal.App.4th 1089, 1103 (*Hill*) [holding that a *Blakely* challenge was forfeited by the defendant's failure to raise it in the trial court].)

We reject this forfeiture argument. Unlike the defendant in *Hill, supra*, 131 Cal.App.4th at page 1103, who waived a *Blakely* challenge by failing to raise it at his sentencing which occurred after *Blakely* but before *People v. Black* (2005) 35 Cal.4th 1238, vacated in *Black v. California* (Feb. 20, 2007) ___ U.S. ___ [127 S.Ct. 1210, 167 L.Ed.2d 36, 2007 WL 505809] (*Black*), defendant was sentenced on February 24, 2006, after *Black* was decided on June 20, 2005. Therefore a *Blakely* objection would have been futile under controlling law which the court was compelled to follow. Under such circumstances, defendant did not forfeit the issue. (*People v. Chavez* (1980) 26 Cal.3d 334, 350, fn. 5; *City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780, 784-785.)

Even if defendant forfeited the issue, to forestall any claim of ineffective assistance of counsel based on failure to raise a timely objection, we will address the issue on the merits. (*People v. Norman* (2003) 109 Cal.App.4th 221, 229-230.)

b. Consecutive Sentencing

As stated in *Cunningham*, California's determinate sentencing law (DSL) and "the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts -- whether related to the offense or the offender -- beyond the elements of the charged offense." (*Cunningham, supra*, 127 S.Ct. at p. 862); § 1170, subd. (b); California Rules of Court, rule 4.420(a).) *Cunningham* rejected this procedure, holding that "under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must

be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." (*Cunningham, supra*, 127 S.Ct. at pp. 863-864.)

Defendant asserts that under *Cunningham, supra*, 127 S.Ct. at pages 863-864, imposition of consecutive terms for counts 5 and 6 violated the Sixth and Fourteenth Amendments to the United States Constitution, as interpreted in *Blakely, supra*, 542 U.S. at pages 303-304. But, as explained in *People v. Hernandez* (2007) 147 Cal.App.4th 1266, 1270 (*Hernandez*), "*Cunningham* did not address the constitutionality of the DSL pertaining to a trial court's decision to impose concurrent or consecutive sentences. It did not mention, let alone expressly overrule, the California Supreme Court's decision that '*Blakely*'s underlying rationale is inapplicable to a trial court's decision whether to require that sentences on two or more offenses be served consecutively or concurrently.' (*People v. Black, supra*, 35 Cal.4th at p. 1262, vacated in *Black v. California* (Feb. 20, 2007) ___ U.S. ___, 127 S.Ct. 1210, 167 L.Ed.2d 36 [2007 U.S. Lexis 1856].)"

In rejecting the defendant's contention that he was entitled to a jury determination of the facts upon which the trial court relied to impose consecutive sentences, the *Hernandez* court explained that "'While there is a statutory presumption in favor of the middle term as the sentence for an offense [citation], there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing." [Citation.]" (*Hernandez, supra*, 147 Cal.App.4th at p. 1270, quoting *People v. Reeder* (1984) 152 Cal.App.3d 900, 923.)

Defendant therefore "does not have a legal right to concurrent sentencing, and as the Supreme Court said in *Blakely*, 'that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.'" (*Hernandez, supra*, at p. 1271, quoting *Blakely, supra,* 542 U.S. at p. 309.)

Accordingly, a jury trial was not required as to the factors the trial court relied on in imposing consecutive terms on counts 5 and 6.

c. Aggravated Sentences

Citing *Cunningham, supra,* 127 S.Ct. at pp. 860, 864-871, defendant contends his aggravated sentence should be reversed because the trial court imposed aggravated terms based on facts not found by the jury.

When imposing the aggravated term on count 1 and the enhancement appended to counts 5 and 6, the trial court relied on factors which, under *Blakely*, *supra*, 542 U.S. at pp. 303-304, and *Cunningham*, *supra*, 127 S.Ct. at pp. 863-864, required true findings by the jury that the crime involved great violence, great bodily harm, and threat of great bodily injury (GBI) and defendant used a weapon. But this court cannot rely on the jury findings of GBI or use of a weapon since those findings were either elements of defendant's crimes or used to impose enhancements and thus were not available for use as aggravating factors. (*People v. Hill* (1994) 23 Cal.App.4th 1566, 1575.) Therefore, under *Cunningham, supra,* 127 S.Ct. 856, the trial court erred in imposing the aggravated terms based on factors which should have been decided by the jury.

An exception, however, exists for facts pertaining to the defendant's recidivism. The United States Supreme Court has held that a jury is not required to determine the

facts of the defendant's prior conviction specifically or facts related to the defendant's recidivism in a broader sense. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 489, citing *Almendarez-Torres v. United States* (1998) 523 U.S. 224; see also *People v. Thomas* (2001) 91 Cal.App.4th 212, 222-223; *People v. Banks*, 2007 WL 1111849 (April 13, 2007).

In this case, the trial court relied on defendant's recidivism in making its sentencing decisions. The court agreed with the probation officer's findings and cited the reasons stated in the probation report. The court specifically noted defendant's prior convictions and the increasing seriousness of his crimes. (See *People v. Sanchez* (1982) 131 Cal.App.3d 718, 738-739; *People v. Pinon* (1979) 96 Cal.App.3d 904, 911.) The facts pertaining to defendant's recidivism alone were sufficient to support the trial court's selection of the upper terms. Because a single valid factor in aggravation is sufficient, the court's reliance on other facts was harmless beyond a reasonable doubt. (See *People v. Osband* (1996) 13 Cal.4th 622, 728; *People v. Forster* (1994) 29 Cal.App.4th 1746, 1759.) A valid factor in aggravation means remand is unnecessary. (See *Forster, supra,* at p. 1759.)

d. Harmless Error

In the alternative, the People argue that any error in imposing an aggravated sentence was harmless error because there was overwhelming or uncontradicted evidence of the aggravated factors relied on by the court. The People argue that since the jury would have found at least one of the aggravating circumstances true beyond a reasonable doubt, there was no prejudice. (*Chapman v. California* (1967) 386 U.S. 18, 24;

Washington v. Recuenco (2006) ___ U.S. ___ [126 S.Ct. 2546, 2553].) Notwithstanding this contention, however, we have determined that the recidivism factors allowed the court to impose the upper term.

6. Section 12022.53, subdivision (d)

The court imposed a nondiscretionary enhancement of an additional and consecutive indeterminate prison term of 25 years to life for using a gun to cause great bodily injury. (§ 12022.53, subd. (d).) Defendant argues the statute is facially unconstitutional because it violates the prohibition against cruel and/or unusual punishment. He reasons the enhancement is unconstitutional because the sentence is harsher than the sentence of 18 years[2] for the underlying crime and longer than if he had used a knife to cause death or more severe injuries.

Defendant acknowledges the weight of authority that has consistently rejected this constitutional challenge to section 12022.53, subdivision (d): "If 50 years to life for stealing $153 worth of videotapes is not cruel and unusual punishment, [fn. omitted] neither is any sentence which could legally be imposed here." (*People v. Riva* (2003) 112 Cal.App.4th 981, 1003; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1212-1216; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 16-19; *People v. Martinez* (1999) 76 Cal.App.4th 489, 493-496.) We agree with those courts and reject defendant's contention for the same reasons as they express quite eloquently.

[2] The upper term of nine years was doubled to 18 years because of a prior strike.

7. Disposition

We affirm the judgment in its entirety.

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s/Gaut
J.

We concur:

s/Hollenhorst
Acting P. J.

s/Miller
J.