Filed 11/16/06 P. v. Smith CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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. DWAYNE SMITH, Defendant and Appellant.	E039170 (Super.Ct.No. FWV 032461) OPINION

APPEAL from the Superior Court of San Bernardino County. Larry W. Allen, Judge. Affirmed with directions.

Sally P. Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Lilia E. Garcia, Supervising Deputy Attorney General, and Kathryn Gayle, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Dwayne Smith appeals from judgment entered following jury convictions for second degree robbery (Pen. Code, § 211)[1] and assault by means likely to produce great bodily injury (§ 245, subd. (a)(1)). The trial court dismissed the great bodily injury allegations due to insufficient evidence. In a bifurcated trial, the trial court found true allegations that defendant had one prior strike conviction (§§ 667, subds. (b)-(i) and 1170.12, subds. (a)-(d)), one prior serious felony conviction (§ 667, subd. (a)), and seven prison priors (§ 667.5, subd. (b)). The court sentenced defendant to an aggregate prison term of 17 years.

Defendant contends the trial court committed reversible error when the judge and prosecutor told the jury the codefendants pleaded guilty to robbery in this case. Defendant also complains there was insufficient evidence identifying defendant as one of the perpetrators of the robbery, and the trial court erred in excluding evidence of the victim's prior misdemeanor conduct. Defendant further asserts that his sentence for assault (count 2) must be stayed under section 654; one prior prison term enhancement must be stricken because it is based on concurrent prison terms; the prior prison term enhancement that was stayed must be dismissed; and the upper term sentence on count 1 violates *Blakely v. Washington* (2004) 542 U.S. 296 and *Apprendi v. New Jersey* (2000) 530 U.S. 466, and therefore must be reduced to the middle term.

We conclude there is no reversible error other than the following sentencing errors: (1) under section 654, the court erred in imposing concurrent sentences for

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[1] Unless otherwise noted, all statutory references are to the Penal Code.

robbery and assault because the two offenses were part of a continuing course of conduct; (2) one of defendant's prior prison term enhancements must be stricken because defendant was sentenced concurrently to two of the underlying prior prison offenses; and (3) the prior prison term which the trial court stayed must be dismissed because it is based on the same conviction used to impose a five-year term for a serious felony prior.

1. Factual Background

During the evening of September 9, 2004, truck driver James Drucker parked his big rig truck at Truck Stops of America in Ontario. He intended to spend the night there in his cab, which contained sleeping quarters resembling a small apartment. While monitoring his CB radio, he heard a woman named Brown Sugar soliciting sex. Later, Drucker encountered Brown Sugar, also known as Tiffany Jackson, at the truck stop picnic area. She introduced herself to Drucker as Brown Sugar and asked him if he would like to engage in "commercial company." Drucker declined but bought her a pack of cigarettes. Jackson followed Drucker back to his truck.

After Drucker and Jackson talked for awhile inside Drucker's cab, Jackson walked into Drucker's living quarters behind the cab. The two talked there for a few minutes until Drucker asked Jackson to return to the cab. Drucker and Jackson left Drucker's living quarters and talked in the cab for about an hour. Jackson invited Drucker to meet her friends who were staying in a motel next to the truck stop. Drucker agreed and the two went to the motel.

Drucker and Jackson joined a group of six to 10 people at the motel. Drucker had a beer and then left after about an hour because the others were using drugs and he felt uncomfortable. Drucker returned to his truck and went to sleep.

The next morning, around 4:00 a.m., Jackson awoke Drucker by knocking on his cab door, crying. She said someone had beaten her and pleaded to let her inside. Drucker initially declined but relented and let her in. Jackson went into the sleeping area and began rummaging through Drucker's belongings, saying that she was "just looking at [Drucker's] stuff." Drucker walked from the cab to where Jackson was and asked her to leave his living quarters and return to the cab. Drucker then saw defendant enter the cab. Defendant punched Drucker in the face, causing Drucker to fall on his bed. Defendant began beating Drucker and told Drucker he was going to kill him.

Right after defendant's first punch, Drucker saw Darren Woodson enter the cab. Woodson climbed on the bed and began choking Drucker. Meanwhile, Jackson rifled through Drucker's drawers and defendant pulled down Drucker's pants and took his money. Defendant and Jackson removed from the truck Drucker's camcorder, digital camera, jewelry, cash, and other items while Woodson continued choking Drucker. Drucker passed out. When he regained consciousness, he saw Woodson handing Drucker's belongings to Jackson and defendant, who were outside the truck. Drucker hit Woodson over the head with a bottle of Jack Daniels. Woodson jumped out of the truck. Drucker then grabbed a metal bar and chased defendant and Woodson down the street. The perpetrators all got away.

When the police arrived at the scene, Drucker reported the incident and described the perpetrators. The police drove Drucker down to the end of the street and asked him to view a Black man and woman who were not defendant, Jackson or Woodson. Drucker said the two individuals were not the perpetrators.

On September 23, 2004, Police Detective Abell showed Drucker a photo lineup. Drucker immediately selected Jackson's photograph as one of the perpetrators. Abell then showed Drucker a second photo lineup and, after about two minutes, Drucker pointed to defendant's photo and said he thought the person he pointed to was one of the perpetrators. While Drucker continued to look at the photo lineup, Drucker and Abell discussed the case for about half an hour. Drucker then circled, signed and dated the photo of defendant, indicating defendant was one of the individuals who had robbed him. Abell arrested defendant at the truck stop in the picnic area, on October 27, 2004.

Abell suspected that Woodson was one of the robbery perpetrators based on Drucker's description of Woodson and Woodson's arrest at the truck stop eight days after the robbery. During a photo lineup on December 8, 2004, Drucker identified Woodson within two minutes as the third perpetrator.

At trial, defendant testified that in September 2004, he worked at the truck stop loading and unloading trucks and lived in the same neighborhood as the truck stop. He denied robbing Drucker but admitted he had convictions for robbery, possession of a firearm, and two auto thefts. Defendant could not remember where he was or what he was doing on September 10, 2004, but said he knew he was not with Woodson.

Defendant admitted he knew Jackson and had been in a relationship with her at the time of the charged robbery, although they were seeing other people at that time.

2. Informing the Jury of Codefendants' Guilty Pleas

Defendant contends the trial court committed reversible error by informing the jury Jackson and Woodson had pled guilty to robbery, the same offense charged against defendant, and by allowing the prosecutor to tell the jury this as well during his opening statement and closing argument. Defendant asserts that informing the jury of the guilty pleas violated his Sixth Amendment right to confrontation and the trial court erred in allowing the information under Evidence Code section 352.

A. Procedural Background

Prior to trial, the court mentioned to counsel that, according to CALJIC No. 2.92, when determining the weight to be given eyewitness identification testimony, the jury may consider the witness's ability to identify other perpetrators. Therefore the jury could consider the fact that Drucker identified the other perpetrators who pled guilty. Defense counsel noted that there was another instruction that states the jury may not question why others involved in the case are not present. The prosecutor stated that was not a problem because the jury would be told the codefendants pled guilty. Defense counsel responded that this was a problem.

The trial court stated that the jury should be permitted to know the codefendants pled guilty because it was relevant to Drucker's credibility in identifying defendant. The court further stated that, when it read to the jury CALJIC No. 2.92, the court would tell the jury the codefendants were not present at trial because they pled guilty to robbery in

the instant case. The court also said that the prosecutor could tell the jury this. Defense counsel objected without stating any grounds, and the court said it understood and noted defendant's objection for the record.

After the court read the preliminary jury instructions, the prosecutor told the jury during his opening statement that codefendants Woodson and Jackson had "already pled guilty. . . . So [the] only remaining defendant is this man right here, Dwane [*sic*] Smith." Defense counsel did not object to this argument.

Right after the prosecution's opening statement, the trial court explained to the jury: "If you recall the instruction I read you on eyewitness identification, one of the factors that the law says that you can consider among them is the fact that the victim or the identification of other perpetrators by the victim. And that's why we have told you about the other two defendants, Ms. Jackson and Mr. Woodson. And that would be the only reason you would consider that information. However, each defendant is also entitled to have their case decided solely on its own merits. So I have allowed you to learn that it is related to the reliability of the identification of the defendant, but that would be the only reason you would consider that. And you will judge each case individually."

The codefendants' plea forms were never placed in evidence and the trial court inadvertently did not judicially notice them despite the prosecutor's request.

Before closing arguments, the trial court read to the jury various instructions, including CALJIC No. 2.09, in which the court told the jury the following: "Certain evidence was admitted for a limited purpose. [¶] At the time this evidence was admitted

you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. [¶] Do not consider the evidence for any purpose except the limited purpose for which it was admitted."

During closing argument the prosecutor remarked concerning the codefendants: "Now the issue of I.D. is . . . Mr. Drucker made three I.D.'s. Two were on September 23, 2004. The other one was on December 8, 2004 of Darren Woodson. The December 8, 2004 is three months after the robbery. That's about two and a half months after the I.D. of Dwayne Smith and Brown Sugar. This man obviously is not important today. He's not here today. He's pled guilty. You can take that into consideration. Brown Sugar, she's not here. She pled guilty. What did they plead guilty to? This 211. What's a 211? A robbery." Defense counsel did not object to this argument.

Defense counsel argued that there was insufficient evidence to prove defendant committed the charged offenses, particularly due to the discrepancies between Drucker's initial reported description of the perpetrator and defendant's actual appearance. In rebuttal, the prosecutor stated, "Think about it. All the guys at the truck stop, the one person who is the boyfriend of Brown Sugar who has pled guilty is picked out, that's not a coincidence."

B. Waiver

The People argue that by not objecting in the trial court on Evidence Code section 352 grounds, defendant waived his objection to the jury being informed of Woodson and Jackson's guilty pleas. But while defendant did not state he was objecting pursuant to Evidence Code section 352, defense counsel objected to the jury being told Jackson and

Woodson pled guilty, noting that telling the jury the codefendants pled guilty conflicted with the jury instruction that the jury could not consider why codefendants were not present at the trial.

In addition, although defendant did not renew his objection during the trial, defendant's objection was not waived because the court had already indicated any such objection would be overruled because the information was relevant to Drucker's credibility as an identification witness. Therefore any additional objection would have been fruitless. An attorney who submits to the authority of an erroneous, adverse ruling after making an appropriate objection "'"does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible."'" (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 213.)

C. Harmless Error

Regardless of whether defendant waived the issue, if there was error in telling the jury Jackson and Woodson pled guilty, it was harmless. Relying on *Leonard*, defendant argues such error constitutes prejudicial error requiring reversal. We disagree. *Leonard* is distinguishable because in *Leonard* there was no evidence linking the defendant to the codefendant's criminal activity. After the charged robbery offense, defendant was stopped and arrested with the codefendant who pled guilty. This created an inference of guilt by association, despite there being no other evidence defendant was involved in the robbery. The *Leonard* court thus held that the trial court abused its discretion by

admitting into evidence the codefendant's guilty plea and the error was prejudicial. (*People v. Leonard* (1983) 34 Cal.3d 183, 189.)

Here, there was evidence linking defendant with the robbery, the crime scene, and the other perpetrators of the robbery. There was evidence defendant was known to frequent the truck stop where the robbery occurred, as did Jackson and Woodson, and the three knew each other and were friends. In addition, Drucker identified Woodson and Jackson, as well as defendant, in separate photo lineups, and identified Woodson and defendant in court. When Drucker identified the three perpetrators, he was unaware of their relationship with each other.

Also, Officer Burkes testified he was familiar with those who frequented the truck stop and adjacent hotel, and such individuals included defendant, Woodson, and Jackson. Burkes said he had had contacts with defendant and Woodson at the truck stop before the robbery. On one occasion defendant had told Burkes that he and Jackson "were together" and "they were married." Defendant told him this while Burkes, Jackson and defendant were at the motel. Burke also testified that he was aware defendant and Woodson were friends.

Police detective Abell also testified that Jackson was arrested at the truck stop 10 days before the robbery, and defendant was arrested for the charged offenses at the truck stop about a month after the robbery.

In addition, defendant testified that he lived near the truck stop; had stayed at the motel next to the truck stop; had worked at the truck stop around September 2004; knew Jackson; was present when Jackson was arrested at the motel next to the truck stop; was

helping raise Jackson's daughter; and had told Burkes at the time of Jackson's arrest that he was married to Jackson, even though this was not true.

Defendant attempts to distinguish *People v. Cummings* (1993) 4 Cal.4th 1233, 1294-1295, in which the court held admission of a codefendant's conviction was harmless error. In *Cummings*, prior to the defendant's trial, the defendant's wife was convicted as an accessory after the murder. The underlying murder was the same offense the defendant was charged with committing. The trial court took judicial notice of the wife's judgment, which was then read to the jury. Defendant argues that, while the court in *Cummings* found the error was harmless, the prejudice in the instant case was more profound because in *Cummings*, the parties did not mention the wife's guilty conviction during closing argument or in the instructions.

Although in the instant case the prosecution mentioned the guilty pleas in the opening statement and closing argument, it was only mentioned briefly. The trial court also briefly mentioned the codefendants' guilty pleas at the beginning of the trial and admonished the jury that the jury could only consider the guilty pleas for the purpose of determining the credibility of Drucker's identification testimony.

Since there was strong identification evidence implicating defendant, any error in informing the jury of the codefendants' guilty pleas was harmless beyond a reasonable doubt, and it is not reasonably probable defendant would have obtained a more favorable outcome had the pleas not been mentioned. (*Chapman v. California* (1967) 386 U.S. 18, 24, and *People v. Watson* (1956) 46 Cal.2d 818, 836.)

3. Sufficiency of Identification Evidence

Defendant contends the identification evidence was insufficient to prove defendant committed the charged offenses. We disagree.

Our review of any claim of insufficiency of the evidence is limited. "In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence that is, evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11, citing *People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *People v. Bolin* (1998) 18 Cal.4th 297, 331.) If the evidence presented below is subject to differing inferences, the reviewing court must assume that the trier of fact resolved all conflicting inferences in favor of the prosecution. (*Jackson v. Virginia* (1979) 443 U.S. 307, 326.) A reviewing court is precluded from making its own subjective determination of guilt. (*Id.* at p. 319, fn. 13.) It is the exclusive function of the trier of fact to assess the credibility of witnesses and draw reasonable inferences from the evidence. (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Hale* (1999) 75 Cal.App.4th 94, 105.)

Defendant claims Drucker's identification of defendant is suspect because of the disparity between Drucker's initial description of defendant and defendant's actual appearance. Drucker described defendant to the police as being 5 feet 10 inches tall and 165 pounds, with a stocky to muscular build. Defendant's actual height and weight was 6 feet tall and 205 pounds when he was arrested and booked. Defendant also notes that

Drucker failed to mention in his initial description of defendant that defendant had a gap between his teeth and a noticeable facial scar.

Drucker's initial imprecise description of defendant to the police and omission of noticeable facial traits is not fatal to the prosecution's case. Such inaccuracies go to the weight of the evidence, not its sufficiency. It was up to the jury to determine the strength or weakness (i.e., credibility) of Drucker's identification of defendant. (*People v. Turner* (1983) 145 Cal.App.3d 658, 671, disapproved of on another ground in *People v. Majors* (1998) 18 Cal.4th 385, 411; *People v. Fagalilo* (1981) 123 Cal.App.3d 524, 530- 531.) If credited by the trier of fact, the testimony of a single eyewitness, unless physically impossible or inherently improbable, is sufficient to sustain a conviction. (*People v. Keltie* (1983) 148 Cal.App.3d 773, 781- 782; *Turner* at p. 671; Evid. Code, § 411.) "Testimony is not inherently improbable unless it appears that what was related or described could not have occurred. [Citations.] 'To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.]'" (*People v. Johnson* (1960) 187 Cal.App.2d 116, 122, see also *People v. Barnes, supra*, 42 Cal.3d at p. 306.)

Here, there was nothing inherently incredible or physically impossible in the eyewitness identification of defendant. Thus, Drucker's identification of defendant was sufficient to support defendant's robbery and assault convictions. Drucker testified he observed defendant and his companions, Jackson and Woodson, when they robbed and assaulted him. The lights were on in his truck at the time and he got a good look at

defendant. Despite not knowing the relationship between Jackson, Woodson, and defendant, Drucker identified all three perpetrators in separate photographic lineups, and Woodson and defendant in court.

Not only is incourt eyewitness identification alone sufficient to sustain the conviction (*In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497), but in addition: "[W]hen the circumstances surrounding the identification and its weight are explored at length at trial, where eyewitness identification is believed by the trier of fact, that determination is binding on the reviewing court." (*Ibid.*) Furthermore, "evidence of a single witness is sufficient for proof of any fact." (*Ibid.*, citing Evid. Code, § 411; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885.)

Defendant argues that there was insufficient identification evidence because Drucker's photo lineup identification of defendant was equivocal. Defendant claims Drucker did not identify defendant until 28 minutes after he was shown the photos, and then Drucker said he "thought" defendant was "the guy." But the reporter's transcript reveals that Drucker actually identified defendant after looking at the photographs for two minutes. He pointed to defendant's picture but did not circle the photograph, sign it, and date it until about 28 minutes later. Abell, who conducted the photo lineup on September 23, 2004, testified he first showed Drucker the photo lineup of Jackson and Drucker identified her right away. Abell then "immediately showed him the second photo lineup of Mr. Smith. [Drucker] looked at it for about two minutes, touched Mr. Smith's photograph, and thought that that was the guy who had done it." Drucker then engaged in a long conversation with Abell about the case and Drucker's stolen property. After

Abell and Drucker talked for about half an hour, Abell said to Drucker, "[I]f you do recognize the person who committed the crime, go ahead and identify him by circling the photograph, putting the date and time and his initials on it. And then he did."

Abell's testimony indicates that Drucker initially identified defendant by pointing to defendant's photograph two minutes after he was shown the photo lineup and then about 28 minutes later circled, dated, and signed defendant's photo. While Drucker's identification of defendant was not as instantaneous as his identification of Jackson, Drucker positively identified defendant and it was for the jury to determine the weight to be given to the evidence.

Also, in arguing there was insufficient identification evidence, defendant argues that none of Drucker's stolen property was found in defendant's possession. We do not find this argument persuasive since defendant was not arrested until over a month after the robbery.

There is more than sufficient identification evidence supporting defendant's convictions.

4. Evidence of Defendant's Prior Misdemeanor Conduct

Defendant contends the trial committed prejudicial error by precluding defense counsel from cross-examining Drucker regarding his 1999 misdemeanor conviction for domestic violence and 1990 misdemeanor DUI conviction. Defendant asserts these offenses are crimes of moral turpitude and therefore cross-examination concerning the offenses was permissible for impeachment purposes. Prior to trial, the court excluded evidence of both offenses on the grounds they were not crimes of moral turpitude and

were too remote in time. Defendant claims excluding the cross-examination was prejudicial error because it would have undermined Drucker's credibility as a witness.

In *Wheeler*, the California Supreme Court stated that section 28, subdivision (d) of the California Constitution, article I, known as Proposition 8's "Truth-in-Evidence" amendment to the Constitution, "makes immoral conduct admissible for impeachment whether or not it produced any conviction, felony or misdemeanor." (*People v. Wheeler* (1992) 4 Cal.4th 284, 297, fn. 7; *People v. Lepolo* (1997) 55 Cal.App.4th 85, 89-90.) However, such evidence is subject to exclusion under Evidence Code section 352. (*People v. Castro* (1985) 38 Cal.3d 301, 306-313.)

Under Evidence Code section 352, California trial courts are "free to exclude evidence which is irrelevant, or whose marginal relevance is outweighed by the unfair prejudice or other difficulties its introduction might cause." (*People v. Wheeler, supra,* 4 Cal.4th at p. 294.) The latitude section 352 allows for exclusion of impeachment evidence is broad. (*Wheeler, supra,* at p. 296, fn. omitted.) "On appeal, the trial court's decision is reviewed for abuse of discretion. . . . In most instances the appellate courts will uphold the exercise of discretion even if another court might have ruled otherwise. [Citation.]" (*People v. Feaster* (2002) 102 Cal.App.4th 1084, 1092.)

Assuming, without deciding that both of Drucker's offenses qualify as crimes of moral turpitude, the trial court did not abuse its discretion in excluding cross-examination of Drucker concerning his misdemeanor offenses. Neither offense involved an act of dishonesty and the misdemeanor domestic violence offense occurred over 14 years before the charged offenses. The two misdemeanor offenses provided little if an "'"'tendency in

reason' [citation] to shake one's confidence in [defendant's] honesty."' [Citation.]" (*People v. Chavez* (2000) 84 Cal.App.4th 25, 28-29.)

Furthermore, any error in excluding cross-examination of Drucker regarding the misdemeanor offenses was harmless. Error in the admission of impeachment evidence justifies reversal only if it resulted in a miscarriage of justice (Evid. Code, § 354). A judgment may be overturned only if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

In this case, there was strong evidence implicating defendant, and Drucker's misdemeanor conduct would have provided little, if any, insight into Drucker's propensity to tell the truth. It thus is not reasonably probable that, had defendant cross-examined Drucker concerning his misdemeanor offenses, the jury would have reached an outcome more favorable to defendant. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; *Clifton v. Ulis* (1976) 17 Cal.3d 99, 105-106.)

5. Sentencing Defendant in Violation of Section 654

Defendant contends the trial court violated section 654 by sentencing him to concurrent separate prison terms for robbery and assault. Defendant asserts, and the People agree, that because the robbery and assault of Drucker were part of a continuing course of conduct, and the assault was incidental to the robbery, the sentence on count 2 for assault must be stayed under section 654.

Section 654 prohibits "multiple sentences where the defendant commits different acts that violate different statutes but the acts comprise an indivisible course of conduct

engaged in with a single intent and objective. [Citation.] 'If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' (*Ibid.*)" (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 196, quoting *Neal v. State of California* (1960) 55 Cal.2d 11, 19.)

In the instant case, defendant's assault on Drucker was incidental to robbing him and was part of an indivisible course of conduct. The concurrent term for assault (count 2) must therefore be stayed.

6. Striking a Prior Prison Term Enhancement

Defendant argues, and the People agree, that one of the two separate one-year prior prison term enhancements (§ 667.5, subd. (b)) should be stricken because the two prior prison terms in case Nos. A913532 and A9171834 were concurrent terms.

Only one prior prison term enhancement can be imposed when sentences imposed in two felony cases are ordered to run concurrent. (*People v. Riel* (2000) 22 Cal.4th 1153, 1203.) One of the prior prison term enhancements must therefore be stricken. The abstract of judgment should be modified to reflect this, and defendant's sentence should be reduced by one year.

Defendant also argues, and the People agree, that the trial court erred in imposing and staying one of the prison prior enhancements (§667.5, subd. (b))[2] and also imposing a five-year term for a serious felony prior (§ 667, subd. (a)) based on the same prior

[2] The prison prior in case RCRT 17239.

conviction. We agree the prison prior should be dismissed, as opposed to being stayed. (*People v. Jones* (1993) 5 Cal.4th 1142, 1150.)

7. *Blakely* Challenge to Upper Term Sentence

Relying on *Blakely v. Washington, supra,* 542 U.S. 296, and *Apprendi v. New Jersey, supra*, 530 U.S. 466, defendant argues the court's imposition of an upper term for count 1, robbery, violated his constitutional rights to a jury trial and due process, and therefore the sentence must be reduced to the middle term.

The California Supreme Court in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*), however, affirmed the constitutionality of the California sentencing scheme. (*Id.* at p. 1244.) The court summarized its decision as follows: "[This case] presents the specific questions whether a defendant is constitutionally entitled to a jury trial on the aggravating factors that justify an upper term sentence or a consecutive sentence. For the reasons discussed below, we conclude that the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*Id.* at p. 1244.)

We are aware that the United States Supreme Court granted review of *People v. Cunningham*. (See *People v. Cunningham* (Apr. 18, 2005, A103501) [nonpub. opn.], cert. granted Feb. 21, 2006, No. 05-6551, sub nom. *Cunningham v. California* (2005) ___ U.S. ___ [126 S.Ct. 1329].) However, at the present time, *Black, supra,* 35 Cal.4th 1238, is the controlling authority in California. (See *Auto Equity Sales, Inc. v. Superior Court*

(1962) 57 Cal.2d 450, 455-456.) Therefore, based on the holding in *Black*, we reject defendant's argument.

8. Disposition

We affirm the judgment of conviction but remand this case to the superior court to correct the sentence as follows: The trial court is directed to (1) stay the prison term imposed for assault (count 2); (2) strike one of the one-year terms for a prison prior (§667.5, subd. (b)); and (3) dismiss the prison prior term which the trial court imposed and stayed.

The trial court shall amend the abstract of judgment to reflect the sentence modifications as directed above, resulting in a one-year reduction in defendant's prison term, and forward a certified copy of the amended abstract of judgment to the Department of Corrections. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

s/Gaut
J.

We concur:

s/Hollenhorst
Acting P. J.

s/Miller
J.