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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ALLEN WAYNE SPEAKES, Defendant and Appellant.	A113668 (San Francisco County Super. Ct. No. 195127)

Allen Wayne Speakes appeals a judgment convicting him of first-degree burglary in violation of Penal Code section 459.[1] He contends the trial court erred in imposing the upper term sentence for this offense, because it improperly considered aggravating factors in violation of his Sixth Amendment right to a jury trial, as articulated in *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*). As discussed below, we find no prejudicial error and affirm.

BACKGROUND

On the evening of March 13, 2005, Paul Kangas and his 90-year-old mother were at home in their second-floor apartment. While his mother slept, Kangas worked at his computer. Hearing a noise, he got up to investigate. Upon entering the kitchen he saw a stranger—defendant—taking coins out of a box and putting them into his pockets.

[1] Further statutory references are to the Penal Code. References to rules are to the California Rules of Court.

Kangas told defendant that he, Kangas, was a "detective,"[2] and that defendant was under arrest and that police were "on their way." Defendant jumped out an open window onto a fire escape and descended into the backyard of the residential building. Grabbing a broom handle and a cordless telephone, Kangas went out his front door. Defendant, exiting through the ground-floor garage, ran past Kangas into the street. He turned and threw a metal object at Kangas as the 63 year old gave chase. The object missed Kangas, who then attempted unsuccessfully to make an emergency 911 call with his cordless telephone. Meanwhile defendant conveniently dropped the cellular telephone he had taken from Kangas' apartment. Kangas picked it up and completed the emergency call. Moments later, a police officer on a motorcycle arrived on the scene, and stopped and detained defendant. As Kangas caught up and approached the two, defendant said: "I should have bashed your . . . head in the kitchen when I had the chance." Officers later found property belonging to Kangas in defendant's possession.[3]

A subsequently filed information charged defendant with first-degree burglary.[4] (§ 459.) The charge included an enhancement allegation based on defendant's commission of the offense in the presence of a person other than an accomplice. (See § 667.5, subd. (c)(21).) On June 9, 2005, a jury found defendant guilty of the charge and found the enhancement allegation to be true. The trial court, on December 1, 2005, imposed the upper term sentence of six years in state prison. (See § 461, subd. (1).) On March 20, 2006, defendant filed a motion for resentencing. (See § 1170, subd. (d).) The court granted this motion but again imposed the upper term sentence. This appeal followed.[5] (§ 1237, subd. (a).)

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[2] At the time Kangas worked as a private investigator.

[3] The foregoing facts summarize briefly the evidence most favorable to the judgment. (See *People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Neufer* (1994) 30 Cal.App.4th 244, 247.)

[4] Other charges set out in the information were dismissed before trial.

[5] Defense counsel moved for resentencing after inadvertently failing to file a timely notice of appeal. However, a resentencing proceeding does not operate to resurrect an otherwise untimely appeal. (See *People v. Pritchett* (1993) 20 Cal.App.4th

DISCUSSION

Defendant argues that the trial court erred in imposing the upper term sentence for his conviction of first-degree burglary, because in doing so it violated the Sixth Amendment limits on judicial factfinding set forth in *Blakely, supra*, 542 U.S. 296.

The Attorney General urges that we deem the issue forfeited, since defendant did not raise it below. This we decline to do. (See *People v. Vera* (1997) 15 Cal.4th 269, 276-277; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648.)

The decision in *Blakely* established the proposition that, under the Sixth Amendment right to a jury trial, any fact " '[o]ther than the fact of a prior conviction . . . [used to] increase[] the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt.' " (*Blakely, supra*, 542 U.S. at p. 301 (italics added), quoting *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*).) More recently, however, our own Supreme Court determined that "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term . . . under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*People v. Black* (2005) 35 Cal.4th 1238, 1244 (*Black*).) Such factfinding is a "traditional[] . . . incident to the [court's] selection of an appropriate sentence within a statutorily prescribed sentencing range." (*Id.* at p. 1254.) In other words, an upper term sentence under California's determinate sentencing law is *within*—not beyond—the "statutory maximum" for purposes of *Blakely* and its progeny. (*Ibid*.) As an intermediate appellate court, we are bound to follow this decision unless and until the United States Supreme Court reaches a contrary conclusion.[6] (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

190, 193-195.) Pursuant to defendant's petition for writ of habeas corpus, we granted relief directing that the notice of appeal dated April 24, 2006, be deemed constructively, timely filed. (*In re Speakes* (October 23, 2006, A115363 [unpub. opn.].)

[6] A case decided before the decision in *Black, supra,* 35 Cal.4th 1238, in which Division Five of this court reached a similar conclusion, is now pending before the United States Supreme Court. (*People v. Cunningham* (April 18, 2005, A103501 [unpub.

Alternately, we note that the trial court reached its decision based on the following findings: (1) a 90-year-old woman, present at the time of the offense, was a particularly vulnerable victim (rule 4.421(a)(3)); (2) the manner in which defendant committed the offense indicated planning, sophistication, or professionalism (rule 4.421(a)(8)); (3) defendant had numerous prior convictions (rule 4.421(b)(2)); (4) defendant had served a prior prison term (rule 4.421(b)(3)); (5) defendant was on probation when he committed the offense (rule 4.421(b)(4)); and (6) defendant's prior performance on both probation and parole were unsatisfactory (rule 4.421(b)(5)).

As we have noted, the " 'fact of a prior conviction' " does not implicate a defendant's Sixth Amendment right to a jury trial. (*Blakely*, *supra*, 542 U.S. at p. 301.) Courts have construed this particular fact to include recidivist factors generally. (See *People v. Thomas* (2001) 91 Cal.App.4th 212, 221-222.) Thus, of the six aggravating factors considered by the trial court in this case, the last four were recidivist factors on which it could properly rely under *Blakely*. A single aggravating factor will support an upper term sentence. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433.) Here, the trial court expressed its choice of the upper term sentence in no uncertain terms, and four of the six reasons on which it relied were unquestionably valid recidivist factors. Even if we were to ignore, for the sake of argument, the controlling precedent of *Black*, *supra*, 35 Cal.4th 1238, and assume that the trial court here committed *Blakely* error when it considered the two non-recidivist factors, we nevertheless conclude that such error was harmless under *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). (See *People v. Senqpadychith* (2001) 26 Cal.4th 316, 320 [error under *Apprendi*, *supra*, 530 U.S. 466, on which *Blakely*, *supra*, 542 U.S. 296, is based, is governed by the harmless error standard of *Chapman*, *supra*, 386 U.S. 18].)

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opn.], cert. granted *sub. nom. Cunningham v. California* (Feb. 21, 2006, No. 05-6551) __ U.S. __ [126 S.Ct. 1329, 164 L.Ed.2d 47].)

DISPOSITION

The judgment is affirmed.

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Marchiano, P.J.

We concur:

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Stein, J.

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Margulies, J.