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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**THE PEOPLE,**

**Plaintiff and Respondent,**

**v.**

**RICKY TITH,**

**Defendant and Appellant.**

**A114094**

**(Sonoma County  
Super. Ct. No. SCR481092)**

Ricky Tith (Tith) appeals from a judgment entered after he pled guilty to felony assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)).<sup>1</sup> He contends that his constitutional rights were violated by the imposition of the upper term of sentence, which was based on one or more aggravating factors neither found by a jury nor admitted by his plea. (See *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*).) We remand for resentencing.<sup>2</sup>

**I. FACTS AND PROCEDURAL BACKGROUND**

A first amended complaint (complaint) charged Tith with felony attempted murder (§§ 664/187, subd. (a)), attempted carjacking (§§ 664/215, subd. (a)), and assault with a

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<sup>1</sup> All statutory references are to the Penal Code.

<sup>2</sup> On January 10, 2007, we affirmed Tith's sentence on the ground that we were obliged to follow *People v. Black* (2005) 35 Cal.4th 1238 (*Black*), in which the California Supreme Court held that *Blakely* did not apply to California's determinate sentencing law. After the decision in *Cunningham v. California* (2007) 549 U.S. \_\_\_, 127 S.Ct. 856 (*Cunningham*), Tith filed a timely petition for rehearing, which we granted. We also ordered supplemental briefing from Tith and respondent, which they have provided.

deadly weapon and with force likely to produce great bodily injury (§ 245, subd. (a)(1)). As to the attempted murder charge, the complaint alleged the personal use of a deadly and dangerous weapon (§ 12022, subd. (b)(1)). As to the charge of assault with a deadly weapon, the complaint alleged the personal infliction of great bodily injury (§ 12022.7, subd. (a)).

#### A. FACTS

We summarize the facts as described in the felony presentence report prepared by the Sonoma County probation office.

On January 29, 2006, victim Luciano drove his truck to the Days Inn Motel where his girlfriend worked. As he got out of the truck, Luciano noticed a person (whom he later identified as appellant Tith) approaching. Tith instructed Luciano, “Give me your keys.” Luciano refused, and Tith repeated his demand. When Luciano again refused, Tith pulled out a black-handled pocket knife and stabbed Luciano in the chest. Luciano’s girlfriend called 911.

When police arrived, Luciano’s girlfriend pointed toward a group of men wearing blue clothing. As the officers attempted to detain the group, two of the men ran into room 129 of the motel. Police saw a one-inch laceration under Luciano’s left breast area, which was bleeding.

Police officers knocked on the door to room 129. Tith opened the door and asked, “What did we do?” Police ordered Tith and his brother Sithorn Tith (Sithorn) out of the room and handcuffed them. Officers found a blue flannel jacket and a white hooded sweatshirt with red stains, which were possibly bloodstains, under the mattress in room 129. A small folding pocketknife, with a two-and-a-half-inch locking blade, was on top of the television.

Police showed Luciano photographs of several of the people detained at the motel. Luciano said that the photograph of Tith most resembled the person who stabbed him.

Tith told officers that he had arrived drunk at a party at the motel with Sithorn and did not remember much about it. An officer told Tith that police had found his knife, and asked Tith what the victim had said that caused Tith to stab him. Tith replied, “Who did I

stab?” After telling Tith that the victim had identified his photograph, the officer left the interview room and returned with a blank videotape marked “Days Inn. Sunday 01-29-06.” The officer left the room again, and Tith picked up the videotape, removed it from the box, opened the protective flap, and broke the tape. When the officer returned, he observed Tith putting the videotape back in the box and asked him why he broke the tape. Tith claimed he did not know. Asked why he stabbed the victim, Tith again claimed he did not know. Tith did not deny stabbing Luciano, but asserted merely that he was too drunk to remember.

Medical records described Luciano’s wound as “a stab wound with isolated skin and minimal superficial soft tissue injury.”

#### B. GUILTY PLEA AND SENTENCE

Tith was arraigned, waived his right to a preliminary hearing, and entered a plea of guilty to the charge of assault with a deadly weapon (§ 245, subd. (a)), in exchange for dismissal of the remaining charges and allegations. Before entering his guilty plea, Tith initialed and signed a written waiver of his constitutional rights, and confirmed to the court that he understood and waived the rights set forth in the written waiver form, and understood that the charge to which he was pleading constituted a felony strike.

The court subsequently denied probation and, after considering the circumstances in aggravation and mitigation, sentenced Tith to the upper term of four years in state prison. The remaining charges and allegations were dismissed pursuant to the plea agreement.

This appeal followed.

#### II. DISCUSSION

Tith contends that the court violated *Blakely, supra*, 542 U.S. 296, by imposing the upper term of sentence based on its own findings of aggravating factors, which had neither been established by a jury beyond a reasonable doubt nor admitted by his plea.

The United States Supreme Court recently held that *Blakely* applies to California’s determinate sentencing law. (*Cunningham, supra*, 549 U.S. \_\_\_, 127 S.Ct. 856 [2007 U.S. Lexis 1324].) In particular, the court ruled that California’s procedure for imposing

upper terms violates the defendant’s Sixth and Fourteenth Amendment right to a jury trial “[b]ecause circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt.” (*Cunningham, supra*, 2007 U.S. Lexis 1324, at p. 35.) Under *Cunningham*, the imposition of an upper term in California is unconstitutional if based on facts neither admitted by the defendant nor found true by a jury beyond a reasonable doubt.

In the matter before us, the sentencing judge explained his refusal to grant probation and the reason for his selection of the upper term, as follows: “The one thing I am convinced of is the defendant is now remorseful. The source of that remorse, though, I’m not too sure. It looked like he used every angle possible to this very knowledgeable, streetwise 18-year-old with peripheral gang indications to weasel out of this thing. But for an inch either way, he’d be here on a first degree murder case. ¶ He approaches a man in a parking lot, a Latin man, who is there to pick up his girlfriend or help her out; demands his car and his car keys, and then thrusts a knife into his body. Now that is criminal, and that does not deserve probation. ¶ This is an 18-year-old conducting himself like a very mature adult criminal person. And I’ve analyzed this case from top to bottom, and I show no sympathy whatsoever. I don’t feel that he deserves any mercy because of his youth. ¶ I’ve analyzed the criteria affecting probation and feel that he is not an apt candidate for probation. The nature of the offense leads me to conclude that the criteria -- or excuse me, the circumstances in aggravation and mitigation warrant that this Court sentence this defendant to serve four years in the State Prison.”

The court’s reference to the “nature of the offense” as the basis for imposing the four-year upper term refers to the aggravating factors set forth in rule 4.421(a) of the California Rules of Court, which pertain to aspects of the crime such as the degree of violence and the manner in which the offense was committed.<sup>3</sup> None of these

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<sup>3</sup> Rule 4.421 of the California Rules of Court sets forth the circumstances in aggravation that may be considered in determining whether to impose an upper term of sentence. Subdivision (a) of the rule describes circumstances relating to the nature of the crime: “(a) Facts relating to the crime, whether or not charged or chargeable as

aggravating factors was admitted by Tith or found true beyond a reasonable doubt by a jury (or by the court). The upper term of sentence imposed against Tith is therefore unconstitutional under *Cunningham*, and we must vacate the judgment and remand for resentencing.

The People urge that Tith’s sentence should be upheld, notwithstanding *Cunningham*, based on (1) principles of waiver and forfeiture; (2) Tith’s admission that he used a knife; and (3) the doctrine of harmless error. Respondents’ contentions lack merit.

The People first assert that Tith waived or forfeited the right to assert *Blakely* error by stating in his written waiver form that he waived a jury trial “as to all charges, allegations and prior convictions” and by failing to object on *Blakely* grounds at the sentencing hearing. However, Tith’s attorney argued at sentencing that “there is nothing that has been proved beyond a reasonable doubt as aggravating factors,” which may be construed as a reference to the *Blakely* standard. Moreover, any objection on *Blakely* grounds was futile at the time of Tith’s sentencing. Tith was sentenced in May 2006, after the California Supreme Court held in *Black* that *Blakely* did *not* apply. Under these circumstances, Tith is not barred from challenging his sentence under *Blakely* and *Cunningham*. (See *People v. Hill* (1998) 17 Cal.4th 800, 820 [a defendant is excused from failing to timely object if the objection would have been futile].)

The People next argue that Tith’s sentence was based on an aggravating factor admitted by the defendant, because he admitted his use of a knife in perpetrating the crime. The People assert that when Tith pleaded guilty, he admitted not only that the

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enhancements, including the fact that: [¶] (1) 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; [¶] (2) The defendant was armed with or used a weapon at the time of the commission of the crime; [¶] (3) The victim was particularly vulnerable; [¶] . . . [¶] (9) The crime involved an attempted or actual taking or damage of great monetary value . . . .” By contrast, subdivision (b) pertains to facts relating to the defendant, and subdivision (c) refers to facts declared by statute to be aggravating circumstances.

force he used in committing the assault was likely to produce great bodily injury, but also specifically that he used a knife, which is not a required element of aggravated assault. The People further contend that the court relied on Tith's use of a knife in imposing sentence, because the court mentioned how Tith "thrust[] a knife into his [victim's] body." Because a single aggravating circumstance is sufficient to render a defendant eligible for the upper term, the People contend there was no *Cunningham* violation.

We disagree. The record on appeal does not indicate that Tith's admission of his use of the knife was anything more than his acknowledgement that he committed the elements of the crime. The exchange at the sentencing hearing was as follows: "THE COURT: Very well. You are accused in this Complaint, in the third count of the Complaint, with willfully and unlawfully, on the 29th of January, committing assault on one Luciano Guzman Gonzalez (phonetically spelled) with a deadly weapon, it being a knife, and that this force was likely to produce great bodily injury. [¶] How do you plead to that, sir? [¶] THE DEFENDANT: Guilty." Tith was pleading guilty to a charge. There was no pronouncement that he was admitting his use of the knife as an aggravating factor or for the purpose of subjecting himself to an upper term of sentence. Nor could this have been the purpose of the verbal exchange at the sentencing hearing, since it was then California law that *Blakely* did not apply, and there was thus no need to obtain a defendant's admission to an aggravating factor.<sup>4</sup>

Furthermore, it is unclear how much the sentencing judge relied on Tith's use of a knife in imposing the upper term. The court specifically mentioned the knife only in explaining why *probation* was inappropriate, not in explaining why the upper term was selected: "[Tith] approaches a man in a parking lot, a Latin man, who is there to pick up his girlfriend or help her out; demands his car and his car keys, and then *thrusts a knife*

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<sup>4</sup> We need not and do not consider the extent to which it must be shown that a defendant admitted a fact with the understanding that it would be used to aggravate his or her sentence. Even if such an understanding were unnecessary, Tith's acknowledgement of his use of the knife cannot be used to uphold his sentence because, as we explain next, it is not clear that the upper term was imposed on this basis alone.

into his body. Now that is criminal, and *that does not deserve probation.*” (Italics added.) As for imposition of the upper term, the court simply stated: “The *nature of the offense* leads me to conclude that the criteria -- or excuse me, the circumstances in aggravation and mitigation warrant that this Court sentence this defendant to serve four years in the State Prison.” (Italics added.) Even if the “nature of the offense” incorporated all of the circumstances of the crime referenced by the court in deciding not to grant probation, those circumstances included factual matters besides the use of the knife that also could have been used to justify the upper term. For example, the court indicated its view that the viciousness of the attack might have been racially or gang-motivated (“He approaches a man in a parking lot, a Latin man”; see Cal. Rules of Court, rule 4.421(a)(1)), and that Tith attempted to rob or carjack his victim (“demands his car and his car keys”; see Cal. Rules of Court, rule 4.421(a)(9).) Neither of these other circumstances was admitted by Tith or found true beyond a reasonable doubt. And while the People argue that an upper term may be justified by only one aggravating factor, we cannot tell from this record whether the sentencing court would have imposed the upper term if it had considered *only* the use of the knife.

Lastly, the People argue that any *Cunningham* error in this matter was harmless beyond a reasonable doubt. (See *Washington v. Recuenco* (2006) 126 S.Ct. 2546, 2551-2553 [*Blakely* error is not structural, but subject to harmless error analysis for constitutional questions]; *Chapman v. California* (1967) 386 U.S. 18, 24].) Under this standard, relying on an unproven aggravating circumstance is harmless if there was overwhelming or uncontradicted evidence of that circumstance, leaving no doubt that the jury would have found the circumstance to be true. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 328 [*Apprendi*<sup>5</sup> error harmless because no doubt the jury would have found the same conclusion as the trial court].)

Here, the People argue, there is no dispute that Tith stabbed his victim in the chest

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<sup>5</sup> *Apprendi v. New Jersey* (2000) 530 U.S. 466.

with a knife: he admitted to the probation officer “that he did stab the victim while attempting to push him away” and acknowledged his use of the knife when entering his guilty plea. The People also contend that a trier of fact would have found all or most of the other aggravating circumstances true, based on the sentencing judge’s observation that Tith “used every angle possible to this very knowledgeable, streetwise 18-year-old with peripheral gang indications to weasel out of this thing,” “[b]ut for an inch either way, he’d be here on a first degree murder case,” “I’ve analyzed this case from top to bottom, and I show no sympathy whatsoever,” and “[t]his is an 18-year-old conducting himself like a very mature adult criminal person.”

The People’s argument is unavailing. Even if it was undisputed that Tith used the knife, as discussed above the record is not clear that the court would have imposed the upper term of sentence based on this fact alone. As to the other circumstances of the crime, the question is not whether the sentencing judge was firm in his conclusions as to the nature of the offense; the question is whether there was *evidence* from which a jury would have reached the same conclusion. The prosecution provided no competent evidence in this regard. The People have failed to establish that the violation of Tith’s constitutional rights was harmless beyond a reasonable doubt.

### III. DISPOSITION

The judgment is vacated, and the matter is remanded for resentencing.

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MILLER, J.\*

We concur.

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JONES, P. J.

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SIMONS, J.

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\* Judge of the Superior Court of San Francisco County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.