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Opinion following remand from U.S. Supreme Court

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RODNEY CLIFFORD TORRES, Defendant and Appellant.	H027516 (Santa Clara County Super. Ct. No. CC317979)

A jury convicted defendant Rodney Clifford Torres of assault with a deadly weapon and felony hit and run. It also found true allegations that, in committing the assault, defendant personally inflicted great bodily injury (Pen. Code, § 12022.7, subd. (a) [three-year sentence enhancement])[1] and personally inflicted great bodily injury causing the victim to suffer paralysis of a permanent nature (§ 12022.7, subd. (b) [five-year sentence enhancement]). The trial court sentenced defendant to 10 years in prison consisting of a four-year upper term for assault, a consecutive one-year term for hit and run, plus the five-year sentence enhancement (it stayed the three-year sentence enhancement). On appeal, defendant contended that (1) the trial court erred by failing to instruct the jury sua sponte in the language of CALJIC No. 4.45 (defense of accident or misfortune), (2) the evidence was insufficient to support the five-year enhancement, and (3) the trial court's imposition of the upper term was contrary to *Blakely v. Washington*

[1] Further unspecified statutory references are to the Penal Code.

(2004) 542 U.S. 296 (*Blakely*). In his reply brief, defendant conceded that *People v. Black* (2005) 35 Cal.4th 1238, which was decided after he and the People had filed their opening briefs, compelled us to reject the sentencing challenge. We then otherwise disagreed with defendant and affirmed the judgment. Our Supreme Court denied review, but the United States Supreme Court, having decided *Cunningham v. California* (2007) 549 U.S. __ [2007 LEXIS 1324] (*Cunningham*), 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.* Upon reconsideration of the sentencing issue, we agree that *Cunningham* requires resentencing. We therefore reverse the judgment and remand for resentencing.[2]

BACKGROUND

While driving his Toyota pickup truck on Camden Avenue, defendant changed lanes, cutting off a motorcycle. At a traffic light, the motorcycle stopped even with the truck and the victim rider argued with defendant. The victim became afraid and, after riding away, turned into a shopping center. Defendant followed and pursued the motorcycle through the shopping center parking lot at high speed. As he caught up to the motorcycle, he swerved his truck and struck the motorcycle, causing it to go out of control. The victim was thrown into the air and landed on his head. Defendant exclaimed, "See what you get," and drove out of the parking lot.

Defendant admitted to the police that he had cut off and later "bumped" the motorcycle. He explained that he lost self-control when the victim spat on him during their argument. He added that he had pursued the motorcycle to continue the argument rather than to strike it or injure the victim.

[2] Our discussion of the other issues raised by defendant is identical to our original opinion in this case. We discuss those issues again because our earlier opinion was vacated, not because we have revisited those issues.

The victim suffered incomplete spinal injury resulting in near but not total paralysis below the level of the injury. Surgeons removed the fourth and fifth cervical vertebrae and replaced them with a bone graft secured by a titanium plate. The victim wore a cast for five months. By the time of trial, his condition had improved to 90 percent of what it will be. Various testimony described the following conditions: the victim was numb and experienced spasms on his right side; he could not tell the location of his right arm or foot; he could not grip objects with his right hand and could only move the fingers on that hand about 10 degrees; he could not bend the right arm; he could not sense hot or cold on his left side; he could not stand without a cane or standing frame; he could not walk, get dressed, or go to the bathroom without assistance; he will never be normal; and he will always have difficulty with the use of his right hand and strength of his right side.

Defendant argued that, though he had chased the victim, he did not have intent to kill. He posed that the collision was accidental as a result of his misjudging the distance between his truck and the motorcycle. The jury acquitted him of attempted murder.

ACCIDENT OR MISFORTUNE

Defendant contends that the trial court erred in failing to instruct the jury, sua sponte, in the language of CALJIC No. 4.45 regarding the defense of accident or misfortune. He urges that the instruction was justified because the evidence showed and he argued to the jury that he did not intend to strike the motorcycle or injure the victim. This analysis is erroneous.

CALJIC No. 4.45 provides: "When a person commits an act or makes an omission through misfortune or by accident under circumstances that show [no] [neither] [criminal intent [n]or purpose,] [nor] [[criminal] negligence,] [he][she] does not thereby commit a crime."

The defense of accident or misfortune is based on section 26, which provides, in relevant part: "All persons are capable of committing crimes except those belonging to

the following classes: [¶] . . . [¶] Five--Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence." This defense "is a claim that the defendant acted without forming the mental state necessary to make his actions a crime." (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 390.)[3]

"Trial courts only have a sua sponte duty to instruct on 'the general principles of law relevant to and governing the case.' [Citation.] 'That obligation includes instructions on all of the elements of a charged offense' [citation], and on recognized 'defenses . . . and on the relationship of these defenses to the elements of the charged offense.' " (*People v. Rubalcava* (2000) 23 Cal.4th 322, 333-334.) "As to defenses, . . . the court must instruct sua sponte only if there is substantial evidence of the defense and the defense is not 'inconsistent with defendant's theory of the case.' " (*People v. Elize* (1999) 71 Cal.App.4th 605, 615.) However, a court need not instruct the jury on defenses not supported by the evidence. (*People v. Beardslee* (1991) 53 Cal.3d 68, 87-88.) In this context, " '[s]ubstantial evidence is evidence sufficient to "deserve consideration by the jury," that is, evidence that a reasonable jury could find persuasive.' " (*People v. Lewis* (2001) 25 Cal.4th 610, 645.)

Accident or the absence of intent refers to the act and not the result. The defense is available only when the alleged crime was the result of an event that happened while the defendant was engaged in a lawful act. (*People v. Gorgol* (1953) 122 Cal.App.2d 281, 308.)

Here, the accident defense was unavailable to defendant because he freely admitted chasing the victim through the shopping center using his truck. (*People v.*

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[3] The People argue that *Gonzales* incorrectly characterized the accident-or-misfortune doctrine as a defense. They urge that the doctrine is an attack on the intent element of an offense and, as such, is a pinpoint instruction that need not be given if it is not requested. Since we disagree with defendant, we need not address this point.

Wright (2002) 100 Cal.App.4th 703, 706 [operating a vehicle in a way that would lead a reasonable person to believe a battery will probably and directly result is assault with a deadly weapon].) Stated another way, the only intent necessary for assault with a deadly weapon is that the defendant intended to do the act, here, the chasing; actual battery or injury is not an element of the offense. (*People v. Williams* (2001) 26 Cal.4th 779, 790.) Thus, that defendant accidentally struck and injured the victim is no defense.

Defendant's reliance on *People v. Gonzales*, *supra*, 74 Cal.App.4th 382, is therefore misplaced. There, the defendant was charged with hitting, punching, and kicking his cohabitant. The evidence at trial showed that the victim's injuries could have been caused when the defendant was opening the bathroom door and the door accidentally hit the victim in the head. The reviewing court concluded that the court had a sua sponte duty to instruct the jury with CALJIC No. 4.45 because there was substantial evidence that the victim's injuries were caused by accident. (*People v. Gonzales*, *supra*, 74 Cal.App.4th at pp. 385-387, 390.) Here, there is no evidence that the act causing the injury (the chasing) was accidental.

Even if the court's failure to instruct the jury on the defense of accident or misfortune was error, such error was harmless.

The erroneous failure to instruct on a defense is harmless if the factual question posed by the omitted instruction was necessarily decided under other proper instructions. (*People v. Jones* (1991) 234 Cal.App.3d 1303, 1314-1315, fn. 9.) In *Jones*, the court held the trial court's failure to instruct the jury on the defense of accident or misfortune with respect to a charge of attempted murder was harmless because the jury was properly instructed, inter alia, "[t]hat it had to determine the truth *vel non* of the charged allegation that the attempted murder was 'willful, deliberate and premeditated,' " and the jury found the allegation true. (*Id.* at p. 1315.)

Here, under the instructions as given, including CALJIC Nos. 3.30 (concurrence of act and general criminal intent), 9.00 (assault--defined), and 9.02 (assault with a

deadly weapon--defined), the jury must have concluded that defendant intended to chase the victim (indeed, defendant admitted as much), all that it was required to find for a crime of general criminal intent. If the jury believed that defendant did not intend to chase the victim, it would not have been able to find the requisite mental state necessary for the offense. On this record, we see no reasonable probability of a result more favorable to defendant had the trial court given CALJIC No. 4.45. (See *People v. Corning* (1983) 146 Cal.App.3d 83 [in light of the evidence, the jury's findings rejecting the defendant's version and the self-evident nature of CALJIC No. 4.45, it is not reasonably probable a more favorable result would have been reached had the instruction actually been given].)

PARALYSIS ENHANCEMENT

Section 12022.7, subdivision (b), states: "Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony which causes the victim to become comatose due to brain injury or to suffer paralysis of a permanent nature, shall be punished by an additional and consecutive term of imprisonment in the state prison for five years. As used in this subdivision, 'paralysis' means a major or complete loss of motor function resulting from injury to the nervous system or to a muscular mechanism."

Defendant argues that the evidence is insufficient to show that the victim suffered paralysis "of a permanent nature." We disagree.

The parties agree that the standard of review of the sufficiency of the evidence to support imposition of a sentence enhancement is the same as that which applies to the sufficiency of the evidence to support a determination of guilt.

"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. [Citation.] . . . [R]eview for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

According to defendant, the victim's surgeon never testified that the paralysis would be "permanent," dismissed the notion that "major" paralysis was a workable concept, and left open the possibility for more improvement. In defendant's view, the testimony fails to demonstrate permanent paralysis, but rather a state of recovery that was, at least at the time of trial, continuing. This analysis is erroneous.

Defendant does not question that the victim's physical state at trial was one of paralysis. In this context, the surgeon testified without contradiction that the victim had recovered to 90 percent of expectancy and would never be normal. This testimony therefore supports a conclusion that the victim's paralysis was permanent. That the victim's recovery was continuing does not require a contrary conclusion. This is especially so in the absence of any evidence that (a) the victim's past improvement will necessarily continue, and (b) the victim will eventually enjoy a complete recovery. In our view, a reasonable trier of fact could conclude that the paralysis was "permanent" within the meaning of section 12022.7.

UPPER-TERM SENTENCE

A trial court must impose the statutory middle term "unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation." (Cal. Rules of Court, rule 4.420(a).) "Circumstances in aggravation and mitigation must be established by a preponderance of the evidence. Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation. . . . Selection of the lower term is justified

only if, considering the same facts, the circumstances in mitigation outweigh the circumstances in aggravation." (Cal. Rules of Court, rule 4.420(b).) "The reasons for selecting the upper or lower term must be stated orally on the record." (Cal. Rules of Court, rule 4.420(e).)

The trial court announced its reasons for imposing the upper term as follows:

"[Defendant] used his truck as a weapon to take advantage of the fact that [the victim] was driving a motorcycle. [Defendant] drove his vehicle with total disregard for the safety of the victim and of the public. The use of a vehicle in this manner without any justification indicates that [defendant] is a serious danger to society. A short time after the incident [defendant] changed the appearance of his vehicle to avoid detection, and had a grant deed prepared removing his name from the title of the house he owned with his brother. The crime demonstrates a high degree of cruelty and callousness."

Thus, the record reflects that the trial court imposed the upper term because it acknowledged and weighed three aggravating circumstances against no mitigating circumstances. The aggravating circumstances were that (1) the assault showed defendant to be a serious danger to society (Cal. Rules of Court, rule 4.421(b)(1)), (2) defendant endeavored to avoid detection, and (3) the assault demonstrated a high degree of cruelty and callousness (Cal. Rules of Court, rule 4.421(a)(1)).

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, a five-justice majority of the United States Supreme Court held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490.) *Blakely* held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Blakely*, *supra*, 542 U.S. at p. 303, italics omitted.) In *Cunningham*, the court held that, under California's determinate sentencing scheme, the upper term can

only be imposed if the factors relied upon comport with the requirements of *Apprendi* and *Blakely*. (*Cunningham*, *supra*, 549 U.S. __ [2007 U.S. LEXIS 1324].)

Blakely describes three types of facts that a trial judge can properly use to impose an aggravated sentence: (a) " 'the fact of a prior conviction' " (*Blakely*, *supra*, 542 U.S. at p. 301); (b) "facts reflected in the jury verdict" (*id.* at p. 303, italics omitted); and (c) facts "admitted by the defendant" (*ibid.*, italics omitted).

In light of *Apprendi*, *Blakely*, and *Cunningham*, the trial court's imposition of the upper term for assault violated defendant's right to a jury trial because it was based upon aggravating factors not such that a trial judge can properly use without being found true by a jury.[4]

Preliminarily, the People argue that defendant has forfeited the claimed sentencing error because he failed to make an objection below. We disagree. Not all claims of error are prohibited in the absence of a timely objection in the trial court. A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights such as the constitutional right to a jury trial. (*People v. Holmes* (1960) 54 Cal.2d 442, 443-444; see *People v. Vera* (1997) 15 Cal.4th 269, 276-278; *People v. Saunders* (1993) 5 Cal.4th 580, 589, fn. 5.)

The People then urge that the error was harmless. They rely on the underlying facts of the case and assert that "Any reasonable jury would have made the same factual determinations as were made by the court."

In *Washington v. Recuenco* (2006) __ U.S. __ [126 S.Ct. 2546, 2548], the court reversed a Washington Supreme Court judgment that had held that *Apprendi/Blakely* error was structural error and thus not subject to harmless-error analysis. In doing so, it

[4] The People do not argue that the record shows unrelied-upon aggravating circumstances that the trial court could properly use without the circumstances being found true by a jury.

observed that *Apprendi/Blakely* error is indistinguishable from the constitutional error in *Neder v. United States* (1999) 527 U.S. 1 (*Neder*), a case in which it had held that harmless-error analysis applied to the error in failing to instruct the jury on an element of the offense: "[A]n instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." (*Id*. at p. 9.)

Following the *Neder* analogy, we can affirm after *Apprendi/Blakely* error only if we conclude beyond a reasonable doubt that the aggravating circumstances were "uncontested and supported by overwhelming evidence, such that [a] jury verdict would have been the same [as the trial court's finding]." (*Neder*, *supra*, 527 U.S. at p. 17.) A defendant contests aggravating circumstances when he or she "bring[s] forth facts contesting the [aggravating circumstance]," and "raise[s] evidence sufficient to support a contrary finding." (*Id.* at p. 19.)[5]

Here, we have little doubt that a jury could rationally find beyond a reasonable doubt that defendant's brutal assault shows defendant to be a serious danger to society, shows that defendant endeavored to avoid detection, and demonstrates defendant's high degree of cruelty and callousness. But the jury in this case was not asked to find, nor did it find, expressly or even impliedly, what the assault showed or demonstrated. Nor was defendant put on notice that these subjective points were at issue so as to give him reason

[5] Following *Recuenco*, the Ninth Circuit Court of Appeals applied the harmless error test formulated in *Neder* in a case raising *Apprendi*/*Blakely* error. (*United States v. Zepeda-Martinez* (9th Cir. 2006) 470 F.3d 909, 910.) "Under *Recuenco* and *Neder*, an error is harmless if the court finds beyond a reasonable doubt that the result 'would have been the same absent the error.' *Neder*, 527 U.S. at 19, 119 S.Ct. 1827. *Neder* explained that where the record contains 'overwhelming' and 'uncontroverted' evidence supporting an element of the crime, the error is harmless. *Id*. at 17, 18, 119 S.Ct. 1827. Conversely, the error is not harmless if 'the defendant contested the omitted element and raised evidence sufficient to support a contrary finding.' *Id*. at 19, 119 S.Ct. 1827." (*Id.* at p. 913.)

to contest what the assault showed or demonstrated. Stated another way, aggravating circumstances that were not at issue in a trial were not "uncontested" at the trial. We therefore cannot conclude that the *Apprendi/Blakely* error in this case was harmless.

Currently, there are no procedures in place allowing juries to be convened for purposes of deciding aggravating circumstances either after conviction or on remand after an appeal. (See *State v. Pillatos* (2007) 150 P.3d 1130 [Washington courts lacked power to empanel sentencing juries, until the state Legislature specified the procedures in a new statute]; *State v. Kessler* (2003) 276 Kan. 202, 215-217 [trial court lacked power to devise a procedure under which the jury determined the fact that increased the sentence].) We nevertheless recognize that the People may wish to pursue a path leading to an upper term. We therefore decline to modify the judgment so as to reduce defendant's sentence to a middle term.

DISPOSITION

The judgment is reversed. The trial court is directed to enter judgment imposing the middle term for the assault conviction unless, within 30 days from the date the remittitur is filed, the People request a jury trial on sentencing aggravating circumstances.

Premo, Acting P.J.

WE CONCUR:

Elia, J.

Bamattre-Manoukian, J.