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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIFTH APPELLATE DISTRICT**

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>OSCAR DANIEL VIELMA,<br><br>Defendant and Appellant. | F050858<br><br>(Super. Ct. No. VCF161203)<br><br>**O P I N I O N** |

**THE COURT**[*]

APPEAL from a judgment of the Superior Court of Tulare County. Ronn M. Couillard, Judge.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, and Julie A. Hokans and Christina Hitomi, Deputy Attorneys General, for Plaintiff and Respondent.

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[*]Before Vartabedian, Acting, P.J., Levy, J., and Gomes, J.

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A jury convicted appellant Oscar Vielma of second degree burglary (Pen. Code, §§ 459; 460, subd. (b)). In a separate proceeding, the court found true enhancement allegations that appellant had served three separate prison terms for prior felony convictions (Pen. Code, § 667.5, subd. (b)). The court imposed a prison term of five years, consisting of the three-year upper term on the substantive offense and one year on each of the three prior prison term enhancements.

On appeal, appellant contends (1) the court erred in denying appellant's motion for a continuance, and (2) he was denied his rights to trial by jury and due process of law under the United States Constitution because the court imposed the upper term based on circumstances in aggravation that were not found by a jury beyond a reasonable doubt. We will affirm.

**FACTS**

At approximately 3:00 p.m. on March 15, 2006,[1] Richard Bailey looked out one of the windows in the building where he was working and saw appellant, who was in a parking lot approximately 100 feet from Bailey, approach Bailey's parked car and break a window on the passenger side with his hand.[2] Bailey, after telling a co-worker to call 911, ran outside.

When he got within approximately 10 feet of appellant, Bailey called to appellant. Appellant turned and ran, and Bailey gave chase. Police officers arrived on the scene shortly thereafter and apprehended appellant in an alley nearby.

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1 Further references to dates of events are to dates in 2006.

2 Except as otherwise indicated, the factual statement is taken from Bailey's testimony.

Bailey had been in his car a few hours previously, at which time nothing was missing from the car. After the break-in of his car, the car stereo was missing; it had been "ripped out."

City of Porterville Police Officer John Olmos testified to the following. He spoke to appellant on March 15 at the police station booking area, at which time, after advising appellant of his constitutional rights, including the right to remain silent, appellant told him the following. Appellant was standing near appellant's car, acting as a look-out for a 40-year-old Hispanic male whose first name was Guadalupe or Lupe. "Guadalupe was the actual person who had entered the car and taken the stereo," and after doing so he fled on a bicycle before Bailey "contact[ed]" appellant.

After appellant was apprehended, Officer Olmos and Bailey retraced the steps Bailey had taken in chasing appellant, but they did not find the stereo.

Appellant called no witnesses and presented no evidence.

## DISCUSSION

### *Denial of Motion for Continuance*

As indicated above, appellant contends the court abused its discretion in denying appellant's motion for a continuance of trial.

*Background*

The information in the instant case was filed April 4 and the one-day trial took place a little more than a month later, on May 8.

On May 4, appellant filed a notice of motion for continuance, and supporting papers, including a declaration, executed May 4, in which appellant's trial counsel averred as follows: on April 28, appellant informed counsel that "he may have potential witnesses but he did not have any contact information"; appellant, who was in custody, "would need to make telephone calls from the jail in order to provide [counsel with such] information"; appellant "has been on 'lock down' status since May 2" and was "[t]herefore[] . . . unable to make any telephone calls from the facility"; and "[t]hese

witnesses may be exculpatory and the only way to obtain such information is from the defendant, who is currently unable to assist in his defense due to the 'lock down' status of Unit 41 at Bob Wiley Detention Facility."

At the hearing on the motion on the morning of May 8, prior to any testimony, defense counsel told the court: "Because the trial was somewhat short-set compared to other trials and because we did not have any concrete information, we have not been able to conduct any investigation. So we request more time to allow our investigators to contact potential witnesses or people who work at the businesses in the area to see if they can provide any helpful information to the defense."

In denying the motion, the court, after noting the incident giving rise to the charge of the instant offense occurred March 8 and a preliminary hearing was held March 29, stated: "It seems like there's nothing concrete here. This sounds like more of a fishing expedition to me. Certainly . . . if the defendant had any witnesses or potential witnesses that needed to be contacted, this could easily have been done."

At trial on May 8, the People rested after presenting the testimony of two witnesses, at which point the following exchange occurred outside the presence of the jury:

"[Defense counsel]: . . . My client informed me this morning that he did receive witness names and contact information. A cellmate was able to make a phone call for Mr. Vielma. However, the deputy . . . took this information from him and threw it away. I would be renewing my motion to continue.

"THE COURT: I'm going to deny it again. One other thing that did come up is that -- still, the reason I'm denying it is because this is not real substantive information. It's something that he pulled out of thin air. I'll make a finding that it's not persuasive enough to continue the trial."

*Analysis*

Continuances in a criminal case may be granted only upon a showing of good cause. (Pen. Code, § 1050, subd. (e); *People v. Frye* (1998) 18 Cal.4th 894, 1012-1013.) In a criminal case, " 'counsel . . . [must be] given a reasonable time in which to prepare the defense.' [Citation.] Failure to respect these rights constitutes a denial of due process." (*People v. Courts* (1985) 37 Cal.3rd 784, 790.)

"The determination of whether a continuance should be granted rests within the sound discretion of the trial court, although that discretion may not be exercised so as to deprive the defendant or his attorney of a reasonable opportunity to prepare. [Citations.]" (*People v. Sakarias* (2000) 22 Cal.4th 596, 646.) "Not every restriction on counsel's time or opportunity to investigate . . . or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel. [Citation.]" (*Morris v. Slappy* (1983) 461 U.S. 1, 11.) Similarly, "it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. [Citation.] Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. [Citation.]" (*Ungar v. Sarafite* (1964) 376 U.S. 575, 589 [84 S.Ct. 841, 849].)

When a motion to continue is based on the need to interview potential witnesses, the court should consider the diligence of defendant and counsel (*People v. Grant* (1988) 45 Cal.3d 829, 844), the benefit that the moving party anticipates, the likelihood that such benefit will result, the burden on other witnesses, jurors and the court, and whether granting the motion will accomplish or defeat substantial justice (*People v. Barnett* (1998) 17 Cal.4th 1044, 1125-1126). A defendant has the burden of showing by "affirmative proof . . . that the ends of justice require a continuance." (Cal. Rules of Court, rule 4.113.) Thus, "When a continuance is sought to secure the attendance of a witness, the defendant must establish 'he had exercised due diligence to secure the witness's attendance, that the witness's expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the

facts to which the witness would testify could not otherwise be proven.' [Citation.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.)

Upon review, "the appellate court looks to the circumstances of each case and to the reasons presented for the request" (*People v. Frye*, *supra*, 18 Cal.4th at p. 1013), and the defendant bears the burden of establishing that denial of a continuance constituted an abuse of discretion (*People v. Beeler* (1995) 9 Cal.4th 953, 1003). " 'Discretion is abused only when the court exceeds the bounds of reason, all circumstances being considered.' " (*People v. Froehlig* (1991) 1 Cal.App.4th 260, 265.)

We reject appellant's challenge to the denial of his motion for continuance. First, appellant has not affirmatively shown the required diligence. As best we can determine, the basis for appellant's request for a continuance of his trial was the claim that he needed more time in order provide counsel with information regarding "potential [defense] witnesses," so that counsel could contact and interview these witnesses. With respect to this claim, defense counsel's declaration indicates the following: appellant was aware of the existence of such witnesses on April 28, but had no "contact information"; in order to obtain such information, he had to make telephone calls to certain persons to whom he refers in his opening brief as "third parties"; but he was in custody, and was prevented from making these calls because he and other jail inmates were put "on 'lock-down' status" on May 2, four days after he advised counsel of these matters.

Appellant does not attempt to explain why it was not until April 28 that he told his counsel of the existence of potential witnesses; the record is silent on this question. If appellant knew of such witnesses for several weeks but made no mention of them to counsel before April 28, he could not be said to have acted with due diligence. And even if we assume appellant had not learned, and through the exercise of due diligence could not have learned, of the existence of the "potential witnesses" before April 28, there is nothing in defense counsel's declaration or anywhere else in the record indicating what steps, if any, appellant took to learn of the existence of these witnesses during the more

than three weeks that elapsed between the filing of the information, on April 4, and April 28. Moreover, the record is similarly silent as to what efforts appellant made to make telephone calls to third parties between April 28, when, counsel's declaration makes clear, appellant was aware of the existence of potential witnesses, and May 2, the first day the lock-down which prevented from making such calls went into effect. As indicated above, appellant has the burden of establishing he acted with due diligence. Because the record contains no indication that prior to the filing of the motion for continuance appellant did anything to provide his counsel with information necessary to contact potential witnesses, he has not met this burden.

Moreover, appellant has not established any likelihood that he would benefit from obtaining a continuance for the purpose of making contact with "potential witnesses." Specifically, he has not established "that the witness's expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven.' [Citation.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) Indeed, he makes no showing of what the witnesses' expected testimony would be. Defense counsel's May 4 declaration stated only that appellant indicated "he *may* have potential witnesses" who "*may* be exculpatory," and defense counsel, at the hearing on the motion on the morning of May 8 told the court she was requesting more time to contact "potential witnesses . . . to see *if* they can provide any helpful information . . . ." (Emphasis added.) And later on May 8, when counsel renewed the motion, although she suggested she had obtained "witness names and contact information," she gave no indication of what the witnesses' expected testimony would be. On this record, any benefit the defense could have realized from a continuance was entirely speculative. Therefore, appellant has not met his burden of establishing the court abused its discretion in refusing appellant's request for a continuance. (Cf. *People v. Gatlin* (1989) 209 Cal.App.3d 31, 40-41 [although continuance proper to permit defendant to investigate exculpatory evidence, speculative

nature of what is to be gained by a continuance justifies its denial]; *People v. Snow* (2003) 30 Cal.4th 43, 75 [“bare assertions” about needing more time insufficient to demonstrate good cause]; *People v. Roybal* (1998) 19 Cal.4th 481, 505 [“vague expressions of hope that an appropriate expert could be found” insufficient]; *People v. Courts* (1985) 37 Cal.3d 784, 791 [availability of attorney too speculative to warrant continuance]; *People v. Murphy* (1973) 35 Cal.App.3d 905, 920 [grounds for continuance too speculative].)

***Imposition of Upper Term***

Appellant contends he was denied his rights to trial by jury and due process of law under the United States Constitution because the court imposed the upper term based on circumstances in aggravation that were not found by a jury beyond a reasonable doubt.

*Background*

In imposing the upper term, the court found no circumstances in mitigation and the following circumstances in aggravation: “[appellant’s] prior convictions as an adult are numerous” and “his prior performance on parole and probation has been unsatisfactory.”

The report of the probation officer (RPO) indicates appellant has suffered four prior felony convictions and at least nine misdemeanor convictions. The RPO also indicates appellant’s probation was revoked on one occasion, he committed three parole violations and he committed at least six misdemeanors while on probation.

*Analysis*

In *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531] (*Blakely*), 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. 301, quoting *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348] (*Apprendi*).) Thereafter, in *People v. Black* (2005) 35 Cal.4th 1238, the California Supreme Court held that the imposition of upper terms under California law does not constitute an

increase in the penalty for a crime beyond the statutory maximum, and therefore "the judicial fact finding that occurs when a judge exercises discretion to impose an upper term sentence . . . does not implicate a defendant's Sixth Amendment right to a jury trial." (*Id.* at p. 1244.)

Recently, however, in *Cunningham v. California* (2007) 549 U.S. __ [127 S.Ct. 856] (*Cunningham*) the United States Supreme Court found that *Black* was wrongly decided. The high court held: "Under California's DSL [determinate sentencing law], an upper term sentence may be imposed only when the trial judge finds an aggravating circumstance. [Citation.] [A]ggravating circumstances depend on facts found discretely and solely by the judge. In accord with *Blakely*, . . . the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum. [Citation.] ('[T]he "statutory maximum" . . . 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*.' (emphasis in original)). Because 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, [citation], the DSL violates [the] . . . bright-line rule [announced in *Apprendi*]: Except for 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.' [Citation.]" (*Cunningham*, *supra*, 127 S.Ct. at p. 868.)

At least one of the aggravating factors here, viz., appellant's numerous prior convictions, fell within the *Apprendi*/*Blakely*/*Cunningham* prior conviction exception and therefore did not implicate appellant's right to a jury trial. We recognize that the numerous-prior-convictions factor is not, strictly, " 'the *fact* of a prior conviction.' " (*Blakely*, *supra*, 542 U.S. at p. 301, emphasis added.) However, "[C]ourts have construed *Apprendi* as requiring a jury trial except as to matters relating to 'recidivism.' Courts have not described *Apprendi* as requiring jury trials on matters other than the

precise 'fact' of a prior conviction. Rather, courts have held that no jury trial right exists in matters involving the more broadly framed issue of 'recidivism.' " (*People v. Thomas* (2001) 91 Cal.App.4th 212, 221.) Thus, in *Thomas* the court held "the language in *Apprendi*, . . . '[o]ther than the fact of a prior conviction,' refers broadly to recidivism enhancements which include [Penal Code] section 667.5 prior prison term allegations." (*Id*. at p. 223.) In our view, the numerous-prior-convictions aggravating factor is, like the prior prison term enhancement, so closely related to recidivism that it falls within the exception.

The other aggravating factor at issue here, appellant's unsatisfactory performance on parole and probation, is not as closely related to recidivism. Although a grant of probation or parole presupposes a prior conviction, the RPO suggests that three of appellant's parole violations were based on noncriminal conduct. But even assuming it was required under *Cunningham* that this factor be found beyond a reasonable doubt by a jury, reversal is not required. A single factor in aggravation suffices to support imposition of the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 730.) And as indicated above, appellant suffered at least 13 prior convictions, four of which were for offenses serious enough to be classified as felonies. Any error in considering appellant's unsatisfactory performance on parole and probation was harmless under both *Chapman v. California* (1967) 386 U.S. 18 (harmless beyond a reasonable doubt) and *People v. Watson* (1956) 46 Cal.2d 818 (reasonable probability error did not impact outcome).

**DISPOSITION**

The judgment is affirmed.