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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ERIC VOGT, Defendant and Appellant.	E039410 (Super.Ct.No. RIF120263) **OPINION**

APPEAL from the Superior Court of Riverside County. James B. Jennings, Judge. (Retired judge of the Santa Barbara Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed.

Gregory S. Cilli, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Lilia E. Garcia, Supervising Deputy Attorney General, and Meagan J. Beale, Deputy Attorney General, for Plaintiff and Respondent.

A jury found defendant guilty of theft or embezzlement from an elder by a caretaker in violation of Penal Code section 368, subdivision (e).[1], [2] Defendant was sentenced to an upper term of four years in state prison. On appeal, defendant contends (1) his due process right was violated when the trial court refused to allow him to present witnesses at the sentencing hearing; (2) he was deprived of his federal and state constitutional rights to a jury trial and due process under *Cunningham v. California* (2007) ___ U.S. ___, ___ [127 S .Ct. 856, 868] (*Cunningham*), *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*), and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] (*Apprendi*) when the trial court imposed the upper term; and (3) the abstract of judgment must be corrected to reflect the correct amount of fines imposed by the trial court. We agree, as we must, that defendant's upper term sentence runs afoul of *Cunningham*. Accordingly, we will vacate defendant's sentence and remand the matter to the trial court for further proceedings consistent with this opinion.[3]

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[1] All future statutory references are to the Penal Code unless otherwise stated.

[2] The jury found defendant not guilty of theft or embezzlement from an elder by a *non*caretaker (§ 368, subd. (d)) as alleged in count 2.

[3] Because we remand the matter for resentencing, we need not address defendant's remaining contentions. Nonetheless, we note that the court abused its discretion when it refused to allow witnesses to testify pursuant to section 1204. (See also *People v. Mitchell* (1988) 199 Cal.App.3d 300, 313; *People v. Valdivia* (1960) 182 Cal.App.2d 145, 148 [defendant has a right to present evidence in mitigation of his punishment at a sentencing hearing, or to counteract or correct a probation report]; § 1170, subd. (b); Cal. Rules of Court, rule 4.414(b)(3) & (4).)

I

FACTUAL BACKGROUND

From November 2002 through August 2003, defendant took advantage of and stole money from his elderly neighbor, Virginia Richardson, while purporting to take care of her. Richardson was an 80-year-old single woman living in Riverside with no near relatives.[4]

Though defendant was Richardson's neighbor for about 20 years and friendly with her, they were not close, and Richardson did not consider him to be her son. Defendant was unemployed and had been for a couple of years. He claimed he supported himself by taking a second mortgage on his house and stated he was "employed" by Richardson from November 2002 until September 12, 2003. Defendant alleged that he and Richardson entered into an agreement in November 2002 whereby defendant would care for Richardson by providing food, cleaning her house, maintaining her yard, performing home repairs, and taking care of her dog; in exchange, Richardson would pay defendant's living expenses of $1,500 or $2,000 per month. In addition, defendant took over Richardson's finances by gaining access to Richardson's bank accounts, from which he would pay Richardson's bills as well as his own over the internet. During this time, defendant withdrew over $13,000 from Richardson's bank accounts and charged $500

[4] Richardson's nearest relative was her half sister, Marilyn Fortenberry, who lived in Texas. Richardson did not testify at trial; however, the videotape of Richardson's preliminary hearing testimony was admitted into evidence.

per month on her credit card accounts. He even continued to withdraw money from her bank account after Richardson fell and broke her hip in August 2003, resulting in her being admitted into the hospital.

Though Richardson occasionally gave defendant money to buy groceries for her, she did not agree to pay defendant's bills, hire him as help, or give him control of her bank accounts; she had told a neighbor numerous times that she wished defendant "would leave [her] alone."

When Richardson's half sister made a surprise visit in February 2003, she found the house to be dirty, although previously Richardson had kept a meticulously clean home. There were dead rats in the garage and one in the kitchen and dog and human feces throughout the house. Richardson's clothes were soiled, and Richardson's garden -- once a great source of pride -- was a shambles. Richardson herself was dirty, with terrible hygiene and mental deterioration. Defendant told Fortenberry during this visit that he was Richardson's caretaker. Defendant called Richardson "mom," which Richardson did not like.

Around this time period, defendant also took steps to acquire ownership and control of most of Richardson's property. On November 14, 2002, defendant arranged to be named trustee and sole beneficiary of Richardson's living trust and executor of her will, instead of Fortenberry, the original trustee, sole beneficiary, and executrix. Additionally, defendant possessed an accidental death insurance policy on Richardson's life, secured a power of attorney to deal with Richardson's affairs, and secured a

quitclaim deed to Richardson's property. The quitclaim deed was notarized by a Steve Goryan. Goryan had his tuition for a notary public class paid by defendant in May 2002. On November 19, 2002, a check from Richardson's bank account with her signature was made payable to Goryan in the amount of $1,500.

Although Richardson's signature had appeared on the above documents, she denied giving or assigning control over any of her property to defendant. She also denied changing her will to benefit defendant or lending him $3,500. Richardson had told Fortenberry that she did not give any property to defendant.

On August 17, 2003, following her fall, Richardson was discharged to a skilled nursing facility. At that time, defendant told the admissions coordinator that he was Richardson's son and that Richardson did not have the capacity or understanding to make decisions for herself. Defendant also said that Richardson did not want any visitors, especially her sister Fortenberry, and presented a power of attorney as well as a letter dated April 7, 2000, with Richardson's signature indicating that she did not want any visitors, particularly Fortenberry. Defendant also signed a document directing the facility not to resuscitate Richardson if she fell ill and directing the facility to have her cremated rather than buried if she died. Defendant signed this document as "Virginia Richardson," by defendant, her son and attorney in fact.

When the nursing facility admissions coordinator brought up the cost of care, defendant refused to pay. The coordinator suggested that defendant apply for Medi-Cal benefits, but defendant said that Richardson had "too much money." Defendant then

stated that he would transfer her money from her account into his to attempt to qualify for Medi-Cal benefits. Defendant became upset when the coordinator told him that if payment was not received, the public guardian's office would be asked to take control of her estate.

The coordinator later learned that Richardson in fact wanted visitors, wanted to be resuscitated, and wanted to be buried rather than cremated. Richardson became upset when told by the coordinator that defendant had requested cremation and informed the coordinator that she had two family plots, one of which was for her. Richardson appeared shocked when she was told that her "son" had admitted her, had a power of attorney, and represented that she did not have the capacity to make her own decisions. After speaking to Richardson, the coordinator called the police, which led to an investigation of defendant.

Pursuant to the investigation, in September 2003, the police executed a search warrant upon defendant's home. A number of documents relating to Richardson were found in defendant's home, including bank documents, credit cards, a checkbook in Richardson's name, a living trust with power of attorney and directives, letters, and a rubber stamp of Richardson's signature. Defendant said he had the stamp to facilitate signing checks and other documents. The police also discovered $6,500 in cash; a copy of a letter dated February 5, 2003, in which defendant asked a doctor to find Richardson incompetent; a memorandum dated April 14, 2003, purportedly with Richardson's

signature, in which she agreed to lend defendant money; and an insurance policy on Richardson's life.

The police also noted the filthy condition of Richardson's home. The lawn was dead, the trees were not trimmed, and there was overgrowth in the yard. Inside, the home was "[v]ery, very dirty." The carpet had been cut away in spots, there were stains on the carpet around the bed, the dog had free rein of the house, and the home smelled of feces.

In an interview with a police investigator, defendant admitted that he had placed Richardson into a facility and that his goal was to have her doctor diagnose her with a mental handicap or disease. He also admitted that he would receive Richardson's estate pursuant to her trust when she died. He further stated that although he knew Richardson wanted to be buried in one of her family plots, he intended to have her cremated because "he doesn't believe in spending money in death . . . ." Defendant was eventually arrested in November 2004.

II

DISCUSSION

At sentencing, the court indicated that it had read and considered the probation report and a typed statement from defendant. When the court asked if defendant had anything further to offer, defense counsel stated that defendant had brought two witnesses to speak on defendant's behalf. The court refused to hear these witnesses and stated, "No. That should have gone through the Probation Department. You can tell me what they're going to say though. Except for victims, under the Code, I am precluded from

hearing evidence at a sentencing hearing. Everything has to go through the Probation Department."

Defense counsel disagreed with the court's position but followed the court's suggestion and proffered the two witness's testimony in support of defendant's request for probation.

After the court heard from the prosecutor and Richardson's half sister, it denied probation and sentenced defendant to the upper term of four years. The judge noted defendant's despicable conduct, stating, "[I]t is one of the coldest, most calculated, cruelest series of acts I've ever seen." The court found the case to be "completely aggravated," citing two factors in aggravation: (1) defendant's lack of remorse,[5] and (2) defendant's callous and depraved mind. The court found the fact that defendant had no prior record to be a factor in mitigation.

Defendant contends the imposition of the aggravated term without jury findings on circumstances in aggravation violated the federal constitutional guarantees of jury trial and proof beyond a reasonable doubt pursuant to *Cunningham, supra*, 127 S.Ct. 856, *Blakely, supra*, 542 U.S. 296, and *Apprendi, supra*, 530 U.S. 466.

The People argue that defendant forfeited the error by not objecting at the sentencing hearing. We reject that argument. On June 20, 2005, some five months before defendant's sentencing hearing in this case, our state Supreme Court concluded

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[5] Defendant denied his conduct, excused himself, and claimed to be a victim.

that the imposition of an upper term sentence, as provided under California law, was constitutional and does not implicate a defendant's Sixth Amendment right to a jury trial. (*People v. Black* (2005) 35 Cal.4th 1238, 1244.) At that time, the trial court was compelled to follow *Black*. Therefore, it would have been futile for defense counsel to object at sentencing based on *Blakely*, *Apprendi*, or the United States Constitution. Under these circumstances, defendant's *Blakely* challenge was not forfeited. (*People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6; *People v. Turner* (1990) 50 Cal.3d 668, 703-704.)

In *Cunningham*, *supra*, 127 S .Ct. 856, 868, the United States Supreme Court overruled *Black* and held that the middle term in California's determinate sentencing law (DSL) was the relevant statutory maximum for the purpose of applying *Blakely* and *Apprendi*. (*Cunningham*, at p. 868.) The court noted that California's DSL, by placing sentence-elevating factfinding within the trial judge's province, violates a criminal defendant's right to a jury trial safeguarded by the Sixth and Fourteenth Amendments to the federal Constitution. (*Cunningham*, *supra*, 127 S.Ct. at p. 860.) *Cunningham* explained that because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence rather than by proof beyond a reasonable doubt, the DSL violates the bright-line rule in *Apprendi* and that any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. (*Cunningham*, at p. 868.) Quoting *Blakely*, *supra*, 542 U.S. at pages

303 and 304 for the proposition 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,'" the *Cunningham* court concluded that "[i]n accord with *Blakely*, therefore, the middle term prescribed in California statutes, not the upper term, is the relevant statutory maximum." (*Cunningham*, at p. 868.)

Here, though we agree with the trial court that defendant's contemptible conduct warranted an aggravated term, the jury's verdict alone limited the permissible sentence on the substantive offense of theft or embezzlement from an elder by a caretaker to the middle term of three years. (See *Cunningham*, *supra*, 127 S.Ct. at p. 860.) The additional judicial factfinding, however, resulted in the upper term in violation of defendant's right to a jury trial under the federal Constitution. (*Cunningham*, at p. 860.)

In the alternative, the People argue that any error in imposing an aggravated sentence was harmless error because there was overwhelming or uncontradicted evidence of the aggravated factors relied on by the court. The People argue that since the jury would have found at least one of the aggravating circumstances true beyond a reasonable doubt, there was no prejudice. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; *Washington v. Recuenco* (2006) ___ U.S. ___ [126 S.Ct. 2546, 2553] (*Recuenco*).)

The United States Supreme Court in *Recuenco* concluded that failure to submit a sentencing factor to the jury does not constitute structural error requiring reversal per se. (*Recuenco*, *supra*, 126 S.Ct. at p. 2553.) In *Recuenco*, the defendant was convicted of

assault with a deadly weapon. The trial court imposed a sentence enhancement based on the defendant being armed with a firearm. The jury verdict did not contain a finding as to this factor. (*Id*. at p. 2549.) The United States Supreme Court in *Recuenco* held the error was subject to a harmless error analysis, rather than reversible per se. (*Ibid*.)

Likewise, in the instant case the harmless error analysis applies to the trial court's error in imposing an aggravated term based on findings that should have been made by the jury rather than the court. The record in this case reflects that, absent the unconstitutional factfinding made by the court, the trial court could not have imposed the aggravated term. There were also no recidivism factors upon which the trial court could have relied in imposing the aggravated sentence.

The People's claim that the jury would have found some or all of the aggravating factors true had they been presented to the jury for determination is unavailing.

The court imposed the upper-term sentence in this case because it found two aggravating factors and one mitigating factor -- that defendant had no criminal record. We recognize that a single aggravating factor is sufficient to impose an aggravated upper prison term where the aggravating factor outweighs the cumulative effect of all mitigating factors. (*People v. Osband* (1996) 13 Cal.4th 622, 728-729; *People v. Nevill* (1985) 167 Cal.App.3d 198, 202.) Because we can only speculate which, if any, of the aggravating factors relied on by the court the jury would have found true, and what effect those findings would have had on the court at sentencing when weighed against the single

mitigating factor, we cannot find the *Blakely* error to have been harmless beyond a reasonable doubt.

Thus, pending further guidance from our Supreme Court, we choose to utilize the remedy of a remand for resentencing, as that is the usual remedy for erroneous imposition of the upper term. (See, e.g., *People v. Quinones* (1988) 202 Cal.App.3d 1154, 1159-1160; *People v. Young* (1983) 146 Cal.App.3d 729, 737.)

III

DISPOSITION

The upper term sentence is vacated and the matter is remanded to the trial court for the limited purpose of resentencing. Consistent with this opinion, *Blakely*, and *Cunningham*, the trial court shall resentence defendant on the sole count of theft or embezzlement from an elder by a caretaker. In all other respects, the judgment is affirmed.

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RICHLI
J.

We concur:

HOLLENHORST
Acting P.J.

McKINSTER
J.