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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ISAAC KING WALKER, JR.,

Defendant and Appellant.

2d Crim. No. B189669  
(Super. Ct. No. VA087590)  
(Los Angeles County)

A jury convicted appellant Isaac King Walker, Jr. of arson of an inhabited structure, in violation of Penal Code section 451, subdivision (b).<sup>1</sup> The trial court found true a prior prison term alleged pursuant to section 667.5, subdivision (b).

Walker was sentenced to the upper term of eight years for arson, plus an additional year for the prior prison term enhancement.

On appeal, Walker asserts the trial court erred in imposing the upper term for the arson conviction. We agree. The sentence is vacated and the matter is remanded for resentencing.

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

### *FACTS AND PROCEDURAL HISTORY*

Walker had lived with Marcia Porto in her home in Norwalk since February 2004. When Porto tried to end the relationship several months later, Walker refused to leave her home.

On February 4, 2005, Porto's home was set on fire. Walker was convicted in a jury trial of arson. His conviction is not disputed. The court sentenced him to the upper term of eight years plus an additional year enhancement for a prior prison term.

### *DISCUSSION*

Walker's sole argument on appeal is that imposition of an upper term violated his Sixth Amendment right to a jury trial under *Blakely v. Washington* (2004) 542 U.S. 296. In *Blakely*, the United States Supreme Court held that any upward adjustment of the maximum sentence a judge may impose can only be based on factors admitted by the defendant or necessarily embraced in the jury's verdict; otherwise, the sentence violates the defendant's Sixth Amendment right to a unanimous jury verdict.

In imposing the upper term, the trial court found that Porto was a particularly vulnerable victim, the planning of the crime was sophisticated, Walker's conduct was a serious danger to society, and Walker had been convicted of numerous prior felonies and had served prior prison terms. Walker correctly asserts that these factors were not considered by the jury.

While this appeal was pending, the Supreme Court issued its decision in *Cunningham v. California* (Jan. 22, 2007, No. 05-6551) 549 U.S. \_\_\_\_ [2007 WL 135687]. In *Cunningham*, the Supreme Court held that a judge may not impose an upper term sentence because the aggravating sentencing factors to support such a sentence must be tried by a jury. We asked the parties to submit supplemental briefing on the effect of the *Cunningham* decision on this appeal.

Walker asserts that *Cunningham* requires us to remand for resentencing. The prosecution asserts that Walker is precluded from raising this issue on appeal because he failed to object in the trial court. We disagree. A claim of an unlawful sentence generally is not waived by failure to object during sentencing. (*People v. Hester*

(2000) 22 Cal.4th 290, 295.) Moreover, we agree with Walker that any objection would have been futile because at the time of sentencing, the law in California was as stated in *People v. Black* (2005) 35 Cal.4th 1238. In *Black*, our Supreme Court held that *Blakely* does not apply to the imposition of upper terms under California's determinate sentencing law.

The prosecution also argues that *Cunningham* does not apply here because, under *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 246, a defendant does not have a right to a jury trial for a sentence based on the fact of a prior conviction. We disagree. Here, the trial court imposed the upper sentence based both on the prior convictions and impermissible aggravating facts not found by a jury or admitted by Walker. We also disagree with the prosecution's contention that relying on impermissible aggravating factors constituted harmless error.

We vacate Walker's sentence and remand the matter to the trial court for resentencing.

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PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Robert J. Higa, Judge  
Superior Court County of Los Angeles

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Karyn H. Bucur, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C. Johnson, Supervising Deputy Attorney General, Joseph P. Lee, Deputy Attorney General, for Plaintiff and Respondent.