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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. TONY LAVELLE WILLIAMS, Defendant and Appellant.	B190668 (Los Angeles County Super. Ct. No. LA050504)

APPEAL from a judgment of the Superior Court of Los Angeles County, John Fisher, Judge. Affirmed in part, reversed in part and remanded.

Shawn O'Laughlin, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves and Dane R. Gillette, Chief Assistant Attorneys General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Taryle, Susan S. Pithey and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

Tony Lavelle Williams appeals from a judgment entered following a jury trial in which he was convicted of second degree robbery, count 1 (Pen. Code, § 211), evading an officer causing serious injury, count 2 (Veh. Code, § 2800.3[1]), leaving the scene of an accident with the finding that he personally inflicted great bodily injury upon his victim within the meaning of Penal Code section 12022.7, subd. (a), count 3 (Veh. Code, § 20001, subd. (a)),[2] and two counts of hit and run driving, misdemeanors, counts 4 and 5 (Veh. Code, § 20002, subd. (a)). Sentenced to prison for a total of eight years and four months, he requests that we

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[1] Vehicle Code section 2800.3, subdivision (a) provides in pertinent part, "Whenever willful flight or attempt to elude a pursuing peace officer in violation of [Vehicle Code] Section 2800.1 proximately causes serious bodily injury to any person, the person driving the pursued vehicle, upon conviction, shall be punished by imprisonment in the state prison for three, five, or seven years . . . ."

Vehicle Code section 2800.1 provides in pertinent part, "(a) Any person who, while operating a motor vehicle and with the intent to evade, willfully flees or otherwise attempts to elude a pursuing peace officer's motor vehicle, is guilty of a misdemeanor punishable by imprisonment in a county jail for not more than one year if all of the following conditions exist: [¶] (1) The peace officer's motor vehicle is exhibiting at least one lighted red lamp visible from the front and the person either sees or reasonably should have seen the lamp. [¶] (2) The peace officer's motor vehicle is sounding a siren as may be reasonably necessary. [¶] (3) The peace officer's motor vehicle is distinctively marked. [¶] (4) The peace officer's motor vehicle is operated by a peace officer . . . and that peace officer is wearing a distinctive uniform."

[2] Vehicle Code section 20001 provides in pertinent part, "(a) The driver of any vehicle involved in an accident resulting in injury to any person, other than himself or herself, or in the death of any person shall immediately stop the vehicle at the scene of the accident and shall fulfill the requirements of [Vehicle Code] Sections 20003 and 20004. [¶] (b)(1) Except as provided in paragraph (2), any person who violates subdivision (a) shall be punished by imprisonment in the state prison . . . ."

Penal Code section 12022.7, subdivision (a) provides: "Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years."

review the sealed transcript of the in camera hearing to determine whether the trial court improperly limited the scope of discovery turned over to the defense pursuant to appellant's *Pitchess*[3] motion. He also claims the trial court erred in imposing multiple punishments in violation of Penal Code section 654 and in imposing the upper term for count 3 in violation of the Sixth and Fourteenth Amendments and *Blakely v. Washington* (2004) 542 U.S. 296, 301.[4] For reasons explained in the opinion, we reverse the sentence and remand for resentencing.

FACTUAL AND PROCEDURAL SUMMARY

On October 30, 2005, at approximately 4:30 p.m., Ramesh Patel was working at King's Liquor on Saticoy Street in the County of Los Angeles when appellant entered the store carrying a gun and wearing a mask. He ordered Mr. Patel to open the cash register and to sit on the floor. Appellant grabbed money from the register and took lottery tickets. He then left through the back door.

Los Angeles Police Officer Jack Chavez was sitting in his patrol car with his partner Officer Abolfazlian when he saw appellant running away from King's Liquor Store. The officers followed appellant in their vehicle down an alley and saw him get into a parked Saturn vehicle. The officers were approximately one car length behind appellant and activated the patrol car's forward facing red light and siren. The officers chased appellant as he "sped off southbound through the

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[3] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

[4] We asked the parties to file supplemental briefs regarding this sentencing issue following the opinion of the United States Supreme Court in *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856]. We have considered their responses.

alley." Appellant drove at a high rate of speed, sometimes up to 70 miles per hour, through residential areas, and failed to stop at several stop signs.

At the intersection of Saticoy and Milwood Avenue, appellant's vehicle collided with Efrain Rivera, who was walking across the street. Mr. Rivera was thrown 20 to 25 feet up into the air and fell to the ground. Appellant drove away without stopping. Mr. Rivera sustained two fractured ribs, a shattered rib, and both legs were dislocated.

Officer Chavez and his partner continued to follow appellant, who was driving 60 to 75 miles per hour in a residential area. During the pursuit, their lights and siren were activated. Appellant continued to drive through intersections without stopping at stop signs. After he collided with two parked cars, he exited his own car and fled on foot. He was arrested a half block from where he crashed his car. Inside his pocket he had a receipt from a drug store dated October 30, 2005 for items purchased, which included a mask, T-shirt and gloves. On the floorboard of appellant's vehicle were lottery tickets, money, a Halloween mask, and other miscellaneous clothing.

Following waiver of his *Miranda*[5] rights, appellant stated this robbery was the only one he had ever committed; he had been a regular customer of the store for several years and knew the people there. He claimed "he was down on his luck, bills were piling up. His car had been towed and he needed some money so . . . he purchased the sweat shirt, the mask and some other items and committed the robbery." He was also very concerned about the person he struck during the pursuit.

The court sentenced appellant to a total of eight years and four months. The court selected count 3 as the base term and sentenced appellant to the upper

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[5] *Miranda v. Arizona* (1966) 384 U.S. 436.

term of three years plus a consecutive three years for the great bodily injury enhancement. Appellant was sentenced to a consecutive one-year term and a 16-month term for counts 1 and 2, respectively.[6]

DISCUSSION

I

Prior to trial, appellant brought a discovery motion pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 requesting personnel records of the two police officers who interviewed him following his arrest. Appellant alleged these officers fabricated incriminating statements in their police report. The court granted the *Pitchess* motion in part. The court determined it would examine complaints relevant to "falsifying police reports, lying or fabricating any statements, or manufacturing probable cause" regarding the two officers. It found "complaints regarding acts of aggressive behavior, racial bias, ethnic bias, coercive conduct, violation of constitutional rights" irrelevant. At appellant's request, this court has reviewed the sealed transcript of the in camera hearing and find the trial court properly turned over all relevant discoverable evidence. (See *People v. Warrick* (2005) 35 Cal.4th 1011, 1024; *People v. Mooc* (2001) 26 Cal.4th 1216, 1232.)[7]

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[6] The middle term for a violation of Vehicle Code section 20001 is five years, and one-third of that term is 20 months. (See Veh. Code, § 2800.3.)

[7] This is so, notwithstanding appellant's claim the trial court should have turned over complaints alleging racial bias against the officers.

II

Appellant contends the trial court erred in imposing multiple punishments in violation of Penal Code section 654.[8] He claims the sentence in count 2 for evading a police officer with serious bodily injury should be stayed because the crime occurred as appellant was fleeing the scene of the robbery and was part of the same conduct which was the basis for the three-year term on count 3, hit and run causing injury. We agree.

Penal Code section 654 "bars multiple punishment where the convictions arise out of an indivisible transaction and have a single intent and objective. [Citations.] Whether a defendant did in fact have multiple objectives is generally a question of fact for the trial court, and its decision will be upheld on appeal if supported by substantial evidence. [Citation.]" (*People v. Monarrez* (1998) 66 Cal.App.4th 710, 713.)

Respondent asserts substantial evidence supports the trial court's implied finding that Penal Code section 654 did not apply to counts 2 and 3 because crimes of violence against multiple victims are separately punishable. Respondent asserts the victims of the two offenses at issue were different. The victims of the evasive driving in count 2 were the pursuing police officers and other motorists who were endangered by appellant's actions. The victim of appellant's leaving the scene of the accident, as alleged in count 3, was the pedestrian actually injured, Mr. Rivera. Felony evading as defined by the legislature is not a crime of violence against the police officer, however. (See *People v. Garcia* (2003) 107 Cal.App.4th 1159, 1163.)

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[8] Penal Code section 654 provides in pertinent part, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

More to the point, appellant was charged and convicted of a violation of Vehicle Code section 2800.3 in count 2 because in the course of evading the officers, he caused serious injury to Mr. Rivera. Mr. Rivera was also the named victim of hit and run with injury in count 3. Thus, the two crimes were not crimes of violence against separate victims. Based on the foregoing, the sentence in count 2 must be stayed.

III

Appellant contends in light of *Cunningham v. California, supra,* 549 U.S.___, the upper term sentence on count three must be vacated and reduced to the middle term or in the alternative the matter must be remanded for resentencing.

In *Cunningham v. California, supra,* 549 U.S. ___, ___ [127 S.Ct. 856], the United States Supreme Court concluded California's determinate sentencing law, authorizing a judge to find the facts permitting an upper term sentence and to permit the finding based on a preponderance of the evidence, violated the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 and the Sixth Amendment.[9]

In light of *Cunningham*, we conclude that without jury findings made beyond a reasonable doubt, use of the aggravating factors as stated by the court to impose the upper term in count 3 violated the Sixth Amendment. (See *People v. Diaz* (April 25, 2007, B185735) ___ Cal.Rtpr.3d ___, 2007 W.L. 1203627.) In sentencing appellant to the upper term, the trial court stated, "in its evaluation of the aggravating factors and the mitigating factors [it] does feel that the

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[9] On February 7, 2007, the Supreme Court granted review in five cases to address the impact of *Cunningham.* (*People v. Sandoval,* S148917; *People v. Mvuemba,* S149247; *People v. French,* S148845; *People v. Hernandez,* S148974; and *People v. Pardo,* S148914.)

aggravating factors outweigh the mitigating factors in several respects. [¶] Starting with aggravating factors, the overall general nature of the crime, all of the crimes, certainly show a significant degree of callousness. [¶] There's no explanation for this crime, so the logical inference is that he just planned this thing out. It was a premeditated crime for the money. [¶] He made a decision to flee the police endangering vulnerable victims, whether they're driving a car, whether they're walking across the street, some lady with a stroller. [¶] The specific other things include the armed with a fake weapon, the fact that he will not be sentenced on two other crimes that he was convicted of, the misdemeanor hit and run's. [¶] These all equate to aggravating factors that allow a high term as well as a consecutive sentence." The court also noted appellant should consider himself very lucky in that the victim did not die and lucky that he was not killed by the police during the pursuit or killed by the liquor store employee during the robbery. Defense counsel pointed out factors in mitigation, that appellant had "absolutely no record at all[,] had never been arrested before[,] served with an honorable discharge from the U. S. Army" and had worked approximately five years as an adult licensed health care worker.

"In order for the trial court to find each of the . . . aggravating factors it believed to be present, the court necessarily engaged in additional factfinding beyond the facts found true by the jury. This is exactly the factfinding that failed constitutional scrutiny in *Cunningham:* 'If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied.' [Citation.]" (*People v. Diaz, supra,* 2007 W.L. 1203627.) Further, we cannot conclude the error was harmless beyond a reasonable doubt and must remand the

matter for resentencing.[10] (Cf. *People v. Lozano* (May 18, 2007, B189649) 2007 W.L. 1453756.)

DISPOSITION

The matter is remanded for resentencing in accordance with the views expressed herein, and in all other respects the judgment is affirmed.

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SUZUKAWA, J.

We concur:

EPSTEIN, P.J.

WILLHITE, J.

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[10] Respondent argues any error was harmless in that there is no reasonable doubt that the jury would have found certain aggravating factors true (appellant's conduct exhibited callousness; the victim was vulnerable). We are not persuaded. The facts respondent relies on are those necessary to prove the elements of the crime and are not particularly egregious.