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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN CUNNINGHAM,

Defendant and Appellant.

A103501

**(Contra Costa County
Super. Ct. No. 010396-0)**

In *People v. Cunningham* (Apr. 18, 2005, as mod. May 4, 2005, A103501 [nonpub. opn.]), we affirmed appellant’s conviction by jury trial of continuous sexual abuse of a child under age 14. (Pen. Code, § 288.5.) Among the rulings we upheld was the trial court’s decision to impose the upper term of 16 years in reliance on certain aggravating factors not found by the jury or admitted by appellant. We rejected appellant’s argument that this sentence violated his Sixth Amendment right to a jury trial under *Blakely v. Washington* (2004) 542 U.S. 296. Following our decision, appellant’s petition for review was denied by our Supreme Court (June 29, 2005, S133971), but the United States Supreme Court granted certiorari (*Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856]) and reversed our earlier ruling upholding imposition of the upper term and remanded the matter “for further proceedings not inconsistent with [its] opinion.” (*Cunningham*, at p. 871.) We provided the parties with an opportunity to file

supplemental briefing on the sentencing issue.¹ We vacate the sentence imposed by the trial court and remand for resentencing.

BACKGROUND²

The victim, referred to at trial and herein as John Doe, is appellant's son. Doe, born in August 1989, testified that he lived with his mother, Wanda, for the first 10 years of his life. In December 1999, when Doe was 10 years old, he went to live with appellant. Doe testified that in January 2000, shortly after he moved in with appellant, appellant began forcibly sodomizing him and forcing him to orally copulate appellant. Sometimes while being sodomized by appellant, Doe screamed for help because it hurt "very bad" and appellant put his hand over Doe's mouth to stop Doe from screaming. The acts occurred in appellant's bedroom, the living room, the bathroom, and the shower. Sometimes appellant molested Doe when he was angry with Doe. Because appellant threatened to kill Doe if he told anyone about the abuse, Doe was afraid of appellant and did not tell anyone until December 2000, when he first told his younger cousin, Brittany. Ultimately the police were notified, and, in January 2001, Doe was interviewed by San Pablo Police Officer Jeff Palmieri and told Palmieri that appellant sexually abused him numerous times beginning shortly after he moved in with appellant. On January 5, 2001, appellant agreed to a videotaped interview by Palmieri and Contra Costa District Attorney's Office Inspector Ted Todd.³ At the beginning of the interview, appellant adamantly denied any type of sexual touching of Doe. As the questioning continued, appellant became more forthcoming in his responses. After two or three hours, appellant admitted that Doe's mouth did make contact with appellant's penis for five seconds while in the shower on one occasion. Appellant also said that Doe was a liar and was

¹ Because the United States Supreme Court did not consider or rule upon appellant's challenges to his conviction, those portions of our earlier opinion need not and are not readdressed in this decision.

² The factual recitation is limited to those facts germane to the sentencing issue and is derived from our prior opinion.

³ The videotaped interview was played for the jury.

manipulative, and later said Doe was a homosexual and “can’t quit the homosexual behavior.” Testifying in his own defense at trial, appellant denied ever molesting Doe or any child.

Following the jury’s verdict, but prior to sentencing, the court appointed psychologist Richard Lundeen, pursuant to Penal Code section 288.1, to examine appellant and submit to the court a written report and recommendation.⁴ Dr. Lundeen opined that appellant would not be a danger to Doe or other children in the community if released. Regarding treatment, Dr. Lundeen stated “ ‘either [appellant] did not engage in inappropriate sexual behavior as charged, or else he has repressed those behaviors to a depth where he cannot deal with them at a conscious level at this time. In either case, he would be a poor candidate for rehabilitative therapy if he does not have a condition from which he is trying to rehabilitate.’” Appellant retained psychologist John Kincaid to conduct a psychological evaluation. Dr. Kincaid’s report stated that if granted probation appellant would be unlikely to pose a risk to Doe, but it would be prudent to restrict him from direct contact with minors without the immediate presence of a responsible adult. Dr. Kincaid also stated that he saw “little likelihood that [appellant’s] incarceration would be a detriment to [Doe], who had lived with him only a relatively brief time.” Dr. Kincaid recommended that appellant obtain treatment which would decrease the likelihood that he would reoffend. He also stated that, if incarcerated, appellant should be referred for a mental health evaluation although “offense-specific treatments are almost nonexistent in custody.”

Though the probation report did not recommend a particular sentence, it noted the following circumstances in aggravation: (1) “The crime involved great sexual violence and callousness toward a 10-year-old child.” In particular, the report noted that the victim was “brutally whipped and sodomized over 100 times in a one year period.” (2) The victim was particularly vulnerable as he relied on his father, as his custodial

⁴ Dr. Lundeen’s report is not included within the appellate record but is summarized in the probation report.

parent, for support. (3) Appellant took advantage of his position of parental trust and trust as a police officer to commit the offense. (4) Appellant engaged in violent conduct which indicated a serious danger to children in society. (Cal. Rules of Court, rule 4.421.)⁵ The probation report noted the single mitigating factor that appellant had no prior criminal record. (Rule 4.423)

At sentencing, the court acknowledged that it had considered the probation report, psychological evaluations, sentencing memoranda, letters from the community in mitigation and letters from Doe and his mother. After denying probation, it found the sole mitigating factor was appellant's lack of prior criminal conduct. (Rule 4.423(b).) The court found the following aggravating factors: (1) The crime involved great violence and the threat of great bodily harm disclosing a high degree of viciousness and callousness. (2) The victim was particularly vulnerable due to his age and dependence on appellant as his father and primary caretaker. (3) Appellant threatened to commit bodily injury upon the victim in an attempt to coerce the victim to recant his statements about the crime. (4) Appellant took advantage of a position of trust to commit the crime in that he is the victim's father and sole caretaker for a substantial period of time. (5) Appellant engaged in violent conduct which indicates a serious danger to the community. (6) Appellant was a peace officer at the time he committed the criminal acts, violating his duty to serve the community of which the victim was a member. After finding that the aggravating circumstances outweighed the sole mitigating factor, the court imposed the upper 16-year term.

DISCUSSION

Appellant challenges the trial court's decision to impose the upper term of 16 years following his conviction, arguing that the court relied on factors that were statutorily and/or constitutionally improper.

⁵ All rule references are to the California Rules of Court.

I. Statutory Challenges

A. The Relationship Between Appellant and the Victim

Appellant contends the court erred in finding the victim was vulnerable due to his age because age was an element of the charged offense. (Rule 4.420(d).) Although the victim's minority cannot be used as an aggravating factor where minority is an element of the offense (*People v. Robinson* (1992) 11 Cal.App.4th 609, 615, disapproved on other grounds in *People v. Scott* (1994) 9 Cal.4th 331, 353, fn. 16), victim vulnerability in this case was also based on the victim's dependence on appellant as his primary caretaker. Thus, the finding that Doe was a vulnerable victim was based on a factor other than the victim's age. (*People v. Garcia* (1985) 166 Cal.App.3d 1056, 1070.)

Appellant next contends the court erred in using the victim's dependence on appellant, and appellant's taking advantage of a position of trust as the victim's father/sole caretaker as two separate aggravating factors. He relies on *Garcia*, which held that the victim's relationship to the defendant could not be used both to support a finding of vulnerability and to find that the defendant took advantage of a position of trust or confidence to commit the offense. "It does appear that these factors are two sides of the same coin. The significant circumstance is the relationship between the defendant and the victim. The circumstances that placed the defendant in a position of trust and confidence were identical to the circumstances which placed the victim in a position of vulnerability." (*People v. Garcia, supra*, 166 Cal.App.3d at p. 1070.) We agree with this analysis and conclude that having used the relationship between appellant and the victim in support of the vulnerable victim factor (rule 4.421(a)(3)), the court could not use that fact in support of a separate aggravating factor (rule 4.421(a)(11)).

B. Status As Peace Officer

Appellant further contends his status as a police officer was not reasonably related to his sentencing and therefore the court erroneously relied upon it as an aggravating

circumstance under rule 4.408(a).⁶ In particular, he argues that the abuse he inflicted on the victim was in no way related to his employment as a police officer. Moreover, he argues that his status as a police officer did not make the offense against the victim “distinctively worse than it would ordinarily have been.” (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 682.)

Appellant also notes that this case is factually distinguishable from *People v. Brown* (2000) 83 Cal.App.4th 1037, where the defendant’s status as a police officer was properly relied on as an aggravating factor in imposing the upper term on a firearm enhancement. In that case, the defendant shot a fellow officer with whom she was having an affair, and thereafter destroyed evidence. *Brown* stated that the trial court could properly have considered the unusual facts relating to the defendant—that the defendant was a police officer who used deadly force to solve a personal problem, caused serious injury, and thereafter destroyed evidence—as an aggravating factor because peace officers are seen as having a duty to protect people, not unlawfully shoot an unarmed estranged lover. (*Id.* at pp. 1043-1044.) We agree with appellant that *Brown* is distinguishable from the instant case.

II. Constitutional Challenges

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court interpreted the Sixth Amendment to the United States Constitution to require that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Apprendi*, at p. 490.) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury’s verdict or admitted by the defendant; thus, when a sentencing court’s authority to impose an enhanced sentence depends upon additional factfindings, there is a right to a jury trial and proof

⁶ Rule 4.408(a) provides: “The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. Any such additional criteria shall be stated on the record by the sentencing judge.”

beyond a reasonable doubt on the additional facts. (*Blakely v. Washington* (2004) 542 U.S. 296, 301-305.) In *Cunningham*, the United States Supreme Court held that by “assign[ing] to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated ‘upper term’ sentence,” California’s determinate sentencing law “violates a defendant’s right to trial by jury safeguarded by the Sixth and Fourteenth Amendments.” (*Cunningham, supra*, 549 U.S. ____ [127 S.Ct. at p. 860] overruling on this point *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*), vacated in *Black v. California* (2007) 549 U.S. ____ [127 S.Ct. 1210].) Finally, in *People v. Black* (2007) 41 Cal.4th 799, 813 (*Black II*), our Supreme Court held that “as long as a single aggravating circumstance that renders a defendant *eligible* for the upper term sentence has been established in accordance with the requirements of *Apprendi* and its progeny, any additional factfinding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant’s right to a jury trial.”

Each of the statutorily valid factors relied upon by the trial court was found true by the trial court, not by the jury, and none was admitted by appellant. Further none qualify as recidivist factors, even under the broad definition given that term in *Black II*. (*Black II, supra*, 41 Cal.4th at p. 819 & fn. 8.) Thus, the trial court erred in imposing the upper term.⁷

Respondent argues we should find the trial court’s error harmless under *Washington v. Recuenco* (2006) 548 U.S. ____ [126 S.Ct. 2546] (*Recuenco*) and *People v. Sengpadychith* (2001) 26 Cal.4th 316. *Recuenco* held that *Blakely* error is not structural, but instead is subject to harmless error analysis under *Chapman v. California* (1967) 368 U.S. 18 (*Chapman*). (*People v. Sandoval* (2007) 41 Cal.4th 825, 838.) “[I]f a reviewing court concludes, beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable-doubt standard, unquestionably would have found true at least a

⁷ We use the term “erred” with more than our usual respect, since the majority of this court made the identical error in initially affirming the trial court’s sentencing decision.

single aggravating circumstance had it been submitted to the jury, the Sixth Amendment error properly may be found harmless.” (*Sandoval*, at p. 839.) Where the evidence of an aggravating circumstance at trial and sentencing is overwhelming or uncontradicted, *Blakely* error is harmless. (See *Sandoval*, at pp. 839-841.) Respondent argues that aggravating factors (2) and (5) were “overwhelmingly established by the record and would have been found true beyond a reasonable doubt by a jury.” We disagree.

Sandoval extensively cautioned reviewing courts about applying the harmless error analysis:

“ . . . In a case such as the present one, the reviewing court cannot necessarily assume that the record reflects all of the evidence that would have been presented had aggravating circumstances been submitted to the jury. Although the aggravating circumstances found by the trial court were based upon the evidence presented at trial, they were not part of the charge and were not directly at issue in the trial. Aggravating circumstances are based upon facts that are not elements of the crime. [Citation.] Defendant thus did not necessarily have reason—or the opportunity—during trial to challenge the evidence supporting these aggravating circumstances unless such a challenge also would have tended to undermine proof of an element of an alleged offense.

“Furthermore, although defendant did have an incentive and opportunity at the sentencing hearing to contest any aggravating circumstances mentioned in the probation report or in the prosecutor’s statement in aggravation, that incentive and opportunity were not necessarily the same as they would have been had the aggravating circumstances been tried to a jury. First, the standard of proof at the sentencing hearing was lower; the trial court was required to make a finding of one or more aggravating circumstances only by a preponderance of the evidence. [Citation.] Second, because the trial court had broad discretion in imposing sentence, a finding by the court concerning whether or not any particular aggravating circumstance existed reasonably might have been viewed by defense counsel as less significant than the court’s overall assessment of defendant’s history and conduct. Counsel’s strategy might have been different had the aggravating

circumstances been tried under a beyond-a-reasonable-doubt standard of proof to a trier of fact that was responsible only for determining whether such circumstances were proved (and not for making the ultimate sentencing decision). Accordingly, a reviewing court cannot always be confident that the factual record would have been the same had aggravating circumstances been charged and tried to the jury.

“Additionally, to the extent a potential aggravating circumstance at issue in a particular case rests on a somewhat vague or subjective standard, it may be difficult for a reviewing court to conclude with confidence that, had the issue been submitted to the jury, the jury would have assessed the facts in the same manner as did the trial court. The sentencing rules that set forth aggravating circumstances were not drafted with a jury in mind. Rather, they were intended to ‘provid[e] criteria for the consideration of the trial judge.’ [Citation.] It has been recognized that, because the rules provide criteria intended to be applied to a broad spectrum of offenses, they are ‘framed more broadly than’ criminal statutes and necessarily ‘partake of a certain amount of vagueness which would be impermissible if those standards were attempting to define specific criminal offenses.’ [Citation.] Many of the aggravating circumstances described in the rules require an imprecise quantitative or comparative evaluation of the facts. For example, aggravating circumstances set forth in the sentencing rules call for a determination as to whether ‘[t]he victim was *particularly* vulnerable,’ whether the crime ‘involved a[] . . . taking or damage of *great* monetary value,’ or whether the ‘quantity of contraband’ involved was ‘*large*’ [citation]. In addition, the trial court may consider aggravating circumstances not set forth in rules or statutes. Such aggravating circumstances need only be ‘reasonably related to the decision being made.’ [Citation.] Aggravating circumstances considered by the trial court that are not set out in the rules are not subject to clear standards, and often entail a subjective assessment of the circumstances rather than a straightforward finding of facts.” (*Sandoval, supra*, 41 Cal.4th at pp. 839-840.)

Alert to these concerns, we consider respondent’s argument regarding factors (2) the victim was particularly vulnerable due to his age and dependence on appellant as his father and primary caretaker, and (5) appellant engaged in violent conduct which

indicates a serious danger to the community. As discussed, *ante*, California state law barred the court from relying on the victim's age to establish that he was particularly vulnerable. (Rule 4.421(a)(3).) And we cannot say beyond a reasonable doubt that a jury would have concluded beyond a reasonable doubt that the victim was particularly vulnerable because of his dependence on appellant as his primary caretaker. For example, there is no evidence that appellant isolated Doe, who continued to have contacts with other members of his family while living with appellant. Moreover, we are unable to speculate as to the evidence appellant could and would have produced during trial, had this factor been submitted to a jury. As in *Sandoval*, the record does not "reflect such a clear-cut instance of victim vulnerability that we confidently can conclude the jury would have made the same findings, as might be the case if, for example, the victims had been elderly, very young, or disabled, or otherwise obviously and indisputably vulnerable." (*Sandoval*, *supra*, 41 Cal.4th at p. 842.)

As to factor (5), we reach the same conclusion. Though the evidence that appellant was a serious danger to society was quite strong, it was not undisputed. The court-appointed expert, Dr. Lundeen, expressed the opinion that appellant would not be a danger to the community if released. And from this opinion a jury could reasonably conclude that appellant was not a serious danger to the community. Thus, the *Chapman* standard is not satisfied as to this factor.

The sentence imposed by the trial court fails to comply with the standards set out in *Blakely* and *Cunningham*. Further, under *Recuenco* and *Sandoval*, this error is not harmless beyond a reasonable doubt. We vacate the sentence and remand for the trial court to exercise " 'broad discretion' in selecting among the three terms specified by statute for the offense, subject to the requirements that the court consider the aggravating and mitigating circumstances as set out in statutes and rules and that reasons be stated for the choice of sentence." (*Sandoval*, *supra*, 41 Cal.4th at p. 843.)

DISPOSITION

The sentence imposed following conviction of appellant is vacated, and the matter is remanded for resentencing.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.