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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

NICOLAS QUINTANILLA,

Defendant and Appellant.

A104009

(San Francisco County
Super. Ct. No. 187408)

This case is one of several remanded to us by the United States Supreme Court after the decision in *Cunningham v. California* (2007) 549 U.S. ____ [127 S.Ct. 856] (*Cunningham*), which has significant effects on California's criminal sentencing scheme. As explained below, we vacate the sentence and remand to the trial court for resentencing.

PROCEDURAL BACKGROUND

An amended information filed on March 27, 2003, charged appellant with various offenses arising from his physical and sexual abuse of his girlfriend, Isabel J. On April 4, 2003, the jury returned guilty verdicts as follows: count 4—false imprisonment (Penal Code section 236);¹ count 5—cohabitant injury (§ 273.5, subd. (a)); count 6—sexual penetration with a foreign object (289, subd. (a)(1)); count 8—prevent or dissuade witness

¹ Further statutory references are to the Penal Code unless otherwise noted.

testimony (§ 136.1, subd. (a)); count 10—assault likely to produce great bodily injury (§ 245, subd. (a)(1); count 11—criminal threat (§ 422); and count 13—forcible rape (§ 261, subd. (a)(2)).

In September 2005, we issued an opinion reversing appellant’s conviction for intimidating a witness and affirming the judgment in all other respects. (*People v. Quintanilla* (2005) 132 Cal.App.4th 572.) In the unpublished part of our opinion, and relying on *People v. Black*,² we rejected appellant’s contention the trial court violated *Blakely v. Washington*³ when it imposed upper terms and consecutive sentences. The Supreme Court of California denied appellant’s petition for review on November 30, 2005.

On February 20, 2007, the United States Supreme Court issued an order in this case granting certiorari, vacating the judgment, and remanding to this court for further consideration in light of *Cunningham, supra*, 127 S.Ct. 856. Pursuant to its mandate, we have recalled the remittitur. We have reexamined our initial opinion in this case, and incorporate it by reference, and we have received supplemental briefing from the parties.

THE TRIAL COURT’S SENTENCING DECISION

The trial court sentenced appellant as follows: count 5 (cohabitant injury)—upper term of four years; count 6 (sexual penetration)—middle term of six years; count 8 (dissuading witness)—one-third of the middle term, eight months; count 11 (criminal threat)—one-third of the middle term, eight months; and count 13 (rape)—upper term of eight years. The court imposed all sentences consecutive to count 5 (cohabitant injury),

² *People v. Black* (2005) 35 Cal.4th 1238, certiorari granted and judgment vacated by *Black v. California* (2007) ___ U.S. ___ [127 S.Ct. 1210].)

³ *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), in which the high court ruled the sentence violated petitioner’s Sixth Amendment right to a jury trial because he “was sentenced to more than three years above the 53-month statutory maximum of the standard range because he had acted with ‘deliberate cruelty’ [and] [t]he facts supporting that finding were neither admitted by petitioner nor found by a jury.” (*Id.* at p. 303.)

and suspended sentence on counts 4 and 10 pursuant to California Rules of Court, rule 424. The total sentence imposed was a term of nineteen years and four months.

Regarding the basis for the imposition of consecutive sentences, the court found the objective of the criminal threats was predominantly independent of the beating of the victim, pursuant to California Rules of Court, rule 4.425(a)(1). The court also found the crimes involved separate various acts of violence, pursuant to California Rules of Court, rule 4.425(a)(2).

In imposing the upper terms on counts 5—cohabitant injury and 13—rape, the court found the following factors in aggravation: (1) the crime involved great violence disclosing a high degree of cruelty, viciousness and callousness; (2) the victim was particularly vulnerable; (3) appellant took advantage of a position of trust or confidence to commit the offense; (4) appellant had three previous felony convictions; (5) appellant was on probation when the crime was committed; (6) appellant’s prior performance on probation was unsatisfactory.

ANALYSIS

In *Cunningham*, California’s determinate sentencing law was held to violate a defendant’s right to jury trial because California statutes permitted trial judges to determine facts used to impose an upper term sentence by a preponderance of the evidence. (*Cunningham, supra*, 127 S.Ct. at p. 868.) Under *Cunningham*, the only fact which a trial judge may determine by a preponderance of the evidence and use to increase a sentence is the fact of a prior conviction. (*Ibid.*)

In imposing the upper terms, the trial court found by a preponderance of the evidence three factors *which are not facts of a prior conviction*—the crime involved great violence disclosing a high degree of cruelty, viciousness and callousness; the victim was particularly vulnerable; and appellant took advantage of a position of trust or confidence to commit the offense. Under *Cunningham*, however, such factors must be submitted to a jury and proved beyond a reasonable doubt. Therefore, the trial court committed error of

constitutional magnitude under *Cunningham* by imposing the aggravated terms based in part on these factors.⁴ (*Cunningham, supra*, 127 S.Ct. at p. 868.)

Cunningham error is susceptible to *Chapman*⁵ harmless error review. (*Washington v. Recuenco* (2006) 548 U.S. ___ [126 S.Ct. 2546, 2552-2553] [*Blakely* error not structural and is subject to *Chapman* harmless error review].) Under *Chapman* harmless-error review, reversal is required unless we can say that, beyond a reasonable doubt, the result would not have been more favorable in the absence of the error. (See *People v. Brown* (2003) 31 Cal.4th 518, 538.)

As noted, three of the factors in aggravation relied upon by the trial court were improper under *Cunningham*. The court relied as well on three other factors in aggravation—appellant’s prior convictions, his probation status at the time of the offense, and his prior performance on probation.⁶ Even if the trial court properly relied on these other factors, we cannot say beyond a reasonable doubt it would have sentenced appellant to the upper terms if had *not* also found the factors in aggravation which were not

⁴ Respondent’s claim that appellant has forfeited any Sixth Amendment claim comes too late—we considered his claim and denied it under *Black, supra*, in the unpublished portion of our previous opinion. (See *ante* p. 2.)

⁵ *Chapman v. California* (1967) 386 U.S. 18.

⁶ As noted above, under *Cunningham* a sentencing court may properly determine by a preponderance of the evidence the fact of a defendant’s prior conviction and use that fact to increase the sentence without offending the Sixth Amendment. (*Cunningham, supra*, 127 S.Ct. at p. 868.) However, appellant’s probation status and performance on probation, although *related to* appellant’s prior convictions, are not, strictly speaking, the *fact of* prior conviction, a distinction which reflects the current uncertainty regarding the scope and breadth of the so-called “recidivism related” exception in the wake of *Cunningham*. (See *People v. Govan* (2007) 150 Cal.App.4th 1015, 1032 [concluding *Cunningham* held that recidivism relates to the “ ‘commission of the offense itself’ ” and therefore since “none of the recidivism related aggravating factors on which the trial court in this case relied is the mere fact of a prior conviction, . . . the trial court improperly relied on these factors in imposing an upper term sentence”]; *People v. Guess* (2007) 150 Cal.App.4th 148, 166 [parole status is not within the prior-conviction exception under *Cunningham*].) We need not and do not decide whether the trial court in this case erred under *Cunningham* by relying on appellant’s probation factors to enhance his sentence.

submitted to a jury, and which *Cunningham* requires a jury to find true beyond a reasonable doubt. Therefore, we remand for resentencing in accordance with the requirements of *Cunningham*.

C. Imposition of Consecutive Terms

Appellant also claims he was wrongly denied a jury trial on factors used to impose consecutive terms. We address this claim for purposes of resentencing.

The California Supreme Court foreclosed such a claim in *People v. Black, supra*, 35 Cal.4th at page 1262: “[A] jury trial is not required on the aggravating factors that justify imposition of consecutive sentences.” That holding was not disturbed by *Cunningham*, which did not discuss the distinct issue of consecutive sentences imposed for separate crimes. *Black* is binding on this court, (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), and dispositive of this aspect of appellant’s challenge to his sentence.

DISPOSITION

The judgment is vacated only as to appellant’s sentence, and the case is remanded for resentencing. The judgment is otherwise affirmed. We express no opinion whether compliance with *Cunningham* will require a change in the actual sentence imposed in this case.

Parrilli, Acting P. J.

We concur:

Pollak, J.

Siggins, J.