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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT S. HUGHES,

Defendant and Appellant.

A105756

(Sonoma County

Super. Ct. No. MCR429522)

Over three years ago, defendant appealed from a judgment following pleas of guilty and imposition of a ten-year state prison term: the upper term of eight years on count one, and a two-year consecutive term on count two. His counsel raised no issues and asked this court for an independent review of the record to determine whether there are any issues that would, if resolved favorably to appellant, result in reversal or modification of the judgment. (*People v. Wende* (1979) 25 Cal.3d 436; see also *Smith v. Robbins* (2000) 528 U.S. 259.) Upon review of the record we found no arguable issues, although we ordered an amendment of the abstract of judgment to require AIDS testing.

We subsequently granted defendant's petition for rehearing to consider the impact of the decision in *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), upon defendant's sentence. We concluded that under *Blakely* the upper term imposed upon defendant must be vacated, but otherwise affirmed the judgment as amended. The California Supreme Court then transferred the case back to this Court for reconsideration in light of *People v. Black* (2005) 35 Cal.4th 1238 (*Black*). In accordance with the opinion in *Black* we found no error in the imposition of upper and consecutive terms under the California

Determinate Sentencing Law (DSL), and therefore vacated our prior opinion and affirmed the judgment of the trial court.

Then came *Cunningham v. California* (2007) 549 U.S. ____ [166 L.Ed.2d 856, 127 S.Ct. 856] (*Cunningham*), in which the United States Supreme Court reversed the *Black* decision, and concluded, “Contrary to the *Black* court’s holding, our decisions from *Apprendi*^[1] to *Booker*^[2] point to the middle term specified in California’s statutes, not the upper term, as the relevant statutory maximum. Because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent.” (*Cunningham, supra*, 166 L.Ed.2d 856, 876.) This case was remanded to us again for further consideration in light of *Cunningham*.

In accordance with the decision in *Cunningham*, we reverted to our (pre-*Black*) position that imposition of an upper term upon defendant was error, and followed the federal standard of review of constitutional errors (*Chapman v. California* (1967) 386 U.S. 18, 24), to determine if the error was reversible. (*People v. Neal* (2003) 31 Cal.4th 63, 86; *People v. Carter* (2003) 30 Cal.4th 1166, 1221–1222; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.) We found that all of the sentencing factors relied upon by the trial court to impose the upper term relate to the current offenses rather than any aggravating circumstances that fall within the recognized exception from the right to a jury trial articulated in *Apprendi* for an increase in penalty due to the defendant’s prior convictions or other associated recidivist conduct. (*Apprendi, supra*, 530 U.S. 466, 490; *People v. Kelii* (1999) 21 Cal.4th 452, 455; *People v. Taylor* (2004) 118 Cal.App.4th 11, 28; *People v. Superior Court (Andrades)* (2003) 113 Cal.App.4th 817, 831; *People v. Lee* (2003) 111 Cal.App.4th 1310, 1314; *People v. Belmares* (2003) 106 Cal.App.4th 19, 27; *People v. Thomas* (2001) 91 Cal.App.4th 212, 222–223; *Thompson v. Superior Court* (2001) 91 Cal.App.4th 144, 154.) We thus could not determine that beyond a reasonable

¹ *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*).

² *United States v. Booker* (2005) 543 U.S. 220 (*Booker*).

doubt the assumed error did not contribute to the judgment, and concluded that the imposition of the upper term on count one must be considered prejudicial to defendant. We remanded the case to the trial court for the limited purpose of conducting sentencing proceedings in accordance with the requirements of *Blakely* and *Cunningham*.

The California Supreme Court thereafter issued opinions in *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*), and *People v. Black* (2007) 41 Cal.4th 799 (*Black II*). The case has now been remanded to us yet again for reconsideration in light of the *Sandoval* and *Black II* opinions. We once more conclude that the *Blakely* error in the imposition of the upper term cannot be considered harmless and remand the case to the trial court.

DISCUSSION

We commence our reconsideration by observing that in *Sandoval* and *Black II* the California Supreme Court confirmed that where, as here, the trial and sentencing proceedings occurred before the decision in *Blakely*, and an objection in the trial court would have been futile, we cannot find a forfeiture of the claim. (*Sandoval, supra*, 41 Cal.4th 825, 837, fn. 4.) The court also reaffirmed our prior conclusion in this case that imposition of consecutive sentences “does not violate a defendant’s Sixth Amendment right to [a] jury trial” under *Blakely*. (*Black II, supra*, 41 Cal.4th 799, 821.)

We proceed to an examination of the error in the imposition of an upper term, which “is reviewed under the harmless error standard set forth in *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824] (*Chapman*), as applied in *Neder v. United States* (1999) 527 U.S. 1 [144 L.Ed.2d 35, 119 S.Ct. 1827].” (*Sandoval, supra*, 41 Cal.4th 825, 838.) “In the context of the present case, the question is not whether the error ‘contribute[d] to the verdict obtained’ (*Chapman, supra*, 386 U.S. at p. 24), because the jury’s verdict on the charged offense is not at issue. Rather, we must determine whether, if the question of the existence of an aggravating circumstance or circumstances had been submitted to the jury, the jury’s verdict would have authorized the upper term sentence.” (*Ibid.*)

All of the sentencing factors relied upon by the trial court to impose the upper term upon defendant relate to the current offenses: a threat of great bodily harm, actions indicative of sophisticated planning, isolation of the victim, escalating seriousness of the sexual abuse over time, and a high degree of callousness. The upper term was not based upon any aggravating circumstances that fall within the recognized exception from the right to a jury trial articulated in *Apprendi* for an increase in penalty due to the defendant's prior convictions or other associated recidivist conduct. (Cf., *Black II, supra*, 41 Cal.4th 799, 818–819.) Thus, we cannot find, as the court did in *Black II*, that there is no Sixth Amendment error in a case in which one or more aggravating circumstances have been established in accordance with Sixth Amendment principles. (*Id.*, at p. 819–820.)

Sandoval instructs that in our determination of prejudice, “if 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 single aggravating circumstance had it been submitted to the jury, the Sixth Amendment error properly may be found harmless.” (*Sandoval, supra*, 41 Cal.4th 825, 839.) “In applying harmless error analysis in this context, we must take into account the differences between the nature of the errors at issue in the present case and in a case in which the trial court fails to instruct the jury on an element of the crime but where the parties were aware during trial that the element was at issue. 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. (Cal. Rules of Court, rule 4.420(d).) 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.” (*Ibid.*) Further, the incentive and opportunity of the

defendant to contest aggravating circumstances at the sentencing hearing “were not necessarily the same . . . had the aggravating circumstances been tried to a jury” due to the reduced preponderance of the evidence burden of proof and distinguishable strategic considerations. (*Ibid.*; see also *id.* at p. 840.)

“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.” (*Sandoval, supra*, 41 Cal.4th 825, 840.) “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.” (*Ibid.*)

Upon our review of the record, we discern that the aggravating factors mentioned by the trial court are not supported by undisputed evidence that the jury would have unquestionably accepted. Much of the supporting evidence consists solely of statements of the victim that are not definitive, uncontradicted or overwhelming. (*Sandoval, supra*, 41 Cal.4th 825, 842.) This is particularly true when we consider, as *Sandoval* instructs, that defendant may have offered contradictory evidence if the truth of the aggravating factors had been presented to a jury. We therefore conclude, as we did before, that the denial of the right to a jury trial and findings on the aggravating circumstances which resulted in the imposition of the upper term on count one must be considered prejudicial to defendant.

DISPOSITION

Accordingly, the upper term sentence of eight years imposed upon count one is vacated and the case is remanded to the trial court for the limited purpose of conducting sentencing proceedings in accordance with the directives stated in *Blakely, Cunningham*, and *Sandoval*. In all other respects the judgment, as previously amended, is affirmed.

Swager, J.

We concur:

Marchiano, P. J.

Margulies, J.