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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION FIVE

**THE PEOPLE,**

**Plaintiff and Respondent,**

**A106395**

**v.**

**JAMES E. ELLIOTT,**

**(Alameda County  
Super. Ct. No. 146053C)**

**Defendant and Appellant.**

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James E. Elliott appeals from a judgment entered after a jury convicted him of involuntary manslaughter. In our original unpublished opinion, filed on August 12, 2005, we affirmed appellant's conviction and the four-year upper term sentence that was imposed.

On February 20, 2007, the United States Supreme Court vacated the judgment and remanded to us for further consideration in light of *Cunningham v. California* (2007) 549 U.S. \_\_\_ [127 S.Ct. 856] (*Cunningham*). We requested and received further briefing from the parties on the effect of *Cunningham* and two recent California Supreme Court decisions interpreting that case; *People v. Black* (2007) 41 Cal.4th 799, and *People v.*

*Sandoval* (2007) 41 Cal.4th 825. In light of those cases, we will vacate appellant's sentence and remand to the trial court for resentencing.

## I. FACTUAL AND PROCEDURAL BACKGROUND

The trial court explained its sentencing decision as follows:

"It's the judgment and sentence of this court that the defendant be imprisoned in the state prison for the upper term of four years.

"I'm selecting the upper term for the following reasons. While I acknowledge that Mr. Elliott has got virtually no criminal record, he's got a 14601 traffic infraction, a misdemeanor, before this. I just got to comment, I don't necessarily – I don't actually wholly believe his testimony regarding the extent of his conduct here. I'm not arguing with the jury's decision on the facts, but I do believe that if the jury, depending on what the jury found exactly to be true, Mr. Elliott could very easily have been convicted of second degree murder based upon implied malice. I don't believe that his conduct was as minimal as he described it.

"What I keep coming back to is the description of witnesses, who didn't actually see the beating, but heard it and heard this man yelling for help, for what seemed like 10 minutes, and what sounded like 10 people beating on him, which suggests to me quite a commotion, which also suggests more than one person really doing most of the damage there. We've got a defendant here who's a large man, who works as a bouncer, who's clearly capable of inflicting serious injury without trying very hard.

"The victim was seriously injured. He was savagely [beaten]. I don't dispute the fact the testimony – I don't have any quarrel with the notion that Mr. Carney went back and basically went back and finished off the job, but I think by that time the victim was in such condition that he was especially susceptible of being killed by further blows to the head, and I think that Mr. Elliott assisted more than he's willing to admit and in putting him in that position.

“I, therefore, think the level of his conduct and the savageness of the beating that he participated in is an aggravated circumstance that outweighs any mitigating circumstance and justifies imposing of the upper term.

“Going back to my comment that he could easily have been convicted of second degree murder, I think that while I’m imposing the upper term here, it’s only four years, and Mr. Elliott, I hope appreciates the job that his lawyer did in seeing to it that he didn’t get convicted of that second degree murder where he would be looking at a life top.”

## II. DISCUSSION

Appellant claims the upper term sentence that was imposed must be reversed because it was based on facts that were neither admitted nor found by the jury to be true.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the United States Supreme Court held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be tried to a jury and proved beyond a reasonable doubt. In *Cunningham*, the court held that California’s determinate sentencing law violated a defendant’s federal constitutional right to a jury trial by assigning to the trial judge, rather than the jury, the authority to make factual findings that subject a defendant to the possibility of an upper term sentence. (*Cunningham, supra*, 549 U.S. at p. \_\_\_ [127 S.Ct. at p. 860].)

In *Black*, our Supreme Court interpreted *Cunningham* to mean that the imposition of an upper term sentence “does not infringe upon the defendant’s constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant’s record of prior convictions.” (*People v. Black, supra*, 41 Cal.4th at p. 816.) Under California law, the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for imposition of the upper term. (*Id.* at p. 813; *People v. Osband* (1996) 13 Cal.4th 622, 728.) Therefore, “[a]s 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 jury trial.” (*People v. Black, supra*, 41 Cal.4th at p. 812, original italics.) In other words, “so long as a defendant is *eligible* for the upper term by virtue of facts that have been established consistently with Sixth Amendment principles, the federal Constitution permits the trial court to rely upon any number of aggravating circumstances in exercising its discretion to select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those circumstances have been found to be true by a jury.” (*Id.* at p. 813, original italics.)

Here, the trial court imposed the upper term because it believed the victim Brinkley was subjected to a savage beating. While this is a circumstance that validly can be used to impose an upper term sentence, (see Cal. Rules of Court, rule 4.421(a)(1)<sup>1</sup>) that factor was not found by the jury to exist, was not admitted by appellant, and was not related to appellant’s prior record. Accordingly, the court could not validly rely on that factor to impose the upper term sentence. (*People v. Black, supra*, 41 Cal.4th at p. 816.)

The People argue the court could validly rely on the savageness of the beating to impose the upper term because appellant admitted participating in the attack on Brinkley. Appellant did admit that he participated; however, he not admit to a savage attack. Indeed, while appellant admitted that he hit Brinkley “two or three” times he downplayed his involvement testifying that he repeatedly tried to prevent Carney from inflicting a more serious injury. The court could not rely on appellant’s admission to support the upper term.

The People also argue that the upper term sentence can be justified by the fact that the killing was orchestrated to interfere with the judicial process. The People base this argument on evidence that indicated appellant and the others attacked Brinkley because he had implicated another man in an unrelated robbery. We are unpersuaded.

The denial of the right to a jury trial on an aggravating circumstance is not structural error that invariably requires reversal. (*Washington v. Recuenco* (2006) 548 U.S. \_\_\_ [126 S.Ct. 2546, 2556].) “[I]f a reviewing court concludes, beyond a reasonable

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<sup>1</sup> All further rule references will be to the California Rules of Court.

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.” (*People v. Sandoval, supra*, 41 Cal.4th at p. 839.)

Rule 4.421 states that factors relating to the crime and factors relating to the defendant may be used to enhance a sentence. The factors relating to the crime are set forth in rule 4.421(a). It states, in part as follows: “*Factors relating to the crime . . . include that: [¶] . . . [¶] (6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process.*” (Italics added.)

Here, we are unable to conclude, beyond a reasonable doubt, that a jury unquestionably would have found this circumstance to be true. Rule 4.421 states that factors “relating to the crime” may be used to enhance a sentence, and the crime at issue here was murder of Brinkley. We cannot conclude, beyond a reasonable doubt, that the jurors would have interpreted appellant’s actions with respect to the unrelated robbery as interfering with the judicial process of the crime that was charged in this case.

Because appellant’s upper term sentence was based on an aggravating factor that was neither admitted nor found true by a jury, and the error was not harmless, the imposition of the upper term must be reversed and the case remanded to the trial court for resentencing in a manner consistent with the Sixth Amendment as interpreted in *People v. Sandoval, supra*, 41 Cal.4th at page 846.<sup>2</sup>

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<sup>2</sup> In all other respects, our August 12, 2005 decision remains in effect.

III. DISPOSITION

The judgment is reversed and the matter is remanded for resentencing.

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Jones, P.J.

We concur:

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Gemello, J.

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Needham, J.