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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

COLLIE GEORGE DOWNER,

Defendant and Appellant.

A106919

(San Francisco County
Super. Ct. No. 179567)

I.

INTRODUCTION

Appellant Collie George Downer was convicted by jury of three counts of forcible sexual penetration with a foreign object (counts 1-3; Pen. Code, § 289, subd. (a)(1)),¹ three counts of forcible oral copulation (counts 4-6; § 288a, subd. (c)); two counts of forcible rape (counts 7-8; § 261, subd. (a)(2)); and two counts of unlawful sexual intercourse with a minor (counts 9-10; § 261.5, subd. (c)). The trial court sentenced appellant to an aggregate term of 40 years in prison. On October 31, 2005, we issued a nonpublished opinion affirming appellant's conviction and sentence. (*People v. Downer* (A106919); hereafter *Downer I.*)

On February 20, 2007, the United States Supreme Court granted a petition for writ of certiorari in this case, vacated the judgment of this court and remanded the case to us

¹ All statutory references are to the Penal Code.

for further consideration in light of *Cunningham v. California* (2007) 549 U.S.____ [166 L.Ed.2d 856, 127 S.Ct. 856] (*Cunningham*). Since that time, the California Supreme Court has issued its decisions in *People v. Black* (2007) 41 Cal.4th 799 (*Black*) and *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*), explaining the effect of *Cunningham* on California’s determinate sentencing law (DSL). This court has received supplemental briefing addressing the applicability of *Cunningham*, *Black* and *Sandoval* to the sentencing choices made by the trial court in this case. Upon further consideration of this new authority, we shall remand for resentencing, but otherwise affirm the judgment.²

II.

FACTS AND PROCEDURAL HISTORY

Appellant was tried and convicted of committing multiple forcible sexual acts against Elizabeth W. According to Elizabeth, when she met appellant, she was a 16-year-old runaway alone at night in San Francisco. Appellant agreed to drive her to a homeless shelter in his shuttle van; but instead, he took her to his apartment and sexually assaulted her. According to appellant, he allowed Elizabeth to spend the night at his apartment because she had no where else to stay, and they engaged in consensual sex.

At the sentencing hearing, the trial court imposed an aggravated term of eight years each for counts 1 through 8 based on its findings concerning the aggravating and mitigating circumstances in the case. The trial court then selected count 7 as the principal count. It imposed consecutive terms in counts 1, 2, 6, and 8, and concurrent terms in counts 3, 4, and 5. The court stayed execution of sentence in counts 9 and 10.

The court found two mitigating factors—the fact that appellant had no criminal record, and the fact that he initially acted out of concern for the victim and only later

² Because *Cunningham*, *Black* and *Sandoval* do not affect our disposition of appellant’s appeal from his conviction for the underlying offenses, we find it unnecessary to modify *Downer I* in its entirety. In response to the United State Supreme Court’s remand, we only modify subsection C on page 18 of *Downer I*, entitled “Blakely Error.” With the exception of this subsection, we reiterate *Downer I* in its entirety. (See *City of Long Beach v. Bozek* (1983) 33 Cal.3d 727, 728.)

developed a criminal intent. But the court determined that there were aggravating circumstances also present and applied them to each count—that the crime involved a high degree of callousness, that the victim was particularly vulnerable due to her age and lack of sophistication and being alone in the city, that the victim was a virgin before the crimes, that appellant inflicted both physical and emotional harm, and that appellant persisted in committing the crimes despite the victim’s protests.

In appellant’s appeal in *Downer I*, he argued that judicial imposition of the upper term for all eight counts infringed on his federal constitutional jury trial right under *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*). In *Blakely*, the United States Supreme Court extended the rule articulated in *Apprendi* that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.’ ” (*Blakely, supra*, 542 U.S. at p. 301.) We rejected appellant’s argument, noting that we were bound by the California Supreme Court’s decision in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*), which had held that *Blakely* did not apply to imposition of an upper term. (*Downer I* at p. 18.)

Appellant ultimately filed a petition for a writ of certiorari in the United States Supreme Court. On February 20, 2007, the United States Supreme Court granted appellant’s certiorari petition, vacated our judgment in *Downer I*, and remanded the matter to us for further consideration in light of *Cunningham*. In *Cunningham*, the United States Supreme Court held that California’s determinate sentencing law violated a defendant’s federal constitutional right to a jury trial under the Sixth and Fourteenth Amendments 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*, 127 S.Ct. at p. 871.) Following the Supreme Court’s remand, we recalled the remittitur we had issued in *Downer I* and received further briefing from the parties “addressing the effect of *Cunningham*, if any, on the issues presented in this appeal.”

On July 19, 2007, while this case was still pending, the California Supreme Court issued its decisions in *Black, supra*, 41 Cal.4th 799 and *Sandoval, supra*, 41 Cal.4th 825. Once *Black* and *Sandoval* became final, we requested and obtained additional supplemental briefing from the parties regarding the effect of these cases on this appeal.

III.

DISCUSSION

Appellant requests that this court vacate the upper terms imposed for his convictions in counts one through eight because the trial court imposed the upper term based on facts that were neither admitted nor found true by the jury in violation of *Cunningham, supra*, 127 S.Ct. 856. Appellant is correct that in imposing the upper term sentence, the trial court relied upon aggravating factors that were neither admitted by appellant nor found true by a jury beyond a reasonable doubt. The court found the crime involved a high degree of callousness, and the victim was particularly vulnerable. The court also found appellant inflicted both physical and emotional harm because he robbed the victim of her virginity, and appellant persisted in committing the crimes despite the victim's protests. The jury made no finding concerning any one of those factors.³ Thus, the trial court engaged in precisely the type of judicial fact finding that is prohibited by *Cunningham, supra*, 127 S.Ct. 856.

Very recently, in *Black* and *Sandoval*, the California Supreme Court addressed several issues arising from the *Cunningham* decision. In *Black*, the court concluded that an upper term sentence does not violate a defendant's right to a jury trial when "at least one aggravating circumstance [is] established by means that satisfy Sixth Amendment

³ Respondent argues that the jury's verdict finding appellant guilty of unlawful sexual intercourse with a minor necessarily encompasses the trial court's finding that the victim was particularly vulnerable because of her age—16 years old. The record of the sentencing proceeding does not support respondent's argument. The trial court found the victim particularly vulnerable for a number of reasons other than her age—the court cited her lack of sophistication, that she was alone in the city, and that she was not able to obtain a hotel room because she was a minor. Thus, the trial court did not rely on the victim's age alone as an aggravating factor.

requirements and thus [make him or her] eligible for the upper term.” (41 Cal.4th at p. 806.)

In *Sandoval* our high court held that the denial of the right to a jury trial on aggravating circumstances is reviewed under the harmless error standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. (*Sandoval, supra*, 41 Cal.3d at p. 838.) In making this determination, “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.*) “[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 single aggravating circumstance had it been submitted to the jury, the Sixth Amendment error properly may be found harmless.” (*Id.* at p. 839.)

Sandoval observed that, in making this determination, a 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. A defendant at trial does not necessarily have the reason or opportunity to challenge the evidence supporting aggravating circumstances unless such a challenge would also have tended to undermine proof of an element of the offense. (*Sandoval, supra*, 41 Cal.4th at p. 839.) Furthermore, “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.” (*Id.* at p. 840.)

In *Sandoval*, the aggravating factors relied upon by the trial court were that the crime “ ‘involv[ed] a great amount of violence. This was also incredibly callous behavior. . . . The victims were particularly vulnerable [The defendant’s] actions showed planning, premeditation’ ” (*Sandoval, supra*, 41 Cal.4th at p. 837.) The Supreme Court examined the record to determine whether it, as the reviewing court, could conclude that a jury would have found true beyond a reasonable doubt one or more of the aggravating circumstances found by the trial court. (*Id.* at p. 839.) While the court

acknowledged that there was significant evidence supporting the aggravating factors, it noted “[a]ll of the aggravating circumstances cited by the trial court were based upon the facts underlying the crime; none were admitted by defendant or established by the jury’s verdict.” (*Id.* at pp. 837-838.) The court held that the Sixth Amendment error was not harmless beyond a reasonable doubt under the above-enunciated standard. (*Id.* at p. 843.) Consequently, the case had to be remanded for resentencing. (*Ibid.*)

Having found that the trial court erred in this case, we too must decide whether the error was harmless beyond a reasonable doubt. (See *Sandoval, supra*, 41 Cal.4th at p. 838.) Even though the trial transcript contains evidence supporting each and every aggravating factor cited by the trial court, the record simply does not demonstrate that a jury, “applying the beyond-a-reasonable doubt standard, unquestionably would have found true at least a single aggravating circumstance.” (*Sandoval, supra*, 41 Cal.4th at p. 839.) Most importantly, each aggravating factor cited by the trial court involved a qualitative assessment of the nature of appellant’s actions or of the victim’s status. 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. Consequently, we cannot assume the record before us contains all the evidence that might have been presented if the aggravating circumstances cited by the trial court had actually been litigated at trial. (See *Sandoval, supra*, 41 Cal.4th at p. 839 [noting need to take into account that a defendant did not necessarily have reason or opportunity during trial to challenge evidence supporting aggravating circumstances when applying harmless error analysis].)

In the context of this case, given the qualitative assessments made by the trial court “rest[ing] on a somewhat vague or subjective standard,” we cannot confidently determine whether a jury would have assessed the facts in the same manner as did the trial court. (*Sandoval, supra*, 41 Cal.4th at p. 840.) Therefore, under *Sandoval*, the error was not harmless beyond a reasonable doubt.

In his supplemental brief, appellant argues that instead of remanding the case for resentencing, we should instead “vacate the upper terms imposed for his convictions in

counts one through eight.” We are required to follow our high court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456.) Consistent with *Sandoval*, the case must be remanded to the trial court for resentencing. Of course, in this resentencing under *Sandoval*, the reasons relied upon by the trial court for imposing its selected sentence need not be proven to a jury beyond a reasonable doubt and the trial court “will not be required to cite ‘facts’ that support its decision or to weigh aggravating and mitigating circumstances. [Citations.]” (*Sandoval, supra*, 41 Cal.4th at pp. 846-847, italics added.) A statement of *reasons* for the court’s sentencing decision will be required, even if the middle term is imposed, and the decision will be reviewed for an abuse of discretion. (*Id.* at p. 847.) This sentencing scheme “may afford the trial court somewhat greater discretion to select the upper or lower term than it had under the former scheme” and “[i]t seems likely that in all but the rarest of cases the level of discretion afforded the trial court . . . would lead to the same sentence as that which would have been imposed under the DSL as initially enacted.” (*Id.* at p. 850.) Nevertheless, *Sandoval* contemplates remand for resentencing under these circumstances.

IV.

DISPOSITION

Appellant’s sentence is reversed and the case is remanded to the trial court with directions to resentence defendant in accordance with *Cunningham, Black* and *Sandoval*. In all other respects, the judgment is affirmed.

Ruvolo, P. J.

We concur:

Reardon, J.

Sepulveda, J.