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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.

RAYMOND JONES,

Defendant and Appellant.

A106943

(Alameda County
Super. Ct. No. 144961)

This case is one of several remanded to us by the United States Supreme Court due to their 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

In September 2005, we issued an opinion affirming defendant's convictions for murder, domestic violence, and assault by means likely to produce great bodily injury. (*People v. Jones* (Sept. 26, 2005, A106943) [nonpub. opn.].) Relying on *People v. Black* (2005) 35 Cal.4th 1238, we rejected defendant's argument that his right to jury trial was violated by the court's finding of aggravating factors at sentencing.

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 imposed the upper term of four years for defendant's domestic violence conviction, with consecutive upper terms on enhancements for infliction of great bodily injury (five years) and use of a firearm (10 years), after it found several aggravating factors: the victim was particularly vulnerable; the act involved great violence, threat of great bodily injury, and the actual infliction of great bodily injury; defendant was armed with and used a weapon; and defendant had engaged in a pattern of violent conduct indicating a serious danger to society, with particular reference to the fact that the victim had suffered "many acts of violence [at the hands of] this defendant that span many, many years."¹

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.)

The People argue that any *Cunningham* error was harmless in this case, because the jury found true the infliction of great bodily injury and personal use of firearm enhancements in connection with the domestic violence conviction. But even assuming, as the People argue, that the jury "would have found at least one of these aggravating circumstances to be true," we cannot tell from the record whether the court would have imposed the same sentence if it had not considered the additional aggravating factors not considered by the jury, but that *Cunningham* would require the jury to find true beyond a

¹ The court also imposed a consecutive indeterminate sentence of 25 years to life on the murder conviction, with a consecutive enhancement of 25 years to life for personal discharge of a firearm resulting in great bodily injury, because the two offenses were committed at different places against different victims. The sentence on the assault conviction was stayed.

reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.) Because the sentencing court relied in part on aggravating factors determined by the court upon a preponderance of the evidence, we remand for resentencing in accordance with the requirements of *Cunningham*.

DISPOSITION

The judgment is vacated only as to defendant’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.

Siggins, J.

We concur:

Parrilli, Acting P.J.

Pollak, J.