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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.

ALFREDO GOMEZ RODRIGUEZ,

Defendant and Appellant.

A108071

(Mendocino County
Super. Ct. No. SCUKCR04-60854-
2)

Under a plea agreement, defendant Alfredo Gomez Rodriguez pleaded guilty to committing a lewd and lascivious act on a child under the age of 14 and admitted a special allegation that he engaged in substantial sexual conduct with the victim. The trial court sentenced him to the upper term sentence of eight years. Defendant appealed from the imposition of the upper term sentence, contending that the trial court committed prejudicial error by (1) disregarding significant mitigating factors shown in the record, and (2) relying on aggravating circumstances neither admitted in his plea nor proven beyond a reasonable doubt to a jury. We affirmed the judgment in a nonpublished opinion issued on September 29, 2005.

On February 20, 2007, the United States Supreme Court granted certiorari, vacated the judgment, and remanded the case to this court for further consideration in light of *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856] (*Cunningham*). We vacated defendant's upper term sentence in a nonpublished opinion filed on June 1, 2007, and remanded the case to the trial court for the limited purpose of conducting sentencing

proceedings in accordance with the requirements of *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531] (*Blakely*) and *Cunningham*.

The California Supreme Court granted the People's petition for review, and ultimately transferred the case back to this court with directions to vacate our decision of June 1, 2007, and to reconsider the cause in light of *People v. French* (2008) 43 Cal.4th 36 (*French*). Having now done so, we vacate defendant's upper term sentence, and remand the case to the trial court for the limited purpose of conducting sentencing proceedings in accordance with the requirements of *Blakely*, *Cunningham*, *French*, and *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*).

I. BACKGROUND

Defendant was charged by information with committing a lewd and lascivious act on a child under the age of 14 (Pen. Code,¹ § 288, subd. (a); count one), forcible oral copulation on a child under the age of 14 (§ 288a, subd. (c)(1); count two), and sodomy on a child under the age of 14 (§ 286, subd. (c)(1); count three). The information further alleged that defendant committed substantial sexual conduct with his child victim (§ 1203.066, subd. (a)(8)), and committed the charged offenses in conjunction with the commission of a kidnapping (§§ 207, subd. (b), 667.61, subd. (e)(1)).

In August 2004, under a negotiated disposition, defendant pleaded guilty to count one and admitted the section 1203.066, subdivision (a)(8) special allegation. He entered a *Harvey* waiver (*People v. Harvey* (1979) 25 Cal.3d 754) permitting the court to consider the dismissed counts in sentencing. In October 2004, the trial court sentenced defendant to the upper term sentence of eight years. Defendant timely appealed from his sentence.

The following is based on the probation officer's presentence report and testimony given at the preliminary hearing:

E. is the 13-year-old cousin of defendant's wife. On April 2, 2004, E. and her 15-year-old sister were dropped off in the early evening at the residence of defendant and his

¹ All further statutory references are to the Penal Code.

wife, to spend the night. The girls were to sleep in the home of defendant and his wife that night because E.'s sister had gotten into an argument with their father. Defendant's wife and her four children were staying at another relative's residence that night.

Defendant had told E. and her sister they could stay at the apartment and he would be gone for the night. Defendant suggested that E. sleep in his bedroom and her sister could sleep in the kids' room. E. had never stayed in defendant's residence without her cousin, his wife, being there, and she had never stayed in their bedroom.

E. went to sleep on top of defendant's bed, covered by her sleeping bag. She was woken up at around 6:30 the next morning by defendant who had pulled the sleeping bag off of her. Defendant, then 31 years old, was standing over her naked and wearing a condom on his erect penis. He locked the bedroom door. Defendant crawled on top of E., pushed her down, removed her pajamas and underwear, and pushed her legs apart. She tried to push him away and told him to stop but he pushed her back down on the bed and began to fondle her breasts, and touch her all over her body. She told him to stop three or four times, but he did not comply. He orally copulated her, forced her to have intercourse, and then sodomized her.

After a while, defendant took off his condom, threw it to the floor, and began to masturbate. He then grabbed E.'s hair and told her to open her mouth. When she said no, defendant pulled harder on her hair so she opened her mouth. Defendant placed his penis into her mouth and told her to "suck on it," but she refused and just left her mouth open with his penis inside.

When defendant stopped, he told E. to take a shower. After showering, E. got dressed and defendant drove her to her father's house. On the way, he told E. that if she told anyone he would get his brother or cousin to do the same thing to her. E. did not report defendant out of fear, and because he was family.

Sometime between April and June 2004, E. wrote a letter describing what had happened on the morning of April 3. She had intended to send the letter to a television show that was doing a program on rape, but had never mailed it. E.'s grandmother found the letter in E.'s school backpack on June 25, 2004, and called police. E. was

interviewed by Detective Derek Scott of the Mendocino County Sheriff's Office, and recounted to him the events described in her letter.²

When confronted with E.'s accusations, defendant admitted that he and E. had engaged in the sex acts she described, but he maintained that she had asked him to try these acts with her. He stated that he knew what he did was wrong. Defendant denied forcing E. to have sex with him and denied threatening her at any time.

II. DISCUSSION

Defendant contends that the trial court's imposition of an upper term sentence was erroneous because the court (1) implicitly made "findings," unsupported by the record, that certain mitigating factors proposed by defendant did not exist; and (2) made findings of aggravating circumstances in a manner that violated *Blakely*. Although we find no error in the trial court's consideration of mitigating factors, we agree that the trial court's findings concerning aggravating circumstances were improper in light of *Blakely*, *Cunningham*, and *French*.

The probation officer found one factor in mitigation under California Rules of Court, rule 4.423: "The defendant has no known prior adult criminal history" In defendant's sentencing memorandum and at the sentencing hearing, defendant's trial counsel identified other mitigating factors in addition to his lack of a prior record, including the following: (1) the event occurred under unusual circumstances that are not likely to recur; (2) defendant admitted to law enforcement upon contact that he had sexual relations with the victim; and (3) defendant's family was both supportive of and dependent on him.

Before imposing sentence the trial court discussed aggravating and mitigating circumstances as follows: "The record reflects that the defendant entered a plea of guilty or no contest to . . . lewd or lascivious acts with a child under the age of 14 years. [¶] He

² E. wrote in her letter that defendant told her he would deny it and "hurt her" if she told anyone. She did not state that defendant threatened to get his brother or cousin to do the same thing to her.

also admitted the first special allegation . . . that [he] had substantial sexual conduct with a victim under the age of 14. [¶] The court has reviewed the criteria affecting the defendant's eligibility for probation [and] [n]otes that under 1203.066(a)(8), the defendant is statutorily ineligible for a grant of probation because of the substantial sexual conduct. Probation is therefore denied. [¶] The court has reviewed the circumstances in aggravation versus the circumstances in mitigation. [¶] In mitigation, [the court] notes that the defendant has no known prior adult criminal history. [¶] In aggravation, the court notes that the defendant apparently threatened the victim by threatening to have his brother or cousin do the same thing to her if she told anyone, which discloses a high degree of cruelty and callousness. [¶] There is some demonstration of planning because the defendant lured the victim to sleep in his room to commit the act. [¶] Additionally, the defendant engaged in violent conduct. As I . . . read this, it was a rape. That indicates that the defendant is very likely a danger to society. [¶] The court puts a great deal of emphasis on that one aggravating factor alone and, for that reason, believes that the aggravated term is appropriate. [¶] The defendant is hereby then sentenced with respect to count 1 . . . to a period of the aggravated term of eight years in the state prison."

A. Mitigating Factors

According to defendant, since the court expressly mentioned only one factor in mitigation—defendant's lack of a prior criminal history—it must have found, erroneously, that no other factors in mitigation were true. Defendant emphasizes three circumstances that went unmentioned by the court—his early acknowledgement of wrongdoing, the unlikelihood of a recurrence of the offense, and family factors. Defendant maintains that these circumstances were each fully supported by the evidence and should have been weighed in favor of a midterm or mitigated sentence. But rather than arguing on appeal that the trial court abused its discretion in failing to give due weight to these factors, defendant contends that the substantial evidence test must govern our review. In his view, the trial court's failure to cite these factors must be reviewed as

if it were an implicit factual finding—unsupported by any substantial evidence in the record—that these factors did not exist.

We are not persuaded. Defendant treats the trial court’s statement of its reasons for imposing the upper term as if it was supposed to serve as an exhaustive list of facts found true and not true by the court. It was not. When the trial court selected an upper term, it was required by former California Rules of Court, rule 4.420(e) to make “a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected.” (See also former § 1170, subd. (b) [“[t]he court shall set forth on the record the facts and reasons for imposing the upper or lower term”].) By opting to mention only one mitigating factor in its “concise statement” the court was in no way excluding the existence of other mitigating factors, either implicitly or otherwise. The court may well have been signaling that it did not lend much weight to defendant’s proposed mitigating factors (apart from his clean criminal record) but it is impossible to read more into it than that.

Even if the existence of a particular circumstance in mitigation is undisputed, the weight or significance, if any, that the court attaches to that circumstance is a matter within its discretion. (See *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583.) Subject to ordinary appellate review for abuse of discretion, the trial court in this case was free to minimize or disregard any of the factors defendant offered in mitigation, and it was under no requirement to state its reasons for doing so. (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401; *People v. Salazar* (1983) 144 Cal.App.3d 799, 813.)

Although defendant attempts to frame his objection on appeal as a nonwaivable challenge to the sufficiency of the evidence, it boils down in the end to a complaint about “the manner in which the trial court exercise[d] its sentencing discretion and articulate[d] its supporting reasons.” (*People v. Scott* (1994) 9 Cal.4th 331, 356.) We therefore agree with the People’s position that defendant waived his current claim by failing to timely raise it in the trial court. (*Ibid.*) In any event, we would find no abuse of discretion even if the issue had been properly preserved for appellate review.

The trial court properly declined to give influential weight to the mitigating factors defendant has emphasized on appeal. First, defendant never in fact fully acknowledged his wrongdoing. He continued to insist that the 13-year-old victim had seduced him. This denial compounded the harm to the victim by rupturing formerly close family relationships, including that between the victim and her cousin.³ Second, defendant's claim that the incident occurred under unusual circumstances and is not likely to recur is unconvincing. The "unusual circumstance" in this case was simply that the female victim was sleeping at defendant's house when his own family was staying elsewhere overnight. But defendant returned to the house to attack the victim at 6:30 a.m. while her sister slept in a nearby room. That defendant was unable to resist the impulse to sexually assault his wife's 13-year-old cousin in those circumstances does little to establish that his risk of committing future sexual offenses is low. Finally, although defendant has family support and his immediate family is dependent on him, he has maintained family support in part by falsely impugning the conduct of his young victim. Although the hardship that defendant's prison term will work on his wife and children is unfortunate, that is not alone sufficient to warrant a lesser sentence in view of the severity of his criminal conduct.

The court twice stated during the sentencing hearing that it had in fact considered the defendant's statement in mitigation as well as the probation officer's report.⁴ We find

³ This was discussed in the probation report and referred to in the victim impact statement made by E.'s grandmother.

⁴ Before hearing argument, the court stated: "The court has read the . . . probation officer's report and recommendation. I've also read the defendant's statement in mitigation of the sentence. [¶] I'm inclined to go along with the probation officer's recommendation. This was, in the court's opinion, essentially a rape of a young child." At the close of argument, the court stated: "Well, as I read the defense statement in mitigation, it's based upon some contest as to, in part, whether this was in fact a rape. So we have a contest as to the facts. [¶] The court still finds that this is violent conduct as apparently determined by the probation department from the police reports [¶] [reading from probation report] [Defendant] came back to the bed and took off her

no error, abuse of discretion, or insufficiency of the evidence in the trial court's identification or consideration of mitigating factors.

B. Blakely Error

In reliance on *Blakely, supra*, 542 U.S. 296, defendant claims that the trial court violated his Sixth Amendment right to a jury trial by imposing an upper term sentence on the basis of aggravating circumstances neither admitted by him as part of his plea nor found true by a jury beyond a reasonable doubt. The People contend that defendant's *Blakely* claims must be rejected without consideration of their merits because he (1) failed to obtain a certificate of probable cause before filing his appeal, and (2) failed to raise the issue of *Blakely* error in the trial court even though his sentencing took place after the *Blakely* opinion was filed.

1. The People's Procedural Claims

Procedural claims identical to those raised by the People here were squarely rejected by the Supreme Court in *French*.

French held that a *Blakely* claim—asserting that the upper term is not authorized because the prosecution failed to establish an aggravating circumstance at the sentencing hearing in the manner required by the Sixth Amendment—does not require a certificate of probable cause because such a claim does not affect the validity of the plea agreement. (*French, supra*, 43 Cal.4th at p. 45.) The court in *French* went on to explain that upon remand after a finding of prejudicial *Blakely* error the prosecution would not be deprived of the full benefit of the plea agreement because it would still have the opportunity to argue for an upper term sentence without having to establish an aggravating circumstance: “[W]e held in *Sandoval* . . . that a defendant who has established prejudicial Sixth Amendment error under *Cunningham* . . . is entitled to be resentenced under a scheme in which the trial court has full discretion to impose the upper, middle, or lower term, unconstrained by the requirement that the upper term may not be imposed

shirt. She said she pushed [defendant] off and said, ‘Alfred stop,’ but he kept going. [end of reading] Well, that’s violence.”

unless an aggravating circumstance is established. Under our holding in *Sandoval*, if a defendant is successful in establishing *Cunningham* error on appeal, the trial court is not precluded from imposing the upper term upon remand for resentencing. The defendant is entitled only to be resentenced under a constitutional scheme and is afforded the opportunity to attempt to persuade the trial court to exercise its discretion to impose a lesser sentence. . . . [D]efendant’s claim, if successful, would not deprive the People of the benefit of the plea agreement, because they still would have the opportunity to convince the trial court that the full 18-year term should be imposed.” (*Id.* at pp. 45–46.)

As in this case, the People argued in *French* that the defendant had waived his *Blakely* claim by failing to raise it at sentencing even though the Supreme Court had already issued its *Blakely* opinion when the sentencing hearing took place. (*French, supra*, 43 Cal.4th at p. 46.) *French* rejected that argument, holding that the right to a jury trial on aggravating circumstances, which is guaranteed by the federal Constitution, may not be forfeited without an express waiver by the defendant. (*Id.* at pp. 46–48.) The court stated: “When the constitutional right to jury trial is involved, we have required an express waiver even in cases in which the circumstances make it apparent that all involved—the trial court, the prosecutor, defense counsel, and the defendant—assumed that the defendant had waived or intended to waive the right to a jury trial. [Citations.] [Fn. omitted.] At the time that defendant entered his plea of no contest, he expressly waived his right to a jury trial on the substantive offenses, but this waiver did not encompass his right to a jury trial on any aggravating circumstances.” (*Id.* at pp. 47–48.)

The court in *French* also pointed to the fact that the defendant in that case entered his plea agreement before *Blakely* was decided: “When defendant entered his plea, *Blakely* had not yet been decided Defendant pleaded no contest only to the offenses charged and did not admit any sentencing factors. Defendant’s waiver of jury trial on the offenses in connection with his no contest plea cannot reasonably be interpreted to extend to proof of aggravating circumstances when, at the time of the plea, no right to a jury trial on such circumstances had been recognized.” (*French, supra*, 43 Cal.4th at p. 48, fn. omitted.) Here, the scenario was different. Defendant entered his guilty plea *after* the

United States Supreme Court issued its *Blakely* opinion. As we read *French*, however, merely pleading guilty to the underlying offenses without expressly waiving the right to a jury trial on aggravating circumstances will not be construed as a waiver of *Blakely* rights, even if the plea was entered after *Blakely* was decided.

Here, the defendant made no express waiver of his right to a jury trial on aggravating circumstances when he entered his plea or thereafter. Under *French*, he was entitled to raise his *Blakely* claims for the first time on appeal.

2. Merits of Defendant's Blakely Claim

Defendant pleaded guilty to committing a lewd and lascivious act on a child under the age of 14 and admitted a special allegation that he engaged in substantial sexual conduct with the victim. As an initial matter, we note that under *French* defendant's plea did not in itself constitute an implicit admission that his conduct could support the maximum sentence that could be imposed under his plea agreement. (*French, supra*, 43 Cal.4th at p. 48.) Moreover, *French* establishes that defendant's plea, although an admission of the elements of his offense and of the special allegation, was not an admission of any aggravating circumstances for sentencing purposes. (*Id.* at p. 49.)

Before accepting defendant's plea in this case, the trial court was required to determine that there was a factual basis for the plea. (*French, supra*, 43 Cal.4th at p. 50.) The court in this case found there was a factual basis for the plea based on the preliminary hearing transcript. There is no indication in the record that defendant, either personally or through counsel, admitted the truth of any facts elicited at the hearing beyond those necessary to support his plea. In particular, defendant never dropped his claim that the sex was consensual. He made no admission of forcible or violent conduct toward the victim, and no admission of the facts cited by the court in finding that he had acted with callousness and cruelty or had engaged in some degree of planning.

The trial court therefore violated defendant's Sixth Amendment right to a jury trial by imposing an upper term sentence based on aggravating circumstances neither admitted by him nor found true by a jury beyond a reasonable doubt. Unless we find the federal

constitutional error to be harmless beyond a reasonable doubt, defendant's sentence must be reversed. (*Chapman v. California* (1967) 386 U.S. 18.)

C. Harmless Error Analysis

The Supreme Court reaffirmed in *French* that *Blakely* error is generally subject to harmless error analysis. (*French, supra*, 43 Cal.4th at p. 52.) An upper term sentence imposed in violation of *Blakely* may be affirmed on appeal if the reviewing court determines that a “ ‘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.’ ” (*French*, at p. 53, quoting *Sandoval, supra*, 41 Cal.4th at p. 839.) Such a finding may be made only when there is no evidence that could rationally lead to a contrary finding. (*French*, at p. 53.)

The defendant in *French* argued that error could never be found harmless in a case in which the defendant pleads no contest because “there was no jury trial and, consequently, there is no trial evidence that may be subjected to harmless-error analysis.” (*French, supra*, 43 Cal.4th at p. 53.) While the court stopped short of adopting the defendant's argument, it made clear that in the great majority of cases, *Blakely* sentencing error could not be demonstrated to be harmless absent a full factual record developed at trial. The reviewing court is not entitled to assume that the facts put in evidence at a preliminary hearing or contained in a probation report are the same as those that would have been brought forward had aggravating circumstances been charged and tried to the jury. As *French* points out, the defense does not have the same incentive and opportunity to contest aggravating circumstances raised in a preliminary hearing, probation report, or prosecutor's statement in aggravation as it would if the existence of the aggravating circumstances had to be proven beyond a reasonable doubt to a jury. (*Id.* at pp. 53–54.)

Here, the trial court mentioned the following factors in aggravation (1) the defendant's high degree of cruelty and callousness as evidenced by his “apparent[]” threat to the victim that his brother or cousin would do the same thing to her if she reported him; (2) “some demonstration of planning” because the defendant lured the victim into sleeping in his room in order to commit the offense; and (3) most importantly

to the court, defendant's violent conduct toward the victim, forcibly raping her, indicating that he is "very likely a danger to society."

We note that that the trial court itself did not seem to place a high degree of confidence in the first factor. As noted earlier, although E. told police when she was interviewed that defendant threatened to get his brother or cousin to do the same thing to her, the unmailed letter she had written did not mention that threat. Regarding the latter two factors, and bearing in mind that defendant never had an opportunity or incentive to contest the underlying facts, we cannot say that the evidentiary record regarding the defendant's planning of the offense or violence toward the victim is such that one or both factors would unquestionably have been found true beyond a reasonable doubt by the jury.

Accordingly, we hold that (1) the trial court violated defendant's Sixth Amendment right to a jury trial by imposing an upper term sentence on the basis of aggravating circumstances neither admitted by him nor found true by a jury beyond a reasonable doubt; and (2) the error was not harmless beyond a reasonable doubt. We therefore remand for resentencing in light of *Blakely*, *Cunningham*, *French*, and *Sandoval*.

III. DISPOSITION

The upper term sentence of eight years is vacated and the case is remanded to the trial court for the limited purpose of conducting sentencing proceedings in accordance with the requirements of *Blakely*, *Cunningham*, *French*, *Sandoval* and other applicable law.⁵ In all other respects, the judgment is affirmed.

Margulies, J.

We concur:

Marchiano, P.J.

Stein, J.

⁵ We are not suggesting what the sentence should be or limiting the various options open to the court on remand.