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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.  
MARK DELROY DALEY,  
Defendant and Appellant.

A109917  
(Sonoma County  
Super. Ct. Nos. SCR-31585,  
SCR-32982)

Appellant Mark Delroy Daley supplied three teenage girls with drugs and arranged for them to engage in acts of prostitution. He was tried before the court and sentenced to prison for an aggregate term of 19 years 8 months based on his conviction of one count of child endangerment (Pen. Code, § 273a, subd. (a)), two counts of furnishing methamphetamine to a minor (Health & Saf. Code, § 11353), two counts of procuring a minor for prostitution (Pen. Code, § 266i, subd. (a)(5)), one count of procuring a person for prostitution (Pen. Code, § 266i, subd. (a)(1)), three counts of procuring a child under 16 to perform a lewd and lascivious act (Pen. Code, § 266j), and one count of possessing methamphetamine (Health & Saf. Code, § 11377, subd. (a)).

Appellant argues: (1) the evidence was insufficient to support the child endangerment conviction; (2) the court relied on an improper aggravating factor when it imposed the upper term on the furnishing count that was selected as the principal term; (3) the upper-term sentence violated *Cunningham v. California* (2007) 549 U.S.

\_\_\_ [166 L.Ed.2d 856, 127 S.Ct. 856] (*Cunningham*) and *Blakely v. Washington* (2004) 542 U.S. 296, 301 (*Blakely*); and (4) a \$20 court security fee must be stricken because the crimes in this case were committed before the operative date of the statute authorizing the fee. We agree the case must be remanded for resentencing under *Cunningham* and *Blakely*, but otherwise affirm.

## FACTS

In March 2003, 14-year-old Renata ran away from home. She and her boyfriend Rodney were sitting in a park in Santa Rosa when they were approached by appellant, who asked Rodney's permission to "sell" Renata. Rodney told him no. About a week later, Renata was again in downtown Santa Rosa with Rodney and another 14-year-old runaway named Jennifer. The trio was worried about having no money and no place to go. They saw appellant and his friend Greg, and the group agreed that Jennifer would prostitute herself.

Appellant arranged for Jennifer to meet Emmanuel Ayala in a hotel room where she had sex with him in exchange for \$300, \$100 of which went to appellant. Appellant gave methamphetamine to Renata and Rodney while they waited elsewhere for Jennifer to finish. Renata and Rodney eventually joined Jennifer in the hotel room to spend the night, where they found Jennifer drying off from a shower and Ayala getting dressed. Ayala told Renata he would pay her \$400 to have sex with him.

The following day, appellant rented another motel room for Renata, Rodney and Jennifer. They all smoked methamphetamine that appellant provided, and at one point appellant placed his fingers inside Jennifer's vagina while Renata and Rodney were in the bathroom showering. Appellant directed Jennifer to give Renata a note stating that Ayala would pay \$400 to have sex with her. Renata did not want to do so, but she agreed after appellant persuaded her. When Ayala arrived, he gave appellant \$100, saying he would give Renata the rest later, and had unprotected sex with Renata in another room. Rodney, Renata and Jennifer spent the night at the motel. During the night, they smoked methamphetamine they got from appellant.

Jennifer started to worry about their safety and contacted Renata's mother, who drove her to the police station so she could report what had happened. The police arranged for Jennifer to make pretext telephone calls to appellant and Ayala. Jennifer ran away with her twin sister Janessa about a week later and contacted appellant, who gave them methamphetamine and arranged for Janessa to have sex with Ayala.

Meanwhile, police began an investigation in which Santa Rosa Police Detective Philip Brazis called appellant in an undercover capacity and solicited sexual contact with juveniles. Appellant had Janessa speak to this new "client" over the phone and they arranged to meet at a motel and have sex. Appellant was arrested when he introduced Brazis to Janessa at the motel. Methamphetamine and cash were discovered in his pocket when he was searched incident to the arrest.

Appellant testified at trial and denied giving drugs to the girls or arranging for them to have sex. He claimed that he agreed to provide a girl to Detective Brazis because he was trying to get Ayala arrested. Appellant believed the girls and the police department were conspiring against him.

## DISCUSSION

### *Sufficiency of the Evidence--Child Endangerment Count*

Appellant was convicted of a single count of child endangerment under Penal Code section 273a, subdivision (a), which is violated when "[a]ny person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering. . . ." He argues that this conviction must be reversed because the evidence was insufficient to show he endangered any of the three victims "under circumstances likely to produce great bodily injury or death." We disagree.

Our task on appeal is to review the whole record in the light most favorable to the judgment to determine whether there is substantial evidence—evidence that is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) We view the evidence in the light most favorable to the judgment,

accepting those logical inferences which the trier of fact could have reasonably drawn from that evidence. (*Ibid.*)

The testimony in this case showed that appellant arranged for three teenage girls to have sex with an adult male stranger alone in a motel room. Renata testified that the man did not use a condom when they had intercourse, and there is no evidence that any birth control or disease prevention method was utilized by the other two girls. Each girl was exposed to a significant risk of sexually transmitted disease or pregnancy, from which abortion, miscarriage or childbirth would result. Any one of these would be sufficient to constitute great bodily harm. (See *People v. Superior Court (Duval)* (1988) 198 Cal.App.3d 1121, 1131-1132; see also *People v. Sargent* (1978) 86 Cal.App.3d 148, 151-152.) Appellant also gave the girls methamphetamine, a stimulant whose use was dangerous to their health.

We do not agree with appellant's assertion that great bodily harm must be "probable" or "very probable" for the risk to fall within Penal Code section 273a, subdivision (a). "[G]iven the interest protected, i.e., the lives of highly vulnerable children, the definition of 'likely' in the context of section 273a is not that death or serious injury is probable or more likely than not. . . . '[L]ikely' as used in section 273a means a substantial danger, i.e., a serious and well-founded risk, of great bodily harm or death." (*People v. Wilson* (2006) 138 Cal.App.4th 1197, 1204.) The trial court reasonably inferred that appellant's actions exposed the victims to a serious and well-founded risk of great bodily harm, and the evidence amply supports the conviction for child endangerment.

#### *Upper Term Sentence*

The trial court imposed the nine-year upper term on count two, which charged appellant with furnishing methamphetamine to a minor (Janessa) under Health and Safety Code section 11353. Appellant argues that this component of the sentence violated his rights under the federal constitution because it was based on aggravating factors that were not found true beyond a reasonable doubt. We agree.

The Sixth and Fourteenth Amendments require that any factor increasing the penalty for a crime beyond the statutory maximum (other than a prior conviction) must be submitted to a jury and proved beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) The relevant statutory maximum “is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.” (*Blakely, supra*, 542 U.S. at pp. 303-304.)

In *Cunningham, supra*, 549 U.S. \_\_\_\_ [166 L.Ed.2d 856, 127 S.Ct. 856], the United States Supreme Court analyzed California’s Determinate Sentencing Law (DSL) and concluded that under the three-tiered sentencing structure applicable to most offenses, the middle term was the statutory maximum because the upper term could not be imposed absent additional factual findings. (*Cunningham, supra*, 166 L.Ed.2d at pp. 873, 876, 127 S.Ct. at pp. 868, 871]; see also Pen. Code, § 1170, subd. (b).) *Cunningham* held that the DSL ran afoul of the principles set forth in *Apprendi* and *Blakely* to the extent it allowed the imposition of an upper term sentence based on facts that were found true by the trial court using only a preponderance of the evidence standard. (*Cunningham, supra*, 166 L.Ed.2d at p. 876, 127 S.Ct. at p. 871.) In so holding, *Cunningham* expressly rejected the analysis in the California Supreme Court’s decision in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*), which was subsequently vacated and remanded for further consideration in light of *Cunningham*. (*Black v. California* (Feb. 20, 2007, No. 05-6793) \_\_ U.S. \_\_\_\_ [2007 U.S.Lexis 6793]). *Black* had upheld the upper term sentencing provisions of the DSL as constitutional and rejected an argument that these provisions violated *Apprendi* and *Blakely*.

The trial court in this case explained its reasons for imposing the upper term on count two as follows: “[T]he three minors were particularly vulnerable as they were [runaways] and also the act of providing methamphetamine to one minor, at least Renata, posed a threat of great bodily harm.” Appellant correctly asserts that under *Cunningham*, these factual determinations should have been made under a standard of

proof beyond a reasonable doubt.<sup>1</sup> The court did not state that it was making its findings beyond a reasonable doubt, and, in the absence of such a statement, we must presume it followed California law as it existed before *Cunningham* was decided, which allowed such findings to be made by a preponderance of the evidence. (Cal. Rules of Court, rule 4.420(b); see *People v. Wright* (1982) 30 Cal.3d 705, 710.) This was a violation of the federal constitution as explained in *Cunningham*.<sup>2</sup>

The error cannot be deemed harmless. One of the two aggravating factors relied upon by the court to impose the upper term on count two—the threat of great bodily harm to *Renata*—was not factually applicable to that count, in which *Janessa* was the named victim. A factor in aggravation must have the effect of making a crime “ ‘ ‘distinctively worse than the ordinary’ ’ ” (*People v. Webber* (1991) 228 Cal.App.3d 1146, 1169), and appellant’s conduct toward Renata did not make his provision of methamphetamine to Janessa distinctively worse than the average such offense. There was also mitigating evidence that appellant suffered from a mental illness that had at one point rendered him incompetent to stand trial. Given that the court relied on one improper aggravating factor and that an arguable circumstance in mitigation was present, we cannot conclude that the imposition of an upper term sentence under a lesser standard of proof was harmless beyond a reasonable doubt. (See *Washington v. Recuenco* (2006) \_\_\_ U.S. \_\_\_ [165 L.Ed.2d 466, 473-474, 476, 126 S.Ct. 2546, 2550, 2553] [*Blakely* error not structural error]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 320 [*Apprendi* error governed by harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24.]

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<sup>1</sup> Appellant waived a jury trial in this case and he does not argue that he was entitled to a jury determination of the applicable factors in aggravation.

<sup>2</sup> Although trial counsel did not lodge a specific objection to the two aggravating factors on federal constitutional grounds at the post-*Blakely*, pre-*Black* sentencing hearing, appellant mentioned the *Blakely* decision in his allocution to the court before sentence was imposed. To the extent an objection was necessary during the window period between *Blakely* and *Black* (see *People v. Hill* (2005) 131 Cal.App.4th 1089, 1103), appellant’s remarks were sufficient to preserve his constitutional claim.

The case must therefore be remanded for a new sentencing hearing. This resolution makes it unnecessary to address appellant's separate claim that remand is required because the evidence did not support the court's finding that the act of providing methamphetamine posed a risk of great bodily harm.

*\$20 Court Security Fee*

The court imposed a \$20 security fee under Penal Code section 1465.8, subdivision (a)(1), which provides, in relevant part, "To ensure and maintain adequate funding for court security, a fee of twenty dollars (\$20) shall be imposed on every conviction for a criminal offense, including a traffic offense, except [certain] parking offenses . . . ." The statute was operative August 17, 2003 (Stats. 2003, ch. 159, § 25), a few months after appellant committed the instant offenses but more than a year before he was convicted and sentenced. Appellant argues that imposition of the court security fine violated the federal and state constitutional prohibitions against ex post facto laws (U.S. Const., 5th Amend.; Cal. Const., art. I, § 9) and the statutory prohibition against the retroactive application of penal laws (Pen. Code, § 3). We disagree.<sup>3</sup>

In a thorough and well-reasoned opinion, Division Five of the Second District Court of Appeal held that imposition of the \$20 court security fee does not violate ex post facto principles simply because the crimes were committed before the effective date of Penal Code section 1465.8. (*People v. Wallace* (2004) 120 Cal.App.4th 867.) The statute's expressly stated purpose is "[t]o ensure and maintain adequate funding for court security" (Pen. Code, § 1465.8, subd. (a)(1)), and the legislative history surrounding its enactment as part of emergency legislation showed that the primary purpose of the fee was budgetary, not punitive. (*People v. Wallace, supra*, 120

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<sup>3</sup> The Supreme Court has granted review in two cases raising these issues. (*People v. Alford* (2006) 137 Cal.App.4th 612, review granted on ex post facto issue May 10, 2006, S142508, supplemental briefing ordered on retroactivity issue completed Dec. 13, 2006; *People v. Carmichael* (2006) 135 Cal.App.4th 937, review granted May 10, 2006, S141415, consideration deferred pending disposition in *Alford*.)

Cal.App.4th at p. 876.) Nor was the effect of the fee so punitive as to negate the Legislature's intent to treat it as a civil disability. (*Id.* at pp. 876-878.)

We also reject the argument that the imposition of the security fee violated Penal Code section 3, which provides that “[n]o part of [the Penal Code] is retroactive, unless expressly so declared.” “In general, application of a law is retroactive only if it attaches new legal consequences to, or increases a party's liability for, an event, transaction, or conduct that was *completed* before the law's effective date. [Citations.] Thus, the critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date. [Citations.] A law is not retroactive ‘merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment.’ [Citation.]” (*People v. Grant* (1999) 20 Cal.4th 150, 157.)

In Penal Code section 1465.8, subdivision (a)(1), the Legislature stated its intent that a \$20 fee “be imposed on every *conviction*.” (Italics added.) Because appellant was not *convicted* of the offenses in this case until after section 1465.8 went into effect, the statute operates only prospectively with respect to him. Although his conviction was dependent upon his earlier commission of the offenses, “the last act or event necessary to trigger application of the statute” was the conviction. (*People v. Grant, supra*, 20 Cal.4th at p. 157; see also *People v. Bailey* (2002) 101 Cal.App.4th 238, 242-243 [Pen. Code, § 186.30 gang registration requirement for “any person convicted in a criminal court” was not retroactive when applied to a defendant who was convicted after the statute's effective date].)

#### *Appellant's Supplemental Brief*

Appellant has filed a supplemental brief arguing that the evidence was insufficient to support his convictions because there was no DNA evidence showing that any of the girls had sex with Ayala and no evidence of drug testing to prove their methamphetamine use. We have considered the substance of these claims and conclude they lack merit. (See *People v. Clark* (1992) 3 Cal.4th 41, 173.)

DISPOSITION

The sentence is vacated and the case is remanded for resentencing. The judgment is otherwise affirmed.

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McGuinness, P.J.

We concur:

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Pollak, J.

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Siggins, J.