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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH DIDASA,

Defendant and Appellant.

A112205

(Del Norte County  
Super. Ct. No. CRF05-9595)

Appellant was convicted, pursuant to a plea agreement, of false imprisonment and battery with serious bodily injury. On appeal, he contends the trial court's imposition of an upper term sentence was unconstitutional because the court relied on factors not found by a jury beyond a reasonable doubt. He also contends the imposition of consecutive terms was improper both because the reason stated by the court was inadequate to justify its decision and because the court relied on factors not found by a jury beyond a reasonable doubt. We agree that imposition of an upper term sentence was unconstitutional and shall therefore remand to the trial court for resentencing. We shall otherwise affirm the judgment.

***PROCEDURAL BACKGROUND***

Appellant was charged by information with first degree robbery (Pen. Code, § 212.5, subd. (a)–count one),<sup>1</sup> first degree burglary (§ 459/460–count two); making a criminal threat (§ 422–count three); false imprisonment by violence (§ 236–count four);

<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

threatening a witness to a crime (§ 140–count five); dissuading a witness from testifying (§ 136.1, subd. (a)(1)–count six); two counts of assault with a deadly weapon or by force likely to cause great bodily injury (§ 245, subd. (a)(1)–counts seven and eight); battery with serious bodily injury (§ 243, subd. (d)–count nine); and dissuading a witness by force or threat (§ 136.1, subd. (c)(1)–count ten). Count one included an allegation of firearm use (§ 12022.53, subd. (b)); counts two, three, four, five, and six included an allegation of firearm use in commission of a felony (§ 12022.5); and count nine included a great bodily injury allegation (§ 12022.7).

On September 9, 2005, appellant pleaded no contest to count four (false imprisonment) and count nine (battery with serious bodily injury).

On November 18, 2005, the trial court sentenced appellant to the four-year upper term on count nine and an eight-month consecutive term (one-third the midterm) on count four.

On November 21, 2005, appellant filed a notice of appeal.

### ***FACTUAL BACKGROUND***

#### ***Probation Report Summary***

The following factual summary is taken from the presentence investigation report:

“On July 7, 2005, a deputy of the Del Norte County Sheriff’s Department was dispatched on a report of a home invasion. Upon arrival, the deputy made contact with the victim Derrick Roach. Roach was naked and bleeding from his scalp and forehead. His hands were bound behind his back with duct tape and cable ties, and his feet were bound with duct tape. There was blood dripping down his face and body. There were blood drops and smears on the hard floor just inside the doorway, as well as on the flooring and carpet inside the dining room and living room.

“Roach told the deputy that he had been awakened approximately an hour earlier by a knock on his front door. When he answered the door, the defendant and two other Hispanic adult males forced their way inside and closed the door behind him. The defendant and one of [the] other assailants pulled out handguns and ordered Roach to give them money. They threatened to kill him if he did not comply. Roach attempted to

resist and they began to beat him in the face and head with the butts of their guns. He fought them off, and during the struggle his boxer shorts were ripped off him. Roach said he tried to get away from them but they were able to grab him and bind his hands with cable ties and tape. They then began to search his house for items to take.

“The victim possessed a [Proposition] 215 card and had one or two ounces of marijuana, as well as a grow [light] in his garage. The assailants took the marijuana, a set of grow lights, his cell phone and about \$300.00 from his wallet, which they found on the floor next to his bed. As they were leaving, the defendant told Roach he would kill him, his girlfriend and their child if he called the police. As they were leaving, one of them took a photo of his newborn daughter as if to verify the threat.

“Roach stated that he has purchased Ecstasy from the defendant in the past but did not owe him any money and could not think of any reason the defendant would do this to him.

“Based on the victim’s prior knowledge of the defendant, the Del Norte County Sheriff’s Department was able to provide sufficient information to the Vallejo Police Department, who obtained and executed a search warrant on the defendant’s residence.

“Officers serving the warrants located a pair of jeans with what appeared to be blood on them, the marijuana grow light[,] .380 caliber ammunition, marijuana, and several pills believed by the officers to be Ecstasy.”

### ***Appellant’s Statement***

Appellant provided a statement to the probation officer, reported as follows:

“The defendant was interviewed at the Del Norte County Probation Department on September 9, 2005. He said, ‘This was a dope deal gone bad.’ He said he came up here with two friends to purchase marijuana. He said the victim owes him \$300.00 for some Ecstasy. The defendant declined to name the subjects who accompanied him in this offense.

“The defendant said he originally went to the victim’s residence the previous day, July 6, to buy a quarter-pound of marijuana, but the victim said he didn’t have any and to return the next morning. When they came back at approximately 7:30 [a.m.], the victim

said he still didn't have it because he owed the supplier money. The defendant confronted the victim about the outstanding \$300.00, the victim said he did not have that either. According to the defendant, the victim gave him the grow light as a compensatory gesture. When the defendant returned from putting the light in his vehicle, the victim and the two unnamed subjects were arguing. He said the victim assaulted one of the subjects and the second one jumped into the fray. The victim then pulled out a stick, and one of the subjects pulled out a gun. The victim then dropped the stick and they began searching his residence for items of value."

## ***DISCUSSION***

### ***I. Imposition of the Upper Term on Count Nine***

Appellant contends the trial court's imposition of an upper term sentence was unconstitutional because the court relied on factors not found by a jury beyond a reasonable doubt. Appellant cites the recent United States Supreme Court opinion of *Cunningham v. California* (2007) \_\_\_ U.S. \_\_\_, 127 S.Ct. 856 (*Cunningham*), in which the high court rejected *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*), in which our Supreme Court had held that California's determinate sentencing law was constitutional under *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Blakeley v. Washington* (2004) 542 U.S. 296, and *United States v. Booker* (2005) 543 U.S. 220.<sup>2</sup> The *Cunningham* court held that California's sentencing law violates a defendant's Sixth and Fourteenth Amendment right to a jury trial because it "assigns to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence." (*Cunningham, supra*, 127 S.Ct. at p. 860.) The court explained that "the federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." (*Ibid.*)

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<sup>2</sup> At our invitation, the parties submitted supplemental briefing on the effect of the *Cunningham* decision on the issues raised in this case.

Very recently, in *People v. Black* (2007) 41 Cal.4th 799 (*Black II*) and *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*), the California Supreme Court addressed several issues arising from the *Cunningham* decision. In *Black II*, the court concluded, inter alia, 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 requirements and thus [make him or her] eligible for the upper term." (41 Cal.4th at p. 805.) In *Sandoval*, the court held that harmless error analysis applies to upper term sentences that violate a defendant's Sixth Amendment right to a jury trial, but found, in that case, that the error was not harmless beyond a reasonable doubt and that, therefore, the case had to be remanded for resentencing. (41 Cal.4th at p. 843.)

At the sentencing hearing in the present case, the trial court sentenced appellant to the upper term on count nine, battery with serious bodily injury, after addressing relevant aggravating and mitigating factors as follows: "Turning to aggravating and mitigating factors, under [California Rules of Court, former rule] 421(a)(2)<sup>3</sup> [(now rule 4.421(a)(2))], I find that the defendant was armed with or—and did use a firearm in the commission of the offenses; that the—that the weapon was displayed in a menacing manner and was also used as a bludgeon to beat the victim.

"I do find that because of the—the presence of the weapons and the—and the manner in which threats were made I do find that there was a degree of planning, sophistication and professionalism here under [former rule] 421(a)(8) [(now rule 4.421(a)(8))] and that's an aggravating factor.

"And in mitigation I find under [former rule] 423(b)(1) [(now rule 4.423(b)(1))] that the defendant has little or no prior record and did voluntarily acknowledge wrongdoing, at least to a degree, at an early stage of the case[, under former rule 423(b)(3), now rule 4.423(b)(3)].

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<sup>3</sup> All further rule references are to the California Rules of Court.

“But, taken as a whole, considering the surrounding circumstances, I find that the aggravating circumstances outweigh the mitigating circumstances and therefore the aggravated term will be employed—imposed.”

The probation officer had recommended that the court find the same two factors in aggravation and the same two factors in mitigation. The probation report also indicated that appellant had suffered a prior infraction.

As a preliminary matter, respondent asserts that appellant forfeited this claim by failing to object on this ground at the sentencing hearing. Appellant was sentenced on November 18, 2005, shortly after the California Supreme Court opinion in *Black I, supra*, 35 Cal.4th 1238, and well before the United States issued its decision in *Cunningham, supra*, 127 S.Ct. 856. Given that, at the time of appellant’s sentencing hearing, our Supreme Court had held that California’s determinate sentencing law did not violate the federal Constitution, it would be unreasonable to expect appellant to have objected on *Blakely/Cunningham* grounds.<sup>4</sup> (See *Sandoval, supra*, 41 Cal.4th at p. 837, fn. 4; cf. *Black II, supra*, 41 Cal.4th at pp. 811-812.) Accordingly, appellant has not forfeited this issue on appeal.

In its supplemental brief, respondent also argues that this claim is not cognizable on appeal because appellant failed to obtain a certificate of probable cause before filing his notice of appeal. (See § 1237.5, subd. (a); rule 8.304(b).) However, even assuming such a requirement would be applicable in the present circumstances, we nonetheless will address the merits. First, respondent did not even mention the certificate of probable cause requirement until after we requested supplemental briefing on the effect of *Cunningham* on the present case. Second, the state of the law in this area was so unsettled at the time of appellant’s sentencing that, as with the failure to object at the sentencing hearing, appellant’s failure to obtain a certificate of probable cause does not preclude him from raising the issue on appeal.

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<sup>4</sup> In fact, in his opening brief, appellant acknowledged that this court was bound to follow *Black I* under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, but stated that he made this argument to preserve it for federal court review.

Turning to the merits, the court sentenced appellant to the upper term after finding two circumstances in aggravation: first, appellant “was armed with or—and did use a firearm in the commission of the offenses; that the—that the weapon was displayed in a menacing manner and was also used as a bludgeon to beat the victim,” and, second, “because of the—the presence of the weapons and the—and the manner in which threats were made I do find that there was a degree of planning, sophistication and professionalism here . . . .”

Appellant is correct that the court’s upper term sentence improperly relied on factors not found by a jury beyond a reasonable doubt, in violation of appellant’s Sixth and Fourteenth Amendment rights. (See *Cunningham*, *supra*, 127 S.Ct. at p. 860.) Neither of these factors was found by a jury beyond a reasonable doubt; indeed there was no jury trial in this case. Moreover, appellant never conceded that he used a firearm during the offense. Finally, according to the probation report, appellant had previously suffered only a single infraction, and the court found, as a factor in mitigation under rule 4.423(b)(1), that appellant had little or no prior record. (See *Sandoval*, *supra*, 41 Cal.4th at pp. 837-838 [finding that none of the aggravating factors cited by trial court came within exceptions set forth in *Blakely*, noting that defendant had no prior criminal convictions, all factors were based on facts underlying crime, and none were admitted by defendant or established by jury’s verdict].)

Having found that the court erred, we now must decide whether the error was harmless beyond a reasonable doubt. (See *Sandoval*, *supra*, 41 Cal.4th at p. 838, citing *Chapman v. California* (1967) 386 U.S. 18.) Respondent argues that the error was harmless because the evidence both of planning and that appellant used a firearm was largely uncontested or overwhelming, such that we can conclude the jury would have found at least one of these aggravating factors true beyond a reasonable doubt. We disagree.

First and most importantly, there was no trial in this case and we therefore cannot assess what a jury might have found based on the evidence presented, since no evidence was in fact presented at a trial. (Cf. *Sandoval*, *supra*, 41 Cal.4th at pp. 838-839 [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].) Second, as previously noted and as respondent acknowledges, appellant did not admit to personally using a weapon at the time of his plea and he contested such use at sentencing. Third, even were we to agree that the probation report and the preliminary hearing transcript constitute “evidence” for purposes of determining whether the error was harmless, 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*, at p. 839.) That is because the record clearly does not contain overwhelming or uncontradicted evidence that appellant used a firearm (rule 4.421(a)(2)) or that the crime showed “a degree of planning, sophistication and professionalism” (rule 4.421(a)(8)) on appellant’s part.

For these reasons, the constitutional error in this case cannot be found harmless. (See *Sandoval*, *supra*, 41 Cal.4th at p. 843.) We shall remand the matter so that the trial court can exercise its discretion to impose the lower, middle, or upper term, consistent with the recently amended determinate sentencing law (§ 1170, subd. (b)),<sup>5</sup> which our Supreme Court has found applicable to cases such as the present one. (*Sandoval*, at pp. 845-846.) Under this revised scheme, the middle term is no longer the presumptive sentence. Rather, the court may, in its discretion, select the lower, middle, or upper term of imprisonment. (See § 1170, subd. (b).)

## **II. *Imposition of Consecutive Sentences***

Appellant contends the trial court improperly imposed consecutive sentences both because the reason stated by the court was inadequate to justify its decision and because the court relied on factors not found by a jury beyond a reasonable doubt.

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<sup>5</sup> Following *Cunningham*, the California Legislature amended the determinate sentencing law by urgency legislation effective March 30, 2007. (Stats. 2007, ch. 3, pp. 4-9.)

In deciding to impose consecutive sentences on both counts, the trial court stated: “[I]t does appear to the Court that the battery with serious bodily injury was—although it occurred in the same general struggle, that was a struggle that lasted over a period of time and it was clearly a separate and distinct act that—the battery and then the taping up and binding of the victim, the false imprisonment charge, and so I do find that consecutive terms should be and are imposed.”

**A. *The Trial Court’s Reasons for Imposing Consecutive Sentences***

Appellant contends the trial court improperly imposed consecutive sentences because the reason stated by the court was inadequate to justify its decision. Appellant failed, however, to object to this alleged error at the sentencing hearing. He therefore has waived the issue on appeal. (See *People v. Scott* (1994) 9 Cal.4th 331, 353 [concluding that the waiver doctrine applies to claims involving the trial court’s “failure to properly make or articulate its discretionary sentencing choices,” including “cases in which the stated reasons allegedly do not apply to the particular case”].)

**B. *Constitutional Claim***

Appellant also contends the imposition of consecutive sentences violated his Sixth and Fourteenth Amendment rights to a jury trial under *Cunningham, supra*, 127 S.Ct. 856.

The United States Supreme Court did not address the question of consecutive sentences in *Cunningham*. In *Black II*, however, our Supreme Court found that the *Cunningham* decision did not call into question its conclusion in *Black I* that a defendant’s constitutional right to a jury trial is not violated by a trial court’s imposition of consecutive sentences and, accordingly, reaffirmed that previous conclusion. (*Black II*, 41 Cal.4th at pp. 822-823, citing *Black I, supra*, 35 Cal.4th at p. 1264.) We are bound by the decision in *Black II* (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455), and therefore must reject appellant’s constitutional challenge to the imposition of consecutive sentences.

*DISPOSITION*

The decision of the trial court to impose an upper term sentence on count nine is reversed and the matter is remanded to the trial court for resentencing in accordance with this opinion. The judgment is otherwise affirmed.

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Kline, P.J.

We concur:

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Lambden, J.

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Richman, J.