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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JESUS XAVIER ACOSTA, Defendant and Appellant.	B170330 (Los Angeles County Super. Ct. No. VA073500)

APPEAL from a judgment in the Superior Court of Los Angeles County. Dewey L. Falcone, Judge. Affirmed in part, reversed in part and remanded.

Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C. Johnson, Lawrence M. Daniels and Karen Bissonnette, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jesus Xavier Acosta appeals from the judgment entered following a jury trial that resulted in his conviction of voluntary manslaughter. He contends: (1) the trial court prejudicially erred in failing to give CALJIC No. 2.01; and (2) the trial court committed sentencing error under *Blakely v. Washington* (2004) 542 U.S. ___, 124 S.Ct. 2531, 159 L.Ed. 403 (*Blakely*), and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*). We reverse the judgment as to the sentence only and remand for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

Viewed in accord with the usual rules on appeal (*People v. Kraft* (2000) 23 Cal.4th 978, 1053), the evidence established that defendant fatally shot Cesar Abrica, known as "Crank," at about 5:30 p.m. on October 16, 2002. The only real issue at trial was whether defendant acted in self-defense. In support of the prosecution's theory of murder, witnesses testified that they saw Abrica running up Orchard Avenue, apparently being chased by defendant driving a gray Mustang. When Abrica ran up a driveway, defendant stopped the car and fired at Abrica through the driver's side window. Defendant then sped away in the Mustang.[1]

The defense presented evidence that Abrica associated with gang members. Defendant's brother, girlfriend, and several friends testified that Abrica and Abrica's friends had been harassing defendant and defendant's friends for several months before the shooting, including chasing defendant, starting fist fights with him and threatening to "smoke" him.

Testifying in his own behalf, defendant could recall no incident that would have triggered his problems with Abrica. Defendant described more than half a dozen

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1 Abrica died from a single gunshot wound to the head. There was no soot or stippling at the point of entry. The medical examiner testified that the wound was consistent with someone running away and turning briefly sideways.

altercations between himself and Abrica in the year prior to the shooting. Fearful that Abrica's threats to kill him were serious, defendant acquired a gun about a month before the shooting.

On the day of the shooting, defendant borrowed his girlfriend, Jessica's, car to drive to a late morning dentist appointment. Three or four hours later, after having two teeth pulled, defendant drove himself home and took some medicine. Some time later, although drowsy and in pain, defendant went to the home of his friend, Marcos, where Marcos installed stereo speakers in Jessica's car. Marcos and defendant then went clothes shopping, but defendant felt unwell, so he took Marcos home. After dropping Marcos off, defendant moved the gun from the back seat to the front.

On the way home, defendant saw Abrica walking across the street at the intersection of Bell and Orchard. Abrica threw some gang signs at defendant and told defendant to come over. Defendant stopped to talk to Abrica because he was tired of being afraid and wanted to tell Abrica to leave him alone; having the gun made him feel safer. While defendant continued driving, Abrica walked next to the car and the two men argued. Abrica called defendant names and repeated his threat that Abrica and his "homies" were going to "smoke" defendant. Abrica stopped walking at the driveway to 6629 Orchard Avenue. He looked around then suddenly bent down and reached for his waist in a manner that made defendant think Abrica was reaching for a gun. Believing that Abrica was going to shoot him, defendant grabbed his own gun from under the seat and shot Abrica. Defendant drove away in a panic. He denied chasing Abrica and maintained that Abrica was not running, but was walking along side the Mustang. No gun or other weapon was found near Abrica's body.

Defendant was charged with special circumstance first degree murder (Pen. Code, § 187, subd. (a); § 190.2, subd. (a)(21).[2] Various gun use enhancements also were alleged. (§ 12022.53, subds. (b), (c), (d)); § 12022.55.) Following a jury trial, he was convicted of the lesser included offense of voluntary manslaughter (§ 190, subd. (a)); the

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[2] All further undesignated section references are to the Penal Code.

jury found true a section 12022.5 gun use enhancement, but found not true the remaining enhancement allegations. Defendant was sentenced to 21 years in prison.

DISCUSSION

The Trial Court Was Not Required to Give CALJIC No. 2.01

Defendant contends the trial court prejudicially erred in failing to give CALJIC No. 2.01 (sufficiency of circumstantial evidence).[3] He argues that the instruction was necessary because "the jury almost certainly convicted [defendant] because they concluded that his claim of self-defense was not reasonable because no weapons were found on or near the victim's body." We disagree.

CALJIC No. 2.02 was given.[4] That instruction "was designed to be used in place

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[3] CALJIC No. 2.01 reads: "However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion. [¶] Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt. [¶] Also, if the circumstantial evidence [as to any particular count] permits two reasonable interpretations, one of which points to the defendant's guilt and the other to [his] [her] innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to [his] [her] guilt. [¶] If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable."

[4] As given, the instruction reads: "The specific intent or mental state with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not find the defendant guilty of the crime charged in Count 1, that's the murder count, or the crime of voluntary manslaughter based on intentional killing, which is a lesser crime, unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required specific intent or mental state but (2) cannot be reconciled with any other rational conclusion. [¶] Also, if the evidence as to that specific intent or mental state permits two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to its absence,

of CALJIC No. 2.01 when the defendant's specific intent or mental state is the only element of the offense that rests substantially or entirely on circumstantial evidence." (*People v. Honig* (1996) 48 Cal.App.4th 289, 341; see Use Note to CALJIC No. 2.01 ["CALJIC 2.01 and CALJIC 2.02 should never be given together. This is because CALJIC 2.01 is inclusive of all issues, including mental state and/or specific intent, whereas CALJIC 2.02 is limited to just mental state and/or specific intent. Therefore, they are alternative instructions. *If the only circumstantial evidence relates to specific intent or mental state, CALJIC 2.02 should be given.* If the circumstantial evidence relates to other matters, or relates to other matters as well as specific intent or mental state, CALJIC No. 2.01 should be given and not CALJIC No. 2.02." (Italics added.)]; see also Use Note to CALJIC No. 2.02 [same].)

Thus, to state defendant's argument is to refute it. The only circumstantial evidence which defendant argues required the giving of CALJIC No. 2.01 was evidence probative of defendant's mental state—i.e., the reasonableness of defendant's belief that Abrica was going to shoot him. Since the only circumstantial evidence in this case related to defendant's mental state, CALJIC No. 2.01 was unnecessary.

We are not persuaded to the contrary by appellant's argument that the fact that no gun was found near Abrica's body was circumstantial evidence probative of something other than defendant's mental state and therefore required the giving of CALJIC No. 2.01. The circumstantial evidence that Abrica had been systematically harassing defendant and his friends supported the defense theory that defendant reasonably believed Abrica was going to shoot him. While the absence of any weapon at the scene may have been circumstantial evidence that Abrica was unarmed, the fact that Abrica may have been unarmed was circumstantial evidence that defendant's belief in the need for self-defense was unreasonable. Thus, all the circumstantial evidence was probative of

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you must adopt that interpretation which points to its absence. [¶] If, on the other hand, one interpretation of the evidence as to the specific intent or mental state appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable."

the issue of defendant's mental state. As such, CALJIC No. 2.02 was the correct instruction.

Blakely Error

In a supplemental opening brief, defendant contends the trial court committed sentencing error under *Blakely* because it imposed the upper term based upon aggravating factors not found true by the jury.[5] We agree and remand for resentencing.

In *Apprendi, supra,* 530 U.S. at page 490, the United States Supreme Court determined 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." In *Blakely*, the high court clarified that the statutory maximum is the maximum sentence a judge may impose "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" (124 S.Ct. at p. 2537, italics in original.) Whether *Blakely* applies to the California sentencing scheme is currently before our Supreme Court in a number of cases, including *People v. Butler* (2004) 122 Cal.App.4th 910, review granted Dec. 15, 2004, S129000; *People v. George* (2004) 122 Cal.App.4th 419, review granted Dec. 15, 2004, S128582; *People v. Black*, review granted July 28, 2004, S126182; and *People v. Towne*, review granted July 14, 2004, S125677. We agree with those courts that have concluded *Blakely* applies because the maximum penalty a court can impose under California law without making additional factual findings is the middle of three terms. (See § 1170, subd. (b), and Cal. Rules of Court, rule 4.420(a) and (b).)

Here, defendant's 21-year sentence is comprised of the 11-year upper term for voluntary manslaughter, plus the 10-year high term for the gun use. At the sentencing hearing, the trial court articulated the following reasons for selecting the high terms: (1)

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[5] The People's argument that defendant forfeited his *Blakely* claim by failing to object at the sentencing hearing is not well taken. The Supreme Court's decision in *Blakely* extended the *Apprendi* rationale into a new area. Defendant cannot have forfeited or waived a legal argument that was not recognized at the time of his trial.

the crime involved great violence (Cal. Rules of Court, rule 4.421(a)(1)); (2) the victim was particularly vulnerable (rule 4.421(a)(3)); (3) the defendant has engaged in a pattern of violent conduct which indicates a serious danger to society (rule 4.421(b)(1); (4) defendant's prior sustained petition as a juvenile and the current offense are of increasing seriousness (rule 4.421(b)(2)); (5) the manner in which the crime was carried out indicates planning (rule 4.421(a)(8)); and (6) defendant was on probation or parole when the crime was committed (rule 4.421(b)(4)).[6] Of these six reasons, only two involve the fact of a prior conviction: the increasing seriousness of defendant's prior sustained juvenile petition and the current adult conviction, and the fact defendant was on parole at the time he committed this crime.

Generally, a single valid aggravating circumstance is sufficient to support imposition of the upper term even if the trial court also relied on other invalid factors. (See *People v. Osband* (1996) 13 Cal.4th 622, 728; *People v. Steele* (2000) 83 Cal.App.4th 212, 226; *People v. Forster* (1994) 29 Cal.App.4th 1746, 1759.) But the relevant question in deciding whether a *Blakely* sentencing error is harmless, is whether it can be determined that the trial court would have exercised its discretion to impose the upper term if it knew that one or more of the aggravating factors it relied on were invalid. Here, where only two out of six aggravating factors were valid under *Blakely*, we cannot determine whether the trial court would have imposed the upper term based only upon those two valid factors. Accordingly, we reverse and remand for resentencing.

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6 Although the trial court articulated these six reasons at the sentencing hearing, the minute order from that proceeding lists only three aggravating circumstances: (1) defendant was on probation at the time of the offense, (2) the crime demonstrated violent conduct, and (3) planning.

DISPOSITION

The judgment is reversed as to the sentence only, and the matter remanded to the trial court to conduct a new sentence determination. In all other respects, the judgment is affirmed.

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RUBIN, J.

We concur:

COOPER, P.J.

BOLAND, J.