Filed 1/30/08 P. v. Anderson CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARKCINE ANDERSON,

Defendant and Appellant.

B189211

(Los Angeles County
Super. Ct. No. TA075280)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald V. Skyers, Judge. Affirmed.

David L. Polsky, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey and Erika D. Jackson, Deputy Attorneys General, for Plaintiff and Respondent.

Markcine Anderson appeals following her conviction by jury of attempted murder, with findings she used a deadly weapon and inflicted great bodily injury. The jury found not true the allegation that appellant committed the offense willfully, deliberately, and premeditatedly. Sentenced to a term of 13 years, she contends that the following rulings constituted prejudicial error: (1) admission of a police officer's testimony that, when interviewed, appellant avoided his questions; (2) admission of a psychiatrist's opinions about appellant's veracity and motive; (3) allowing the prosecutor to comment on appellant's failure to testify; (4) alleged failure to hold a hearing on the voluntariness of appellant's *Miranda* waiver (*Miranda v. Arizona* (1966) 384 U.S. 436); (5) imposing an upper term sentence allegedly in violation of the right to jury trial. We find these rulings either were not error or were not prejudicial, and we affirm the judgment.

FACTS

Appellant initially pled not guilty by reason of insanity, but withdrew that plea after she was examined pursuant to Penal Code section 1027 (undesignated section references are to that code). Viewed in accordance with the governing rules of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence at trial showed that sometime between 7:00 and 8:00 a.m. on June 24, 2004, appellant, then age 36, repeatedly stabbed her nine-year-old nephew Timothy M. with a kitchen knife, at the home where they both resided, together with appellant's mother Angeline Sanders, Timothy's two brothers and cousin, and appellant's brother George Kennedy. (Timothy's father, Lacour Harrison (also Sanders's son) did not live there.) With nobody else at home, appellant entered the bedroom where Timothy was watching television, and after he stood up she stabbed him more than once in the stomach. Timothy tried to run from the room, but appellant grabbed his shirt and stabbed him in the back. She then stabbed him in the chest, both arms, and right middle finger. In shock, Timothy lay on the floor. Appellant left the room and closed the door.

Timothy testified that on an occasion previous to the stabbing, appellant had come into a room in which Timothy's cousin was helping him with homework, and had struck

Timothy in the back with a wooden snake. On another occasion, she had locked Timothy out of the house when he returned home from school.

When Sanders returned to the house around 9:00 a.m., Timothy called to her, and she went to his room upstairs. Still on the floor, Timothy told Sanders appellant had stabbed him. Sanders observed a laceration in Timothy's abdomen, from which intestines were protruding, and there was blood on the floor, walls, and window. Sanders screamed, rousing her son Kennedy, who had recently returned home and fallen asleep. He covered Timothy's wounds while Sanders phoned 911. Paramedics transported Timothy to Harbor UCLA Medical Center. He arrived near death from bleeding, with several potentially fatal wounds, and underwent surgery to repair numerous organs. Timothy remained hospitalized for six weeks, and suffered scars.

Kennedy went looking for appellant, whom he had seen walking toward a metro rail station as he went home. He located her at a bus stop in Carson, more than 10 miles from home. She was under police detention. Kennedy asked her why she had "done that" to Timothy, and she replied, "Timothy who? Do what to Timothy?"

Los Angeles Police Detective Juan Gonzales and his partner arrived at the Sanders residence following uniformed officers. Detective Gonzales observed a seven to eight-inch bloody knife by the kitchen sink, and in Timothy's room he found a blood-stained shirt with six holes in front and four in back, consistent with penetration by a knife. The detectives proceeded to the police station where appellant had been taken, and questioned her. Appellant first was read her *Miranda* rights, and stated she understood each of them. When then asked whether she wanted to talk about what had happened, appellant replied, "No. It doesn't matter. I didn't do anything."

Appellant proceeded to make statements that Detective Gonzales characterized as having nothing to do with the investigation or the questions posed. For example, appellant said that children shouldn't be at her house; only she and her mother should be. Appellant said the children upset her. Asked about her knowledge of the offense, she remarked "Timothy who?" and said she had no idea what the detectives were talking about.

On cross-examination by appellant, Detective Gonzales admitted that an audio recording made of appellant's interview could not be located. Questioned extensively about appellant's having given answers unrelated to the investigation, Detective Gonzales stated that "she seemed to be giving me attitude," which he illustrated as involving rolling her eyes and staring at the wall, "as if we were wasting her time."

On redirect examination, Detective Gonzales testified that other criminal suspects he had interviewed had similarly given him attitude. Then, asked how he would describe appellant's behavior, the detective replied, "Just seemed like she was avoiding the questions." Appellant's motion to strike on grounds of speculation and lack of foundation was denied. The witness then volunteered, "She was avoiding questions. She was pretty much – seemed to be lying. Didn't want to – [.]" This time the court sustained appellant's motion to strike. On recross examination, Detective Gonzales related that of the defendants he had questioned whom he knew to be mentally ill, some had not been responsive to questions.

The evidence reflected that appellant had suffered from mental illness for a significant time. According to Sanders, she frequently engaged in "conversations" with no one else present, and sometimes answered questions in a way unrelated to them. Sanders testified that appellant had been in several mental hospitals, initially on direction of criminal court, and was diagnosed with schizophrenia. When she emerged from her last hospitalization, she initially took medication, which rendered her much more normal and social. She then stopped taking it and began to act childlike, walking the streets, talking to herself, not bathing, responding to questions nonsensically.

Appellant also had been cocaine-dependent. Kennedy testified appellant had used the substance for 10 years. He did not believe she had been using it at the time of the stabbing.

Appellant's defense was that she had been psychotic and delusional, and hence had not acted with the specific intents of the charges (intent to kill and premeditation and deliberation), so she should be found guilty only of assault with a deadly weapon. Psychiatrist Mark Jaffe, who examined appellant in 2004 under court appointment,

opined that she had a psychotic disorder. It included disorganized thinking, such as answering questions with unrelated statements. Appellant had told Dr. Jaffe she was accused of "poking" her 29-year-old, dangerously mentally ill brother (no such person existed). Dr. Jaffe testified that drug use may induce symptoms like those of a psychotic disorder, but they cease once the drug use does.

Dr. Jaffe had again interviewed appellant in August 2005.[1] She told him that before the offense she had been angry about, among other things, her mother having removed a computer from her room and placed it in her niece's room, so the children could use it too. Appellant was also angry because her brother Harrison had thrown her down the stairs when she expressed anger to him.[2] When asked about getting the knife she had used, appellant said she had been thinking about the pain the family had caused her over the bad children. Earlier voluble, appellant was guarded when asked about the offense; she admitted stabbing Timothy, but only because perhaps he was giving her problems.

Appellant also had been diagnosed with a psychotic disorder at Patton State Hospital, in October 2004. She had been sent there because incompetent to stand trial. Dr. Jaffe tended to agree with the diagnosis when he saw appellant in 2005. In contrast to her 2004 examination, in 2005 appellant, then under medication, spoke rationally and responsively.

Dr. Richard Romanoff, a clinical psychologist, examined appellant in April and May of 2005. From those visits and his review of appellant's psychiatric records, he reached the opinion that she suffered from a schizo-affective disorder, a combination of thought disorder and affective disorder, as reflected by her incoherence and aural

---

[1] Appellant's trial took place in October and November of 2005.

[2] Harrison, Timothy's father, testified he had confronted appellant about hitting his sons, and she had said she would do it whenever she was ready to. Harrison had responded by grabbing appellant, pulling her down the stairs, and throwing her out the door to the house.

hallucinations, and depressive and manic episodes. In her interviews, appellant most prominently displayed disorganized thinking; she also showed symptoms of paranoid thinking. She stated that her family was favoring Timothy over her. Appellant cited as one reason why she "poked" Timothy that his father had thrown her down the stairs a few days earlier. She said she didn't know why he had done that. Dr. Romanoff opined that symptoms of a drug-induced psychosis will dissipate in three months after the person ceases using.

In rebuttal, the prosecution called Dr. Kaushal Sharma, a forensic psychiatrist who interviewed appellant at county jail in July 2005. He testified that appellant had described the offense to him as follows. She had gone to the kitchen to make herself breakfast – french fries – and had taken out a knife. She then went to use a bathroom upstairs; there was a downstairs one, and she couldn't say why she had gone up. Appellant decided to "play" with the knife, and "poked" her nephew several times, but not hard. He began to bleed, and appellant left, to go to a shopping mall. Police detained her. She did not tell them the truth.

The prosecutor asked Dr. Sharma whether he had made a judgment regarding appellant's credibility, based on her statements. Appellant's objections of irrelevance and "out of the purview of this witness" were overruled, and the doctor said he felt he could not accept her description "at face value." Over objection, he gave as reasons that "when you become a psychiatrist you don't leave your common sense outside the door," people don't ordinarily cut up potatoes for french fries for breakfast, and appellant couldn't explain why she went upstairs with the knife. These and other statements and conduct led him to believe that appellant was being deceptive. Appellant's admission she had not told the police the truth, her response of "Timothy who?" and her statement that she had poked Timothy but not hard, manifested deceptiveness. Dr. Sharma further testified, over objection, that in his report he had written that appellant was less than credible in providing information.

Dr. Sharma further opined that appellant's behavior could not be explained "on the basis of any mental illness she may have had at the time of the crime." Based on

appellant's police report statements disparaging the children, Dr. Sharma concluded over objection that appellant had been jealous of Timothy, it being clear there was "bad blood" between them. The court struck, however, the doctor's further statement that the "bad blood" suggested a reason for appellant's conduct, which had nothing to do with mental illness. Dr. Sharma testified that at his interview appellant had not shown symptoms of schizo-affective disorder, and that based on various documentation there was no evidence she had done so on the date of the stabbing.

Other aspects of the trial proceedings that appellant assigns as error are described below.

DISCUSSION

1. Opinions About Appellant's Truthfulness and Jealousy.

Appellant contends that the trial court erred in admitting testimony by Detective Gonzales impugning her credibility, as well as Dr. Sharma's testimony about appellant's untruthfulness and her jealousy of the victim. We find no error with respect to Detective Gonzales, but we conclude that both of appellant's claims regarding Dr. Sharma's testimony are well taken. However, we further conclude that the error was harmless.

A police officer's testimony that a witness whom he interviewed was or was not telling the truth has been held inadmissible, as neither proper lay or expert opinion under Evidence Code sections 800 and 801 nor relevant. (*People v. Sergill* (1982) 138 Cal.App.3d 34, 39-40; see *People v. Melton* (1988) 44 Cal.3d 713, 744.) However, Detective Gonzales's testimony did not violate these restrictions. Appellant directs his claim to the detective's statement that it "Just seemed like she was avoiding the questions."[3] Contrary to appellant's urgings, this statement was not an implied opinion of disbelief or untruthfulness. Rather, it restated Detective Gonzales's account of appellant giving responses that did not relate to the questions posed. Moreover, the ascribed behavior, of avoiding questions, could just as well be understood to reflect

---

[3] Appellant's objections and motion to strike the testimony were sufficient to preserve her appellate contentions regarding it.

irrationality, or simple uncooperativeness.[4] Detective Gonzales testimony did not constitute an impermissible opinion about appellant's credibility.

The record is different with respect to Dr. Sharma. The prosecutor directly asked for his opinion about appellant's credibility, and, over objections, the doctor stated that he could not accept appellant's account of her conduct in the offense, that he perceived her as deceptive, and that he had reported that she was less than credible. These opinions should not have been admitted. They contravened the established rule that expert witnesses may not opine about credibility, as that subject is not beyond common experience. (Evid. Code, § 801, subd. (a); *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 82; see *People v. Chatman* (2006) 38 Cal.4th 344, 375-376 [discussing and disapproving use of psychiatric witnesses to assess credibility].)

A similar disqualification applies to Dr. Sharma's opinion testimony that appellant was jealous of Timothy. The conclusion that appellant did or did not possess that attitude or frame of mind was determinable by the jurors, from the same facts Dr. Sharma referred to. It was not beyond common experience. (*People v. Kennedy* (1962) 200 Cal.App.2d 814, 818-819.)

Whether the foregoing errors warrant reversal depends upon the "reasonable probability" test of *People v. Watson* (1956) 46 Cal.2d 818, 836. We do not believe that the errors were thus prejudicial. The primary reason is that Dr. Sharma's opinions about appellant's credibility and jealousy pertained to facts and consequent conclusions that the jury was fully capable of assessing and reaching independently. The doctor himself explained that his opinions about appellant's credibility were based on his lay common sense. The facts giving rise to the conclusion of "jealous" also were patent and articulated. Moreover, appellant's credibility was not itself a material issue. What was relevant was whether her statements were willful, or the product of psychosis. And in her closing, appellant's counsel made it clear to the jury that these were lay, not psychiatric,

---

4 Dr. Jaffe had testified that giving unrelated responses was symptomatic of appellant's mental disorder.

opinions. The erroneously admitted testimony did not pose a realistic threat of misleading the jury in their function of assessing the evidence and issues. There is not a reasonable probability that appellant would have obtained a more favorable verdict had the testimony not been admitted.

2. Comment on Appellant's Failure to Testify.

Appellant next contends that the court and the prosecutor committed constitutional error by respectively authorizing and delivering comment, disparaging of innocence, about appellant's failure to testify at trial, in violation of the Fifth Amendment and *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*). We agree with this contention, but also find the error to be harmless.

The comment followed a ruling made during final arguments. During her initial argument, the prosecutor had exhorted the jury to find malice (intent to kill) and premeditation and deliberation by considering appellant's conduct before the stabbing, and the types of wounds she inflicted. In reviewing this evidence, the prosecutor attributed certain thoughts to appellant. In her responsive argument, defense counsel urged that this technique involved impermissible speculation, because there was no evidence of what appellant had thought. Counsel stated, "For instance, if the defendant had testified and she had provided information . . . in terms of what she was thinking and what she was going to do," then her thoughts could be propounded for consideration. Turning to the definitions of premeditation and deliberation, counsel further stated, "We don't have any evidence of that. We don't have any information from [appellant] during the course of this trial providing us that information. And, again, it's not for you to speculate. What we do have are statements that she makes at a later time . . . ."

At this point the prosecutor objected. At the bench, she argued it was improper for counsel tell the jury that because appellant didn't testify, other evidence couldn't be considered. The prosecutor suggested this was intrinsically incorrect, and also that it constituted *Griffin* error by the defense. The court responded that there was no error or impropriety, but that counsel's argument had opened the door to rebuttal "on that area. I'm not saying it's wide open for the prosecution to say or talk about what could be

testified to. But clearly *she could rebut by saying, but if she did take the witness stand, on the contrary, this would be shown*, just limited to the areas that you have opened it." (Italics added.) Appellant's counsel protested that this ruling would engender a violation of *Griffin*, but the court responded that "if you open the door to some speculation about what could have been shown if she took the witness stand, I believe there can be rebuttal as to what could or could not have been shown if she did take the witness stand."

In her final argument, the prosecutor argued that defense counsel had wrongly asserted that the jury couldn't consider circumstantial evidence of appellant's thinking unless she gave direct evidence by testifying. The prosecutor explained, "We have to prove our case . . . without the defendant taking the stand . . . ." The prosecutor then concluded: "If her client took the stand, we would have known what happened. Why her client didn't take the stand? She knows not to talk to you. She knows where she is. She knows her own statements can incriminate her like they have already done."

Appellant contends that the last-quoted remarks about her failure to testify were Fifth Amendment error under *Griffin.* They were. To protect the defendant's constitutional right not to testify, generally "the prosecutor may neither comment on a defendant's failure to testify nor urge the jury to infer guilt from such silence. [Citations, including *Griffin*]." (*People v. Hardy* (1992) 2 Cal.4th 86, 154.) In her remarks, the prosecutor not only referred to appellant's silence as an absence of evidence, but further characterized appellant's motive in not testifying, implying that to have done so would have incriminated her.

Respondent avers that the prosecutor's argument should be considered a fair and proper response to defense counsel's reference to appellant's failure to testify, permissible under *United States v. Robinson* (1988) 485 U.S. 25 (*Robinson*). In that mail fraud prosecution, defense counsel argued to the jury several times that the government had not given the defendant an opportunity to explain certain matters. The trial court ruled that to the extent counsel had referred to the defendant's ability to testify, he had opened the door to rebuttal. In his rebuttal, the prosecutor argued that the defense position about opportunity to explain was wrong, that the defendant had given some

explanations during investigation, and "'He could have taken the stand and explained it to you, anything he wanted to. The United States of America has given him, throughout, the opportunity to explain.'" (*Id.* at p. 28.) The Supreme Court held that this reference to the defendant's failure to testify did not infringe *Griffin*, because it constituted only "a fair response to a claim made by defendant or his counsel . . . ." (*Id.* at p. 32.)

In the present case, appellant agrees that the prosecutor's initial rebuttal comments, explaining that they jury could consider circumstantial evidence of appellant's thinking despite her failure to testify, constituted a fair response to appellant's argument to the contrary, permissible under *Robinson*, *supra*, 485 U.S. 25. But the following portion of the rebuttal went far further. The comments impugned appellant's constitutional choice not to testify, and asserted that it had been motivated to avoid testimony that could have been incriminating. *Griffin* prohibits this type of disparagement of the defendant based on election of the constitutional right, as well as attribution of knowledge supposedly withheld. (*Robinson, supra,* 485 U.S. at pp. 30, 32.)

Accordingly, the court's permitting and the prosecutor's pursuing the type of comment on appellant's exercise of her Fifth Amendment right that finally developed constituted constitutional error. Under *Chapman v. California* (1967) 386 U.S. 18, this error requires reversal unless it may be found harmless beyond a reasonable doubt, meaning that the error did not contribute to the verdict. (*Id.* at p. 24.) That is the case here.

First, although the prosecutor's comments were improper, they were hardly informative. The initial statement, that if appellant had taken the stand "we would have known what happened," essentially reiterated something appellant's counsel had already argued, and which was rather obvious. The remainder of the comments, that appellant had not testified to protect herself from self-incrimination, were a familiar characterization of invoking the Fifth Amendment, and they also were undocumented, speculative, and not inherently persuasive.

Second, appellant urges that the remarks were surrounded by references to specific intent. But the subject of testimony by appellant regarding her thinking, was connected

throughout the arguments with the question of premeditation and deliberation. That was the issue the prosecutor repeatedly referred to before making her comments. Notwithstanding this emphasis on the absence of appellant's testimony with respect to premeditation and deliberation, the jury decided that issue in appellant's favor. That verdict is strong evidence that the objectionable comments were not persuasive, and that they did not contribute to the verdict.

Third, the jurors were instructed directly opposite to the prosecutor's remarks. Under CALJIC No. 2.60, they were told: "A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that a defendant does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way." We are satisfied, beyond a reasonable doubt, that the *Griffin* violation did not affect the verdict, and was constitutionally harmless.

4. Cumulative Error

Appellant appends to his first three contentions, just reviewed, a further argument that even if the asserted errors were not individually prejudicial, together they deprived him of a fair adjudication, and therefore they collectively require reversal. We do not agree. Apart from the fact that appellant's first claim of error is meritless, there was no prejudicial effect from the errors identified, and appellant received a full and fair trial. (Cf. *People v. Jenkins* (2000) 22 Cal.4th 900, 1056.)

5. Waiver of Miranda *Rights.*

Appellant contends that the trial court erroneously refused to afford her a hearing regarding the voluntariness of her waiver of *Miranda* rights, and the consequent admissibility of her statements made after that waiver. The claim lacks merit, because appellant received such a hearing.

In a motion made just before Detective Gonzales testified, appellant's counsel urged that appellant's mental illness had rendered her waiver of rights "not knowing, and therefore not voluntary." Counsel explained that this would be substantiated by "what the testimony's been so far, in addition to what the officer's going to say concerning the

observations he may have heard."[5] Counsel concluded, "So it's my position that, in fact, any statements that arise . . . after those rights were read should be [sup]pressed, [because] she was not able to make a knowing and intelligent waiver."

The court then suggested that once Detective Gonzales testified to the objective facts of *Miranda* warnings and waiver, "then it [voluntariness] becomes a jury issue." Counsel responded that the issue was one for the court, involving admissibility. The court expressed concern that to find the waiver involuntary would effectively take the question of intent from the jury. After defense counsel reiterated that the issue was one of admissibility, the court stated that the evidence as to appellant's mental condition did not in his opinion prevent her from giving an intelligent *Miranda* waiver. After referring again to not taking the issue of mental state from the jury, the court ruled that "based on what your motion is . . . if the *Miranda* rights are given and responded to appropriately during the testimony of the officer, I'm going to allow the statement in." Appellant could then yet explore the issue of intelligent waiver. Her statements would be "admitted conditionally while the foundation is laid that there's *Miranda* given and waived."

Appellant's contention is that she was denied a hearing on the preliminary fact of the voluntariness of her *Miranda* waiver. (See Evid. Code, §§ 402, 405.) But appellant received such a hearing. Her counsel moved to suppress her statements as involuntary, based on the evidence of record concerning mental illness and such further facts as Detective Gonzales's testimony might provide. Counsel did not seek to present any further evidence. After hearing argument, the court ruled that the evidence of "mental state" did not require a finding of involuntariness, and that the post-waiver statements would be conditionally admitted, subject to Detective Gonzales's testimony. The court afforded appellant the requisite hearing to determine voluntariness on the evidence invoked.

---

[5] The court and jury had already heard the lay testimony concerning appellant's mental illness, and also Dr. Jaffe's testimony.

The court's allusions to preempting the jury's determination of intent in light of mental illness were misconceived, because the issue of voluntariness was not identical, and even if it had been the correct course was not to inform the jury of the ruling. (See Evid. Code, § 405, subd. (b)(1).) But regardless, the court did hear and decide appellant's challenge to the voluntariness of her *Miranda* waiver, based on the evidence that appellant requested be considered.

6. Upper-Term Sentencing.

The trial court sentenced appellant to the upper term of nine years (§ 664), enhanced by three years for infliction of great bodily injury (§ 12022.7, subd. (a)) and an additional year for use of a deadly weapon (§ 12022, subd. (b)(1)). In imposing the upper term, the court relied on the factors in aggravation adduced by the prosecution, which included that the crime involved great violence, great bodily harm, and other acts disclosing a high degree of cruelty, viciousness, or callousness (Cal. Rules of Court (hereafter cited as rules), rule 4.421(a)(1)); the defendant used a weapon (rule 4.421(a)(2)); the victim was particularly vulnerable (rule 4.421(a)(3)); the manner of the crime indicated planning, sophistication, and professionalism (rule 4.421(a)(8)); and the defendant engaged in a pattern of violent conduct indicating a serious danger to society (rule 421(b)(1)). The court acknowledged the presence of a mitigating factor derived from appellant's mental illness (see rule 4.423(b)(2)), which was outweighed by the aggravating factors.

Appellant contends her upper-term sentence was imposed unlawfully, because the only two aggravating facts that the jury found (weapon use and bodily injury) were used to enhance the sentence (rule 4.420), and use of the remaining factors violated appellant's constitutional jury trial rights under *Cunningham v. California* (2007) 549 U.S. __ [127 S.Ct. 856] (*Cunningham*) and its United States Supreme Court antecedents. Those cases hold that "Except for 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.'" (*Id.*, 127 S.Ct at p. 868.)

In *People v. Black* (2007) 41 Cal.4th 799 (*Black II*), our Supreme Court explained that the requisites of *Cunningham* et al. are satisfied if one aggravating factor is established in accordance with the rules of those cases. At that point, the defendant is eligible for the upper term, and further judicial finding or balancing of factors in deciding whether to impose it is constitutionally permissible. (*Black II, supra,* 41 Cal.4th at pp. 813, 815-816.) Therefore, the *Black II* defendant's criminal history (see rule 4.421(b)(2)), referred to in the prosecutor's sentencing memorandum and the probation report, properly rendered the defendant upper-term eligible, under the prior conviction exception of the United States Supreme Court cases. (*Black II, supra,* 41 Cal.4th at pp. 818-820.)

The present case is on all fours. The probation report listed as an aggravating factor appellant's having served a state prison term, and the prosecutor's sentencing memorandum reiterated this circumstance (rule 4.421(b)(3)). This reflection of a prior felony conviction qualified appellant for the upper term, and did not require a jury finding under *Cunningham* et al. (*Black II, supra,* 41 Cal.4th at p. 819.) Accordingly, as explicated by *Black II*, the use of other judicially found factors in imposing an upper-term sentence on appellant did not abridge her federal jury trial rights.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COOPER, P.J.

We concur:

RUBIN, J.

FLIER, J.