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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS MANUEL BANEGAS,

Defendant and Appellant.

B193283

(Los Angeles County
Super. Ct. No. VA084675)

APPEAL from a judgment of the Superior Court of Los Angeles County. Larry S. Knupp, Judge. Affirmed.

Thomas T. Ono, 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, Assistant Attorney General, Lawrence M. Daniels and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

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Carlos Manuel Banegas[1] appeals from the judgment entered upon his convictions by jury of second-degree murder (Pen. Code, § 187, subd. (a), count 1), felony hit-and-run (Veh. Code, § 20001, subd. (a) count 2),[2] driving under the influence causing injury (§ 23153, subd. (a), count 3), driving under the influence of more than 0.08 percent alcohol (§ 23153, subd. (b), count 4), and gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a), count 5). In connection with counts 3 through 5, appellant admitted suffering two prior drunk driving convictions within the meaning of section 23566, subdivisions (b) and (c) and Penal Code section 191.5, subdivision (d). The trial court sentenced him to the upper term of four years on his conviction in count 2 plus a consecutive term of 15 years to life on his conviction in count 1. Imposition of sentence on counts 3 through 5 was stayed pursuant to section 654. Appellant contends that (1) there is insufficient evidence to support his convictions of second degree murder, hit-and-run and gross vehicular manslaughter, (2) the trial court gave erroneous causation instructions to the jury, thereby depriving him of due process and a fair trial, and (3) the upper term sentence on his felony hit-and-run conviction violates the Sixth and Fourteenth Amendments to the United States Constitution as set forth in *Cunningham v. California* (2007) 549 U.S.__ [127 S.Ct. 856] (*Cunningham*), compelling reduction of the sentence to the midterm.

The judgment is affirmed.

FACTUAL BACKGROUND

We review the evidence in accordance with the usual rules on appeal. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) On July 12, 2004, at approximately 11:00 p.m., Sean Tackett was driving south in the number one (fast) lane of the 710 freeway, near Firestone Boulevard, at 70 to 75 miles per hour. He saw a white Chevy Camaro in the

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[1] Appellant is also known as Oscar Espinosa, Lorenzo German, Loreto German Lopez, Lorento German Lopez, Compa Lopez, German Lopez, Oscar Jerman Pompa, and German Compa.

[2] All further statutory references are to the Vehicle Code unless otherwise indicated.

number four (slow) lane pass him, with its lights on, traveling 90 to 95 miles per hour. A Honda Civic traveling 70 miles per hour, four car lengths ahead of the Camaro, placed its turn signal on and merged in front of the Camaro. The Camaro did not slow down. When it was a foot or two behind the Civic, it swerved to the left to avoid hitting it, nearly hit two other cars and crashed into the center divider. It came to rest 80 percent in the fast lane and 20 percent on the shoulder. Tackett pulled over and stopped. The Camaro's headlights were then off and its hazard lights did not come on.

Twenty to 30 seconds later, Tackett saw a motorcycle in the fast lane strike the driver's side, rear panel of the Camaro and the rider, wearing a helmet, "fly[] through the air and hit the pavement." Five to 10 minutes later, Tackett saw appellant exit the Camaro and walk past the motorcyclist toward the freeway exit. Tackett detected a strong smell of alcohol as appellant walked by him.

Appellant walked south on the freeway toward Gregory Boagni, an off-duty Los Angeles County sheriff's deputy, who saw appellant hit the center divider, stopped his car and called 911. Boagni testified that he saw appellant walk south, past the downed motorcyclist, without stopping. Appellant approached Boagni a minute or so after the Camaro had hit the divider. Boagni smelled alcohol on his breadth. Appellant walked past him and, when asked, said he did not need medical attention and was going home. Boagni showed appellant his badge and told him to stay. Appellant complied and was handcuffed. He did not offer his license number, registration or assistance. Boagni turned him over to California Highway Patrol (CHP) officers when they arrived.

CHP Officer Horacio McComb responded to the scene. He observed the Camaro with its front end "smashed," in the number one lane, parallel to the center median, facing north. A motorcycle was in the number two lane. The motorcyclist, Jack Bush, was being attended to by others, so Officer McComb attended to appellant, who identified himself as Carlos Banegas. While it was apparent that English was not appellant's native language, Officer McComb spoke to him in English, and appellant appeared to understand. Appellant was unsteady on his feet, his breadth smelled of alcohol, his eyes were red and watery, and his speech was slow and slurred. He told Officer McComb that

he had consumed six Bud Lights, between 5:00 p.m. and 10:00 p.m., and showed him a photocopy of his driver's license.

Officer McComb administered several field sobriety tests to appellant, who failed two of them and could not perform two others, claiming he had been shot in the ankle years earlier. Officer McComb also administered two preliminary alcohol screening tests (PAS) which revealed that appellant had a blood alcohol level of .106 and .105 percent. Approximately an hour and 20 minutes after the initial radio call, appellant underwent a blood alcohol test which reflected a blood alcohol level of 0.08 percent. The officer concluded appellant was driving under the influence and arrested him. Unaware that the motorcycle had hit the Camaro, the officer cited appellant for driving under the influence and driving with a blood-alcohol level above 0.08 percent, but not for driving under the influence causing injury. His report stated that the cause of the accident was "other than driver."

Officer McComb spoke with Bush the night of the accident. Bush was coherent, and the officer did not expect him to die. But the parties stipulated that "four days after the accident on July 16 . . . [he] died as a result of death from severe head injuries." This was the only evidence of Bush's physical condition.

Officer Levi Miller investigated the case. He found the Camaro's shifter in the reverse position and, while the hazard lights on the Camaro were operative, the emergency activation button was in the off position. He concluded that the front tire of the motorcycle struck the driver's side of the Camaro. There was no evidence the Camaro was hit by any other vehicle. Officer Miller did not try to start the Camaro, although he knew appellant claimed he tried to move it but could not. He found that Bush's helmet was cracked down the middle. Officer Miller testified that speeding, failing to turn on one's hazard lights after an accident, tailgating and making an unsafe lane change are Vehicle Code violations.

A criminalist from the Sheriff's Department testified that a person of appellant's size with a blood alcohol level of 0.08 percent is impaired to safely operate a car.

On August 17, 2004, appellant was arrested for another incident of driving under the influence. On that occasion, he identified himself as Oscar Espinosa. After this arrest, Officer Miller, who had been unable to locate appellant, did so and conducted an audio-recorded interview with him, where appellant again identified himself as Oscar Espinosa. Appellant said that he never had a driver's license. He acknowledged having a drinking problem and knowing that drunk driving is dangerous and kills people. He could not recall how many prior drunk driving arrests he had had.

Appellant described the collision, stating that he had consumed a 12-pack of beer between 7:00 p.m. and 11:00 p.m. He was driving in the number three lane when a trailer cut him off, and he lost control of his vehicle. As other cars were hitting each other, he turned left and hit the wall. He tried to move the car to the side, but it would not start. He did not turn on the emergency lights because a motorcycle crashed into the side of his car, and he was scared for the person lying there. Appellant said that he believed the accident would not have occurred if he had not been drinking. He said he tried to get help for the motorcyclist, but an African-American police officer on the scene told him that the motorcyclist was fine, did not want to help, and arrested him.

Appellant also said that his real name was Lorenzo or Loreto Lopez or Lorenzo German, but that he used Carlos Banegas and Banegas's driver's license in the accident "to avoid problems." He used the name Oscar Espinosa when arrested on August 17 because the name Carlos Banegas was "burned by the accident." Appellant was recently arrested in Ventura for failing to attend court-ordered alcohol abuse classes. He claimed he did not have enough money for the classes, but that he had completed such a class in 1996. He was also ordered to, but apparently did not, attend alcohol abuse classes after arrests in 2000, 2002, and 2004.

DISCUSSION

I

Sufficiency of Evidence

Appellant contends that there is insufficient evidence to support his convictions of murder, hit-and-run and gross vehicular manslaughter. He argues that there was

inadequate evidence of causation, implied malice and failure to perform statutory duties. This contention is meritless.

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses 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. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the evidence. (*People v. Autry, supra*, 37 Cal.App.4th at p. 358.) Reversal on this ground is unwarranted unless '"upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin, supra*, at p. 331.)

A. *Causation*

Appellant argues that there were no medical records or medical testimony presented regarding Bush's physical condition at the scene of the accident, at the hospital or regarding any autopsy, to establish that the accident caused his death. The stipulation that, "Bush died following severe head injuries suffered in the accident," did not establish that those head injuries were incurred in the crash. We find the evidence to be sufficient.

To establish criminal culpability for murder, the prosecution must prove that a defendant's actions proximately caused the death. (See *People v. Roberts* (1992) 2 Cal.4th 271, 315; *People v. Harrison* (1959) 176 Cal.App.2d 330, 345, disapproved on other grounds in *People v. Whitehorn* (1963) 60 Cal.2d 256, 264.) To constitute the proximate cause of a death, "the cause of the harm not only must be *direct*, but also not so remote as to fail to constitute the *natural* and *probable* consequence of the defendant's act." (*People v. Roberts*, *supra,* at p. 319, italics added.)

While medical evidence would have more clearly tied Bush's severe head injuries to the accident, we cannot say that the evidence presented was insufficient to allow the jury to draw that causal connection. Appellant's car was stopped in the fast lane of the freeway. Bush's motorcycle struck it while traveling 70 miles per hour. He was thrown through the air and hit the pavement. Paramedics treated him at the scene and brought

him to the hospital, where he died four days later of "severe head injuries." The helmet he wore at the time of the accident was cracked down the middle. It can be reasonably inferred from this evidence that Bush suffered the "severe head injuries" in the accident that the parties stipulated caused his death. There was no evidence or argument at trial that Bush had preexisting head injuries or that something happened after the accident to cause his death. The significance of this evidence was for the jury to evaluate.

B. *Malice*

Appellant argues that there was insufficient evidence of implied malice to support his conviction of second degree murder because there was no evidence that his acts were intentional and done with conscious disregard for human life. He tried to start the car in order to move it out of the fast lane, showing his concern. He asserts that the prosecution is bound by its presentation of his statement as to how the killing occurred in the "'absence of proof to the contrary.'"

Second degree murder is the unlawful killing of a human being with malice aforethought, but without the additional element that it be willful, deliberate and premeditated, which is required for first degree murder. (Pen. Code, §§ 187, subd. (a), 189; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102.) Malice may be express or implied. (Pen. Code, § 188; *People v. Nieto Benitez, supra*, at p. 102.) Express malice is manifested when there is a "deliberate intention unlawfully to take away the life of a fellow creature." (Pen. Code, § 188.) Implied malice exists when an intentional act naturally dangerous to human life is committed "'by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.'" (*People v. Lasko* (2000) 23 Cal.4th 101, 107; *People v. Martinez* (2003) 31 Cal.4th 673, 684; Pen. Code, § 188.) It is determined by examining the defendant's subjective mental state to see if the defendant actually appreciated the risk of his actions. (*People v. Dellinger* (1989) 49 Cal.3d 1212, 1217; *People v. Watson* (1981) 30 Cal.3d 290, 296-297.) Implied malice may be proven by circumstantial evidence. (*People v. James* (1998) 62 Cal.App.4th 244, 277.)

Vehicular homicide committed while intoxicated may be found to be second degree murder rather than vehicular manslaughter. The applicable law is set forth in *People v. Watson* (1981) 30 Cal.3d 290 (*Watson*). There, the defendant drove to a bar and consumed large quantities of beer. Thereafter, he drove through a red light, avoided a collision only by skidding to a halt, drove up to a speed of 84 miles per hour, and slowed only to 70 miles per hour at an intersection where he struck a car, killing two people. The defendant's blood alcohol level one-half hour after the collision was 0.23 percent. The trial court dismissed two counts of second degree murder. The California Supreme Court reversed the dismissal order, holding that there was sufficient evidence of second degree murder. (*Id*. at pp. 292-294.) It explained that a vehicular homicide committed while intoxicated involves implied malice, and is thus second degree murder, if "a person, knowing that his conduct endangers the life of another, nonetheless acts deliberately with conscious disregard for life." (*Id*. at p. 296.) "'One who willfully consumes alcoholic beverages to the point of intoxication, knowing that he thereafter must operate a motor vehicle, thereby combining sharply impaired physical and mental faculties with a vehicle capable of great force and speed, reasonably may be held to exhibit a conscious disregard of the safety of others.'" (*Id*. at pp. 300-301.)

Here, appellant consumed a 12-pack of beer before driving home. His PAS tests measured .106 and .105 percent, exceeding the legal limit, and a blood alcohol test taken approximately an hour and a quarter later still showed a 0.08 percent blood-alcohol reading. While unquestionably impaired, he entered his car and, not only drove 90 to 95 miles per hour on the freeway dangerously tailgating, but did so in the slow lane. These intentional acts were unquestionably dangerous to human life.

The evidence was also sufficient to support a finding that appellant acted in conscious disregard for life. He had several prior drunk driving convictions which alone should have made him aware of its dangers. (See *People v. Autry*, *supra*, 37 Cal.App.4th at p. 359.) He had attended alcohol abuse classes, which even more emphatically would have driven home the life-threatening dangers of drunk driving. In his interview by police, he said he knew he had an alcohol problem and that drunk driving can kill. He

had recently been arrested in Ventura County for failing to attend court ordered alcohol abuse classes which, as the trial court noted, had he attended might have averted the charged collision. After his vehicle was hit by Bush's motorcycle, he further reflected his conscious disregard for life, walking right by his victim with little concern for his condition. It was for the jury to decide under these circumstances whether he acted with implied malice. (*People v. Ricardi* (1990) 221 Cal.App.3d 249, 259-260.)

Appellant argues that after the accident he remained in his car and tried to move it out of the traffic lane, reflecting his lack of malice. Even if we accept that appellant tried to move his car out of traffic lanes, that does not mitigate the conscious disregard he showed by drinking and driving, thereby placing himself in that precarious position in the first place.

C. *Required duties*

The Vehicle Code imposes numerous duties on drivers of vehicles involved in accidents resulting in death or injury. As pertinent here, those include the duty to (1) immediately stop the vehicle at the accident scene, (2) give his and the vehicle owner's name, current residence address, and the registration number of the vehicle he or she is driving to the person struck, to the driver or occupants of any vehicle collided with and to any traffic or police officer at the scene, and (3) ascertain what assistance any injured person required and render reasonable assistance to that person. (§§ 20001, subd. (a); 20003; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1028.)

Appellant argues that there was insufficient evidence that he willfully failed to perform his statutory duties to support his hit and run conviction. He argues that he stopped at the scene and did not give the required information to the victim only because he sought help from Boagni and Tackett, but gave the information to the CHP officer when requested.

While appellant self-servingly selects the facts he presents in support of this claim, he ignores those facts which support the jury's verdict. Appellant stopped his car only because it had become disabled after crashing into the center divider. There was evidence that he had no intention of performing his statutory duties. He walked past the

downed motorcyclist, past Tackett, and past Boagni without providing or attempting to provide assistance or information, telling Boagni, he was going home. He only remained at the scene when Boagni ordered him to do so and showed him his badge. The only time appellant provided information was when he showed a copy of a driver's license to Officer McComb. But appellant stated in his interview that this was not his driver's license, and he was not Carlos Banegas. Thus, even if providing information after attempting to leave the scene could be viewed as compliance with the statutes, appellant did not provide true information.

II

Erroneous Jury Instructions

The trial court instructed the jury in accordance with CALJIC No. 3.40, as follows: "To constitute the crime of second degree murder and gross vehicular manslaughter while intoxicated there must be in addition to the death an unlawful act which was a cause of that death. The criminal law has its own particular way of defining cause. A cause of the death is an act that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act the death and without which the death would not [have] occur[red]."

It also instructed in accordance with CALJIC No. 3.41 as follows: "There may be more than one cause of the death. When the conduct of two or more persons contributes concurrently as a cause of the death, the conduct of each is a cause of the death if that conduct was also a substantial factor contributing to the result. A cause is concurrent if it was operative at the moment of the *collision* and acted with another cause to produce the death. If you find that the defendant's conduct was a cause of death, to another person, then it is no defense that the conduct of some other person contributed to the death." (Italics added.)

Appellant contends that the trial court erred in giving these instructions. He argues that the second paragraph of CALJIC No. 3.40 is erroneous because it "misleads the jury into adopting a strict liability analysis of causation. That is, the jury was instructed that, if it found a direct, chain of events between appellant's act and Mr.

Bush's death, it was required to find that appellant's act was the proximate cause of Mr. Bush's death," even though not all factors in causing death are proximate causes. Appellant also argues that the second sentence of the first paragraph of CALJIC No. 3.41 "is erroneous because it defined a cause as concurrent 'if it was operative at the moment of the *collision* and acted with another cause to produce the death.' This is an incorrect statement of law which lightened the prosecution's burden of proof. This incorrect statement of law allowed the jury to find appellant strictly culpable based on his collision with the center divider." Additionally, he asserts, there was no evidence of concurrent causes, and therefore CALJIC No. 3.41 should not have been given. We conclude that giving these instructions resulted in no prejudicial error.

A. *CALJIC No. 3.40*

Contrary to appellant's assertion, CALJIC No. 3.40 does not provide strict liability analysis of causation. Rather, it provides that an act is a proximate cause of death only when it sets in motion a chain of events that operates *directly* to cause the death which is a *natural* and *probable* consequence of the act. Only acts without which the death would not occur can be a proximate cause. This definition of proximate cause is derived from our Supreme Court's decision in *People v. Roberts* (1992) 2 Cal.4th 271, 319, which states: "The criminal law thus is clear that for liability to be found, the cause of the harm not only must be *direct*, but also not so remote as to fail to constitute the *natural* and *probable* consequence of the defendant's act." (Italics added.) Relying upon this language, our Supreme Court and some appellate courts have approved CALJIC No. 3.40. (*People v. Cervantes* (2001) 26 Cal.4th 860, 866 [citing with approval and quoting CALJIC No. 3.40]; see also *People v. Temple* (1993) 19 Cal.App.4th 1750, 1756 [explicitly holding that CALJIC 3.40 correctly states proximate cause definition, and cited with approval in *People v. Bland* (2002) 28 Cal.4th 313, 335].) "Ordinarily the question [of proximate cause] will be for the jury . . . ." (*People v. Roberts*, *supra*, at p. 320, fn. 11.) Given these compelling authorities, we see no reason to revisit this question.

B. *CALJIC No. 3.41*

We agree with appellant that there was no evidence to support this instruction. The evidence only indicated that appellant's drunk and erratic driving led directly to the collision with the center divider and the natural and probable consequence that the Camaro would be hit by fast moving traffic, including Bush's motorcycle. A trial court must "'refrain from instructing on principles of law which . . . are irrelevant to the issues raised by the evidence.'" (*People v. Saddler* (1979) 24 Cal.3d 671, 681.) It is error to give an instruction that correctly states a principle of law that is inapplicable to the facts of the case. (*People v. Eggers* (1947) 30 Cal.2d 676, 687; *People v. Anderson* (1965) 63 Cal.2d 351, 360.) We also agree that CALJIC No. 3.41, as given, should have defined concurrent causes as those operating at the time of death, not at the time of the collision. (*People v. Sanchez* (2001) 26 Cal.4th 834, 847 ["'"A cause is concurrent if it was operative at the time of death and acted with another cause to produce the death"'"].)

We nonetheless find that the error in giving CALJIC No. 3.41 was harmless, as it was not reasonably probable that if it were not given, or if it were corrected, a verdict more favorable to appellant would have resulted. (*People v. Palmer* (2005) 133 Cal.App.4th 1141, 1157 [misdirection of the jury, including incorrect, ambiguous, conflicting, or wrongly omitted instructions that do not amount to federal constitutional error, are reviewed under *People v. Watson* (1956) 46 Cal.2d 818, 836].) There is little chance that giving CALJIC No. 3.41 would have misled the jury, as there was no evidence of any cause operating at the time of Bush's death that was not operating at the time of the collision. Furthermore, CALJIC No. 3.41 correctly instructed the jury that appellant was not absolved of responsibility for Bush's death if the conduct of another was also a substantial or contributing factor to the death. We fail to see how an instruction suggesting that there might be a concurrent cause of death would prejudice appellant as, by its terms, it would not affect his liability for the death. Additionally, the evidence of appellant's guilt is strong. It was undisputed that he was intoxicated, that he drove recklessly as a result, that he hit the center divider and that the motorcycle hit him because he came to a stop in the fast lane.

III

Cunningham Error

On August 14, 2006, the trial court sentenced appellant to the upper term of four years on his conviction in count 2 of felony hit-and-run and to 15 years to life on count 1 for second degree murder. It stayed imposition of sentence on the remaining counts. The trial court found as aggravating factors that appellant (1) was on probation at the time of the offense, (2) had pending arrest warrants for failure to attend alcohol classes, (3) drove his vehicle knowing he was intoxicated, (4) committed a serious crime, and (5) his prior performance on probation or parole was unsatisfactory. It found no mitigating factors.

Appellant contends that, under the dictates of *Cunningham*, the upper term sentence on count 2 violated the Sixth Amendment right to a jury trial and the Fourteenth Amendment right to proof beyond a reasonable doubt of aggravating factors used to support that sentence. He requests that his sentence be reduced to the middle term. Respondent contends that appellant's *Cunningham* claim was forfeited by his failure to raise it in the trial court. We conclude that appellant has not forfeited the claim, but that it is without merit.

A. *Forfeiture*

In the recent case of *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*), our Supreme Court resolved the forfeiture question now before us. In that case, as here, the trial and sentencing proceedings took place after the United States Supreme Court's decision in *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) and the California Supreme Court's decision in *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*), but before *Cunningham*. *Sandoval* concluded that the claim was not forfeited because the decision in *Black I*, in which our Supreme Court held that the California determinate sentencing law (DSL) did not implicate the Sixth Amendment right to a jury, was binding on the lower courts until it was overruled by the United States Supreme Court in *Cunningham*. "Had defendant requested a jury trial on aggravating circumstances, that request clearly would have been futile, because the trial court would have been required [pursuant to *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 228, 237-238] to follow our

decision in *Black I* and deny the request." (*Sandoval, supra*, 41 Cal.4th at p. 837, fn. 4.) An objection in the trial court is not required if it would have been futile. (*Ibid*.)

B. *Right to Jury*

For the reasons set forth in *People v. Black* (2007) 41 Cal.4th 799 (*Black II*), we find no constitutional violation in the trial court's imposition of the upper term.

In *Blakely*, the United States Supreme Court held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum, that 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*," must be determined by a jury and proved beyond a reasonable doubt. (*Blakely, supra,* 542 U.S. at p. 303.) The high court recently made clear that "[i]n accord with Blakely . . . the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum." (*Cunningham, supra,* 549 U.S.__ [127 S.Ct. at p. 868].) In *Cunningham*, contrary to the California Supreme Court's conclusion in *Black I*, the United States Supreme Court held that California's DSL was unconstitutional to the extent it authorized the trial court to impose an upper term sentence based on facts that were found by the court rather than by a jury beyond a reasonable doubt. (*Cunningham, supra,* 549 U.S. at p.__ [127 S.Ct. at p. 871].)

In *Black II*, the California Supreme Court reasoned that "as long as a single aggravating circumstance that renders a defendant *eligible* for the upper term sentence has been established in accordance with the requirements of *Apprendi*[3] and its progeny, any additional factfinding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." (*Black II, supra*, 41 Cal.4th at p. 812.) "[I]f one aggravating circumstance has been established in accordance with the constitutional requirements set forth in *Blakely*, the defendant is not 'legally entitled' to the middle term sentence, and the upper term sentence is the 'statutory maximum.'" (*Black II, supra,* at p. 813.)

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[3] *Apprendi v. New Jersey* (2000) 530 U.S. 466.

The United States Supreme Court has consistently stated that the right to a jury trial does not apply to the fact of a prior conviction. (*Blakely, supra*, 542 U.S. at p. 301; see also *Black II, supra,* 41 Cal.4th at p. 818.) This exception is not to be read too narrowly. (*Black II, supra,* at p. 819.) The fact of a prior conviction includes "other related issues that may be determined by examining the records of the prior convictions." (*Ibid*.) It has also been concluded that this exception relates more broadly to the issue of "recidivism." (*People v. Thomas* (2001) 91 Cal.App.4th 212, 221-222, cited with approval in *People v. McGee* (2006) 38 Cal.4th 682, 700-703.) Factors such as being on probation at the time of the offense and previously being unsuccessful on probation come within the recidivism exception. Both may be ascertained simply by examining the records of prior convictions. (*Black II, supra*, at p. 819.)[4] Citing federal circuit decisions stating that the prior conviction exception may be found using the preponderance of the evidence standard, *Black II* also concluded that "[t]he high court never has suggested that the requirement of proof beyond a reasonable doubt could be severed from the right to jury trial for purposes of applying the [prior convictions exception]." (*Black II, supra*, at p. 820, fn. 9.)

Applying *Black II* here, we conclude that defendant was not deprived of due process or his constitutional right to a jury trial by imposition of the upper term. That sentence was based on at least one aggravating factor that satisfied the Sixth Amendment and made him eligible for the upper term sentence. (*Black II, supra*, 41Cal.4th at p. 813.) The trial court finding that appellant was on probation at the time of the charged offense was the type of finding relating to a defendant's recidivism "that may be determined by examining the records of the prior convictions" and is "'typically and appropriately undertaken by a court.'" (*Black II, supra*, at pp. 818-820; accord, *People v. Yim* (2007)

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4 The issue of whether a trial court can constitutionally impose an upper term based on the fact that the defendant was on parole when the crime was committed, without a jury determination, is currently before the California Supreme Court in *People v. Towne*, review granted July 14, 2004, S125677.

152 Cal.App.4th 366, 370-371.) This single factor made defendant eligible for an upper term sentence, and the trial court was free to consider other factors in imposing an upper term sentence.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

________________, P. J.
BOREN

We concur:

______________________, J.
ASHMANN-GERST

______________________, J.
CHAVEZ