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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DOUGLAS CONERLY et al., Defendants and Appellants.	A113827 (San Francisco County Super. Ct. No. 193977)

Codefendants Douglas Conerly, Clarence Webster, and Kevin Jones appeal from judgments entered following a joint jury trial convicting them of three counts of second degree robbery among other things and sentencing Jones and Conerly to 20 years and Webster to 17 years in state prison. Defendants attack their judgments on numerous grounds, only one of which is meritorious. As the Attorney General acknowledges, defendants were improperly convicted of receiving the property they stole during the robberies for which they were convicted. Accordingly, we vacate defendants' convictions for receiving stolen property and affirm the judgments in all other respects.

Factual and Procedural History

On December 7, 2004, an information was filed against Conerly, Webster, Jones and a fourth defendant, Edwina Traylor, charging defendants with three counts of second degree robbery (Pen. Code,[1] § 212.5, subd. (c)), one count of receiving stolen property (§ 496, subd. (a)) and one count of misdemeanor possession of a loaded firearm in a

[1] All statutory references are to the Penal Code unless otherwise indicated.

public place (§ 12031, subd. (a)(1)). Traylor was also charged with an additional count of carrying a concealed weapon (§ 12025, subd. (a)(1)). The information alleged further that Webster personally used a firearm in the commission of one of the robberies (§ 12022.53, subd. (b)) and, as to the remaining defendants, that a firearm was used in the commission of the offense (§ 12022, subd. (a)(1)). The information also alleged that Jones had suffered two prior convictions within the meaning of sections 667, subdivisions (d) and (e) and 1170.12, subdivisions (b) and (c) and that he had suffered two prior serious felony convictions within the meaning of section 667, subd. (a). The information alleged that Conerly had suffered one prior conviction within the meaning of sections 667, subdivisions (d) and (e) and 1170.12, subdivisions (b) and (c), one prior serious felony conviction within the meaning of section 667, subdivision (a), and one prior conviction within the meaning of section 667.5, subdivision (b).

Evidence of the following facts was presented at trial:

At 10:30 p.m. on March 23, 2004, Leonardo Caamal-Poot was attacked and robbed by three African-American men as he was leaving work in San Francisco's North Beach neighborhood. One man was wearing a black jacket, one a blue jacket and the third was wearing a knit cap. As he approached the men, the one in the blue jacket punched him in the face. The other two grabbed him and threw him on the ground. The men continued to beat him on the ground. The man in the black coat took his wallet from his pants and the man in the blue jacket took his backpack. Once Caamal-Poot escaped, he called the police. He reported that the three men got into a white four-door car that was waiting for them less than a block away. At trial, Caamal-Poot identified Conerly as the man who was wearing the blue jacket and Webster as the man who was wearing the black jacket. A bystander testified that he witnessed the robbery. As he was on the phone reporting the crime, defendants walked past him and got into a white four-door car.

Willie Rones testified that he left work at around 11:00 p.m. on March 23. Shortly thereafter, he was approached and surrounded by three African-American men while waiting for a bus near San Francisco's Fisherman's Wharf. One was wearing a black jacket and the other a jacket with a hood. Rones's next memory of that evening is

awakening inside a police car, bleeding. He was missing his keys and wallet. The officer testified that at approximately 12:30 a.m. on March 24, she found Rones "staggering and bleeding" on a street corner.

At 12:15 a.m. on March 24, David Bain, who had just arrived from the airport and was carrying a computer and a suitcase, was walking in downtown San Francisco when he was approached by an African-American man with a gun. The man said, "Everything you've got or you die." As Bain put down his computer bag and suitcase, two other African-American men approached and began collecting his property. The man with the gun ordered him to give them his jacket, wallet and Rolex watch. After the men left, he called the police. Later that morning, Bain was given an opportunity to identify the defendants and recognized Webster as the man with the gun. He thought the other two were the other men involved, but was not entirely certain. At trial, Bain again identified Webster as the man with the gun.

Officer John Barcojo testified that at about 11:45 p.m. on March 23, he was dispatched to the scene of a robbery. Caamal-Poot flagged him down and reported that he had been robbed by three African-American men who drove away in a white car. Shortly thereafter, Barcojo received a second report of a robbery that had occurred six blocks away. As Barcojo was driving through the area, he saw a vehicle that matched Caamal-Poot's description. As he followed the car, he saw that it was being driven by an African-American woman and that there were three African-American male passengers. When the vehicle pulled into a gas station, Barcojo approached the driver and told her that there had been a crime in the area and that her vehicle matched the description of the car used in the crime. At the same time, Barcojo heard on his radio that a black suitcase with rollers had been taken in the second robbery and Barcojo noticed that one of the men in the back seat had a roller suitcase on his lap. Barcojo told the driver that he had made a mistake and apologized for taking up their time. As the car drove from the gas station, Barcojo followed and called for back-up. The car was stopped again a few blocks away. Inside the car, officers located Bain's computer bag and rolling suitcase, Caamal-Poot's backpack

and wallet, and Rones's wallet and keys. Officers found a handgun inside Traylor's purse and later found Webster's fingerprint on the gun.

After the prosecution rested, Traylor testified in her own defense. She stated that she was a choir director at the Bayview Missionary Baptist church. She explained that on the night of the robberies, Webster called and asked her to pick him up in downtown San Francisco. Jones and Conerly were with him when she arrived. Webster told her where to drive and park as the men got in and out of the car on a number of occasions. She denied knowing anything about the robberies and explained that she did not question what Webster was doing because "you don't question him." She also denied any knowledge of the gun that was found in her purse.

At the close of trial, the prosecution dismissed the robbery charges against Traylor and amended the information to charge her with being an accessory to a felony. The misdemeanor gun charge was dismissed against all the defendants. Thereafter, the jury found the three appealing defendants and Traylor guilty as charged. The court found that both Jones and Conerly had suffered one prior serious felony conviction. Jones and Conerly were sentenced to 20 years in state prison and Webster was sentenced to 17 years in state prison.

Defendants filed timely notices of appeal.

Discussion

1. *There was no prejudicial Brady error*.

At trial, Traylor denied having had any prior discussion with the prosecutor regarding leniency in exchange for her testimony and denied being told that "if [she] testified and if that testimony was truthful that [she] could receive leniency in this case." After the trial, however, Traylor's attorney informed her codefendants' attorneys that he had sought leniency for Traylor in exchange for her testimony. His declaration states, "When it became clear during trial that the case would not settle, I spoke with the prosecutor . . . about my client testifying. My client wanted to testify and did not want a cooperation agreement, and did not want to be considered an informant. I did not seek a cooperation agreement whereby my client would be considered a cooperating witness or

an informant. Instead, with Ms. Traylor's approval, I asked [the prosecutor] whether if my client testified in her own defense, and he believed my client's testimony, would he amend the information against my client to reflect the charges which he believed were appropriate. [The prosecutor] stated that it would be his ethical obligation to do so, and of course he would do it if he believed Ms. Traylor's testimony." Traylor was informed of her attorney's conversation with the prosecutor prior to testifying at the trial. Defendants contend the prosecution's failure to disclose the promise of leniency to Traylor and to correct her false denial of the promise deprived them of due process.

In *Brady v. Maryland* (1963) 373 U.S. 83, 87, the court held that the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. This rule extends to the disclosure of evidence relating to the credibility of witnesses, including any inducements made to secure the witnesses' testimony. (*Giglio v. United States* (1972) 405 U.S. 150, 154.) "Evidence is 'material' 'only if there is a reasonable probability that, had [it] been disclosed to the defense, the result . . . would have been different.' [Citations.] The requisite 'reasonable probability' is a probability sufficient to 'undermine[ ] confidence in the outcome' on the part of the reviewing court." (*In re Sassounian* (1995) 9 Cal.4th 535, 544.) " 'In general, impeachment evidence has been found to be material where the witness at issue "supplied the only evidence linking the defendant(s) to the crime," [citations], or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case [citations]. In contrast, a new trial is generally not required when the testimony of the witness is "corroborated by other testimony." ' " (*People v. Salazar* (2005) 35 Cal.4th 1031, 1050.)

Here, any assurance of leniency was undoubtedly immaterial. As the trial court concluded in denying defendants' motion for a new trial based in part on this ground, substantial evidence connects each defendant to the robberies without Traylor's testimony. The court explained, "I looked through the trial and I stopped before her testimony. And, before Ms. Traylor took the stand, I think there was sufficient testimony

presented directing each of the codefendants to the robberies. [¶] [Y]ou had Officer Barcojo seeing the car shortly after he heard it described . . . the black suitcase with the rollers inside, the wallet, the I.D. and the gun was in the car, the fingerprint of Mr. Webster was in the car according to Officer Wong, and then Officer Hnatow said it was the left index finger of Mr. Caamal-Poot. [¶] [A]ll of the identifications were somewhat shaky, which is understandable given the circumstances. [Caamal-Poot] testified that Mr. Webster held him down while Mr. Conerly beat on him. [¶] He identifies his wallet. [¶] Mr. Rones identifies his, which is found in Mr. Bain's suitcase. [¶] [M]r. Bain testifies, somewhat uncertain on the identification, [that] Mr. Webster is the man with the gun because he recognizes his eyes. [¶] . . . [¶] The same with Mr. Conerly, who's described by Officer Barcojo, new jacket, he was in the car, Mr. Caamal-Poot says he's the one who says, 'Yes, we are going to take everything,' and punched him, had his wallet, papers, wearing his backpack. [¶] . . . Inspector Wong said that Mr. Conerly had Mr. Rones's I.D. and keys in his jacket. [¶] All of these took place before Ms. Traylor took the stand. So, I don't think that I could find that . . . another result . . . would have been reasonably probable."[2]

2. *The jury was properly instructed*.

The jury was instructed pursuant to CALJIC No. 2.21.2 that "A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars." Although defendants did not object to this

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[2] For the same reason, we reject defendants' argument that their attorneys failed to render effective assistance because they did not investigate and discover impeachment evidence of Traylor's bad character. While it is possible, as defendants suggest, that "minimal investigation by trial counsel would have led to the discovery that Traylor's 'good character' claim was a sham," there is no reasonable probability that with such evidence the jury "would have had a reasonable doubt respecting guilt." (*People v. Ledesma* (1987) 43 Cal.3d 171, 217-218; *Strickland v. Washington* (1984) 466 U.S. 668, 693-694.)

instruction in the trial court, they contend on appeal that the court denied them due process of law by so instructing the jury because "the instruction permitted evaluation of testimony of a crucial prosecution witness [Traylor] by a probability standard." Defendants rely on *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046, in which the court indicated that "[a]n instruction which told the jury that this testimony could be accepted based on a 'probability' standard is somewhat suspect" and expressed "some concerns about the use of the instruction where it affects the crucial testimony of a sole percipient witness." Since *Rivers* was decided, however, the Supreme Court, as well as numerous appellate courts, have rejected the argument that CALJIC No. 2.21.2 reduces the prosecution's burden of proof when the jury otherwise is fully instructed on the burden of proof and told to consider the instructions as a whole. (*People v. Riel* (2000) 22 Cal.4th 1153, 1200; *People v. Brown* (1996) 42 Cal.App.4th 1493, 1502-1503; *People v. Wade* (1995) 39 Cal.App.4th 1487, 1494-1495; *People v. Foster* (1995) 34 Cal.App.4th 766, 775.) In *Riel, supra*, at page 1200, the court explained, "Contrary to defendant's argument, nothing in *People v. Rivers*[, *supra*,] 20 Cal.App.4th 1040, casts doubt on our upholding the standard instruction on false testimony. Even if the language 'probability of truth' standing alone would be 'somewhat suspect' [citation] when applied to a prosecution witness, it does not stand alone. The trial court correctly instructed the jury on the reasonable doubt standard and told it to 'consider all the instructions as a whole and . . . to regard each in the light of all the others.' The instructions as a whole correctly instructed the jury on the prosecution's burden of proof." (Fn. omitted.) Likewise, in the present case the jury was fully instructed on the burden of proof and there is no "reasonable likelihood" that the jury misunderstood the burden of proof and believed it could convict defendant if it simply believed Traylor's testimony was probably true. (See, e.g., *Boyde v. California* (1990) 494 U.S. 370, 380 [where an instruction is claimed to be ambiguous and therefore subject to erroneous interpretation, the proper inquiry is whether

there is a "reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence"].)[3]

3. *Defendants' convictions for receiving stolen property must be vacated.*

Defendants argue, and the Attorney General agrees, that they were improperly convicted of receiving the property stolen during the robberies for which they were convicted. Under section 496, subdivision (a), a principal of a theft of property may be convicted of receiving stolen property, but "no person may be convicted both pursuant to this section and of the theft of the same property." In *People v. Allen* (1999) 21 Cal.4th 846, 857, the court confirmed that section 496, subdivision (a) prohibits dual convictions of both stealing property and receiving the same stolen property. Because robbery is an aggravated form of theft (*People v. Donnell* (1976) 65 Cal.App.3d 227, 231, fn. 7), section 496, subdivision (a) prohibits defendants' dual convictions for the robberies in counts one, two and three and receiving stolen property in count 4. Accordingly, defendants' convictions under count 4 must be vacated.[4]

4. *Conerly was not denied effective assistance of counsel with regard to sentencing.*

Conerly contends that his trial counsel rendered ineffective assistance when he failed to make a motion pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) to strike his prior serious felony conviction for voluntary manslaughter. To prevail on this claim, defendant must show that his counsel's representation fell below an objective standard of reasonableness under prevailing professional standards and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.) We need not consider the adequacy of counsel's representation in this case, as it

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[3] Contrary to defendants' assertion, we perceive no cumulative error that requires reversal of their convictions.

[4] Modification of the judgments to vacate these convictions does not require recalculation of defendants' sentences. For each defendant, the court imposed and stayed pursuant to section 654 an eight-month sentence on this count.

is clear that Conerly was not prejudiced by his attorney's failure to make a motion to strike his prior conviction.

The trial court's discretion to strike a prior strike is limited. The three strikes law "was intended to restrict courts' discretion in sentencing repeat offenders." (*People v. Romero*, *supra*, 13 Cal.4th at p. 528; *People v. Carmony* (2004) 33 Cal.4th 367, 377. [Three strikes law establishes "a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike" unless the sentencing court finds a reason for making an exception to this rule].) In order to strike a prior strike "the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Here, Conerly's probation report reflects that he suffered a prior serious felony conviction for voluntary manslaughter in 1986. Prior to that, he was convicted in 1981 of giving false information to a police officer. After his strike conviction, Conerly suffered two parole violations in 1987 and 1990, and in 1992 he was convicted of resisting arrest. Conerly was discharged from parole in 1994, and in 1996 he was convicted of possession of a controlled substance. Six months later, he was convicted again of possessing a controlled substance and receiving stolen property. Conerly was convicted a third time for possessing a controlled substance in 1999 and after being returned to custody for a parole violation in 2000, he was ultimately discharged from parole in 2002. As noted above, the present robberies occurred in March 2004. Based on Conerly's significant and uninterrupted criminal history, had a *Romero* motion been made it was not likely to have been granted. Indeed, although Conerly's attorney did not make such a motion, the prosecution's sentencing memorandum raised the issue and argued persuasively why the court should not exercise its discretion to strike the prior conviction.

5. *The trial court did not err in sentencing defendants to an upper term*.

Defendants contend that, under the dictates of *Cunningham v. California* (2007) 549 U.S. __ [127 S.Ct. 856] (*Cunningham*), the imposition of the upper term on the principal robbery count violated their Sixth Amendment right to a jury trial and their Fourteenth Amendment right to proof beyond a reasonable doubt of aggravating factors used to support that sentence. "In *Cunningham* the Supreme Court reaffirmed *Apprendi v. New Jersey* (2000) 530 U.S. 466 . . . , *Blakely v. Washington* (2004) 542 U.S. 296 . . . and *United States v. Booker* (2005) 543 U.S. 220 . . . , overruled *People v. Black* (2005) 35 Cal.4th 1238, and held California's determinate sentencing law (DSL) violates a defendant's constitutional right to a jury trial to the extent it authorizes the trial judge to find facts (other than a prior conviction) that expose a defendant to an upper term sentence by a preponderance of the evidence. 'This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence.' " (*People v. Velasquez* (2007) 152 Cal.App.4th 1503, 1513, quoting *Cunningham*, *supra*, 549 U.S. at p. __ [127 S.Ct. at pp. 863-864].) Since *Cunningham* was decided, the California Supreme Court has decided two cases relevant to defendants' contention. In *People v. Black* (2007) 41 Cal.4th 799, 816 (*Black II*), the court held "that imposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions." In *People v. Sandoval* (2007) 41 Cal.4th 825, 838-839, the court held that the applicable test for harmless error (*Washington v. Recuenco* (2006) 548 U.S. __ [126 S.Ct. 2546]) is whether the reviewing court can conclude, "beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable-doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury."

Here, the Attorney General argues that defendants' sentences were authorized based on defendants' recidivism. We consider each defendant's sentence in turn.

A. Webster was properly sentenced to the upper term.

The trial court sentenced Webster to the upper term of five years on count 2 (the Bain's robbery) plus a consecutive 10-year term for the firearm enhancement and one-third the midterm or a one year term on each of the other two robberies. The court explained that it did not find any facts in mitigation but found the following facts in aggravation: "the fact that this did involve great violence and bodily harm to others, the fact that Mr. Rones, one of the victims, was particularly vulnerable because he had suffered a stroke prior to this incident, and that both he and Mr. Poot were, you know, subjected to a three-on-one attack are factors that the court has to consider. [¶] The fact that also the manner in which the crime or crimes were carried out, the fact that they were done seriatim indicates planning. [¶] Also note pursuant to [California Rules of Court, rule 4.421], subsection (b), that Mr. Webster had been on probation previously, that there was not successful completion of these prior probations. [¶] The court also considered that other circumstances . . . that two of the three victims of the robbery were unnecessarily beaten and the third, you know, was held at gunpoint." The court's finding that "Webster had been on probation previously [and] that there was not successful completion of these prior probations" within the meaning of rule 4.421(b)(5) is supported by the record. Accordingly, under *Black II*, *supra*, 41 Cal.4th 799, we must uphold Webster's sentence.

B. Conerly was properly sentenced to the upper term.

Conerly was also sentenced to the upper term on count 2 plus one-third the mid term on the remaining two robberies. The court imposed a consecutive one year term for the firearm enhancement and consecutive terms totaling 12 years based on his prior felony convictions. In selecting the upper term, the court explained, "There are aggravating factors that I find, you know, great violence to others, some people were harmed, Mr. Rones had suffered a stroke before the time of his episode, and both he and Mr. Poot were attacked by three people, the manner in which it was carried out indicated

[planning.] [¶] The other thing I have to look at under the Rules of Court is that your past performance on parole wasn't satisfactory. [¶] And the other circumstances, you know, two of the three victims were unnecessarily beaten, the other was held by gunpoint, not by you personally, but you were there." As with Webster, the record supports the trial court's finding that Conerly's prior performance on parole was not satisfactory under California Rules of Court, rule 4.421(b)(1). Accordingly, under *Black II* Conerly's sentence was correctly imposed.

C. Jones was properly sentenced to the upper term.

Jones's sentence was calculated in the same manner as Conerly's sentence. Although Jones's substantial criminal history was documented in the probation department's sentencing report,[5] the court inexplicably did not refer to his recidivism in explaining the basis for selecting the upper term. The court referred only to the factors relating to the crimes and the victims noted above. Had the court mentioned any of the applicable recidivism factors in explaining its decision to select the upper term, *Black II* unquestionably would have required that we uphold Jones's sentence.

The Attorney General argues that the trial court's failure to refer explicitly to Jones's criminal history was an oversight, and that the selection of the upper term was nonetheless authorized based on Jones's undisputed recidivism. We agree. The trial court found true the enhancement allegation that Jones had suffered a prior strike conviction and the court sentenced him under the provisions of the three strikes law. In so doing, the court denied Jones's motion to strike his prior conviction under *Romero*, *supra*, 13 Cal.4th at page 528, necessarily concluding that Jones should be sentenced as a recidivist offender. Although the court could not use Jones's prior strike conviction as a basis on

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[5] The probation officer's report indicates that although Jones was only 22 at the time of the sentencing hearing, he had a significant juvenile and adult criminal record. Jones had been convicted as an adult for attempted murder (§§ 664, 187), assault with a deadly weapon other than a firearm (§ 245, subd. (a)(1)), battery with serious bodily injury (§ 243, subd. (b)), and second degree robbery (§ 211). The report indicates that he was previously sentenced to two years in prison and was on probation at the time of the present offenses.

which to impose the aggravated term (§ 1170, subd. (b)), the court's ruling on the *Romero* motion indicates that the court would have imposed the upper term based on the undisputed evidence of Jones's other numerous prior convictions and the fact that he was on probation at the time of the present offenses. Because Jones's criminal record necessarily exposed him to the upper term sentence, his aggravated sentence was authorized. (*Black II, supra,* 41 Cal.4th at p. 815 ["under the DSL the presence of one aggravating circumstance renders it lawful for the trial court to impose an upper term sentence"].) In *Black II*, the court explained, "*Cunningham* requires us to recognize that aggravating circumstances serve two analytically distinct functions in California's current determinate sentencing scheme. One function is to raise the maximum permissible sentence from the middle term to the upper term. The other function is to serve as a consideration in the trial court's exercise of its discretion in selecting the appropriate term from among those authorized for the defendant's offense. Although the DSL does not distinguish between these two functions, in light of *Cunningham* it is now clear that we must view the federal Constitution as treating them differently. Federal constitutional principles provide a criminal defendant the right to a jury trial and require the prosecution to prove its case beyond a reasonable doubt as to factual determinations (other than prior convictions) that serve the first function, but leave the trial court free to make factual determinations that serve the second function. It follows that imposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions." (*Black II, supra,* at pp. 815-816.) Thus, even though the trial judge relied on the nature of Jones's offenses as aggravating factors in articulating his reasons for exercising his discretion to impose the upper term, Jones's Sixth and Fourteenth Amendment rights under *Cunningham* were not violated because the upper term was authorized as the maximum permissible sentence based on the constitutionally established recidivism factors. (See *People v. Velasquez, supra,* 152 Cal.App.4th at p. 1516 [trial court gave no reasons for imposing the upper term, but reasons relied on for

imposing consecutive sentences could be considered to justify the imposition of the upper term].)

Disposition

Defendants' convictions for receiving stolen property under count four are vacated. The judgments are affirmed in all other respects.

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Pollak, Acting P. J.

We concur:

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Siggins, J.

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Horner, J.*

* Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.