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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JAMES EVANS, Defendant and Appellant.	H029616 (Santa Clara County Super. Ct. Nos. CC590605, CC463318)

A jury convicted defendant James Evans of one count of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))[1] and found true the allegation that defendant had personally inflicted great bodily injury upon the victim (§ 12022.7, subd. (a)). The trial court also found that defendant had violated probation in a separate case in which defendant had pleaded guilty to one count of possession of a controlled substance. (Health & Saf. Code, § 11350, subd. (a).) The trial court sentenced defendant to the upper term of four years for the assault, three years for the great bodily injury enhancement, and a consecutive eight months in prison for the violation of probation matter.

Defendant appeals. He contends that evidence of the assault victim's in-the-field identification of him should have been excluded, that the trial court impermissibly limited his cross-examination of a jailhouse informant, and that the upper term and consecutive

[1] Further unspecified code references are to the Penal Code.

sentences violate the rule of *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*). We find merit in part of defendant's *Blakely* argument and shall remand for resentencing.

I. FACTS

A. The Prosecution Case

At about 3:00 a.m. on May 1, 2005, Angela Riste (the victim) was in bed in her home in downtown San Jose. The victim's home was located at 340 South Third Street, immediately next door to the Iguana restaurant. The victim heard her husband and other family members at the front door. When she got up to let them in she heard a commotion in the street outside. There was group of about 20 Latino people and about the same number of African-Americans shouting angrily at each other. Soon a fight broke out.

The victim testified that she opened the front door, called her family members inside the house, and then stepped onto the porch to close the screen door, which had swung all the way back on its hinges. Just then she saw a man run from the direction of the Iguana restaurant toward her house. He ran up the steps to her porch. He was dark complected, African-American, about 20 to 35 years old. "He was not skinny, he was not fat. He was [in] pretty good shape, tall, he was not short." He was wearing dark pants and a black and white jersey shirt with sleeves. The shirt had numbers in the area of the upper shoulders and the same numbers on the back. There was a "6" and another number right next to it.

The man was carrying a black pole or pipe. He swung it or threw it at the victim and she raised her hand to protect her face so that the pole struck her in the forearm. The victim fell to the ground, blanking out just briefly. She got right back up and saw her assailant run away, back toward the Iguana restaurant. The fight, by then, had broken up and people were running away.

The police arrived very soon after the victim was struck. Sometime later, the police told her they had a possible suspect and wanted her to identify him. The police brought the suspect (defendant) to the corner of the Iguana restaurant where the police

flashed a light upon him so that the victim could see him. The victim identified him. She testified, "I remember what he was wearing and I glimpsed at him and he matched the description what I remembered." She was "very sure" of her identification at the time. The victim was later transported to the hospital where she was diagnosed with a broken arm. The victim was unable to identify defendant in court.

San Jose Police Officers Mark Pimentel and Patrick Ward responded to a report of a fight in the area of South Third Street around 3:00 a.m. on May 1, 2005. Upon their arrival, several suspects had already been detained by other officers. Defendant was one of only two or three African-Americans who had been detained. He was handcuffed and lying face down on the sidewalk in front of 320 South Third Street, two buildings away from the victim's home, on the other side of the Iguana restaurant. Ward interviewed the victim and obtained a description of her assailant. Defendant was the only person in the vicinity who matched her description. In addition, Pimentel found a three-foot metal porch light pole in the bushes at 320 South Third, about 10 feet from where he first encountered defendant. (No fingerprints were ever obtained from the pole.) Defendant was talking very fast. He admitted having been to the Iguana restaurant and, when asked if he had been down to the victim's house, he did not deny having been there.

Pimentel walked defendant to the sidewalk by the victim's house. Defendant was walking with a limp. He was wearing a shoe on one foot and his other foot was wrapped in an elastic bandage as a result of a recent fracture of his fibula. The victim identified defendant as her assailant.

Alton King testified that he had met defendant when they were both in custody at the Santa Clara County jail. He said that defendant had approached him to see if he could help him figure out a defense to this case. Defendant, at first, denied that he had committed the assault and wanted King to look over the police reports to see if he could pick up any useful discrepancies. After reviewing the reports and meeting with defendant several times, King told defendant that it looked like there were people who saw him and

could identify him as the assailant. Defendant insisted they had to find something to "prove these mother f'ers wrong." Defendant eventually confessed, telling King, "Yes, I want to kill the mother f'ers." Defendant allegedly told King that he had been sitting in a restaurant with his "homies" when he saw a group of people, "Blacks and Mexican," in a fight and he went out to "protect his homies." He grabbed a piece of pole and ran toward one particular man who ran into a house. Defendant told King that he ran after the man but "the wife of the gentleman opened up the door and he swung to hit the mother f'er and it hit the lady."

B. The Defense Case

Defendant did not testify. His case focused upon casting doubt upon the victim's identification and impeaching King's credibility. Defendant also offered the testimony of Dr. Anthony Chiang, who treated defendant for a broken fibula on April 24, 2005, about a week before the assault incident. Dr. Chiang stated that a broken fibula does not generally prevent a person from walking since the fibula is a non-weight-bearing bone. Defendant, however, was suffering quite a bit of swelling and limped so badly he was given crutches when he was discharged. Dr. Chiang agreed, however, that it is possible for a person to run a week after suffering a broken fibula. The ingestion of certain drugs, or adrenaline, could affect the person's ability to walk or run. At the time he treated defendant, defendant's urine drug screen was positive for a "certain drug."

II. DISCUSSION

A. Victim's Identification of Defendant

Prior to trial, defendant moved to exclude evidence of the victim's in-the-field identification. The motion was based upon the evidence introduced at the preliminary hearing. At that hearing, the victim testified about the incident. When asked if she saw the person who hit her, the victim replied, "I seen very little bit. I know it was a dark man who had struck me. [¶] . . . [¶] He was wearing a shirt, I believe jersey, it was black and white. I glimpsed at the face." The first time she saw him she was standing in her

doorway and he was about three feet away from her. He quickly crossed the three feet and hit her with the pole and she fell to the ground. She "blanked out" but then got back up. The police responded "right away." She stated that she described her assailant to one of the police officers as "wearing I believe a jersey shirt. It was like a some kind of football player's name. I don't know. It was black and white. I believe he was wearing dark pants." She described his jersey as having the number "6" and another number on it. Of his race, she said the assailant was "Black." He was a "big man." When asked if the police showed her a suspect to find out if the suspect was or was not the person who hit her, she stated, "I did identify somebody. I identified by the clothes because of the dark man, okay." The court asked the victim if the person that the police showed her was wearing clothes similar to the clothes her attacker wore. The victim answered, "Yes, it was the clothes I seen when I looked down and up. It was the same clothes that I identified." The court tried to clarify by asking, "But the face you still couldn't see." The victim replied, "It was a dark man, heavy set." The victim could not identify defendant in court, stating, "I am not for sure."

Officer Pimentel had obtained a description from the victim describing her assailant as a "[t]all Black male, dark comple[c]ted wearing a black and white jersey" with the number six and another number on it. (This is not the description set forth in his initial report, which, he admitted, states that the victim described her assailant as wearing all black.) Pimentel located defendant, who is African-American, six feet one inch tall, about 185 pounds, wearing dark colored baggie pants, and a white shirt with the number 69 on it. Pimentel brought defendant, in handcuffs, to the sidewalk by the restaurant where he was clearly illuminated by streetlight and light from the restaurant. The victim made the identification from about 75 to 100 feet away.

The trial court denied the motion to suppress, stating: "This is not a classic identification case because the alleged victim never pointed at the defendant and said, 'That's the person, I recognize him.' It's based primarily on the clothing and the fact that

he was Black. And I don't find that the police officers were overly suggestive in their attempt to have her identify the person who hit her and all of your arguments are well taken, [counsel], but they go towards the weight of the evidence not the admissibility of the evidence and the jury will be presented with all of your points, I am certain, so, therefore, I will allow the pseudo identification of the defendant, his clothing and the color of his skin to the jury."

On appeal, defendant argues that the victim's out-of-court identification was the result of impermissibly suggestive procedures and, therefore, she should not have been permitted to testify that she had previously identified defendant. He claims the error requires reversal. We find no error.

An identification may be so unreliable that it violates a defendant's right to due process under the Fourteenth Amendment. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 104-107.) "In order to determine whether the admission of identification evidence violates a defendant's right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification." (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.) "Against these factors is to be weighed the corrupting effect of the suggestive identification itself." (*Manson v. Brathwaite*, *supra*, 432 U.S. at p. 114.) Because this rule is intended to avert an unfair trial rather than an unfair identification, an unnecessarily suggestive identification procedure does not, of itself, require exclusion of tainted identification evidence, much less constitute reversible error. (*Id.* at pp. 106, 110-114.) It is "reliability . . . that primarily determines . . . admissibility." (*Watkins v. Sowders* (1981) 449 U.S.

341, 347; see also *Manson v. Brathwaite*, *supra*, 432 U.S. at p. 114.) A conviction based upon eyewitness identification will be set aside only if the identification procedure was so impermissibly suggestive as to give rise to a "very substantial likelihood of irreparable misidentification." (*Simmons v. United States* (1968) 390 U.S. 377, 384.) We review the trial court's ruling that a pretrial identification procedure was not unduly suggestive under the independent standard of review. (*People v. Kennedy* (2005) 36 Cal.4th 595, 609.)

Defendant claims that the single-person show up that was used in this case is a suggestive identification procedure that taints the reliability of the identification. An in-the-field showup of a single person in handcuffs may be suggestive (see *Manson v. Brathwaite*, *supra*, 432 U.S. at p. 110), but it is not always unnecessary. "Prompt identification of a suspect who has been apprehended close to the time and place of the offense to exonerate the innocent and aid in discovering the guilty is a valid purpose for conducting a one-person showup [citation], and is likely to be more accurate than a belated identification days or weeks later." (*People v. Martinez* (1989) 207 Cal.App.3d 1204, 1219.) In any event, if, under the totality of the circumstances, the evidence is reliable, it may be admitted. (*Ibid.*)

In the present case, the in-the-field showup took place very close in time to the incident itself. The victim described the attack as having happened around 3:00 a.m. Pimentel arrived about 3:10 a.m. He collected some information and took control of defendant, moving him into the light where the victim could identify him. Thus, the identification must have taken place within an hour or so of the attack, when the image of her assailant was still fresh in the victim's mind. "Obviously, an identification under such circumstances has much greater indicia of reliability than one made after a lapse of a substantial period of time." (*People v. Hall* (1979) 95 Cal.App.3d 299, 310.)

Further, the totality of the circumstances does not create a very substantial likelihood of irreparable misidentification. The victim had a brief, but close-up

opportunity, to view the suspect. Her attention was focused upon him because she saw the pole in his hands as he was coming toward her. She noted his build, his skin color, and details pertaining to the shirt he was wearing. She described more than just a black and white shirt. She noted the style and the graphics printed or stitched on to the shirt. The victim's description accurately depicted defendant and the shirt he was wearing when he was detained. The victim was certain of her identification of the shirt, "it was the same" as the one her attacker had worn.

Defendant argues that the victim's identification was not so accurate, having once described her assailant as "heavy set." Defendant, who is six feet, one inch in height and weighs around 185 pounds, contends that he would not generally be considered to be overweight. Given the totality of the circumstance, the discrepancy is minor. To begin with, the phrase does not necessarily mean overweight. It is defined by Webster's as "Having a heavy, compact build." (Webster's II New Riverside Univ. Dict. (1984) p. 571, col. 2.) Further, it is clear from the victim's testimony at trial that she did not have an extensive English vocabulary; more than once she had to ask that questions be rephrased because she did not understand the words her questioner was using. Thus, one cannot say for certain that, when she used the phrase "heavy set," she used it in a colloquial sense as meaning overweight. And compared to the victim, who weighed 99 pounds, someone of defendant's size may well have seemed heavy or heavy set.

Defendant contends that, in general, courts permit evidence of identifications made by a single-person showup when the suspect had been apprehended based upon the victim's description. In this case, he was not apprehended based upon the victim's description, he was one of only a handful of persons, no more than three of whom were African-American, detained in the aftermath of the street brawl. We can think of no reason, and defendant offers none, for concluding that an identification made in the former circumstances would be any more reliable than that made under the circumstances of this case. The cases defendant cites do not stand for that proposition. (See *U.S. v.*

Jones (9th Cir. 1996) 84 F.3d 1206, 1210; *People v. Edwards* (1981) 126 Cal.App.3d 447, 455; *People v. Hall*, *supra*, 95 Cal.App.3d at p. 311.)

It is true that the victim did not affirmatively identify defendant by his facial features. But that failure affects the probative value of the identification, not its admissibility. As the United States Supreme Court has said, "We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." (*Manson v. Brathwaite*, *supra*, 432 U.S. at p. 116.) We conclude that the circumstances of the showup in this case did not create a substantial likelihood of misidentification. Accordingly, the trial court did not err in admitting evidence of the identification.

B. Ineffective Assistance of Counsel

Officer Ward testified at trial about the identification procedure. He testified that before the victim viewed defendant, Ward spoke to her: "I told her that we have one person that was detained at the scene that matched the description that she gave me. We are not sure if he is the person that did commit the crime, but we needed her to identify the person just to make sure that we had who she said was involved." Defendant argues that Ward's statement impermissibly suggested to the victim that the police believed they already had the person who assaulted her and her identification was needed just to confirm.

Defendant cites secondary sources containing recommendations and guidelines for minimizing the suggestiveness of lineup and showup procedures. (See, e.g., Report of the Illinois Gov.'s Comm. on Capital Punishment, Recommendations Only (April 2002),

Ch. 2, Recommendation 11.)[2] Among the recommendations cited is the recommendation that the officer admonish the witness that the perpetrator may or may not be in the lineup or the showup and that the investigation will continue whether or not the witness is able to make an identification. (Cal. Comm. on the Fair Admin. of Justice, "Report and Recommendations Regarding Eye Witness Identification Procedures" (2006), Recommendation No. 4, p. 5.)[3] Defendant argues that the absence of these or similar admonitions made the procedure unfairly suggestive warranting exclusion of the identification evidence. Defendant maintains that Ward's testimony was new evidence that should have prompted his attorney to renew the motion to suppress and his counsel's failure to do so was ineffective assistance of counsel.

To demonstrate constitutionally ineffective assistance of counsel, defendant must prove two things. First, defendant must show that counsel's performance was unreasonable when measured by prevailing professional norms. Second, defendant must show that there is a reasonable probability that but for counsel's acts or omissions, the result of the proceeding would have been more favorable to the defense. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) " 'In some cases, . . . the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged. In such circumstances, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, *these cases are affirmed on appeal*.' " (*People v. Avena* (1996) 13 Cal.4th 394, 418, quoting *People v. Pope* (1979) 23 Cal.3d 412, 426.)

The record reveals at least two satisfactory explanations for counsel's failure to renew the suppression motion. First, by the time Ward took the stand, the victim had

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[2]http://www.state.il.us/defender/summary_recommendations.pdf (accessed May 29, 2007).

[3]http://www.ccfaj.org/documents/reports/eyewitness/official/eyewitnessidrep.pdf (accessed May 29, 2007).

already testified about her identification so that even a successful renewal of the motion would not have prevented the jury from hearing the evidence defendant wanted to exclude. Second, there is no rule of law requiring the officer to have given the admonitions defendant describes. Moreover, we do not read Ward's statements to the victim as suggesting that the police knew they had the right person. Rather, Ward's statements, in effect, gave the victim power to make the identification. He told her to make sure defendant was the person "that did commit the crime." In short, counsel might have decided that renewal of the motion to suppress would have been futile. Counsel has no duty to make a futile motion. (See *People v. Memro* (1995) 11 Cal.4th 786, 834.) Accordingly, counsel was not ineffective for failing to renew the suppression motion mid-trial.

C. Testimony of the Jailhouse Informant

Alton King allegedly met defendant while the two were in custody in jail. As set forth above, King testified that defendant confessed his crime while he was discussing possible defenses with King. King was in custody on charges of child molestation. He was in protective custody due, at least in part, to the nature of the crimes with which he was charged. He also had a history of five prior convictions for child molestation. Defense counsel had information that, in connection with one or more of the prior convictions, King had lied to the victims, telling them he was a doctor when, in fact, he was really their coach. Counsel wanted to introduce evidence of all five prior convictions and of King's modus operandi of lying to his victims, as impeachment of the witness. Counsel also wanted to refer to the prior convictions as involving children under the age of 14, to specify that the prior crimes involved the use of force, and to explore the nature of King's currently pending charges.

The trial court allowed the defense to introduce evidence of King's prior convictions for child molestation but specified that counsel could not refer to more than two of those convictions. As the trial court explained, it was the court's practice "to

allow for a sampling of similar convictions, but it's not necessary to have all of them because it becomes unduly prejudicial and the probative value is nil." By allowing the defense to refer to prior convictions in the plural, the jury would get no false sense of respectability. The court denied counsel's request to use the phrase, "sexual battery with force," concluding that "child molestation" better described the flavor and summation of the charges. The court chose not to use the phrase "lewd and lascivious" because that sounded less egregious than child molestation and the jurors might think it meant simple harassment. The court refused to allow counsel to impeach King with the nature of his pending charges unless he could prove them up; but the court did allow exploration of the maximum term King believed he faced if convicted of the charges for which he was then in custody.

Defendant argues that by limiting his cross-examination of King, the trial court denied him the right of confrontation. We disagree.

A criminal defendant has federal and state constitutional rights to confront witnesses against him or her. (U.S. Const., 6th Amend.; Cal. Const. art. I, § 15; *Pointer v. Texas* (1965) 380 U.S. 400, 406-407.) Undue restrictions on a criminal defendant's cross-examination of a prosecution witness may amount to a deprivation of the constitutional right of confrontation. (*Davis v. Alaska* (1974) 415 U.S. 308, 318; *Olden v. Kentucky* (1988) 488 U.S. 227, 231-232.) Because no witness is entitled to a false aura of veracity, exposing a witness's bias and motivation for testifying is an important function of cross-examination. (*Davis v. Alaska*, *supra*, 415 U.S. at pp. 316-317; cf. Evid. Code, § 780, subds. (f) & (j).) For the same reason, evidence of prior felony convictions bearing upon the witness's credibility is generally admissible. (*People v. Beagle* (1972) 6 Cal.3d 441, 453, superseded by statute on other grounds.)

"Although the right of confrontation includes the right to cross-examine adverse witnesses on matters reflecting on their credibility, 'trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such

cross-examination.' (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679.) In particular, notwithstanding the confrontation clause, a trial court may restrict cross-examination of an adverse witness on the grounds stated in Evidence Code section 352. [Citation.] A trial court's limitation on cross-examination pertaining to the credibility of a witness does not violate the confrontation clause unless a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted." (*People v. Quartermain* (1997) 16 Cal.4th 600, 623-624.)

The decision whether to allow the requested cross-examination was squarely within the discretion of the trial court under Evidence Code section 352. Under this provision a trial court has broad discretion to exclude relevant evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The trial court's decision on this point may not be overturned on appeal absent an abuse of that discretion--that is, only if the trial court " 'exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

It is apparent from the record that the trial court carefully weighed defendant's right to insure that the jury received an accurate picture of King's credibility with the countervailing concerns of undue prejudice, confusion, and misleading the jury. The balance that the trial court struck did not give the jury a significantly different impression of King's credibility than it would have received if the excluded evidence had been admitted. Defense counsel elicited numerous facts to support the argument that King was not to be believed. Counsel established that King believed that he was facing up to 16 years in prison for the charges then pending against him, indicating that he was presently charged with something rather serious. He further established that, in addition to giving information in this case, King had given information to the prosecution in another, even

more serious case. Although King had received no promise of leniency, he admitted that he would not object if a judge were lenient in sentencing him on the pending charges based upon King's cooperation in the two other cases. Thus, counsel established that King had a motive to lie.

Counsel also elicited evidence that King had been previously convicted of molesting two different children and that he had been sentenced to prison for child molestation. King admitted that he was in protective custody while in jail due to the charges against him and, when he had been in prison for child molestation in the past, he had requested protective custody because other inmates do not like child molesters. From this evidence the jury could easily have drawn the inference that King was facing further child molestation charges.

In short, counsel's able cross-examination prevented the jury from acquiring a false impression of King's credibility. The jury was informed that King was a repeat child molester facing a lengthy prison term who had a motive to give information to help the prosecution. The additional evidence defendant sought to introduce would have added little to what counsel was able to establish within the limitations the court imposed. Accordingly, we conclude that the trial court did not abuse its discretion in restricting counsel from further inquiry.

D. Blakely Error

The trial court sentenced defendant to the upper term of four years on the assault count. In so doing, the court stated: "The court on count 1, which is [Penal Code] section 245 [subdivision] (a)(1) with a triad of 2, 3, 4, the court chooses the upper term of 4 years. The court does so because of the aggravated nature of this case, the seriousness of the offense, the unprovoked nature of the offense against a woman who did nothing but stand there. A factor the court considered is that the defendant was on probation with a suspended prison term at the time of this offense." In the violation of probation matter,

the court revoked probation and, without comment upon its reasons, the court decided that the previously imposed sentence should run consecutive to the term for the assault.

Defendant claims that under *Blakely*, *supra*, 542 U.S. 296, the trial court was not permitted to impose a sentence greater than the middle term, or consecutive sentences, absent a jury's finding, beyond a reasonable doubt, of the truth of the aggravating facts warranting the longer sentence. The Attorney General argues that defendant waived the issue by failing to raise it below and, in any event, there was no *Blakely* violation because the trial court based its selection of the upper term, in part, upon defendant's recidivism.

The United States Constitution requires that any factor increasing the penalty for a crime beyond the statutory maximum (other than a prior conviction) must be submitted to a jury and proved beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; U.S. Const., 6th & 14th Amends.) The relevant statutory maximum "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely*, *supra*, 542 U.S. at pp. 303-304.)

Cunningham v. California (2007) 549 U.S. __ [127 S.Ct. 856] (*Cunningham*), concluded that under California's Determinate Sentencing Law (DSL), the middle term of the three-tiered sentencing structure applicable to most offenses is the statutory maximum. (*Id.* at p. __ [127 S.Ct. at pp. 868, 871].) Rejecting a contrary holding by the California Supreme Court, *Cunningham* concluded that the DSL was unconstitutional to the extent it allowed the imposition of an upper term sentence based upon facts that were found true by the trial court using only a preponderance of the evidence standard. (*Id.* at p. __ [127 S.Ct. at p. 871]; and see *People v. Black* (2005) 35 Cal.4th 1238, judg. vacated and cause remanded *sub nom*. *Black v. California* (Feb. 20, 2007, U.S. Supreme Ct. No. S126182) __ U.S. __ (*Black*).)

Turning to the instant case, we first reject the Attorney General's waiver argument. *Black*, *supra*, 35 Cal.4th 1238, which held that the DSL was constitutional,

was decided on June 20, 2005, prior to defendant's sentencing hearing. *Cunningham* was not decided until this case was on appeal. Therefore, at the time of sentencing, the trial court was bound by *Black* and any *Blakely* objection that defense counsel might have made would have been futile. Under these circumstances, defendant's *Blakely* challenge was not forfeited. (Cf. *People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6.)

On the merits, we reject defendant's argument that *Blakely* prohibits imposition of consecutive sentences absent a jury finding of the facts supporting consecutive sentencing. In the now-vacated *Black* case, our Supreme Court held that a judge's discretionary imposition of consecutive sentences does not implicate a defendant's Sixth Amendment rights. (*Black, supra,* 35 Cal.4th at pp. 1244, 1263-1264; and see *People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231.) *Cunningham* did not overturn the consecutive sentencing holding of *Black*. Our Supreme Court is currently considering whether *Cunningham* affects this aspect of *Black*. (See *Black v. California* (Feb. 20, 2007, No. S126182 remanded from the U.S. Supreme Ct.) In the interim, we are guided by *Black*'s holding on the issue of consecutive term sentences and conclude that "entrusting to the trial courts the decision whether to impose concurrent or consecutive sentencing under California's sentencing laws is not precluded by the decisions in *Apprendi*, *Blakely*, and *Cunningham*." (*People v. Hernandez* (2007) 147 Cal.App.4th 1266, 1271.)[4]

We now come to the upper term sentence. In imposing an upper term sentence, the trial court may rely upon three types of facts: (1) " 'the fact of a prior conviction' " (*Blakely*, *supra*, 542 U.S. at p. 301); (2) "facts reflected in the jury verdict" (*id.* at p. 303, italics omitted); and (3) facts "admitted by the defendant" (*ibid.*, italics omitted). In this case, three of the four reasons the court gave for imposing the upper term involved the

[4] Our decision is without prejudice to any relief to which defendant might be entitled should the Supreme Court ultimately conclude that rule of *Blakely* extends to consecutive sentences.

aggravated nature of the crime. These factual findings do not fall within any of the three permissible *Blakely* categories and, therefore, should have been presented to a jury. However, the court also noted that it was relying upon defendant's status as a probationer with sentence imposed at the time he committed the assault. The Attorney General argues that *Blakely*'s prior-conviction exception permits the court to impose the aggravated term based solely upon this fact.

Assuming, without deciding, that defendant's status as a probationer with sentence imposed is the equivalent of a prior conviction, remand is nevertheless required. Although the trial court found no mitigating factors, after considering the record as a whole, we cannot say that it is reasonably probable that the court would have imposed the upper term based solely upon the fact that defendant was on probation for possession of a controlled substance. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Accordingly, we shall vacate the sentence and remand for resentencing.[5]

[5] Defendant argues, in addition, that the probation violation cannot stand because it was based upon the invalid assault charge. Since we find no error with the assault conviction, this issue is moot.

III. DISPOSITION

The judgment is reversed. The cause is remanded to the trial court for resentencing.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.