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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RIGOBERTO FERNANDEZ et al. Defendants and Appellants.	E034306 (Super.Ct.No. FWV 026468) OPINION

APPEAL from the Superior Court of San Bernardino County. Paul M. Bryant, Jr., Judge. Affirmed.

Richard P. Siref, under appointment by the Court of Appeal, for Defendant and Appellant Raul Alain Santos Gonzales.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant Armando Fernandez.

Donal M. Hill, under appointment by the Court of Appeal, for Defendant and Appellant Oscar Perez.

Douglas G. Benedon, under appointment by the Court of Appeal, for Defendant and Appellant Michel Fajuardo.

Dacia A. Burz, under appointment by the Court of Appeal, for Defendant and Appellant Rigoberto Fernandez.

Daniel H. Clifford, under appointment by the Court of Appeal, for Defendant and Appellant Geovanni Gonzales.

Laura G. Schaefer, under appointment by the Court of Appeal, for Defendant and Appellant Ismely Suarez.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Larissa Karpovics Hendren and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

1. Introduction[1]

Seven defendants[2] appeal from their convictions after a court trial for conspiracy to commit grand theft (§§ 182 & 487) and commercial burglary (§ 459), involving property worth more than $150,000. (§ 12022.6, subd. (a)(2).) Defendants received sentences of three years four months, four years, and five years.

Defendants were thwarted in the attempted heist of computer monitors with a wholesale value of $900,000. During the course of the burglary, defendants caused about $15,000 in related damage.

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

[2] Rigoberto Fernandez, Armando Fernandez, Oscar Perez, Giovanni Gonzalez, Raul Santos Gonzales, Michael Fajuardo, and Ismely Saurez.

We hold there is sufficient evidence the victim suffered a loss within the meaning of section 12022.6, subdivision (a)(2). We reject the argument that the court imposed defendants' sentences in retaliation for them not accepting a proposed plea bargain for a three-year sentence. Because defendants Armando Fernandez and Rigoberto Fernandez waived the right to a jury trial and agreed to a court trial, we reject their claim of *Blakely* (*Blakely v. Washington* (2004) 534 U.S. ____ (124 S.Ct. 2531) error. We affirm.

2. Sufficiency of Evidence

Defendants argue there was no "loss" because they only succeeded in moving the property to the receiving dock before they were discovered in the act and subsequently apprehended. The People argue there was a "taking" when the property was moved to the receiving dock. Therefore, section 12022.6 applies.

The subject statute provides: "(a) When any person *takes*, damages, or destroys any property in the commission or attempted commission of a felony, with the intent to cause that *taking*, damage, or destruction, the court shall impose an additional term as follows: [¶] . . . [¶]

"(2) If the *loss* exceeds one hundred fifty thousand dollars ($150,000), the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose an additional term of two years. [Emphasis added.]"

The cases support the People. In *People v. Bates* (1980) 113 Cal.App.3d 481, 483-484, defendant was caught while fleeing the county courthouse with a large gold nugget. The court held:

"Police interruption of a crime in progress is a fortuity external to defendant and logically does not mitigate his conduct. [Citation.] Before his apprehension, defendant had managed a taking from the county which constituted a completed theft by larceny of over $100,000 in gold. [Citation.] The express legislative purpose in calling for enhanced punishment for an enhanced taking is to exact punishment commensurate with the seriousness of the crime [citation]. That purpose would not be served by distinguishing among thieves who steal property in excess of $100,000, those who, due to fortuitous circumstances, are immediately apprehended and those who reach a position of security with their loot. The former are no less culpable merely because they are relatively less successful criminals than the latter. The word 'loss,' as used in section 12022.6 in the context of the *taking* of property, therefore includes any dispossession which constitutes theft of the victim's property."

The same analysis applies here. Defendants committed burglary and conspired to commit grand theft, for which they were convicted, when they broke into the warehouse and moved the property to the receiving dock. The *taking* of property meant the victim suffered a *loss* within the meaning of section 12022.6, subdivision (a)(2), thus negating defendants' argument.

Further support is found in *People v. Kellett* (1982) 134 Cal.App.3d 949, addressing the same argument made here. Discussing both *Bates* and *People v. Ramirez* (1980) 109 Cal.App.3d 529, *Kellett* said "it was contended that a section 12022.6 enhancement cannot be imposed unless it is shown that the victim has actually suffered a loss. [Fn omitted.] In both cases, it was held to be irrelevant whether the victims

suffered a loss so long as the defendants initially intended to take the property. [Citations.]" (*Kellett, supra,* 134 Cal.App.3d at p. 959.)

Kellett concluded with language apropos: "In short, there does not appear to be any reason either in logic, or the case law, to adopt [defendants'] interpretation of section 12022.6. The Legislature intended to deter large-scale crime. [Citation.] That purpose is served in this case by imposing an additional punishment on [defendants.]" (*People v. Kellett, supra,* 134 Cal.App.3d at p. 960.)

3. Punishment for Refusing Plea Bargain

One defendant, Michael Fajuardo, joined by the other defendants as it applies, argues his four-year sentence was imposed as punishment because he refused to accept a plea bargain for a three-year prison term. Relying primarily on a federal case, *United States v. Stockwell* (9th Cir. 1973) 472 F.2d 1186, 1187-1188, Fajuardo argues there is a rebuttable presumption of judicial vindictiveness when a trial court has participated in unsuccessful plea bargaining and then sentences defendant to a harsher term. Fajuardo urges the matter be remanded for a resentencing hearing in which the trial court shall state its reasons for imposing a harsher sentence than the proposed plea bargain.

Of course, the federal case is not precedent; except for the United States Supreme Court, we are not bound by other decisions of the federal courts. (*People v. $8,921 United States Currency* (1994) 28 Cal.App.4th 1226, 1232, fn. 6.) Furthermore, there is no evidence in the record that the sentencing judge, who was the trial judge but not the same judge who proposed the plea bargain, intended to punish defendants with harsher sentences: "The mere fact . . . that following trial defendant received a more severe

sentence than he was offered during plea negotiations does not in itself support the inference that he was penalized for exercising his constitutional rights." (*People v. Szeto* (1981) 29 Cal.3d 20, 35.) A rejected plea bargain does not guarantee a defendant will receive the same sentence after a trial.

In this case, the lightest sentence, three years four months, was imposed on Raul Santos Gonzales because of mitigating circumstances. Four defendants[3] received midterm sentences of four years because neither mitigating or aggravating circumstances preponderated. Rigoberto Fernandez and Armando Fernandez each received five-year sentences because of aggravating circumstances. In each instance, the court based its sentence on the probation report and on its own observations at trial. The record fully supports the court's decision to sentence each defendant to a sentence greater than three years.

4. *Blakely* Error

Based on aggravating factors, two defendants, Armando Fernandez and Rigoberto Fernandez, received upper-term sentences of three years for conspiracy to commit grand theft. (§§ 182, subd. (a)(1) and 487.) The court also imposed (and stayed) individual three-year upper-term sentences for commercial burglary. (§ 459.) The aggravating factors used included: as to defendant Rigoberto, his leadership role and a pattern of regular or increasing criminal conduct; and, as to both defendants, the planning,

[3] Fajuardo, Perez, Gonzalez, and Suarez.

sophistication, and professionalism and the great monetary value of the crime. (Cal. Rules of Court, rule 4.421.)

Defendants contend that their upper-term sentences violate the constitutional prohibition against punishment increased by the use of facts other than those based solely on a jury verdict or a plea. (*Blakeley, supra*; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.)

We agree the issue has not been forfeited or waived on appeal because appellant cannot have forfeited or waived a legal argument that was not recognized at the time of his trial. (*People v. Vaughn,* 2004 WL 2223299, 15 (Cal.App. 2 Dist.); *People v. George* (2004) 18 Cal.Rptr.3d 651, 654.) Nevertheless, we reject defendants' argument for the simple reason that they both waived their right to a jury trial and agreed to allow the court to decide their guilt or innocence as well as their sentences. In its capacity as fact-finder, the court occupied the same position as the jury and was similarly able to decide whether aggravating circumstances existed beyond a reasonable doubt. (See *People v. Earley* (2004) 18 Cal.Rptr.3d 694, 699.)

It does not change the analysis that *Blakely* involved a sentence that the court imposed after a guilty plea. In that circumstance, the court did not hear and decide all the facts related to the crime. Here a court trial allowed the court to hear all the evidence that allowed it to decide the aggravating factors except for the recidivist-related factor of a pattern of regular or increasing criminal conduct. The recidivist factor was probably not subject to *Apprendi*, and by extension, *Blakely*. (*Almendarez-Torres v. U.S.* (1998) 523 U.S. 224, 118 S.Ct. 1219.) But even without the recidivist factor being considered, the

court could properly impose the upper term based on the three aggravating factors applicable to Rigoberto and the two aggravating factors applicable to Armando. (*People v. Osband* (1996) 13 Cal.4th 622, 728.)

5. Disposition

The judgment is affirmed.

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s/Gaut
J.

We concur:

s/Hollenhorst
Acting P. J.

s/Ward
J.