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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

HUBERT LEE FONTENOT, JR.,

Defendant and Appellant.

A112109

(Solano County
Super. Ct. No. FCR213332)

I.

INTRODUCTION

Hubert Lee Fontenot, Jr. (Fontenot) appeals from his conviction of attempted voluntary manslaughter and assault with a firearm. He argues that the court erred in imposing the aggravated term for the handgun use enhancements, based in part on the United States Supreme Court's holding in *Cunningham v. California*.¹ We agree and remand the case for resentencing.

II.

PROCEDURAL BACKGROUND

The Solano County District Attorney charged Fontenot by information with attempted murder (Pen. Code,² §§ 187, subd. (a), 664) and assault with a firearm (§ 245, subd. (a)(2).) The information also alleged that, as to the attempted murder charge,

¹ *Cunningham v. California* (2007) 549 U.S. ___, 127 S.Ct. 856 (*Cunningham*).

² Unless otherwise indicated, all further statutory references are to the Penal Code.

Fontenot personally and intentionally discharged a handgun causing great bodily injury, (§ 12022.53, subd. (d)), discharged a handgun (§ 12022.53, subd. (c)), and used a handgun (§§ 12022.5, subds. (a)(1), 12022.53, subd. (b)). As to the assault with a firearm charge, the information alleged that Fontenot inflicted great bodily injury. (§ 12022.7, subd. (a).)

A jury convicted Fontenot of attempted voluntary manslaughter. The jury found true the allegations that Fontenot used a handgun and inflicted great bodily injury as to both counts.

The court sentenced Fontenot to the midterm of three years for attempted voluntary manslaughter, the aggravated term of ten years for the firearm use enhancement, and the midterm of three years for the great bodily injury enhancement. On the second count, the court imposed a sentence of three years for assault with a firearm, plus ten years for the handgun use enhancement and three years for the great bodily injury enhancement, but stayed this sentence pursuant to section 654. In imposing the upper term for the firearm enhancement, the trial court found and relied on five aggravating factors: “[1] the crime involved great violence, great bodily harm, threat of great bodily harm or other action disclosing a high degree of cruelty, viciousness and callousness, (2) [Fontenot] was armed with or used a weapon at the time of the commission of the offense, (3) the victim was particularly vulnerable, ([4]) the manner in which the crime was carried out indicates planning, sophistication or professionalism, and . . . [(5) Fontenot’s] prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are of numerous or of increasing seriousness, and we’ll leave it at that.”

This timely appeal followed. After the parties filed their briefs, the United States Supreme Court issued its decision in *Cunningham*. We directed the parties to file supplemental briefs addressing the sentencing issues in light of the holding of *Cunningham*.

III.

FACTUAL BACKGROUND

We set forth the facts to the limited extent necessary to address the issues raised on appeal. On December 30, 2003, a gang-related altercation occurred on Phoenix Drive in Fairfield, during which Donshay Caldwell (Caldwell) knocked Cory Davis unconscious. Afterwards, Fontenot and Davis telephoned Caldwell and threatened to shoot him.

The following day, Caldwell returned to Phoenix Drive, where an unidentified person informed him that someone wanted to see him at the end of the street. Fontenot, Willie McClure and Markell Davis were there, and words were exchanged. Caldwell and Fontenot began shoving each other, with Fontenot indicating he would “beat [his] ass.” Caldwell walked back towards his car, and Fontenot shot him in the arm.

Caldwell told police officers that Fontenot shot him, and identified Fontenot in a photo lineup. Caldwell would not identify Fontenot as the shooter at trial.

IV.

SENTENCING ISSUES

Fontenot maintains that the court erred in sentencing him to the aggravated term of 10 years for the section 12022.5 enhancement for personal use of a firearm. In his initial opening brief, he asserted that two of the five factors on which the trial court relied to impose the aggravated sentence were improper, in that they were also elements of the substantive offenses or the enhancements themselves. He also maintained that there was no evidence supporting the third and fourth factors: that the victim was particularly vulnerable, and that the crime involved sophistication or professionalism. Following the *Cunningham* decision, which overruled *People v. Black* (2005) 35 Cal.4th 1238 (*Black*), Fontenot asserts in his supplemental brief that the jury was required to determine beyond a reasonable doubt whether the factors in aggravation were true. Accordingly, he seeks remand for resentencing.

A. *Cunningham v. California*

1. Forfeiture

Respondent first argues that Fontenot forfeited his claims of error based on *Cunningham* made in his supplemental opening brief by not raising the issue in the trial court. “Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence. [Citations.]” *People v. Welch* (1993) 5 Cal.4th 228, 237-238.) In light of the clear mandate of *Black* at the time of sentencing, failure to raise the issue in the court below did not constitute a forfeiture. (*People v. Diaz* (2007) 150 Cal.App.4th 254; *People v. Waymire* (2007) 149 Cal.App.4th 1448, modified on denial of rehearing ___ Cal.App.4th (May 18, 2007) 2007 WL 1453700.)

2. Determination of Facts on Which Upper Term is Based

Fontenot asserts that the court erred in imposing the aggravated term for the firearm use enhancement based on facts which were not found by the jury beyond a reasonable doubt. He maintains that, based on the United States Supreme Court’s decision in *Cunningham*, the trial court could not impose the aggravated term based on its own findings of facts in aggravation.

In *Cunningham*, the court considered the constitutionality of California’s Determinate Sentencing Law (DSL) in the context of a case in which the trial court had imposed the upper term for continuous sexual abuse of a child, based on facts found solely by the court rather than the jury. The *Cunningham* court explained that, under California law, “an upper term sentence may be imposed only when the trial judge finds an aggravating circumstance. . . . An element of the charged offense, essential to a jury’s determination of guilt, or admitted in a defendant’s guilty plea, does not qualify as such a circumstance. . . . Instead, aggravating circumstances depend on facts found discretely and solely by the judge. In accord with *Blakely*, therefore, the middle term prescribed in California’s statutes, not the upper term, is the relevant statutory maximum. [*Blakely v. Washington* (2004)] 542 U.S. [296,] 303. . . . Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the

evidence, not beyond a reasonable doubt, . . . the DSL violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' . . ." (*Cunningham, supra*, 127 S.Ct. at p. 868, quoting *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*).)

Cunningham further explained: "[w]hile '[t]hat should be the end of the matter' [(*Blakely, supra*, 542 U.S. at [p.] 313 . . . [])] in *People v. Black*, the California Supreme Court held otherwise. In that court's view, the DSL survived examination under our precedent intact. . . . The *Black* court acknowledged that California's system appears on surface inspection to be in tension with the rule of *Apprendi*. But in 'operation and effect,' the court said, the DSL 'simply authorize[s] a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range.' . . . [*Black*] concluded, 'the upper term is the "statutory maximum" and a trial court's imposition of an upper term sentence does not violate a defendant's right to a jury trial under the principles set forth in *Apprendi*, *Blakely*, and *Booker*.'³⁾ " (*Cunningham, supra*, 127 S.Ct. at p. 868, citing *Black, supra*, 35 Cal.4th at p. 1254.)

The *Cunningham* court disagreed with the California Supreme Court's analysis, and overruled *Black, supra*, 35 Cal.4th 1238. *Cunningham* held that "[c]ontrary to the *Black* court's holding, our decisions from *Apprendi* to *Booker* point to the middle term specified in California's statutes, not the upper term, as the relevant statutory maximum. Because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." (*Cunningham, supra*, 127 S.Ct. at p. 871, fn. omitted.)

³ *United States v. Booker* (2005) 543 U.S. 220.

Respondent does not dispute that the first four factors on which the trial court relied were elements either of the charged offenses or the enhancements,⁴ or were required to be found by a jury. (See *Cunningham*, *supra*, 127 S.Ct. at p. 868, quoting *Apprendi*, *supra*, 530 U.S. at p. 490.) Respondent maintains, however, that the fifth aggravating factor was proper, urging “[t]he jury trial right . . . does not extend to an aggravating circumstance based on appellant’s criminal record.” Respondent claims that “ ‘no jury trial right exists on matters involving the more broadly framed issue of ‘recidivism,’ ” citing *People v. McGee* (2006) 38 Cal.4th 682, 700-703.) Accordingly, respondent asserts that the court’s finding that Fontenot’s prior convictions were numerous or of increasing seriousness did not violate the constitutional mandate of *Cunningham*.

The question of which “recidivist factors” must be found by a jury after *Cunningham* is a source of disagreement among the Courts of Appeal, and is currently

⁴ Fontenot urges that the first two aggravating factors, great bodily harm and gun use, were improperly used both to find true the firearm use and great bodily injury enhancements, and to impose the upper term on the firearm use enhancement. Respondent concedes that the firearm use aggravating factor was improper for this reason. Respondent also concedes that the “trial court could not consider whether [Fontenot] inflicted great bodily harm,” but claims it was not a dual use of facts, because the factor also included facts relating to whether Fontenot *threatened* great bodily harm or whether the crime involved a high degree of cruelty or callousness. Given the subsequent decision in *Cunningham*, we need not determine whether this constituted a prohibited dual use of facts.

before the California Supreme Court.⁵ We need not decide this issue, because even if a higher court holds that the “numerosity and increasing seriousness” aggravating factor constitutes the “fact of a prior conviction,” we conclude that, on this record, the court’s erroneous reliance on other aggravating factors was not harmless beyond a reasonable doubt.

3. Prejudice and Harmless Error

Respondent urges that, while the aggravating factors at issue were not found true by a jury beyond a reasonable doubt, there was “overwhelming” evidence supporting the factors such that any error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18. Respondent maintains that a jury would have found, beyond a reasonable doubt, that the victim was particularly vulnerable, and the crime was committed with a high degree of sophistication, callousness and cruelty.

These factors related to the crime may be used to impose an aggravated sentence only when they make “ ‘the offense distinctively worse than the ordinary.’ [Citation.]” (*People v. Young* (1983) 146 Cal.App.3d 729, 734.) Likewise, the victim vulnerability factor under California Rules of Court, rule 4.421(a)(3) requires a finding that the victim was “particularly” vulnerable compared to other victims. (See *People v. Piceno* (1987)

⁵ After *Cunningham* was decided, the Supreme Court requested additional briefing in *People v. Towne*, S125677, on the following issues: “(1) Do *Cunningham v. California, supra*, and *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 239-247, permit the trial judge to sentence defendant to the upper term based on any or all of the following aggravating factors, without submitting them to a jury: the defendant’s prior convictions as an adult are numerous and of increasing seriousness; the defendant has served a prior prison term; the defendant was on parole when the crime was committed; the defendant’s prior performance on probation or parole was unsatisfactory ([Cal.] Rules of Court, rule 4.421[(b)(2)-(b)(5)])? [¶] (2) Is there any violation of the defendant’s Sixth Amendment rights under *Cunningham v. California, supra*, if the defendant is eligible for the upper term based upon a single aggravating factor that has been established by means that satisfy the governing Sixth Amendment authorities by, for example, a jury finding, the defendant’s criminal history, or the defendant’s admission—even if the trial judge relies on other aggravating factors (not established by such means) in exercising his or her discretion to select among the three sentences for which the defendant is eligible?” (*People v. Towne, supra*, Cal. S.Ct. dock. entry (2/7/07).)

195 Cal.App.3d 1353, 1357.) A finding of particular vulnerability usually requires evidence that “ ‘the age or physical characteristics of the victim, or the circumstances under which the crime is committed, make the defendant’s act especially contemptible.’ ” (*Id.* at pp. 1357-1358.) Given the circumstances of this crime, we cannot say that the jury would have found beyond a reasonable doubt that the circumstances of this crime were “distinctively worse” than the usual, or that the victim here was particularly vulnerable compared to other victims.

Respondent also argues that the aggravated sentence should be upheld because an upper term may be based on a single aggravating factor under *People v. Osband* (1996) 13 Cal.4th 622, 728. Respondent maintains that, because Fontenot’s “recidivism” was properly determined by the court, the sentence should be affirmed.

While some cases have found this type of error to be harmless if the trial court indicated on the record that the recidivist factor, standing alone, would have been enough to impose the aggravated term (see *People v. Perez* (2007) 148 Cal.App.4th 353, 372), the trial court here made no such indication. Given that the trial court expressly refused to follow the probation report’s recommendation of the middle term in order to “get the attention of those in the community to lead a law-abiding safe life,” it is clear that the court did not rely solely on the “recidivist” factor to impose the upper term. Moreover, the probation report here indicated that Fontenot’s “limited” prior record and successful completion of juvenile probation were *mitigating* factors.

As the court in *People v. Banks* (2007) 149 Cal.App.4th 969 explained in remanding a similar case for resentencing, “the trial court in this case cited several additional factors to support its choice of the upper term . . . and also did not declare defendant’s prior criminal record alone would support its decision. Since we are not convinced the trial court would have imposed the same sentence solely because of defendant’s prior criminal history, we remand for resentencing.” (*Id.* at p. 973.) There is no dispute here that the trial court’s reliance on four out of the five factors stated for imposing the upper term was error. Given the probation report’s characterization of Fontenot’s criminal history as “limited” and his term of juvenile probation as

“successful,” together with the notable absence of any indication by the trial court that the “recidivist” factor alone would have supported the upper term, we cannot say beyond a reasonable doubt that the trial court would have imposed the aggravated term based solely on this factor.

V.

DISPOSITION

The sentence is vacated and the case is remanded to the trial court for resentencing consistent with the views expressed in this opinion, and in light of *Cunningham*. In all other respects, the judgment is affirmed.

Ruvolo, P. J.

We concur:

Reardon, J.

Sepulveda, J.