Filed 6/19/07 P. v. Hinton CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. GINA HINTON, Defendant and Appellant.	A114057 (San Mateo County Super. Ct. No. SC060066)

Defendant Gina Hinton appeals from a judgment convicting her of several offenses including assault with a deadly weapon on a police officer and second degree robbery. She contends that the trial court erred in failing sua sponte to instruct the jury on the lesser included offense of assault on a police officer and that there is insufficient evidence to support her robbery conviction. She also argues that the trial court's imposition of an upper term sentence violated her constitutional right to a jury trial under (*Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) and *Cunningham v. California* (2007) 546 U.S.___ [127 S.Ct. 856] (*Cunningham*).) We conclude that the trial court did not err in instructing the jury and that substantial evidence supports defendant's robbery conviction, but that the imposition of an upper term sentence violated defendant's constitutional right to a jury trial as construed in *Blakely* and *Cunningham*. Accordingly, we affirm the conviction and remand for resentencing.

FACTUAL AND PROCEDURAL HISTORY

On December 20, 2005, defendant was charged by information with second degree burglary (Pen. Code,[1] § 460, subd. (b) - count one), second degree robbery (§ 211, subd. (c) - counts two, three and four), driving with willful or wanton disregard for the safety of persons and property while fleeing from a pursuing peace officer's vehicle (Veh. Code, § 2800.2 - count five), assault with a deadly weapon on a police officer (§ 245, subd. (c) - count six), and possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a) - counts seven and eight). The information also alleged that defendant had suffered a prior conviction for possession of a controlled substance. (Health & Saf. Code, § 11350, subd. (a).)

Evidence of the following facts was presented at the jury trial:

On May 25, 2005, at 9:15 p.m., defendant attempted to leave a Target store in Colma without paying for merchandise that she had concealed in two gift bags. As defendant entered the vestibule of the store, she was ordered to stop by two security guards who had been observing her on the store's surveillance cameras. When the guards asked defendant to return to the store, she refused and tried to leave. When one of the guards grabbed her arm, defendant pulled a canister of mace from her purse and sprayed the guard. Although the guard ducked, the mace contacted the side of his face, burning his eyes and skin. The second guard was also sprayed on his shoulder. A third guard arrived and attempted to stop defendant from leaving by grabbing her cart. Defendant sprayed the top of his head, grabbed her bags and fled. The guards called the police and gave them a description of defendant and her car.

Officer William Pon, in uniform and driving a police motorcycle, responded to the call and spotted defendant's vehicle in traffic. He activated his lights and siren, but defendant did not stop. Pon, along with Sergeant Stratton who was driving a marked police car, chased defendant from Colma to San Francisco. During the course of the five- to seven-minute chase, defendant drove at excessive speeds and ran though numerous

---

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

stop signs and red lights. Pon followed defendant down a dead-end street and stopped his motorcycle one and a half car lengths behind defendant's car. Pon saw the car's reverse taillight come on, and the car began backing up at five to ten miles an hour. As Pon jumped off his motorcycle, the car struck the motorcycle, dragging it backwards and pushing the handlebar into Pon's leg. Pon was unable to disengage his radio and was pulled to the ground. Defendant continued to rev the engine, causing Pon to fear the car, which was four and one-half feet from him, was going to crush him between the motorcycle and another car parked behind him. When he stood his radio cord disengaged. He drew his gun and ordered defendant to stop. When she continued to rev the engine, he fired his gun three times. Defendant raised both hands and said, "I give up. I'm shot. Don't shoot."

Officer Roger Arreola testified that he pulled into the dead end street just as defendant's car was backing up. He saw the motorcycle on the ground and Pon's leg pinned under it. Arreola parked his car behind defendant's car so that she could not crush Pon. A witness testified that he twice heard the gunning of a car's engine and a "crunching noise" as if "something was trying to drive over something" metallic, and then heard three gunshots.

Once defendant was removed from the car, officers recovered two gifts bags containing the stolen merchandise. The police also recovered two bindles of an off-white substance, later determined to be cocaine, and four bindles of a black substance, later determined to be heroin.

In her defense, defendant offered the expert testimony of Dr. Terry Forte, who opined that Pon fired four not three rounds from his gun.

The jury found defendant guilty as charged. Defendant waived a jury trial on the prior conviction allegation, and the court found the allegation true. The court imposed the upper term of five years on one count of second degree robbery, a consecutive term of 16 months (one-third the midterm) for assault with a deadly weapon upon a police officer, and concurrent terms on all other counts, for a total of six years four months in state prison. Defendant filed a timely notice of appeal.

DISCUSSION

1. *The jury was properly instructed.*

The jury was instructed pursuant to CALCRIM No. 860 that "The defendant is charged in Count 6 with assault with a deadly weapon on a peace officer. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person; [¶] 2. The defendant did that act willfully; [¶] 3. When the defendant acted, she was aware of facts that would lead a reasonable person to realize that her act by its nature would directly and probably result in the application of force to someone; [¶] 4. When the defendant acted, she had the present ability to apply force with a deadly weapon; [¶] 5. When the defendant acted, the person assaulted was lawfully performing his duties as a peace officer; [¶] AND 6. When the defendant acted, she knew, or reasonably should have known, that the person assaulted was a peace officer who was performing his duties." The jury was further instructed that "[a] deadly weapon is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury." Defendant contends that the trial court erred in failing on its own motion to instruct on the lesser included offense of simple assault on a peace officer because there was substantial evidence on which the jury might have found that defendant's car was not being used as a deadly weapon.

"The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request. [Citations.] That obligation encompasses instructions on lesser included offenses if there is evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser." (*People v. Blair* (2005) 36 Cal.4th 686, 744-745.) Ordinarily, the obligation to instruct on lesser included offenses exists even over the objections of the parties. (*People v. Birks* (1998) 19 Cal.4th 108, 118.) However, " '[a] defendant may not invoke a trial court's failure to instruct on a lesser included offense as a basis on which to reverse a conviction when, for tactical reasons, the

defendant persuades a trial court not to instruct on a lesser included offense supported by the evidence. [Citations.] In that situation, the doctrine of invited error bars the defendant from challenging on appeal the trial court's failure to give the instruction.' " (*People v. Horning* (2004) 34 Cal.4th 871, 905.) In order to support a claim of invited error, the record must reflect deliberate action by the defense to cause the court to fail fully to instruct. (*People v. Avalos* (1984) 37 Cal.3d 216, 229.) "Invited error . . . will only be found if counsel expresses a deliberate tactical purpose in resisting or acceding to the complained-of instruction." (*People v. Valdez* (2004) 32 Cal.4th 73, 115.)

Here, defendant's attorney specifically requested that the court not instruct on the lesser included assault offense. In response to the court's inquiry, defendant's attorney stated, "[W]hile I would concede as a matter of law that it is a lesser included offense to what Ms. Hinton is charged with, I am specifically requesting that the court not give this instruction. I am seeking a flat out not guilty on this count. And I'm not going to be arguing, you know, some part of this was committed but not all of it. And I do not and I specifically request that I do not want this instruction given to this jury." Thereafter, the court stated, "Seems like the only real issue is whether the vehicle constitutes a deadly weapon. And under the circumstances here, it seems as though it would be a stretch to argue that the motor vehicle in the circumstances of this case was not a deadly weapon in view of the collision with the motorcycle and so forth. So for the reasons stated, the court will not deliver [the instruction on the lesser included offense]."

Despite defendant's contrary argument on appeal, it is difficult to imagine a clearer case of invited error. The court did not, as defendant suggests, find "that [defendant's] vehicle necessarily constituted a deadly weapon under the circumstances." Nor is defendant correct that the court's ruling was "not prompted by defense counsel's request, but rather on the court's own erroneous determination that the evidence did not support such instruction[]." In response to the defense attorney's request, the court merely noted that under the circumstances it would be "a stretch" to argue that the car was not a deadly weapon. The court's observation simply acknowledged the soundness of the defense attorney's tactical decision to request that the lesser included instruction not

be given. Hence, defendant is barred from challenging on appeal the court's failure to instruct on the lesser included offense. (*People v. Horning, supra,* 34 Cal.4th at pp. 905-906.)

2. *Defendant's robbery conviction is supported by substantial evidence.*

Robbery is defined in section 211 as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Defendant's three robbery convictions were based on her theft of the Target merchandise from the immediate presence of the three security guards by use of force or fear. Defendant contends that her convictions must be reversed because there was insufficient evidence to establish that she "took the store's property from the immediate presence of the security guards."

Assuming, without deciding, that the security guards' contemporaneous observation by means of an on-site surveillance camera of defendant placing merchandise in bags and leaving the store without paying is insufficient to establish the immediate presence requirement,[2] defendant's subsequent encounter with the guards in the vestibule of the store is sufficient. (*People v. Estes* (1983) 147 Cal.App.3d 23, 26 (*Estes*).) In *Estes*, a security guard watched a defendant remove clothing from store shelves, put the clothing on and leave the store without paying. The guard "followed defendant outside the store, identified himself, and confronted him about the coat and vest in the parking lot about five feet from the store. Defendant refused to accompany [the guard] to the store and

---

[2] In *People v. Hayes* (1990) 52 Cal.3d 577, 627 (*Hayes*), our Supreme Court held that a taking is from the immediate presence of the victim if it occurs in an area within the victim's reach, inspection, observation or control such that he or she could, if not overcome by force or fear, retain possession of the property. "Under this definition, property may be found to be in the victim's immediate presence 'even though it is located in another room of the house, or in another building on [the] premises.' " (*Ibid.*) "The term 'immediate presence' is to be liberally construed. Any and all the sensory perceptions are included in determining 'presence.' [Citations.] The actual corporeal presence of the victim is not required." (*People v. Hays* (1983) 147 Cal.App.3d 534, 541-542.) Here, the guards observed defendant place store merchandise in bags and pass the check stand without paying and they were close enough to get from the security office to the vestibule in time to intercept defendant before she left the store.

began to walk away. As [the guard] attempted to detain him, defendant pulled out a knife, swung it at [the guard], and threatened to kill [him]. [The guard], who was unarmed, returned to the store for help." (*Ibid*.) On appeal, defendant argued that "the merchandise was not taken from the 'immediate presence' of the security guard." (*Id*. at p. 27.) The court rejected this argument, stating, "The evidence establishes that appellant forcibly resisted the security guard's efforts to retake the property and used that force to remove the items from the guard's immediate presence. By preventing the guard from regaining control over the merchandise, defendant is held to have taken the property as if the guard had actual possession of the goods in the first instance. [Citation.] [¶] . . . A robbery is not completed at the moment the robber obtains possession of the stolen property. The crime of robbery includes the element of asportation, the robber's escape with the loot being considered as important in the commission of the crime as gaining possession of the property. . . . [A] robbery occurs when defendant uses force or fear in resisting attempts to regain the property or in attempting to remove the property from the owner's immediate presence regardless of the means by which defendant originally acquired the property." (*Id.* at pp. 27-28.) Subsequently, in *Miller v. Superior Court* (2004) 115 Cal.App.4th 216, 222 (*Miller*) the court, relying on *Estes*, *supra*, 147 Cal.App.3d 23, confirmed that while "[t]raditionally, the 'immediate presence' requirement has been described as relating to the 'gaining possession' element of the taking rather than the 'carrying away' element of a robbery charge," "subsequent authority establishes that the victim's presence after the taking is in progress is sufficient to establish the immediate presence element of a robbery charge."

Defendant argues that *Estes* was overruled by the California Supreme Court in *People v. Cooper* (1991) 53 Cal.3d 1158 (*Cooper*). In *Cooper*, in the course of deciding that one is an aider and abettor of a robbery if he forms the intent to facilitate the robbery and does so during the "carrying away of the loot to a place of temporary safety" (*id.* at p. 1161, italics omitted), the court stated that the "immediate presence" requirement "relate[s] to the 'gaining possession' component of the taking as distinct from the 'carrying away' component" (*id.* at p. 1166). In *Miller, supra,* 115 Cal.App.4th at

page 223, a majority of the court expressly rejected the argument that the Supreme Court in *Cooper* overruled *Estes* "to the extent *Estes* concludes the element of 'immediate presence' can be satisfied by a victim's presence during a defendant's asporting or carrying away of property." The majority explained that "although *Cooper* described the immediate presence element of a robbery charge as relating to the 'gaining possession' element of the taking rather than the 'carrying away' element [citation], the opinion did not overrule or disapprove of *Estes* in any respect, but rather cites *Estes* with approval." (*Miller*, *supra*, at pp. 223-224.)[3] We agree. Since a robbery involves conduct continuing from the initial taking until the property reaches a place of temporary safety, using force or fear to prevent the victim from regaining possession before temporary safety has been achieved satisfies the immediate presence required for the commission of a robbery. As the court noted in *Miller*, "in light of the widespread acceptance of the analysis of *Estes* and the fact that the California Supreme Court has not criticized or overruled *Estes* in the 20 years since that decision issued, we do not believe that our opinion expresses a change in the law, but instead reflects the current state of the law on the issue of what is sufficient to establish the immediate presence element of a robbery charge." (*Miller, supra,* at p. 224.) Accordingly, defendant's robbery convictions must be upheld.[4]

3. *The judgment must be remanded for resentencing*.

Defendant contends the trial court imposed the upper term on her robbery conviction in violation of *Blakely, supra*, 542 U.S. 296 and *Cunningham, supra,* 546 U.S.___ [127 S.Ct. 856]. The trial court explained its sentencing decision as follows: "The court will select count 2, the first of the robbery counts, as the principal terms and

---

[3] The statement in *Cooper* to which the *Miller* court cited points out that "a long line of Court of Appeal cases, left undisturbed by this court, hold[s] that mere theft becomes robbery if the perpetrator, having gained possession of the property without use of force or fear, resorts to force or fear while carrying away the loot." (*Cooper, supra,* 53 Cal.3d at p. 1165, fn. 8.)

[4] We note that similar issues are currently pending review before the California Supreme Court. (*People v. Gomez* (2005) 134 Cal .App.4th 1241, review granted March

will impose the aggravated term relying on various criteria in [California Rules of Court,[5]] rule 4.421, circumstances in aggravation, including (a), (a)(1), the crime involved great violence, great bodily harm, and threat of great bodily harm or other acts disclosing a high degree of cruelty, viciousness, or callousness; (2), the defendant was armed with or used a weapon at the time of the commission of the crime; (a)(8), the manner in which the crime was carried out indicates planning, sophistication, or professionalism. The fact that you entered the store with foil-lined bags I think certainly shows planning and some professionalism. [¶] And, most importantly, the circumstances described in (b)(1) and (2), the defendant has engaged in violent conduct which indicates a serious danger to society; and (2), the defendant's prior convictions . . . are numerous or of increasing seriousness. I think that clearly applies here and warrants the upper term."

Defendant objected to the sentence on the ground that imposition of the upper term on these facts not found by the jury or admitted by defendant violated *Blakely.* The court disagreed, stating, "[T]he California Supreme Court has spoken on that issue and finds no *Blakely* problem in California. Ultimately, it will be for the United States Supreme Court to decide. [¶] But, I want to point out for the record in finding aggravated circumstances on the upper term as relating to the crime as I indicated but also facts relating to the defendant, including her prior record of convictions, and in the court's view, the facts relating to the defendant are actually more serious and more aggravating than those relating to the facts of this case. And even under *Blakely* and Federal law, the factors that the court announced in—under rule 4.421 (b)(1) and (b)(2) fully support an aggravated term under the federal Constitution. And this court so explicitly makes a factual finding with regard to the preeminent facts in (b)(1) and (b)(2) and on which it is relying."

22, 2006, S140612, and *People v. Johnson* (2006) 141 Cal.App.4th 1161, review granted November 15, 2006, S146207.)

5 All rule references are to the California Rules of Court.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), the United States Supreme Court held, "Other than the fact of 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." (*Id*. at p. 490.) *Blakely* held that "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Blakely, supra*, 542 U.S. at p. 303, italics omitted.) In *Cunningham*, the court held that under California's determinant sentencing scheme the upper term can be imposed only if the factors relied upon comport with the requirements of *Apprendi* and *Blakely*. (*Cunningham, supra*, 546 U.S. ___ [127 S.Ct. 856].) *Blakely* describes three types of facts that a trial judge may properly use to impose an aggravated sentence: (a) "the fact of a prior conviction" (*Blakely, supra,* 542 U.S. at p. 301); (b) "facts reflected in the jury verdict" (*id*. at p. 303, italics omitted); and (c) facts "admitted by the defendant" (*ibid*., italics omitted).

As we now know, in *Cunningham, supra,* 546 U.S. ___ [127 S.Ct. 856], the United States Supreme Court overruled the decision of the California Supreme Court in *People v. Black* (2005) 35 Cal.4th 1238, 1244, which had upheld California sentencing laws. Under *Cunningham*, the trial court's consideration of the factors relating to the crime listed in subdivision (a) of rule 4.421 was improper. The Attorney General argues, however, that the court's reliance on the recidivism factors reflected in subdivision (b) of rule 4.421 was permissible and sufficient to support defendant's sentence. The Attorney General also argues that in light of the evidence in this case, any error in relying on the impermissible factors was harmless beyond a reasonable doubt. (*Washington v. Recuenco* (2006) ___ U.S. ___ [126 S.Ct. 2546, 2551-2553] [denial of jury trial on sentencing factor subject to review for prejudice].)

The fact of a prior conviction, or a defendant's "recidivism," is a sentencing factor unrelated to the commission of the charged offense which the United States Supreme Court has reaffirmed may be considered without an admission or jury finding. The prior convictions on which it is based result from proceedings in which the defendant was

already afforded substantial constitutional protections. (*Cunningham, supra*, 546 U.S. at p. __ [127 S.Ct. at p. 860]; *Blakely, supra*, 542 U.S. at p. 301; *Apprendi, supra*, 530 U.S. at pp. 487-488; *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 243-244.) California and other jurisdictions have held that the recidivism exception to the jury trial right established by *Apprendi* and *Blakely* applies not only to the precise fact of a prior conviction but also to other factors that necessarily follow from the prior conviction, such as being on probation or parole at the time of the instant offense. (*People v. McGee* (2006) 38 Cal.4th 682, 695-709; *People v. Abercrombie* (2007) ___ Cal.App.4th ___ [2007 WL 1532807, p. *5]; *People v. Thomas* (2001) 91 Cal.App.4th 212, 215-223.) In *People v. McGee, supra,* 38 Cal.4th at pages 707 and 709, the court explained that *Apprendi* does not preclude a court from making sentencing determinations related to a defendant's recidivism because the required inquiry contemplates only "the examination of court records pertaining to a defendant's prior conviction to determine the nature or basis of the conviction—a task to which *Apprendi* did not speak and [which is] 'the type of inquiry that judges traditionally perform as part of the sentencing function.' " (Italics omitted.) The scope of this exception, however, is not yet settled.[6]

Here, in response to defendant's *Blakely* objection, the trial court expressly stated that two "recidivism factors" on which it was relying were sufficient to support the imposition of the upper term without consideration of other factors. This explanation adequately eliminated any question of prejudice from the court's reference to crime-related factors listed in subdivision (a) of rule 4.421. However, we do not believe that both of the rule 4.421, subdivision (b) factors on which the court relied are beyond the scope of *Apprendi* and *Blakely.* The two factors to which the trial court referred are that

---

[6] This issue is among those now pending in the California Supreme Court. (E.g., *People v. Hernandez* (2006) 2006 WL 3325604, review granted Feb. 7, 2007, S148974.) The Supreme Court has previously rejected defendant's arguments that there is no valid prior conviction exception, and that any such exception must be narrowly construed. (*People v. McGee, supra,* 38 Cal.4th at pp. 695-709.) Until we receive further direction from our high court, we are bound by existing precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

the defendant has engaged in violent conduct which indicates a serious danger to society (rule 4.421(b)(1)) and that the defendant's prior convictions are numerous or of increasing seriousness (rule 4.421(b)(2)). The Attorney General acknowledges implicitly that the finding that defendant engaged in violent conduct indicating a serious danger to society is a not recidivist factor that can be applied without additional fact-finding. However, he argues that the jury's finding that defendant robbed the victims by use of force or fear is sufficient to support application of this factor. A factor in aggravation, however, must have the effect of making a crime " ' "distinctively worse than the ordinary" ' " (*People v. Webber* (1991) 228 Cal.App.3d 1146, 1169), and a fact that is an element of a crime or that is essential to a jury's determination of guilt may not be used to impose the upper term (*Cunningham, supra*, 546 U.S. at p. ___ [127 S.Ct. at p. 868]; see also rule 4.420(d)). Hence, the trial court improperly considered this factor in imposing the upper term.[7]

The second factor on which the court relied may have been properly considered without a jury finding or admission by the defendant. Rule 4.421(b)(2) specifies as a factor in aggravation that "[t]he defendant's prior convictions . . . are numerous or of increasing seriousness." This factor is stated in the alternative. While there may be some subjectivity in determining how many convictions it takes to be "numerous," the determination turns on no factual issues and would seem more appropriately treated as a question of law. In addition to the present offense, defendant was previously convicted of two misdemeanors and two felonies. Five convictions, we think it safe to say, are numerous. Moreover, the felonies were preceded by the misdemeanors. And defendant's first felony conviction was for possession of cocaine base for sale (Health & Saf. Code, § 11351), for which the sentencing range is two, three or four years in state prison, while

---

[7] We also reject the Attorney General's argument that consideration of this factor was harmless beyond a reasonable doubt because if this factor had been submitted to the jury, it unquestionably would have been found to be true. While a jury might reasonably have so found, we cannot conclude beyond a reasonable doubt that a jury necessarily would have done so.

the sentencing range on defendant's present robbery conviction is two, three or five years (§ 212.5, 213, subd. (a)(2).) Hence, defendant's offenses have been of increasing seriousness.

While one permissible recidivism factor is sufficient to support an upper term sentence (*People v. Osband* (1996) 13 Cal.4th 622, 728-729 [single aggravating circumstance is sufficient to render defendant eligible for the upper term]), we cannot agree with the Attorney General that this renders the trial court's reliance on an impermissible factor necessarily harmless error. The trial judge here made clear that he considered the two factors relating to defendant sufficient to justify the upper term, but he did not say, and we cannot know beyond a reasonable doubt, that he would reach the same conclusion based only upon the single factor he was permitted to consider. (*Chapman v. California* (1967) 386 U.S. 18.) We have no choice but to remand so that the trial court may exercise its discretion in selecting the proper sentence in light of the permissible recidivism factor (assuming that the district attorney does not seek to prove additional factors before a jury).

DISPOSITION

Defendant's conviction is affirmed, the sentence is vacated, and the matter is remanded to the trial court for resentencing in accordance with the views expressed

_____
Pollak, J.

We concur:

_____
Parrilli, Acting P. J.

_____
Siggins, J.