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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

AMBER JACKSON,

Defendant and Appellant.

D047769

(Super. Ct. No. SCD 185923)

APPEAL from a judgment of the Superior Court of San Diego County, Robert F. O'Neill, Judge. Affirmed in part, reversed in part, and remanded for further proceedings.

I.

INTRODUCTION

Appellant Amber Jackson appeals from a judgment of conviction and sentence. Jackson was convicted of aggravated mayhem (Pen. Code,¹ § 205; count 1) and assault

¹ Further statutory references are to the Penal Code unless otherwise indicated.

by means of force likely to cause great bodily injury (§ 245, subd. (a)(1); count 2). The jury also found true the allegation that Jackson personally inflicted great bodily injury in violation of section 12022.7, subdivision (a). The allegations arose from an incident in which Jackson threw scalding oil on her sister, Stephanie.

Jackson raises four arguments on appeal. Jackson first contends that the trial court improperly instructed the jury with regard to defense counsel's reference in opening statements to a remark made by a witness suggesting that Jackson's case was a "three strikes" case. Jackson also maintains that the trial court improperly allowed a paramedic to testify about statements Stephanie made to the paramedic as Stephanie was being transported to the hospital. According to Jackson, the prosecutor failed to disclose to the defense the statements Stephanie made to the paramedic, despite the fact that the prosecutor learned about the statements at least a day before the prosecutor called the paramedic as a witness. Jackson next claims that the trial court abused its discretion in restricting the scope of her cross-examination of Stephanie. Finally, Jackson contends that the trial court erred in sentencing her to the upper terms on count 2, assault, and on a child abduction conviction in a separate case.²

² Jackson had pled guilty to child abduction in a prior case and was released from custody "on bail, and on her own recognizance" pending sentencing at the time she committed the current offenses. In a supplemental brief filed on appeal, Jackson challenges the imposition of an upper term sentence for the child abduction conviction. However, Jackson has not appealed from her conviction or sentence in that case. We therefore do not address her argument pertaining to that case. Jackson may be able to challenge that sentence by way of petition for writ of habeas corpus.

We conclude that the trial court did not err in admonishing the jury with regard to defense counsel's reference to "three strikes," that the court erred in allowing the prosecutor to elicit testimony about statements that were not disclosed to the defense, but that this error did not prejudice Jackson, and that the trial court did not abuse its discretion in restricting the scope of defense counsel's cross-examination of Stephanie. We therefore affirm Jackson's convictions.

With regard to Jackson's contention that the trial court violated her constitutional rights by sentencing her to the upper term for assault, we agree. The trial court improperly imposed a sentence based on facts that were neither found by the jury nor admitted by Jackson, in violation of *Cunningham v. California* (2007) 549 U.S. ____ [127 S.Ct. 856] (*Cunningham*). The upper term sentence for assault must therefore be vacated. We remand the case for resentencing.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Procedural background*

On December 6, 2004, Jackson was charged with aggravated mayhem and assault by means of force likely to cause great bodily injury. The information also alleged that (1) Jackson personally inflicted great bodily injury during the commission of the assault, (2) Jackson committed the offense while she was released from custody on her own recognizance pending final judgment on an earlier felony offense, and (3) Jackson had suffered a prior strike conviction within the meaning of sections 667, subdivisions (b) through (i) and 1170.12.

A jury trial commenced on October 25, 2005. The jury found Jackson guilty on both counts and found true the allegation that Jackson personally inflicted great bodily injury. Jackson admitted that she had suffered a prior strike and that she was out on bail at the time she committed the instant offenses.³

On December 16, 2005, in case No. SCD185923, the trial court sentenced Jackson on count 1 to prison for life with the possibility of parole, plus two years for the enhancement for being on bail at the time of the offense, and to the upper term (four years, stayed) on count 2. In case No. SCD181527, the child abduction case, the court imposed an upper term of eight years (four years, doubled), to run consecutive to the life sentence in case No. SCD185923.

Jackson filed a timely notice of appeal in case No. SCD185923 only, on December 22, 2005.

B. *Factual background*

1. *The prosecution's case*

The prosecution contended that Jackson intentionally threw a cup of boiling hot oil on her 15-year-old sister Stephanie on September 27, 2004. Approximately two weeks before this incident, Stephanie and Jackson had had an argument about Jackson wearing Stephanie's jacket without Stephanie's permission. Jackson suggested that the two fight, and a physical altercation ensued. Later, while Stephanie was taking a shower, Jackson stole Stephanie's purse and jacket.

³ These allegations were bifurcated prior to trial.

On the day of the hot oil incident, Stephanie was in her bedroom when Jackson approached Stephanie and said, "You have a pretty face, but beauty doesn't last forever." Stephanie was not particularly concerned about that comment, because she and Jackson "weren't getting along anyway."

Jackson later knocked on the door to Stephanie's bedroom. When Stephanie opened the door, she saw Jackson holding a cup of hot oil. Jackson said, "I'll give you a chance to apologize for stealing my weed." Stephanie replied, "I'm not apologizing to you." Jackson then threw the hot oil on Stephanie. Stephanie turned away, and the oil splashed on the left side of her body.

After Jackson threw the oil on Stephanie, Jackson ran out the front door of the house. Teresa, a friend of Stephanie's, and Alex, one of Jackson and Stephanie's sisters, came to help Stephanie. Stephanie took off her clothes and jumped into the shower to try to get the oil off of her. When Stephanie got out of the shower, she put on a t-shirt and wrapped herself in a towel.

Earlier that day, while Teresa was at Jackson and Stephanie's home, Teresa heard Jackson tell Stephanie that Stephanie's face was pretty, but that prettiness doesn't last forever. At some point, Teresa decided to go to the store. As Teresa was leaving the Jackson residence to go to the store, she saw Jackson in the kitchen cooking with hot oil. Teresa then left for the store. When she returned approximately five or 10 minutes later, Teresa heard Stephanie screaming and saw Jackson leaving the apartment, walking fast. Teresa went into Stephanie's bedroom and saw oil "everywhere in the room." Stephanie

was crying and screaming, and Teresa could see that Stephanie's skin was bubbling.

Teresa called for Stephanie's sisters, Alex and Olivia.

Earlier, Olivia had seen Jackson heating up a pan of oil. Olivia then went to take a shower. While she was in the shower, she heard screams and crashes. After Olivia got out of the shower, Alex told her that Jackson had thrown hot oil on Stephanie. Olivia saw Stephanie screaming and crying, and trying frantically to get the oil off of her skin. Olivia called 911.

Approximately 10 minutes later, an ambulance arrived. Olivia rode with Stephanie in the ambulance to the hospital. Stephanie was upset and appeared to be in pain. A paramedic gave Stephanie morphine for the pain.

When Stephanie arrived at the hospital, she was placed in a room for treatment and later admitted to the hospital. The next day, police officers came into Stephanie's hospital room to question her and Olivia, and to take pictures of Stephanie's burns. Stephanie suffered burns over about seven percent of her body. Most of the burns were deep, second-degree burns. Hospital personnel continued to administer pain medication to Stephanie. After approximately a week in the hospital, Stephanie underwent skin graft surgery. Stephanie sustained permanent scars from her burns.

2. *The defense*

Jackson's defense was that she had accidentally spilled the hot oil on Stephanie when Stephanie grabbed Jackson while Jackson was holding the cup of hot oil. According to Jackson, the hot oil had begun to melt the cup and started to burn her finger, and that is when she accidentally spilled the oil on Stephanie. Jackson said that she had intended to throw the oil out of the window in Stephanie's room, into a trash pile. Jackson claimed that she never intended to maim or disfigure her sister.

Jackson also challenged the credibility of other witnesses. For instance, in an attempt to impeach Teresa, Jackson pointed out that Teresa never told police that she had heard Jackson make the "prettiness doesn't last forever" comment to Stephanie.

III.

DISCUSSION

A. *The three strikes issue*

1. *Background*

During his opening statement, Jackson's attorney told the jury three times that Stephanie had said, referring to Jackson, "I want to kill her. I want her dead. I want her in jail for the rest of her life. This will be her third strike. I want her gone forever." The People did not object to these statements. A conviction on the charged offense would *not* have been Jackson's third strike.

Later that day, the trial court discussed the references to a third strike that defense counsel had made during his opening statement. The People argued that the jury should be instructed that a conviction in this case would not constitute a third strike for Jackson.

Jackson's attorney took the position that if the court were to instruct the jury that this case was not a third strike case, this instruction would contradict the instruction that the jury is not to consider the potential punishment for the crime. Defense counsel further asserted that instructing the jury that the case was not a third strike case would be misleading in the sense that although the case did not involve a third strike, which the jury could presume would involve a lengthy sentence, Jackson was nevertheless facing a mandatory life sentence for aggravated mayhem. Defense counsel was concerned that the jury would erroneously infer from the court's proposed instruction that Jackson was not facing severe punishment because she was not facing a third strike, and that the jury would thus be more inclined to convict.

After hearing counsel's arguments, the court admonished the jury that, "Remarks in opening statement referenced a third strike. This is not a third strike case," and also instructed the jury with CALJIC No. 17.42.⁴ Defense counsel and the prosecutor ultimately agreed to the wording of the trial court's admonition.

On October 27, 2005, during a discussion concerning jury instructions, Jackson's attorney asked the court to further admonish the jury with the statement: "The issue of whether this case qualifies as a third strike, one strike, or no strike is not for the jury to decide." The following colloquy then occurred:

"The Court: That's what you want me to give?"

⁴ The trial court instructed the jury as follows: "[T]here is a jury instruction which I'll read to you at this point in time. It's called CALJIC 17.42, jury must not consider penalty, noncapital case. In your deliberations do not discuss or consider the subject of penalty or punishment. That subject must not in any way affect your verdict."

"Mr. Funk: Yes, Your Honor, that's because of what happened in the opening statement and the court's actual instruction.

"The Court: Which counsel stipulated to.

"Mr. Funk: I did, but upon further reflection, I think it tips the balance unfairly toward the People.

"The Court: Okay. All right. So you want me to state when I read 17.42, 'The issue of whether this case is a' – should say 'qualifies as a third strike, one strike, or no strike is not for the jury to decide.' And Ms. Santana?

"Ms. Santana: Your Honor, I oppose. We covered that already. We already read the instruction and we took care of it. The only reason this became a problem is because counsel's statement at opening left the inference this was a third-strike case, which was improper. [¶] Other than that, the jury is not to speculate. That's why they are told, 'You are not to speculate. And the punishment is not up to you to decide.' So that's more than sufficient. [¶] If we start highlighting, it is almost like saying, 'Wink, wink, it is.' And I don't think that's proper. And it is not fair that be done. I think that's why we have that jury instruction. . . ."

After considering the issue, the court concluded that the prior admonition, in conjunction with CALJIC No. 17.42, had been proper, and that it was sufficient to cure any harm:

"So based on all that and the Court's previous admonition—it was given on Tuesday, October 25th, in the afternoon. And that admonition is, I quote, 'This morning there were remarks in the opening statement reference to a third strike. This is not a third strike case. There was a jury instruction which I'll read to you at this point in time. It's called CALJIC 17.42. "'A jury must not consider penalty in a non-capital case and in deliberation do not discuss or

consider the subject of penalty or punishment. That subject must not in any way affect your verdict." [¶] That instruction was given. Counsel both agreed to it. And I consider the issue to have been resolved. And I'll deny the request for a—subsequent request for an additional instruction based on that."

The trial court did not instruct the jury further regarding the three strikes issue.

2. *Analysis*

Jackson contends that the trial court erred in instructing the jurors that they were not deciding a "three strikes case." According to Jackson, the court's instruction suggested to the jury that the potential punishment for the crimes charged was not severe, when in fact Jackson was facing a sentence of life in prison if convicted.

The People assert that Jackson should be "barred from asserting error" in this regard because it was defense counsel who initially raised the issue of strikes in front of the jury, and also because defense counsel affirmatively agreed to the admonition the court gave. Jackson responds that her trial counsel objected to the court's admonition, and that the record suggests that although defense counsel eventually did acquiesce to the trial court's admonition, that acquiescence came only after lengthy discussion of the issue during which defense counsel voiced his objections. Regardless of whether Jackson invited the alleged error⁵ or waived her right to challenge the error, we conclude that there is no merit to her argument.

⁵ At trial, the prosecutor suggested that defense counsel's use of Stephanie's statement was "improper," apparently because the statement referred to the issue of three strikes. As a point of clarification, however, defense counsel's reference to the "three strikes" issue was not improper in this context. Although counsel and the court should not refer to issues of potential punishment in front of the jury, that is not what occurred

Jackson contends that by admonishing the jury that "this case is not a third strike case," the trial judge implied that Jackson was not facing a life sentence, when she was in fact facing a life sentence. Jackson also contends that by telling the jury that the case was "not a third strike case," the court directly contradicted its instruction to the jury that it was not to consider punishment at all.

The combined instructions to the jury—i.e. that the case was "not a third strike case" together with the instruction that the jury was not to consider penalty or punishment in reaching a verdict—were accurate statements of the law. It was within the trial court's discretion to inform the jury that this was not a third strike case, to correct the misimpression the jury may have had as a result of the remarks defense counsel made during his opening statement. Further, the instruction did not necessarily weigh only in the prosecution's favor, as Jackson suggests. It is possible that upon learning that the case was not a three strikes case, the jury could have viewed Jackson in a more favorable light than it might have if the court had not given the corrective instructions. The court's instructions did not unfairly prejudice Jackson.

here. Defense counsel raised the three strikes issue only to introduce it as a prior statement made by a witness, not to suggest that it was in any way true or that the jury should consider the punishment Jackson could potentially face if convicted. Specifically, defense counsel was quoting Stephanie's statement in an attempt to establish Jackson's defense that Stephanie was fabricating certain aspects of the story out of anger toward Jackson and a desire to cause Jackson harm. Defense counsel was not suggesting to the jury that the case involved strikes, and the statement was not automatically impermissible simply because it involved a reference to three strikes. However, the court's attempt to cure any potential problem caused by defense counsel's reference to three strikes by admonishing the jury, was proper.

Jackson also argues that the court erred in failing to instruct the jury again, at the end of the trial, regarding the three strikes issue. During discussions regarding jury instructions, defense counsel requested that the court instruct the jury as follows: "The issue of whether this case qualifies as a third strike, one strike, or no strike is not for the jury to decide." The court declined to raise the issue of three strikes again with the jury. This was not error. The court had previously instructed and admonished the jury on that point, and was not required to give another instruction on a matter it had addressed earlier. (See *People v. Smith* (2003) 30 Cal.4th 581, 638 [court's refusal to give instruction was proper because prior instructions "fully explained the applicable law"].) The trial court's earlier admonition properly cured any potential misperception the jury may have had.

B. *The admission of the paramedic's testimony about Stephanie's statements was error, but did not unfairly prejudice Jackson*

1. *Background*

On October 25, during the People's case-in-chief, the prosecutor called as a witness Kimberly Rose, a paramedic who assisted in transporting Stephanie to the hospital after the hot oil incident. During direct examination of Rose, the prosecutor asked Rose what Stephanie had said to Rose about what had occurred that day. Defense counsel objected to this inquiry on the ground that the prosecution had provided no discovery regarding any statements Stephanie made to Rose, and that use of such statements at trial would thus violate Jackson's due process rights. The prosecutor responded that she had learned that Stephanie made statements to Rose only the day

before Rose was called to testify, and that the information was not contained in any report because paramedics do not create the same kind of reports that police officers do.⁶

Defense counsel informed the court that he had asked the prosecutor whether Rose was going to testify about any statements Stephanie had made, and that the prosecutor told him there would be no such testimony. The prosecutor denied having been asked "if there was [*sic*] any statements being made." The trial court overruled the objection, stating, "She's not a police officer, she's a firefighter/paramedic, and counsel has represented there's no report generated, so she's testifying from her recollection. You can cross-examine her, so the objection is overruled."

In response to the question whether Stephanie had said anything to Rose, Rose testified that Stephanie "said that her sister said something on the level of: You aren't going to have a pretty face anymore, and threw oil on her." Rose said that although she had not memorialized Stephanie's statement in her report,⁷ she remembered what Stephanie had said because Rose's brother was a burn victim, and Rose was extremely passionate about burn cases. On cross-examination, Rose indicated that she had

⁶ When asked when she had spoken with Rose, the prosecutor responded, "I think either last night or I don't remember exactly. It was not this morning. It was probably last night or yesterday afternoon sometime." Defense counsel noted, "She [Rose] was put on the witness list last week." The prosecutor said, "Yes, but I hadn't had a chance to talk to her and she wasn't interviewed by a cop."

⁷ Although the prosecutor had represented to the court that Rose had created no report regarding this incident, on cross-examination, Rose stated that she had created a report about the incident, but that she had not given the report to the prosecutor.

discussed with the prosecutor her recollection of what Stephanie had told her sometime during the prior week.

On October 27, 2005, defense counsel filed a motion for a mistrial, or, in the alternative, to strike Rose's testimony regarding Stephanie's statement. Counsel argued that a mistrial was required because Jackson's defense was that Stephanie had fabricated her story about Jackson saying that "beauty doesn't last," after the incident, and after Stephanie had had time to reflect. Counsel argued that Rose's testimony concerning the statement Stephanie allegedly made to Rose in the ambulance immediately after the incident was thus extremely prejudicial to Jackson's defense. Jackson's counsel maintained that the prosecution's failure to inform defense counsel of the statement prior to eliciting it from Rose, and the trial court's denial of Jackson's request for a continuance at the time the testimony was elicited, violated Jackson's right to due process and required a mistrial. The trial court denied the motion for a mistrial and also denied the request to strike Rose's testimony about what Stephanie had said.

2. *Analysis*

Jackson contends that the trial court erred in refusing to grant her motion for a mistrial, and that the court also erred in denying her requests for a continuance and to strike Rose's testimony regarding what Stephanie said to Rose while Stephanie was being transported to the hospital after the incident. According to Jackson, the prosecutor failed to disclose the statement Stephanie made to Rose before Rose took the stand to testify at trial, despite the fact that the prosecutor knew about the statement at least the day before Rose testified, and possibly up to a week prior to Rose's testimony.

Although the People assert in a single sentence that there was "no discovery violation," the majority of the People's argument focuses on whether Jackson suffered any prejudice as a result of a possible violation.

The prosecutor clearly had a duty disclose Rose's relevant statements to the defense immediately upon learning of the statements. The failure to do so constitutes a discovery violation.⁸ However, the trial court's admission of Rose's testimony regarding what Stephanie said while she was being transported to the hospital did not unfairly prejudice Jackson.

The standard for determining prejudice as to a claim that evidence was erroneously admitted is that articulated in *People v. Watson* (1956) 46 Cal.2d 818, i.e., whether it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error. (*People v. Champion* (1995) 9 Cal.4th

⁸ While the prosecutor may not have willfully withheld this information from the defense, regardless of the prosecutor's intent, she failed to fulfill her duty to disclose. Section 1054.1 requires that a prosecuting attorney disclose to the defendant "[r]elevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial . . ." (§ 1054.1, subd. (f).) Section 1054.7 establishes that at any time within 30 days of trial, disclosure is required immediately upon the discovery of material information: "The disclosures required under this chapter shall be made at least 30 days prior to the trial If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why disclosure should be denied, restricted, or deferred. 'Good cause' is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement."

Courts have interpreted the statutes as imposing on both the prosecution and defense a continuing duty to disclose to the other party relevant *oral* statements made to them by witnesses they intend to call to trial as well as statements that have been reduced to writing. (*Roland v. Superior Court* (2004) 124 Cal.App.4th 154, 166-168.)

879, 919, disapproved of on other grounds in *People v. Ray* (1996) 13 Cal.4th 313, 369, fn. 2 (conc. opn. of George, C.J.)) This same standard applies when the error complained of is the admission of evidence that was not disclosed to the defense: "[T]o prevail on a contention made on appeal from a judgment of conviction on the grounds of violation of the pretrial discovery right of a defendant, the defendant must establish that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different." [Citations.]" (*People v. Bohannon* (2000) 82 Cal.App.4th 798, 806-807.)

Jackson contends that the admission of Rose's testimony was particularly harmful to her defense because Jackson's attorney told the jury during his opening statement that the evidence would show that Stephanie had not told anyone about the "pretty face" comment at or near the time she claims Jackson made the remark, but rather, that she mentioned the remark only after she had been treated at the hospital. Jackson's defense was that Stephanie had fabricated the statement after she had had time to reflect, because she wanted Jackson to receive a life sentence. Jackson complains that Rose's testimony constituted an unfair surprise because it completely undermined Jackson's theory of the case. According to Jackson, Rose's testimony on this subject "was the primary, and in essence, the only real evidence that appellant had the specific intent to maim or disfigure Stephanie"

Contrary to Jackson's assertions, Rose was *not* the only witness who testified about the "pretty face" comment Jackson made to Stephanie earlier on the day of the incident. She thus did not provide "the only real evidence that [Jackson] had the specific

intent to maim or disfigure Stephanie." Teresa independently testified that on the day of the incident, before Jackson threw the hot oil on Stephanie, Teresa heard Jackson tell Stephanie "that Stephanie's face was pretty, but prettiness doesn't last forever." This testimony corroborated what Stephanie said to Rose in the ambulance, and was also consistent with what Stephanie told two police officers the day after the incident, which was the first time she was interviewed.

In light of Teresa's testimony and the testimony establishing that Stephanie told two police officers about Jackson's comment the day after the incident, it is not reasonably probable that the result of the proceedings would have been different if the prosecutor had disclosed to the defense Rose's statement concerning what Stephanie said on the way to the hospital, prior to Rose being called as a witness.

C. *The court did not abuse its discretion when it restricted the scope of Jackson's cross-examination of Stephanie*

1. *Background*

On October 31, 2005, Jackson requested that the trial court allow her to reopen the defense case in order to recall Stephanie. Jackson wanted to cross-examine Stephanie about specific incidents Jackson contended were relevant to establish that Stephanie was not credible. Specifically, Jackson wanted to ask Stephanie about Stephanie's admissions that she had stolen clothes and a ring from another individual in her foster home, an incident in which Stephanie was absent from public school without approval, and an occasion on which Stephanie had lied about having in her possession a razor blade for shaving eyebrows. These incidents were identified in a report written on April 23, 2002

and maintained by San Diego County Department of Health and Human Services in a file on the Jackson family. Jackson's attorney was first notified about the existence of the report on the Friday before Jackson made the motion to reopen her defense. Jackson also sought to question Stephanie about an incident in which Stephanie had lied about playing music on a stereo that was hidden under some steps, because she was not supposed to have the stereo turned on.

The trial court denied Jackson's request to reopen her defense and cross-examine Stephanie about these incidents. The court concluded that the information was collateral and not sufficiently relevant, and that it should be excluded pursuant to Evidence Code section 352.

2. *Analysis*

Jackson contends that the trial court improperly limited her ability to cross-examine Stephanie regarding issues that pertained to Stephanie's credibility.

"In general, the trial court is vested with wide discretion in determining relevance and in weighing the prejudicial effect of proffered evidence against its probative value. Its rulings will not be overturned on appeal in the absence of an abuse of that discretion. [Citations.] This discretion is not, however, unlimited, especially when its exercise hampers the ability of the defense to present evidence. While the trial judge has broad discretion to control the ultimate scope of cross-examination, wide latitude should be given to cross-examination designed to test the credibility of a prosecution witness in a criminal case. [Citation.]" (*People v. Cooper* (1991) 53 Cal.3d 771, 816 (*Cooper*)).

Although exposing a witness's motivation is an important part of the right of cross-examination, the Confrontation Clause of the Sixth Amendment does not prevent a trial court from imposing some limits on defense counsel's inquiry into a witness's potential bias. (*Cooper, supra*, 53 Cal.3d at pp. 816-817.) "Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. [Citations.] California law is in accord. [Citation.] Thus, unless the defendant can show that the prohibited cross-examination would have produced 'a significantly different impression of [the witnesses'] credibility' [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment. [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 946.) Under these standards, we conclude that the trial court did not err in denying Jackson's request to reopen the defense case to allow further cross-examination of Stephanie.

The trial court concluded that the incidents about which defense counsel wanted to question Stephanie involved collateral issues, and that to the extent any of the issues were relevant, the testimony would be cumulative to testimony defense counsel had already elicited from Stephanie on cross-examination. The court stated,

"I'll deny the motion. It's cumulative. It's collateral. You've had an adequate chance to attempt to impeach the complaining witness. I already gave you wide latitude. She admitted on the stand that she had lied before. So you've had an adequate opportunity to present the criteria under believability of a witness to the jury panel. And I gave you latitude to go into the prior events that Ms. Santana strongly argued were not relative—or not relevant."

The trial court was reasonable in concluding that the proffered subjects of cross-examination were not relevant to the question of Jackson's guilt or to Stephanie's veracity about what had occurred on the day of the incident, and that the proposed cross-examination would be cumulative to testimony the defense had already elicited from Stephanie. Stephanie had acknowledged during her testimony that she had lied in the past, and admitted to having lied to a nurse so that she could leave the hospital without being discharged. The jury was also aware of the fact that Stephanie had been in foster care, and that she had run away without permission because she did not like the rules she had to follow in foster care. Defense counsel had cross-examined Stephanie about these incidents. Because these issues had been raised and addressed, the specifics of the additional incidents about which defense counsel proposed to cross-examine Stephanie were, at best, only minimally relevant to the issue of whether Stephanie's testimony was credible.

Further, Jackson has not shown that "the prohibited cross-examination would have produced 'a significantly different impression of [the witness's] credibility.' [Citation]" (*People v. Frye, supra*, 18 Cal.4th at p. 946.) Stephanie had admitted that she had been dishonest in the past, and at least one other witness corroborated Stephanie's testimony about Jackson having made the "pretty face" comment. The facts concerning additional incidents of Stephanie's past dishonest behavior would have added little, if anything, to the jury's impression of Stephanie's credibility. The trial court's exercise of its discretion in denying Jackson's request to reopen the defense case to cross-examine Stephanie about these minor incidents did not violate the Sixth Amendment. (*Ibid.*)

D. *The trial court's imposition of the upper term for assault constitutes reversible error*

Jackson contends that the trial court erred in sentencing her to the upper term for her conviction for assault because the factors the court relied on in imposing the upper term were not proved to a jury or admitted by Jackson. After the parties had briefed the issue on appeal, the United States Supreme Court issued its opinion in *Cunningham, supra*, 127 S.Ct. 856, in which the court held that the imposition of an upper term sentence under California's determinate sentencing law, based on neither a prior conviction nor facts found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments of the United States Constitution:

"California's determinate sentencing law (DSL) assigns to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence. The facts so found are neither inherent in the jury's verdict nor embraced by the defendant's plea, and they need only be established by a preponderance of the evidence, not beyond a reasonable doubt. The question presented is whether the DSL, by placing sentence-elevating factfinding within the judge's province, violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments. We hold that it does." (*Cunningham, supra*, 127 S.Ct. at p. 860.)

The *Cunningham* court reasoned:

"As this Court's decisions instruct, the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) [*Apprendi*]; *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) [*Ring*]; *Blakely* [, *supra*,] 542 U.S. 296; *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) [*Booker*]. '[T]he relevant "statutory maximum, "'this Court has clarified, 'is not the maximum sentence a

judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.' *Blakely*, 542 U.S., at 303-304, 124 S.Ct. 2531 (emphasis in original)." (*Cunningham, supra*, 127 S.Ct. at p. 860.)

The *Cunningham* court reversed the defendant's upper term sentence because "the four-year elevation based on judicial factfinding denied petitioner his right to a jury trial." (*Cunningham, supra*, 127 S.Ct. at p. 860.)⁹

As a result of the United States Supreme Court's decision in *Cunningham*, this court issued a miscellaneous order permitting defendants whose appeals had already been briefed to submit supplemental briefing on the effect of *Cunningham*. Jackson filed a supplemental brief in compliance with this court's miscellaneous order, and the Attorney General filed a response.

⁹ In response to *Cunningham*, the Legislature recently passed an amendment to the DSL, which was signed into law by the Governor on March 30, 2007. (See § 1170, as amended by Stats. 2007, ch 3, § 2.) The act became effective immediately upon its signing. (Stats. 2007, ch. 3, § 7 ["This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect."].) The Legislature amended section 1170 to give trial courts full discretion to impose the lower, middle, or upper term sentence, effectively increasing the "statutory maximum" from the middle term to the upper term. (Compare § 1170, subd. (b), as amended by Stats. 2007, ch. 3, § 2 ["When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court"] with former § 1170, subd. (b) ["When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime"].) At the time Jackson was sentenced, the new law was not yet in effect. In our discussion, we consider the state of the law as it existed at the time of Jackson's sentencing.

1. *Additional factual background*

The court imposed an upper term of four years (stayed) on count 2 in the current case. With respect to factors in aggravation and mitigation, the court's only comment was that it was incorporating the evaluation done by the probation officer in assessing the factors in aggravation and mitigation to determine Jackson's sentence on count 2. The probation report listed three factors in aggravation: (1) that the crime involved great violence and a high degree of cruelty and viciousness, (2) that the crime involved planning, in that Jackson boiled the oil before she threw it on Stephanie, and (3) that Jackson "has engaged in violent conduct, which indicates a serious danger to society," in that she had suffered a prior true finding that she attacked her father, and that she had been convicted of abducting her child, whom she endangered by refusing to provide him with the prescription formula he needed. The report listed the fact that Jackson's "prior performance on juvenile probation was satisfactory" as a possible circumstance in mitigation.

2. *Analysis*

a. *Jackson has not forfeited her claim of error*

The Attorney General asserts that Jackson has forfeited her claim by failing to "object under *Apprendi*, *Blakely*, or the right to a jury trial." Although defense counsel did not raise a *Blakely* objection at sentencing, we conclude that Jackson is not precluded from asserting this argument on appeal. Prior to Jackson's sentencing, in *People v. Black* (2005) 35 Cal.4th 1238, certiorari granted, judgment vacated, and cause remanded *sub nom.* (*Black v. California* (2007) ____ U.S. ____ [127 S.Ct. 1210] (*Black*), the

California Supreme Court analyzed *Apprendi*, *Blakely* and *Booker* and concluded that the imposition of an upper term sentence under California law was constitutional. (*Black*, *supra*, 35 Cal.4th at pp. 1244, 1254, 1261.) In light of *Black*, any objection Jackson would have made at sentencing based on *Blakely*, *Apprendi*, or the United States Constitution would have been futile. Additionally, a defendant is not precluded from asserting on appeal that she was denied her constitutional right to a jury trial, despite her failure to raise the issue in the trial court. (*People v. Saunders* (1993) 5 Cal.4th 580, 589, fn. 5.) We conclude that Jackson's challenge to her upper term sentences is cognizable on appeal despite her failure to raise the issue in the trial court.

b. *The trial court committed reversible error under Cunningham in imposing a sentence for assault that exceeds the middle term*

In this case, the trial court imposed an upper term sentence for assault (count 2) based on facts that were neither found by the jury nor admitted by Jackson. The People contend that the court relied on at least one permissible factor to impose the upper sentence, and that the presence of a single permissible circumstance in aggravation is sufficient to authorize the imposition of an upper term sentence. The People further contend that even if the trial court erred in utilizing impermissible aggravating factors to impose an upper term sentence, any *Cunningham* error was harmless because the jury would have found the aggravating circumstances true beyond a reasonable doubt. We reject these contentions.

- i. *None of the aggravating factors on which the trial court relied is a constitutionally permissible ground for exceeding the statutory maximum*

As to two of the three factors on which the trial court relied in imposing the upper term on count 2, the People do not argue that they provided a constitutionally permissible basis for exceeding the statutory maximum midterm sentence. The trial court's use of the fact that Jackson's crime involved great violence and a high degree of cruelty and viciousness, and the fact that the crime involved advance planning to impose an upper term sentence, violated *Blakely*, since these factors were neither found by a jury nor admitted by Jackson. (See *Cunningham, supra*, 127 S.Ct. at p. 860.) However, the People contend that it was permissible for the trial court to rely on its findings regarding Jackson's recidivism, and specifically, Jackson's "lengthy criminal record, including for robbery and battery on an officer," to impose the upper term.

The findings pertaining to Jackson's recidivism on which the court relied to impose the upper term on count 2 were those noted in the probation report's list of circumstances in aggravation. Those circumstances did not include Jackson's "lengthy criminal record," nor did the report mention her prior convictions for robbery or battery of a police officer as circumstances in aggravation. Rather, the only circumstance listed in the probation report as a factor in aggravation that is arguably related to recidivistic behavior is that "[t]he defendant has engaged in violent conduct, which indicates a serious danger to society, in that she has a prior true finding wherein she attacked her father; she had a prior child abduction conviction wherein she took her child from foster care," and that she refused to tell authorities where her child was located despite the

child's need for prescription formula. We thus analyze the People's argument with reference to the aggravating factor on which the court actually relied, not "the recidivism facts that appellant had a lengthy criminal record, including for robbery and battery on an officer," as the People urge.

The People note that under *Almendarez-Torres v. United States* (1998) 523 U.S. 224 (*Almendarez-Torres*), a court may impose a sentence that exceeds the statutory maximum, on the basis of a defendant's prior conviction. The People contend that courts have construed the "*Almendarez-Torres* exception" to apply broadly, encompassing more than the mere fact of a prior conviction. Specifically, the People maintain that *Almendarez-Torres* applies to the "recidivism factors" upon which the trial court relied in part in imposing an upper term sentence in this case.

Prior to *Cunningham*, courts, including the California Supreme Court, had construed the *Almendarez-Torres* exception to apply to more than the fact of a prior conviction. (See e.g. *People v. Thomas* (2001) 91 Cal.App.4th 212, 221 [agreeing with "courts [that] have held that no jury trial right exists on matters involving the more broadly framed issue of 'recidivism'"]; *People v. McGee* (2006) 38 Cal.4th 682, 708 [concluding Court of Appeal erred in "narrowly constru[ing] the *Almendarez-Torres* exception for recidivist conduct as preserved by *Apprendi*"]; accord *Black, supra*, 35 Cal.4th at p. 1269 [construing *Apprendi* and its progeny to apply only to "offense-based facts"] (conc. & dis. opn of Kennard, J.).)

However, in *Cunningham*, the United States Supreme Court clarified the narrow scope of the *Almendarez-Torres* exception, and rejected the notion that factors that

pertain to a defendant's recidivism need not be proven to a jury. In his dissent in *Cunningham*, Justice Kennedy wrote:

"The Court could distinguish between sentencing enhancements based on the nature of the offense, where the *Apprendi* principle would apply, and sentencing enhancements based on the nature of the offender, where it would not. California attempted to make this initial distinction. Compare Cal. Rules of Court 4.421(a) (Criminal Cases) (West 2006) (listing aggravating "[f]acts relating to the crime"), with Rule 4.421(b) (listing aggravating "[f]acts relating to the defendant"). The Court should not foreclose its efforts." (*Cunningham, supra*, 127 S.Ct. at p. 872 (dis. opn. of Kennedy, J).)

Nearly all of the "facts relating to the defendant" that Justice Kennedy mentions, to which rule 4.421(b) refers, are recidivism related factors. Rule 4.421(b) provides:

"Facts relating to the defendant include the fact that:

"(1) The defendant has engaged in violent conduct that indicates a serious danger to society;

"(2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness;

"(3) The defendant has served a prior prison term;

"(4) The defendant was on probation or parole when the crime was committed; and

"(5) The defendant's prior performance on probation or parole was unsatisfactory."

The *Cunningham* majority concluded that, pursuant to *Apprendi*'s "'bright-line rule'" (*Cunningham, supra*, 127 S.Ct. at p. 869, quoting *Blakely, supra*, 542 U.S. at p. 308), such factors are subject to *Apprendi*'s jury trial requirement:

"Justice KENNEDY urges a distinction between facts concerning the offense, where *Apprendi* would apply, and facts concerning the

offender, where it would not. *Post*, at 872 (dissenting opinion). *Apprendi* itself, however, leaves no room for the bifurcated approach Justice KENNEDY proposes. See 530 U.S., at 490, 120 S.Ct. 2348 ('[A]ny 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.' (emphasis added))." (*Cunningham*, *supra*, 127 S.Ct. at p. 869, fn. 14, quoting *Apprendi*.)

In addition, prior to issuing its decision in *Cunningham*, the United States Supreme Court had repeatedly described the exception provided in *Almendarez-Torres* as "narrow" (*Apprendi*, *supra*, 530 U.S. at p. 489), so as to *exclude* recidivism related factors from the scope of that exception. (*Booker*, *supra*, 543 U.S. at p. 244 ["[W]e reaffirm our holding in *Apprendi*: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt"]; *Blakely*, *supra*, 542 U.S. at p. 301 [stating that case requires court to "apply the rule we expressed in [*Apprendi*]: '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'"]; *Ring*, *supra*, 536 U.S. at p. 597, fn. 4 (*Ring*) [describing *Almendarez-Torres* as holding "that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence"].)

There is nothing in *Booker*, *Blakely*, or *Ring* that would warrant expanding *Almendarez-Torres*'s "exceptional departure" (*Apprendi*, *supra*, 530 U.S. at p. 487) from the "historic practice" outlined in *Apprendi*, which prohibits the imposition of a term of punishment greater than that authorized by the jury's verdict. (*Apprendi*, *supra*, 530 U.S.

at p. 487.) Accordingly, we conclude that the United States Supreme Court's statement that, "[e]xcept 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), means that courts may consider as an aggravating factor for purposes of sentencing only the fact of the defendant having incurred a prior conviction, and not other factors related to the defendant's prior convictions.

Further, many of the reasons the Supreme Court offered in *Apprendi* for distinguishing *Almendarez-Torres* and identifying the basis for the *Almendarez-Torres* exception do not apply to the recidivism related factors present in this case. (See *Apprendi, supra*, 530 U.S. at p. 488 ["Both the certainty that procedural safeguards attached to any 'fact' of prior conviction, and the reality that *Almendarez-Torres* did not challenge the accuracy of that 'fact' in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range"].) Unlike the bare, and admitted, prior convictions at issue in *Almendarez-Torres*, Jackson has not admitted the recidivism related aggravating facts the court utilized to impose an upper term sentence for assault in this case (i.e., that she "has engaged in violent conduct, which indicates a serious danger to society" in that she has a prior true finding about an attack on her father and a prior child abduction conviction), and no jury has determined that Jackson has engaged in "violent conduct" that indicates that she is a serious danger to society.

Because the recidivism related aggravating facts on which the trial court relied are more than the fact of a prior conviction, and because they were neither found by a jury nor admitted by Jackson, we conclude that the trial court improperly relied on these factors in imposing an upper term sentence.

- ii. *The fact that there is evidence in the record that would provide a constitutionally permissible ground for exceeding the middle term does not authorize the imposition of an upper term sentence*

The People maintain that although *Cunningham* "generally precludes a trial court from finding facts to impose an upper term sentence, and . . . holds that the middle term is the statutory maximum," there are still aggravating factors, such as those related to recidivism, on which a court may base an upper term sentence even without a jury finding. The People argue that where the record establishes the existence of any aggravating factor that constitutes a constitutionally permissible ground for imposing an upper term sentence, the imposition of an upper term is not error under *Cunningham*. The People maintain that because a single aggravating circumstance is sufficient to render a defendant *eligible* for an upper term under California law, imposition of the upper term is constitutionally permissible in all such cases, irrespective of the particular factors on which the trial court actually relied in imposing an upper term. The People contend, "[A] trial court's finding of a single aggravating circumstance based on the defendant's criminal history falls within the recidivism exception to the jury trial requirement and is sufficient to authorize the imposition of an upper term sentence under the Sixth Amendment."

The People's argument is premised on the proposition that under the DSL at the time Jackson was sentenced, the upper term was the statutory maximum in all cases in which a single constitutionally permissible aggravating factor existed. (See *Black, supra*, 35 Cal.4th at p. 1269 ["[T]he jury's findings pertaining to defendant's probation eligibility, and the trial court's findings pertaining to defendant's criminal record, were each sufficient to satisfy this statutory requirement [that there be at least one aggravating circumstance], *thereby making the upper term the statutory maximum for the offense*," italics added] (conc. & dis. opn of Kennard, J.)) However, as *Cunningham* makes clear, the statutory maximum under the DSL, prior to enactment of the amendment, was *always* the middle term. (*Cunningham, supra*, 127 S.Ct. at p. 868 ["In accord with *Blakely*, therefore, the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum"].) This is because facts inherent in a jury's verdict, a defendant's admission, or a defendant's prior conviction, were never sufficient under the DSL to authorize an upper term sentence. Rather, the DSL required that the trial court find that such facts constitute a circumstance in aggravation before the court could impose an upper term. (*Cunningham, supra*, 127 S.Ct. at p. 862 ["In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when *the court* itself finds and places on the record facts — whether related to the offense or the offender — beyond the elements of the charged offense," italics added].) This judicial fact-finding is precisely what *Cunningham* prohibits.

Prior to the March 30, 2007 amendment to section 1170, the existence of a prior conviction, or the existence of a fact found by the jury or admitted by the defendant upon which the trial court was authorized under the DSL to impose an aggravated term, *did not* raise the statutory maximum. Rather, in such a case, the trial court was authorized to sentence a defendant *beyond* the statutory maximum and impose an upper term sentence. (*Cunningham, supra*, 127 S.Ct. at p. 868 ["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,' italics added].) For this reason, we disagree with the People's suggestion that prior to the recent amendment to section 1170, the upper term was the statutory maximum whenever the record reflected the existence of a single constitutionally permissible aggravating factor. Further, as *Cunningham* also made clear, under the DSL prior to its amendment, a court could exceed the statutory maximum only on the basis of a prior conviction, or facts found by the jury or admitted by the defendant. (*Cunningham, supra*, 127 S.Ct. at p. 860 ["As this Court's decisions instruct, the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant"].)

iii.. *The error requires reversal*

The People contend that any *Cunningham* error in this case was harmless. We disagree.

In *Washington v. Recuenco* (2006) 548 U.S. ____ [126 S.Ct. 2546, 2549]

(*Recuenco*), the United States Supreme Court considered whether a court's imposition of an enhanced sentence on the basis of a fact not found by the jury, in violation of *Blakely*, constitutes structural error necessitating automatic reversal. The *Recuenco* court held that "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error." (*Recuenco, supra*, 126 S.Ct. at p. 2553.) Rather, a reviewing court must determine whether the prosecution can establish beyond a reasonable doubt that the jury would have found the fact supporting the enhanced sentence if it had been asked to do so. (*Id.* at pp. 2550-2552, citing *Chapman v. California* (1967) 386 U.S. 18 and *Neder v. United States* (1999) 527 U.S. 1.) Because *Cunningham* is merely an application of the holding in *Blakely* to California's DSL, we conclude that *Recuenco* governs our determination of whether the supporting facts on which the trial court relied would have been found by the jury.

The People claim that the jury would have found that Jackson's crime was "vicious and cruel," and that Jackson had a lengthy criminal history.¹⁰ The People assert that as long as the jury "would have found at least one of the aggravating circumstances true beyond a reasonable doubt, the prejudice inquiry ends and the reviewing court must deem the *Cunningham* error not prejudicial" because the existence of one fact "that *authorizes*

¹⁰ Again, the trial court did not rely on Jackson's "lengthy" criminal history as an aggravating factor supporting its decision to impose the upper term, as the People suggest. Rather, the only recidivism related factor on which the court relied to impose the upper term was that Jackson had engaged in "violent conduct," which included attacking her father and abducting her child from foster care.

the imposition of, or makes the defendant *eligible* for, the increased sentence" is sufficient to raise the statutory maximum to the upper term.

We disagree with the People's assertion that under the DSL prior to the amendment, the existence of one fact authorizing the court to impose an increased sentence raised the statutory maximum to the upper term, for the same reasons we rejected this argument in part III.D.2.b.ii., *ante*. Rather, we conclude that in order to establish that Jackson suffered no harm by the court's error, the People must establish beyond a reasonable doubt either (a) that a jury would have found true all of the aggravating circumstances on which the court relied, beyond a reasonable doubt, or (b) in the case where the People have failed to establish beyond a reasonable doubt that a jury would have found true beyond a reasonable doubt *all* of the aggravating circumstances on which the court relied, that the trial court would have exercised its discretion to impose the upper term based only on those aggravating circumstances the jury would have found true beyond a reasonable doubt. We conclude that the People have not established either that the jury would have found all of the factors true beyond a reasonable doubt, or that the trial court would have imposed the upper term based on less than all three of the aggravating factors.

First, the People have not attempted to establish that there was any procedure by which the jury could have considered and made findings of fact to support the aggravating factors the court used to justify the upper term. In *Recuenco, supra*, 126 S.Ct. at page 2550, the Supreme Court strongly suggested that the absence of a procedure by which a jury could make findings about the factors utilized by the judge would likely

render a *Blakely* error prejudicial: "If respondent is correct that Washington law does not provide for a procedure by which his jury could have made a finding pertaining to his possession of a firearm, that merely suggests that respondent will be able to demonstrate that the *Blakely* violation in this particular case was not harmless. [Citation.]"¹¹ We conclude that the *Blakely* violation in this case cannot be deemed harmless because the People have not identified any provision of California law that would have allowed the jury to make findings of fact regarding the three aggravating factors on which the trial court relied in sentencing Jackson to the upper term.

Even assuming that the lack of any procedure by which the jury could have made findings about the aggravating factors is insufficient to establish that Jackson was prejudiced by the court's error, we nevertheless reach the same conclusion because the People have not established beyond a reasonable doubt that a jury would have found true beyond a reasonable doubt facts to support all three of the aggravating factors on which the court relied. Specifically, we cannot determine that a jury would have concluded that this crime "involved great violence, and acts disclosing a high degree of cruelty and viciousness" as the probation report asserts. Jackson was convicted of aggravated mayhem, an offense that inherently involves violence and cruelty to another. Section 205

¹¹ The *Recuenco* court did not have to decide the issue, however, because that question was not before the court: "The correctness of respondent's interpretation of Washington law [as not providing a procedure for a jury to determine whether he was armed with a firearm], however, is not determinative of the question that the Supreme Court of Washington decided and on which we granted review, i.e., whether *Blakely* error can ever be deemed harmless." (*Recuenco, supra*, 126 S.Ct. at p. 2550.)

provides in relevant part that, "[a] person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body." We cannot conclude that the jury would have viewed Jackson's crime as more violent, more cruel or more vicious than other crimes of this nature, or that it would have had any basis to make such a finding. The People have thus not established beyond a reasonable doubt that the jury would have found true all of the facts necessary to support all of the aggravating factors on which the trial court based its decision to impose the upper term.

The People do not argue that this court can determine beyond a reasonable doubt that the trial court would have imposed an upper term solely on the basis of any single aggravating factor or combination of factors involving facts the jury could have found beyond a reasonable doubt. In this case, we have determined that the People cannot establish beyond a reasonable doubt that the jury would have found true certain facts to support at least one of the three aggravating factors used to justify imposition of the upper term. Therefore, in order to demonstrate that this error was harmless, the People must establish not only that the trial court *could* have imposed the upper term on the basis of the remaining two factors,¹² but that the trial court *would* have imposed the upper

¹² We assume for purposes of this argument that the People can establish that a jury would have found true beyond a reasonable doubt facts supporting the remaining two aggravating factors listed in the probation report, on which the court relied.

term in the absence of all three factors on which the court relied in the first instance. The People do not maintain that the trial court would have imposed the upper term based on anything less than all three of the factors it cited to justify the upper term. In light of the fact that the trial court found a mitigating factor that weighed against imposition of the upper term, we cannot conclude that the trial court would necessarily have imposed the upper term based solely on the two aggravating factors that we assume, for argument's sake, the jury would have found true beyond a reasonable doubt.

Because the People have failed to establish beyond a reasonable doubt that the trial court would have imposed an upper term sentence solely on the basis of constitutionally permissible aggravating factors, we conclude that the *Cunningham* error requires reversal of the upper term sentence imposed on count 2. The matter is remanded to the trial court for resentencing. The trial court should have the opportunity to exercise its discretion to impose a sentence it believes is appropriate, given the requirements of *Blakely*, *Booker*, and *Cunningham*.

IV.

DISPOSITION

The convictions are affirmed. The judgment is reversed as to the upper term sentence on count 2. The sentence is vacated and the case is remanded for resentencing.

AARON, J.

I CONCUR:

McINTYRE, J.

HUFFMAN, J., concurring.

I concur in both the reasoning and the results in the majority opinion except for the discussion in III.D. of that opinion. As to the discussion in III.D., I concur only in the result.

In this case the trial court imposed an upper term sentence based on the factors set forth in the probation officer's report. The report offered three factors, two of which the Attorney General concedes are not proper under the analysis of *Cunningham v California* (2007) ___ U.S. ___, 127 S.Ct. 856 (*Cunningham*). The third factor, as described in the majority opinion, is a recidivism-related factor. It does not, however, rely on the fact of prior convictions, thus the majority properly concludes the trial court erred in relying on that factor because it does not involve prior convictions within the meaning of *Almendarez-Torres v. United States* (1998) 523 U.S. 224. I would end the discussion at that point. Instead the majority labors through an extensive discussion of the scope of the *Almendarez-Torres* exception in light of the various opinions in *Cunningham*. The California Supreme Court has granted review in a host of cases to attempt to reconcile California sentencing law with the Sixth Amendment mandates applied by *Cunningham*.

We are not called on in this case to examine the scope of the *Almendarez-Torres* exception as it applies to recidivist sentencing factors, thus the analysis of the potential scope of the recidivist exception to the right to jury trial on factors which increase punishment beyond that prescribed by legislatures is unnecessary and unwarranted.

I agree the sentencing error should not be deemed waived on this record, and I agree the record does not support a finding of harmless error as to the selection of the

upper term sentence. That said, I agree with the conclusion reached by the majority that this case must be remanded for resentencing. Hopefully, by the time the case is resentenced our Supreme Court will have rendered its opinions on the application of *Cunningham, supra*, 127 S.Ct. 856, to our statutes. Those opinions will provide adequate guidance to the trial court. Further guidance by this court is unnecessary.

Accordingly I concur only in the result as to section III.D. of the majority opinion.

HUFFMAN, Acting P. J.