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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. RICO LAMAR LITTLE, Defendant and Appellant.	D048452 (Super. Ct. No. SCD191845)

APPEAL from a judgment of the Superior Court of San Diego County, Janet I. Kintner, Judge. Affirmed in part and reversed in part.

A jury convicted Rico Lamar Little of two counts of assault with force likely to produce great bodily injury against Patrick Malone and Freddie D. McNew in violation of Penal Code[1] section 245, subdivision (a)(1) (counts 1 and 6) and two counts of battery with serious bodily injury against the same in violation of section 243, subdivision (d) (counts 2 and 5). The jury also found true the two allegations as to counts 1 and 6

regarding Little's personal infliction of great bodily injury in violation of section 12022.7, subdivision (a).

Little was sentenced to a total of nine years in state prison. He received the upper term of four years for the assault against Malone (count 1) based on judicial findings regarding: (1) the viciousness of the crime (Cal. Rules of Court,[2] rule 4.421(a)(1)), (2) the vulnerability of the victim (rule 4.421(a)(3)), (3) the threat to society posed by Little (rule 4.421(b)(1)), (4) Little's prior convictions (rule 4.421(b)(2)), (5) Little's probationary status at the time of the commission of the crime (rule 4.421(b)(4)), and (6) Little's unsatisfactory prior performance on probation (rule 4.421(b)(5)). Little was also sentenced consecutively to (1) one year, one-third the midterm, for the assault on McNew (count 6), and (2) three years and one year, respectively, for the personal infliction of great bodily injury allegations against Malone and McNew. The court stayed Little's sentences for the battery convictions (counts 2 and 5) under section 654.

Little contends (1) the court violated his federal and state constitutional rights to confront the witness against him at trial when it found that the prosecution exercised due diligence in its efforts to produce Malone, an unavailable witness due to military deployment, and allowed Malone's preliminary hearing testimony to be read to the jury; and (2) the court violated his federal constitutional rights to a jury trial and proof beyond a reasonable doubt, under *Blakely v. Washington* (2004) 542 U.S. 296 and *Cunningham v.*

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1 All further statutory references are to the Penal Code.

2 All further rule references are to the California Rules of Court.

California (2007) __ U.S. __ [127 S.Ct. 856] (*Cunningham*) when he was sentenced to the upper term on count 1 based on aggravating factors found by the court. We reverse the upper term sentence for the assault on Malone because Little was denied his federal constitutional rights to a jury trial and proof beyond a reasonable doubt by the imposition of the upper term on the basis of judicial factfinding. We otherwise affirm the judgment and remand the matter for further proceedings not inconsistent with this opinion.

FACTUAL BACKGROUND

A. *The People's Case*

At approximately 1:00 p.m. on June 28, 2005, McNew, a disabled college student who has a clubfoot and scoliosis of the spine, was waiting for a light to change at an intersection in downtown San Diego with his friend Ricardo Mosley. McNew heard a man state, "This is what you get." McNew turned toward the man and was hit on the right side of his face by the man's right hand on which there was a hard sort of cast. McNew fell into the street and landed on his face. The man, who McNew later identified in a photographic lineup as Little, kicked McNew's face and right foot. Little also patted McNew's pockets looking for his wallet. Little stated, in reference to McNew, "I'm going to kill you motherfucker."

During the attack, 90-year-old Ann Depento was told by Little to "shut up." Depento, who either fell or was struck by Little, required stitches to close a gash on her hand. The attack on McNew stopped when Mosley interfered and Little overheard that the police had been called.

McNew was initially in the hospital for a week. He suffered a broken foot and has twice had facial reconstructive surgery. A plastic surgeon surgically implanted a metal plate and approximately 10 screws in McNew's face and McNew remains physically scarred from the procedures. McNew did not know Little.

Around 3:00 p.m. the same day, Little attacked Malone, a sailor in the United States Navy, while he was talking on his cell phone and walking a few blocks from the location of the McNew incident. Malone's next memory was of waking up in the hospital. He did not know the identity of his attacker.

Lauren Boyd, Rachel Rose, and Michael Gurney witnessed the attack. The witnesses testified they saw Little, who they all positively identified in a curbside lineup, kick Malone repeatedly "full force" in the head and chest and jump on Malone's head with both feet. They testified that Malone attempted to shield his face with his hands. After the attack, Little casually walked in the direction of the trolley tracks.

The witnesses to Malone's attack then helped Malone. Malone told Rose that he did not know what had happened to him and asked her why Little had attacked him. Malone could not tell Paul Schwenn, a responding officer, what had happened to him. Testimony from the witnesses and Schwenn revealed that Malone (1) had suffered injuries to his face, knee, and arm; (2) did not remember the attack; (3) had difficulty standing and walking after the attack; (4) had pain in his head and neck; and (5) could not remember paramedics asking him two questions that were asked to test his memory. Malone was transported to the hospital on a stretcher. As a result of the attack, Malone

suffered major headaches and has had problems chewing. He was on sick leave for four days and on limited duty for the Navy for two weeks.

Officer Steve Holliday responded to information called into the San Diego Police Department that the suspect in Malone's attack had boarded a specific bus. Holliday detained Little when he got off of the bus because Little matched the suspect's description. Once detained, Little told Holliday that Malone had attempted to hit him and that he hit Malone in response once and kicked his head when he was on the ground. Holliday did not observe, and photographs of Little did not reveal, any injuries on Little. Little did have some type of cast on his right arm.

Little was advised of and chose to waive his *Miranda*[3] rights. In an interview by San Diego Police Detective Dawn Wolfe, Little stated that "White K" was plotting against him to make him gay and that Malone was one of those who wanted him to be gay. Little stated that he had recently been in several fights because of this conspiracy to make him gay. Little repeatedly told Wolfe that he was the best fighter in the world. Little also stated that Malone, who was accompanied by a Black male who was never identified, told Little, "You need to be a fag," to which Little responded, "Fuck you, I'm nobody's fag." Malone then attempted to hit Little but ran off when he missed. Little then beat up the unidentified Black male and chased after Malone. Little stated that he punched Malone in the jaw and kicked him twice in the head. Little told Wolfe that he was angry with Malone and wanted to "finish him off."

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3 *Miranda v. Arizona* (1966) 384 U.S. 436.

B. *The Defense*

Little testified he was listening to music on his headphones when Malone pushed him into McNew. McNew fell into the street and as a result of this accidental impact sustained all of his previously described injuries. Mosley then attempted to engage Little in a fight but Little did not respond. Little testified that he never touched Depento and that when he first noticed her she was already on the ground. Little observed Malone standing with clenched fists and left the area because he thought he was going to be "jumped."

Little then testified that later that afternoon he again encountered Malone. Malone approached Little with both fists clenched and said, "You are the fool who jumped me the other day, huh?" Malone then hit Little in the mouth breaking a tooth. Little responded by punching Malone in the face, tripping him, and kicking him in the stomach and buttocks because Malone was fighting back and trying to get up. Little decided to leave because he saw Gurney, who he believed to be Malone's friend, approach him. Before he left he heard Malone tell him "Fag, you need to be a fag." Little denied telling Officer Wolfe (1) about the "White K" conspiracy to make him gay; (2) of his fighting prowess; and (3) that he had kicked Malone in the face and head.

DISCUSSION

A. *Preliminary Hearing Testimony*

Little first contends the court violated his federal and state constitutional rights by allowing Malone's preliminary hearing testimony to be read to the jury. Specifically, he contends that the court erred in finding that Malone was unavailable because the

prosecution did not exercise due diligence to secure his attendance at trial by placing him on standby for the week following the start of the trial. This contention is unavailing.

1. *Background*

The trial in this case was to start on Friday, February 24, 2006, but was trailed to the following Monday on the stipulation of both parties. Malone was personally served with a subpoena on February 22 by Patricia Sanchez-Valdez, a field specialist with the district attorney's office, and was to appear in court on February 24, the anticipated trial date. Phone messages made by Malone to the prosecutor formerly responsible for this case indicate that Malone had appeared on this date. Specifically, Malone stated, "It's 9:40, I guess it's not happening today. I'm going now. You guys call me later." It is not clear whether Malone was placed on a standby arrangement.

On Monday, February 27, 2006, a jury was sworn in and the prosecutor, David Grapilon, stated in his opening statement that Malone would testify. On Tuesday, February 28, Rodney Tucker, a process server, was sent to locate Malone at a Navy base and was informed that Malone's ship, the U.S.S. Rushmore, had been deployed. Tucker was also informed that the information regarding where the ship had been sent and when Malone was expected to return was classified. Later that day, Grapilon informed the judge that Malone had been deployed and requested he be declared unavailable. The defense requested a hearing on the issue of whether the prosecution had exercised due diligence.

At the due diligence hearing, Paul Meyers, the prosecutor formerly assigned to Little's case, testified that Malone had been a cooperative witness in that he was present

at all of the five to seven preliminary hearing dates that had been set for the case and subsequently continued for various reasons on the request of the defense. Malone received notice of these preliminary hearings by way of subpoenas and orders given to him by the judge to appear. The prosecution was given no indication by Malone that he would soon be deployed or otherwise unavailable after the subpoena date. The judge declared Malone unavailable and allowed his preliminary testimony to be read to the jury as Malone was subject to cross examination at the preliminary hearing.

2. *Applicable Legal Principles*

The confrontation clauses of both the United States and California Constitutions guarantee criminal defendants the right to confront the witnesses against them. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) However, this right is not absolute. (*Chambers v. Missi*ssippi (1973) 410 U.S. 284, 295.) "An exception exists when a witness is unavailable and, at a previous court proceeding against the same defendant, has given testimony that was subject to cross-examination. Under federal constitutional law, such testimony is admissible if the prosecution shows it made 'a good-faith effort' to obtain the presence of the witness at trial. [Citations.] California allows introduction of the witness's prior recorded testimony if the prosecution has used 'reasonable diligence' (often referred to as due diligence) in its unsuccessful efforts to locate the missing witness. [Citation.]" (*People v. Cromer* (2001) 24 Cal.4th 889, 892.) It is the burden of the proponent of the evidence to prove unavailability and due diligence. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1296.)

We review *de novo* a court's finding of due diligence by the prosecution in its unsuccessful efforts to locate an absent witness to determine the validity of its subsequent declaration of unavailability warranting an exception to a defendant's constitutionally protected right of confrontation at trial. (*People v. Cromer, supra,* 24 Cal.4th at p. 901.) "What constitutes due diligence to secure the presence of a witness depends upon the facts of the individual case. [Citation.] The term is incapable of a mechanical definition. It has been said that the word 'diligence' connotes persevering application, untiring efforts in good earnest, efforts of a substantial character. [Citation.] The totality of efforts of the proponent to achieve presence of the witness must be considered by the court. Prior decisions have taken into consideration not only the character of the proponent's affirmative efforts but such matters as whether he reasonably believed prior to trial that the witness would appear willingly and therefore did not subpoena him when he was available [citation], whether the search was timely begun, and whether the witness would have been produced if reasonable diligence had been exercised [citation]." (*People v. Linder* (1971) 5 Cal.3d 342, 346-347.)

3. *Analysis*

The case of *People v. Benjamin* (1970) 3 Cal.App.3d 687 (*Benjamin*), disapproved on other grounds by *People v. Brigham* (1979) 25 Cal.3d 283, 292, footnote 14, is instructive. In *Benjamin*, the unavailable witness was a Marine who had been deployed to Vietnam and who had never been subpoenaed. (*Benjamin, supra*, 3 Cal.App.3d at p. 696.) There, the court upheld the finding that the witness was unavailable due to his deployment and that due diligence had been exercised even though the search was slight

and began at a late date because prior cooperation of the witness justified the prosecutor's assumption that if he had not been deployed then he would have been available at trial.[4] (*Id.* at pp. 696-698; see also *People v. Cavazos* (1944) 25 Cal.2d 198, 201 [witnesses in the military who had been deployed were outside the jurisdiction of the court and "it would have been an idle act to require further inquiry or search in this state"].)

Here, as in *Benjamin*, Malone was a cooperative witness. He attended the five to seven dates that had been set for the preliminary hearing in this matter that had subsequently been continued for various reasons by the defense. Malone had been subpoenaed and was present on the initial trial date. Telephone calls made by Malone on that day stating that the prosecution should call him later indicate that, had he not been deployed, he would have willingly testified in the matter. The prosecution is not required to undertake all possible efforts to procure attendance and there is nothing in the record to indicate that had the prosecution been aware of Malone's possible deployment and taken additional measures to secure his attendance, Malone would have been able to testify. (See *People v. Lopez* (1998) 64 Cal.App.4th 1122, 1128.) Malone was a willing and cooperative witness; his unavailability in this matter was caused by his deployment and not by any misunderstandings regarding his standby status under the subpoena. We

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[4] Although the Court of Appeal in *Benjamin* stated the trial court did not "abuse its discretion" in declaring the witness unavailable, it in fact conducted an independent review of all the facts and circumstances of the case and did not simply defer to the trial court's finding of due diligence. (See *Benjamin, supra*, 3 Cal.App.3d at pp. 696-699.) Therefore, the court's misapprehension of the correct standard of review is of no moment.

conclude that the court properly declared Malone an unavailable witness and therefore did not err by allowing his preliminary hearing testimony at trial.

B. *Sentencing Error*

Little contends this court must reduce his upper term sentence for the assault on Malone with force likely to produce great bodily injury conviction (count 1) to the middle term sentence of three years because the trial court violated his rights to a jury trial and proof beyond a reasonable doubt when it sentenced him to the upper term based in part on its own factual determinations.[5] In light of the United States Supreme Court's recent decision in *Cunningham, supra*, 127 S.Ct. 856, we conclude the court's imposition of the upper term sentence based in part on impermissible judicial fact finding denied Little of his federal constitutional rights to a jury trial and proof beyond a reasonable doubt. We therefore reverse the sentence on his count 1 conviction and remand this matter for resentencing.

1. *Background*

The sentencing range for assault by means of force likely to produce great bodily injury is two, three, or four years. (§ 245, subd. (a)(1).) At sentencing, Little received the upper term for the assault against Malone because the court found the following aggravating factors to be present: (1) Little's crime involved a "high degree of viciousness" as evidenced in part by the numerous hard kicks to Malone's head; (2)

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[5] Little preserved this issue for appeal when his counsel objected to the use of judicially found aggravating factors at sentencing.

Little's attack on Malone was unprovoked and without warning, rendering Malone particularly vulnerable; (3) Little engaged in violent conduct which indicates he presents a "serious danger to society;" (4) Little has prior convictions for numerous infractions and misdemeanors; (5) Little, who has been granted probation six times in San Diego County, was on probation at the time of the crime's commission; and (6) Little has performed unsatisfactorily on prior grants of probation. Little's defense counsel argued to the court that Little's possible mental disorder was a factor in mitigation.

2. *Legal Principles*

California's determinate sentencing law (DSL) was found by the United States Supreme Court to violate a criminal defendant's federal constitutional rights to a jury trial and proof beyond reasonable doubt to the extent it allowed a judge to find a fact that "exposes a [criminal] defendant to a greater potential sentence" by a mere preponderance of the evidence. (*Cunningham, supra,* 127 S.Ct. at pp. 863-864.) Thus, California's DSL violated the bright line rule in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 that "[o]ther 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."

The Supreme Court of the United States first enunciated the recidivist exception—a judge may find true a prior conviction and accordingly increase the sentencing penalty beyond the prescribed statutory maximum—in *Almendarez-Torres v. U. S.* (1998) 523 U.S. 224, 239-247. It reaffirmed the exception in *Cunningham, supra,* 127 S.Ct. at page 864. This exception is not limited to the mere existence of prior convictions; the court

may "find" true "matters involving the more broadly framed issue of 'recidivism.'" (*People v. Thomas* (2001) 91 Cal.App.4th 212, 221; see also *People v. McGee* (2006) 38 Cal.4th 682, 707 [courts are not precluded from "making sentencing determinations related to a defendant's recidivism"].)

The rationale for the recidivist exception is twofold. First, the finding of recidivist factors has long been treated as falling within the purview of the sentencing court. (See *People v. Thomas, supra,* 91 Cal.App.4th at pp. 215-222.) Second, the court is not required to engage in fact finding beyond a review of written evidence in the record concerning facts not related to the commission of the instant offense. (See *Almendarez-Torres, supra* 523 U.S. at p. 244.) Such written evidence includes information found in abstracts of judgments, probationary reports, and Department of Corrections and Rehabilitation documents which "have the constitutional requisite level of reliability so as to meet any pertinent due process concerns." (*People v. Thomas, supra,* 91 Cal.App.4th at p. 223.)

Thus, when a court increases a criminal defendant's sentencing penalty because of prior convictions, probationary status, or unsatisfactory prior performance on probation, it is making a determination based on recidivist behavior gathered from reliable sources and unrelated to the commission of the instant offense. Therefore, these are facts that can properly be found by a judge within the bounds of the recidivist exception. (See *McGee, supra,* 38 Cal.4th at p. 709 [under the recidivist exception, it was proper for the court to determine whether defendant's Nevada convictions qualified as strikes under California law].)

A single valid aggravating factor is sufficient to justify the court's imposition of an upper term sentence on a criminal defendant. (*People v. Forster* (1994) 29 Cal.App.4th 1746, 1759.) However, when a court considers both properly and improperly judicially found aggravating factors, then the consideration of the improperly found factors must be harmless beyond a reasonable doubt for the sentence to remain valid. (See *Chapman v. California* (1967) 386 U.S. 18, 24.)[6]

3. *Analysis*

It is true that a single aggravating factor, such as Little's prior convictions, his probationary status at the time of the crime's commission, or his poor prior performances on probation, can provide sufficient foundation for a court's determination that the upper term is justified in light of mitigating factors and general sentencing objectives stated in rule 4.410(a).[7] (*People v. Nevill* (1985) 167 Cal.App.3d 198, 202.) However, we cannot say beyond a reasonable doubt that the court would have selected the upper term had it been limited to the consideration of the three recidivist factors — Little's prior convictions for infractions and misdeameanors, his probabtionary status and his poor

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6 Little incorrectly argues that the consideration of improper aggravating factors is a structural error which requires reversal per se. (See *People v. Neal* (2003) 31 Cal.4th 63, 85-86.)

7 General objectives of sentencing include: [¶]"(1) Protecting society; [¶] (2) Punishing the defendant; [¶] (3) Encouraging the defendant to lead a law-abiding life in the future and deterring him or her from future offenses; [¶] (4) Deterring others from criminal conduct by demonstrating its consequences; [¶] (5) Preventing the defendant from committing new crimes by isolating him or her for the period of incarceration; [¶] (6) Securing restitution for the victims of crime; and [¶] (7) Achieving uniformity in sentencing." (Rule 4.410(a).)

prior performances on parole—balanced against the mitigating factor concerning indications that Little suffers from a possible mental disorder.

The record shows the court was especially concerned with the nonrecidivist factors in aggravation when imposing the upper term sentence. The judge stated that "this is a case that just cries out for the upper term" before she described the viciousness of the attack and vulnerability of the victim in detail. Specifically, the judge stated that Little was "jumping on a victim lying on the ground unconscious . . . kicking his head football style numerous times" and that "[b]oth attacks were unprovoked. They had no clue it was coming. Defendant would strike them from behind while they were walking downtown in midday light, in the middle of the day. There was no warning. They had done nothing. They did not know the defendant. They had no contact with him. He just attacked them." In contrast, the court only briefly mentioned the three recidivist factors.

The People argue that any error was harmless beyond a reasonable doubt because the jury, had they the opportunity, would likely have found the aggravating factors true. While it is true that the record has sufficient evidence to warrant such findings by the jury, this determination is a factual one and we cannot properly substitute the jury's likely judgment with our own. We simply cannot conclude beyond a reasonable doubt the jury would have come to this conclusion. Likewise, we cannot dismiss the possibility that the upper term would have been imposed and thus it is not appropriate to simply reduce Little's sentence to the midterm. We therefore remand this matter for resentencing.

DISPOSITION

The court's imposition of an upper term sentence on the assault on Malone by means of force likely to produce great bodily injury is reversed, and we remand this matter for further proceedings not inconsistent with this opinion and *Cunningham, supra,* 127 S.Ct. 856. In all other respects, the judgment is affirmed.

NARES, Acting P. J.

WE CONCUR:

HALLER, J.

IRION, J.