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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ANTONIO LOPEZ LOPEZ, Defendant and Appellant.	H029737 (Monterey County Super. Ct. No. SS052108A)

Defendant Antonio Lopez Lopez appeals from a judgment entered following his conviction on charges of residential burglary (Pen. Code, § 459),[1] and transportation of a controlled substance, methamphetamine (Health & Saf. Code, § 11379, subd. (a)). The court sentenced defendant to seven years in prison; the sentence included an upper term sentence on the burglary conviction.

Defendant contends that the court erred in admitting a statement that he made to police in connection with a prior, unrelated burglary investigation. The statement was obtained through a police interpreter, but his partner, the officer who interrogated defendant in English, was the witness who offered testimony at trial concerning the substance of defendant's prior statement. Defendant contends that this evidence was inadmissible hearsay because it did not meet the "language conduit" test articulated in

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

Correa v. Superior Court (2002) 27 Cal.4th 444 (*Correa*). Further, defendant contends that admission of his prior statement to the police violated his Sixth Amendment confrontation rights under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).

In addition, defendant claims that the court erred in imposing an upper term sentence for the burglary conviction in violation of his Sixth Amendment right to a jury trial and his Fourteenth Amendment right to due process. He claims that under *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), he was entitled to have a jury determine beyond a reasonable doubt any aggravating facts that were used as prerequisites to the imposition of an upper term sentence.

We conclude that the court did not abuse its discretion by its admission of defendant's statement made through a translator under the language conduit theory. Since the translated statement was defendant's own statement, its admission did not violate defendant's constitutional right of confrontation. We find further, based upon a very recent controlling decision of United States Supreme Court (see *Cunningham v. California* (2007) 549 U.S. __ [127 S.Ct. 856] (*Cunningham*)), that there was *Blakely* error. We therefore reverse the judgment and remand for resentencing in light of the holding in *Cunningham*.

FACTS

We present a summary of the evidence from the trial utilizing the applicable standard. We resolve factual conflicts in support of the verdict. (*People v. Holt* (1997) 15 Cal.4th 619, 667-668.)

I. *Prosecution Evidence*

A. *Testimony of Giselle C.*

Giselle C., 14 years old at the time of trial, was at home taking care of her three younger sisters on the morning of July 15, 2005. They heard footsteps on the porch, and Giselle saw a male in a partially constructed room by the porch. Giselle gathered her sisters together, and the four of them went into their parents' room because it had a lock.

She heard multiple (probably more than two) people whispering. The substance of what she heard was, " 'Is someone there?' " Giselle heard this question whispered at least twice.

Several minutes later, Giselle heard car doors slam. About three minutes later, she heard her father ask if she and her sisters were all right. He then ran out. When Giselle came out of the bedroom, she noticed that the television was missing and that "all kinds of stuff [had been] thrown [around] in the living room."

B. *Testimony of Arnoldo Sanchez*

At about 10:00 a.m. on July 15, 2005, Arnoldo Sanchez arrived at his home on Old Stage Road in Monterey County. He observed defendant located about three meters from the front door. Sanchez and defendant got within about one meter of each other, and Sanchez asked, " 'What are you looking for?' " Defendant responded that "they were looking for this man named Lopez." Sanchez saw a minivan parked very close to the house with a woman in the driver's seat and a man dressed as a woman in the middle of the back seat. He also observed that there was a cord dangling out of the back of the van.[2] Sanchez responded to defendant that no one named Lopez lived at the house and that defendant should leave. Defendant said that they were leaving and got into the front passenger seat. Sanchez moved his vehicle in order to allow the minivan to leave.

When Sanchez walked into his house--his front door was ajar--the first thing he noticed was that his television was missing and there were some items dropped on the floor. He called out to his daughters to see if they were all right, and one of them said that they were fine. Sanchez then got into his car with his ranch worker, Nestor Amarillias, to follow the minivan. Sanchez caught up with defendant and his associates approximately two to three miles away, and he began honking to try to get the van to

[2] Sanchez later testified that the cord was the cable to his stolen television set.

stop. Because the van did not stop, Sanchez called the police. He continued to follow defendant; the van stopped about five or six miles from Sanchez's house, the driver and the passenger in the back seat exited, and defendant got into the driver's seat and drove off. Defendant drove the van fast and Sanchez continued the pursuit.

Defendant eventually stopped the van, got out, and started running; he left the engine running. Amarillias chased defendant, while Sanchez continued talking on the phone with the police and describing where the two vehicles were located. After Sanchez saw Amarillias struggling with defendant, he joined the chase; he and Amarillias caught up with defendant and subdued him.

A policeman arrived and arrested defendant. The police recovered from the van Sanchez's television (that had been inside the house). They also recovered from the van various tools that Sanchez used on his ranch (weed whacker, leaf blower, gas can, and tool box) that had been stored on Sanchez's front porch. Sanchez also observed that the police recovered a Marlboro box from defendant's pocket.

C. *Testimony of Deputy Sheriff Anthony Wood*

Deputy Sheriff Anthony Wood with the Monterey County Sheriff's office recovered seven items (i.e., the television, weed whacker, leaf blower, tool box with tools, gas can, hair clipper, and miscellaneous tools) from the minivan defendant was driving. Deputy Wood caused the contents of the Marlboro box from defendant's pocket to be sent to the Department of Justice for analysis. (The parties stipulated at trial that a baggie containing .61 grams of methamphetamine was recovered from this cigarette box.)

D. *Officer Stephen Craig*[3]

Stephen Craig is a Salinas Police Officer. On June 25, 2004, he interviewed defendant (who was then using the name "Jose Martinez") a prowling incident in which defendant had been seen leaving the backyard of a Salinas home on Meadow Drive. Two weeks earlier, defendant had been observed burglarizing a garage at the same location. Officer Craig interviewed defendant with Officer Dagoberto Zubiate, who acted as a Spanish-speaking interpreter.

After being advised of his *Miranda* rights,[4] defendant said that he had been in the backyard looking for a friend of his. Defendant "then changed his story and told [the officers] that he was a mechanic and that he had keys to a vehicle that he was going to be working on in the backyard. And . . . he [then] . . . spontaneously told Officer Zubiate that he didn't go into the garage and didn't steal things[, e]ven though [the officers] hadn't mentioned that at the time [and had] only asked him why he was in the backyard."

II. *Defense Evidence*

Deputy Sheriff Wood, who was called as a witness by the defense, was the lead investigative officer for the case. He did not instruct anyone to obtain fingerprint evidence from Sanchez's residence. Deputy Wood was unable to connect defendant to the registered owner of the minivan.

PROCEDURAL BACKGROUND

By amended information filed on September 19, 2005, defendant was charged with six felony counts, namely, first degree burglary (§ 459, count 1); assault with force likely to produce great bodily injury (§ 245, subd. (a)(1), count 2); transportation of a

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[3] The court ruled after a hearing pursuant to Evidence Code section 402 that Officer Craig's testimony was admissible. This ruling concerning admissibility is challenged by defendant on appeal and is addressed in part II of the Discussion, *post*.

[4] *Miranda v. Arizona* (1966) 384 U.S. 436.

controlled substance (Health & Saf. Code, § 11379, subd. (a), count 3); possession of a controlled substance (*id*., § 11377, subd. (a), count 4); receiving stolen property (§ 496, subd. (a), count 5); and forgery (§ 470, subd. (a), count 6). At the prosecution's request, the court dismissed count 2 before trial.[5] Immediately after announcing the dismissal, the trial judge recited the parties' understanding that no evidence would be presented concerning counts 5 and 6, and that the case would proceed to trial on the burglary charge (count 1), the transportation of a controlled substance charge (count 3), and the controlled substance possession charge (count 4, a lesser included offense to count 3).

Defendant was found guilty after a jury trial of first degree burglary, and of transportation of a controlled substance. The court thereafter sentenced defendant to a total term of seven years in state prison. He was sentenced to the upper term of six years for the first degree burglary conviction, and a consecutive term of one year in prison for the drug transportation conviction (one-third of the middle term). Defendant filed a timely notice of appeal from the judgment.

DISCUSSION

I. *Contentions On Appeal*

Defendant asserts two challenges to the judgment:

1. The court erred by admitting evidence of defendant's statement to the police in connection with a prior investigation because the statement, made through an interpreter, did not satisfy the "language conduit" test articulated in *Correa*, *supra*, 27 Cal.4th 444.

2. The court imposed an upper term sentence for the burglary conviction (§ 118) that was based upon aggravating circumstances that were not part of a jury's factual

[5] The clerk's transcript for proceedings on November 14, 2005, reflect the court's dismissal of "count 3," which is listed under the heading "charges" as the aggravated assault charge. Notwithstanding this conflicting entry, it is clear from the reporter's transcript that it was count 2 that was dismissed.

findings. Under *Blakely*, *supra*, 542 U.S. 296, this sentence violated defendant's right to a jury trial guaranteed under the United States and California Constitutions.

II. *Admission Of Defendant's Statement To Police*

A. *Background*

During the trial, the court conducted a hearing outside of the jury's presence pursuant to Evidence Code 402 (402 hearing)[6] to determine whether it would admit the testimony of Officer Craig concerning his interview of defendant about a prior (2004) incident. The interview was conducted through an interpreter, Officer Zubiate, a former Salinas Police Officer. (The assistant district attorney represented to the court that Officer Zubiate had retired from the force.) Officer Zubiate translated Officer Craig's questions from English to Spanish, and defendant's answers from Spanish to English. Officer Craig testified that he had known Officer Zubiate for approximately three years before he used him as a Spanish-speaking interpreter during his interview of defendant that was the subject of the 402 hearing. He estimated that he had utilized Officer Zubiate as an interpreter approximately 15 to 20 times. Officer Craig testified that Officer Zubiate was a certified interpreter with the police department and that he had been so certified for approximately 10 years.

Officer Craig interviewed defendant about an instance on June 25, 2004, in which defendant was observed exiting the backyard of a residence on Meadow Drive. Defendant "initially told [the police] that he'd gone back there to meet a friend of his. And then he changed his story and said that he'd been given some keys, and he was going

[6] "The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests." (Evid. Code, § 402, subd. (b).) "[T]he purpose of a hearing under Evidence Code section 402 is to decide preliminary questions of fact upon which the admissibility of evidence depends." (*People v. Superior Court* (*Blakely*) (1997) 60 Cal.App.4th 202, 209, fn. 6.)

back there to work on a brown car because he was a mechanic." Officer Craig testified that during the interview, defendant volunteered that "he had not gone into the garage and he didn't steal things or he didn't rob things." (There had been a burglary of the garage at the same location 11 days earlier.) At the time defendant volunteered this statement, the officers had not been talking to defendant about a burglary, but were only asking him about his presence in the backyard of the Meadow Drive home.

After hearing argument from counsel at the 402 hearing, the court ruled that Officer Zubiate was a language conduit for the defendant and that therefore Officer Craig's testimony was admissible.

B. *Discussion of Claim of Error*

1. Correa v. Superior Court

Our evaluation of defendant's claim of error is governed by *Correa*, *supra*, 27 Cal.4th 444. The issue in *Correa* arose through the testimony of police officers concerning statements taken from two Spanish-speaking witnesses through the use of interpreters. The declarants did not testify at the preliminary hearing; the police officers and the interpreters did testify. The Court of Appeal held that the officers' testimony as to the declarants' statements constituted inadmissible multiple hearsay, because the officers were recounting the statements of the interpreters, not those of the declarants. (*Id.* at p. 448.) The Supreme Court reversed, noting that "the weight of recent authority in this and other jurisdictions does not treat the participation of a translator in such circumstances as interposing a layer of hearsay. Rather, a generally unbiased and adequately skilled translator simply serves as a 'language conduit,' so that the translated statement is considered to be the statement of the original declarant, and not that of the translator." (*Ibid.*) Further, although *Correa* concerned the statements of third party witnesses, the Supreme Court observed that the language conduit doctrine had been applied in instances in which the criminal defendant made an admission or confession through an interpreter. (*Id.* at p. 456.)

Correa held that whether the translator's statement will be deemed that of the declarant "calls for a case-by-case determination whether, under the particular circumstances of the case, the translated statement fairly may be considered to be that of the original speaker." (*Correa*, *supra*, 27 Cal.4th at p. 457.) The Supreme Court approved of the "measured approach" (*ibid.*) used by the Ninth Circuit Court of Appeals in *United States v. Nazemian* (9th Cir. 1991) 948 F.2d 522, 525-527 (*Nazemian*), for determining whether the translated statement is deemed one fairly attributable to the speaker. *Nazemian* held that there are " 'a number of factors which may be relevant in determining whether the interpreter's statements should be attributed to the [declarant] . . . , such as which party supplied the interpreter, whether the interpreter had any motive to mislead or distort, the interpreter's qualifications and language skill, and whether actions taken subsequent to the conversation were consistent with the statements as translated.' " (*Correa*, *supra*, at p. 458, quoting *Nazemian*, *supra*, at p. 527.)

The Supreme Court noted, citing with approval *People v. Torres* (1989) 213 Cal.App.3d 1248, that a police officer may testify about the contents of an extrajudicial confession even though it may have been translated from a foreign language unknown to the officer. (*Correa*, *supra*, 27 Cal.4th at p. 461.) The *Correa* court noted: "[A]n experienced officer may provide meaningful assistance by testifying, . . . regarding the context in which the original declaration was made. The officer may explain the circumstances under which the translator was pressed into service, the apparent language skills of the translator, and the potential for bias on the part of the translator. The officer also may testify regarding such circumstances of the crime or incident under investigation as may corroborate the translation and aid the magistrate in determining not only whether the translation is reliable, but also whether the underlying statement of the declarant is reliable." (*Id.* at pp. 465-466.)

The court in *Correa* noted that, utilizing this case-by-case approach, there would be cases in which the interpreter should be called to testify. (*Correa*, *supra*, 27 Cal.4th at

pp. 458-459.) The Supreme Court agreed with the Fifth Circuit Court of Appeals in *U.S. v. Martinez-Gaytan* (5th Cir. 2000) 213 F.3d 890, 892, that " 'where the particular facts of a case cast significant doubt upon the accuracy of a translated [statement], the translator or a witness who heard and understood the untranslated [statement] must be available for testimony and cross-examination at the . . . hearing before the [statement] can be admitted.' " (*Correa*, *supra*, at p. 459; cf. *U.S. v. Lopez* (2nd Cir. 1991) 937 F.2d 716, 724 ["[e]xcept in unusual circumstances," translator is merely language conduit and translation is not additional level of hearsay].)

2. *Application of language conduit theory*

As a reviewing court, we must draw all legitimate inferences in favor of the implicit determination of the trial court that Officer Zubiate was sufficiently skilled and unbiased such that the translated statement was fairly attributable to defendant. (*Correa*, *supra*, 27 Cal.4th at p. 467.) We review for abuse of discretion the trial court's decision to admit evidence following a foundational hearing conducted pursuant to Evidence Code 402. (*Correa*, *supra*, at p. 467; *People v. Williams* (1997) 16 Cal.4th 153, 196.)

The trial court did not abuse its discretion by finding that defendant's statements translated by Officer Zubiate were fairly attributable to defendant. As we read *Correa*, *Nazemian*, and other cases addressing the language conduit issue, no one factor is determinative. Thus, the fact that it was the police who supplied the interpreter--a point emphasized by defendant here--does not undercut the trial court's conclusion. (*Nazemian*, *supra*, 948 F.2d at p. 527 ["fact that the interpreter is provided by the government, in and of itself," is not dispositive of whether interpreter's statement is attributable to declarant]; *People v. Torres*, *supra*, 213 Cal.App.3d at p. 1259 [same].)

Although defendant argues to the contrary, the record does not show that Officer Zubiate had a "motive to mislead or distort," the second factor mentioned in *Nazemian*. (*Nazemian*, *supra*, 948 F.2d at p. 527; *Correa*, *supra*, 27 Cal.4th at p. 458.) There is nothing to suggest that Officer Zubiate distorted anything that was said by defendant

during the interview. The mere fact that the interpreter was a member of law enforcement is an insufficient basis for us to conclude that he had a motive to mislead or distort in translating Officer Craig's questions and defendant's responses to them. Significantly, defendant ignores the point that defendant's critical statement (as translated by Officer Zubiate) did *not* inculpate defendant at the time it was made. The thrust of the prosecution's position was that defendant's statement to the police in 2004 that he had gone to the recently burglarized home to meet a friend was the same kind of false explanation that he had given in 2005 when confronted by Sanchez on the front porch of Sanchez's home. The earlier statement was thus admissible (the prosecution argued) under Evidence Code section 1101, subdivision (b) to show intent or common scheme or plan.[7] Therefore, even assuming bias on Officer Zubiate's part, the 2004 statement on its face does not suggest that it was distorted to implicate defendant in any criminal activity.[8]

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[7] "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act." (Evidence Code, § 1101, subd. (b).) At the outset of the trial, the court concluded that defendant's prior (2004) statement to police was sufficiently similar to his statement to Sanchez in 2005 that it satisfied the admissibility requirements of Evidence Code section 1101, subdivision (b). Defendant does not contend on appeal that, assuming his translated statement was admissible under the language conduit theory, the court erred by admitting it pursuant to Evidence Code section 1101, subdivision (b).

[8] We note that Officer Craig testified that he created a ruse--by showing defendant copies of fingerprints and falsely suggesting that they belonged to defendant and were taken from the garage door after the burglary--in an attempt to implicate defendant during the June 2004 interview. But the record fairly reflects that Officer Zubiate's only participation in this ruse was to translate Officer Craig's questions. In any event, as we have noted, since the statement at issue here did not inculpate defendant, the existence of Officer Craig's ruse does not undermine the trustworthiness of defendant's translated statement.

The third *Nazemian* factor--" 'the interpreter's qualifications and language skill' " (*Correa*, *supra*, 27 Cal.4th at p. 458, quoting *Nazemian*, *supra*, 948 F.2d at p. 527)--supports the trial court's conclusion concerning the admissibility of defendant's statement. The evidence was that Officer Zubiate had acted as a certified interpreter with the Salinas Police Department for approximately 10 years. Officer Craig had utilized and relied on Officer Zubiate's services as an interpreter on approximately 15 to 20 occasions. Although Officer Craig is not proficient in Spanish, he testified that he had previously observed Officer Zubiate testify in court by translating from Spanish to English. Moreover, during the interview, Officer Craig noted that defendant's responses to questions seemed appropriate and that defendant did not act unusual in any way during the interview. From this testimony, the court could have reasonably inferred that there was no problem with Officer Zubiate's translation of the questions and answers. (See *Correa*, *supra*, at pp. 465-466: An experienced officer may testify concerning context of translated statement, including "apparent language skills of the translator, and the potential for bias on the part of the translator [and] . . . such circumstances of the crime or incident under investigation as may corroborate the translation and aid the magistrate in determining not only whether the translation is reliable, but also whether the underlying statement of the declarant is reliable.")

Immediately before announcing his ruling at the 402 hearing, the trial judge noted his familiarity with Officer Zubiate, stating that he had "previously heard Officer Zubiate testify as a certified interpreter a number of times. Probably at least 10 or 15 over the past 15 or 16 years." Defendant contends that this statement evidenced a bias on the part of the trial judge and/or his reliance upon matters not before him in finding that defendant's translated statement was admissible. We reject that claim and take at his word the trial judge, who stated--immediately after making the above-quoted remarks and specifically with reference to his personal familiarity with Officer Zubiate--"But I'm not going to base my decision on that."

Furthermore, defendant points to no aspect of his statement (through Officer Zubiate) that he contends was inaccurately translated. Nor does he identify any particular fact that suggests that the translator was not competent or did not render an accurate translation. (*Nazemian*, *supra*, 948 F.2d at p. 528 [noting absence of evidence that translation was inaccurate]; *U.S. v. Koskerides* (2nd Cir. 1989) 877 F.2d 1129, 1135 [same].) Furthermore, the record shows that Zubiate's role was simply that of translator, and there is nothing indicating that he exceeded that role. (*Nazemian, supra*, at p. 528.) While we acknowledge that it was the prosecution's burden at the 402 hearing to establish the reliability of the translation (and thus the admissibility of the translated statement under the language conduit theory), it is nonetheless significant that there were no facts presented below (e.g., through defendant's cross-examination of Officer Craig) suggesting that Officer Zubiate was not competent or that he gave an inaccurate translation.

As we have noted, the application of the language conduit theory is based upon the individual facts and circumstances of the case. No single criterion controls the analysis, and the overall principle is whether "the translated statement fairly may be considered to be that of the original speaker." (*Correa*, *supra*, 27 Cal.4th at p. 457.) Here, there was substantial evidence upon which the trial court based its conclusion that defendant's statements made through Officer Zubiate were fairly considered to have been those of defendant. And this is not an instance, highlighted by the Supreme Court, " 'where the particular facts of a case cast significant doubt upon the accuracy of a translated [statement], [thereby requiring that] the translator or a witness who heard and understood the untranslated [statement] . . . be available for testimony and cross-examination . . .' "

(*Id.* at p. 459.) We find no abuse of discretion by the court and conclude that there was no error.[9]

III. *Claimed Blakely Violation*

A. *Contentions of the Parties*

The court imposed an upper term sentence of six years in prison for the count 1 conviction (first degree burglary).[10] The court made a finding that the factors in aggravation greatly outweighed those in mitigation. After making this finding, the court corrected itself by noting that "really there aren't any factors in mitigation."[11] In making its findings in support of imposing an upper term sentence, the court adopted five of the aggravating factors from California Rules of Court, rule 4.421, that were listed in the probation officer's report: (1) the victims were particularly vulnerable (i.e., four children between the ages of three and 14 who were in the home alone); (2) the way in which the crime was carried out showed planning, sophistication, or professionalism; (3) defendant's prior convictions were numerous and of increasing seriousness; (4) defendant

[9] Our finding that the court properly concluded that defendant's statements made through Officer Zubiate were admissible because they were fairly considered to have been those of defendant necessarily disposes of defendant's contention that the statements were inadmissible under *Crawford*, *supra*, 541 U.S. 36. *Crawford* concerned Sixth Amendment's guarantee of the right of confrontation as applied to an unavailable witness's out-of-court testimonial statement against a criminal defendant. The constitutional concerns of *Crawford* are not implicated where the statement, as is the case here, is the defendant's own statement. (*People v. Roldan* (2005) 35 Cal.4th 646, 711, fn. 25; see also *Nazemian*, *supra*, 948 F.2d at pp. 525-526 [if translated statement is properly viewed as that of the declarant, and not the interpreter, no confrontation clause issue is implicated because one cannot be denied the opportunity to confront oneself].) Therefore, the admission of defendant's statement to the police did not violate defendant's right of confrontation under *Crawford*.

[10] "Burglary is punishable as follows: [¶] 1. Burglary in the first degree: by imprisonment in the state prison for two, four, or six years." (§ 461.)

[11] The probation officer's report listed no mitigating factors.

was on felony probation at the time the offense was committed; and (5) defendant's prior performance on probation was unsatisfactory.

Defendant claims that under *Blakely*, *supra*, 542 U.S. 296, he was deprived of his constitutional right to a jury trial when the trial court imposed an upper term sentence for the first degree burglary conviction. He asserts that because the court's sentencing determination was based upon finding the existence of aggravating factors by a preponderance of the evidence, he was deprived of his constitutional right to a jury trial and application of proof beyond a reasonable doubt.

The Attorney General makes two arguments in response to defendant's *Blakely* challenge. First, *Blakely* was decided almost 18 months before defendant herein was sentenced; he forfeited the *Blakely* challenge by failing to assert it below. Second, any *Blakely* challenge is substantively without merit, based upon the California Supreme Court's holding in *People v. Black* (2005) 35 Cal.4th 1238, certiorari granted and judgment vacated in *Black v. California* (Feb. 20, 2007, No. 05-6793) __ U.S. __ [2007 WL 505809] (*Black*).

After briefing was completed but before oral argument, the United States Supreme Court decided *Cunningham*, *supra*, 549 U.S. __ [127 S.Ct. 856]. While the parties at oral argument did not specifically address the impact of *Cunningham* upon the sentencing issue before us, this court did give them leave to submit letter briefs to discuss a recent post-*Cunningham* decision, *People v. Banks* (2007) 149 Cal.App.4th 969 (*Banks*). Following submission of those letter briefs, upon defendant's application, we granted the parties leave to submit further letter briefs to discuss another recent case, *People v. Diaz* (2007) 150 Cal.App.4th 254 (*Diaz*).

As discussed below, we conclude that there was *Blakely* error that was not harmless and that the matter must therefore be remanded for resentencing. In so holding, we have considered the cases (*Banks* and *Diaz*) raised in supplemental briefing, but

conclude that another case, *People v. Govan* (2007) 150 Cal.App.4th 1015 (*Govan*) is more on point to the circumstances before us.

B. *Discussion of Blakely Challenge*

1. *Forfeiture*

In response to the Attorney General's forfeiture argument, defendant asserts that the claim was not forfeited because it would have been futile for his counsel to have asserted that challenge in the trial court. As we discuss, *post*, the holding of the California Supreme Court in *Black, supra*, 35 Cal.4th 1238, until very recently, compelled the conclusion that a criminal defendant's constitutional rights are not abridged when a court sentences him or her to the upper term under California's determinate sentencing law (hereafter sometimes referred to as DSL). Our Supreme Court decided *Black* on June 20, 2005, nearly six months before defendant's sentencing hearing. At that time, the trial court was compelled to follow *Black*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.) Therefore, any *Blakely* objection that defense counsel might have made concerning the trial court's imposition of an upper term sentence would have been futile. (*People v. Guess* (2007) 150 Cal.App.4th 148, 164 (*Guess*); *Diaz, supra,* 150 Cal.App.4th at p. 260.) Under these circumstances, defendant's *Blakely* challenge was not forfeited. (*People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6; *People v. Turner* (1990) 50 Cal.3d 668, 703-704.)

2. *Applicable law*

Defendant claims that because the court found the existence of factors warranting the imposition of an upper term sentence by a preponderance of the evidence, he was deprived of his constitutional right to a jury trial and application of proof beyond a reasonable doubt. He cites the United States Supreme Court's decision in *Blakely, supra*, 542 U.S. 296, as authority compelling the conclusion that the upper term sentence for the burglary conviction violated his constitutional rights. In making this contention, however, defendant acknowledges that the California Supreme Court, in *Black, supra*, 35

Cal.4th at page 1244, held *Blakely* inapplicable to the imposition of upper term sentences under California's determinate sentencing law.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), the United States Supreme Court held unconstitutional a New Jersey law that permitted an enhancement that could have resulted in potentially double the maximum sentence for possession of a firearm in the event that the judge determined by a preponderance of the evidence that a hate crime had been committed. It concluded 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." (*Id.* at p. 490.) This principle, the court explained, derives from two constitutional rights, namely, the right to trial by jury, and the prohibition against depriving a person of liberty without due process of law. (*Id.* at pp. 476-477; see also *Ring v. Arizona* (2002) 536 U.S. 584, 603-609.)

In *Blakely*, *supra*, 542 U.S. 296, the Supreme Court considered Washington determinate sentencing laws under which the trial court--after defendant had pleaded guilty to a class B felony--determined that he "had acted with 'deliberate cruelty' " (*id.* at p. 298), and accordingly "imposed an exceptional sentence of 90 months--37 months beyond the standard maximum." (*Id.* at p. 300.) The defendant contended that the Washington sentencing procedure deprived him of his federal constitutional right to a jury trial to determine beyond a reasonable doubt all of the facts required for the sentence imposed. (*Id.* at p. 301.) The Supreme Court agreed, holding "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at pp. 303-304.) The judge had relied on a fact not found by the jury or admitted by the defendant; accordingly the Supreme Court

concluded that the sentence in *Blakely* was invalid. (*Id.* at p. 304; see also *United States v. Booker* (2005) 543 U.S. 220 [*Blakely* holding found applicable to Federal Sentencing Guidelines].)

In *Black*, *supra*, 35 Cal.4th 1238, the California Supreme Court considered the effect of *Blakely* and *Booker* on upper term sentencing under California's determinate sentencing law. The court noted that under California's DSL, "[t]hree terms of imprisonment are specified by statute for most offenses." (*Black*, *supra*, at p. 1247.) The judge's sentencing discretion is guided as follows: "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." (§ 1170, subd. (b).) The court may select the upper term "only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation." (Cal. Rules of Court, rule 4.420(b).) The California Supreme Court acknowledged under this scheme, "[t]he sentencing judge retains considerable discretion to identify aggravating factors" (*Black*, *supra*, at p. 1247), and that he or she may base that decision "on aggravating facts that have not been found true by the jury." (*Id*. at p. 1248.)[12] Circumstances in aggravation or mitigation need be proved to the sentencing judge only by a preponderance of the evidence. (Cal. Rules of Court, rule 4.420(b).)

The *Black* court held that the imposition of an upper term sentence under California's determinate sentencing statute was not unconstitutional under *Blakely*. Our high court reasoned: "[E]ven though section 1170, subdivision (b) can be characterized as establishing the middle term sentence as a presumptive sentence, the upper term is the

[12] Rule 4.421 of the California Rules of Court provides a nonexclusive list of 17 factors in aggravation that the sentencing judge may consider. The sentencing judge, however, may consider any "additional criteria reasonably related to the decision being made." (Cal. Rules of Court, rule 4.408(a).)

'statutory maximum' for purposes of Sixth Amendment analysis. The jury's verdict of guilty on an offense authorizes the judge to sentence a defendant to any of the three terms specified by statute as the potential punishments for that offense, as long as the judge exercises his or her discretion in a reasonable manner that is consistent with the requirements and guidelines contained in statutes and court rules. . . . [T]he upper term is the 'maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict*. . . .' " (*Black, supra,* 35 Cal.4th at pp. 1257-1258, quoting *Blakely, supra,* 542 U.S. at p. 303.)

The defendant in *Cunningham, supra,* 549 U.S. __ [127 S.Ct. 856]--like the defendant in *Black*--received an upper term sentence of 16 years after his conviction under section 288.5, the sentencing judge having found six aggravating factors warranting the sentence. (*Cunningham, supra,* at pp. __ [at pp. 860-861].) The California Court of Appeal (First District) rejected the defendant's *Blakely* challenge, and the California Supreme Court denied review, having decided *Black* nine days earlier. (*Cunningham, supra,* at p. __ [at p. 861].)

As a starting point for the court's analysis, Justice Ginsburg, writing for the majority in *Cunningham,* noted: "This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." (*Cunningham, supra,* 549 U.S. at pp. __ [127 S.Ct. at pp. 863-864].) Accordingly, after discussing California's determinate sentencing law, and the court's decisions in *Apprendi, Blakely,* and *Booker*, the court concluded that "aggravating circumstances depend on facts found discretely and solely by the judge. In accord with *Blakely*, therefore, the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum. [Citation.] Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt, [citation], the DSL

violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " (*Id.* at p. __ [at p. 868].) After discussing *Black* at some length, the *Cunningham* court concluded that the California Supreme Court's reasoning was at odds with the principles of *Apprendi* and *Blakely*: "Because the DSL allocates to judges sole authority to find facts permitting the imposition of an upper term sentence, the system violates the Sixth Amendment. It is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.* at p. __ [at p. 870].)

3. *Merits of Blakely challenge*

We apply the holding in *Cunningham* to defendant's challenge here. The sentencing provision with which we are concerned here specifies that "[b]urglary in the first degree: by imprisonment in the state prison for two, four, or six years." (§ 461, subd. 1.) Under *Cunningham*, the middle term of four years was the "statutory maximum" for Sixth Amendment purposes under *Blakely*. (*Cunningham*, *supra*, 549 U.S. at p. __ [127 S.Ct. at p. 868].)

The court imposed an upper term sentence of six years on the basis of five aggravating factors. As we have noted, the Supreme Court in *Apprendi* held 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." (*Apprendi*, *supra*, 530 U.S. at p. 490.)[13] We therefore examine whether any of the five aggravating factors relied on by the sentencing judge fell within the *Apprendi* "prior conviction" exception.

[13] The "prior conviction" exception originates from *Almendarez-Torres v. United States* (1998) 523 U.S. 224.

Plainly, the first two factors identified by the trial court--(1) the victims were particularly vulnerable (Cal. Rules of Court, rule 4.421(a)(3)), and (2) the way in which the crime was carried out showed planning, sophistication, or professionalism (Cal. Rules of Court, rule 4.421(a)(8))--did not involve defendant's recidivism. (*Govan*, *supra*, 150 Cal.App.4th at pp. 1028, 1032 [reliance on factor that crime was accomplished through planning, sophistication and professionalism violated *Cunningham*]; *Diaz*, *supra*, 150 Cal.App.4th at p. 265 [court's reliance on findings that victims were particularly vulnerable and that manner in which crime was carried out exhibited planning and sophistication violated *Cunningham*].) It was therefore error under *Cunningham* for the court to have based an upper term sentence on either of those factors.

We also conclude that the fourth aggravating factor mentioned by the court--that defendant was on felony probation at the time the offense was committed (Cal. Rules of Court, rule 4.421(b)(4))--did not come within the *Apprendi* "prior conviction" exception. (*Govan*, *supra*, 150 Cal.App.4th at pp. 1028, 1032 [reliance on factor that the defendant was on probation at time of commission of current offenses violated *Cunningham*]; *Guess*, *supra*, 150 Cal.App.4th at p. 166 [fact of being admitted to parole does not come within the "prior conviction" exception].) Similarly, we conclude that it was improper under *Cunningham* for the court to have based the imposition of an upper term sentence on the fifth factor relied upon by the court below--that defendant's prior performance on probation was unsatisfactory. (*Govan*, *supra*, at pp. 1028, 1032.)

The third factor on which the court relied--defendant's prior convictions were numerous and of increasing seriousness (Cal. Rules of Court, rule 4.421(b)(2))--arguably fell within the *Apprendi* "prior conviction" exception. Certainly, the *existence* of prior convictions that is one component of this factor would not require a finding by a jury beyond a reasonable doubt. But there are qualitative aspects of this factor--that the convictions are "numerous" and "of increasing seriousness"--that are not matters strictly determined by the fact of the convictions alone. For this reason, we agree with the Fourth

District Court of Appeal (Division One) that under *Cunningham*, a court may not base the imposition of an upper term sentence on this factor unless it has been previously determined by a jury beyond a reasonable doubt. (*Govan*, *supra*, 150 Cal.App.4th at pp. 1028, 1032; but see *People v. Perez* (2007) 148 Cal.App.4th 353, 371-372 [upper term sentence based on factor that the defendant had prior adult convictions that were numerous and serious was not proscribed by *Cunningham*].)[14]

We therefore conclude that the court erred by imposing the upper term of six years as provided in section 461 for the first degree burglary conviction.

4. *Prejudice*

Neither defendant nor the Attorney General argues whether, assuming that there was *Blakely* error, it was prejudicial. We conclude that the *Chapman*[15] constitutional standard for prejudice--namely, whether the error was "harmless beyond a reasonable doubt"--applies. In other words, *Blakely* error does not warrant relief if the failure to obtain jury findings on the aggravating factors resulting in the imposition of an upper term sentence was "harmless beyond a reasonable doubt." (See *Washington v. Recuenco* (2006) __ U.S. __ [126 S.Ct. 2546] [*Blakely* sentencing error is not structural error mandating reversal without consideration of whether error is harmless]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326 [*Chapman* test applied to instructional error with regard to element of sentence enhancement].)

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[14] We note that a case is pending before the California Supreme Court (*People v. Towne*, review granted Jul. 14, 2004, S125677), in which the court has asked that the parties submit supplemental briefing on, inter alia, whether *Cunningham*, *supra*, 549 U.S. __ [127 S.Ct. 856], and *Almendarez-Torres v. United States*, *supra*, 523 U.S. 224 "permit the trial judge to sentence defendant to the upper term based on any or all of the following aggravating factors, without submitting them to a jury: the defendant's prior convictions as an adult are numerous and of increasing seriousness; . . . " (See http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=327418&doc_no=S125677 [as of June 26, 2007].)

[15] *Chapman v. California* (1967) 386 U.S. 18, 24.

On the surface, since we have concluded that each of the five factors on which the court relied in imposing an upper term sentence involved issues that, under *Apprendi*/*Blakely*/*Cunningham*, required findings by a jury beyond a reasonable doubt, the error was clearly not harmless. But we acknowledge that a debate exists concerning whether a sentencing judge may constitutionally impose an upper term sentence on the ground that the defendant's crimes are numerous and of increasing seriousness. (See fn. 14, *ante*.) Therefore, for purposes of assessing whether the *Blakely* error was harmless, we will assume that one of the court's bases for imposing an upper term sentence was not proscribed by *Cunningham*.[16]

"A single factor in aggravation will support imposition of an upper term." (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433.) Here, the Attorney General argues that any error was harmless because there was at least one factor that fell within the *Apprendi* "other conviction" exception. We cannot from this record conclude that the trial court would have imposed an upper term sentence simply on the basis of this one arguably-proper factor (defendant's crimes are numerous and of increasing seriousness). Therefore, as was the case in *Banks*, *supra*, 149 Cal.App.4th 969--where the appellate court concluded that the error was not harmless because it was uncertain whether the trial court would have imposed an upper term sentence based upon only the one factor determined to have been proper--we hold that the error under *Blakely* was not harmless beyond a reasonable doubt and we will remand for resentencing.

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[16] For this reason, we decline defendant's suggestion that we--as the court did in *Diaz*, *supra*, 150 Cal.App.4th 254--modify the judgment to impose a middle term sentence. Although the *Diaz* court took this approach, it did so because there it was clear that none of the four factors relied upon by the trial judge in imposing an upper term sentence was "admitted by Diaz or found to be true by the jury beyond a reasonable doubt, nor did Diaz have any prior convictions." (*Id.* at p. 273.) *Diaz* is distinguishable, and we are not presented with such a clear-cut case that would compel us to modify the sentence.

DISPOSITION

The judgment is reversed and remanded to the trial court for the limited purpose of resentencing. Consistent with this opinion, *Blakely*, and *Cunningham*, the trial court shall resentence defendant with respect to the first degree burglary conviction.

Premo, Acting P.J.

WE CONCUR:

Elia, J.

McAdams, J.