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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JUAN CARLOS MARROQUIN, Defendant and Appellant.	B191010 (Los Angeles County Super. Ct. No. NA 065801)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard R. Romero, Judge. Affirmed.

Judith Vitek, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Robert F. Katz and Richard S. Moskowitz, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Juan Carlos Marroquin on one count of first-degree residential burglary, and the trial court sentenced him to the upper term of six years imprisonment. Marroquin appeals, challenging the sufficiency of the evidence and the constitutionality of his sentence under *Blakely v. Washington* (2004) 542 U.S. 296. We affirm.

BACKGROUND

The information charged Marroquin with a single count of first degree residential burglary, in violation of Penal Code section 459.[1] It also alleged under section 667.5, subdivision (b), that he had suffered two prior felony convictions for which prison sentences had been served, and that he did not remain free of both prison custody and additional felony convictions for a period of five years after his prior imprisonment. A jury convicted Marroquin and found the burglary to be of the first degree. Marroquin waived his right to a jury trial on the alleged prior convictions, and the court found the allegations true. At sentencing, the court struck the prison priors and sentenced Marroquin to the upper term of six years.

The evidence showed that the home of Dora and Marco Ruano and their three children was burglarized while Mrs. Ruano and the children were at Disneyland and Mr. Ruano was out of town on business. When Mrs. Ruano and her children left their house at roughly 6:30 a.m. on July 4, 2004, the windows were closed and the doors locked. When they returned around 2:00 a.m. the following day, the front door was open, a window was broken, and a number of items were missing. A police investigator recovered fingerprints matching Marroquin's from the outside of a window, from a piece of broken glass inside the house, and from a dresser drawer inside the house.

The Ruanos have known Marroquin for years; he is Mr. Ruano's cousin's wife's brother. Mr. and Mrs. Ruano testified that Marroquin had visited their previous home several times, but that he had never visited them at their current home, which they had

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1 All subsequent statutory references are to the Penal Code, unless otherwise noted.

occupied for roughly one and one-half years at the time of the break-in.[2] Both Mr. and Mrs. Ruano testified that they could think of no reason why Marroquin's fingerprints would be found on the dresser inside their current home.

Marroquin did not testify and called no witnesses in his defense.

STANDARD OF REVIEW

When a criminal defendant challenges a conviction as lacking evidentiary support, we "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

DISCUSSION

I. Sufficiency of the Evidence

Marroquin argues that the evidence is insufficient to support his conviction. We disagree.

Marroquin's fingerprints were found on the outside of a window at the Ruano's home, on a piece of broken glass inside the home, and on a dresser inside the home. Mr. and Mrs. Ruano both testified that Marroquin had never visited their current home and that they had no idea how his fingerprints could have gotten there. The jury could reasonably infer from the evidence presented that Marroquin had never been inside the Ruanos' present home with their consent. Further, the jury could reasonably infer that Marroquin left his fingerprints on the dresser inside the home when he was there without the Ruanos' consent, when he committed the burglary.

Marroquin argues that the fingerprint evidence is insufficient because there was no evidence of (1) how old the fingerprints were, (2) whether Marroquin would have had

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[2] Mr. Ruano initially told a police investigator that Marroquin had visited the Ruanos' current home once, but he later told the investigator that he had been mistaken, and that it was Marroquin's brother, not Marroquin, who had visited the Ruanos' home on that occasion.

access to the dresser in question when he visited the Ruanos' previous home, or (3) how often the Ruanos cleaned the dresser surface on which the fingerprint was found. We are not persuaded. Because there is substantial evidence that Marroquin was never in the Ruanos' current home with their consent, there is substantial evidence that Marroquin must have left his fingerprint on the dresser during the commission of the burglary unless he left it there at least one and one-half years before the burglary was committed, when the Ruanos lived at their previous home. But it was reasonable for the jury to infer that any fingerprints created that long ago would have been erased or covered up either during the Ruanos' move to their current home or in the subsequent one and one-half years of use of the dresser. (See *People v. Preciado* (1991) 233 Cal.App.3d 1244, 1246-1247 [adopting similar reasoning about fingerprints that were found on an object that had been inside the victim's residence for one and one-half years before the burglary].)[3]

For all of these reasons, we reject Marroquin's argument that his conviction is not supported by substantial evidence.

II. Sentencing

The trial court imposed the upper term for Marroquin's burglary conviction because it found that there were zero mitigating factors and three aggravating factors, namely, (1) the defendant took advantage of a position of trust and confidence, (2) the defendant's prior convictions were of increasing seriousness, and (3) the defendant had served a prior prison term. Marroquin argues, on the basis of *Blakely v. Washington*

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3 The cases Marroquin relies upon are distinguishable. In *Mikes v. Borg* (9th Cir. 1991) 947 F.2d 353, the defendant's fingerprints were found on the murder weapon (a post from a turnstile), which had been in the victim's possession for only four months before the murder; before that, the object was accessible to the public. (*Id.* at pp. 357-359.) In *People v. Johnson* (1984) 158 Cal.App.3d 850 and *People v. Jenkins* (1979) 91 Cal.App.3d 579, both of which involved fingerprints found on bottles containing drugs or drug precursors, there was no evidence showing when the defendants had touched the bottles, and thus no evidence showing that the bottles contained contraband when the defendants touched them. (*People v. Johnson*, *supra*, 158 Cal.App.3d at pp. 855-856; *People v. Jenkins*, *supra*, 91 Cal.App.3d at pp. 583-584.) In the instant case, however, there was substantial evidence that if Marroquin's fingerprint on the dresser had been created innocently, it must have been created at least one and one-half years before the burglary. As we have already stated, the jury could reasonably discount that possibility as being too unlikely.

(2004) 542 U.S. 296, that the trial court violated his rights under the Fifth and Sixth Amendments to the United States Constitution when it imposed the upper term in the absence of a finding by a jury, beyond a reasonable doubt, of the presence of any aggravating factors other than the fact of a prior conviction. The United States Supreme Court recently held that California's upper-term sentencing procedure does violate defendants' Sixth Amendment rights. (*Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856].)

We reject the Attorney General's argument that Marroquin waived this issue by not raising it in the trial court. The defendant in *People v. Hill* (2005) 131 Cal.App.4th 1089, 1103 (upon which the Attorney General relies) waived a *Blakely* challenge by failing to raise it when he was sentenced *after Blakely* but *before People v. Black* (2005) 35 Cal.4th 1238, in which the California Supreme Court rejected the Sixth Amendment arguments that the United States Supreme Court later upheld in *Cunningham*. Marroquin, however, was sentenced *after Black* but before *Cunningham*, at which point a *Blakely* objection would have been futile under controlling law that the trial court was compelled to follow. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Under these circumstances, Marroquin did not waive the issue. (*People v. Chavez* (1980) 26 Cal.3d 334, 350, fn. 5; *City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780, 784-785.)

The Attorney General also argues that any error was harmless beyond a reasonable doubt. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.) We agree, for two independent reasons.

First, one of the aggravating factors that the trial court relied on was the fact that Marroquin served a prior prison term. That factor falls within the exception to *Blakely* for the fact of a prior conviction. (*People v. Thomas* (2001) 91 Cal.App.4th 212, 222-223.) A single aggravating factor is sufficient to support imposition of the upper term for Marroquin's current offense. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433-434.) The trial court found no mitigating factors, and the record contains no indication that the court had any inclination to sentence Marroquin to less than six years.

Second, at sentencing the trial court struck Marroquin's two prison priors. Had the court not done so, and had it not relied on either prison prior as an aggravating factor and sentenced Marroquin to the mid-term of four years (see section 461), it could have used each prison prior to add a one-year enhancement under section 667.5, subdivision (b), yielding the same six-year sentence that was in fact imposed. Again, no jury finding on the prison priors was necessary. (*People v. Thomas*, *supra*, 91 Cal.App.4th at pp. 222-223.) And, again, the record contains no indication that the court had any inclination to sentence Marroquin to less than six years.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, Acting P.J.

VOGEL, J.