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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSE MATAMOROS, Defendant and Appellant.	B171776 (Los Angeles County Super. Ct. No. PA040537)

APPEAL from a judgment of the Superior Court of Los Angeles County, Meredith C. Taylor, Judge. Reversed and Remanded in part; Affirmed in part.

Linn Davis, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, William T. Harter and Robert F. Katz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Based upon incidents that occurred within a three-week period at eight different commercial establishments, a jury convicted defendant Jose Matamoros of seven counts of robbery and one count of attempted robbery. In addition, in each of those eight incidents, defendant was convicted of being a felon in possession of a firearm. The jury found true the enhancement allegation that defendant personally used a firearm during the robberies and attempted robbery. The court found defendant had suffered a 1997 robbery conviction charged under the "Three Strikes" law. The court sentenced defendant to a term of 61 years and 8 months.

On this appeal, defendant attacks the sufficiency of the evidence to sustain his convictions arising out of three incidents. In regard to the first incident, he argues that the evidence was insufficient because the victim only testified that defendant looked similar to the man who robbed him. In regard to the second incident, he argues that the jury should not have credited the victim's out-of-court identifications of him because at trial she testified that defendant was not the robber. We find no merit to either argument and therefore affirm the convictions arising out of those two incidents. In regard to the third incident, he urges that the hearsay statements of the victim who did not testify at trial were inadmissible in light of *Crawford v. Washington* (2004) 541 U.S. 36. We agree the statements may have qualified for treatment under *Crawford* but find admission of the evidence non-prejudicial. Lastly, defendant urges the trial court's decision to impose the upper term in sentencing him was error under *Blakely v. Washington* (2004) 542 U.S. ____. Given the ambiguity of the court's reason for selecting the upper term, we agree and remand for a new sentencing hearing.

SUFFICIENCY OF THE EVIDENCE -- COUNTS 1 AND 2

Defendant first contends that his conviction of counts 1 (robbery) and 2 (possession by a felon of a firearm) must be reversed "because there is insufficient evidence of identification[.]" We disagree.

Statement of Facts

These two crimes were committed at Galaxy Communications on December 20, 2001. Two employees of the business were present: Freddie Moreno and Letty Rodriguez. Only Moreno testified at defendant's trial which took place almost two years after the crimes. Moreno gave the following evidence.

The store sells electronic accessories such as pagers and cell phones. Defendant entered the store at approximately 6:00 p.m. Rodriguez was working at the counter; Moreno was in the back of the store. Rodriguez called for Moreno in a scared tone of voice. Moreno went out to the front of the store. A man was pointing a gun at Rodriguez. When the man saw Moreno, he pointed the gun at Moreno and asked for money. Moreno gave him the money in the cash register. The assailant forced Moreno and Rodriguez into the store's back room and fled.

When the prosecutor asked Moreno if he saw his assailant in the court, the following exchange occurred:

> "A. [Moreno] I'll be very, very serious with it; but it doesn't really look exactly like that person I saw.
>
> "Q. [The Prosecutor] Do you see somebody that is similar to the person you saw?
>
> "A. He looks similar. Him right there."

Moreno identified defendant. He testified that defendant's eyes and height were similar to those of his assailant. The prosecutor showed Moreno a gun that

had been recovered when defendant was arrested. Moreno testified it was similar to the gun used in the robbery.

On cross-examination, defense counsel asked if her client was "the person that you saw in the store that robbed you?" Moreno answered: "I'm going to be really honest. What he looks like, it looks like it's not." Moreno then explained: "From what I see it looks similar, but it might not be, you know. I don't know. It's been two years." On redirect examination, Moreno testified it had "been too long" for him to remember exactly the assailant's face.

Detective William Caughey testified that several weeks after the robbery he showed Moreno a six-person photo show-up. Moreno carefully looked at the display and selected defendant's photo. On the comments section of the photographic display, Moreno wrote: "Photo number two [defendant] looks similar to the person that came in. It looks like his eyes are the same to the ones I remember. I remember seeing red eyes on him. They look alike to the person on photo number two." When Moreno made his photographic identification he did not express any hesitancy or reluctance in identifying defendant. In selecting defendant's photo, he told the detective "the eyes looked very familiar. [I] remember[] the eyes as being red."

During deliberations, the jury asked for and received a reread of Moreno's testimony about the gun used in the robbery.

Discussion

Defendant argues that the evidence is insufficient to sustain his convictions for the two crimes committed at Galaxy Communications because Moreno could only testify that defendant looked similar to the person who robbed him. This was

the same argument defense counsel unsuccessfully advanced to the jury.[1] In other words, defendant suggests that an identification that lacks complete certitude is insufficient to support a conviction. This approach is incorrect.

"It is a familiar rule that '[i]n order to sustain a conviction the identification of the defendant need not be positive. [Citations.] Testimony that a defendant "resembles" the robber [citation] or "looks like the same man" [citation] has been held sufficient. The testimony of one witness is sufficient to support a verdict if such testimony is not inherently incredible. [Citation.] The sufficiency of the evidence of identification is generally a question for the trier of the facts. [Citation.]'" (*People v. Barranday* (1971) 20 Cal.App.3d 16, 22.)

Within three weeks of the crimes, Moreno carefully reviewed a photographic show-up and identified defendant as his assailant. He expressed no hesitation in making that identification. His handwritten notation indicated that he remembered defendant's eyes. At trial, Moreno again noted defendant's eyes in identifying him. Moreno explained that because of the passage of time he could only testify that defendant looked "similar" to the robber. Taken together, this evidence was sufficient to convince a rationale trier of fact beyond a reasonable doubt that defendant was the individual who robbed Moreno. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-577.)

Defendant claims that "[i]n his arguments to the jury, the prosecutor stressed that just because Mr. Moreno had a memory problem did not mean that [defendant]

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[1] For instance, she argued: "On the day he [Moreno] talked to the police he said it looks similar. His eyes look similar. [¶] When he came to court he said, 'Yeah, he looks similar, but it's not him.' [¶] You can close the door out on counts one and two because the witness [Moreno] told you himself it's not him; and the D.A. will say he identified him before. [¶] Saying the man looked similar and saying that's him are two very different things. [¶] . . . [¶] Counts one and two you have to find not guilty because the witness told you himself it wasn't him."

should obtain a free pass. The other robberies could be used to fill in the evidentiary gaps in the Moreno case." The prosecutor did not argue as defendant claims. The portion of the prosecutor's closing argument that defendant cites relates to crimes committed at another location (Wireless Express) on a different day (Jan. 8, 2002). We set forth below in footnote two the prosecutor's argument about the Galaxy Communications crimes.[2] And while the brief portion of the

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[2] The prosecutor argued: "You also heard from Freddie Moreno at Galaxy Communications. He talked about how Letty [Rodriguez] was first there, a customer came in, he heard his name 'Freddie' uttered; and Freddie said he came out and he was standing within two to three feet of this guy and he saw his eyes; and the gun was then taken from Letty's direction over to his direction; and again he identifies the same firearm; . . . .

"Some memory difficulties.

"Again Detective Caughey took the stand; and he testified about how when he showed the photographic line-up to Mr. Moreno he clearly pointed out number two; said, 'I remember these eyes. The eyes on this picture are the eyes of the guy that came in and robbed me;' and again he said, 'Hey, it's been two years. My memory is going to be a little shaky.'

"Ladies and gentlemen, are we going to say that because a crime is two years ago or occurred two years ago and a witness may suffer some memory loss that now a defendant gets a free pass?

"What happens after three years, after five years, after ten years, after 20 years?

"No, the crime if it's still there -- and we have testimony or statements from these people at the time of the crime when it's important, when it matters, and they have identified this person -- you should trust that.

"Given all the other circumstances surrounding the evidence that point to this individual you should trust that; but what he did -- remember he recalled what made him fearful.

"He [Moreno] recalled that gun at him. He recalled that real looking gun pointed right at him, displayed at him, pointed at him; and again he talked about hearing that slide when Letty was out with the defendant.

"Detective Caughey talked about how his identification was quick. He did not hesitate.

"It wasn't one of those circumstance situations where he said, 'I can't recognize anyone;' 'does anyone look similar to you;' and then he makes these statements.

"It wasn't like that. He never said, 'I cannot make an identification.'

"What he did is, 'number two looks like the guy based upon the eyes.' Again the red eyes that he saw. (Contd. on next page.)

prosecutor's rebuttal argument cited by defendant does reference, among others, the Galaxy Communications crimes, defendant failed to object, which objection would most likely have been futile in any event given the similarity of the crimes. (*People v. Rodriguez* (1970) 10 Cal.App.3d 18, 33-34.)

SUFFICIENCY OF THE EVIDENCE -- COUNTS 11 AND 12

Defendant next contends that "there was insufficient evidence to support count[s] 11-12[.]" We disagree.

Statement of Facts

These two counts involve crimes committed on January 10, 2002, at Video Fox. The victim, Young Soon Yoon, testified a man came into the store, asked about opening a membership, walked behind the counter, and pushed an object against her. He told her to give him the money. She gave him the money from the cash register. He then asked for the money from her wallet. She complied and he left.

Detective Caughey testified that shortly after the crimes, Detective Rudy Quintanilla presented a photo display to Yoon. She identified defendant as the robber. Thereafter, Detective Caughey interviewed her with the assistance of Officer Tae Hong who spoke Korean. Although Yoon spoke English, Detective Caughey wanted to be sure there was no problem of communication. With those two officers, Yoon confirmed her prior selection of defendant's photograph as the man who had robbed her. She told them that defendant had used a gun similar to

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"He said that the perpetrator or the suspect was keeping his head down at the time for a lot of the time that he was in there."

Detective Caughey's nine-millimeter blue steel Baretta. (The detective's gun was similar to the firearm taken when defendant was arrested.)

At trial, Yoon did not identify defendant as the robber. She testified he "is not the person." She explained her assailant had bigger eyes than defendant. She thought her assailant was black "even though . . . his skin color wasn't that dark." In regard to her prior photographic identification of defendant, she testified that she only told the police "that the picture [of defendant] looked similar" to her assailant but that she "wasn't sure." She denied that she told the officers that defendant was the person who had robbed her. She also testified she never saw the robber holding a gun although she did not remember whether she had told the police the assailant had displayed a handgun. When the police came immediately after the robbery, she described her assailant as "a black man with a flat top[.]"[3] She selected defendant from the photographic show-up because "he looked the most like a black man." When the prosecutor showed Yoon the photo show-up and asked her the race of the man (defendant) shown in photo number two, Yoon replied "black." However, when asked to look at defendant in the courtroom, she said: "He's not black." (Defendant is Hispanic.)

As set forth below in footnote 4, the prosecutor argued to the jury that Yoon's failure to make an in-court identification was the product of fear and that her prior identifications of defendant to the police were more reliable than her trial testimony.[4] As for Yoon's statement that the robber was black, the prosecutor

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[3] Detective Caughey confirmed this was the description she had given to the police.

[4] The prosecutor argued: "*Ms. Yoon Young Soon had some nerves on the stand. She was a little bit hesitant to testify*. [¶] . . . [¶]

"*It was clear that she had some reluctance, maybe some fear about coming in and testifying about a robbery;* but in any case we have her statements to officers at the time that this crime was fresh in her mind.

drew upon the fact that the jury had had an opportunity to observe defendant's Honduran mother when she had testified at trial and Yoon's testimony that the robber's "skin color wasn't that dark" to argue defendant could appear to be

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"The detailed information, she gave us detailed information about what he did that day.

"She talked about how she went through that swinging door and she heard that squeak of the door and then she heard it a second time.

"It was very interesting that she had a very good memory about details like that, the fact that she got money out of the cash register first, the amount of money that she got out, the fact she went to the purse, where the purse was; but *as soon as she talked about anything involving a gun or anything about identifying a defendant or identifying anybody, she minimized her memory and her ability to talk about those details. Clearly someone that was very afraid to testify.*

"Again how can we blame her? Having a firearm like this displayed towards you, having to come back where the person that committed this crime against you is going to be thinking about all of these actions, what does she want to do? She just wanted to get back to her business, go about her life.

"She didn't want to think about helping to solve a crime, helping to make her community safe or anything like that, helping to put away the person that did this against her.

"All she wants to do is not worry about it because again she doesn't want to think about something like this; but she had previously told the detective that the defendant was the person and said she saw a gun and it was displayed at her. It was pointed at her during the robbery; and she thought it was a real gun again.

"Why she didn't testify to that, I've gone over it.

"There was nothing in her identification to indicate that she wasn't sure about her identification.

"In fact, to make sure she was giving a correct identification after she made the identification with an English speaking officer, Detective Caughey went back, went over the identification with her again with a Korean speaking officer.

"She again told him everything that occurred with the gun, how he came in, which she testified to in front of you, and how she identified the defendant in that picture." (Italics added.)

In the rebuttal portion of his argument, the prosecutor reiterated that Yoon had made the prior identifications to the police, including a Korean-speaking officer.

similar to a light skinned black man.[5] Defense counsel, on the other hand, invited the jury to draw a different picture of Yoon's courtroom demeanor and to credit her trial testimony.[6] She also placed heavy emphasis on Yoon's statements that the robber was black.

During deliberations, the jury asked for a reread of Detective Caughey's testimony about his interview with Yoon. The court complied.

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[5] In closing argument the prosecutor said: "All of the witnesses identified him [the robber] as a Latino. The only one who didn't was Ms. Yoon Young Soon, who -- it was a Korean woman; and what did she say? He was an African-American, but light-skinned; putting him right there on the borderline. [¶] You heard from his mother how he was Honduran. He's not Mexican-American. [¶] He may or may not have some dark features. She appeared to have some dark color in her as well that maybe draws some similarities to African American[.]"

During his rebuttal argument, the prosecutor stated: "He [defendant] fits the description of all of these cases. [¶] There was one case where he was described as an African-American, light-skinned. [¶] I can see it happening with this man, but I can also see how you could think he's Hispanic. [¶] The cross racial or ethnic nature of the identification. [¶] All of the Latino or Hispanic witnesses identify this guy as Latino. There is no mix-up with these witnesses. A factor in favor of their identification."

CALJIC No. 2.92 explained to the jury that one of the factors it could consider in evaluating eyewitness testimony was "the cross-racial or ethnic nature of the identification, if any."

[6] Defense counsel argued Yoon had not been fearful. Counsel stated: "You saw her demeanor. . . . [¶] There was nothing about her to indicate that she had any fear or any reservation about testifying. [¶] This was the first time she had done anything but give a description to the police. [¶] . . . [¶] You have to follow [her in-court testimony]. Otherwise you're creating evidence that a witness didn't give you. [¶] Unless you feel in your heart that she was fearful and afraid and somehow changing things for that reason; but if that were the case why question it at all? [¶] A lot of witnesses come to court and stare down and say, 'I don't remember. I don't remember. I don't remember;' or they cry. [¶] [With another victim who had testified], you feel that emotion. I felt and saw nothing like that. [¶] You were closer to her. You get to evaluate it; but she was being honest and truthful that he [defendant] didn't commit that crime, which is consistent with what was said."

Discussion

Defendant now argues: "[Yoon's] prior identification is not of solid value, because her description all along was that she was robbed by someone Black and [defendant] is not Black. As a result, counts 11 and 12 must be reversed." Precedent leads to a contrary result.

In *People v. Cuevas* (1995) 12 Cal.4th 252, our state supreme court overruled its prior holding in *People v. Gould* (1960) 54 Cal.2d 621 that an out-of-court identification was insufficient to sustain a conviction absent corroborating evidence linking the defendant to the crime. *Cuevas* held: "[T]he sufficiency of an out-of-court identification to support a conviction should be determined under the substantial evidence test of *People v. Johnson* [*supra*] 26 Cal.3d 557, 578 that is used to determine the sufficiency of other forms of evidence to support a conviction." (*People v. Cuevas, supra,* at p. 257.) *Cuevas* explained that a reviewing court should assess the circumstances of the out-of-court identification to determine whether it is sufficiently probative to support the conviction. (*Id.* at pp. 269, 271, 274.)

Yoon made two out-of-court identifications of defendant shortly after the crimes occurred. The first was when Detective Quintanilla presented her with a photo display. The second was when Detective Caughey re-interviewed her with the aid of Officer Hong who spoke Korean. In neither of those identifications did Yoon express any uncertainty or equivocation.

Yoon's trial testimony that defendant was not the robber, that she had only told the police that defendant's photo looked similar to the robber, and that the robber was black were merely factors for the jury to consider in deciding whether to credit her prior identifications. As the *Cuevas* court explained: "[J]uries are capable of determining the credibility of out-of-court statements that are

inconsistent with a witness's trial testimony by observing the witness's in-court demeanor: 'If, from all that the jury see of the witness, they conclude that what [s]he says now is not the truth, but what [s]he said before, they are none the less deciding from what they see and hear of that person and in court. There is no mythical necessity that the case must be decided only in accordance with the truth of the words uttered under oath in court.' [Citation.]" (*People v. Cuevas, supra,* 12 Cal.4th at p. 273.)

In closing argument, both the prosecutor and defense counsel explicitly asked the jury to evaluate Yoon's credibility based upon its observations of her in-court demeanor in order to decide whether it should credit her prior identifications of defendant or, instead, her trial testimony that he was not her assailant. (See fns. 4 and 6, *supra.*) By convicting defendant, the jury implicitly determined that Yoon was telling the truth when she made the earlier identifications. This is a determination that the jury was uniquely situated to make based upon its observations of Yoon's demeanor and credibility.[7] We are ill-suited to second guess that decision.[8] (See, e. g., *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

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[7] The pattern instructions, CALJIC Nos. 2.91 ("Burden of Proving Identity Based Solely on Eyewitnesses") and 2.92 ("Factors to Consider in Proving Identity by Eyewitness Testimony") were submitted.

[8] In sentencing defendant, the court said this about Yoon's testimony: "Ms. Soon Yoon Young said she couldn't really say for sure; but it was very clear with [her] to this court and apparently to the jury as well [that] she simply wanted to get on with her life. [¶] She didn't hold any grudge against you. She just wanted to get it over with and get out of here. [¶] So I don't have a problem with her identification. [¶] . . . [¶] [The jury] had reread on the testimony of the investigating officer in this case; and the investigating officer's testimony convinced them that, in fact, it was you. [¶] It was Detective Caughey; and there was sufficient evidence in what he said for that conviction to stand[.]"

Defendant's contrary arguments are not persuasive. He suggests that the jury's decision is infirm because the prosecutor did not offer evidence to explain why Yoon had recanted the prior identifications. Although evidence was offered in *People v. Cuevas, supra,* 12 Cal.4th 252 to explain the witnesses' in-court recantations, the *Cuevas* court did not purport to establish a rule that such evidence was required as a matter of law to uphold the validity of prior identifications. And the fact that Yoon told the police her assailant was black was simply one factor for the jury to consider in making its ultimate determination. This was not fatal to crediting her identifications of defendant because the prosecutor offered a credible explanation for that error in her description. (See fn. 5, *supra*.)

In sum, a reasonable jury could have concluded Yoon was telling the truth when she made her out-of-court identifications to the police. "Those out-of-court statements are 'substantial evidence -- that is, evidence which is reasonable, credible, and of solid value --' [citation] from which a reasonable jury could conclude beyond a reasonable doubt that defendant" robbed Yoon. (*People v. Cuevas, supra,* 12 Cal.4th at p. 277.)

SUFFICIENCY OF THE EVIDENCE -- COUNTS 7 AND 8

Defendant next contends that the evidence is insufficient to sustain his convictions for counts 7 and 8 because "the admission of hearsay statements made by the alleged victim to an officer" violated his federal constitutional right to confront and cross-examine as explained in *Crawford v. Washington, supra,* ___U.S.___ [124 S.Ct. 1354] (*Crawford*). Whether the statements were inadmissible hearsay, we find the evidence admitted was non-prejudicial.

Factual Background

Counts 7 and 8 were committed on January 4, 2002, at a flower store, Blooming Flowers. The victim was Annie Agayan. Shortly after the crimes, she gave a statement to the police describing what had happened, but not identifying defendant. Her statement was videotaped by the detective but it was not admitted as evidence.

Because the prosecutor was unable to locate Agayan for trial, a hearing was conducted to determine whether due diligence had been exercised to find her. The court determined there had been and found Agayan was unavailable within the meaning of Evidence Code section 240, subdivision (a)(5).[9] Relying upon section 1370, the prosecutor sought to introduce at trial Agayan's hearsay statements to the police. In a nutshell, section 1370 establishes a hearsay exception for an unavailable victim's statements to the police that describe an assault or threat of assault if the statements were made under circumstances indicating trustworthiness.[10] In this case, the trial court held there was a sufficient indicia of trustworthiness to permit testimony about the statements.

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9 All subsequent undesignated statutory references in this discussion are to the Evidence Code.

10 Section 1370 provides, in toto:

"(a) Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met:

"(1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.

"(2) The declarant is unavailable as a witness pursuant to Section 240.

"(3) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of statements made more than five years before the filing of the current action or proceeding shall be inadmissible under this section.

"(4) The statement was made under circumstances that would indicate its trustworthiness.

"(5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official.

During trial, Los Angeles Police Officer Daniel Wesley Tanner testified as follows. On January 4, 2002, he and a partner went to Blooming Flowers.[11] Agayan said she had been robbed. Officer Tanner testified that Agayan told them "she was working behind the counter; and suspect walked in and was posing as a customer and asked her a couple questions. [¶] She came out from behind the counter, answered his questions; and then as she was walking back behind the counter she heard the sound of a semiautomatic handgun, the racking action; and she turned and the suspect had a gun and told her, 'Open the register or I'll shoot you.' [¶] . . . She opened the register. . . . [¶] When he walked back, grabbed her by the arm, took her to the register; she opened the register, he grabbed the money and ran out the front door of the store." As he left, he told Agayan that if she screamed, he would shoot her. Agayan told the officer she had been fearful during these events.

After this testimony, the prosecutor played a videotape that had been retrieved from the store. Officer Tanner testified that the woman in the video was

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"(b) For purposes of paragraph (4) of subdivision (a), circumstances relevant to the issue of trustworthiness include, but are not limited to, the following:

"(1) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.

"(2) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.

"(3) Whether the statement is corroborated by evidence other than statements that are admissible only pursuant to this section.

"(c) A statement is admissible pursuant to this section only if the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement."

11 During the pretrial litigation about the admissibility of Agayan's hearsay statements, the prosecutor stated the interview was conducted "within 15 minutes of the incident."

Agayan. The videotape,[12] which lacks sound, clearly shows the commission of a robbery. A man walks into the store. After meandering around the premises, he walks behind the counter. He pulls out a gun and points it at Agayan. He grabs her by the arm, pushes her toward the cash register, and forces her to open it. He takes the cash and leaves.

Discussion

Crawford held that an unavailable declarant's "testimonial" hearsay statement can not be offered against a criminal defendant unless the defendant had the opportunity to cross-examine the declarant. The court reached this conclusion after reviewing the history of the Confrontation Clause found in the Sixth Amendment. It explained: "[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." (*Crawford, supra,* 124 S.Ct. at p. 1363.) "[The confrontation clause] applies to 'witnesses' against the accused -- in other words, those who 'bear testimony.' [Citation.] 'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' [Citation.] *An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.*" (*Id.* at p. 1364, italics added.) The court therefore held that "[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination [of the hearsay declarant]." (*Id.* at p. 1374.)

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12 On our own motion, we augmented the record on appeal to include the videotape which we have viewed. (Cal. Rules of court, Rule 12(a)(1)(A).)

Consequently, *Crawford* applies to a given hearsay statement if it is considered testimonial. *Crawford* held that "[s]tatements taken by police officers in the course of interrogations are . . . testimonial." (*Id.* at p. 1364.) The court stated that it used "the term 'interrogation' in its colloquial, rather than any technical legal, sense." (*Id.* at p. 1365, fn. 4.) It explained: "Police interrogations bear a striking resemblance to examinations by justices of the peace in England." (*Id*. at p. 1364.) "Justices of the peace conducting examinations under the Marian statutes were not magistrates as we understand that office today, but had an essentially investigative and prosecutorial function. [Citations.] England did not have a professional police force until the 19th century, [citation], so it is not surprising that other government officers performed the investigative functions now associated primarily with the police. The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace." (*Id.* at p. 1365.)

Crawford concluded: "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, *and to police interrogations*. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." (*Id.* at p. 1374, italics added and fn. omitted.)

In *Crawford,* the court held that the hearsay in issue there -- tape recorded statements "knowingly given in response to structured police questioning" -- were testimonial. (*Id.* at p. 1365, fn. 4.)

Whether hearsay statements offered pursuant to section 1370 are testimonial within the meaning of *Crawford* is an issue presently pending before the California

Supreme Court.[13] For purposes of this appeal, we will treat Agayan's statements as testimonial,[14] although the circumstances also suggest the statements were made within a time frame which could trigger the spontaneous declaration exception to the hearsay rule. (§ 1240.)

The issue is whether admission of the statements was prejudicial. This requires a determination whether the admission of Agayan's statements was harmless beyond a reasonable doubt. (*Lilly v. Virginia* (1999) 527 U.S. 116, 139-140.) In making that determination, we consider all of the evidence received by the jury, including the videotape of the crimes. (*People v. Harris* (1994) 9 Cal.4th 407, 428.) "To say that an error did not 'contribute' to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial later held to have been erroneous." (*Yates v. Evatt* (1991) 500 U.S. 391, 403.) Instead it means that to find "an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Id*. at p. 403.) Applied to this case, we conclude admission of the statements had no effect on the outcome of the case.

First we must point out Agayan's statements are silent on the identification of the perpetrator of the crime. They only establish that a crime occurred, a fact

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13 See, e. g., *People v. Adams* (2004) 120 Cal.App.4th 1065, review granted October 13, 2004, S127373 and *People v. Cage* (2004) 120 Cal.App.4th 770, review granted October 13, 2004, S127344. The AOC press release states: "*Adams* and *Cage* include the following issue: Are *all* statements made by an ostensible crime victim to a police officer in response to general investigative questioning 'testimonial hearsay' within the meaning of *Crawford v. Washington* [*supra*] 541 U.S. __, 124 S.Ct. 1354 and inadmissible in the absence of an opportunity to cross-examine the declarant, or does 'testimonial hearsay' include only statements made in response to a formal interview at a police station?"

14 Defendant had no prior opportunity to cross-examine Agayan because he waived his right to a preliminary hearing.

which defendant never challenged: only the identity of the perpetrator was challenged by defense counsel. In closing argument, the prosecutor stated that one could "see [defendant] so clearly in that Blooming Flowers video[.]" When referencing Officer Tanner's testimony about Agayan's hearsay statements, the prosecutor said: "[W]hat she told him you can accept as the truth, and you can also accept the fact that it corroborates what you see on the videotape. [¶] . . . [¶] The video shows the defendant." The prosecutor then reviewed how the videotape first showed defendant's initial movements in the store and then his commission of the crimes. He concluded: "It's a very clear video. You don't have an identification in front of you by Ms. Agayan, . . . but what you have is a very good videotape. . . . [¶] [T]his tape -- it's apparent to me, but you're the jury -- that that is Mr. Matamoros, clear as day." After freeze-framing one segment, the prosecutor said: "[T]hat profile that you can see so clearly in that video frame, it's a profile of the defendant and it's very pronounced." He concluded: "This charge is based upon the videotape and Officer Tanner's statements to you [taken from Agayan] about what occurred[.]"

Defense counsel's closing argument understandably downplayed the significance of the video. After noting that Agayan apparently never gave a description of the robber to the police and referencing the equivocations and changes in the in-court identifications made by two other victims (Moreno and Yoon), counsel argued: "[Y]ou can't rely on a picture to make an identification. We need to hear from her [Agayan]. [¶] The only proof you have of that crime is that a videotape. [¶] . . . [¶] I don't think that the film is fair. It's surveillance video. It's not a movie. [¶] . . . [¶] How suggestive is it we've been looking at one guy [the defendant] this whole time, you can't go it must be him. You have to know beyond any doubt that it is him. [¶] It could be anybody. We have no proof except that they've show this into the batch. [¶] People look different on film."

In rebuttal argument, the prosecutor stated: "[I]t's not true that that tape is the only evidence of the robbery in that situation [Blooming Flowers] because again you have the physical evidence and you have Detective Tanner's testimony and what she [Agayan] said to him; and that can be taken . . . by you as the truth and you can see it. It's corroborated."

SENTENCING TO THE UPPER TERM

On this appeal, defendant has raised two distinct contentions of sentencing error. In his opening brief, defendant urged that remand for re-sentencing was required because "the trial court misunderstood the scope of its discretion" when it chose the upper term for the robbery in count 1 which it then used as the base term. In his reply brief, defendant urged that the imposition of the upper term was error under the recently rendered decision in *Blakely v. Washington, supra,* 542 U.S. ___ [124 S.Ct. 2531] (*Blakely)*. We find merit to the second contention and therefore remand for a new sentencing hearing. This renders moot defendant's first contention that the court erred in selecting the upper term.

Factual Background

The pre-plea probation report stated that four juvenile court petitions had been sustained against defendant: (1) in February 1993 for robbery; (2) in October 1993 for failure to obey an order of the juvenile court; (3) in November 1993 for possession of a controlled substance; and (4) in June 1996 for battery.

Prior to the sentencing hearing, the prosecution filed a memorandum seeking, *inter alia*, the upper term for the robbery. It listed nine factors in aggravation: (1) the crimes involved great violence because in each one defendant used a gun to instill fear in the victims; (2) defendant was armed with a firearm in each robbery; (3) the victims were particularly vulnerable because they either were

working alone or were female and overpowered by defendant; (4) defendant threatened witnesses because he told some of the victims either he would shoot them if they did not comply or not to call the police; (5) defendant carried out the crimes in a manner indicating planning, sophistication or professionalism because he often waited until the victim was alone; (6) as indicated by his prior robbery conviction,[15] defendant has previously engaged in violent conduct indicating a serious danger to society; (7) defendant's prior convictions are of increasing seriousness because he now chose to use a firearm and committed crimes "at a furious pace"; (8) defendant had served a prior prison term for his robbery conviction; and (9) defendant's prior performance on parole was unsatisfactory.

Defense counsel filed opposition to the prosecutor's sentencing memorandum. It contested the factual bases of some of the factors cited by the prosecutor, contended that others were an improper dual use of the same fact(s), and minimized the nature of other factors. It concluded that no sentence "above the midterm" was justified.

At the hearing, each counsel reiterated points made in their pleadings. Defendant addressed the court. Seeking leniency, he explained his background and needs.

The court ruled: "*With regard to the term that is appropriate because of your history, Mr. Matamoros, the court must choose the high term*. [¶] I regret that. I regret that; but to choose any other term would not be a true, honest exercise of the court's discretion; and so as I say I regret that's a position I'm put in; but *we've discussed it from time to time over the course of the period that I've known you, and so you've understood what the result would be if the People were*

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15 In an earlier proceeding, the court found defendant had been convicted of robbery in 1997.

successful; and so that's the result that we have that's before the court today." (Italics added.) After explaining why defendant's life experience did not warrant a different result, the court stated: "Count one will be the base term. *The court chooses the high term because of the past history established by [defendant]*, believing that the high term is the only true and appropriate term that would applicable." (Italics added.) Defense counsel did not object to the court's reason(s) for imposing the high term.

Because this was a "two strikes" case, the court doubled the five-year high term to 10 years. After sentencing on the other counts and enhancements, the court imposed a total sentence of 61 and 2/3 years.

Discussion

Blakely builds on the following holding from *Apprendi v. New Jersey* (2000) 530 U.S. 466: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490.) In *Blakely*, the United States Supreme Court explained 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. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation] [so that] the judge exceeds his proper authority." (124 S.Ct. at p. 2537.)

Under the California determinate sentencing law, a sentencing court must impose the middle term unless it finds there are factors in mitigation or

aggravation. Only where factors in aggravation are found to exist may the court impose the upper term. (Pen. Code, § 1170, subd. (b).)

The issue is whether the upper term can be imposed only if the jury finds the factors in aggravation to be true.

The Attorney General's preliminary argument that the contention has been waived by failure to object in the trial court lacks merit for the reasons we explained in *People v. Vaughn* (2004) 122 Cal.App.4th 1363, 1369 [review granted Dec. 15, 2004].

With regard to sentencing a defendant to the upper term, we reject the Attorney General's contention that *Blakely* is inapplicable because California's sentencing scheme is sufficiently distinguishable from the state statutory scheme reviewed by the *Blakely* court. Our reasons for this conclusion are set forth in detail in our recent opinion in *People v. White* (Dec. 15, 2004; B166502) __Cal.App.4th ___. Simply stated, imposition of the upper term does require fact finding by the jury.

Nor do we agree with the Attorney General's request that we can apply a harmless error analysis to the *Blakely* violation. His request is based upon the general principle that a single factor is sufficient to support imposition of the upper term. (See, e. g. *People v. Osband* (1996) 13 Cal.4th 622, 728.) The Attorney General argues such a result can be justified by holding either that the jury found, as required by *Blakely,* a single aggravating factor (substantive events in this case) or that defendant admitted such a factor (defendant's personal background admitted in his plea for leniency to the court) or that the single aggravating factor falls outside the scope of *Blakely* (defendant's criminal history). The problem with this approach is that it is not clear from the court's statement the precise reason(s) for its decision to impose the upper term. After alluding to prior (possibly unreported) discussions with defendant and his attorney in which the court had

apparently indicated it would impose the high term were defendant convicted, the judge stated only: "The court chooses the high term because of the past history established by [defendant], believing that the high term is the only true and appropriate term that would be applicable." Given that the court made no reference to the specifics of defendant's criminal history,[16] it is not apparent that was the predicate of its decision. Nor is it apparent that this is a reference to defendant's personal background as explained by him to the court. And there certainly is nothing in the remark to suggest the court was relying upon any factor related to the commission of the present offenses, including the many factors cited in the prosecutor's sentencing memorandum, some of which the Attorney General now relies upon to advance a harmless error analysis.

As we explained in *People v. White, supra,* "[t]he relevant question is not whether we can conceive of a legitimate way for the trial court to have arrived at the . . . sentence imposed on appellant. The question is whether the trial court would have exercised its discretion to impose the upper term" if it knew of *Blakely's* constraints. (*Id.* at pp. 29-30 of slip opn.) On this record, we can not conclude it would have. We therefore reverse the sentence and remand for re-sentencing.

DISPOSITION

The judgment is reversed as to the sentence only, and the matter is remanded for the court to conduct a new sentencing determination pursuant to

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16 A sentencing court can rely upon prior convictions (including juvenile adjudications) or the fact the defendant was on probation at the time of the charged offense without running afoul of *Blakely*. (*People v. Vu* (Dec. 9, 2004, G033583) ___Cal.App.4th ____.)

Blakely v. Washington, supra, 542 U.S. ___. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED

HASTINGS, J.

We concur:

EPSTEIN, P.J.

CURRY, J.