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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES ISAAC MESA,

Defendant and Appellant.

A112921

**(Sonoma County
Super. Ct. No. SCR-452927)**

Appellant James Isaac Mesa contends the evidence is insufficient to support his convictions for robbery and carjacking. (Pen. Code, §§ 211, 215.)¹ He also contends the trial court violated his constitutional rights in sentencing him to upper terms on all offenses, and in committing other sentencing errors. We reject appellant’s contentions as to the sufficiency of the evidence, but agree with appellant that the matter must be remanded for resentencing.

I. FACTS AND PROCEDURAL HISTORY

This appeal arises from numerous crimes perpetrated by appellant in November of 2004, in four different incidents on four different dates. Although only the robbery and carjacking convictions arising from events on November 11, 2004 are directly in issue on this appeal, we will also briefly summarize the facts as to the other crimes.

A. ROBBERY AND CARJACKING INVOLVING A CHEVY BLAZER TRUCK

On November 11, 2004, appellant approached a victim he knew, Richard Mitchell (Richard) who was working in his workshop on Windsor Road. Appellant pulled out a

¹ All subsequent statutory references are to the Penal Code.

gun and demanded the keys to Richard's Chevy Blazer truck, at gunpoint. After appellant got the keys to the truck, he drove away, while firing his gun at Richard. Richard then fired a gun at appellant, shattering the windows of the truck. Appellant could not drive away very fast, because Richard had left the truck in four-wheel drive mode, which limited the top speed of the truck to about 35 to 45 miles an hour. Richard could hear the loud revving of the engine on the truck, as appellant drove off.

The truck was later found abandoned, just a mile or so away from the site of the original taking. The windows had been shattered by gunfire. There was also a bullet hole in the roof, on the passenger side; this hole had been created by someone firing from the inside of the vehicle.

B. OTHER OFFENSES

Appellant also perpetrated other offenses involving firearms in November of 2004, which are less relevant to the issues raised on appeal. On November 5, 2004, appellant had a dispute with Jason Mitchell (Jason), who is no relation to Richard Mitchell, and who had just cut appellant's hair. Shortly after the haircut, Jason received a call from appellant's girlfriend, who was scared and upset because appellant had a gun and was in her apartment. Jason went to appellant's girlfriend's apartment to try to talk to appellant and defuse the situation. Appellant fired his gun at Jason at least three times, wounding him in the foot, forearm, and chest.

On November 12, 2004, appellant had a dispute with his own brother Joseph Mesa (Joseph). Appellant was at his brother's home early in the morning, and Joseph told appellant to leave. Appellant got mad and fired a gun at Joseph at least three times, missing him.

Finally, on November 16, 2004, appellant was arrested, and he had a loaded .357 magnum revolver in his waistband.

C. PROCEDURAL HISTORY, VERDICTS, AND SENTENCING

In an information filed on January 4, 2005, appellant was charged with 12 counts, as a result of his criminal activities in November 2004: (1) attempted murder of Jason; (2) assault with a firearm, also as to Jason; (3) unlawful possession of a firearm by an ex-

convict, in violation of section 12021, subdivision (a)(1), on November 5, 2004, the same date counts I and II were alleged to have occurred; (4) carjacking, as to the truck belonging to Richard; (5) robbery, also as to Richard; (6) assault with a firearm, as to Richard; (7) vehicle theft, as to the truck belonging to Richard; (8) unlawful possession of a firearm by an ex-convict, in violation of section 12021, subdivision (a)(1), on November 11, 2004, the same date counts IV through VII were alleged to have occurred; (9) attempted murder, as to Joseph; (10) assault with a firearm, as to Joseph; (11) unlawful possession of a firearm by an ex-convict, in violation of section 12021, subdivision (a)(1), on November 12, 2004, the same date counts IX and X were alleged to have occurred; and (12) unlawful possession of a firearm by an ex-convict, in violation of section 12021, subdivision (a)(1), on November 16, 2004.

It was also alleged that appellant had six prior felony convictions, of which one was a prior strike, and three were prior prison convictions, within the meaning of sections 667.5, subdivision (b) and 1170.12; and that appellant had personally used a firearm and personally discharged a firearm, and had been released from custody on bail at the time of the offenses.

In the course of a jury trial at which the evidence summarized above was adduced, the trial court granted a motion for acquittal on the attempted murder charge as to Joseph, count IX, but appellant was convicted by the jury on all the other charged crimes except the remaining attempted murder charge, as to Jason, count I. Appellant also admitted to the court that he had been on bail at the time of the offenses, and admitted he had suffered the prior convictions.

The trial court sentenced appellant to a total term of 54 years in prison.

The court selected count IV, the carjacking, as the principal term, and imposed the upper term of nine years, doubled for the prior strike conviction, for a subtotal of 18 years. As an enhancement under the terms of section 12022.53, subdivision (c) for the discharge of the firearm during the course of this crime, the court imposed an additional 20 years, for another subtotal of 38 years.

In addition, the court imposed another 16 years, calculated as follows: three years for the assault with a firearm in count II, with a four-month enhancement under section 12022.5, subdivision (a)(1); one year four months for the unlawful firearm possession in count III; plus three years for the assault with a firearm on count X, with a four-month enhancement; and an additional eight years for prior prison terms. The court also imposed certain concurrent and stayed terms. The court imposed concurrent terms of six years apiece for the unlawful possession of a firearm charged in counts XI and XII. The court also imposed but stayed terms of 10 years on count V, eight years on count VI, six years on count VII. The court imposed another concurrent six-year term on count VIII, which is incorrectly shown as a stay on the abstract of judgment.

As to substantive crimes in which the trial court was choosing to impose the upper, middle, or lower terms, the trial court chose to impose upper terms, and found three aggravating factors justifying this sentencing choice: (1) defendant engaged in violent conduct indicating a serious danger to society; (2) defendant's prior convictions as an adult and sustained proceedings as a juvenile were numerous and of increasing seriousness; and (3) defendant's prior performance on probation and parole was unsatisfactory. The court found these aggravating factors outweighed the mitigating factor suggested by the probation department, i.e., the fact that appellant's performance on parole from the California Youth Authority (CYA) had been satisfactory. In addition, the court observed that if one factor, the factor relating to violent conduct posing a serious danger to society, was later found improper because it should have been found true by the jury rather than the court, the court would still choose to impose the upper term. We will discuss the sentencing proceedings in more detail in the final two parts of this opinion, in connection with appellant's specific claims of sentencing error.

II. DISCUSSION

A. SUFFICIENCY OF THE EVIDENCE FOR ROBBERY AND CARJACKING

Appellant first contends there is insufficient evidence that he intended to *permanently* deprive Richard of his possession of the Chevy Blazer truck, as relevant to the robbery conviction and carjacking conviction.

When the sufficiency of the evidence is in dispute, the court “must ‘review the entire record, and drawing all reasonable inferences in favor of [the judgment], . . . determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” (*People v. Hughes* (2002) 27 Cal.4th 287, 357.) On appeal, the court must determine whether the record “contains substantial evidence—i.e., evidence that is credible and of solid value,” from which a rational trier of fact could have found that the elements of the crime were established beyond a reasonable doubt. (*People v. Jennings* (1991) 53 Cal.3d 334, 364 (*Jennings*)). On review, however, the appellate court need not be convinced beyond a reasonable doubt. (*People v. Alcala* (1984) 36 Cal.3d 604, 623 (*Alcala*), disapproved on other grounds in *People v. Falsetta* (1999) 21 Cal.4th 903, 911.) The appellate court “must merely determine whether ‘any rational trier of fact’ at all could be so persuaded.” (*Alcala, supra*, at p. 623.)

In the present case, there was evidence more than sufficient to justify the jury’s factual finding that appellant took the truck with the intent to permanently deprive its owner of possession. As previously mentioned, appellant demanded the keys to the truck at gunpoint. After appellant obtained the keys to the truck, he drove away, while firing his gun at Richard. Richard then fired back at appellant, shattering the windows of the truck. Appellant could not drive away very fast, because the truck was in four-wheel drive mode, which limited the top speed of the truck to about 35 to 45 miles an hour. The truck made a loud revving sound as appellant tried to drive off at high speed but could not. The truck was later found abandoned, just a mile or so away from the site of the original taking. The back window and side window had been shattered. These actions were obviously inconsistent with an intent to merely borrow the truck, or return the truck to its owner later.

Appellant however places emphasis on the fact that the truck was found abandoned just a mile or so away from the site of the taking. From the fact that the truck was found abandoned not far away, appellant suggests it might have been his intent to merely obtain temporary, not permanent possession. Perhaps that was one inference the jury could have drawn, although it is certainly not the only inference or the most

reasonable inference. The most reasonable inference is that appellant intended to deprive the owner of possession permanently, but later changed his mind for some reason and abandoned the vehicle. As for why appellant changed his mind, only he would know, and he presented no evidence on the point, but the prosecution evidence indicates the truck had been left in a four-wheel drive mode of operation, which prevented it from operating at normal high speeds.² In addition, of course, the owner of the truck had just shot out some of its windows as appellant was driving off, which would have made the stolen truck stand out even more when it was on the road.

In any event, the jury's task was not to determine why appellant abandoned the truck, but instead to determine whether he took it, with the intent to permanently deprive its owner of possession. The evidence is fully sufficient to justify the jury's reasonable inference that appellant took the truck and intended to deprive the owner of possession permanently, so appellant's argument in this respect fails. (See *Jennings, supra*, 53 Cal.3d at p. 364.)³

B. IMPOSITION OF UPPER TERMS

Appellant next contends the court committed *Blakely* error by imposing the upper terms based on aggravating facts not determined by the jury, thereby denying him his

² Appellant suggests there was no evidence that the truck was still in four-wheel drive mode at the time it was found. However, Richard testified that the truck was in four-wheel drive mode when appellant took it, and Richard testified the only difference with the truck when found was that the windows had been shot out. It was reasonable for the jury to infer from his evidence that the truck was still in four-wheel drive mode. In addition, of course, the fact that the windows had been shot out was another circumstance suggesting that appellant would want to abandon the vehicle.

³ We also do not agree with appellant's contention that the carjacking conviction necessarily required a showing of an intent to deprive the owner of his vehicle permanently. The relevant statute (§ 215) and the jury instructions properly given in this case allowed a carjacking conviction even if the deprivation was intended to be only temporary. Appellant however argues that because the information mistakenly charged that appellant acted "with the intent to permanently *and* temporarily deprive" (italics added) that an intent to permanently deprive was required to be shown at trial. The mere use of the word "and" as a conjunction in the information did not require such a showing and in any event we need not address this issue further, as we have found substantial evidence of an intent to permanently deprive.

federal constitutional right to jury trial in violation of the Sixth and Fourteenth Amendments.⁴ We agree a remand for resentencing is appropriate in this case.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), the United States Supreme Court interpreted the Sixth Amendment to the United States Constitution to require that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Apprendi, supra*, at p. 490.)

For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by defendant; thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional fact finding, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely v. Washington* (2004) 542 U.S. 296, 301-305 (*Blakely*)). In *Cunningham*, the United States Supreme Court held that by "assign[ing] to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence," California's determinate sentencing law "violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments." (*Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856, 860] (*Cunningham*), overruling on this point *Black, supra*, 35 Cal.4th 1238.)

In this case, when the trial court was choosing to impose the upper, middle, or lower terms, the trial court chose to impose upper terms, and found three aggravating factors justifying this sentencing choice: (1) defendant engaged in violent conduct, indicating a serious danger to society; (2) defendant's prior convictions as an adult and sustained proceedings as a juvenile were numerous and of increasing seriousness; and (3) defendant's prior performance on probation and parole was unsatisfactory. These

⁴ We reject the Attorney General's assertion that appellant waived this claim of sentencing error by failing to assert it below. Appellant's sentencing hearing occurred on December 12, 2005, which was almost six months after *People v. Black* (2005) 35 Cal.4th 1238 (*Black*) was decided. Thus, at the time of sentencing, the court was compelled to follow *Black* on this issue, and any objection would have been futile. Consequently, there was no waiver. (See *People v. Turner* (1990) 50 Cal.3d 668, 703-704.)

aggravating factors outweighed the mitigating factor suggested by the probation department, i.e., the fact that appellant's performance on parole from CYA had been satisfactory. In addition, the court observed that if one factor, the factor relating to violent conduct posing a serious danger to society, was later found improper because it should have been found true by the jury rather than the court, the court would still choose to impose the upper term.

The fact that appellant had previous convictions could be appropriately relied upon by the court under *Blakely* and *Cunningham*, even without a jury finding. (See *Blakely, supra*, 542 U.S. at p. 301; *Cunningham, supra*, 127 S.Ct. at p. 868.) However, the remaining factors should have been submitted to a jury.

We note that in *Washington v. Recuenco* (2006) ___ U.S. ___ [126 S.Ct. 2546, 2550-2553], the United States Supreme Court held that *Blakely* error was not structural error, but instead was subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*); see also *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327.)

Any error the trial court made in considering an aggravating circumstance is harmless under *Chapman*, if we conclude, beyond a reasonable doubt, that the jury would have found the circumstance true. It does appear that the jury would have concluded that appellant engaged in violent conduct and posed a serious danger to society. Further, as pointed out above, the trial court explicitly stated that it would still have decided to impose the upper terms, even if this factor were subsequently held to be invalid. However, there remains the question of factor (3), i.e., whether appellant's prior performance on probation and adult parole had been unsatisfactory. The trial court explicitly stated that it would have imposed the same sentence even if factor (1) was invalid, but did not make the same statement regarding the other factors. In these circumstances, we cannot properly conclude beyond a reasonable doubt under *Chapman* that the jury would have found these additional aggravating facts, and also that the trial court would still have imposed the upper or aggravated terms in any event, even in the

absence of this factor. Therefore, the matter should be remanded to the trial court for resentencing, and a properly based decision as to whether to impose the upper terms.

C. OTHER SENTENCING ERRORS

Appellant finally contends, and the People concede, that the trial court committed other sentencing errors. We will direct that these errors, which we summarize as follows, be corrected on remand.

We first summarize the part of the sentence that is not challenged in this respect on appeal. The court selected count IV, the carjacking, as the principal term, and imposed the upper term of nine years, doubled for the prior strike conviction, for a subtotal of 18 years. As an enhancement under the terms of section 12022.53, subdivision (c) for the discharge of the firearm during the course of this crime, the court imposed an additional 20 years, for another subtotal of 38 years. Thus far, there are no errors in the sentence.

In addition, the court imposed another 16 years, calculated as follows: three years for the assault with a firearm in count II, with a four-month enhancement under section 12022.5, subdivision (a)(1); one year four months for the unlawful firearm possession in count III; plus three years for the assault with a firearm on count X, with a four-month enhancement; and an additional eight years for prior prison terms. The court also imposed certain concurrent and stayed terms. The court imposed concurrent terms of six years apiece for the unlawful possession of a firearm charged in counts XI and XII. The court also imposed but stayed terms of 10 years on count V, eight years on count VI, six years on count VII. The court imposed another concurrent six-year term on count VIII, which is incorrectly shown as a stay on the abstract of judgment. Appellant and the People agree there were numerous errors in these portions of the sentence.

First, as appellant points out and the People concede, appellant's sentence for assault with a firearm as charged in count II should be two years, not the three years actually imposed, because the sentence for this subordinate term should be one third of the middle term of three years, doubled for one prior strike conviction. (See *People v. Nguyen* (1999) 21 Cal.4th 197, 204.) This error must be corrected on remand.

Further, the People also concede appellant's argument that a one-year prior conviction enhancement imposed for the October 29, 1996 prior conviction for dissuading a witness must be stricken, because the trial court also imposed a five-year enhancement for this same conviction. (See *People v. Jones* (1993) 5 Cal.4th 1142, 1152.) This error must be corrected on remand.

In addition, the court imposed another concurrent term of six years on count VIII, which is incorrectly shown as a stay on the abstract of judgment. This error must be corrected on remand.

On count X, the assault with a firearm as to Joseph, the court orally imposed a concurrent full term composed of the aggravated term of eight years, i.e., the upper term of four years, doubled by the prior strike. The parties agree the term for this offense must be consecutive, not concurrent. This error was apparently caught by the clerk of the court, and the abstract of judgment indicates imposition of a consecutive sentence, but with the term indicated as three years, plus a four-month consecutive enhancement. The sentence for this substantive offense should be two years, i.e., one third of the middle term of three years, doubled by the prior strike. This error must be corrected on remand, and will reduce by one more year the operative sentence.

Thus far the errors asserted by appellant would require a three-year reduction in appellant's operative sentence, but there is another error which when corrected will operate to lengthen his sentence somewhat. As the People point out, the trial court should have imposed enhancements under the terms of section 12022.5, subdivision (a) as to counts II and VI, and in the case of the unstayed sentence on count II the enhancement should be in the amount of two years eight months, which is one third of the midterm, or one year four months, doubled for the prior strike, and the court should not have imposed just the four months actually imposed in the abstract of judgment. (See *People v. Felix* (2000) 22 Cal.4th 651, 656.) This error should be corrected on remand, and it would require lengthening the operative sentence by two years four months, as compared to the shortening of the sentence by three years that would otherwise be proper, for a net reduction of eight months.

In addition, we agree with the parties that the trial court properly imposed full term sentences for the convictions on counts V, VI, and VII, but then stayed those terms. (See *People v. Guzman* (1996) 45 Cal.App.4th 1023, 1028.) We also remand to the trial court to consider whether to sentence appellant to the upper terms, as was discussed in the preceding part of this opinion.

III. DISPOSITION

The judgment of conviction is affirmed. However, the matter is remanded to the trial court for resentencing and correction of the sentence indicated on the abstract of judgment, as set forth herein, and the forwarding of a corrected copy of the abstract of judgment to the Department of Corrections.

NEEDHAM, J.

We concur.

JONES, P. J.

SIMONS, J.