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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH MUSHARBASH, Defendant and Appellant.	B174478 (Los Angeles County Super. Ct. No. KA063863)

APPEAL from a judgment of the Superior Court of Los Angeles County, Philip S. Gutierrez, Judge. Affirmed in part, reversed in part and remanded.

Dennis L. Cava, 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, Lawrence M. Daniels and Marc J. Nolan, Deputy Attorneys General, for Plaintiff and Respondent.

Joseph Musharbash appeals from judgment entered following a jury trial in which he was convicted of four counts of grand theft of personal property (Pen. Code, § 487, subd. (a)) and four counts of second degree commercial burglary (Pen. Code, § 459.) Sentenced to prison for a total of three years, he contends the jury did not make the factual determinations necessary to impose the upper term. For reasons explained in the opinion, we reverse the sentence and remand the matter for resentencing.

FACTUAL AND PROCEDURAL SUMMARY

As appellant only challenges the sentence, it will suffice to observe that in June 2003, appellant deposited and cashed various checks written on accounts with insufficient funds. Downey Savings lost approximately $5,000 and Bank of America lost approximately $12,000 as a result of paying amounts out of appellant's accounts that exceeded the amounts deposited. Appellant testified that he had been assured by his business partner that the partner would put money into the accounts to cover the amount of cash needed.

At sentencing the court noted there were three factors addressed by the prosecution in its sentencing memorandum: "The sophistication of the crime. And one of the things that struck [the court] was basically Mr. Musharbash's position at trial was that he wasn't sophisticated enough to pull this off in terms of the kiting. But yet his background, as reflected by the letters, indicate that he knows the latest technology, he's active in websites, he does internet research. [¶] So it was--kiting is sophisticated. You have to know the bank's weak spot in terms of being able to pull off the transactions, because you need to do multiple transactions quickly so that the bank can't detect it. And you can, in a very quick period of time, basically keep multiplying the benefit if you do it correctly. And it was done correctly in this case, so the crime was sophisticated. [¶] The amount of loss was substantial,

in the amount of $17,000. . . . [¶] The other point . . . is basically he induced--I mean if you acknowledge that the jurors found, albeit very quickly, they found that his sister Rula Musharbash, was not guilty. She was not an active participant. [¶] Basically my read on that is that she went along unwittingly with what Mr. Musharbash told her to do. And therefore, he induced her to do something. And he basically put his sister--we talk about a person not willing to harm someone else. But you look at what he put his sister Rula Musharbash to, through, his own sister. . . ."

As to count 1, a violation of Penal Code section 487, subdivision (a), the court sentenced appellant to prison for the upper term of three years. The court stated it selected the upper term because of the sophistication of the crime, the amount of the loss and the fact that appellant induced others to participate in the crime. For count 2, a violation of Penal Code section 459, appellant was sentenced to the midterm of two years, stayed pursuant to Penal Code section 654. For counts 3, 5, and 7, also violations of Penal Code section 487, subdivision (a), appellant was sentenced in each to the midterm of two years in prison, concurrent to count 1. Four counts 4, 6, and 8, also violations of Penal Code section 459, appellant was sentenced to prison for the midterm of two years, stayed pursuant to Penal Code section 654.

DISCUSSION

Appellant contends his sentence in count 1 to the upper term of three years, based on factual findings not found true by the jury nor held to the standard of proof beyond a reasonable doubt, violated his Fifth, Sixth, and Fourteenth Amendment rights under the case of *Blakely v. Washington* (2004) 542 U.S.___ [124 S.Ct. 2531].

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), the United States Supreme Court held: "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." In *Blakely v. Washington*, *supra*, 124 S.Ct. 2531, 2537 (*Blakely*), the Supreme Court held 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. . . . 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." (Italics omitted.) It appears that the holding applies to all cases not yet final when *Blakely* was decided in June 2004. (See *Schriro v. Summerlin* (2004) 542 U.S. ___ [124 S.Ct. 2519].)

Appellant argues that *Blakely* applies to the California determinate sentencing law. We agree. Under Penal Code section 1170, subdivision (b), "[w]hen 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." Circumstances in aggravation cannot include a fact on which an enhancement is based or a fact which is an element of the underlying offense. (Cal. Rules of Court, rule 4.420(c) and (d).) Like the "standard range" in the Washington sentencing scheme considered in *Blakely*, the middle term under California law is the maximum sentence the court can impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Blakely, supra*, 124 S.Ct. 2531, 2537.)

Here, the court imposed the upper term based on three factors. The court found that the crime was sophisticated, the loss was substantial and appellant induced another to participate in the crime. Appellant was entitled to have a jury

determine these facts used to impose the upper term, and the resulting sentence here is an invalid sentence.

DISPOSITION

Appellant's sentence is reversed and the matter is remanded for resentencing[1] in accordance with the views expressed in this opinion and in all other respects, the judgment is affirmed.

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HASTINGS, J.

We concur:

EPSTEIN, P.J.

CURRY, J.

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[1] The court may impose any otherwise lawful resentence suggested by the facts available at the time of rensentencing but may not sentence appellant to a greater term than originally imposed. (*In re Ditsch* (1984) 162 Cal.App.3d 578, 582.)