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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

RAUL FRIDAY RAMOS,

Defendant and Appellant.

B192823

(Los Angeles County
Super. Ct. No. NA064531)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Arthur H. Jean, Jr., Judge. Affirmed.

Catherine Campbell, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters and Linda C. Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Raul Friday Ramos challenges his assault with a deadly weapon conviction on the ground the trial court violated his right to a jury trial by imposing an upper term sentence on the basis of factors not found by the jury. We conclude appellant forfeited the contention by failing to object in the trial court.

BACKGROUND AND PROCEDURAL HISTORY

Appellant and a companion beat a man on a Blue Line train. The victim testified they punched him, kicked him, and struck him with a cane.

A jury convicted appellant of assault with a deadly weapon or by means of force likely to produce great bodily injury and misdemeanor battery. The jury also found appellant personally inflicted great bodily injury on the victim. Appellant waived a jury trial on all strike and enhancement allegations. The court found appellant had suffered one prior serious felony conviction, within the meaning of the Three Strikes law and Penal Code section 667, subdivision (a)(1), and served five prior prison terms. The court sentenced appellant to a second strike term of 19 years in prison.

DISCUSSION

The trial court chose the upper term of four years for the base term, after finding no mitigating factors and two aggravating factors: appellant was on parole at the time of the offense and his performance on parole was “awful.”

Citing *Cunningham v. California* (2007) __ U.S. __ [127 S.Ct. 856] and *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), appellant contends the imposition of the upper term violated his right to a jury trial, in that it was based upon facts found by the court, not a jury. However, he did not raise the issue in the trial court, and has therefore forfeited it. (*People v. Hill* (2005) 131 Cal.App.4th 1089, 1103.) Appellant was sentenced on June 13, 2005. Sentencing occurred after *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Blakely*, but before *People v. Black* (2005) 35 Cal.4th 1238, 1262. Accordingly, the issue was known and the state of law at the time did not render the claim futile. Appellant was required to raise the issue in the trial court to preserve it

for appeal.

Even if appellant had not forfeited the issue, it would have no merit. The trial court relied upon at least one recidivism-type factor, i.e., that appellant was on parole at the time of the commission of the offense. In *Apprendi*, the court explained that recidivism was distinguishable from other matters used to increase a sentence because (1) recidivism traditionally has been used by sentencing courts to increase the length of a sentence, (2) recidivism does not relate to the commission of the charged offense, and (3) prior convictions result from proceedings that include substantial procedural protections. (*Apprendi, supra*, 530 U.S. at p. 488.) The recidivism exception to *Apprendi* has been deemed by many courts to extend beyond the mere fact of a prior conviction to include closely related matters, such as the nature of the prior conviction. (*People v. Thomas* (2001) 91 Cal.App.4th 212, 222-223; *People v. McGee* (2006) 38 Cal.4th 682, 702-707.) Appellant's parole status reflected his relatively recent release from prison, and the commission of the charged offense during the term of parole necessarily reflected swift recidivism. It was therefore a recidivism-type factor. This factor was sufficient to support the court's choice of an upper term. (*People v. Black* (2007) 41 Cal.4th 799, 806.)

DISPOSITION

The judgment is affirmed.

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BOLAND, J.

We concur:

COOPER, P. J.

RUBIN, J.