Filed 3/30/05 P. v. Salinas CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. ALFRED SALINAS, Defendant and Appellant.	B167804 (Los Angeles County Super. Ct. No. BA213459)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tricia Ann Bigelow, Judge. Affirmed in part; reversed in part.

Richard D. Miggins, 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, Joseph P. Lee, Chung L. Mar and Steven E. Mercer, Deputy Attorneys General for Plaintiff and Respondent.

Alfred Salinas appeals his conviction for second degree murder. He claims a pre-trial photographic lineup was impermissibly suggestive and tainted a later, in-court identification; that he should have been readvised of his *Miranda*[1] rights during a second police interview; and that his counsel was ineffective in failing to object to the *Miranda* violation. He claims counsel also was ineffective in failing to object to repeated prosecutorial misconduct during argument. He argues error in the court's admission of hearsay testimony by a witness, in its admission of a video recreation of the shooting, and in its reconvening the jury to determine the priors after receiving the guilty verdict. He asserts a one-day error in the calculation of his credits, and complains that he was erroneously denied post-verdict access to juror information. Finally, he claims he was improperly sentenced to the upper term for the gun use enhancement under *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531]. We conclude there was *Blakeley* error, necessitating remand for resentencing. Except for the resentencing, as to which a partial reversal is required, we affirm the judgment of the trial court.

FACTUAL AND PROCEDURAL SUMMARY

At about 2:00 p.m. or 3:00 p.m. on August 19, 2000, Sophia Gomez told her mother she was going out to look for appellant and left her mother's house in her dark blue Honda. Appellant and Sophia went to Marcelino's Bar and Café, where they ate and drank for several hours. During the evening, they argued loudly, and Sophia threw beer in appellant's face. While they were arguing, appellant and Sophia went outside. Appellant came back into the bar, but Sophia did not. According to one of the waitresses, Sophia left the bar about two hours before its 2:00 a.m. closing, and appellant left about one hour before closing.

Sophia returned home around 1:00 a.m. She told her mother she was going to pick up her car and left.

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436.

In the early hours of August 20, 2000, Carlos Lopez was at home in the vicinity of Avenue 32 and Verdugo Road, across the street from Mike's Liquor. At about 1:20 a.m., he heard gunshots from the vicinity of the liquor store. He looked out the window and saw a dark-colored car parked at Mike's Liquor. The car backed out and headed north on Verdugo Road. Some of the tires were shot out and the rims were hitting the ground. The car turned onto Avenue 32, then right onto Verdugo Place. One or two minutes later, Lopez saw the car come back down Verdugo Place onto Verdugo Road, followed by a light-colored car. There appeared to be two people in the dark car.

George Espinoza also lived near Avenue 32 and Verdugo Road. He arrived home from work shortly after midnight on August 20, 2000. At around 1:30 a.m., he heard a couple of shots coming from the corner of Avenue 32 and Verdugo Road. He heard more shots and walked outside, then heard three more shots. He saw a white car come around the corner and drive north on Verdugo Road at high speed. Then he saw a dark-colored Honda come out of the driveway next to the liquor store. It crashed into the wall next to the driveway, sending out sparks. It appeared the tires were flat because the car was having trouble moving, and Espinoza could hear the noise of the tire rims. The bumper was hanging onto the street. Espinoza saw the car turn onto Avenue 32 before he went inside.

Peter Keenan lived on Division Street, approximately one mile from the corner of Avenue 32 and Verdugo Road. As Keenan parked his car at home at around 1:30 a.m. on August 20, 2000, he heard a loud sound like a tire running on the wheel rim. A black Honda stopped in front of his house, with the right front tire running on its rim. Keenan saw appellant get out of the Honda and walk quickly to a green Honda Odyssey van parked nearby. Appellant got into the van and it drove away.

At about 4:00 a.m. that morning, Sophia Gomez's body was found in the dark-colored Honda. She died of multiple gunshot wounds: one to her abdomen, three to her back, and one to her right leg.

Appellant was charged with first degree murder by means of lying in wait. He also was charged with being an accessory after the fact. It was alleged that he suffered two prior serious felonies within the meaning of the Three Strikes law.

After two mistrials due to deadlocked juries, appellant was convicted of second degree murder and accessory after the fact. The jury found true the allegation that he had personally discharged a firearm at an occupied vehicle, causing great bodily injury and death, and found the lying in wait allegation not true. The court granted the People's motion to dismiss the conviction for accessory after the fact. Appellant waived jury on the priors, and the court found the strike allegations to be true. He was sentenced to 65 years to life, and filed this timely appeal.

DISCUSSION

I

Appellant contends the photographic lineup shown to witness Peter Keenan was impermissibly suggestive because appellant was the only man pictured with a military haircut, and that this tainted Keenan's subsequent in-court identification. "Due process requires the exclusion of identification testimony only if the identification procedures used were unnecessarily suggestive and, if so, the resulting identification was also unreliable." (*People v. Yeoman* (2003) 31 Cal.4th 93, 123.) "[T]here is no requirement that a defendant in a lineup, either in person or by photo, be surrounded by others nearly identical in appearance. [Citation.] Nor is the validity of a photographic lineup considered unconstitutional simply where one suspect's photograph is much more distinguishable from the others in the lineup." (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052.) "Because human beings do not look exactly alike, differences are inevitable. The question is whether anything caused defendant to 'stand out' from the others in a way that would suggest the witness should select him." (*People v. Carpenter* (1997) 15 Cal.4th 312, 367.)

When he was interviewed by police, Keenan indicated that the person he saw run from the Honda Accord and enter the Odyssey van was a male Hispanic, 5'9", 20 to 25

years old, thin build, "fade" type hair cut (short on the sides, longer on top) and clean-shaven. We have inspected the photographic lineup which was shown to Keenan. It consists of six clean-shaven men with dark hair. Any of them could be Hispanic. All but No. 4 appear to be of similar age. All but Nos. 1 and 4 have short hair which is close cut on the sides. Appellant's photograph did not "stand out" from the others in such a suggestive way as to render the lineup unconstitutional. (See *People v. Carpenter*, *supra*, 15 Cal.4th at p. 367.)

II

Appellant was first interviewed by police on September 1, 2000. At that time, he was advised of his *Miranda* rights. He was interviewed a second time on September 25, 2000. For the first time on appeal, appellant claims he was not readvised of his *Miranda* rights during this second interview. Appellant failed to raise this objection at trial, and hence has forfeited the issue. (*People v. Holt* (1997) 15 Cal.4th 619, 667.) We nevertheless proceed to the merits to forestall his claim that the failure to object constituted ineffective assistance of counsel. (See *People v. Mitcham* (1992) 1 Cal.4th 1027, 1044.)

Detective Garcia testified that he interviewed appellant on September 1, 2000. Prior to the interview, he advised appellant of his constitutional rights by reading from a card, and asked appellant if he understood his rights. Appellant answered yes, and the detective proceeded to question him. Detective Garcia testified that he had a subsequent interview with appellant on September 25, 2000. He was asked: "And did you remind the defendant of his previously waived rights at that time?" The detective answered, "Yes." He was asked, "And did he agree to speak with you again?" The detective answered, "Yes, he did." No *Miranda* violation is established on this record.

III

Appellant makes several claims of prosecutorial misconduct. First, appellant claims the prosecutor's comments improperly disparaged defense counsel by accusing him of withholding facts, engaging in sleight of hand, and trying to bamboozle the jury. "Prosecutorial argument that denigrates defense counsel directs the jury's attention away

from the evidence and is therefore improper. [Citation.] In evaluating a claim of such misconduct, we determine whether the prosecutor's comments were a fair response to defense counsel's remarks." (*People v. Young* (2005) 34 Cal.4th 1149, 1189.)

Here, defense counsel argued to the jury that the prosecution's theory was unsupported by fact, and "theory unsupported by fact is like slicing into a pie without the filling." He then raised numerous questions: what car did the victim and the appellant use to go to the bar; what vehicle did the victim use when she left; how did appellant leave the bar; where did the victim go after she left the bar; what was she doing between the time she left the bar and 1:00 a.m. when she was seen at home; when did she change her clothing; and why would appellant wait around the bar for several hours after supposedly having a fight with the victim. It was in response to this argument that the prosecutor argued in rebuttal that the defense attorney "can run, but he can't hide. He wants to hoodwink you. He wants to bamboozle you. He wants to lead you astray. But one thing he can't do is that he cannot run from the facts, because the facts tie his client to this crime." This response was to the argument, not to defense counsel's character.

Similarly, it was in response to defense counsel's attempt to dispute the evidentiary value of Peter Keenan's photographic identification that the prosecutor argued, "The facts are that on August the 30th of the year 2000 Peter Keenan did pick out the defendant, Alfred Salinas, from a photo six-pack. Now, the defense is coming up with all kind of tricks and sleight of hand to try to get you to believe that somehow the detectives directed Mr. Keenan to pick out Alfred Salinas in position No. 2. But the fact remains he picked out in the photo lineup Alfred Salinas." This was fair rebuttal.

The prosecutor also argued, "The defense does not have to put on a defense. They can sit there, just as Mr. Jacke told you, and sit there and do nothing. They called one witness, Detective Carrillo, to talk about Frank White. Trickery. Chicanery." This, too, was a fair response to defense counsel's attempt to place suspicion on Frank White as the killer. None of these comments constitutes prosecutorial misconduct.

Next appellant claims error in the prosecutor's comments on his failure to call certain witnesses. Detective Garcia testified that in his first police interview, appellant

told him that on the night of August 19, 2000, he was not with the victim. Appellant stated that he had been dropped off at Villa Sombrero Restaurant, that he stayed there until 10:30 p.m. or 11:00 p.m., and then went with his friend Albert to the home of Albert's girlfriend, Cecelia. The prosecutor commented on appellant's failure to call "Who would you have expected them to call as their own witness, or some witnesses—the individuals from Villa Sombrero—that Alfred Salinas was there. Mr. Jacke just told you that after pressing and everything his client came up miraculously and said 'I was at Villa Sombrero.' He wasn't there alone. He was there with other people. And another thing that Mr. Jacke conveniently doesn't talk about is in that statement he says that he left Villa Sombrero and went to Albert and Cecelia's house and spent the night there, conveniently placing himself away from 3186 Verdugo Road where he lived. Where is Albert?" Defense counsel objected and asked to approach. The court overruled the objection "at this time." The prosecutor then continued, "Where is Albert? Where is Cecelia? They're not here. Why? Because it's lies."

Outside the presence of the jury, defense counsel elaborated on his objection: "Those are two witnesses that both took the fifth. I think it's highly improper. He knows it. He called them as witnesses. I couldn't call them. They wanted to take the fifth. For him to talk about why not call these witnesses, it's impossible." The court acknowledged that Albert and Cecelia had taken the fifth in appellant's earlier trials, "but we didn't have any hearings this time about it." Defense counsel said he had tried to get them to come forward and testify, but that their attorney recently had told him "He's still taking the fifth."

After a recess, the court noted that the first trial occurred in August 2002, and the witnesses claimed the privilege at that time. There was a second trial, and now they were in trial for a third time in March 2003. "But this is a new trial for all intents and purposes. And even though I think Mr. Jacke is fair and would clearly represent to this court the honest truth about that, that they have not called him back and he's sure they probably would still assert the fifth amendment, the fact of the matter is without them here it's a bit speculative. Not only on that, but also because sometimes people will say

one thing and do a different thing in court. But the other thing is that I don't know if after having had two trials, one that hung ten to two, and one that hung eleven to one, also whether or not the People might have decided to grant those witnesses immunity to get that testimony from them, because they wanted to close all the loopholes. For me it's speculation to say that they would have had a valid fifth amendment right that would have been sustained and that wouldn't have been granted immunity." With that explanation, the court found nothing improper in the prosecutor's argument. Nor do we.

Appellant also argues that the prosecutor's comment about the failure to call Albert and Cecelia or any witnesses from the Villa Sombrero restaurant improperly shifted the burden of proof to him. We disagree. There is nothing improper about the prosecutor commenting on the state of the evidence, including the failure of the defense to introduce material evidence or call logical witnesses. (*People v. Mincey* (1992) 2 Cal.4th 408, 446; *People v. Ford* (1988) 45 Cal.3d 431, 447.) Nothing in his comments implied that appellant had the burden of proof.

Finally, appellant claims the prosecutor's references to Frank White's background in the Navy, his employment status, and his willingness to testify without a grant of immunity amounted to improper vouching and referenced facts not in evidence. White's police interview, in which he stated he had been in the Navy for two years, was admitted into evidence. In the interview, White also stated he did not have time for a relationship with the victim when he got out of the Navy because he was working. And the fact that White was willing to testify without a grant of immunity indicated he was not concerned about his own criminal liability, and hence bore on his credibility. There was no improper vouching.

Finding no prosecutorial misconduct, we need not and do not address appellant's claim that counsel was ineffective in failing to object to the prosecutor's argument.

IV

Appellant claims the court erred by allowing the testimony of Marcelino Gallarzo, as Gallarzo's testimony at the previous trials established that he had not actually seen the events, but had been told about them. Hence appellant claimed Gallarzo's testimony

would be inadmissible hearsay. On appeal, however, he does not point to any specific hearsay testimony. Nor can he.

Gallarzo testified that on August 19, 2000, he arrived at the bar at about 10:00 a.m., and was there until 3:30 p.m. or 4:00 p.m. He saw appellant and the victim at the bar that day at around 1:00 p.m. They came in for a beer and some food. Gallarzo was asked if something unusual happened between appellant and the victim while he was there. He replied, "No." He acknowledged that he had been interviewed twice by police detectives, and that he identified the victim in the photograph Detective Garcia showed him. He was asked if he told the detectives "about any specific incident that had occurred in the bar on the date of August the 19th of the year 2000 that you observed?" He replied, "That I observed, no." He was asked, "Did you tell them about an incident that was told to you?" He replied, "[Y]es. I heard something that happened, or something." He repeatedly denied telling police he had seen or heard the incident, explaining, "I told them what people were saying and what I heard, what they told me."

At his second interview, he told the detectives that someone named Dorado had told him there was an incident that had happened. Gallarzo never stated what he was told by Dorado, and did not testify about the incident itself. He insisted he had not been present at the bar at the time of the incident, and that he did not tell the detectives he saw an incident occur. His testimony was that he had repeated information given to him by another. There was no hearsay problem in this testimony.

V

Appellant claims the court abused its discretion by admitting a video re-creation in which the coroner, Dr. Wang, used a model to try to establish the position of the victim when she suffered each of the gunshot wounds. This video was played after Dr. Wang testified about each of the five gunshot wounds and the likely trajectory of each bullet. According to Dr. Wang, "Gunshot wound No. 1 to her right abdomen, the direction is from front to back, right to left and downwards. Gunshot wound No. 2 to her left lower back, exit wound at her right breast. Direction of the wound tract is from back to front, left to right and upwards. No. 3 and 4, the gunshot wound is located at her left side of the

body. Entrance wound is located at her abdomen. These two, the direction is from back to front, left to right and slightly downwards. The last gunshot wound to her right leg, entrance wound right inner thigh and exit wound outer right thigh. Direction left to right and downwards." The video was used to illustrate the possible position of the victim's body during each of these gunshots.

In *People v. Cummings* (1993) 4 Cal.4th 1233, 1291, the prosecution used a mannequin impaled with dowels to illustrate the paths of six bullets. The Supreme Court rejected the defendant's challenge to this evidence: "Mannequins may be used as illustrative evidence to assist the jury in understanding the testimony of witnesses or to clarify the circumstances of a crime." (*Ibid*.) Given the confusing expert testimony in that case, the court held the probative value of the illustrative evidence outweighed any prejudice to the defendant. (*Ibid*.)

The illustrative evidence in our case was similarly used to clarify the coroner's opinion about the circumstances of the crime. The court took care to avoid undue prejudice, admitting only the portion of the video where the coroner was near the car, and the model was placed in the positions he thought the victim would likely have been in when shot. No re-creation of the shooting was included, nor was there any narration. The court did not abuse its discretion in permitting portions of the video.

We note there was no objection at trial based on insufficient foundation that the experiment was conducted under conditions substantially similar to those at the time of the shooting. Hence the court did not determine whether this evidence constituted an experiment, nor was the prosecutor called upon to establish the foundation. Any such claim has been forfeited.

VI

Appellant claims the court erred in reconvening the jury for trial on the prior conviction allegations. As we shall explain, the transcript reveals that the jury had not been formally discharged, and therefore there was no issue of reconvening. Moreover, appellant waived jury trial on the prior conviction allegations.

The court received the jury verdict, and then told the jury, "You can now go back to the jury room. You will be excused. You can go back to the jury room on the 11th floor, and you'll get a paper that says you served your duty. Again, like I said in the beginning, we can't operate without people like you. We really appreciate it. I made a previous order that you can't talk about this case with anyone, and I'm going to lift that order now. You can speak with anyone. You are not required to. If you wish to, you may speak with them. Sometimes the attorneys like to speak with the jury afterwards. You have to consent to the discussion, it has to occur at a reasonable time and place, and if there's any problem with that, you should let me know. I'm required to say it would be a violation of a court order subject to sanctions if anybody violated that. I don't expect there will be any problem with these attorneys. . . . We'll just escort you back into the jury room."

After the jury was escorted into the jury deliberating room adjacent to the courtroom, the prosecutor stated to the court: "Your honor, before you excuse the jury, it's alleged as a three strikes case." The court asked defense counsel whether appellant wanted a jury trial on the priors, or whether he wished to waive jury. Defense counsel did not answer that question, and replied, "Your honor, I think you excused the jury. They haven't left, but they physically left the box. As such, I think they're discharged." The court noted it had not used the word "discharged," but recessed to do some research.

After the recess, the court discussed *People v. Bonillas* (1989) 48 Cal.3d 757, which addressed the question of reconvening a jury. In *Bonillas*, the court explained that the primary concern is whether the court has lost control over the jurors. Where the jurors have been instructed that they are still jurors in the case, have been admonished not to discuss the case with anyone nor to read anything about the case, they "have not thrown off their character as jurors nor entered the outside world freed of the admonitions and obligations shielding their thought process from outside influences." (48 Cal.3d at p. 773.)

In our case, the jurors were sent back to the jury deliberating room, adjacent to the courtroom. They remained in that room and did not speak with anyone from the outside.

Under the circumstances, the court concluded it had not lost control of the jury and there had been no taint. We agree.

But even if we did not, appellant proceeded to waive his right to a jury trial on the prior convictions. He suffered no harm from the court's decision that the jury could be reconvened if needed for trial of the priors.

VII

Appellant claims he is entitled to one additional day of presentence custody credit. He was arrested on September 1, 2000, and sentenced on May 29, 2003. He erroneously asserts that 2003 was a leap year; it was not. (The years 2000 and 2004 were leap years.) His actual presentence custody was correctly calculated as 1,001 days, not 1,002 days as he argues.

VIII

In a supplemental brief, appellant claims the court abused its discretion in denying his application for access to jurors' identifying information. On the day before the case was set for sentencing, appellant moved for access to personal juror information. In support of the motion, he attached the declaration of his cousin, Diana Rojo, who had attended the trial. According to her declaration, she was outside the courtroom several minutes before the verdict was announced, and observed a man in gray sweatpants speaking to a uniformed Los Angeles Police Department officer. "The uniformed officer asked, 'What are you doing here?' [¶] The man in the gray sweatpants replied, '"I'm off duty and I'm her[e] to protect my wife.' [¶] This same man dressed in gray sweatpants also spoke to several deputy sheriffs and displayed a badge. [¶] In the hallway outside the courtroom, just prior to the verdict being announced, I saw this same man in gray standing near some jurors. A different uniformed L.A.P.D. officer said to this man in gray, 'What are you doing?' The man in gray replied, 'I'm here because my wife is on jury duty.' The L.A.P.D. officer asked, 'What court?' The man in gray replied Department 102. The L.A.P.D. officer said, 'Oh, Salinas?" The man in gray said, 'Yes.' The L.A.P.D. officer then asked, 'Do you think he is going to be found guilty?' The man in gray said, 'Yes, definitely he'll be found guilty this time, not like before.'" Ms. Rojo

saw the man in gray sit inside the courtroom, and later saw him near the parking lot with one of the female jurors.

In his declaration, defense counsel stated that Ms. Rojo had informed him of the conversations she overheard, and pointed out the man in the gray sweatpants. Counsel reviewed his juror seating chart and notes, which did not reflect that anyone married to a peace officer remained on the jury. He had been unable to interview any jurors after the verdict because they did not leave through an area accessible to the public. He asked for juror identification information so that he could investigate the possibility of juror misconduct, including improper verbal communication between the man in gray and the juror, or the possibility that the juror was not truthful about her relationship to a member of law enforcement.

Code of Civil Procedure section 237, subdivision (a)(2) requires that, upon the recording of a jury verdict in a criminal trial, the court seal the record of personal juror identifying information is to be sealed until further order of the court. Under subdivision (b), "Any person may petition the court for access to these records. The petition shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information. The court shall set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for the release of the personal juror identifying information, but shall not set the matter for hearing if there is a showing on the record of facts that establish a compelling interest against disclosure."

In denying the motion for disclosure, the court explained: "[T]he application for an order disclosing the jurors' addresses and telephone numbers will not be granted, because the court has not found good cause for that. There has to be some showing that statements by the jurors were going to help them. If you had jurors' statements which indicated how they came about reaching a verdict, those would be inadmissible under the Evidence Code and could not be used to support this motion. Therefore, it will be denied." We review this ruling for abuse of discretion, and find none. (*People v. Jones* (1998) 17 Cal.4th 279, 317)

Appellant presented only the barest indication that the "man in gray" might be a peace officer. Contrary to appellant's argument on appeal, Ms. Rojo did not state in her declaration that she saw two police officers conversing. She stated that she saw the man in gray sweat pants talking with police officers. Her report that the man showed a badge to several deputy sheriffs, and that he stated he was off duty and was there to protect his wife could indicate he was a peace officer, but also was consistent with other professions. Significantly, there was no showing of improper communication between a juror and this individual. His statement that appellant would be found guilty this time could have reflected his own view of the evidence. Moreover, this information did not come from a neutral individual, but by appellant's cousin, who was in court with appellant's mother. The cousin reportedly told counsel what she overheard at the time the verdicts were received, yet counsel failed to bring the matter to the court's attention until the time of sentencing, two months later. The showing was too little, and too late.

IX

Finally, appellant argues that the trial court's selection of the upper term for the firearm use enhancement violated his right to jury trial, as explicated by the United States Supreme Court in *Blakely v. Washington, supra,* 124 S.Ct. 2531. The reason is that this determination required the finding of facts, other than the fact of a prior conviction, that the jury had not necessarily determined. We previously have determined that a *Blakely* argument may be presented even though not raised before the trial court, where sentencing occurred before that case was decided by the high court. We also have concluded that the California determinate sentencing law is sufficiently similar to the statute reviewed in *Blakely* to make the holding of that case applicable: the upper term cannot be imposed where the jury has not decided the factual basis for the aggravated term, except where the greater punishment is imposed on the basis of recidivism. The Supreme Court recently has added to the literature on the issue by its decision in *United States v. Booker* (2005) ___ U.S. ___ [125 S.Ct. 738]. The issue is now before our Supreme Court in *People v. Black,* S126182. Pending a decision in *Black* or a related case, we see no reason to depart from the position we have held.

In choosing between the low, middle and upper term for the firearm use enhancement, the trial court explained: "I must consider the factors with regards to the firearm used by Mr. Salinas in this case, and in listening to the evidence which the jury found beyond a reasonable doubt to be true. In this case the defendant waited for his girlfriend to come, knew where she had left her car, which was parked outside his home in an area where she absolutely had to go back to get the car, and really was trapped in that position by a three-walled area. The defendant took advantage of that; was above the car on a stairway, and he shot repeatedly into the car. Not just once, not just twice, and then continued to shoot as Miss Bernice Gomez tried to escape from that three-walled semi prison that she was in in the car, and he continued to shoot as she started to move the car until he was certain that she was quite dead. And in such circumstances, I can really see no reason for doing anything but sentencing to the maximum term of ten years as to that gun use."

The recited facts upon which the court relied were not found by the jury beyond a reasonable doubt, nor admitted by appellant. Selection of the upper term based on such facts violates appellant's right to jury trial, under *Blakely v. Washington, supra*, 124 S.Ct. 2531. We reverse the sentencing in this case for further proceedings on that issue.

DISPOSITION

The judgment is reversed as to sentencing and remanded for further proceedings on that issue, consistent with our opinion. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P.J.

We concur:

HASTINGS, J.

CURRY, J.