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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. JESUS SOTO, Defendant and Appellant.	B175088 (Los Angeles County Super. Ct. No. BA251906)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronni B. MacLaren, Judge. Affirmed in part, reversed in part and remanded.

Gerald J. Miller, 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, Linda C. Johnson, Lawrence M. Daniels, and James William Bilderback II, Deputy Attorneys General, for Plaintiff and Respondent.

RELEVANT PROCEDURAL BACKGROUND

On September 29, 2003, an information was filed against appellant Jesus Soto and Arturo Garcia.[1] Count 1 charged appellant and Garcia with the second degree robbery of Salvador Godoy on July 6, 2003. (Pen. Code,[2] § 211.) In addition, count 1 alleged that appellant had personally used a deadly and dangerous weapon, namely, a knife, in committing the offense. (§ 12022, subd. (b)(1).) Count 2 charged appellant and Garcia with assault with a deadly weapon, by means likely to produce great bodily injury, upon Godoy on July 6, 2003. (§ 245, subd. (a)(1).) Appellant pleaded not guilty and denied the special allegation.

Trial by jury began on January 7, 2004. On January 21, 2004, the jury found appellant guilty on counts 1 and 2, and found true the special allegation against appellant under count 1.

Appellant's sentencing hearing occurred on April 30, 2004. The trial court denied probation. As to count 1, appellant was sentenced to the high term of five years, plus an additional and consecutive term of one year for the weapon-use allegation. As to count 2, appellant was sentenced to a term of one year (one-third of the three-year middle term), which was stayed. (§ 654.)

FACTS

A. *Prosecution Evidence*

At approximately 4:00 a.m. on July 6, 2003, Godoy was walking to work in Los Angeles. As he neared a cross-street, a red car entered the alley in front of him. After the car backed out of the alley and turned onto the cross-street, Godoy encountered appellant, Garcia, and another man.

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1 Garcia is not a party to this appeal.

2 All further statutory references are to the Penal Code, unless otherwise indicated.

Appellant put a knife to Godoy's throat while Garcia stood nearby, holding an aluminum baseball bat. Appellant then told Godoy to give him some money. When Godoy answered that he had no money, appellant said, "You better have some." While holding the knife to Godoy's throat, appellant searched Godoy's body, found his wallet, and removed $70 from his wallet. The three men then left in the red car.

On July 19, 2003, police officers stopped a speeding red Honda containing appellant, Garcia, and two other persons. The car was registered in appellant's name. In the back seat area, the officers found an aluminum baseball bat.

Godoy identified the car as the one that he had seen when he was robbed. He also indicated that the bat was similar to the one used in the robbery. Godoy subsequently identified appellant and Garcia in photographic lineups.

B. *Defense Evidence*

Appellant and Garcia presented several relatives and friends whose testimony indicated that appellant and Garcia were not in Los Angeles when Godoy was robbed. The witnesses testified as follows: On July 5, 2003, appellant and Garcia attended a wedding reception in Los Angeles, which they left at or after midnight. Thereafter, appellant and Garcia drove several of the witnesses in two separate cars—including appellant's burgundy Honda—to Romoland in Riverside County, where Garcia and some of the witnesses lived. Appellant and Garcia arrived in Romoland after 3:00 a.m. on July 6, 2003, and they stayed in Garcia's residence that morning.

DISCUSSION

Appellant's sole contention is that the imposition of the high term on count 1 was improper under *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*). We conclude that this sentence is infirm under *Blakely*.

Pursuant to section 1170, subdivision (b), and rule 4.420 of the California Rules of Court, the trial court imposed the high term of five years on the conviction for second degree robbery. It found no mitigating factors, and indicated the following aggravating factors: (1) the crime involved a threat of bodily injury conduct (Cal. Rules of Court, rule 4.421(a)(1)); (2) the crime involved advanced planning (Cal. Rules of Court, rule 4.421(a)(8)); and (3) appellant, who was 19 years old at the time of his current offense, had been adjudicated as a juvenile as having committed a burglary (Cal. Rules of Court, rule 4.421(b)(2)). In addition to the high term, the trial court also imposed a one-year weapon-use enhancement. (§ 12022, subd. (b)(1).)

At the outset, respondent argues that appellant has waived or forfeited his challenge under *Blakely* to the imposition of the high term by failing to raise it before the trial court. Because appellant was sentenced before *Blakely*, we decline to find a waiver or forfeiture for the reasons that we recently explained in *People v. White* (2004) 124 Cal.App.4th 1417, 1433. We therefore examine appellant's contention on its merits.

Blakely relies on the holding in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*). In *Apprendi*, defendant's sentence had been doubled because the trial court found the crime to have been motivated by racial animus. The *Apprendi* court held that the doubling was improper because "[o]ther 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 defendant was convicted of kidnapping under Washington state law. (*Blakely*, *supra*, 124 S.Ct. at p. 2535.) The trial court increased the defendant's sentence for this offense above the statutorily defined standard range for the offense (Wash. Rev. Code Ann. § 9.94A.320) pursuant to a separate statutory provision permitting such exceptional sentences when the trial court found that there were "substantial and compelling reasons" (*id*. at § 9.94A.120(2)). (124 S.Ct. at p. 2535.) The court in *Blakely* concluded that *Apprendi* barred the enhanced sentence because the jury had not determined the facts cited by the trial court for increasing the sentence. (*Id*. at p. 2539.)

Respondent argues that *Blakely* is inapplicable here because the pertinent provisions of California's sentencing laws are unlike those at issue in *Blakely*. We rejected this contention in *People v. White*, *supra*, 124 Cal.App.4th at pages 1434-1439, and we decline to revisit it.

Accordingly, the key issue before us is the extent to which the trial court improperly relied on aggravating factors proscribed under *Blakely*. As we explain below, factors (1) and (2)—but not factor (3)—contravene *Blakely*.

We begin with factor (3). In *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 243-244, the United States Supreme Court held that a prior conviction is not an element of a crime that the Fifth Amendment due process clause required to be alleged in the indictment. Subsequently, the court in *Apprendi* stated that "a prior conviction" is an appropriate factor for a judge to consider in imposing a sentence that need not be submitted to the jury. (*Apprendi*, *supra*, 530 U.S. at p. 490.) The *Blakely* court expressly noted that *Apprendi* does not apply to "'the fact

of a prior conviction."[3] (*Blakely*, *supra*, 124 S.Ct. at p. 2536, quoting *Apprendi*, *supra*, 530 U.S. at p. 490.)

In our view, the "prior conviction" exception in *Apprendi* and *Blakely* encompasses factor (3), which concerns appellant's adjudication for burglary as a juvenile and his status as a 19-year-old adult at the time of sentencing. As the court explained in *People v. Thomas, supra,* 91 Cal.App.4th at page 221, numerous courts have concluded that the "prior conviction" exception in *Apprendi* applies to a variety of issues relating to the defendant's recidivism, for example, whether the defendant had committed a new offense within a certain number of years of being released from prison or whether the defendant had served a prior prison term.

We cannot reach the same conclusion with respect to factors (1) and (2). As a preliminary observation regarding factor (1), we note that the trial court may not impose the high term due to the threat of great bodily injury when the sole basis for finding this threat are the facts supporting a weapon-use enhancement. (*People v. Garcia* (1995) 32 Cal.App.4th 1756, 1777; Cal. Rules of Court, rule 4.420(c).) Here, the trial court avoided this prohibition on the "dual use" of facts by finding a threat of great bodily injury in the manner in which appellant and Garcia approached Godoy and physically searched him for money. (*People v. Garcia*, *supra*, 32 Cal.App.4th at pp. 1777-1778 [no "dual use" when threat of great bodily injury rests on defendant's kicking of victim, aside from use of weapon]; *People v. Edwards* (1981) 117 Cal.App.3d 436, 444-446 [no "dual use" when threat of great

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3 Appellant suggests that *Apprendi* and *Blakely* abrogated *Almendarez-Torres.* We disagree. As the court noted in *People v. Thomas* (2001) 91 Cal.App.4th 212, 220, the court in *Apprendi* recognized a tension between its holding and *Almendarez-Torres,* but it declined to revisit *Almendarez-Torres.* (See *Apprendi, supra,* 530 U.S. at pp. 489-490.) Nothing in *Blakely* suggests a departure from *Apprendi* on this matter.

bodily injury rests on defendant's verbal threats to victim, aside from use of weapon].)

Nonetheless, in finding factor (1) on this basis, the trial court resolved factual issues not presented to the jury, in contravention of *Blakely*. The same conclusion is true for factor (2), given that no issue regarding advanced planning for the crime was submitted to the jury.

The remaining question concerns the prejudice from this error. Here, appellant suggests that all *Blakely* error is structural, requiring reversal per se because it is tantamount to denial of a jury trial. By contrast, respondent contends that *Blakely* error is subject to prejudice analysis under *Chapman v. California* (1967) 386 U.S. 18, 22-24.

It is unnecessary for us to resolve this dispute because the error here is not harmless if *Chapman* applies. Because the trial court did not explain how it weighed the aggravating factors in imposing the high term, there is a reasonable possibility that the trial court might have come to a different conclusion about the upper term had it been aware that factors (1) and (2) were improper. We therefore cannot conclude that the error was harmless "beyond a reasonable doubt." (*Chapman v. California*, *supra*, 386 U.S. at pp. 22-24.)

DISPOSITION

The judgment with respect to the imposition of the high term on count 1 is reversed, and the matter is remanded for resentencing in accordance with this opinion. The judgment is affirmed in all other respects.

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CURRY, J.

I concur:

EPSTEIN, P.J.

GRIMES, J., Dissenting.

Respectfully, I dissent from my colleague's conclusion that *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*) mandates reversal of the upper term imposed on appellant's conviction for second degree robbery.

My colleagues conclude that imposition of the upper term requires fact finding by the jury, and that it is unknown whether the trial court would have exercised discretion to impose the upper term if it had known of *Blakely*'s constraints. Until our Supreme Court concludes otherwise,[1] I am of the opinion that *Blakely* does not apply to the tripartite prison scheme (upper, middle, and low term) of the California determinate sentencing law (Pen. Code, § 1170, subds. (a)(3) & (b); see also, Cal. Rules of Court, rules 4.420(a)-(c), 4.421 & 4.423). It is my view that our California sentencing scheme is the type of discretionary sentencing within a range authorized by law to which *Blakely* does not apply.

In view of the foregoing, I would affirm the trial court's imposition of the upper term on appellant's second degree robbery conviction.

GRIMES, J.*

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[1] The issue of whether *Blakely* applies to the upper term choice is pending before our Supreme Court in *People v. Black*, S126182 and *People v. Towne*, S125677.

* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.