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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

HAMISI XAVIER SPEARS,

Defendant and Appellant.

A107984

(Alameda County
Super. Ct. No. C126894)

MEMORANDUM OPINION

On February 20, 2007, the United States Supreme Court issued an order in this case granting certiorari, vacating the judgment, and remanding to this court for further consideration in light of *Cunningham v. California* (2007) 549 U.S. ____ [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*).

Pursuant to this mandate, we have recalled the remittitur. We have re-examined our initial opinion in this case (*People v. Spears* (Feb. 10, 2006, A107984) [nonpub. opn.]), which remains on file with this court, and which we hereby incorporate by reference into this order.

Defendant was convicted of first degree murder and sentenced to 25 years to life. He was also sentenced to the upper term of 10 years for use of a firearm.

In our prior opinion, we rejected defendant's claim that the imposition of the upper term for firearm use violated *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*)

because the upper term was imposed based on facts neither admitted by defendant nor found true by the jury beyond a reasonable doubt. We relied on *People v. Black* (2005) 35 Cal.4th 1238 (*Black*), filed after defendant's opening brief, which held that *Blakely* did not apply to the California sentencing scheme.

In *Black*, the California Supreme Court held that "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term . . . under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*Black, supra*, 35 Cal.4th at p. 1244.) The court reasoned that the California determinate sentencing law "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range. Therefore, the upper term is the 'statutory maximum' and a trial court's imposition of an upper term sentence does not violate a defendant's right to a jury trial under the principles set forth in *Apprendi* [*v. New Jersey* (2000) 530 U.S. 466], *Blakely* and *Booker*." (*Black, supra*, 35 Cal.4th at p. 1254, referring to *United States v. Booker* (2005) 543 U.S. 220.)

Pursuant to the mandate of the United States Supreme Court, we have reconsidered our prior opinion in light of *Cunningham*, which holds, contrary to *Black*, that *Blakely* does apply to California sentencing law. Thus, an upper term may not be imposed based on facts unrelated to recidivism which were neither admitted by the defendant nor found true by the jury. (*Cunningham, supra*, 127 S.Ct. at p. 860.)

The record in this case shows the murder victim was shot in the back, right arm, chest, upper abdomen, and chin, in the course of a robbery. Defendant testified and admitted that he first shot the victim in the back; the victim fell, and defendant then fired at least three more shots while he stood over him.

The trial court imposed the upper term for firearm use based on two aggravating factors: (1) the crime involved great violence and great bodily harm (Cal. Rules of Court, rule 4.421(a)(1)); and (2) the victim was particularly vulnerable (Cal. Rules of Court, rule 4.421(a)(3)). The trial court found factor (1) "based upon what was presented to the jury,

that multiple shots were fired at the victim, which were over and above the violence necessary to carry out” the robbery or its attempt.

With regard to factor (2), the trial court noted “that the victim was vulnerable and shot multiple times, the victim was unarmed, which evidence was presented to the jury, the victim was shot once in the back which disabled him and which at that time the defendant could have discontinued the contact with the victim and thereafter the victim was shot three more times while totally incapacitated. So these facts were presented to the jury. The court believes that they supported the jury’s finding of first degree murder and personal use and the nature of the use of the firearm greatly exceeded that which was necessary to commit the robbery as planned.”

It is not so much that the evidence was presented to the jury, but *how* it was presented: through defendant’s admission that he fired three additional shots at the victim while the victim was down. This admission supports the aggravating factors, as found by the trial court. Defendant admitted facts showing great violence, above and beyond that necessary for the commission of a robbery, and of the use of a firearm against a vulnerable victim. Thus, the upper term was imposed based on facts admitted by defendant, not facts found by the court. There is no *Cunningham* error with regard to the upper term imposed for the use of a firearm.¹

In any case, any *Cunningham* error would be harmless under the applicable *Chapman* standard. (*Chapman v. California* (1967) 386 U.S. 18 (*Chapman*); see *Washington v. Recuenco* (2006) ___ U.S. ___ [126 S.Ct. 2546, 2550-2553] [*Chapman* standard of harmless error applies to *Blakely* error]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 320, 324-326 [error under *Apprendi*, on which *Blakely* is based, governed by *Chapman* standard]; *People v. Govan* (2007) 150 Cal.App.4th 1015, 1034-1035.)

¹Defendant also raised a *Blakely* challenge to consecutive sentences imposed on two other robberies. His postremand supplemental brief focuses on the issue of the upper term, and presents no substantive argument on consecutive sentencing. Defendant notes the latter issue is currently pending before the California Supreme Court.

It is clear beyond a reasonable doubt that, on the evidence presented, the jury would have found that defendant used great violence in excess of that necessary to commit the robbery, and fired three shots at the victim while he lay wounded on the ground. The aggravating factors in this case are not based on qualitative assessments of abstract concepts—such as victim vulnerability—never put before the jury. Rather, the factors are based on precise, objective facts shown by the evidence presented at trial.

Since there is no *Cunningham* error, and we have previously rejected defendant's claims of error which are untouched by the Supreme Court remand, we again affirm the judgment.

Marchiano, P.J.

We concur:

Stein, J.

Swager, J.