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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. SAMUEL F. TEWOLDE, Defendant and Appellant.	A106273 (Sonoma County Super. Ct. No. MCR-426478)

Defendant Samuel F. Tewolde pleaded no contest to one count of assault with force likely to produce great bodily injury (GBI) (Pen. Code, § 245, subd. (a)(1)) and admitted an enhancement that he personally inflicted GBI upon the victim (Pen. Code, § 12022.7, subd. (a)). The trial court denied probation and imposed the upper (or aggravated) term of four years in state prison for the assault, plus three years for the GBI enhancement for a total of seven years.

Defendant contends that Penal Code section 296, which requires the submission of blood and saliva samples from defendants convicted of certain listed felonies, violates the Fourth Amendment of the United States Constitution. We disagree and affirm our ruling in *People v. King* (2000) 82 Cal.App.4th 1363, 1372 (*King*).

Defendant also contends that under *Blakely v. Washington* (2004) 542 U.S. ___ [159 L.Ed.2d 403] (*Blakely*), he was entitled to proof before a jury beyond a reasonable doubt of the factors in aggravation used to increase his assault sentence beyond the middle term. We agree. The imposition of the aggravated term violated *Blakely* because

the aggravating factors were not admitted by defendant in the course of entering his plea, and were not determined by a jury beyond a reasonable doubt. Accordingly, we reverse and remand for resentencing or to allow the prosecution to seek a jury trial on the aggravating factors.

I. FACTS

Defendant pleaded no contest before the case proceeded to a preliminary hearing. Accordingly, we take the facts from the probation report.

This case arises from a vicious attack on Ryan Nelson by a group of men after the group was asked to leave a party. Nelson had gone to a party at the Santa Rosa home of a minor female whose mother was absent. Some time during the evening some uninvited guests arrived, including "a large group of Hispanic and African American males whom the host did not want to admit . . . ." The host "did admit [the group] after they began causing a disturbance outside." The group included defendant, who is apparently an African American of Eritrean descent.

The group was soon asked to leave the party. They left, but loitered outside the house and were loud. Nelson, who is Caucasian, went outside to try to get the group to leave. One of the men hit Nelson over the head with a bottle. Defendant punched Nelson in the head, and Nelson fell to the ground. Six to 10 men circled Nelson and began jumping up and down on his head " 'like a trampoline' " and kicking him. As they kicked Nelson the group chanted "gang-related statements." Eventually, the group stopped beating Nelson and ran off.

"Witnesses indicated that the defendant participated in the assault . . . ." "One witness positively identified the defendant as having punched the victim after Nelson was hit over the head with the bottle. The victim fell to the ground, and [defendant] proceeded to stomp on the victim's head while chanting, 'go to sleep.' " According to witnesses, Nelson was not armed and "nothing took place which indicated there was trouble between [Nelson] and the assailants."

Eighteen-year-old Nelson suffered serious injuries. He continues to have problems with his vision, and suffered from migraines for three months after the assault.

He suffers from depression and is afraid to go out. At defendant's sentencing Nelson described the assault as "terrible" and "definitely . . . the most traumatic thing that I [have] experienced. . . ."

When defendant first spoke to police, apparently soon after the incident, he was wearing "a red and white shirt with a number indicating Norteno gang affiliation on it . . . ." He admitted going to the party with "a friend," but denied there were Nortenos there. As he was leaving the party he saw "a commotion outside," but avoided it.

When confronted with witness accounts, defendant admitted he saw Nelson being assaulted. He said Nelson "got 'cracked,' and that he saw the suspects 'stomping on the dude.' " He thought the attackers might have been Nortenos. Defendant became angry and said, " 'I care less about some fucking little dude, white dude, that got knocked out or whatever . . . .' " The detective speaking to defendant noted he made several inconsistent statements. The detective concluded defendant was "clearly lying."

When he learned Nelson's condition had improved and that he was expected to survive, defendant admitted his participation in the assault. "[D]efendant admitted he punched the victim in the head. He denied using a bottle, and denied kicking or stomping the victim's head. The defendant stated, 'I hit him . . . I was the first one to hit him.' He indicated he punched the victim because[] 'he was talking shit.'. . . [Defendant] claimed he tried to dissuade the other men from further attacking the victim."

Defendant was arrested and jailed. The jail staff monitored his telephone conversations for two months after his arrest. "In conversations, the defendant referred to being with his 'homies,' mentioning monikers police identified as belonging to Norteno gang members." He also discussed the assault on Nelson. In a conversation two days after he was arrested, defendant "stated he punched the victim one time, 'hella hard,' that the victim was 'out cold,' and that [defendant] was 'hella happy.' When everyone began stomping on the victim's head, 'I was like oh well.' "

The probation report listed several indications that defendant was affiliated with the Norteno gang. According to the probation report, "Gang-related clothing and newspaper articles regarding Norteno gang crimes and assaults—including the present

offense—were found in the defendant's home after [defendant] was arrested. The [investigating] detective detailed several local law enforcement contacts which occurred from 1998 through 2003 which pointed to gang involvement by the defendant. [Defendant] had been contacted with known Norteno gang members, had admitted being an affiliate, had participated in a Norteno-Sureno fracas at the County Fair in 2001, and had perpetrated an attempted robbery (adjudicated as false imprisonment) with a known Norteno member at Santa Rosa Middle School in 1998. The detective noted at least one Norteno member was present with the defendant when the assault on Nelson took place in the present case. . . ."

Defendant was originally charged with assault with force likely to produce GBI, the enhancement for personal infliction of GBI, and a criminal street gang enhancement (Pen. Code, § 186.22, subd. (b)(1)). He entered an open plea of no contest to the assault and the GBI enhancement, in exchange for the dismissal of the gang enhancement. He was specifically admonished that his open plea meant there were no guarantees as to sentence, and he faced anything from the minimum of probation to the maximum of the upper term of four years for the assault, plus three years for the GBI enhancement, for a total of seven years. Defense counsel stipulated there was a factual basis for the plea, but defendant did not specifically admit any aggravating circumstances.

When interviewed for the probation report, defendant said he had been drinking on the night of the assault—although he had previously told police he had not been drinking. He said Nelson and his friends were " 'talking shit,' making statements which the defendant felt were racially derogatory, such as, 'it's dark in here.' " This angered defendant, who admitted he punched Nelson once when he saw him outside. Again, defendant said he only hit Nelson once and did not participate in kicking or stomping him. He expressed remorse for Nelson. He hoped he would be placed on probation.

Defendant, who was 20 at the time of the incident, has suffered three juvenile adjudications: one each for false imprisonment, receiving stolen property, and escape from Probation Camp, a juvenile facility. The earliest, the false imprisonment referred to by the investigating detective as evidence of gang involvement, was a robbery attempt—

the 15-year-old defendant pulled a jacket over a boy's head while two associates rifled his pockets looking for money. During juvenile probation for this offense, defendant violated probation several times. After the latest adjudication for escape, he returned to Probation Camp where he earned a high school diploma and received vocational training and counseling. He showed "some difficulty with authority figures," but did graduate from the camp.

The probation report recommended against probation, and recommended the court impose the upper term of four years for the assault. The report listed five circumstances in aggravation (California Rules of Court, rule 4.421 (Rule)):[1]

• "The crime involved a high degree of cruelty, viciousness, and callousness, in that the defendant and his companions stomped on the victim's head after [defendant] knocked him to the ground while the defendant chanted, 'go to sleep.' " (Rule 4.421(a)(1));

• "The victim was particularly vulnerable, in that Nelson was apparently somewhat intoxicated and vastly outnumbered by the defendant and his companions." (Rule 4.421(a)(3));[2]

• "The present offense coupled with his first adjudication as a juvenile indicates the defendant has engaged in violent conduct which indicates a serious danger to society." (Rule 4.421(b)(1));

• "His prior sustained petitions as a juvenile were numerous." (Rule 4.421(b)(3)); and;

• "His prior performance on probation as a juvenile was mostly unsatisfactory." (Rule 4.421(b)(5)). The report also noted that defendant "just got off Juvenile Probation six months prior to this offense."

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[1] Subsequent rule references are to the California Rules of Court.

[2] Other than this reference to intoxication, the probation report does not make it clear that drinking occurred at the party and, if it did, whether drinking was light, moderate or heavy. In a letter to the court Nelson said he was hit by a wine bottle.

The report listed only one circumstance in mitigation (rule 4.423), presumably a reference to defendant's successful completion of Probation Camp: "The defendant managed to make a positive adjustment at the end of wardship." (Rule 4.423(b)(6).)

Attached to the report was a letter from Nelson in which he asked that defendant receive "the maximum punishment . . . for his crimes." Also attached was a letter from defendant, in which he expressed remorse, and several letters from defendant's family and friends, attesting to his good character.

Defendant filed a Statement in Mitigation in which he set forth "facts," purportedly from witness statements, which defendant claimed showed that he only punched Nelson, and did not participate in the kicking and stomping. This was apparently done in an attempt to mitigate, or refute, the aggravating circumstance of cruelty, viciousness, and callousness. But these purported "facts" are not properly before us.[3]

Defendant's Statement in Mitigation disputed other circumstances in aggravation listed in the probation report, and proposed five factors in mitigation: the victim allegedly provoked the attack with a racial slur; defendant was 21 with no adult criminal record and a juvenile record of minimal violence; defendant has substance abuse problems; defendant supposedly acknowledged wrongdoing at an early stage in the proceedings; and defendant successfully completed Probation Camp. Defendant also argued that he was a deserving candidate for probation.

At sentencing, the court indicated it had read and considered the probation report, including the attached letters. Nelson was present and made a statement. Defendant also made a statement, saying he was "sorry for what happened that night." After oral argument of counsel, the court denied probation and imposed a state prison sentence of seven years.

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[3] Evidence in support of aggravation or mitigation must generally be presented in the form of testimony. (Pen. Code, § 1204.) The purported "facts" are not evidentiary ones, and are not supported by the probation report—they have simply been set forth in an unsworn statement of counsel. As such, they will be disregarded.

The court noted: "As I read this probation report and I look at the letters and other information that's attached to it, I see this huge disconnect" between defendant's loving family and friends, and "what [defendant] did and who [he was] hanging out with." The court found three aggravating factors:

(1) "[T]he crime involved a high degree of cruelty, viciousness, and callousness in that the defendant and his companions stomped on the victim's head after [defendant] knocked him to the ground."

(2) "The victim was particularly vulnerable in that Mr. Nelson was apparently intoxicated and vastly outnumbered by the defendant and his companions."

(3) "And his prior sustained petitions as a juvenile were numerous."

The court found a single circumstance in mitigation, that defendant "managed to make a positive adjustment at the end of wardship."

The court found that the circumstances in aggravation "prevail," and sentenced defendant to the upper term of four years for the assault. The court sentenced defendant to an additional three years for the GBI enhancement, for a total sentence of seven years.

II. DISCUSSION

Defendant contends that Penal Code section 296, which requires the submission of blood and saliva samples from defendants convicted of certain listed felonies, violates the Fourth Amendment of the United States Constitution.[4] He also contends that under *Blakely, supra,* 159 L.Ed.2d 403, he was entitled to proof before a jury beyond a reasonable doubt of the factors in aggravation used to increase his assault sentence beyond the middle term. We disagree with the former contention because of *King* and cognate cases, but we agree with the latter and conclude that defendant's sentence violated *Blakely*. Accordingly, we reverse and remand for resentencing.

A. Section 296

Section 296 requires defendants convicted of certain listed felonies to "provide buccal swab samples, right thumbprints, and a full palm print impression of each hand,

[4] Henceforth we refer to Penal Code section 296 as section 296 and cite it as § 296. Other statutory references are to the Penal Code.

and any blood specimens or other biological samples required . . . for law enforcement identification analysis[.]" (§ 296, subd. (a)(1).) The statute is part of the DNA and Forensic Identification Data Base and Data Bank Act of 1998 (§ 295 et seq.) in which the Legislature found and declared that felons convicted of certain listed offenses must provide "DNA and forensic identification data bank samples" because DNA and forensic identification analysis "is a useful law enforcement tool for identifying and prosecuting criminal offenders and exonerating the innocent." (§ 295, subd. (b)(1), (2).)

At the time defendant entered his plea, assault with force likely to produce GBI was an offense listed under section 296. (Former Pen. Code, § 296, subd. (a)(1)(F).)[5] Accordingly, the sentencing court ordered defendant to provide samples of his blood and saliva. Defendant argues this statutory requirement of submission of blood and saliva violates the Fourth Amendment. He presents lengthy argument which we need not discuss in detail.

"DNA data base and date bank acts have been enacted in all 50 states as well as by the federal government. [Citations.] Various constitutional challenges to these acts have been rejected consistently. [Citations.]" (*Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 505 (*Alfaro*); see Annot., Validity, Construction, and Operation of State DNA Database Statutes (2000) 76 A.L.R.5th 239.)[6] As our colleagues stated in *Alfaro*, "In view of the thoroughness with which constitutional challenges to DNA data base and data bank acts have been discussed, there is little we would venture to add." (*Alfaro, supra,* at p. 505.)

In *King* we held that the typical Fourth Amendment requirement of a warrant, based on probable cause, did not apply to the taking of blood from a convicted felon pursuant to the statutory predecessor of section 296. (*King, supra,* 82 Cal.App.4th at

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[5] Section 296 was subsequently amended to include convictions of all felonies. (§ 296, subd. (a)(1) [post-amendment].)

[6] Recently, an en banc panel of the Ninth Circuit upheld blood sample collection for DNA databasing against a Fourth Amendment challenge. (*U.S. v. Kincade* (9th Cir. 2004) 379 F.3d 813.)

pp. 1369-1374.) Rather, we held that under a balancing test such a minimal search could be conducted without individualized suspicion if requiring such suspicion would thwart an important government interest. (*King, supra,* at pp. 1373-1378.)

Balancing the reduced privacy interest of a convicted felon, especially when incarcerated, with the "undeniable interest" of the government in crime prevention and solution, we held the predecessor of section 296 did not violate the Fourth Amendment. (*King, supra,* 82 Cal.App.4th at pp. 1373-1378.) In light of the balancing test approach, we did not feel it necessary to decide whether drawing blood for DNA testing satisfied the "special needs" doctrine as set forth in several well-known decisions of the United States Supreme Court. (*King, supra,* at pp. 1376-1377.)

We reaffirm our decision in *King*. We note that two subsequent California decisions have also upheld the taking of blood and saliva for DNA testing under section 296. (*Alfaro, supra,* 98 Cal.App.4th at pp. 505-509; *People v. Adams* (2004) 115 Cal.App.4th 243, 255-259 (*Adams*).)

Defendant argues that section 296 is not justified by a "special need," which is defined in the case law as a special need over and above the normal needs of law enforcement. Our answer to this is twofold: (1) in *King* we held a special needs analysis is not necessary to uphold the statute (*King, supra,* 82 Cal.App.4th at pp. 1376-1377); and (2) the court in *Adams* held that the special needs doctrine does not apply because "the class of persons subject to [section 296] is convicted criminals, not the general population. . . . [C]onvicted criminals do not enjoy the same expectation of privacy that nonconvicts do. The [special needs] cases . . . involved different populations of test subjects[,]" such as motorists and state hospital patients. (*Adams, supra,* 115 Cal.App.4th at p. 258.)

Section 296 does not violate the Fourth Amendment. The trial court's order for blood and saliva samples does not offend the Constitution.[7]

[7] In light of this conclusion we need not address the Attorney General's contention that defendant waived this issue by failing to object below.

B. *Blakely* Error

Defendant contends that *Blakely* requires that we set aside his sentence because the aggravating factors used to impose the upper term for the assault were neither admitted by defendant nor proved beyond a reasonable doubt to a jury.[8] We conclude there is *Blakely* error in this case, and that error is not harmless. We must therefore reverse and remand for resentencing.

We need not discourse at length on the much discussed issue of *Blakely* and its impact on the California sentencing scheme. *Blakely* held that " '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.' " (*Blakely*, *supra*, 159 L.Ed.2d at p. 412, quoting *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*).) The phrase "statutory maximum" for *Blakely* and *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. [Citations.]" (*Blakely, supra,* 159 L.Ed.2d at p. 413.) Thus, *Blakely* prohibits the use of any judicially determined fact, other than recidivism, to increase a sentence beyond the statutory maximum.

Numerous California Court of Appeal decisions involving aspects of *Blakely* are pending before the California Supreme Court. We are familiar with those decisions, none of which are citable because of the grants of review. But we agree with those decisions which held that *Blakely* applies to the California determinate sentencing scheme, and prohibits the imposition of an upper term based on nonrecidivist aggravating factors which have neither been admitted by the defendant, nor determined by a jury. We also

[8] We reject the Attorney General's argument that defendant has waived his *Blakely* claim. (See *People v. White* (2004) 124 Cal.App.4th 1417, 1433 (*White*); see also *People v. Vera* (1997) 15 Cal.4th 269, 276-277; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648.) We also note that defendant entered his no contest plea on January 29, 2004 and was sentenced April 16, 2004. *Blakely* was not decided until June 24, 2004.

agree with the recent case of *White, supra,* 124 Cal.App.4th at p. 1439, decided December 15, 2004, which so held.[9]

In sentencing defendant to the upper term, the trial judge made factual findings that three aggravating factors were present:

(1) The crime involved a high degree of cruelty, viciousness, and callousness;

(2) The victim was particularly vulnerable; and

(3) Defendant had suffered numerous prior juvenile adjudications.

Factor (3) is based on recidivism, and thus is not invalid under *Blakely*; a sentencing court retains the power to determine the fact of a prior conviction. But factors (1) and (2) involve issues of fact which were not admitted by defendant or determined by a jury. Thus, it was error for the court to rely on factors (1) and (2) to impose the upper term.

We must decide whether, under the circumstances of this case, the error is harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).) A finding of *Blakely* error signifies the infringement of the defendant's Sixth Amendment right to trial by jury. (*Blakely, supra,* 159 L.Ed.2d at pp. 410, 415.) We conclude, as did numerous post-*Blakely* California decisions we can no longer cite because of grants of review, that the *Chapman* standard of harmless error applies to *Blakely* error. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 320, 324-327 (*Sengpadychith*) [error under *Apprendi* on which *Blakely* is based, governed by *Chapman* standard]; *U.S. v. Sanchez* (11th Cir. 2001) 269 F.3d 1250, 1271-1273 (*Sanchez*) [same]; cf. *White, supra,* 124 Cal.App.4th at p. 1437 & fn. 6 [court agrees with now uncitable decision that *Blakely* error subject to harmless error analysis].)

In *Sengpadychith*, our Supreme Court held that the trial court's failure to instruct the jury on certain aspects of a gang enhancement, which when found true increased the penalty for the charged offenses, was (1) similar to failing to instruct on an element of the

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[9] On January 12, 2005, the United States Supreme Court reaffirmed *Blakely* in a decision involving the federal sentencing guidelines. (*United States v. Booker* (2005) ___ U.S. ___ [125 S.Ct. 738].)

offense, and (2) error under *Apprendi* because it removed from the jury's consideration facts which lengthened punishment. Thus, reasoned the Supreme Court, the error amounted to federal constitutional error governed by the *Chapman* test for harmless error. (*Sengpadychith, supra,* 26 Cal.4th at pp. 320, 324-327.) In *Sanchez,* the court explained that *Apprendi* error—in that case, the failure to submit the issue of drug quantity to the jury—was not structural error because the error did not necessarily render the trial unreliable or unfair. The error was merely one of trial process, albeit of constitutional dimension, and was thus governed by *Chapman*. (*Sanchez, supra,* 269 F.3d at pp. 1272-1273.)

The harmless error analysis in the present case focuses on the presence of one persuasive valid factor despite the invalidity of the other two. As noted, factor (3) is based on recidivism and is untouched by the *Blakely* error. It is generally true that one valid factor is sufficient to expose a defendant to the upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433.) But even in the context of general, nonconstitutional sentencing error, a reviewing court will set aside a sentence "if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper." (*People v. Price* (1991) 1 Cal.4th 324, 492.)

We must decide whether it is clear beyond a reasonable doubt that the trial court would have imposed the upper term had it known factors (1) and (2) were invalid—i.e., if the court was faced only with one aggravating factor, factor (3). We will not automatically assume the trial court would have imposed the upper term simply because one valid factor remains in the sentencing calculus. "The relevant question is not whether we can conceive of a legitimate way for the trial court to have arrived at the [upper term]. . . . The question is whether the trial court would have exercised its discretion to impose the upper term . . . if it knew that one or more of the factors relied on were invalid. This is a question that can only be answered on a case-by-case basis. [Citations.]" (*White, supra,* 124 Cal.App.4th at pp. 1439-1440.)

Here factors (1) and (2) were by far the more severe of the three. Factor (1) involved cruelty, viciousness, and callousness, based on the kicking of the victim when

he was lying unconscious. Factor (2) involved the victim's vulnerability. In contrast, factor (3) involved a relatively brief juvenile history of less than serious offenses. When he was 15 defendant pulled a jacket over a boy's head so others could rifle his pockets. There is no indication defendant struck the victim or used a weapon. His other two juvenile adjudications were bereft of violence. And at the conclusion of his juvenile wardship, defendant successfully completed Probation Camp, where he earned a high school diploma and completed vocational education. Defendant did not admit the aggravating factors, strongly contested factors (1) and (2), and disputed the characterization of his involvement that led to the court's conclusions. He also urged his admission of guilt at an early stage before a preliminary hearing as a mitigating factor.

When we consider the factor in mitigation discussed by the trial court, as well as the numerous letters in defendant's favor, we cannot conclude beyond a reasonable doubt that the trial court would have imposed the upper term based solely on factor (3). This is a serious crime, but we cannot find the sentencing error harmless under these circumstances. The trial court must reconsider the appropriate sentence.

III. DISPOSITION

The judgment is reversed. The matter is remanded to the trial court for further proceedings consistent with *Blakely*.[10] This reversal is solely for resentencing or to allow the prosecution to seek a jury trial on the aggravating factors and does not affect the order for blood and saliva samples under section 296, or any other provision of the judgment other than the aggravated term for the assault.

[10] We are not suggesting what the sentence should be or limiting the various options open to the court on remand. Also, in light of our remand, we need not address defendant's remaining challenges to his sentence—including claims that the court erred by not finding more mitigating circumstances and that the aggravating factor of cruelty, viciousness and callousness was not supported by the evidence.

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Marchiano, P.J.

We concur:

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Swager, J.

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Margulies, J.