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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

TYRONE THOMPSON,

Defendant and Appellant.

B189042

(Los Angeles County
Super. Ct. No. YA061222)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Francis J. Hourigan III, Judge. Affirmed as modified.

Vanessa Place, under appointment by the Court of Appeal, for Defendant
and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney
General, Pamela C. Hamanaka, Senior Assistant Attorney General, Ana R. Duarte,
Lawrence M. Daniels and Catherine Okawa Kohm, Deputy Attorneys General, for
Plaintiff and Respondent.

INTRODUCTION

Tyrone Thompson, defendant/appellant (“Thompson”), was charged in an information filed by the District Attorney of Los Angeles County for allegedly having committed the following crimes: two counts of first degree burglary pursuant to Penal Code¹ section 459; two counts of first degree residential robbery under section 211; three counts of forcible oral copulation pursuant to section 288a, subdivision (c)(2); one count of forcible rape under section 261, subdivision (a)(2). Special allegations were alleged pursuant to section 12022, subdivision (b)(1) contending that Thompson personally used a knife during the commission of the robberies; personally used a deadly weapon during the course of the rape; and used a deadly weapon while in the commission of a burglary involving more than one victim, under section 667.61, subdivisions (a), (b), (d), and (e). The information also contained allegations Thompson had served four prior prison terms pursuant to section 667.5, subdivision (b). Thompson entered a plea of not guilty, denied all special allegations and demanded a jury trial.

The jury found Thompson guilty on all charges and found all special allegations to be true. The trial court found Thompson had served two prior prison terms and granted a prosecution motion to dismiss the allegations contained in two of the three oral copulation counts under section 667.61.

The trial court denied probation and sentenced Thompson to prison for an indeterminate sentence of 50 years to life, plus a determinate sentence of 27 years 4 months calculated as follows: consecutive 25 years to life on an oral copulation and forcible rape conviction, plus one third the mid term or one year and four months on the conviction for residential robbery, plus the upper term of eight years each for two of the oral copulation convictions, plus the upper term of six years on the conviction for residential robbery, plus one year each on the two weapon enhancements and two prior prison term enhancements, for a total commitment of 77 years and 4 months to life.

¹ All statutory references are to the Penal Code.

The court stayed the enhancement on one of the convictions for first degree residential robbery under section 654.

Thompson was ordered to pay a \$10,000 restitution fine on each count for a total of \$80,000 per section 1202.4, subdivision (b) and a \$20 court security fee under section 1465.8, subdivision (a)(1).

An \$80,000 parole revocation fine under section 1202.45 was ordered but suspended. Thompson was given credit for 320 days of pre-sentence custody.

This appeal followed.

FACTUAL AND PROCEDURAL SYNOPSIS

Prosecution evidence.

Events of February 28, 2005.

Amanda G. entered her apartment on the evening of February 28, 2005, in Los Angeles County, left the door unlocked to enable her mother to enter the apartment later that night and fell asleep while watching television in her bedroom. Amanda awoke later that night and observed Thompson standing next to her with a knife in his hand next to her head. Amanda had never seen Thompson before. Thompson licked her vagina after removing her clothing, then took her money and left through a window when he heard Amanda's family knocking at the door of her bedroom. That night Amanda reported the incident to the police.

Events of March 17, 2005.

Sandy M., mother of Amanda G., was at home alone and lying in her bed on the morning of March 17, 2005, when Thompson, an unknown person entered her apartment and displayed a knife. Thompson held a knife to her throat, choked her, demanded money, threatened to kill her, and directed her to disrobe. Sandy M. was fortunate in persuading Thompson to let her use the bathroom and while she was in the bathroom she called Amanda G.'s boyfriend by cellphone and asked the boyfriend to call the police, which he did. Thompson took \$425 in cash belonging to Sandy M. in an envelope with her name on the envelope, removed her underwear when she returned from the bathroom,

licked her vagina, placed his penis in her mouth, forced his penis into her vagina and then went into the bathroom and started masturbating.

Sandy M. then ran out of the apartment building, observed the sheriff deputies as they arrived and suggested to them that Thompson might try to escape via the apartment window. Upon running to the back of the building, the deputies observed Thompson running down the alley and attempt to scale a wall. Upon detaining Thompson the deputies found a knife in his pocket and the envelope containing the cash he had taken from Sandy M. Both Sandy M. and Amanda G. identified Thompson as the assailant.

Thompson made various statements to the deputies including: “She invited me in”; “At what point is it considered rape?”; “You’re all charging me with the wrong crime. If anything, you should be charging me with home invasion.”

An examination of Sandy on the day of the crimes revealed three bleeding abrasions on her vagina which were consistent with non-consensual sexual intercourse. DNA evidence matched a sample of semen found on the floor of Sandy M.’s apartment. A sample taken from Thompson’s penis matched Sandy M.’s DNA. Human saliva was found in Sandy M.’s vagina and on Thompson’s penis. Semen was also found on Thompson’s thigh.

At trial, both Amanda G. and Sandy M. identified Thompson as the person who had attacked them.

Thompson’s defense consisted of highlighting inconsistencies in Sandy M.’s statement to medical personnel on the day of the crimes.

DISCUSSION

Thompson’s major and apparently sole claim on appeal is under *Blakely v. Washington* (2004) 542 U.S. 296 contending that the imposition of the upper term sentences based on facts that were neither found by the jury nor admitted by him violated his Sixth Amendment right to a jury trial. We find the contention to be without merit.

On the merits the *Blakely* claim must be rejected. Our Supreme Court, in *People v. Black* (2005) 35 Cal.4th 1238 held that *Blakely* does not invalidate California's upper term sentencing procedure. We reject Thompson's Sixth Amendment argument in that no issues unresolved in *Black* have been raised by Thompson. Thus, we are bound by our Supreme Court's decision in *Black*. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Our decision is of course subject to the right of Thompson to renew his *Blakely* claim should the United States Supreme Court invalidate California's upper-term sentencing procedure in *Cunningham v. California* [No. 05-6551, cert. granted Feb. 21, 2006, 126 S.Ct. 1329], which is now pending before the high court.

The attorney general volunteers, and we agree, that the restitution and parole revocation fine imposed by the court should be reduced to the statutory minimum of \$10,000. In sentencing Thompson, the trial court imposed a restitution fine of \$10,000 on each of the eight counts charged and for which convictions were imposed for a total of \$80,000, and suspended the parole revocation fine in accordance with section 1202.45. However, in accordance with *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1534, the maximum restitution fine that can be imposed in a case is \$10,000 "regardless of the number of victims or counts involved." Therefore the restitution and parole revocation fines are to be reduced to the statutory maximum of \$10,000.

DISPOSITION

The restitution and parole revocation fines are reduced from \$80,000 to \$10,000 and the abstract of judgment is ordered corrected to so reflect. Otherwise, the judgment is affirmed in all other respects.

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WOODS, J.

We concur:

PERLUSS, P.J.

ZELON, J.