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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. BEE VANG, Defendant and Appellant.	C052414 (Super. Ct. Nos. CM023755, CM019853)

In case No. CM023755, a jury convicted defendant Bee Vang of assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b)) and unlawful driving of or taking a vehicle (Veh. Code, § 10851, subd. (a)). The court sentenced defendant to state prison for an aggregate term of nine years eight months, that is, the upper term of nine years for the assault offense and a consecutive one-third the midterm or eight months for the unlawful driving or taking offense. In case No. CM019853, the trial court found defendant in violation of probation and imposed a consecutive one-third the midterm or eight months for

possession of a controlled substance. The trial court thus assessed an unstayed prison term of 10 years four months.

Defendant appeals in both cases. In case No. CM023755, he contends (1) the trial court prejudicially erred in admitting into evidence a tainted in-court identification and (2) the trial court's imposition of the upper term violated *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (*Blakely*) and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*). In case No. CM019853, defendant contends that the trial court erroneously imposed additional fees and fines upon revocation of probation. We affirm the judgment.

FACTS AND PROCEEDINGS

About 6:00 p.m. on September 7, 2005, Anthony Seiler drove past Central School. Seiler had two passengers. Sixteen-year-old Dustin W. sat in the front passenger seat and 16-year-old Cassandra D. sat in the back seat behind Dustin. Two Asian males in a blue SUV drove by in the opposite direction, giving Seiler a "dirty" look. Seiler made a U-turn and caught up with the blue SUV which pulled over. Seiler stopped alongside the SUV and argued with the driver of the SUV. The driver told Seiler to "watch [his] back." Seiler made a U-turn and drove away but the SUV followed. Seiler pulled over and reached for something underneath his seat. The Asian male in the passenger seat of the SUV had put on a red handkerchief over his nose and mouth. Dustin and Cassandra got down on the floorboards. As the SUV drove slowly past Seiler's car, the passenger fired a

380 semiautomatic firearm four times at Seiler's car. Two bullets went through the driver's door, one of which hit just behind the driver's door, one bullet hit the front grill and one bullet hit the rear seat. One of the four bullets entered Seiler's left arm and lodged in his chest. Dustin and Cassandra fled on foot. Seiler drove himself to the hospital where he passed out in the parking lot.

At 7:30 p.m., law enforcement officers arrived at the location of the shooting and continued to the hospital where Seiler told them that he had been the victim of a drive-by shooting. He said that two Asian males were in a blue SUV and that the passenger shot him.

Dustin and Cassandra arrived at the hospital later in the evening. They told officers that they could identify neither the car nor the occupants.

About 10:00 p.m., defendant asked to borrow a car, a black Honda Civic, belonging to his sister, Mai Vang. She refused. He became angry, threatened her, broke down her bedroom door, and demanded the keys to the car. She tossed the keys to him.

The next day when interviewed by an officer, Seiler said he thought the driver was someone he knew from school.

Just days after the shooting while visiting a friend, Cassandra saw defendant washing a black Honda Civic across the street. Several days after the shooting while walking around the Gold Country Casino, Cassandra and Dustin saw defendant. Based on defendant's hairstyle and eyes, Cassandra recognized defendant as the driver of the blue SUV. When she visited her

friend sometime later, she saw defendant again with the black Honda Civic.

When interviewed by the police on September 13, 2005, Dustin admitted that he had seen the occupants of the blue SUV. He did not recall telling an officer that he recognized the driver. At trial, Dustin claimed defendant was someone he knew while living in a group home and that they had had friends in common.

When interviewed by the police on September 14, 2005, Cassandra described the driver of the SUV as an Asian male in his 20's, 6 feet tall, thin build, with bags under his eyes and black hair worn in a ponytail just past his shoulders. She stated that "all Asians look alike," "but not this one." She had seen defendant standing washing the car but it did not change her opinion of how tall she thought defendant was the day of the shooting.

At the hospital on September 15, 2005, Seiler identified defendant from a photographic lineup as the driver of the SUV, stating that he was "dead on the driver right there."

At trial, Seiler claimed defendant had nothing to do with the shooting incident and that the SUV had two Hispanic males. He did not recognize the signature on the photographic lineup as his and did not remember saying what was claimed he said when he identified defendant's photo. Seiler admitted that he was in jail and knew what happened to a "snitch." After Seiler testified, he walked past defendant and stated, "I love you dog."

At trial, both Dustin and Cassandra made in-court identifications of defendant as the driver of the blue SUV. Cassandra thought defendant looked the same as on the day of the shooting.

Cassandra admitted that she had lied to officers at the hospital the evening of the shooting because she "wanted everything to go away." Dustin had told Cassandra they should not report the incident because Dustin did not want to make "enemies" and did not believe in "bringing cops into stuff."

An identification expert testified on defendant's behalf about the unreliability of eyewitness identifications.

DISCUSSION

I

Cassandra's In-court Identification

Defendant first contends that Cassandra's in-court identification was tainted by an unduly suggestive photographic lineup.

Prior to trial, defendant moved in limine to exclude evidence of Seiler, Dustin and Cassandra's photographic lineup identification of defendant. Defendant attached to his motion a copy of a photographic lineup that his motion papers suggested was shown to Seiler, Cassandra, and Dustin which line-up consists of photos of six males all who appear to be Asian, one with very short straight hair (No. 1), three with straight hair to about their ears (Nos. 4, 5, 6), one with wavy hair to his

shoulders (No. 3) and one with straight hair below his shoulders (No. 2).

Defendant claimed the following. When Seiler was first interviewed at the hospital, he stated that he had been shot by "'two Asians'" and later said it was the passenger who shot him.

At the scene, officers interviewed an eyewitness who saw two "Hispanic" males in the blue SUV.

When first interviewed, Dustin claimed he did not know what the occupants looked like. Cassandra said the same. The day after the shooting, Seiler told police that he "'recognized the driver as someone he may have went [*sic*] to school with.'"

On September 13, 2005, Dustin told police that he had seen both the driver and passenger before the shooting and when the shooting started, he jumped out of the car and hid; he recognized the driver but did not know his name.

Defendant further claimed that on September 14, 2005, Cassandra "told the police she believed the driver of the other vehicle to be a member of the Norteno street gang," "an Asian male, approximately 22 years old" with "'baggy eyes [and] black hair just past his shoulders[,] . . . wavy like it had been in a braid'" and that "'all Asians look alike.'"

Defendant argued the photographic lineup was suggestive because, since defendant was taken into custody at 10:24 a.m. on September 15, 2005, a physical lineup was feasible at or about the time the police conducted the photo line-ups. He further argued that none of the people in the photo lineup other than

defendant had the hair length described by Cassandra, that is, "'just past his shoulders.'"

Defendant asserted that on September 14, 2005, Cassandra identified defendant's photo as the driver of the blue SUV; that on September 15, 2005, in ICU at the hospital, Seiler identified defendant's photo, saying "'That is dead on the driver right there'"; and that on September 15, 2005, Dustin identified defendant's photo, saying "That is the driver. I am 100% sure that (Vang) was driving the vehicle when Tony (Seiler) was shot."

At a hearing outside the jury's presence, the parties stipulated that jail staff provided photographs, there was a chain of custody and that the photos were shown one at a time in a random sequence to each witness. Prior to showing the lineup to Seiler and Dustin, Officer John Ryan read a standard admonishment.

The prosecutor opposed the motion, arguing that the length of hair was a changeable feature, that each witness had been advised prior to viewing the photographs that "head and facial hair is subject to change" and that all the photographs showed males of similar race, age and build. The prosecutor noted that Cassandra had seen defendant across the street from her friend's house prior to preparation of the photographic lineup.

The court concluded that Cassandra's photographic lineup identification would be excluded because she had described the driver as an Asian male with wavy black hair, just past his shoulders, prior to preparation of the lineup and that there was

only one photo in the lineup, defendant's, that matched her description. The court determined that the lineup was "inherently unfair so as to create a substantial likelihood of irreparable misidentification" and violated defendant's due process rights. The court initially granted defense counsel's request to exclude Cassandra's in-court identification because Cassandra was unable to describe the car or occupants when she was first interviewed. The court concluded that Cassandra could describe the driver and testify whether the person she saw on three separate occasions thereafter appeared to be the driver. The court further decided it would not exclude evidence of Seiler's or Dustin's identification from the photographic line-up, apparently because the two of them knew defendant prior to the shooting.

After the trial court's ruling, defense counsel and the prosecutor informed the court that the photo lineup shown to Cassandra, which the court had not seen, was different than that shown to Seiler and Dustin. Defense counsel stated that "the Court has made rulings such that I don't need to deal with the second line-up . . . ." The court stated, "All right."

Later during trial, the prosecution requested that the court reconsider its rulings. The prosecution asserted the lineup shown to Cassandra was different from the lineup shown to Seiler and Dustin, although the prosecution could not say how different because one of the six pictures had been lost. Officer Robertson showed the lineup to Cassandra. The record on

appeal does not include the photographic lineup shown to Cassandra.

The court reaffirmed its ruling that Cassandra's photographic lineup identification was excluded but reversed its ruling on her in-court identification, finding that she had "personal contact with the defendant" and that the photo lineup did not taint her in-court identification.

We exercise our independent judgment in reviewing a trial court's ruling on the identification procedure. (*People v. Kennedy* (2005) 36 Cal.4th 595, 608-609.) We first consider "whether the identification procedure was unduly suggestive and unnecessary." (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.) In determining whether the procedure was unduly suggestive, "'[t]he question is whether anything caused defendant to "stand out" from the others in a way that would suggest the witness should select him.'" (*Id.* at p. 990.) If the lineup was unduly suggestive and unnecessary, then we consider "whether the identification itself was nevertheless reliable under the totality of the circumstances . . . ." (*Id.* at p. 989.) If unreliable under this test, we reverse only if there is a "'substantial likelihood of irreparable misidentification.'" (*Id.* at p. 990.)

The trial court excluded Cassandra's photographic lineup identification of defendant. The record on appeal does not include the photographic lineup shown to Cassandra. The only photographic lineup in the record is that shown to Seiler and Dustin. Without the photographic lineup shown to Cassandra, the

trial court had no evidence upon which to make a ruling that the lineup was unduly suggestive.

Even so, and assuming the lineup shown to Cassandra was unduly suggestive, Cassandra's in-court identification was nevertheless reliable. Prior to an officer showing her a photographic lineup, she described the driver as an Asian male in his 20's with black hair just past his shoulders. Cassandra had the opportunity to see the driver prior to the shooting. She saw and heard the driver when he was arguing with Seiler. She saw defendant just days later across the street and at the casino and recognized him as the driver. This reflects that she was paying attention at the time of the offense. She made her identification about a week after the shooting. At trial, she testified that defendant looked the same as the day of the shooting.

Under the totality of the circumstances, Cassandra's in-court identification was reliable (*Cunningham, supra,* 25 Cal.4th at p. 989). There was no substantial likelihood that she misidentified defendant as the driver. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 106-114 [53 L.Ed.2d 140, 149-154].) In court, she identified defendant and was certain that defendant had driven the blue SUV and had been the person she had seen across the street and at the casino. The evidence supports the conclusion that Cassandra's in-court identification was based upon her independent observation and recollection of the events and not upon the photographic lineup.

In any event, defendant has failed to demonstrate prejudice. Cassandra's in-court identification was not the only evidence establishing that defendant drove the car. Seiler identified defendant from the photographic lineup and stated that the photo was "dead on" as the driver. At trial, Seiler recanted his identification but he had been convicted of an offense, was serving a term in jail and did not want to be known as a snitch. Even though Dustin's in-court identification was not as certain as Cassandra's, Dustin recognized defendant as someone he knew from group home and friends. Defendant presented no evidence of an alibi. The jury had the benefit of the defense expert's testimony on eyewitness identifications as well as the court's instructions on factors to consider in evaluating eyewitness testimony. Any error in admitting Cassandra's in-court identification of defendant was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711]; *People v. Martin* (1970) 2 Cal.3d 822, 831.)

II

The Upper Term Sentence

In sentencing defendant to state prison for the upper term of nine years for assault with a semiautomatic firearm, the court cited in aggravation the victim's vulnerability and the fact that defendant was on felony probation at the time of the offense. In imposing a consecutive sentence for the unlawful driving or taking offense, the court cited the fact that the offense involved a high degree of violence.

Defendant contends that the trial court's imposition of the upper term violated *Blakely, supra,* 542 U.S. 296 [159 L.Ed.2d 403] and *Apprendi, supra,* 530 U.S. 466 [147 L.Ed.2d 435].

The Attorney General claims defendant's *Blakely* claim is forfeited. We disagree. When defendant was sentenced on May 11, 2006, the trial court was obligated to follow *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*). *People v. Sandoval* (2007) 41 Cal.4th 825 held that a defendant who failed to object at sentencing which occurred after *Black I* and prior to *Cunningham v. California* (2007) 549 U.S. ___ [166 L.Ed.2d 856] (*Cunningham*) did not forfeit a *Blakely* issue on appeal because it would have been futile to object. (*Sandoval, supra,* at p. 837, fn. 4.) We thus reach the merits.

The Attorney General claims the recidivism exception applies in that the court cited the fact that defendant was on felony probation when he committed the offense. Further, the Attorney General claims that the jury's finding that defendant aided and abetted the assault offense, with undisputed evidence that Seiler was shot and hospitalized, supported the court's finding in aggravation that the crime involved violence which it cited in imposing a consecutive sentence. The Attorney General asserts in the alternative that any error was harmless beyond a reasonable doubt in that the evidence was undisputed that the assault offense involved shooting four times at a car with three occupants resulting in injury to one and thus involved great violence and a threat of great bodily harm.

Applying the Sixth Amendment to the United States Constitution, the United States Supreme Court held in *Apprendi, supra,* 530 U.S. 466 [147 L.Ed.2d 435] that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Id.* at p. 490 [147 L.Ed.2d at p. 455].) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant. Thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely, supra,* 542 U.S. at pp. 303-304 [159 L.Ed.2d at pp. 413-414].) *Cunningham* recently reaffirmed its holdings in *Blakely* and *Apprendi*, rejecting the contrary holding in *Black I, supra,* 35 Cal.4th 1238. (*Cunningham, supra*, 549 U.S. at p. ___ [166 L.Ed.2d at pp. 868, 873, 876].)

People v. Black (2007) 41 Cal.4th 799 (*Black II*) held that "imposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions." (*Id.* at p. 816.) In *Black II*, a jury convicted the defendant of continuous sexual abuse of a child and two counts of lewd and lascivious conduct with a child. In connection with the continuous sexual abuse count, the jury

found true two allegations relevant to probation or a suspended sentence, that is, the offense was committed with force, violence, duress, menace and fear of injury and that the defendant had engaged in substantial sexual conduct. (*Id.* at pp. 806-807.) In imposing the upper term for the continuous abuse offense, the trial court cited the nature, seriousness and circumstances of the offense, noting the use of force on many occasions, victim vulnerability, abuse of a position of trust and the infliction of emotional and physical harm. (*Id.* at p. 807.) "The trial court stated that it considered not only the circumstances of the crime but also the other aggravating circumstances set out in the district attorney's sentencing brief" which included the factor that defendant's prior convictions were numerous and increasingly serious. The probation report set forth defendant's criminal history. (*Id.* at p. 818.) *Black II* concluded that the "defendant's constitutional right to a jury trial was not violated by the trial court's imposition of the upper term sentence for his conviction of continuous sexual abuse" because "the 'statutory maximum' sentence to which defendant was exposed by the jury's verdict was the upper term. . . ." (*Id.* at p. 816.) The trial court's citation of the nature of the offense, specifically noting the use of force, was supported by the jury's probation ineligibility finding (force, violence, duress, menace, and fear of injury) and rendered the defendant eligible for the upper term for the continuous sexual abuse offense. (*Id.* at pp. 816-818.) *Black II* also concluded that the trial court's reliance

upon the defendant's criminal history by reference to the prosecutor's sentencing brief in imposing sentence for the continuous sexual abuse offense was an additional aggravating factor which rendered the defendant eligible for the upper term. (*Id.* at pp. 818-820.)

Here, although the trial court erred in considering the fact that the victim was particularly vulnerable (*Cunningham, supra,* 549 U.S. ___ [166 L.Ed.2d 856]), defendant was eligible for the upper term based on the trial court's finding that defendant was on probation at the time of the offense.

Rule 4.421(b)(4) sets forth as a factor in aggravation of sentence that "defendant was on probation or parole when the crime was committed." (Cal. Rules of Court, rule 4.421(b)(4).) The trial court cited defendant's probationary status at the time of the offense which qualifies as a recidivism factor. At sentencing, the trial court had before it case Nos. CM023755 and CM019853. In the latter case, defendant had been convicted of felony possession of a controlled substance and had been granted probation. He was on probation when he committed the offenses in case No. CM023755. *Black II, supra,* 41 Cal.4th at pages 818 to 820 determined that the "fact of a prior conviction" (*id.* at p. 818) broadly construed encompasses a defendant's criminal history as reflected in records of the prior convictions. There was no *Cunningham* error.

III

Fees and Fines

Finally, defendant challenges the trial court's imposition of additional fees and fines upon revocation of probation in case No. CM019853. We find no error.

We note that the Attorney General incorrectly states that defendant did not file a notice of appeal in case No. CM019853. Defendant filed separate notices of appeal in case Nos. CM023755 and CM019853.

In 2004, in case No. CM019853, the trial court granted probation and imposed, inter alia, a $200 restitution fine, a $170 criminal laboratory analysis fee plus assessments, a $510 drug program fee plus assessments and a $20 court security fee. In sentencing defendant to prison, the trial court imposed these same fees and fines.

Citing *People v. Chambers* (1998) 65 Cal.App.4th 819, defendant contends that the first set of fees and fines survived revocation of probation and that a second set of fees and fines were improperly imposed. This is incorrect.

In case No. CM019853 the trial court simply reimposed the same fees and fines imposed originally. The additional fees and fines reflected in the abstracts of judgment were imposed in case No. CM023755 even though page three of the abstract of judgment misidentifies the case as No. CM023775. There was no legal error.

DISPOSITION

The judgment is affirmed.

HULL, J.

We concur:

SIMS, Acting P.J.

BUTZ, J.