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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.

DARRYEAL WOODROW WILSON,

Defendant and Appellant.

A102205

(Napa County  
Super. Ct. No. CR109693)

A jury convicted defendant Darryeal Woodrow Wilson of four counts of committing lewd acts with his six-year-old niece. The sole issue raised in defendant's original appeal was whether the trial court abused its discretion in admitting a videotaped police interview of the niece. We found that the evidence was properly admitted, and affirmed the judgment. We subsequently granted defendant's petition for rehearing to consider the impact of the decision in *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531] (*Blakely*), upon defendant's sentence. In a nonpublished opinion, *People v. Wilson* (Nov. 24, 2004, A102205) (*Wilson I*), we concluded that the principal, upper term sentence of eight years imposed upon defendant for his conviction in count one must be vacated, and the matter returned to the trial court for resentencing. In all other respects, we affirmed the judgment.

The California Supreme Court granted review, and then retransferred this matter to us with directions to vacate our decision and reconsider the cause in light of *People v. Black* (2005) 35 Cal.4th 1238 (*Black*). In an opinion issued on October 6, 2005, we vacated our decision filed on November 24, 2004, and affirmed defendant's conviction

and sentence. Following the denial of his petition for review to the California Supreme Court, defendant petitioned for certiorari to the United States Supreme Court. On February 20, 2007, the United States Supreme Court issued an order 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] (*Cunningham*).

Pursuant to this mandate, we have recalled the remittitur and afforded the parties an opportunity to file supplemental briefs on the effect of *Cunningham* on the issues presented. We now revert to our conclusion on November 24, 2004 that the principal, upper term sentence of eight years imposed upon defendant must be vacated, and the matter returned to the trial court for resentencing. In all other respects, we affirm the judgment. Because *Cunningham* does not affect our disposition of defendant's appeal from his conviction for the underlying offenses, we deem it unnecessary to modify our opinion in *Wilson I* in that regard, and reiterate pages 1 through 10 of that opinion in their entirety. (See *City of Long Beach v. Bozek* (1983) 33 Cal.3d 727, 728.)

## I. DISCUSSION

At the sentencing hearing on March 28, 2003, the trial court imposed the upper term of eight years on count one, and imposed consecutive sentences of two years on each of the three remaining counts. In imposing the upper term on count one, the court explained that it was relying solely on the following two circumstances in aggravation, which it found to be true based on a preponderance of the evidence: (1) defendant "took advantage of a position of trust and confidence to commit each of these offenses" (former Cal. Rules of Court, rule 4.421(a)(11)); and (2) each of the crimes "was carried out in a fashion that would indicate planning, sophistication or professionalism." (Former Cal. Rules of Court, rule 4.421(a)(8).)

Defendant maintains, and the People do not dispute, that under *Blakely* and *Cunningham*, the trial court committed federal constitutional error by imposing the upper term sentence on count one based on facts not found by a jury to be true beyond a reasonable doubt. The People contend that: (1) defendant waived any claim of error by failing to object that imposition of the upper term violated his jury trial right, and (2) the

*Blakely* error was harmless in this case because the jury would have found one or both of the aggravating circumstances true beyond a reasonable doubt.

#### **A. Waiver**

In *Blakely*, the United States Supreme Court extended the rule articulated in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*)—which was decided three years before defendant’s sentencing in this case—that “ ‘[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.” (*Blakely, supra*, 124 S.Ct. at p. 2536.) The People argue that defendant waived any claim of *Blakely* error by failing to raise a sentencing objection under *Apprendi* in the trial court.

Claims asserting the deprivation of certain fundamental constitutional rights may be raised for the first time on appeal. (*People v. Vera* (1997) 15 Cal.4th 269, 276.) The failure to object to an “unauthorized sentence” also is not subject to the waiver rule. (*In re Birdwell* (1996) 50 Cal.App.4th 926, 931.) “[A] sentence is generally ‘unauthorized’ where it could not lawfully be imposed under any circumstance in the particular case. Appellate courts are willing to intervene in the first instance because such error is ‘clear and correctable’ independent of any factual issues presented by the record at sentencing.” (*People v. Scott* (1994) 9 Cal.4th 331, 354.) A related exception to the waiver rule is that it “is generally not applied when the alleged error involves a pure question of law, which can be resolved on appeal without reference to a record developed below.” (*People v. Williams* (1999) 77 Cal.App.4th 436, 460.)

In the present case, defendant claims deprivation of his fundamental constitutional rights to jury trial and proof beyond a reasonable doubt. He raises an issue of constitutional law that we may decide without reference to the particular sentencing record developed in the trial court. Further, since defendant’s position is that the sentence was not lawfully imposed, it may be corrected on appeal despite the lack of an objection in the trial court. Finally, although *Apprendi* had been decided at the time of defendant’s sentencing, *Blakely* had not. At that time, no relevant judicial tribunal had construed *Apprendi* to require jury determination of facts used to impose an upper term of

imprisonment under a determinate sentencing law comparable to California's. On all of these grounds, defendant cannot be held to have waived the *Blakely* claims he now raises.

**B. Harmless Error**

Sentencing errors under *Blakely* are not structural defects that demand automatic reversal, but are reviewed under the harmless error standard set forth in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). (See *Washington v. Recuenco* (2006) \_\_\_ U.S. \_\_\_ [126 S.Ct. 2546, 2550, 2553]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 320, 324–327 [error under *Apprendi* governed by *Chapman*].) Under *Chapman*, we must reverse defendant's sentence unless it appears beyond a reasonable doubt that the trial court's *Blakely* error did not contribute to the judgment. (*People v. Neal* (2003) 31 Cal.4th 63, 86.)

We are unable to reach that determination in this case. Given that the jury found defendant guilty of molesting his six-year-old niece—offenses that were alleged to have taken place during visits to his sister's house—we can say with great confidence that the jury would have found beyond a reasonable doubt that defendant took advantage of a position of trust and confidence. We cannot say with equal confidence, however, that it would have found that the crimes were carried out in a manner that showed planning, sophistication, or professionalism. Thus, it must be clear beyond a reasonable doubt that the trial court would have imposed the upper term based solely on the first of the two aggravating factors that it cited as its reasons.

The trial court did not state that either (or both) of the aggravating factors it cited was alone a sufficient or independent reason to impose the upper term sentence, nor did it state that neither factor was alone sufficient. On this record, we cannot say beyond a reasonable doubt that the trial court would have exercised its discretion to impose the upper term had it not used the planning and sophistication factor as one of its grounds for doing so. Accordingly, the *Blakely* error was not harmless in this case.

We decline to follow the People's suggestion that we stay these proceedings and await direction from the California Supreme Court on the proper remedy for this error, and will instead remand for resentencing in light of *Blakely*.

**C. Consecutive Sentences**

In *Black, supra*, 35 Cal.4th at pp. 1261–1264, the California Supreme Court held that *Blakely* does not apply to the imposition of consecutive sentences under Penal Code section 669. *Black* remains good law on that point, and we therefore affirm defendant’s consecutive sentences on counts two, three, and four.

**II. DISPOSITION**

The upper term sentence of eight years on count one is vacated and the case is remanded to the trial court for the limited purpose of conducting sentencing proceedings in accordance with the requirements of *Blakely* and *Cunningham*.<sup>1</sup> In all other respects, the judgment is affirmed.

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Margulies, J.

We concur:

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Marchiano, P.J.

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Swager, J.

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<sup>1</sup> We are not suggesting what the sentence should be or limiting the various options open to the court on remand.