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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

CLARENCE WITHERS,

Defendant and Appellant.

B172130

(Los Angeles County
Super. Ct. No. BA218706)

APPEAL from a judgment of the Superior Court of Los Angeles County, Curtis B. Rappe, Judge. Affirmed in part, reversed in part.

Janice M. Lagerlof, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lawrence M. Daniels and Susan Lee Frierson, Deputy Attorneys General, for Plaintiff and Respondent.

Clarence Withers argues that instructional error compels the reversal of his conviction of voluntary manslaughter. In a supplemental brief, he contends that the imposition of the upper term violated his rights to jury trial and due process.

Following established precedent, we find no instructional error because other instructions ensured adequate jury consideration of witness credibility. We reverse the sentence because the trial court failed to give reasons for the imposition of the upper term for the gun use enhancement under Penal Code section 12022.5, and may have based that decision on factual findings in violation of the principles announced in *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Blakely v. Washington* (2004) 542 U.S. ____ [124 S.Ct. 2531].

FACTUAL AND PROCEDURAL SUMMARY

This case arose from a dispute between members of an extended family and the victim. The victim was Demonte Walker, who lived on West 47th Street in Los Angeles with his girlfriend of five years, Ena Payton. They had a child together. A fence with two gates enclosed the property and driveway. During part of his relationship with Payton, Walker also had been involved with a woman named Toshika Carter. Carter lived on South Grand Avenue, around the corner from Walker's house. She is appellant's niece.

About two months before Walker's death, Payton found out about his relationship with Carter. Payton talked to Carter about this two times, and left Walker for a time, but later reconciled with him. At the time of his death, Walker had broken off his relationship with Carter.

An incident occurred at Carter's house on the day of the killing. Various witnesses gave different accounts. Payton testified that she and Walker drove past Carter's house at a "pretty good speed." She denied any confrontation at that house, but said that a car followed them home. When they were opening the gate to get into the yard at their home, Carter's cousin, Tamekia Houston, called profanely for them to move their car. Houston parked in front of a neighbor's house, approached Payton, and

demanded to know what was going on between Payton and Carter. During this discussion, Houston's uncle, Thornton Withers, got out of the car and stood at the gate. Walker had gone into the house. He came back to the yard and told Houston and Withers to leave because he was not "messing" with Houston's cousin any more. Cedric Wilson, a member of appellant's family who was 14 at the time of the incident, rode his scooter to the scene. According to Payton, Houston told Walker not to make her send Wilson to get someone. At that point, Wilson left.

Withers said, "'This n----- need his butt kicked'" in an angry tone of voice. Walker and Withers began to fight. Walker fell against the fence and the fight continued while he was on the ground. Payton looked up and saw appellant, Why-Tinnie Gilbert (the boyfriend of appellant's sister), and Wilson approaching from the direction of Carter's house.

Payton and Houston tried to break up the fight, but appellant pulled Payton away, pulled out a gun, and started shooting at Walker, who was still on the ground. According to Payton, appellant was the only shooter. She saw appellant leaving the scene in a car with Houston. Walker died from gunshot wounds. A gun was found near his body.

Carter testified that on the day of the killing, when Walker and Payton drove by her house, Walker tried to hit her mother, Jennifer Carter. Later, her brother, Cedric Wilson, returned to her house and told her mother that Walker was trying to shoot "everybody." Carter admitted that she never told the police that Walker was shooting at anyone the day of the killing. Wilson apparently left, then returned to the house again and said that there was shooting going on. According to Carter, her uncle, appellant, never left her house at the time of the shooting. But in a statement to police, Carter told them that appellant and Why-Tinnie Gilbert had gone to Walker's house.

Cedric Wilson testified that he saw Walker speeding by the Carter residence on the day of the shooting and that Walker tried to hit Wilson's mother, Jennifer Carter. Wilson then rode his scooter by Walker's house, and saw Walker and Payton. Walker opened the trunk of his car and got a gun. Tamekia Houston and Thornton Withers were already at Walker's house when this happened. Wilson went back to the Carter house to

tell them Walker was going to shoot somebody. He went back to Walker's because his relatives, Houston and Withers, were there. According to Wilson, Walker started shooting at Houston and said he was going to kill somebody. Wilson turned and ran. Wilson also denied that appellant (his uncle) was present at the shooting. This testimony was impeached by Wilson's statements to police saying that he had never seen Walker with a gun during the incident and that appellant was at the scene.

Thornton Withers testified that he saw appellant drive by his mother's house at a high rate of speed on the day of the shooting. He said that he and Houston went to Walker's house, and that Walker came out of the house with his hand in his pocket. A car with three men in it drove up. Thornton felt something was not right about the situation and started running toward Houston, who was talking with Payton. As he ran, he heard gunshots, but did not see anyone shooting. Why-Tinnie Gilbert testified that he only got half way to Walker's house and did not see what had happened there. He was impeached with a statement he made to the police saying that he had seen appellant and Thornton Withers arguing with Walker, and heard shooting.

Appellant was charged with murder. Firearm use and a prior conviction were alleged. The defense theory at trial was self-defense. Appellant was found guilty of the lesser offense of voluntary manslaughter and admitted the prior conviction allegation. Appellant was sentenced to state prison for an aggregate term of 22 years. He filed a timely appeal.

DISCUSSION

I

Appellant argues his conviction must be reversed because CALJIC No. 2.11.5 on unjoined perpetrators should not be given where the unjoined perpetrator testifies at trial. He also points out that the prosecutor argued that he could be convicted of murder either as the shooter or as an aider and abettor. Based on the prosecutor's approach to Thornton's role in the case, appellant argues Thornton was an unjoined perpetrator who testified at trial. He argues that Gilbert and Wilson also could be considered unjoined

perpetrators based on the evidence. Appellant therefore argues CALJIC No. 2.11.5 should not have been given because it prevented the jury from considering whether these witnesses may have attempted to deflect blame from themselves onto appellant. He concludes that CALJIC No. 2.11.5 kept the jury from fully considering the credibility of these witnesses. Respondent argues there was no error, but if there was, it was harmless.

As given, the 1996 version of CALJIC No. 2.11.5 informed the jury: “There has been evidence in this case indicating that a person other than the defendant was or may have been involved in the crime for which the defendant is here on trial. [¶] There may be many reasons why that person is not here on trial. Therefore, do not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether he has been or will be prosecuted. Your sole duty is to decide whether the People have proved the guilt of the defendant here on trial.”

Appellant cites the Use Note to CALJIC No. 2.11.5 which admonishes: “Do not use this instruction if the other person is a witness for either the prosecution or the defense.” (Use Note to CALJIC No. 2.11.5 (7th ed. 2003) p. 43.) In *People v. Brown* (2003) 31 Cal.4th 518, the defendant claimed that this instruction precluded the jury from considering the fact that one witness had been granted immunity and two others were potential accomplices subject to prosecution. (*Brown*, at p. 560.) The court reiterated the principle that it is not error to give the instruction under these circumstances if other instructions adequately guide the jury as to witness credibility: ““The purpose of [CALJIC No. 2.11.5] is to discourage the jury from irrelevant speculation about the prosecution’s reasons for not jointly prosecuting all those shown by the evidence to have participated in the perpetration of the charged offenses, and also to discourage speculation about the eventual fates of unjoined perpetrators. [Citation.] When the instruction is given with the full panoply of witness credibility and accomplice instructions, as it was in this case, [jurors] will understand that although the separate prosecution or nonprosecution of coparticipants, and the reasons therefor, may not be considered on the issue of the charged defendant’s guilt, a plea bargain or grant of immunity may be considered as evidence of interest or bias in assessing the credibility of

prosecution witnesses. [Citation.] Although the instruction should have been clarified or omitted [citations], we cannot agree that giving it amounted to error in this case.’ (*People v. Price* [(1991)] 1 Cal.4th [324,] 446; see also *People v. Cain* (1995) 10 Cal.4th 1, 35 [40 Cal.Rptr.2d 481, 892 P.2d 1224], quoting *Price* with approval.)” (*People v. Brown, supra*, 31 Cal.4th at pp. 560-561.)

In *Brown*, the jury was given CALJIC No. 2.20, which informed it that, “[i]n determining the believability of a witness, you may consider anything that has a tendency [in] reason to prove or disprove the truthfulness of the testimony of the witness, including but not limited to The existence or nonexistence of a bias[,] interest or other motive.”” (*People v. Brown, supra*, 31 Cal.4th at p. 561.) The *Brown* jury also was instructed to consider the instructions as a whole and each in light of all the others. (CALJIC No. 1.01.) Finally, the jury was specifically instructed that one of the witnesses was an accomplice as a matter of law. (*Ibid.*) In light of these instructions, the Supreme Court concluded that “although the instruction challenged here could have been clearer, the trial court did not err in giving it, and there was no reasonable likelihood the jury understood CALJIC No. 2.11.5 to preclude its consideration of P.M.’s grant of immunity, or the potential accomplice status of [two specific witnesses]. (See *People v. Kelly* (1992) 1 Cal.4th 495, 525 [3 Cal.Rptr.2d 677, 822 P.2d 385].)” (*Ibid.*; see also *People v. Jones* (2003) 30 Cal.4th 1084, 1113 [no error where jury also received CALJIC Nos. 2.20 (assessing the credibility of witnesses), 2.23 (witness with felony conviction), and 3.18 (testimony of accomplice to be viewed with distrust)].)

Here, there was no evidence that Thornton Withers, Cedric Wilson, or Why-Tinnie Gilbert received immunity in exchange for their testimony. The jury was given sufficient instructions from which it could thoroughly consider the credibility of these witnesses: CALJIC Nos. 1.01 (instructions to be considered as a whole); 2.20 (believability of witnesses); 2.21.1 (discrepancies in testimony); 2.21.2 (witness willfully false); 2.22 (weighing conflicting testimony); 2.23 (impeachment with felony conviction); and 2.23.1 (impeachment with evidence of commission of a misdemeanor). Following *People v. Brown, supra*, 31 Cal.4th 518, we find no instructional error.

II

In a supplemental brief, appellant argues that the trial court's selection of the upper term for the firearm use enhancement violated his right to jury trial, as explicated by the United States Supreme Court in *Blakely v. Washington, supra*, 542 U.S. ____ [124 S.Ct. 2531] (*Blakely*). The reason is that the trial court failed to give reasons for imposition of the upper term for the enhancement, and may have relied upon facts, other than the fact of a prior conviction, that the jury had not necessarily determined in violation of *Blakely*. Citing *People v. Scott* (1994) 9 Cal.4th 331, 353, respondent argues appellant has forfeited the issue regarding the trial court's failure to give reasons for imposition of the upper term because he failed to object at the time of sentencing.

In *Apprendi v. New Jersey, supra*, 530 U.S. 466, 490, the United States Supreme Court held: "Other 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." In *Blakely*, the Supreme Court held that "the 'statutory maximum' for *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 In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely, supra*, 124 S.Ct. at p. 2537.) It appears that the holding applies to all cases not yet final when *Blakely* was decided in June 2004. (See *Schriro v. Summerlin* (2004) ____ U.S. ____ [124 S.Ct. 2519].)

We agree with appellant's argument that *Blakely* applies to the California determinate sentencing law. We previously have determined in unpublished opinions that a *Blakely* argument may be presented even though not raised before the trial court, where sentencing occurred before that case was decided by the high court. We also have concluded that the California determinate sentencing law is sufficiently similar to the statute reviewed in *Blakely* to make the holding of that case applicable: the upper term cannot be imposed where the jury has not decided the factual basis for the aggravated term, except where the greater punishment is imposed on the basis of recidivism. The

Supreme Court recently has added to the literature on the issue by its decision in *United States v. Booker* (2005) ___ U.S. ___ [125 S.Ct. 738]. The issue is now before our Supreme Court in *People v. Black*, S126182. Pending a decision in *Black* or a related case, we see no reason to depart from the position we have held.

The problem here is that, as appellant argues, the trial court may have imposed the upper term based on a non-recidivism factual finding not made by the jury, which would violate appellant's right to jury trial under *Blakely*. We are unable to make this determination because the trial court did not state its reasons on the record. We therefore reverse the sentence.

DISPOSITION

The judgment is reversed as to sentencing and remanded for further proceedings on that issue, consistent with our opinion. In all other respects the judgment is affirmed.

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EPSTEIN, P.J.

I concur:

HASTINGS, J.

GRIMES, J., Concurring and Dissenting.

I concur in the majority opinion affirming the judgment of conviction. Respectfully, I dissent with respect to the disposition and discussion in part II. The majority concludes that *Blakely v. Washington* (2004) 124 S.Ct. 2531 [159 L.Ed.2d 403] (*Blakely*) mandates reversal of the upper term imposed for the gun use enhancement under Penal code section 12022.5 and remands for resentencing on that count.

My colleagues conclude that imposition of the upper term requires fact finding by the jury, unless the greater punishment is imposed on the basis of recidivism. Until our Supreme Court concludes otherwise,¹ I am of the opinion that *Blakely* does not apply to the tripartite prison scheme (upper, middle, and low term) of the California determinate sentencing law (Pen. Code, § 1170, subs. (a)(3) & (b); see also, Cal. Rules of Court, rules 4.420(a)-(c), 4.421 & 4.423). It is my view that our California sentencing scheme is the type of discretionary sentencing within a range authorized by law to which *Blakely* does not apply.

In view of the foregoing, I would affirm the trial court's imposition of the upper term on the gun use enhancement.

GRIMES, J.*

¹ The issue of whether *Blakely* applies to the upper term choice is pending before our Supreme Court in *People v. Black*, S126182 and *People v. Towne*, S125677.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.