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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

CECELIA ANTIONETTE ZEPEDA,

Defendant and Appellant.

C053912

(Super. Ct. No. CM024049)

Defendant Cecelia Antionette Zepeda entered a negotiated plea of guilty to dissuading a witness by force or threat (Pen. Code, § 136.1, subd. (c)(1)--count 6)¹ and being an accessory after the fact (§ 32--count 7), and was sentenced to an aggregate term of four years eight months in state prison, consisting of the upper term of four years on count 6, and a consecutive eight months (one-third the middle term) on count 7.

On appeal, defendant claims (1) the trial court erred in refusing to stay her sentence on count 7 under section 654; (2) imposition of the upper term on count 6 violates the Sixth

¹ Undesignated statutory references are to the Penal Code.

Amendment under *Cunningham v. California* (2007) 549 U.S. ____ [166 L.Ed.2d 856] (*Cunningham*); and (3) the trial court erred in imposing the upper term by relying in part on two facts that are elements of one of the offenses to which she pleaded guilty.² We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND³

Defendant's brother was a suspect in two shootings that left a father paralyzed and his 17-year-old son dead. A few days after the shootings, defendant drove her brother from California to her home in Oregon, where he lived for the next year or so. Defendant "was not cooperative or forthright during the investigative process" and "threatened witnesses and their families . . . if they provided information to law enforcement about" the shootings.

DISCUSSION

I

At the sentencing hearing, defendant argued her sentence on count 7 (being an accessory after the fact) must be stayed pursuant to section 654 because "the facts in this case are

² This court previously determined defendant did not need a certificate of probable cause to raise the section 654 and *Cunningham* issues on appeal. (See Jan. 25, 2007 order denying application to seek belated certificate of probable cause in trial court.)

³ The facts are taken from the probation report, which defendant stipulated could be used to establish the factual basis for her plea.

interrelated. As far as the dissuading [a witness by force or threat] and the accessory after a fact, you can't segregate them out." The People disagreed, explaining that the accessory after the fact offense "constitutes a whole course of conduct and not threats. That course of conduct involves removing [herself] and her brother, the suspect, from California to Oregon, and also then lying to the police." The trial court agreed and denied defendant's request to stay her sentence, explaining that the accessory after the fact offense "is a whole course of conduct, not just threats that are encompassed in" the dissuading a witness offense.

On appeal, defendant argues the trial court erred in refusing to stay her sentence on count 7 (being an accessory after the fact) because it arose out of the same course of conduct as the dissuading a witness offense and was guided by the same intent and objective--"help[ing] her brother . . . escape justice." We disagree.

Section 654, subdivision (a) provides in relevant part that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

Although section 654, subdivision (a) literally proscribes only multiple punishment for multiple convictions arising from a single "act or omission," it has been extended to a "course of

criminal conduct wherein multiple violations are incident to an accused's single criminal objective." (*People v. Beamon* (1973) 8 Cal.3d 625, 638.) However, "a course of conduct *divisible* in time, although directed to one objective, may give rise to multiple violations and punishment." (*Id.* at p. 639, fn. 11, italics added.) "Thus, a finding that multiple offenses were aimed at one intent and objective does not necessarily mean that they constituted 'one indivisible course of conduct' for purposes of section 654." (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1253.) "This is particularly so where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken." (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.)

Whether the crimes constitute an indivisible course of conduct is a question of fact for the trial court, and its findings will not be disturbed on appeal if they are supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731.)

Here, there is substantial evidence to support a finding that defendant's course of conduct was divisible in time. Indeed, defendant "does not dispute . . . that she both threatened witnesses and helped her brother move to Oregon or that she may have had time to reflect." Because the record reflects, and defendant concedes, that the acts that constituted

the offenses of dissuading a witness and being an accessory after the fact were separated by periods of time in which reflection was possible, the court did not err in failing to stay defendant's sentence on count 7 (being an accessory after the fact) pursuant to section 654. (*People v. Gaio, supra*, 81 Cal.App.4th at p. 935; *People v. Kwok, supra*, 63 Cal.App.4th at p. 1253.)

II

Defendant claims the trial court's decision to impose "the upper term for count 6 violated [her] Sixth Amendment right to a trial by jury because it was based on factual determinations that [the court] itself made by a preponderance of the evidence rather than those that a jury made beyond a reasonable doubt." We disagree.

The United States Supreme Court held in *Cunningham, supra*, 549 U.S. at page ____ [166 L.Ed.2d at p. 873] that under California's determinate sentencing law, the middle term is the statutory maximum which a judge may impose solely based on the facts reflected in the jury verdict or admitted by the defendant. Thus, except for a prior conviction, any fact that increases the penalty for a crime beyond the middle term must be tried to the jury and proved beyond a reasonable doubt. (*Cunningham*, at p. ____ [166 L.Ed.2d at p. 873], overruling *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*) on this point, vacated *sub nom. Black v. California* (2007) 549 U.S. ____ [167 L.Ed.2d 36].)

Applying *Cunningham*, in *People v. Black* (2007) 41 Cal.4th 799, 816 (*Black II*), our Supreme Court recently 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."

As a preliminary matter, we reject the People's assertion that defendant forfeited the issue because she did not raise it in the trial court. Defendant was sentenced on October 5, 2006. Before that, on June 20, 2005, our Supreme Court had decided *Black I*, which held that a defendant does not have a right to have a jury determine aggravating factors used to impose the upper term. (35 Cal.4th at p. 1244.) *Black I* was controlling law at the time of defendant's sentencing. Defendant was not required to make a futile objection. It is pointless to require a defendant to ask a trial court to overrule a decision of the California Supreme Court. (*Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 292, fn. 1.)

Turning to the merits, in deciding to impose the upper term on count 6 (dissuading a witness), the trial court cited the following "[c]ircumstances in aggravation" "as proven by a preponderance of the evidence": "threat of great bodily harm, threatened witnesses who might cooperate with law enforcement, a course of planning and prior planning that indicates criminal

sophistication, and [defendant] was on probation at the time of these offenses."

As noted above, "the right to a jury trial does not apply to the fact of a prior conviction." (*Black II, supra*, 41 Cal.4th at p. 818.) A defendant's probationary status falls within the prior conviction exception. (Cf. *United States v. Corchado* (10th Cir. 2005) 427 F.3d 815, 820; *United States v. Fagans* (2d Cir. 2005) 406 F.3d 138, 141-142.) Indeed, in *Black II*, the court rejected the defendant's contention that "a jury must determine whether [his prior convictions] are numerous or increasingly serious" (41 Cal.4th at p. 819), explaining that such a determination "require[s] consideration of only the number, dates, and offenses of the prior convictions alleged," which "is 'quite different from the resolution of issues submitted to a jury, and is one more typically and appropriately undertaken by a court'" (*id.* at p. 820). A similar undertaking is required to ascertain a defendant's probationary status. Moreover, defendant was not entitled to have her probationary status proved beyond a reasonable doubt. (*Ibid.*, fn. 9.) Accordingly, the trial court's reliance on defendant's probationary status did not run afoul of the Sixth Amendment.

The trial court's reliance on additional factors is of no consequence. A defendant's constitutional right to a jury trial is not violated by the trial court's imposition of the upper term sentence where at least one aggravating factor was established by means that satisfy the requirements of the Sixth

Amendment. (*Black II, supra*, 41 Cal.4th at pp. 815-816.)
Because defendant's probationary status renders her eligible for the upper term, she "was not legally entitled to the middle term, and [her] Sixth Amendment right to [a] jury trial was not violated by imposition of the upper term sentence" on count 6 (dissuading a witness). (*Black II*, at p. 820.)⁴

DISPOSITION

The judgment is affirmed.

BUTZ, J.

We concur:

SIMS, Acting P.J.

HULL, J.

⁴ Because we conclude defendant's probationary status rendered her eligible for the upper term, we need not address her additional contention that the trial court erred in imposing the upper term by relying in part on two facts (other than her probationary status) that are elements of one of the offenses to which she pleaded guilty.