Filed 11/27/07
Opinion following remand by Supreme Court

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GERRY GLENN SCOTT, Defendant and Appellant.	E039093 (Super.Ct.No. FSB047504) OPINION ON REMAND

APPEAL from the Superior Court of San Bernardino County. Kenneth Barr, Judge. Affirmed.

William Flenniken, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorney Generals, Robert R. Anderson and Dane R. Gillette, Chief Assistant Attorneys General, Gary W. Schons, Senior

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part III. B.

Assistant Attorney General, Steve Oetting, Supervising Deputy Attorney General, and David Delgado-Rucci, Deputy Attorney General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury found defendant guilty of violating Penal Code section 285[1] (incest), based on evidence that he had sexual intercourse with his 18-year-old daughter. In a bifurcated trial, the trial court found that defendant had one prior strike conviction, a 1991 robbery conviction. (§§ 667, subds. (b)-(i), 1170.12, subd. (a)-(d).) Defendant was sentenced to six years in prison, consisting of the aggravated term of three years doubled to six years based on the prior strike conviction.[2] Defendant appeals. Relying on *Lawrence v. Texas* (2003) 539 U.S. 558 [123 S.Ct. 2472, 156 L.Ed.2d 508] (*Lawrence*), defendant contends that his section 285 (incest) conviction violates his Fourteenth Amendment due process rights because the statute criminalizes sexual intercourse between consenting adults. For the reasons that follow, we reject this contention and affirm the judgment.

II. STATEMENT OF FACTS

Defendant's daughter, Jane Doe, turned 18 years old in December 2004. Several days later, on December 22, Doe celebrated her birthday at her sister's house. Doe's

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] In addition to incest (§ 285; count 3), defendant was charged with one count of rape (§ 261, subd. (a)(2); count 1) and one count of sexual penetration by a foreign object (§ 289, subd. (a)(1); count 2). A mistrial was declared on the rape and sexual penetration charges after the jury was unable to reach a verdict on these charges. Following a retrial on both charges, a second jury was unable to reach a verdict and the charges were dismissed.

mother, defendant, and other family members attended the birthday party. Doe was raised by another relative and saw defendant only occasionally during her childhood. After the party, between 12:00 and 1:00 a.m., defendant asked Doe to accompany him to his house, a few blocks away. He explained that his girlfriend, Deshawn Smith, with whom he had lived for 15 years, probably would not let him in the house unless Doe was with him. Doe agreed to go with defendant.

At defendant's house, Smith allowed defendant and Doe inside after she saw that Doe was with defendant. Smith smelled alcohol on defendant and on Doe, and saw that defendant had a drink in his hand. Smith was upset with defendant because he had been gone for several hours, he had been in the company of his "ex-girlfriend," Doe's mother, and he had been drinking. Inside the house, defendant made two more drinks. Smith told defendant that he needed to stop drinking because he had to work in the morning.

Smith went to sleep on a couch in the living room, while her and defendant's four-year-old daughter was asleep on another nearby couch. Defendant and Doe went into defendant's bedroom, one of two bedrooms in the house, to get some socks for Doe to wear. Doe was planning to spend the night, so she laid down, fully clothed, on the bed in defendant's bedroom. Defendant turned on a radio in the bedroom.

At some point, defendant got into bed with Doe and put his arm around her waist. Doe was lying on her side, facing away from defendant. Doe tried to move away from defendant, but he kept his arm around her. Next, he unbuckled her pants and put his finger into her vagina. At this point, Doe was quietly crying and "scared" of defendant,

but she did not say anything. Next, defendant pulled her pants down and had intercourse with her for approximately two minutes.

Immediately afterward, Doe got out of bed and tried to leave the house, but she did not have a key to unlock the front security door. She tried to awaken Smith to let her out, but Smith did not wake up. Defendant then came out of the bedroom and unlocked the door for her. As he did so, he told her not to say anything to anyone. Doe walked back to her sister' house. She was crying and visibly upset when she arrived, and her mother asked her what had happened. When she did not answer, her sister called the police.

Doe hesitated to tell her family or the police what had happened at defendant's house, but eventually she told them. She was taken to a hospital, where a sexual assault examination was conducted at approximately 5:30 a.m. The examination revealed the presence of two vaginal injuries—an abrasion and a hemorrhage—and nonmotile or inactive sperm. The findings were consistent with Doe having nonconsensual sexual intercourse only four or five hours earlier, but they were also consistent with her having consensual or nonconsensual sex within the previous several days.

Defendant testified in his defense. He explained that he fell asleep in his bed and, after he woke up sometime later, he thought that Smith was in bed with him. He had intercourse with Doe for less than one minute and stopped immediately when he realized that Doe was not Smith. He did not ejaculate.

III. DISCUSSION

A. *Defendant's Incest Conviction Does Not Violate His Federal Due Process Rights*

Relying on *Lawrence*, *supra*, 539 U.S. 558, defendant contends that section 285 violates his due process rights under the Fourteenth Amendment because it criminalizes incest between consenting adults.[3] We reject this contention.[4]

In *Lawrence*, the high court held that a Texas statute which criminalized sodomy between consenting members of the same sex violated the person's due process rights under the Fourteenth Amendment. (*Lawrence, supra*, 539 U.S. at pp. 564-579.) The court framed the issue as "whether the majority may use the power of the State to enforce [its moral] views on the whole society through operation of the criminal law." (*Id.* at p. 571.) And, in reaching its conclusion, the court noted "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. (*Id.* at p. 572.) The court also noted that, in its

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[3] Penal Code section 285 criminalizes incest, whether consensual or nonconsensual. It provides: "Persons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who intermarry with each other, or who commit fornication or adultery with each other, are punishable by imprisonment in the state prison." Family Code section 2200 declares what marriages are considered incestuous and void. It provides: "Marriages between parents and children, ancestors and descendants of every degree, and between brothers and sisters of the half as well as the whole blood, and between uncles and nieces or aunts and nephews, are incestuous, and void from the beginning, whether the relationship is legitimate or illegitimate."

[4] Before trial, defendant demurred to the section 285 charge on the grounds it was unconstitutional based on *Lawrence*, *supra*, 539 U.S. 558. The demurrer was overruled. Defendant has thus preserved the issue for appeal.

previous decision in *Planned Parenthood v. Casey* (1992) 505 U.S. 833 [112 S.Ct. 2791, 120 L.Ed.2d 674], it "reaffirmed the substantive force of the liberty protected by the Due Process Clause," and "confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, *family relationships,* child rearing and education." (*Lawrence, supra,* at pp. 573-574, italics added.)

Despite the *Lawrence* court's broad pronouncements regarding the liberty interests of persons "in matters pertaining to sex" (*Lawrence, supra,* 539 U.S. at p. 572), *Lawrence* dealt only with sodomy between consenting adults of the same sex. It did not deal with other "matters pertaining to sex," including consensual incest between adult members of the opposite sex who are related by consanguinity.[5] Indeed, the court emphasized the limited nature of its holding by noting that the case before it did not involve, among other things, "persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused." (*Id.* at p. 578.) This aptly describes adult daughters, who are typically in positions of vulnerability vis-à-vis their older, and thus more authoritative fathers, "in matters pertaining to sex."

Moreover, the court in *Lawrence* held that the Texas statute was unconstitutional, not because sodomy between consenting adults is a fundamental right (*Lawrence, supra,*

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[5] We presume for purposes of defendant's argument that the intercourse between himself and Doe was consensual. Consent is not a defense to incest (*People v. Stratton* (1904) 141 Cal. 604, 608-609; § 285), and the jury made no finding that the intercourse between defendant and Doe was not consensual.

539 U.S. at p. 586, dis. opn. of Scalia, J.), but because the statute "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." (*Id.* at p. 578.) *Lawrence* thus "did not announce . . . a fundamental right . . . for adults to engage in all manner of consensual sexual conduct, specifically in this case, incest." (*Muth v. Frank* (7th Cir. 2005) 412 F.3d 808, 817.) And, although there was no rational basis for the Texas statute in *Lawrence*, there is a rational basis for criminalizing incest, specifically between consenting adults of the opposite sex who are related by consanguinity (e.g., fathers and daughters) as the present case involves.

Like other states, California has a legitimate interest in maintaining the integrity of the family unit, in protecting persons who may not be in a position to freely consent to sexual relationships with family members, and in guarding against inbreeding. (*State v. Freeman* (2003) 155 Ohio App.3d 492, 497 [801 N.E.2d 906] [incest laws serve legitimate state interest of protecting integrity of family unit]; *Smith v. State* (Tenn.Crim.App. 1999) 6 S.W.3d 512 [incest is punished, among other reasons, to promote and protect family harmony and to protect children from the abuse of parental authority]; *State v. Kaiser* (1983) 34 Wn.App. 559, 566 [663 P.2d 839] [incest statute prevents mutated births]; *State v. Geddes* (1957) 101 N.H. 164, 165 [136 A.2d 818] [same].) Section 285 serves these purposes.

We note that in *State v. John M.* (2006) 94 Conn. App. 667 [894 A.2d 376], a Connecticut appellate court declared that state's incest statute unconstitutional on equal protection grounds. Here, however, defendant does not challenge Penal Code section 285

on equal protection grounds. Moreover, the incest statute in *John M.* applied to persons related by affinity as well as consanguinity, and to persons of the opposite sex, but not to persons of the same sex. Thus, the *John M.* court found that the statute did not serve the state's *sole* justification for it—the protection against inbreeding—because it clearly applied to persons incapable of inbreeding. (*Id*. at p. 689.) Penal Code section 285 does not suffer this infirmity, because it applies only to persons related by consanguinity and who are of the opposite sex. (Fam Code, § 2200; Pen. Code, § 285) Thus, Penal Code section 285 serves the state's legitimate interest in protecting against inbreeding, as well as its legitimate interests in protecting the integrity of the family unit and protecting persons who may not be in a position to freely consent to sexual relationships.

B. *The Upper Term of Three Years Was Properly Imposed*

In his original opening brief on this appeal, defendant claimed that the trial court violated his Sixth Amendment right to a jury trial in sentencing him to the aggravated term of three years without taking an on-the-record waiver of his right to a jury trial on the factors in aggravation. (*Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]; *Boykin v. Alabama* (1969) 395 U.S. 238 [89 S. Ct. 1709, 23 L.Ed.2d 274]; *In re Tahl* (1969) 1 Cal.3d 122; see also *People v. Gurule* (2002) 28 Cal.4th 557, 633-634.) Because no waiver was taken, he argued that the matter must be remanded for resentencing. Alternatively, he requested that this court reduce his sentence to the middle term of two years.

In the unpublished portion of our March 15, 2007, modified opinion in this case, we remanded the matter for resentencing. We reasoned that, although defendant was eligible for the upper term based on his recidivism, we were not convinced beyond a reasonable doubt that the trial court would have sentenced him to the upper term, because the record did not clearly reflect the amount of weight the trial court placed on each of the factors it found in aggravation.[6] Our March 15 opinion was based on the United States Supreme Court's then-recent decision of *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*).

Following our March 15 opinion, the state Supreme Court granted the People's petition for review. On September 12, the court remanded the matter back to this court with directions to vacate our March 15 opinion and reconsider it in light of the court's decisions in *People v. Black* (2007) 41 Cal.4th 799 (*Black II*) and *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*.) Therafter, defendant and the People each filed supplemental briefs addressing the constitutionality of defendant's upper term sentence in light of *Black II* and *Sandoval*.

In this opinion, we conclude that the trial court's imposition of the upper term sentence of three years did not violate defendant's right to a jury trial because defendant's

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[6] The trial court found several circumstances in aggravation related to the present crime, specifically that the victim Doe was vulnerable; defendant threatened the victim; and defendant took advantage of a position of trust and confidence. (Cal. Rules of Court, rule 4.421(a)(3), (6) & (11).) The court also found several circumstances in aggravation related to defendant, specifically that defendant's prior convictions were numerous and of increasing seriousness; he had served two prior prison terms; and his prior performance on probation and parole were unsatisfactory. (*Id*., rule 4.421(b)(2), (3) & (5).)

recidivism rendered him eligible for the upper term. Specifically, the trial court's findings that defendant had two prison priors and that his prior adult convictions were numerous and of increasing seriousness rendered him eligible for the upper term. For this reason, the imposition of the upper term did not violate defendant's right to a jury trial.

In *Cunningham*, the high court held that the imposition of an upper term sentence under California's determinate sentencing law (DSL), based on a judge's finding by a preponderance of the evidence that circumstances in aggravation outweighed circumstances in mitigation, violates a defendant's Sixth and Fourteenth Amendment right to a jury trial. (*Cunningham, supra,* 127 S.Ct. at p. 871.) The court reasoned that any fact that exposes a defendant to a greater potential sentence than the statutory maximum must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence. (*Id*. at pp. 863-864.) The court also held that the middle term sentence (here, two years), is the maximum sentence a judge may impose under the DSL without the benefit of facts reflected in the jury's verdict—that is, facts found true by a jury beyond a reasonable doubt—or admitted by the defendant. (*Id.* at p. 868.)[7]

[7] In response to *Cunningham*, the California Legislature amended the DSL by urgency legislation effective March 30, 2007. (Stats. 2007, ch. 3, § 2 (Sen. Bill No. 40).) Our references to section 1170 or other provisions of the DSL are to the statutes as they read prior to these amendments.

Following *Cunningham*, the United States Supreme Court remanded *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*) to the California Supreme Court for reconsideration in light of *Cunningham*. Thereafter, the state Supreme Court issued its decisions in *Black II* and *Sandoval*. The court in *Black II* held that, under the DSL, the presence of a single aggravating factor renders the defendant *eligible* for an upper term sentence. (*Black II, supra,* 41 Cal.4th at p. 815, citing *People v. Osband* (1996) 13 Cal.4th 622, 728; see § 1170, subd. (b).) Accordingly, the court held that a trial court's finding of a single circumstance in aggravation that independently satisfies the Sixth Amendment requirements of *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] (*Apprendi*) and its progeny, culminating in *Cunningham*, is sufficient to uphold an aggravated sentence. (*Black II, supra,* at p. 812; *Sandoval, supra,* 41 Cal.4th at pp.838-839.)[8] "[A]ny additional factfinding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." (*Black II, supra,* at p. 812; *Sandoval, supra,* at pp. 838-839.)

The *Black II* court explained: "*Cunningham* requires us to recognize that aggravating circumstances serve two analytically distinct functions in California's current

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[8] An aggravating circumstance is one that "makes the offense . . . 'distinctively worse than the ordinary' [citation]." (*Black II, supra,* 41 Cal.4th at p. 817.) Accordingly, aggravating circumstances include not only those listed in rule 4.421, but also "[a]ny other factors statutorily declared to be circumstances in aggravation" (Cal. Rules of Court, rule 4.421(c)), and any other facts "reasonably related to the decision being made" (Cal. Rules of Court, rule 4.408(a)).

determinate sentencing scheme. One function is to raise the maximum permissible sentence from the middle term to the upper term. The other function is to serve as a consideration in the trial court's exercise of its discretion in selecting the appropriate term from among those authorized for the defendant's offense. Although the DSL does not distinguish between these two functions, in light of *Cunningham* it is now clear that we must view the federal Constitution as treating them differently. Federal constitutional principles provide a criminal defendant the right to a jury trial and require the prosecution to prove its case beyond a reasonable doubt as to factual determinations (other than prior convictions) that serve the first function, but leave the trial court free to make factual determinations that serve the second function. *It follows 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*." (*Black II, supra*, 41 Cal.4th at pp. 815-816, italics added.)

As noted, the trial court found—among other aggravating factors—that defendant's prior convictions as an adult were numerous and of increasing seriousness and that he had served two prior prison terms. (Cal. Rules of Court, rule 4.421(b)(2) & (3).) Either of these findings, standing alone, was sufficient to render defendant eligible for the upper term. (*Black II, supra*, 41 Cal.4th at pp. 818-820.)

As the court in *Black II* explained, the determination that a defendant has suffered prior convictions, and whether those convictions are "'numerous or of increasing

seriousness'" (Cal. Rules of Court, rule 4.421(b)(2)), "require consideration of only the number, dates, and offenses of the prior convictions alleged. The relative seriousness of those alleged convictions may be determined simply by reference to the range of punishment provided by statute for each offense. This type of determination is 'quite different from the resolution of issues submitted to a jury, and is one more typically and appropriately undertaken by a court.'" (*Black II, supra,* 41 Cal.4th at pp. 819-820, citing *People v. McGee* (2006) 38 Cal.4th 682, 706, fn. omitted.)

Similarly, the exception recognized in *Apprendi* for "the fact of a prior conviction" permits a trial court to decide whether a defendant has served a prior prison term. (*Black II, supra,* 41 Cal.4th at p. 819, citing *People v. Thomas* (2001) 91 Cal.App.4th 212, 220-223; see also *People v. Velasquez* (2007) 152 Cal.App.4th 1503, 1515 [trial court's findings that defendant had served a prior prison term and that his prior adult convictions were numerous directly related to defendant's recidivism as that term has been construed by California appellate courts].)

Although the precise scope of the recidivism exception to the *Apprendi* rule has not been comprehensively defined, it clearly encompasses the trial court's findings that defendant's prior convictions as an adult were numerous and of increasing seriousness, and that he had served two prior prison terms.[9] We therefore affirm the imposition of defendant's upper term sentence.

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[9] It is therefore unnecessary for us to determine whether any of the trial court's other findings in aggravation—including its finding that defendant's prior performance on probation or parole was unsatisfactory—were sufficient to render defendant eligible

[footnote continued on next page]

IV. DISPOSITION

The judgment is affirmed.

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/s/ King
J.

We concur:

/s/ McKinster
Acting P.J.

/s/ Gaut
J.

[footnote continued from previous page]
for the upper term. The issue of whether a judge may evaluate a defendant's performance on probation or parole for purposes of imposing the upper term is currently pending before the California Supreme Court in *People v. Towne*, review granted July 14, 2004, S125677.