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CERTIFIED FOR PARTIAL PUBLICATION*

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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**THIRD APPELLATE DISTRICT**

(Sacramento)

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>TASAUNA DANIELLE MURPHY,<br><br>Defendant and Appellant. | C046923<br><br>(Super. Ct. No. 03F10757)<br><br>**OPINION ON REMAND** |

APPEAL from a judgment of the Superior Court of Sacramento County, Tani Cantil-Sakauye, Judge. Affirmed.

Dale Dombkowski, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Robert R. Anderson and Dane R. Gillette, Chief Assistant Attorneys General, Mary Jo Graves and Michael P. Farrell, Assistant Attorneys General, Janis Shank McLean, Carlos A. Martinez and Marcia A. Fay, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts 1, 2, 4 and 5 of the Discussion.

A jury convicted defendant Tasauna Danielle Murphy of single counts of selling cocaine base, possessing cocaine base for sale, and evading a pursuing police officer. (Health & Saf. Code, §§ 11352, subd. (a), 11351.5; Veh. Code, § 2800.2, subd. (a).)

On appeal, defendant contends a prior conviction for possessing cocaine base for sale should have been excluded; her *Marsden* motion was erroneously denied; the possession conviction cannot stand because it was part of the sale; her counsel was ineffective; and her upper term violates *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (*Blakely*) and *Cunningham v. California* (2007) 549 U.S. ___ [166 L.Ed.2d 856] (*Cunningham*). We shall affirm.

In the published portion of the opinion, we conclude that possession of cocaine base for sale is not a necessarily included offense of the crime of selling cocaine base.[1]

## BACKGROUND

On December 10, 2003, Sacramento police officers conducted a narcotic "buy/bust" operation that at one point set its sights on a woman and a man sitting in a car. The woman, who was later

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[1] On February 20, 2007, the United States Supreme Court vacated our decision in this matter and remanded the case to us for further consideration in light of *Cunningham.* Pursuant to this direction, we recalled our remittitur, vacated our December 20, 2005, decision (as modified Jan. 17, 2006), and reinstated the appeal. We requested and received supplemental briefing on the *Cunningham* issue.

identified as defendant, was sitting in the driver's seat; it was her car. The man, later identified as Jimmy Cunningham, got out of the car and asked an undercover officer, who was in another vehicle, what he wanted. The officer indicated "a 20" (meaning $20 of rock cocaine). Cunningham replied that he had to go to the car to get it, and requested $5 for doing so. The officer negotiated this fee down to $2 and gave Cunningham a prerecorded $20 bill.

Cunningham walked to the driver's side of defendant's car, where defendant was sitting. Cunningham reached into the car through the rolled-down window and then walked back to the officer's car, giving the officer a cocaine rock in exchange for the additional two dollars. Cunningham asked the officer if he wanted "10 more." The officer did, and gave Cunningham a prerecorded $10 bill. Cunningham repeated the retrieval process, but, while his arms were in defendant's car, the "buy/bust" arrest team vehicle pulled up and one of the team's officers arrested Cunningham. The buying officer never saw defendant reach for anything or hand anything to Cunningham.

Two other officers of the arrest team (one uniformed, the other plain-clothed) got out of the team vehicle, identified themselves, and ordered defendant to shut off her car engine, which she had just started. Although one of the officers drew his service pistol, defendant drove off with marked police cars in pursuit.

During the chase, defendant ignored stop lights, stop signs, one-way directions, and speed limits. Eventually, an

officer stopped defendant's car and she was arrested after a short foot chase.

A search of defendant's car yielded the prerecorded $10 bill and a second piece of rock cocaine on the front floorboard. An expert explained that, during a drug sale, an intermediary will often act as a go-between for the seller, who is actually holding the dope, and the buyer.

Defendant denied any involvement in or knowledge of the drug transactions; she was merely in the area to get her car fixed and Cunningham coincidentally was helping her to find her mechanic. At one point, Cunningham sat in her car. She drove off because she became frightened of the people around her car.

## DISCUSSION

### 1. *Admission of Prior Conviction*

To prove knowledge and intent regarding the cocaine offenses, the prosecution moved successfully to admit into evidence under Evidence Code section 1101, subdivision (b), that defendant had a prior conviction in 2001 for having possessed cocaine base for sale.

Under Evidence Code section 1101, evidence of a defendant's other crimes is inadmissible to prove the defendant had the disposition to commit the presently charged crime. Under that statute, however, evidence of other crimes is admissible where it tends to show, among other things, particular facts such as guilty knowledge or intent. (Evid. Code, § 1101,

subds. (a), (b).) A trial court must tread carefully in this realm because evidence that a defendant has committed other crimes can be unduly prejudicial. (*People v. Smallwood* (1986) 42 Cal.3d 415, 428.) A court must consider the materiality of the fact to be proven, the probative value of the other-crime evidence to prove that fact, and the existence of any rule or policy requiring exclusion even if the evidence is relevant (most prominently, Evid. Code, § 352 [probative value outweighed by prejudicial effect]). (*People v. Thompson* (1980) 27 Cal.3d 303, 315; *People v. Cole* (2004) 33 Cal.4th 1158, 1194-1195 (*Cole*).)

To prove that defendant had sold cocaine base, the prosecutor had to prove, aside from the sale, that defendant knew of the presence of the cocaine base and knew of its nature as a controlled substance. And to prove that defendant had possessed cocaine base for sale, the prosecutor had to prove, in addition to this knowledge, that defendant possessed the cocaine base with the specific intent to sell it. (*Rideout v. Superior Court* (1967) 67 Cal.2d 471, 474-475 (*Rideout*); *People v. Meza* (1995) 38 Cal.App.4th 1741, 1745-1746; *People v. Daniels* (1991) 52 Cal.3d 815, 857-858 [a defendant's not guilty plea, as here, generally puts the elements of a crime at issue for purposes of deciding the admissibility of evidence under Evid. Code, § 1101].) Here, the trial court admitted the prior conviction into evidence to show this knowledge and intent, and instructed the jury that the conviction could be used only for these purposes and not to show a disposition to commit crime.

We review for abuse of discretion a trial court's ruling admitting other-crime evidence under Evidence Code section 1101. (*Cole, supra,* 33 Cal.4th at p. 1195.) Defendant contends the evidence of her prior conviction should not have been admitted for several reasons.

First, defendant contends the prosecutor failed to show that the prior conviction was substantially similar to the charged offense to be relevant to prove defendant's intent. "To be admissible to show intent, 'the prior conduct and the charged offense need only be sufficiently similar to support the inference that defendant probably harbored the same intent in each instance.'" (*Cole, supra,* 33 Cal.4th at p. 1194.)

Here, the prior conduct at issue was defendant's prior conviction for the same offense as the presently charged offense (possession of cocaine base for sale, Health & Saf. Code, § 11351.5). Therefore, as the People persuasively maintain, the prior conviction "was without question sufficiently similar to support the inference that [defendant] probably harbored the same intent in her current charge for possession for sale, and was not simply the 'victim of circumstances' that she claimed in her defense."

Defendant disputes the People's point. She notes that the prosecutor failed to present any evidence as to *how* the prior conviction had been committed--i.e., whether the prior offense and the charged offense were committed under substantially similar *circumstances*. But here, the *how* is not as critical as

the *what.* And *what* defendant was found to have done in her prior conviction was to have possessed cocaine base with the specific intent to sell it, supporting an inference that she probably harbored the same intent regarding the cocaine base allegedly in her possession here. In other words, the issue of proving intent was proving possession *with an intent to sell*; in this context, *how* the cocaine base had been held or controlled (i.e., possessed) was less relevant than with *what* mindset it had been held or controlled. What was defendant thinking when cocaine base was allegedly in her presence? This supports the trial court's comment that the prosecution needed the prior conviction to prove the required mental state elements of knowledge and intent.

Defendant disputes this comment from the trial court. Defendant argues that "it was necessary to prove intent and knowledge with a prior conviction only because the prosecution had little or no evidence to prove the requisite acts of possessing the [cocaine] rocks or participating in the sale, which necessarily would have proved intent and knowledge and rendered the prior conviction inadmissibly cumulative." In short, defendant contends that letting in her prior conviction was merely letting in disposition evidence through the back door. Defendant is mistaken. Merely proving an act does not prove a mental state. Most criminal offenses, including the ones at issue here, require proof of both an act and a mental state. Here, the prosecutor had to prove the acts of possession and sale, *and* the mental states of knowledge and intent to sell.

The prosecution had sufficient evidence to prove defendant's possession and sale (the two sales transactions with the undercover officer involving defendant and her car; defendant's flight; the incriminating items found in her car). But the prosecution also had to prove the more nebulous mental states of intent and knowledge; especially so, since defendant was working through a sales intermediary.

Second, defendant claims the trial court should have excluded the prior conviction evidence under Evidence Code section 352 (probative value outweighed substantially by prejudicial effect). For the reasons expressed above, the trial court did not abuse its discretion in this regard either. (*Cole, supra,* 33 Cal.4th at p. 1195 [abuse of discretion is the applicable standard of review].) Furthermore, defendant actually had two convictions for possessing cocaine base for sale, one in 1995 and the other in 2001. The trial court agreed with defense counsel and ruled the 1995 conviction inadmissible. The court acknowledged that the admission of two prior identical convictions might cause the jury to believe defendant had a disposition to possess cocaine base with an intent to sell; this could be more prejudicial than probative. Additionally, the trial court properly instructed the jury about the limited use of the prior conviction for purposes of knowledge and intent only.

For all of these same reasons, the trial court's admission of defendant's prior conviction also did not deprive defendant of due process. Defendant argues that, had the trial court

properly ruled the prior conviction inadmissible to prove intent, she could have harmlessly stipulated to the knowledge issue. Two points are worth noting here. One, as we have explained, the trial court properly ruled the prior conviction *admissible*. And two, defendant has misperceived the harmless nature of conceding knowledge. Defendant believes such knowledge encompasses nothing more than knowing that rock cocaine is an illegal narcotic. "Knowledge" in the illegal drug possession realm, however, is knowledge of the presence of the drug and knowledge of its nature as a controlled substance. (*Rideout, supra,* 67 Cal.2d at p. 474.)

Nor, for all these same reasons, did defendant's lawyer render ineffective assistance on the issue of the admission of defendant's prior conviction. Defendant centers this claim on her lawyer's alleged failure to argue that the prior and the charged offenses were committed under different circumstances, and that the prior conviction was more prejudicial than probative.

In the end, the present matter aligns with the following statement from *People v. Pijal* (1973) 33 Cal.App.3d 682, 691: "Since appellant's knowledge of the narcotic contents of the drug and his intent to sell were at issue, evidence of his prior narcotic offenses was clearly admissible to show his guilty knowledge . . . and intent, and the court properly instructed the jury to this limited effect of the evidence[.]"

**2. *Marsden***

Defendant contends the trial court erroneously denied her motion under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) to replace her appointed attorney. We disagree.

We review the denial of a *Marsden* motion under the abuse of discretion standard. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1070.) "'A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations].'" (*People v. Fierro* (1991) 1 Cal.4th 173, 204.)

At the *Marsden* hearing, defendant explained that her attorney had represented her on another matter several years before. In this prior matter, defendant had told the attorney something in confidence that the attorney had repeated to defendant's worrisome mother. The attorney had no recollection of the matter or of defendant.

The trial court inquired further whether defendant was describing a lack of competence or confidence in her attorney regarding the present case. Defendant responded that she felt her attorney was trying to force a seven-year plea deal upon her; and defendant was "not comfortable . . . . If I feel like I disclose something to her in confidence . . . regardless she's my attorney, and she's supposed to be for me . . . . And it's not anything personal, but that's a long time, and I don't feel -- I'm not comfortable." Defendant reiterated that she did not

have any hard feelings against her counsel, but the attorney was not "standing" for her; instead, counsel repeatedly told defendant that she would serve only three and a half years under the plea deal notwithstanding that defendant had told the attorney from the outset she would not accept that.

The trial court questioned defense counsel and examined the counsel's notes regarding what she had done on the case. The court then concluded that defendant's attorney was fighting for defendant and denied the *Marsden* motion (the court had defense counsel provide the notes to defendant as well).

The record does not show that defense counsel was providing inadequate representation, or that counsel and defendant had become embroiled in an irreconcilable conflict. On the issue of adequate representation, the trial court went out of its way to assure adequacy by also examining counsel's notes on the case. On the question of conflict, maintaining confidentiality is undoubtedly a critical factor in the attorney-client relationship. However, several factors mitigated that concern here. The alleged breach of confidence had taken place several years before and concerned defendant's mother, someone whom the attorney could reasonably believe was in defendant's corner (and it was never shown that the mother wasn't in her daughter's corner, only that she was a worrier and now had Alzheimer's). Defendant's focus at the *Marsden* hearing became the length of the sentence under the plea deal rather than the issue of confidentiality. And a seven-year deal (actually serving half that time) did not look bad in light of defendant's prior

convictions and perhaps lead role in the three current offenses. Finally, defendant acknowledged there were no hard feelings between her and counsel.

We conclude the trial court did not abuse its discretion in denying defendant's *Marsden* motion.

**3. *Multiple Convictions***

Defendant contends she was improperly convicted for both selling the cocaine rock in count one and possessing that same rock for sale in count two, a necessarily included offense. We disagree.

Our state high court has long held that multiple convictions may not be based on necessarily included offenses. (*People v. Pearson* (1986) 42 Cal.3d 351, 355.) Here the prosecutor argued, and the trial court in effect instructed, that the offense of possession of cocaine with the intent to sell (count two) could be based not only on the second cocaine rock found in defendant's car after the chase, but also, alternatively, on the first cocaine rock sold to the undercover officer. Defendant contends, correctly, that the record does not show upon which rock the jury founded the count two conviction. If the jury relied upon the first cocaine rock, defendant argues, she was improperly subjected to multiple convictions. This is because she was convicted of *both* selling the first rock in count one and possessing that same rock for sale in count two, a necessarily included offense to count one as shown by the evidence adduced at trial.

"For purposes of the rule proscribing multiple conviction, '"[u]nder California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser."'" (*People v. Sanchez* (2001) 24 Cal.4th 983, 988; *People v. Breverman* (1998) 19 Cal.4th 142, 154, fn. 5; *People v. Thomas* (1991) 231 Cal.App.3d 299, 304-305 (*Thomas*).) As we shall explain, this test of a necessarily included offense--a narrower one than the former test set forth in cases upon which defendant relies--was not met here, and defendant's convictions for selling and possessing for sale are proper. (See e.g., *People v. Francis* (1969) 71 Cal.2d 66, 73 (*Francis*).)

The current test of a necessarily included offense is narrower because it looks *only* to statutory elements or charging allegations. Unlike the former test, the current test of a necessarily included offense does not encompasses an offense in which the *facts* established by the evidence at trial make it impossible to commit one offense without also committing another. (See *Thomas, supra,* 231 Cal.App.3d at pp. 304-306 [discussing the former and current tests of a necessarily included offense and the decisions embodying them, including the former test decision of *Francis, supra,* 71 Cal.2d at p. 73, upon which defendant primarily relies]; see also *People v. Ortega* (1998) 19 Cal.4th 686, 698 ["There are several practical reasons for not considering the evidence adduced at trial in determining

whether one offense is necessarily included within another"--i.e., providing notice to defendant up-front of all possible offenses, promoting consistency in applying the multiple conviction proscription, and easing the burden on trial and appellate courts in applying that proscription].)

The current criteria for a necessarily included offense was not met here because neither the statutory elements test nor the charging allegations test was met.

As for the statutory elements test, a conviction for the greater offense of selling the cocaine (count one) does not require, as one of its statutory elements, the lesser offense of possessing the cocaine for sale (count two); possession is not an essential element of the sale offense. For example, one can broker a sale of a controlled substance that is within the exclusive possession of another. (*People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524; *People v. Rogers* (1971) 5 Cal.3d 129, 134 [in fn. 3, however, *Rogers* applies the former test; see discussion of this at *Thomas, supra,* 231 Cal.App.3d at pp. 304-305]; see also CALJIC No. 12.02 [elements of offense of selling a controlled substance are (i) sale of the substance, and (ii) knowledge of the presence and nature of the substance].)

As for the charging allegations test, the information here simply charged defendant, as relevant, with selling cocaine base (count one) and with possessing cocaine base for sale (count two). Nothing more was alleged.

We conclude defendant was properly convicted of the sale and possession offenses. (In line with Pen. Code, § 654, which prohibits multiple punishment, the trial court properly stayed the sentence for the possession conviction.)

**4. *Ineffective Assistance of Counsel***

Defendant contends her counsel rendered ineffective assistance (1) by failing to object to the trial court's failure to state a reason for imposing a consecutive sentence on the evasion conviction, and (2) by failing to bring to the trial court's attention its discretion in setting the restitution fines.

To show ineffective assistance, defendant must show (1) her counsel performed unreasonably in an objective sense, and (2) there is a reasonable probability the result would have been different absent the deficient performance (i.e., a probability sufficient to undermine confidence in the outcome). (*In re Avena* (1996) 12 Cal.4th 694, 721.)

It is unnecessary to consider the particulars of counsel's performance here. There is not a reasonable probability the result would have been different absent any alleged deficiencies.

As for the consecutive sentence on the evasion count, the probation report properly recommended such a sentence because that count involved independent criminal intent (and, we note, a separate threat of violence (extremely reckless driving during the middle of the day)). (Cal. Rules of Court, rule 4.425, subd. (a)(1), (2).) Furthermore, after imposing sentence, the

trial court allowed defendant personally to state objections to the length of the sentence (12 years 8 months), but the court indicated it was not swayed in any respect.

As for the restitution fines, the court simply followed part of the path suggested by the applicable statute for determining the amount of the fines: $200 times the number of years of imprisonment imposed; here, $2,400. (Pen. Code, § 1202.4, subds. (b)(1), (2), & (d) [restitution fine]; Pen. Code, § 1202.45 [parole revocation restitution fine that tracks the restitution fine].) Although the court stated, "[t]he law requires that the Court impose the $200 restitution fine per year in state prison," this statement does not show the court misunderstood its discretion; the statute allowed the court to do what it did. In fact, the record suggests the court exercised its discretion by not using the additional multiplication factor suggested in the applicable statute, Penal Code section 1202.4, subdivision (b)(2). That section states the court may determine the amount of the restitution fine by multiplying $200 by the number of years of imprisonment *multiplied by the number of felony counts of which the defendant is convicted*; had the court followed this approach, defendant's restitution fine would have been $7,200.

**5. *Blakely and Cunningham--Imposition of Upper Term***

Defendant contends that the trial court's imposition of the five-year upper term on her conviction for selling cocaine base (count one) violated her federal constitutional right to a jury trial. In light of the recent California Supreme Court

decision in *People v. Black* (2007) 41 Cal.4th 799 (*Black II*) that interpreted the relevant decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*), *Blakely, supra,* 542 U.S. 296, and *Cunningham, supra,* 549 U.S. ___, we disagree.

Preliminarily, we reject the People's claim that defendant has forfeited this contention by failing to object. (See *Black II, supra,* 41 Cal.4th at pp. 810-812). There is no forfeiture for failing to raise the jury trial issue regarding an upper-term sentence imposed prior to *Blakely* but after *Apprendi*, because during this interim it was assumed that the *Apprendi* rule mandating jury trial did not apply to this situation; *Blakely* worked a "'sea change'" in the law. (*Id.* at p. 812.)

The trial judge sentenced defendant to the upper term of five years for her conviction for selling cocaine base (count one). The judge found the following aggravating facts: significant prior record of criminal conduct (two prior drug convictions and two prior theft-related convictions); on parole at the time of the current offenses; position of leadership or dominance in the sale; planning; and potentially two sales involved.

As the California Supreme Court ruled in *Black II*, "imposition of the upper term does not infringe upon [a] defendant's constitutional right to jury trial [under *Apprendi-Blakely-Cunningham*] 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 p. 816.) This is because "[u]nder California's determinate sentencing system, the existence of a single aggravating circumstance is legally sufficient to make [a] defendant eligible for the upper term. [Citation.] Therefore, if one aggravating circumstance has been established in accordance with the constitutional requirements set forth in *Blakely*, the defendant is not 'legally entitled' to the middle term sentence, and the upper term sentence is the 'statutory maximum.'" (*Black II, supra,* 41 Cal.4th at p. 813.) And it is only when a sentence goes *beyond* the "statutory maximum" that the *Apprendi-Blakely-Cunningham* rule is triggered, requiring a jury to determine sentencing facts; as *Apprendi* stated, "[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." (*Apprendi, supra,* 530 U.S. at p. 490.)

Here, the record discloses at least one legally sufficient aggravating circumstance that is justified based upon defendant's record of prior convictions. The trial judge found the aggravating circumstance that defendant had a significant prior record of criminal conduct (two prior drug convictions and two prior theft-related convictions). (See *People v. Searle* (1989) 213 Cal.App.3d 1091, 1098 [three prior convictions deemed "'numerous'"]; see also *Black II, supra,* 41 Cal.4th at p. 818, citing approvingly this conclusion in *Searle*]; Cal. Rules of

Court, rule 4.421(b)(2) [defining an aggravating circumstance as including the circumstance of numerous prior convictions].) "The United States Supreme Court consistently has stated that the right to a jury trial does not apply to the fact of a prior conviction." (*Ibid.*) Consequently, under *Black II*, the trial judge's imposition of the upper term on count one did not violate defendant's constitutional right to jury trial under *Apprendi-Blakely-Cunningham*.

**DISPOSITION**

The judgment is affirmed. **(*CERTIFIED FOR PARTIAL PUBLICATION*.)**

DAVIS, J.

We concur:

SIMS, Acting P.J.

BUTZ, J.