

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCUS TERELLE CAESAR et al.,

Defendants and Appellants.

D050387

(Super. Ct. No. RIF119567)

APPEALS from a judgment of the Superior Court of Riverside County, J. Thompson Hanks, Judge. Affirmed in part, and reversed in part and remanded for resentencing.

This matter involves convictions arising out of a confrontation between two groups of men in which guns were fired, killing one man and injuring several others.

The evidence at trial showed that Steven C. Godbolt was one of the shooters. A jury convicted Godbolt of one count of second degree murder (Pen. Code, § 187, subd. (a))¹ and four counts of unpremeditated attempted murder (§§ 664, 187, subd. (a)). The jury also found that Godbolt personally and intentionally discharged a firearm with

respect to each count, proximately causing great bodily injury or death (§§ 12022.53, subd. (d), 1192.7, subd. (c)(8)).

In the same trial, Marcus Terelle Caesar, who did not fire a gun during the confrontation, was tried on the theory that he aided and abetted an assault and battery, and the natural and probable consequences of that assault and battery were the crimes committed by Godbolt. The jury convicted Caesar of one count of second degree murder (§ 187, subd. (a)), one count of premeditated attempted murder (§§ 664, 187, subd. (a)) and three counts of unpremeditated attempted murder (§§ 664, 187, subd. (a)). As to each of the counts, the jury also found that Caesar was a principal in the commission of the crime while another principal was armed with a firearm (§ 12022, subd. (a)(1)). Caesar admitted a prior strike and a prior prison term (§§ 667, subds. (c), (e)(1), 667.5, subd. (b)).

The trial court sentenced Godbolt to 156 years to life in prison and sentenced Caesar to 76 years to life in prison, composed of both determinate and indeterminate terms. As relevant here, the trial court selected count 2 as the principle determinate term for Godbolt and ordered that counts 3, 4 and 5 were to be served consecutive to it, and selected count 3 as the principle determinate term for Caesar and ordered that counts 4 and 5 were to be served consecutive to it.

Both Caesar and Godbolt appeal.

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

First, Caesar argues that his conviction on count 2 for attempted *premeditated* murder should be reduced to attempted *unpremeditated* murder because Godbolt, who was the shooter, was convicted of attempted *unpremeditated* murder.

Second, Godbolt and Caesar both argue that the trial court impermissibly imposed consecutive sentences on the basis that each count involved separate victims.

Third, Godbolt and Caesar both argue that the trial court violated their federal constitutional right to a jury trial by sentencing them to upper terms (count 2 for Godbolt and count 3 for Caesar) based on circumstances in aggravation found by the trial court instead of the jury.

As we will explain, we conclude (1) that Caesar's conviction on count 2 must be reduced to attempted unpremeditated murder; (2) that the trial court did not err in imposing consecutive sentences on Godbolt and Caesar; and (3) that this case must be remanded for resentencing because the trial court imposed an upper term sentence based on facts not found by a jury.

I

FACTUAL AND PROCEDURAL BACKGROUND

On September 14, 2004, Caesar was visiting his girlfriend, who lived with her children, including her teenage son, Andre Clayton. During the visit, a friend of Clayton's accidentally backed into Caesar's vehicle. Caesar was upset by the accident and the reaction of Clayton and his friends. He told Clayton that he would return with some other people and they would teach Clayton a lesson.

Approximately two hours later, while Clayton was at home with several friends, Caesar returned with some other men. Four men, including Caesar, got out of Caesar's vehicle. According to a statement that one of the men in the vehicle gave to police, Caesar had asked the men in his vehicle whether they had guns.

The two groups of men assembled in the middle of the street for a fight. One man who had arrived with Caesar pointed a gun at Clayton. Clayton punched the man and knocked the gun out of his hand. Someone else shot Clayton in the hip. Other shots were fired as Clayton's friends ran away. Caesar did not fire any shots, but two of the men who arrived with him did, including Godbolt. In total, at least 15 bullets were fired from at least two different guns. The men then got back into Caesar's vehicle and drove away.

Four of Clayton's friends were shot or injured as they ran away from the gunfire. Clayton and three other victims — Joe Harris, Dewayne Taylor, and Jesse McDowell — survived their injuries. Yuseff Brown died after being shot in the back.

Godbolt and Caesar were tried together. Godbolt was convicted of one count of second degree murder (§ 187, subd. (a)), and four counts of unpremeditated attempted murder (§§ 664, 187, subd. (a)). Godbolt was also found to have personally and intentionally discharged a firearm with respect to each count, proximately causing great bodily injury or death (§§ 12022.53, subd. (d), 1192.7, subd. (c)(8)).

Caesar, who was not one of the shooters, was prosecuted on the theory that he aided and abetted an assault and battery by instigating the confrontation between the two groups of men, and that he was guilty of murder and attempted murder because those crimes were a natural and probable consequence of the assault and battery. The jury

convicted Caesar of one count of second degree murder (§ 187, subd. (a)), one count of premeditated attempted murder (§§ 664, 187, subd. (a)) and three counts of unpremeditated attempted murder (§§ 664, 187, subd. (a)). As to each of the counts, the jury also found that Caesar was a principal in the commission of the crime while another principal was armed with a firearm (§ 12022, subd. (a)(1)).

The trial court sentenced Godbolt to 156 years to life in prison, consisting of (i) an indeterminate term of 140 years to life, composed of a term of 15 years to life for the murder conviction (count 1), plus 25-year terms for each of the five firearm enhancements, to be served consecutive to (ii) a determinate term of 16 years, based on an upper term of nine years for count 2, plus three consecutive terms of 2 years 4 months (one-third the midterm) for each of counts 3, 4 and 5.

The trial court sentenced Caesar to 76 years to life in prison, consisting of (i) an indeterminate term of 44 years to life, based on a term of 30 years to life for the murder conviction (count 1) plus 14 years to life for the conviction for attempted premeditated murder (count 2), to be served consecutive to (ii) a 32-year determinate term, based on an upper term of 18 years for count 3, plus consecutive terms of 4 years 8 months (one-third the midterm) for each of counts 4 and 5, and additional time for the firearm enhancements and the prior prison term.

Godbolt and Caesar both appeal.

II

DISCUSSION

A. *Caesar's Conviction on Count 2 Under the Natural and Probable Consequences Doctrine*

We first address Caesar's contention that his conviction on count 2 for attempted *premeditated* murder should be reduced to attempted *unpremeditated* murder.

Both Godbolt and Caesar were convicted of the attempted murder of Clayton (count 2 as to both defendants). As to Godbolt, the jury found that "the attempted murder was *not* willful, deliberate and premeditated." (Italics added.) However, as to Caesar, the jury found that "the attempted murder *was* willful, deliberate and premeditated." (Italics added.)

As we have explained, the prosecution's theory against Caesar as to count 2 was that Caesar aided and abetted an assault and battery, and that *the natural and probable consequence* of the assault and battery was the attempted murder of Clayton. Caesar argues that he should not have been convicted of the *premeditated* attempted murder of Clayton in count 2 under the natural and probable consequences doctrine because Godbolt, who was convicted as the shooter, was found to have acted *without* premeditation. Put another way, Caesar argues that a defendant may not be convicted under the natural and probable consequences doctrine for a crime that the jury finds is not proven as to his codefendant who was alleged to have actually performed the crime.

To evaluate this argument, we first provide an overview of the natural and probable consequences doctrine. The natural and probable consequences doctrine is one

theory under which an aider and abettor may be convicted. "[A]n aider and abettor's liability for criminal conduct is of two kinds. First, an aider and abettor with the necessary mental state is guilty of the intended crime." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117 (*McCoy*)). Here, the intended crime was an assault and battery. "Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also 'for any other offense that was a "natural and probable consequence" of the crime aided and abetted.'" (*Ibid.*) When the natural and probable consequences doctrine applies, an aider and abettor "is guilty not only of the offense he intended to facilitate or encourage, but also of any *reasonably foreseeable offense* committed by the person he aids and abets." (*People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5 (*Croy*), italics added.) Thus, as relevant here, "if a person aids and abets only an intended *assault*, but a *murder* results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault." (*McCoy*, at p. 1117, citing *People v. Prettyman* (1996) 14 Cal.4th 248, 260, 267 (*Prettyman*), italics added.)

For a defendant to be convicted under the natural and probable consequences doctrine, "the trier of fact must find that the defendant, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of a predicate or target offense; (3) by act or advice aided, promoted, encouraged or instigated the commission of the target crime.[2]

² The target crime here is the assault and battery.

But the trier of fact must also find that (4) the defendant's confederate committed an offense *other than* the target crime; and (5) the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted." (*Prettyman, supra*, 14 Cal.4th at p. 262, fn. omitted.)³ Thus, it is clear that in applying the natural and probable consequences doctrine, the jury must make a finding as to the crime committed by the defendant's confederate.⁴

In determining whether the crime committed by a confederate was the natural and probable consequence of a crime aided and abetted by the defendant, the inquiry is strictly objective, and does not depend on the defendant's state of mind as to the confederate's crime. "The determination whether a particular criminal act was a natural

³ As explained more fully by another court, "[a]lthough the perpetrator and the aider and abettor need not be tried jointly, the jury first must determine the crimes and degrees of crimes originally contemplated and committed, if any, by the perpetrator. Next, the jury must decide whether the aider and abettor knew of the perpetrator's intent to commit the originally contemplated criminal acts and whether the aider and abettor intended to encourage or facilitate the commission of those acts. In other words, the jury must determine if the aider and abettor is liable vicariously for, i.e., guilty of, the crime or crimes originally contemplated. *Then the jury must determine whether other crimes and degrees of crimes charged against the aider and abettor were committed by the perpetrator.* If so, the jury must determine whether those crimes, although not necessarily contemplated at the outset, were reasonably foreseeable consequences of the original criminal acts encouraged or facilitated by the aider and abettor." (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1586, italics added.)

⁴ As our Supreme Court has stated, "at trial each juror must be convinced, beyond a reasonable doubt, that the defendant aided and abetted the commission of a *criminal act*, and that the offense *actually committed* was a natural and probable consequence of that act." (*Prettyman, supra*, 14 Cal.4th at p. 268, second italics added.) This is because under the natural and probable consequences doctrine, an aider and abettor is "guilty . . . of any reasonably foreseeable offense *committed by* the person he aids and abets." (*Croy, supra*, 41 Cal.3d at p. 12, fn. 5, italics added.)

and probable consequence of another criminal act aided and abetted by a defendant requires application of an *objective* rather than *subjective* test." (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531, italics added.) "[T]he issue does not turn on the defendant's subjective state of mind, but depends upon whether, under all of the circumstances presented, a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant." (*Ibid.*)

Applying the natural and probable consequences doctrine here, in order to find Caesar guilty of attempted premeditated murder as to Clayton, the jury had to find the following: (1) that Caesar aided and abetted an intended assault and battery; (2) that Godbolt, as the shooter, committed attempted premeditated murder as to Clayton; and (3) that a reasonable person in Caesar's position would have or should have known that the attempted premeditated murder of Clayton was a reasonably foreseeable consequence of the assault and battery.

Here, the second element was missing because the jury made an explicit finding that Godbolt did *not* act with premeditation in attempting to murder Clayton. Accordingly, the jury did not make the necessary finding to convict Caesar of attempted *premeditated* murder under the natural and probable consequences doctrine. At most, according to the jury's finding regarding the crime committed by Caesar's confederate

(i.e., Godbolt), the jury could have convicted Caesar of attempted *unpremeditated* murder.⁵

Accordingly, we agree with Caesar that his conviction on count 2 must be reduced to a conviction for attempted unpremeditated murder.

B. *Consecutive Sentences*

We next consider the challenge brought by both Godbolt and Caesar to the trial court's decision to impose consecutive sentences for their convictions for attempted unpremeditated murder, i.e., counts 3, 4 and 5 for Godbolt and counts 4 and 5 for Caesar.

In sentencing Godbolt, the trial court stated that it would sentence consecutively for counts 3, 4 and 5 because each count involved "a separate victim." As to Caesar, the trial court stated that it would sentence consecutively for counts 4 and 5 because each count involved "a separate victim and separate conduct."

"[A] trial court has discretion to determine whether several sentences are to run concurrently or consecutively. [Citations.] In the absence of a clear showing of abuse, the trial court's discretion in this respect is not to be disturbed on appeal. [Citations.]

⁵ In opposing Caesar's argument, the Attorney General relies on *McCoy, supra*, 25 Cal.4th 1111, 1117, in which our Supreme Court held that an aider and abettor could properly be convicted of a greater degree of a murder than his confederate who was the shooter. *McCoy* does not apply here because, as the Supreme Court made clear, its holding did not apply to a conviction obtained under the natural and probable consequences doctrine. The court emphasized, "[O]nly an aider and abettor's guilt of *the intended crime* is relevant here. Nothing we say in this opinion necessarily applies to an aider and abettor's guilt of an unintended crime under the *natural and probable consequences doctrine*." (*Ibid.*, italics added.)

Discretion is abused when the court exceeds the bounds of reason, all of the circumstances being considered." (*People v. Bradford* (1976) 17 Cal.3d 8, 20.)

The criteria applicable to the trial court's discretion are set forth in California Rules of Court, rule 4.425,⁶ which states that in imposing consecutive sentences a trial court may consider: (1) whether the "crimes and their objectives were predominantly independent of each other"; (2) whether the "crimes involved separate acts of violence or threats of violence"; and (3) whether the "crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior." (Rule 4.425(a)(1)-(3).) However, these criteria are not exclusive. Rule 4.408(a) states: "[T]he enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. Any such additional criteria must be stated on the record by the sentencing judge."

In *People v. Calhoun* (2007) 40 Cal.4th 398 (*Calhoun*), our Supreme Court recently addressed an issue relevant to our analysis here, concluding that the presence of separate victims named in separate counts will justify an upper term sentence, and also stating in the course of its analysis that the same facts would, in the alternative, be sufficient to justify a consecutive sentence.

In *Calhoun*, the defendant had been convicted of two counts of vehicular manslaughter and two counts of reckless driving after killing two people and severely

⁶ All further rule references are to the California Rules of Court.

injuring two others. (*Calhoun, supra*, 40 Cal.4th at p. 401.) The trial court imposed the upper term sentence. As an aggravating factor, the trial court relied on the fact that consecutive sentences could have been imposed but were not. (*Id.* at p. 405.) In the same discussion, the trial court also noted that there were "'separate victims of the crime.'" (*Ibid.*) As *Calhoun* pointed out, the trial court was not clear as to (1) whether it was identifying the presence of separate victims as the fact that would have justified consecutive sentences or (2) whether it was identifying the presence of separate victims as a *separate* aggravating factor. (*Ibid.*)

Assuming for the sake of its discussion that the trial court had intended the presence of separate victims as a *separate* aggravating factor, *Calhoun* discussed whether a trial court may use "the fact of multiple victims" as a fact in aggravation "when each count of which the defendant was convicted names only one victim." (*Calhoun, supra*, 40 Cal.4th at p. 406.) Our Supreme Court explained that the "[defendant's] single act of violence caused either the death or serious injury of four people. The gravity of and his culpability for this offense is increased by the number of those he harmed. "'A defendant who commits an act of violence . . . by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person.'" [Citation.] [Defendant] is therefore properly subject to increased punishment for each . . . count." (*Id.* at p. 408.)

In addition, presumably because it was unclear whether the trial court had intended to impose an upper term based solely on the fact that consecutive sentences could have been imposed but were not, *Calhoun* also surveyed the case law on the issue

of whether consecutive sentences could be properly imposed based on the presence of separate victims in separate counts. (*Calhoun, supra*, 40 Cal.4th at p. 407, fn. 6.)⁷

Concluding its analysis, *Calhoun* stated that "there is no persuasive reason why the trial court should not be allowed to consider the fact of multiple victims as a basis for imposing *either* the upper term *or* a consecutive sentence." (*Calhoun, supra*, 40 Cal.4th at p. 408, italics added.)

Based on our Supreme Court's analysis in *Calhoun*, we conclude that the naming of separate victims in separate counts is a circumstance on which a trial court may properly rely to impose consecutive sentences. Accordingly, we reject Godbolt and Caesar's argument that the trial court erred in imposing consecutive sentences based on that factor.

Caesar raises a related issue arising from the fact that he was convicted based on the natural and probable consequences doctrine. He argues that unlike Godbolt, who shot at several different victims, he engaged in only a *single* wrongful act: aiding and abetting an assault and battery, and thus he should not have received consecutive sentences. We reject this argument. As our Supreme Court made clear in *Calhoun*, the relevant culpable factor is not that a defendant engaged in multiple criminal *acts*; instead, the "gravity of and his culpability for [the] offense is increased *by the number of those he harmed*." (*Calhoun, supra*, 40 Cal.4th at p. 408, italics added.) This reasoning applies equally to

⁷ We note that the parties' briefing here extensively discusses one of those opinions: *People v. Valenzuela* (1995) 40 Cal.App.4th 358.

Caesar, who aided and abetted an assault and battery, and Godbolt, who was the shooter.

Both men engaged in wrongful conduct that resulted in harm *to multiple victims*.⁸

Accordingly, the trial court properly imposed consecutive sentences for both Godbolt and Caesar.

C. *Imposition of Upper Term Sentences Based on Facts Not Found by the Jury Violated Caesar's and Godbolt's Sixth Amendment Rights*

The trial court sentenced Godbolt to the upper term for count 2 and sentenced Caesar to the upper term for count 3. Godbolt and Caesar contend that by imposing an upper term sentence in accordance with California's determinate sentencing law (DSL), the trial court violated their constitutional right to a jury trial.

In *Cunningham v. California* (2007) 549 U.S. ____ [127 S.Ct. 856] (*Cunningham*), the United States Supreme Court held that the DSL violates a criminal defendant's right to a jury trial safeguarded by the Sixth and Fourteenth Amendments to the federal Constitution because it allows the trial judge to find facts that will elevate a sentence. (*Cunningham*, at p. 860.) *Cunningham* explained that because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence rather than by proof beyond a reasonable doubt, the DSL violates the rule in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 that any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the

⁸ Caesar cites case law that applies section 654 to situations in which the defendant was convicted under the natural and probable consequences doctrine. (*People v. Bradley* (2003) 111 Cal.App.4th 765; *People v. Nguyen* (1988) 204 Cal.App.3d 181.) These cases are inapposite because they do not deal with the situation of multiple victims.

prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. (*Cunningham*, at p. 868.) Stating that "[t]he '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*[,] "*Cunningham* concluded that "the middle term prescribed in California statutes, not the upper term, is the relevant statutory maximum." (*Cunningham*, at p. 868.)

In sentencing Caesar, the trial court identified four circumstances in aggravation: (1) "the manner in which the crime was carried out indicated planning"; (2) "defendant has engaged in violent conduct [that] indicates a serious danger to society"; (3) "his prior convictions as an adult are numerous and of increasing seriousness"; and (4) "his prior performance on probation and parole is unsatisfactory." The trial court found no circumstances in mitigation and thus determined that "the aggravating outweighs the mitigating." Selecting count 3 as the principle count, the trial court imposed the upper term for that count.

In sentencing Godbolt, the trial court identified three circumstances in aggravation: (1) "there was planning involved"; (2) Godbolt's conduct "indicates a serious danger to society"; and (3) Godbolt's prior performance on probation was unsatisfactory. The trial court found no circumstances in mitigation and thus determined that the aggravating factors outweighed the mitigating factors. Selecting count 2 as the principle count, the trial court imposed the upper term for that count.

Thus, with respect to both Godbolt and Caesar the trial court relied on several aggravating factors premised on facts not found by a jury beyond a reasonable doubt to

impose sentences beyond the prescribed statutory maximum middle term. In doing so, the trial court imposed a sentence in violation of their right to a jury trial safeguarded by the Sixth and Fourteenth Amendments to the federal Constitution. (*Cunningham, supra*, 549 U.S. ____ [127 S.Ct. at p. 860].)⁹

We reject the Attorney General's contention that the error was harmless beyond a reasonable doubt. (See *Washington v. Recuenco* (2006) 548 U.S. ____ [126 S.Ct. 2546, 2550-2553] [harmless error analysis applies to a failure to submit sentencing factors to a jury].) We are not able, under the circumstances, to determine what sentence would have been imposed had the relevant facts been presented to and found by the jury.

We thus vacate the sentences of both Godbolt and Caesar and remand for further proceedings not inconsistent with this opinion and *Cunningham*.

⁹ The Attorney General argues that the trial court properly relied on several recidivist-related facts concerning Caesar and Godbolt that justified the imposition of upper term sentences. Specifically, the Attorney General argues that the trial court properly considered that Caesar's prior convictions as an adult were numerous and of increasing seriousness, and that Caesar's and Godbolt's prior performance on probation and/or parole was unsatisfactory. The Attorney General advocates that these facts may be treated like the fact of a prior conviction and justify an upper term sentence without a jury finding as to those facts. (See *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 246 [no requirement for a jury finding on the fact of a prior conviction].) We find it unnecessary to reach that issue to resolve this appeal. It is clear under the facts of this case that we must remand for resentencing. Even if the recidivist-related facts were to be treated identically to the fact of a prior conviction, the trial court also relied on other aggravating factors not found by a jury. The trial court's process of arriving at the upper term sentences was thus unquestionably flawed under the holding of *Cunningham* because the trial court engaged in a sentencing procedure that relied on aggravating factors that were not found by the jury beyond a reasonable doubt.

DISPOSITION

Caesar's conviction on count 2 shall be reduced to a conviction for attempted unpremeditated murder, and the trial court shall resentence Caesar accordingly. Further, this matter is remanded for the trial court to conduct a new sentencing hearing for both Caesar and Godbolt consistent with the views expressed in *Cunningham, supra*, 549 U.S. ___ [127 S.Ct. 856, 860]. In all other respects, the judgment is affirmed.

IRION, J.

WE CONCUR:

HALLER, Acting P. J.

McDONALD, J.

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D050387

(Super. Ct. No. RIF119567)

ORDER CERTIFYING OPINION
FOR PARTIAL PUBLICATION

THE COURT:

The opinion filed June 19, 2007, is ordered certified for partial publication.

Doris M. Frizzell, under appointment by the Court of Appeal, for Defendant and Appellant Marcus Terelle Caesar.

John L. Dodd & Associates and John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant Steven C. Godbolt.

* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of part II.C.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette and Gary W. Schons,
Assistant Attorneys General, Gil Gonzalez and Randall D. Einhorn, Deputy Attorneys
General, for Plaintiff and Respondent.

HALLER, Acting P. J.

Copies to: All parties