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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JORGE AJTZALAM, Defendant and Appellant.	H051926 (Santa Clara County Super. Ct. No. C2204948)

A jury convicted Jorge Ajtzalam of two counts of robbery and found true one circumstance in aggravation. The trial court, finding two other aggravating circumstances, sentenced Ajtzalam to an upper term of five years in prison. On appeal, Ajtzalam contends that the court in relying on its own factfinding to impose an upper term sentence violated Penal Code section 1170, subdivision (b)(2) (section 1170(b)(2)). We will reverse the judgment and remand for resentencing.[1]

I. BACKGROUND

The Santa Clara County District Attorney charged Ajtzalam with two counts of second degree robbery for separate incidents at two hardware stores, specifically Home Depot (count 1) and Lowe's (count 2). (§§ 211, 212.5, subd. (b)). The district attorney also alleged that the commission of count 1 was aggravated in that Ajtzalam was armed

[1] Undesignated statutory references are to the Penal Code.

with or used a firearm. (Cal. Rules of Court, rule 4.421(a)(2).)[2] The jury found Ajtzalam guilty of both counts and found true that Ajtzalam was armed with or used a firearm during the commission of the offense.

A. *Trial Evidence*

An employee working at the Home Depot store in Morgan Hill saw Ajtzalam and two other men make their way toward the store's electrical wire aisle. Although the electrical wire inventory had recently been secured, the employee asked his supervisor to keep an eye on the men. A few minutes later, the same employee noticed the men pushing a shopping cart filled with tools toward an exit. He contacted the men and began pulling the shopping cart toward a checkout register, but one of the men "jerked it back." Ajtzalam then told the employee, " '[W]e have a receipt.' " When the employee asked to see it, Ajtzalam lifted his shirt to expose what looked like the handle of a gun, saying, " '[H]ere's my receipt.' " The employee backed off, allowing the men to leave with the tools.

Two days prior, a similar robbery occurred at Lowe's in Sunnyvale. A Lowe's customer service associate saw Ajtzalam and two others pushing two shopping carts bearing electrical wires. The employee noted that the group seemed "pretty organized" and led by Ajtzalam. The employee attempted to engage the men in conversation, but they ignored him and continued pushing the carts toward the exit. Another Lowe's employee approached the first shopping cart before it reached the exit. A physical struggle between him and the three men ensued, culminating in Ajtzalam wresting the

[2] The district attorney also alleged as a second circumstance in aggravation that Ajtzalam "threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process." (Cal. Rules of Court, rule 4.421(a)(6).) But at the preliminary examination, the prosecutor sought no holding order on this circumstance, saying it had been alleged in error.

cart away and, along with his two companions, "manhandl[ing]" one cart out of the store, leaving the second cart behind.

Identity being disputed, the prosecution was permitted to introduce evidence of two prior uncharged thefts. (See Evid. Code, § 1101, subd. (b).) The first involved Ajtzalam, along with three other men, stealing electrical wires from a Home Depot in Fresno about one month before the charged robberies. The second uncharged act involved a similar theft of electrical wires from a Home Depot in San Leandro, about two months before the charged robberies. As to the San Leandro incident, the loss prevention officer identified Ajtzalam's group as a "crew that continuously hit Home Depot" and added that Ajtzalam, before driving off with the stolen merchandise, had lifted his shirt to show the loss prevention officer the butt of his gun. A retail theft investigator employed by Home Depot testified that Ajtzalam was part of a larger group responsible for 116 incidents of stealing electrical wire from Home Depot stores across Northern California.

Ajtzalam testified in his own defense and denied involvement in both charged incidents. He insisted that the individual in the video surveillance footage was not him, but he acknowledged wearing a similar jacket and having similar distinctive tattoos as the recorded perpetrator.

B. *Sentencing*

At sentencing, the trial court stated it had reviewed the probation report and the district attorney's sentencing memorandum. Counsel for Ajtzalam filed no sentencing memorandum but urged the court to grant probation on grounds that Ajtzalam had already been convicted of two strike offenses, had a limited criminal history before this case, and "wishe[d] to put this behind him." In his statement to the probation officer, Ajtzalam maintained his innocence and insisted that he had been wrongfully convicted of the charged robberies, as well as a prior theft incident.

The court denied probation, and following the prosecution's recommendation, sentenced Ajtzalam to five years calculated as follows: the upper term of five years for

count 1 and a concurrent middle term of three years for count 2. The court expressly based its selection of the upper term for count 1 on (1) "the defendant's use of a firearm in the commission of a crime"; (2) "the manner in which the crime was committed indicates planning, sophistication, and professionalism"; and (3) "[t]he defendant has refused to accept responsibility for his actions."

Ajtzalam timely appealed.

II. DISCUSSION

A. *Reliance on Unproven Aggravating Circumstances*

Effective January 1, 2022, a sentencing court may not impose a determinate upper term sentence unless (1) "there are circumstances in aggravation of the crime that justify [its] imposition," and (2) the aggravating circumstances "have been stipulated to by the defendant or . . . found true beyond a reasonable doubt at trial." (§ 1170, subd. (b)(1), (2).) Other than stipulated facts or the fact of a prior conviction, "aggravating facts relied upon to justify an upper term must be resolved by the jury beyond a reasonable doubt." (*People v. Lynch* (2024) 16 Cal.5th 730, 755 (*Lynch*).) This jury trial right is not merely a "state law entitlement," but "is constitutionally required for all aggravating facts, other than a prior conviction." (*People v. Wiley* (2025) 17 Cal.5th 1069, 1078 (*Wiley*).) "A Sixth Amendment violation occurs when the trial court relies on unproven aggravating facts to impose an upper term sentence, *even if some other aggravating facts relied on have been properly established.*" (*Lynch,* at p. 768, italics added.)

In imposing the upper term, the trial court here relied on three circumstances in aggravation, only one of which the district attorney pleaded in the information and the jury found true at trial. This was error—one invited by the prosecutor's sentencing memorandum—the only sentencing memorandum before the court—and overlooked by

Ajtzalam's trial counsel, who failed to object that Ajtzalam had neither waived his jury trial right on the two new factors nor stipulated they were true.[3]

The Attorney General does not appear to dispute that this was error. But based on counsel's failure to object to the trial court's reliance on the unproven, unstipulated aggravating circumstances, the Attorney General urges us to deem Ajtzalam's sentencing claim to be forfeited. We have no doubt that a timely objection would have alerted the sentencing court to the constraints imposed by section 1170(b)(2). Even so, we decline to apply forfeiture: It being evident that the trial court imposed an upper term sentence on the basis of its own posttrial factfinding, Ajtzalam's claim that this violated section 1170(b)(2) presents a pure issue of law that "implicates [the] constitutional right" to a jury trial. (*People v. Gonzalez* (2024) 107 Cal.App.5th 312, 327 (*Gonzalez*) [relieving defendant of counsel's failure to raise § 1170(b)(2) in resentencing under § 1172.75]; *Lynch*, *supra*, 16 Cal.5th at p. 768 [holding that § 1170, subd. (b)'s jury right on aggravating factors supporting upper term sentence derives from U.S. Const., 6th Amend.]; cf. *In re Sheena K.* (2007) 40 Cal.4th 875, 879 [construing defendant's constitutional challenge to her probation condition as presenting a pure question of law reviewable on appeal despite her failure to object at sentencing].)

Moreover, Ajtzalam argues in the alternative that his counsel was constitutionally ineffective for failing to object to the court's choosing the upper term in reliance on unpleaded and unproven aggravating circumstances. There can be no tactical justification for failing to object to the imposition of the upper term based on plainly

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[3] The prosecution argued four circumstances in aggravation in the sentencing memorandum: (1) that Ajtzalam was armed with or used a weapon, (2) that he committed the offense in a manner that indicated planning, sophistication, and professionalism, (3) the crime involved the taking of great monetary value, and (4) Ajtzalam lied during his testimony and continues to refuse to accept responsibility. In sentencing Ajtzalam, the trial court relied on the first, second, and fourth proposed circumstances, rejecting the third for insufficiency of the evidence.

unproven aggravating factors that Ajtzalam had no notice of in the operative information. Accordingly, even assuming the issue has been forfeited, we would exercise our discretion to reach the merits to "forestall defendant's claim of ineffective assistance of counsel." (*People v. Torres* (2025) 113 Cal.App.5th 88, 92 [reaching defendant's sentencing claim notwithstanding forfeiture]; see also *People v. Crittenden* (1994) 9 Cal.4th 83, 146 [reviewing court may exercise discretion to consider forfeited claims to forestall ineffective assistance of counsel arguments].)

B. *Prejudice*

Sentencing errors under section 1170(b)(2) are subject to harmless error review under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). (*Wiley, supra*, 17 Cal.5th at p. 1087 ["When a defendant is deprived of a jury trial on aggravating facts used to justify imposition of an upper term sentence, the reviewing court must apply [*Chapman*]"].) Such errors are "prejudicial unless an appellate court can conclude beyond a reasonable doubt that a jury would have found true all of the aggravating facts relied upon by the trial court to justify an upper term sentence, or that those facts were otherwise proved true in compliance with the current statutory requirements." (*Lynch, supra*, 16 Cal.5th at p. 768; *Gonzalez, supra*, 107 Cal.App.5th at p. 332 [accord].) "If the reviewing court cannot so determine, applying the *Chapman* standard of review, the defendant is entitled to a remand for resentencing." (*Lynch*, at p. 768.)[4] Given this exacting standard, we cannot say that the sentencing error here was harmless.

[4] *Lynch* held that the *Chapman* standard of harmless error review applies to sentences imposed before the effective date of amended section 1170(b)(2). (*Lynch*, *supra*, 16 Cal.5th at pp. 742–743.) In *Wiley*, the Supreme Court extended that same standard to sentences imposed after section 1170(b)(2)'s effective date. (See *Wiley*, *supra*, 17 Cal.5th at p. 1077 [July 2022 sentencing date]; *id*. at pp. 1087–1091 [applying *Chapman* in finding prejudicial deprivation of jury trial right on two aggravating factors].)

One of the aggravating factors the trial court relied on in imposing the upper term sentence was Ajtzalam's refusal to accept responsibility—his lack of remorse. Preliminarily, Ajtzalam suggests that because lack of remorse is not an aggravating factor enumerated in the California Rules of Court, rule 4.421, the prosecution could not have pled and proved this factor. Rule 4.421 by its terms sets forth a nonexhaustive list of aggravating factors, permitting a court to consider "[a]ny other factors . . . that reasonably relate to the defendant or the circumstances under which the crime was committed." (Cal. Rules of Court, rule 4.421(c).) In *Lovelace v. Superior Court* (2025) 108 Cal.App.5th 1081, however, the First District held that permitting imposition of an upper term sentence based on this "residual clause" of the rule of court, violated the state constitutional principle of separation of powers. (*Lovelace*, at pp. 1099, 1105.) *Lovelace* aside, we note that section 1170(b)(2) codifies the *twin* constitutional requirements of both pleading the maximum-enhancing fact in the charging document and proving it to a jury beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 476 [holding that due process and the " '[Sixth Amendment's] notice and jury trial guarantees' " require that " 'any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt' "]; *Jones v. United States* (1999) 526 U.S. 227, 243, fn. 6 [same].) Because the prosecution here did not plead lack of remorse as an aggravating factor, the factor could not have been submitted to the jury and found true.

Independent of the customary pleading-then-proof order of operations, we conclude that the sentencing court's reliance on this factor is not harmless under *Chapman*.[5] In the death penalty context, the Supreme Court has clarified that prosecutors

[5] Even under *Strickland v. Washington* (1984) 466 U.S. 668's less stringent prejudice standard of a reasonable probability of a more favorable result absent counsel's error, we have every reason to assume that the sentencing court—had counsel alerted it to the procedural irregularity that the prosecution's sentencing position obscured—would have faithfully observed the strictures of section 1170(b)(2). The trial court was free to

are permitted to focus on a defendant's lack of remorse in two ways: "First, '[c]onduct or statements at the scene of the crime demonstrating lack of remorse may be consider[ed] in aggravation,' " and second, " '[a] prosecutor may properly comment on a defendant's lack of remorse, as relevant to the question of whether remorse is present as a mitigating circumstance, so long as the prosecutor does not suggest that lack of remorse is an aggravating factor.' " (*People v. Bonilla* (2007) 41 Cal.4th 313, 356 (*Bonilla)*.) Though a prosecutor in a death penalty case arguing to the jury that a defendant lacked remorse is distinguishable from a trial court considering evidence of lack of remorse in imposing an upper term sentence, we find the Supreme Court's guidance on the appropriate use of this factor helpful to our harmless error analysis.

Here, nothing in the record suggests that Ajtzalam engaged in conduct or made statements " 'at the scene of the crime[s] demonstrating lack of remorse.' " (*Bonilla, supra,* 41 Cal.4th at p. 356) True, he displayed a firearm in one instance and wrestled control of a shopping cart from an employee in another. But those acts comprised an essential element of the robberies, and there was no additional evidence that either he or his coparticipants went above and beyond the basic elements of the crimes, rejoiced in their acts, or displayed insensitivity to the fear or potential harm suffered by the victims. And though Ajtzalam took the stand in his own defense and denied involvement in the charged offenses, he was within his right to do so and maintaining his innocence to the jury should not result in a previously undisclosed aggravating circumstance—and an enhanced sentence—being imposed against him. (See *People v. Coleman* (1969) 71 Cal.2d 1159, 1169 [holding in death penalty context that "any argument that failure to confess should be deemed evidence of lack of remorse is not permissible"].)

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impose a *middle* term sentence based on judicial factfinding, even as to unpleaded aggravating circumstances not admitted by Ajtzalam or found true by the jury; it lacked authority, however, to impose an upper term sentence based on those judicially found facts.

As to the trial court's finding of lack of remorse based on Ajtzalam's statement *after* trial on both guilt and aggravating factors, we do not believe the prosecution would have been able to prove lack of remorse to the jury at trial, other than by burdening Ajtzalam's exercise of his constitutional rights to trial and to testify at trial. And given his right against self-incrimination, Ajtzalam might well have declined to speak to the probation officer altogether, had he understood that his statement might be used to further aggravate his sentence.[6]

Because we "cannot find the omission of a jury trial harmless beyond a reasonable doubt as to *every* aggravating fact relied upon by the trial court to impose an upper term," we must reverse Ajtzalam's sentence and remand for resentencing. (See *Lynch, supra,* 16 Cal.5th at p. 776.)

III. DISPOSITION

The judgment is reversed.

[6] While the trial court in imposing the upper term also relied on its own finding of a second aggravating circumstance (planning, sophistication, or professionalism), we need not address that factor given our conclusion that a reasonable jury could have resolved an allegation of remorselessness in Ajtzalam's favor. (See *Lynch, supra,* 16 Cal.5th at p. 768 [holding that to find a § 1170, subd. (b) error harmless under *Chapman*, the appellate court must conclude that "a jury would have found true *all* of the aggravating facts relied upon by the trial court" (italics added)].)

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LIE, J.

WE CONCUR:

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GROVER, Acting P. J.

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WILSON, J.

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