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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. HOWARD BIZZELL, Defendant and Appellant.	A104615 (Alameda County Super. Ct. No. H33800)

I. INTRODUCTION

A jury found Howard Bizzell guilty of numerous offenses, including an attempted murder, committed during a two-day period in January 2003. He was sentenced to a total prison term of twelve years and six months in state prison. On appeal, Bizzell contends the judgment must be reversed because he was denied the effective assistance of counsel. He also contends that mis-instruction of the jury requires reversal of two of his convictions. Finally, Bizzell argues the lower court made numerous sentencing errors. We affirm the judgment but remand this case to the trial court to correct sentencing errors that the court made.

II. STATEMENT OF FACTS

On January 26, 2003,[1] Bizzell's former girlfriend, Betty Kokal, moved into a residential rehabilitation recovery home on Smalley Avenue in Hayward (the Smalley

[1] All date references in this section are to the 2003 calendar year.

house). Before she moved to the Smalley house, Kokal had an "off and on" dating relationship with Bizzell, which she ended because she could not "take" Bizzell's attitude and behavior anymore. Kokal did not tell Bizzell that she had moved to the Smalley house because she did not want him to know where she was living. Alex Winn was the executive director of the program at the Smalley house, which housed both men and women.

At around 1:30 p.m. on January 26, Winn arrived at the Smalley house and found Bizzell standing in the driveway. Bizzell said he heard a car was for sale, pointed out Kokal's car, which was parked in the driveway, and asked to buy it. Winn said the car was not for sale. Bizzell responded that he knew the car belonged to "that bitch Betty" and that he used to date her. Bizzell was angry and emotional; he cursed Kokal and used threatening language. Winn asked Bizzell to leave. After arguing for a few minutes, Bizzell left.

At around 8:00 p.m. on January 26, Winn and Kokal arrived at the Smalley house together. As Kokal was getting out of the car, Bizzell rushed toward her, grabbed her, called her a "bitch," and said he would kill her if she did not leave the Smalley house. Bizzell "slammed" Kokal against the car causing the car to rock. He repeatedly cursed at her and called her names. Kokal thought Bizzell smelled of alcohol. Winn told Bizzell to let Kokal go and to leave or he would call the police. Bizzell "came at" Winn as if he was going to punch him. After another resident came out to help, Bizzell agreed to leave. But, before he left, he told Kokal that he was not done with her and that he would be back.

At around 11:30 p.m. on January 26, Winn was in his office in the Smalley house. When the automatic lights went on in the driveway, Winn noticed Bizzell crouching between the cars. Winn watched for a few minutes, and when the lights went off, Winn thought Bizzell had left. However, around 20 minutes later, the lights went on again and Winn saw Bizzell crawling between the cars in the driveway. Winn believed Bizzell posed a safety risk to the residents and called the police. The police took Bizzell to jail

for public drunkenness. Kokal was frightened by news that Bizzell had come back to the Smalley house.

On January 27, at around 11:30 a.m., Winn was outside talking on his cell phone when Bizzell walked down the sidewalk in front of the Smalley house. When Winn asked Bizzell what he was doing, Bizzell made a fist, ran toward Winn and said "I'm gonna' break you in half." Bizzell's tone was aggressive, very threatening and very fierce. Winn told the person he was talking to on the cell phone to call the police, stepped back, stayed calm and tried not to look frightened. When the police called Winn's cell phone and Winn began to give a description, Bizzell ran away. Kokal was frightened, nervous and traumatized by the fact that Bizzell kept returning to the Smalley house.

At around 8:00 p.m. on January 27, Bizzell knocked on the front door at the Smalley house. Winn tried to deadbolt the door but Bizzell pushed his way inside. Bizzell was enraged. He told Winn that he was coming to get Kokal and that she wasn't going to stay at the house any longer. He pushed Winn against a cabinet and then threw him over a desk. Winn saw that Bizzell was holding a knife. Bizzell told Kokal, "I'm gonna kill you bitch." He grabbed her and said, "Bitch, you're coming up out of here." Bizzell tried to drag her out of the house by her neck as he held a knife to her throat. He was choking Kokal who could barely breathe, was extremely frightened and thought Bizzell would kill her.

After Bizzell took two or three steps toward the door, with Kokal still in a choke hold, Winn tried to pull Bizzell off. Bizzell swung around, threw Winn against a cabinet and grabbed Kokal again. He made a motion as if he was going to bring the knife across Kokal's throat. Winn thought Bizzell was going to kill her. The two men struggled and exchanged punches. Bizzell tried to stab Winn at least three times -- in the heart, neck and eye. Winn was cut in the hand and on the side of his face. Winn thought Bizzell was trying to kill him and screamed for help. Other residents of the Smalley house pulled Bizzell off Winn, took the knife and threw Bizzell onto a couch. Winn called 911.

Bizzell testified at trial that Kokal was still his girlfriend at the time of the incident. He stated that Kokal told him where she moved to but then claimed that he knew how to find Kokal because he had a "vision" of her moving to the Smalley house. Bizzell testified that he did not push, touch or threaten Kokal on January 26. He denied he was angry with Kokal but admitted he drank that day and that he was upset that Kokal was not "woman enough to [tell him] what was going on." Bizzell testified that he went to the Smalley house on the morning of January 27 to get his bicycle which he had left there the night before. He claimed he did not threaten Winn but rather apologized to him and explained that he loved Kokal and did not want her to live with "a bunch of drug addicts."

Bizzell testified that he went to the Smalley house on the evening of January 27 to talk to Kokal without any intention of removing her from the house. He claimed he did not force his way into the house; Winn invited him in although he said Bizzell was not supposed to be there. Bizzell testified that he was concerned one of the males in the house might try to take advantage of Kokal, who suffered from a learning disability. He told Kokal it was "no good for her to be there with a bunch of drug addicts," and that she "didn't know what she was getting herself into in that house." He asked Kokal to go outside to talk. When Kokal took a few steps toward the door, Winn told her to go back.

Bizzell testified that he never threatened to kill anyone and did not push, hit or try to stab Winn on January 27. He denied putting a knife to Kokal's throat, calling her a bitch, threatening her or having any intent to harm her. Bizzell testified that he was attacked by Winn and other residents of the Smalley house. He pulled out his knife to protect himself. The residents took the knife from him and Winn hit him in the head and knocked him unconscious. Bizzell testified that Winn and another resident threatened to kill him.

A jury found Bizzell guilty of the following charges: Count one: attempted murder of Winn (Pen. Code, § 187, subd. (a)[2]); Count two: assault with a deadly weapon of Winn (§ 245, subd. (a)(1)); Count three: assault with a deadly weapon of Kokal (§ 245, subd. (a)(1)); Count four: attempted kidnapping of Kokal (§ 207, subd (a)); Count five: making criminal threats against Kokal (§ 422); Count six: stalking Kokal (§ 646.9, subd. (a)). It further found true allegations that, during the commission of the offenses alleged in counts one through four, Bizzell personally used a knife, a deadly and dangerous weapon. (§ 12022, subd. (b)(1).)

The trial court imposed an upper-term sentence of nine years for the attempted murder, plus a one-year term for the weapon use enhancement, a consecutive ten month term for attempted kidnapping, plus four months for the weapon use enhancement, and consecutive eight-month terms for the criminal threats and stalking convictions. It imposed concurrent terms for the two aggravated assault convictions and stayed the sentences for the weapon use enhancements attached to those two counts. Thus, Bizzell was sentenced to serve a total term of twelve years and six months in state prison.

III. DISCUSSION

A. *Assistance of Counsel*

Bizzell contends he was denied effective assistance of counsel at trial because his attorney failed to object when the prosecutor engaged in misconduct during closing argument.

1. *Standard of review*

The right to effective assistance of counsel is guaranteed by both the federal and California constitutions. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) Bizzell carries the burden of rebutting, by a preponderance of the evidence, a presumption that he received effective assistance. (*People v. Garrison* (1989) 47 Cal.3d 746, 788.) "The

[2] Undesignated statutory references are to the Penal Code unless otherwise indicated.

claim of ineffective assistance of counsel involves two components, a showing the counsel's performance was deficient and proof of actual prejudice." (*Id*. at p. 786.)

To be deficient, counsel's performance must have fallen "'below an objective standard of reasonableness . . . under prevailing professional norms.'" *(People v. Ledesma*, *supra*, 43 Cal.3d at p. 216.) In applying this prong of the test, courts must exercise deferential scrutiny so as to avoid the dangers of "'second-guessing.'" (*Ibid*.) Further, except in circumstances not here relevant, prejudice must be affirmatively proved. (*People v. Williams* (1988) 44 Cal.3d 883, 937.) "'The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."' (*People v. Ledesma, supra*, 43 Cal.3d at pp. 217-218.)

Here, Bizzell's claim is that his trial counsel performed deficiently by failing to object to prosecutor misconduct. According to Bizzell, the prosecutor repeatedly and improperly urged jurors to use Bizzell's nontestimonial conduct as evidence of his propensity to commit the charged offenses. To prove his claim, Bizzell must show not only that the prosecutor engaged in misconduct but also that his defense counsel performed deficiently and caused him prejudice by failing to object to the prosecutor's improper comments.

2. *Background: Bizzell's behavior and the prosecutor's comments*

a. *Bizzell's behavior at trial*

Throughout the trial, Bizzell frequently made comments or laughed at statements made by lawyers or witnesses. At least twice during the trial, the court admonished Bizzell outside the presence of the jury not to interrupt the proceedings.

While Bizzell was testifying on direct examination, the court sustained several objections that Bizzell's answers were narratives, were non-responsive or that no question was pending.

At one point during direct examination, the following exchange occurred between defense counsel and Bizzell:

"Q: What about when [Winn] says that, you know, you tried to stab him with that knife two or three times, as I recall?

"A: You know I, like I said, I didn't have no fight with Alex Winn. I didn't hit him. I didn't try to stab him, if it ain't saying too much. But when a person --

"Q: Be careful. No be careful.

"A: No, I'm just saying when a person doesn't have --

"[PROSECUTOR]: Objection, no question pending.

"THE COURT: No question pending. Sustained."

At another point during direct examination, after the court sustained an objection that Bizzell's answer to a question was nonresponsive, Bizzell said, "Everything I say is nonresponsive." Defense counsel repeated his question and Bizzell responded: "Well, I'm saying what I said, and it seems like every time I say something it's got to be something I ain't supposed to say. So, you know, I don't want -- I don't understand this. I don't understand, I really don't." After answering defense counsel's next question, Bizzell began to talk before another question was asked and the court sustained another objection that no question was pending.

During cross-examination, Bizzell testified that Winn lied about several of the events relating to the charges against Bizzell. For example, Bizzell testified that he was not at the Smalley house on the evening of January 26 when Winn called the police, but was driving by on his bicycle on his way home from the store when police stopped and arrested him. Bizzell testified that he believed "the whole thing was a set up." Later, when Bizzell testified that Winn hit him so hard he was rendered unconscious, the prosecutor asked whether pictures that had been taken of Bizzell showed a lump on his head. Bizzell responded that "[a]nybody can turn around and mess with pictures." Then the following exchange occurred:

"Q: Okay. So the pictures have been messed with?

"A: It could be. I wouldn't doubt it, I wouldn't doubt it with nothing the way you correcting things and directing things.

"Q: So now I'm part of the conspiracy too?

"A: It seems like to me, yeah. I'm gonna tell it like it is."

At another point during cross, Bizzell testified that he repeatedly told Kokal to leave him alone but she did not want to stay away. When the prosecutor questioned this assertion and suggested Bizzell was changing his story, the following exchange occurred:

"A: Don't try to come up with that old, you know, what you trying to do? You must think I'm really stupid, and the way you talk to me, that's the way I get it, you know, That's the way I receive it.

"Q: Sir, I'm just trying to understand what you're talking about.

"A: I'm trying to tell you, but you still is coming at me just like I'm -- I can rant like I don't know what the hell I'm talking about."

Bizzell claimed that the residents of the Smalley house had a "conspiracy" against him and that they were waiting to attack him when he came to see Kokal. After the prosecutor stated he had no further questions, Bizzell said "[y]eah. You get the jury to believe your cockeyed stories because it's a bunch of lies."

Bizzell spoke out during the prosecutor's closing argument several times. After the prosecutor completed that argument, the court excused the jury and admonished Bizzell "in the strongest of terms not to keep talking and interrupting the proceedings." The court acknowledged that the prosecutor had repeatedly complained about Bizzell's conduct throughout the trial and that Bizzell had been warned several times. The court advised Bizzell that if he continued to interrupt and/or to be disruptive, the court would have to consider removing him from the courtroom or gagging him, neither of which the court had ever done with any defendant. Nevertheless, Bizzell spoke out two additional times during the prosecutor's rebuttal argument.

b. ***The prosecutor's comments***

During his opening statement, the prosecutor told the jury that it would "see" that Bizzell's "own behavior in this courtroom will indicate that he's guilty." The trial court sustained a defense objection to this comment.[3]

During his closing argument, the prosecutor made the following statement:

"[W]e all know why we're here, power and control. The defendant's conduct shows that. It shows that when he took the stand, it shows that throughout this whole event or events. He's out of control. You saw that.

"He can't even sit here in court and listen to evidence and wait for his turn to talk, to speak, constantly speaking from that chair. He couldn't control himself when he's on that stand. Just answer the question. Well, what would he do? He'd say something. Well, I was trying to get her out of my life. Okay. But you still kept coming back. I've answered you that, I've already answered that, you keep asking me the same question.

"But he continued to offer more and more and more and more and then wouldn't even explain what he meant by it or why he was still coming back. You saw it. You saw -- you saw how angry he was on the stand. He's out of control.

"Fixation. When he testified he showed fixation. It shows fixation. It's all about her, what she's done to me. It's all about her, not about me, not about what I've done. I'm going to explain that a little bit more. It's all about anger. You see it now, you saw it in opening. Once again, you're seeing it."

At another point during closing argument, just after the court asked defense counsel to control Bizzell, the following exchange occurred:

"DEFENDANT: I'm tired of the shit, man. I'm tired of people lying, just lying, straight lying.

"THE COURT: Proceed counsel.

[3] Bizzell includes this statement in his list of complaints. However, since defense counsel objected to the comment and the court sustained the objection, it cannot support the ineffective assistance of counsel claim.

"[PROSECUTOR]: I did not touch Alex Winn. That's what he said, The story changed again. I didn't have no fight with him. Story changed again. Then during his testimony his own attorney said to be careful, be careful while he was testifying. That shows he's out of control.

"DEFENDANT: If I was out of control --

"[PROSECUTOR]: Your own attorney has to tell you be careful, be careful. That shows he's out of control. . . ."

During his rebuttal argument, the prosecutor made the following statement: "Now, what's wrong with the defense? Well, you've actually experienced the defendant. You actually got to see how he really is when someone says something that he doesn't like. So imagine how he was out there at the [Smalley House] when they told him not to come back, when they told him he couldn't come in the house, when Alex Winn tried to prevent him from taking Miss Kokal."

3. *Defense counsel's failure to object to the prosecutor's statements*

Bizzell contends his trial counsel rendered ineffective assistance at trial by failing to object to the prosecutor's statements that we have summarized above because the prosecutor was improperly arguing that Bizzell's off-the-stand courtroom behavior was evidence of his bad character.

In determining whether it is reasonably likely that a juror understood or applied a complained-of comment in an improper or erroneous manner, courts "'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 970.) Here, as our background summary illustrates, almost all of the comments that the prosecutor made about Bizzell's courtroom demeanor could be construed as relating to Bizzell's behavior while he was on the witness stand. That behavior was evidence, relevant to Bizzell's credibility as a witness at trial and the prosecutor was free to comment about it. (*People v. Jackson* (1989) 49 Cal.3d 1170, 1205-1206; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1030-1031 (*Edelbacher*); see also Evid. Code, § 780,

subd. (a) [in determining the believability of a witness, the demeanor and manner of the witness while testifying is a factor to consider].)

The prosecutor did make one statement which unquestionably did encompass Bizzell's off-the stand behavior when he said: "You see it now, you saw it in opening. Once again, you're seeing it." However, Bizzell's trial counsel could reasonably have decided not to underscore or draw attention to this specific remark by objecting to it particularly since the prosecutor's general argument about Bizzell's misbehavior at trial was not objectionable because it focused on Bizzell's conduct while on the stand.

Bizzell contends that, even if the prosecutor's comments are construed as referring to Bizzell's conduct while he was on the witness stand, these comments were improper because they invited the jury to use Bizzell's behavior as bad character evidence. However, Bizzell's only authority for this proposition are cases in which the defendant *did not* testify at trial. (See *United States v. Schuler* (9th Cir. 1987) 813 F.2d 978 (*Schuler*); *United States v. Pearson* (11th Cir. 1984) 746 F.2d 787.)

"In criminal trials of guilt, prosecutorial references to a nontestifying defendant's demeanor or behavior in the courtroom have been held improper on three grounds: (1) Demeanor evidence is cognizable and relevant only as it bears on the credibility of a witness. (2) The prosecutorial comment infringes on the defendant's right not to testify. (3) Consideration of the defendant's behavior or demeanor while off the stand violates the rule that criminal conduct cannot be inferred from bad character. [Citations.]" (*People v. Heishman* (1988) 45 Cal.3d 147, 197; see also *People v. Garcia* (1984) 160 Cal.App.3d 82, 90-92.)

However, comments about the courtroom demeanor or behavior of a defendant who does testify at trial are analyzed differently. Comments about a defendant's attitude or demeanor while on the witness stand are clearly proper. (*People v. Jackson, supra,* 49 Cal.3d at pp. 1205-1206; *Edelbacher, supra,* 47 Cal.3d at pp. 1030-1031; Evid. Code, § 780, subd. (a).) Furthermore, in *Edelbacher*, our Supreme Court stated that comments about a testifying defendant's courtroom demeanor while not on the stand may be also be proper, depending on the circumstances. (*Edelbacher, supra,* 47 Cal.3d at pp. 1030-

1031, citing *People v. Heishman, supra,* 45 Cal.3d at p. 197, and *People v. Thornton,* (1974) 11 Cal.3d 738, 763, disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 608, 685.) For example, in *People v. Heishman, supra,* 45 Cal.3d at page 197, a prosecutor did not commit misconduct by commenting on the defendant's courtroom demeanor during a penalty trial at which the defendant placed character in issue as a mitigating factor.

Like Bizzell, the appellant in *Edelbacher* relied on *Schuler, supra,* 813 F.2d 978, to attempt to show that a prosecutor committed misconduct by commenting on his courtroom demeanor. Noting that *Schuler* was decided by a divided court, the *Edelbacher* court recognized that decision was "expressly premised on the reasoning that prosecutorial comment impinges on the defendant's Fifth Amendment right not to testify [citation] and thus can have no application to a case . . . where the defendant has testified and put his credibility in issue." (*Edelbacher, supra,* 47 Cal.3d at p. 1031.)

Furthermore, the *Schuler* court expressly approved the following principle: "'Unless and until the accused puts his character at issue by giving evidence of his good character *or by taking the stand and raising an issue as to his credibility,* the prosecutor is forbidden to introduce evidence of the bad character of the accused simply to prove that he is a bad man likely to engage in criminal conduct.'" (*Schuler, supra,* 813 F.2d at p. 981, emphasis added.) Applying this principle here, Bizzell put his character at issue by taking the stand and raising an issue as to his credibility.

Bizzell has not cited any authority which demonstrates that the prosecutor's comments constituted clear misconduct. Indeed, as discussed above, to the extent the prosecutor's statements related to Bizzell's credibility as a witness, they were proper. Under these circumstances, defense counsel could well have made a reasonable tactical decision to refrain from objecting to the challenged statements and thereby avoid drawing further attention to Bizzell's behavior during trial.

In a separate argument, Bizzell contends that the prosecutor committed misconduct by urging the jury to treat defense counsel as a character witness against his own client. As noted in our background summary, during the direct examination of

Bizzell, his counsel warned him to be "careful" about testifying when no question was pending. During closing, the prosecutor suggested that this comment by defense counsel showed that Bizzell was "out of control." Bizzell characterizes this comment as an improper argument that defense counsel did not believe his own client's testimony. (Citing *People v. Herring* (1993) 20 Cal.App.4th 1066, 1075.) We disagree with this characterization of the prosecutor's statement. The prosecutor was not making a judgment about defense counsel's belief but, rather, was commenting on Bizzell's behavior while on the witness stand, behavior which was relevant to Bizzell's credibility as a witness at trial.

Finally, even if we could be persuaded that one or more of the prosecutor's comments were improper, Bizzell has not carried his burden of proving prejudice. In this regard, we are not persuaded by Bizzell's efforts to show a conflict in the testimony of the prosecution witnesses in this case. Our own review of that testimony and the other evidence in this record demonstrates to us that it is not reasonably probable that Bizzell would have obtained a more favorable outcome if defense counsel had objected to the prosecutor statements about which Bizzell now complains.

B. ***Attempted Kidnapping -- No Lesser Offense Instruction***

Bizzell contends his attempted kidnapping conviction must be reversed because the trial court violated its sua sponte duty to instruct the jury on the offense of attempted false imprisonment as a lesser necessarily included offense of the charged attempted kidnapping.

The trial court has a sua sponte obligation to instruct on general principles of law relevant to issues raised by the evidence at trial in a criminal case. That obligation includes the duty to instruct on lesser included offenses when the evidence raises a question as to whether all the elements of the charged offense are present and there is substantial evidence to support a jury determination that the defendant was guilty of the lesser offense. (*People v. Breverman* (1998) 19 Cal.4th 142, 154; *People v. Jones* (1992) 2 Cal.App.4th 867, 870.)

In the present case, Bizzell contends that attempted false imprisonment is a lesser included offense of attempted kidnapping. Although the People do not dispute this claim, neither party cites any controlling authority.

"'Under 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.' [Citation.]" (*People v. Breverman, supra,* 19 Cal.4th at p. 154, fn. 5.)

Kidnapping is defined in section 207, subdivision (a), which states: "Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping." The elements of this offense are: "(1) a person was unlawfully moved by the use of physical force or fear; (2) the movement was without the person's consent; and (3) the movement of the person was for a substantial distance. [Citation.]" (*People v. Jones* (2003) 108 Cal.App.4th 455, 462.)

"False imprisonment is the unlawful violation of the personal liberty of another." (§ 236.) The elements of this crime are "'1. A person intentionally restrained, confined, or detained another person, compelling [her] to stay or go somewhere; 2. The other person did not consent to the restraint, confinement, or detention; and 3. The restraint, confinement or detention was accomplished by violence or menace.' [Citation.]" (*People v. Checketts* (1999) 71 Cal.App.4th 1190, 1194.) Confinement in some type of enclosed space is not an element of this crime; "any exercise of force, express or implied, by which the other person is deprived of liberty or freedom of movement, or '". . . is compelled to remain where he does not wish to remain, or to go where he does not wish to go is an imprisonment. . . ."'" (*People v. Fernandez* (1994) 26 Cal.App.4th 710, 718.)

Even a cursory comparison of the elements of these two crimes illustrates the inherent relationship between them. As Bizzell maintains "[a] defendant guilty of kidnapping . . . must necessarily be guilty of the 'unlawful violation of the personal

liberty of' his [or her] victim and therefore be guilty of false imprisonment . . . ." (*People v. Morrison* (1964) 228 Cal.App.2d 707, 713.) Indeed, it appears settled that false imprisonment is a lesser included offense of kidnapping. (See, e.g., *People v. Magana* (1991) 230 Cal.App.3d 1117, 1120, 1121; *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1233; *People v. Chacon* (1995) 37 Cal.App.4th 52, 65.) Bizzell's theory here, which the People do not question, is that, by the same token, attempted false imprisonment is a lesser included offense of attempted kidnapping.

"'An attempt to commit a crime consists of a specific intent to commit the crime, and a direct but ineffectual act done towards its commission. [Citations.] Commission of an element of the underlying crime other than formation of intent to do it is not necessary. [Citation.]'" (*People v. Jones* (1999) 75 Cal.App.4th 616, 627.) It seems clear that a person who has the specific intent required to prove an attempted kidnapping also has the specific intent to violate his victim's personal liberty necessary to establish an attempted false imprisonment. Further, a direct act done toward commission of a kidnapping would also be an act toward commission of a false imprisonment. Thus we accept, at least for purposes of argument, that attempted false imprisonment is a lesser included offense of attempted kidnapping.

Thus, the trial court had a sua sponte duty to instruct on attempted false imprisonment if there was some question as to whether all the elements of attempted kidnapping were established and there was substantial evidence that Bizzell was guilty only of attempted false imprisonment and not of attempted kidnapping. (*People v. Breverman, supra*, 19 Cal.4th at p. 154.)

In the lower court, Bizzell never argued nor presented any evidence that he intended only to falsely imprison Kokal rather than to kidnap her; his defense was a complete denial of any criminal intent or behavior. Nevertheless, Bizzell maintains that the prosecution's evidence relating to his intent to violate the asportation element of a kidnapping offense could have been interpreted by the jury as evidence of an intent to restrain Kokal's liberty. In other words, Bizzell contends the jury could have found that,

although he intended to force Kokal to "go where she did not wish to go," he did not intend to force her to move far enough to satisfy the asportation element of kidnapping.

This argument turns the test for identifying lesser included offenses on its head. By definition, evidence that the greater offense was committed is evidence that the lesser offense was committed. However, to trigger the sua sponte obligation to instruct, there must be evidence that the lesser rather than the greater offense was committed. Here, there is no evidence, as distinguished from Bizzell's conjecture, from which a jury could have found that Bizzell specifically intended to falsely imprison Bizzell but not to kidnap her. Rather, the record before us contains evidence supportive of only two conclusions regarding Bizzell's intent, the People's evidence of an intent to kidnap and Bizzell's evidence of an intent to engage in a voluntary private discussion with his girlfriend.

We reject Bizzell's argument for a second, independent reason. "[I]t has long been settled that the trial court need not, even if requested, instruct the jury on the existence and definition of a lesser included offense if the evidence was such that the defendant, if guilty at all, was guilty of something beyond the lesser offense." (*People v. Morrison, supra,* 228 Cal.App.2d at p. 713.) This principle applies here where any evidence of an attempt to falsely imprison Kokal is necessarily subsumed by the overwhelming evidence that he actually did falsely imprison here. The evidence before us shows that Bizzell did not *attempt* to restrain Kokal's liberty, he *actually* restrained it.[4]

We hold that the trial court had no sua sponte duty to instruct the jury on the offense of attempted false imprisonment.

C. *Criminal Threats -- No Unanimity Instruction*

[4] Although Bizzell does not contend he was entitled to an instruction on false imprisonment as a lesser included offense of attempted kidnapping, we note the trial court had no sua sponte duty to instruct on that offense either. A person can attempt to kidnap someone without restraining the intended victim's liberty. Since the offense of attempted kidnapping can be committed without necessarily committing a false imprisonment, then false imprisonment is not a lesser included offense of attempted kidnapping.

Bizzell contends the trial court had a sua sponte duty to give the jury a unanimity instruction with respect to the criminal threats charge and that its failure to do so constituted reversible error.

"'It is fundamental that a criminal conviction requires a unanimous jury verdict [Citations.]' [Citation.] What is required is that the jurors unanimously agree defendant is criminally responsible for '*one discrete criminal event*.' [Citation.] '[W]hen the accusatory pleading charges a single criminal act and the evidence shows more than one such unlawful act, *either* the prosecution must select the specific act relied upon to prove the charge *or* the jury must be instructed in the words of CALJIC No. 17.01 or 4.71.5 or their equivalent that it must unanimously agree beyond a reasonable doubt that defendant committed the same specific criminal act.' [Citation.]" (*People v. Thompson* (1995) 36 Cal.App.4th 843, 850.)

Courts have held that, when an instruction is essential to insure the constitutional guarantee of unanimity, the trial court has a sua sponte duty to give it. (*People v. Crawford* (1982) 131 Cal.App.3d 591, 596; see also *People v. Madden* (1981) 116 Cal.App.3d 212, 215.)

Bizzell contends he was entitled to a unanimity instruction in this case because, although he was charged with one count of violating section 422 by making a criminal threat, the prosecution introduced evidence of two threats which could have violated section 422. According to Bizzell, the prosecution presented evidence that the first threat occurred on January 26 when Bizzell confronted Kokal in the driveway and threatened to kill her and the second threat occurred on January 27 when Bizzell forced his way into the Smalley house, grabbed Kokal and threatened to kill her while attempting to kidnap her. Bizzell reasons that, since the information alleged that the section 422 violation occurred "on or about January 26," and "on or about" means either the day mentioned or a day in very near proximity thereto, both the January 26 and the January 27 threats occurred within the time frame alleged in the information. Furthermore, Bizzell maintains, since the prosecutor did not make an election with respect to this charge, the court had a sua sponte duty to give a unanimity instruction.

The People counter that the prosecutor did make an election which he clearly communicated to the jury very early in the trial. During his opening statement, the prosecutor said: "[T]he testimony . . . spells guilty of attempted murder; of assault with a deadly weapon two times on two different people; attempted kidnapping when he tried to take her out of the house; *criminal threats when he slams this woman up against the car and says I will kill you, you're time is coming*; and stalking for going over to a residence multiple times when he's told not to." (Emphasis added.) The People also correctly observe that, during closing argument, the prosecutor expressly applied the elements of section 422 to evidence relating to the January 26 incident in the Smalley house driveway.

Bizzell concedes that the prosecutor "emphasized the January 26 threat in discussing the elements of section 422," but maintains that the prosecutor's statements did not constitute an election because he did not formally advise the jury that he was making an election. Citing a decision by a panel of Division Three of this court, Bizzell maintains that an election occurs only if the prosecutor "directly inform[s]" the jurors of his election and of their "concomitant duties." (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1536 (*Melhado*).)

We find it unnecessary to decide whether the prosecutor's statements constituted an election as that concept was defined in *Melhado*. In contrast to that case, and notwithstanding Bizzell's contrary assumption, the evidence before us does not show that Bizzell committed two distinct violations of section 422 on or about January 26.

"In order to prove a violation of section 422, the prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat -- which may be 'made verbally, in writing, or by means of an electronic communication device' -- was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of

purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances. [Citation.]" (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)

Contrary to the premise of Bizzell's argument on appeal, there is no evidence in this record from which a jury could have found that Bizzell violated section 422 during the course of the attempted kidnapping of Kokal on January 27. Winn testified that, during that event, Bizzell threatened to kill Kokal. However, there is absolutely no evidence that Kokal heard that threat. Absent such evidence, the third, fourth and fifth elements of a section 422 offense could not be satisfied. This evidentiary void likely explains why Bizzell was not charged with an additional violation of section 422 based on the January 27 incident.

In any event, since the evidence presented at trial did not tend to show more than one violation of section 422 on or about January 26, neither an election by the prosecutor, nor an unanimity instruction from the trial court were required.

D. *Criminal Threats -- No Multiple Punishment*

Bizzell argues the trial court violated section 654 which states, in part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Bizzell contends the court violated this statute by failing to stay the punishment for the criminal threats violation because that conviction was (1) based on the same threat that supported the stalking conviction and (2) part of the course of conduct which formed the basis of the attempted kidnapping conviction.

Section 654 prohibits multiple punishment not only for a "single act or omission" but also for a single, indivisible course of criminal conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1207-1208.) "'It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible.

[Citations.] . . . [I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.]' [Citation.]" (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) "On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for the independent violations committed in pursuit of each objective even though the violations were parts of an otherwise indivisible course of conduct." (*People v. Perez* (1979) 23 Cal.3d 545, 551.) The determination whether a defendant harbored a single intent and objective within the meaning of section 654 is generally a factual matter. (*People v. Porter* (1987) 194 Cal.App.3d 34, 38.) We will affirm the trial court's finding if it is supported by substantial evidence. (*Ibid*.)

As noted above, Bizzell maintains that the punishment for the criminal threats violation should have been stayed because the same threat was used to prove the stalking charge. Bizzell reasons that, because the evidence shows that "both the January 26 and 27 threats could have supported convictions on either count or both," he is constitutionally entitled to a presumption that the jury relied on the same threat to support both convictions. However, as discussed above, only the January 26 threat supported the criminal threats conviction and Bizzell's extremely confusing argument does not explain why we cannot assume that the January 27 threat, a separate act, satisfied the threat element of the stalking conviction.[5]

In any event, even if we assume that the January 26 threat was one of the acts used by the jury to support the stalking conviction, Bizzell ignores the fact that when a

[5] The jury was instructed that the prosecution had to establish the following elements in order to prove the stalking charge: (1) a person willfully, maliciously and repeatedly followed or harassed another person; (2) the person following or harassing made a credible threat; and (3) the threat was made with the specific intent to place the other person in reasonable fear for his or her safety or the safety of the immediate family of such persons. (See § 646.9; *People v. Ewing* (1999) 76 Cal.App.4th 199, 210.

defendant entertained multiple criminal objectives independent of and not merely incidental to each other, "the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.)

In this case, the trial court expressly found that "the Stalking, and Criminal Threats, and their presumed objectives, were independent of one another and of Counts One and Two." Substantial evidence supports this finding. The criminal threats conviction was based on the January 26 incident during which Bizzell's objective was to force Kokal to move out of the Smalley house. The stalking charge was based not just on that incident but several others spanning a two-day period, the objective of which was to reassert and maintain ongoing control over Kokal's life. The fact that both crimes involved physical and mental intimidation simply does not, as Bizzell intimates, render them indistinguishable.

Alternatively, Bizzell argues that, because the January 27 threat "was incidental to [Bizzell's] objective of securing Kokal's compliance with his efforts to abduct her, section 654 bars punishment on both the criminal threats conviction and the attempted kidnapping." The primary problem with this argument is that, as we have already explained, the criminal threats conviction was not based on the January 27 threat. It was based on the threat Bizzell made on January 26 when he accosted Kokal in the driveway of the Smalley house. Thus, the separate sentences for the criminal threats conviction and the attempted kidnapping conviction did not violate section 654.

E. ***Assault with a Deadly Weapon -- Multiple Punishments***

Bizzell argues the trial court violated section 654 by sentencing him to concurrent terms for the two aggravated assault convictions rather than staying the sentences for these two violations. He argues that the aggravated assault of Winn was based on the same conduct and same criminal objective as the attempted murder of Winn. He further contends that the aggravated assault of Kokal and her attempted kidnapping shared the same conduct and criminal objective.

The People concede that the "aggravated assault of Winn (count two) was based on the same conduct as the attempted murder of Winn," and that the "court should have stayed the punishment for the aggravated assault on Winn (count two)."

However, the People maintain that the aggravated assault of Kokal was a separate act not necessary to effectuate the kidnapping and that these two criminal acts were done in pursuit of distinct criminal objectives. The People reason that the conviction for assaulting Kokal with a deadly weapon was based on the evidence that Bizzell held his knife to Kokal's throat, and then made a gesture suggesting an intent to slit her throat. They contend this conduct was not necessary to effectuate the kidnapping and that it furthered a "more sinister" objective that Bizzell set for himself only after his objective to kidnap Kokal was thwarted by Winn. We are not convinced that Bizzell had two distinct objectives. Indeed, the People's effort to bisect Bizzell's motivation only reinforces a conclusion that the assault was part of the plan to kidnap Kokal necessitated by Winn's efforts to thwart that plan.

More importantly, the trial court expressly found that both the assault convictions were based on the same conduct that constituted more serious offenses. At the sentencing hearing the court stated: "Based upon these findings all sentences will be ordered to be served consecutively to one another save for the two 245(a) counts. Where Mr. Winn was the victim, that assault is subsumed in the attempted murder. Likewise, the 245(a) against Ms. Kokal was part and parcel of his attempt to kidnap her and the term for this act shall be served concurrently."

Thus, the court expressly found that the assault of Kokal was based on the same conduct and motivated by the same objective as the attempted kidnapping. The problem though was that the court failed to realize that section 654's prohibition against multiple punishment includes concurrent sentences. (*People v. Deloza* (1998) 18 Cal.4th 585, 592.) Therefore the concurrent sentences for the two assault convictions must be stayed.

F. ***Aggravated Assault -- Weapon Use Enhancements***

The jury found true enhancement allegations, based on section 12022, that Bizzell personally used a deadly or dangerous weapon in the commission of the two aggravated

assaults. The trial court stayed the sentences relating to these two enhancements.

Section 12022, subdivision (b)(1), provides that "[a]ny person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, *unless use of a deadly or dangerous weapon is an element of that offense*." (Emphasis added.) When an aggravated assault is committed by use of a deadly weapon, the defendant's sentence cannot be enhanced under section 12022, subdivision (b)(1), for use of a deadly weapon. (See *People v. McGee* (1993) 15 Cal.App.4th 107, 113; *People v. Summersville* (1995) 34 Cal.App.4th 1062, 1070.)

In light of this authority, the People concede that the trial court erred by imposing and staying sentences on these enhancements. The enhancements must by stricken.

G. *Stalking -- Not a Violent Felony*

Bizzell contends that the abstract of judgment erroneously states that Bizzell's stalking conviction qualifies as a violent felony. The People concede that stalking is not a "violent" felony within the meaning of the controlling statute, section 667.5, subdivision (c). The abstract of judgment must be amended to reflect that fact.

H. *Blakely Issues*

Bizzell contends that the trial court violated his constitutional rights by supporting its decisions to impose an upper term sentence and consecutive sentences on facts that were not found by a jury beyond a reasonable doubt.

1. *Background*

While this appeal was pending, *Blakely v. Washington* (2004) __U.S.__, [124 S.Ct. 2531] (*Blakely*) was decided by the United States Supreme Court. The *Blakely* Court held that a Washington State court denied a criminal defendant his constitutional right to a jury trial by increasing the defendant's sentence for second-degree kidnapping from the standard range of 49 to 53 months to 90 months based on the trial court's finding that the defendant acted with "deliberate cruelty." (*Blakely, supra*, 124 S.Ct. at p. 2537.) The Court found that the state court violated the rule previously announced in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*) that, "'[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.'" (*Blakely*, *supra*, 124 S.Ct. at p. 2536.) In reaching this conclusion, the court clarified that, for *Apprendi* purposes, the "statutory maximum" is "not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id*. at p. 2537.)

We granted Bizzell leave to file a supplemental brief in this court addressing whether his sentence violates *Blakely*. We reject the People's contention that Bizzell forfeited his right to claim *Blakely* error by failing to raise this issue in the trial court. (See *People v. Vera* (1997) 15 Cal.4th 269, 276-277 [claims asserting deprivation of certain fundamental, constitutional rights not forfeited by failure to object]; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648, and authority discussed therein [exception to waiver rule when objection would have been futile]; 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 36, p. 497 [courts have discretion to consider issues that have not been formally preserved for review].) Therefore, we turn to Bizzell's specific contentions.

2. *Upper term sentence for attempted murder*

As noted above, the trial court imposed an upper term sentence of nine years for the attempted murder conviction. Bizzell contends this sentence violates *Blakely* because it was supported by factual findings other than the fact of a prior conviction which were neither found by the jury nor inherent in the jury's verdict.

The court's decision to impose the upper term was based on findings of several aggravating factors and no mitigating factors. The aggravating factors identified by the trial court were: (1) Bizzell committed a violent act which threatened great bodily harm and disclosed a high degree of viciousness; (2) Bizzell was armed with and used a knife during commission of the offense; (3) Both Kokal and Winn, to a lesser degree, were vulnerable victims; (4) Bizzell's conduct demonstrates he is a serious danger to society; (5) Bizzell's prior convictions are numerous and of an increasingly serious nature; (6) Bizzell was on probation when he committed the offense; (7) Bizzell's prior

performance on probation was unsatisfactory. (See Cal. Rules of Court, rule 4.421 (rule 4.421).)

The People contend that the rule announced in *Blakely* does not apply to sentencing determinations like the one at issue here which comply with California's determinate sentencing law. According to the People, under this "triad" sentencing system, any one of the three legislatively-authorized terms for an offense, including the upper term, can be imposed by a trial court without violating a defendant's constitutional rights. Under their view of this system, although there is a "presumptive mid-term sentence," the upper term is the statutory maximum sentence which the trial court has discretion to impose. The People's argument may have been persuasive before *Blakely* was decided. Now, however, it is flatly contradicted by the Supreme Court's holding that the statutory maximum is "not the maximum sentence a judge may impose after finding additional facts," but rather the sentence it may impose without making *any additional findings*. (*Blakely*, *supra*, 124 S.Ct. at p. 2537.)

Under California law, the maximum sentence a judge may impose without any additional findings is the middle term. Section 1170, subdivision (b), states that "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." Furthermore, rule 4.420(b) states that "[s]election of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation." Thus, contrary to the People's argument, additional findings are required to increase a criminal defendant's sentence beyond the mid-term statutory maximum. Further, those additional findings do implicate *Blakely*.

The People also argue that, if *Blakely* does apply in this context, the upper term sentence in this case was properly supported by aggravating factors relating to Bizzell's recidivism. The requirement that a fact which increases a sentence beyond the statutory maximum must be found by a jury does not apply to the fact of a prior conviction. (*Almendarez-Torres v. United States* (1998) 523 U.S. 224; *Apprendi, supra*, 530 U.S. at pp. 488, 490; *Blakely*, *supra*, 124 S.Ct at p. 2536.) This exception to the *Apprendi* rule

has been construed broadly to apply not just to the fact of the prior conviction, but to other issues relating to the defendant's recidivism. (See, e.g., *People v. Thomas* (2001) 91 Cal.App.4th 212, 216-223.)

Advocating a broad construction of this prior conviction exception, the People maintain that the trial court did not violate *Blakely* by relying on three aggravating factors relating to Bizzell's recidivism: (1) Bizzell's prior convictions are numerous and of an increasingly serious nature; (2) Bizzell was on probation when he committed the offense; (3) Bizzell's prior performance on probation was unsatisfactory. Bizzell disagrees with the People; he maintains that numerosity, increasing seriousness and unsatisfactory performance are all subjective concepts based on extrinsic facts which must be supported by express jury findings.

Accepting, at least for purposes of argument, Bizzell's narrower interpretation of the prior conviction exception, we nevertheless find this exception *does* extend to a finding that a defendant was on probation when he committed the present offense. Like a prior conviction, the defendant's status as a probationer arises out of a prior conviction in which a trier of fact found, or the defendant admitted, the defendant's guilt as to the prior offense. (See *Apprendi, supra*, 530 US. at p. 488.) Also like a prior conviction, a probationer's status can be established by reviewing court records relating to the prior offense. Finally, like a prior conviction, the defendant's status as a probationer "'does not relate to the commission of the offense, but goes to the punishment only . . . .' [Citation.]" (*Almendarez-Torres v. United States, supra,* 523 U.S. at p. 244.) Therefore, we conclude that the defendant's status as a probationer falls within the prior conviction exception.

Thus, at least one aggravating factor articulated by the trial court in this case did not violate *Blakely*. Furthermore, although the People do not press this point, we also find that the trial court did not violate *Blakely* be relying on the aggravating factor that Bizzell was armed with and used a knife during commission of the offense because this factor was supported by an express jury finding. Although Bizzell acknowledges the jury finding, he maintains the trial court erred by using it both as an aggravating factor and to

impose a separate enhancement. Although we agree with this contention (see § 1170, subd. (b); rule 4.420(c)), Bizzell failed to preserve this distinct issue by raising it in the trial court or in his appellate briefs. In any event, the error about which Bizzell belatedly complains does not constitute *Blakely* error.

The presence of two aggravating factors which do not violate *Blakely* makes it unnecessary for us to address the many other issues the parties raise. Under California law, a single factor in aggravation is sufficient to support imposition of an upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728; *People v. Cruz* (1995) 38 Cal.App.4th 427, 433; see also *People v. Kelley* (1997) 52 Cal.App.4th 568, 581; *People v. Piceno* (1987) 195 Cal.App.3d 1353, 1360; *People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) Further, "[w]hen a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen the lesser sentence had it known that some of its reasons were improper." (*People v. Price* (1991) 1 Cal.4th 324, 492; see also *People v. Osband, supra,* 13 Cal.4th at p. 728.)

Applying these rules here, we find that there was the requisite single aggravating factor to support imposing an upper-term sentence. However, we cannot confidently predict what the trial court would have done had it know that many of the factors upon which it relied were improper. Additional uncertainty flows from the fact that the court should not have used the finding that Bizzell used a knife as both an aggravating factor and a ground for imposing an enhancement. Finally, we note that this case must be remanded in any event because of the sentencing errors discussed above. Under these circumstances, we conclude that the proper course of action is to remand this case so the trial court can resentence Bizzell for the attempted murder conviction in a manner which does not violate *Blakely*.

3. *Consecutive sentences*

Bizzell contends that a concurrent term is the "presumptive sentence" under section 669 and that a court "lacks statutory authority to impose consecutive terms unless it finds aggravating circumstances beyond the elements inherent in the offense itself."

Bizzell further contends that the aggravating circumstances used to support the consecutive sentences in this case required factual findings that were not inherent in the jury's verdict. Therefore, Bizzell concludes, his consecutive sentences violate *Blakely*.

Bizzell's faulty argument is based on a misconstruction of the applicable sentencing laws. (*See People v. Reeder* (1984) 152 Cal.App.3d 900, 923, ["there is no . . . statutory presumption in favor of concurrent rather than consecutive sentences . . . ."]. "'[A] trial court's imposition of consecutive sentences does not result in a usurpation of the jury's factfinding powers or appellant's due process rights as long as each sentence imposed is within each offense's prescribed statutory maximum. . . . Although our laws permit the trial judge to order the separate sentences imposed for each crime to run concurrently, its decision in this regard is similar to the discretion afforded under section 654, and results in a lessening of the prescribed sentence -- not an enhancement.'" (*People v. White* (2004) 124 Cal.App.4th 1417, 1441.) Thus, we find that consecutive sentence determinations do not implicate the rule announced in *Blakely*.

IV. DISPOSITION

The judgment is affirmed. This case is remanded to the trial court for resentencing on the conviction for attempted murder in a manner consistent with *Blakely* and for correction of the other sentencing errors identified herein.

_____
Haerle, Acting P.J.

We concur:

_____
Lambden, J.

_____
Ruvolo, J.