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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL SCOTT COSTA, Defendant and Appellant.	H029681 (Santa Clara County Super.Ct.Nos. CC238138 & 210852)

Defendant Michael Scott Costa appeals from a judgment entered following his entry of pleas of nolo contendere and his admission of enhancement allegations. In consolidated proceedings, defendant pleaded no contest to 17 counts, namely, 12 counts of possession of a firearm by a felon (Pen. Code, § 12020, subd. (a)(1)),[1] two counts of possession of ammunition by a felon (§ 12316, subd. (b)), one count of perjury (§ 118, subd. (a)), one count of conspiracy (§§ 182, subd. (a)(1), 12021, subd. (a)), and one count of misdemeanor possession of marijuana (Health & Saf. Code, § 11357, subd. (c)). The court sentenced defendant to 22 years, eight months in prison; the sentence included an upper term sentence on the perjury conviction.

Defendant presents two challenges on appeal. First, he claims that the court erred in imposing an upper term sentence for the perjury conviction (in superior court case

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

number 210852) in violation of his Sixth Amendment right to a jury trial and his Fourteenth Amendment right to due process. He claims that under *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), he was entitled to have a jury determine beyond a reasonable doubt any aggravating facts that were used as prerequisites to the imposition of an upper term sentence. Second, he contends that the sentence for the ammunition-possession conviction (count 6 in superior court case number CC238138) should have been stayed pursuant to section 654.

We conclude, based upon a very recent controlling decision of United States Supreme Court (see *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*)), that there was *Blakely* error. We hold further that the sentence for the ammunition-possession conviction did not violate section 654. We therefore reverse the judgment and remand for resentencing in light of the holding in *Cunningham*.

FACTS

Since defendant pleaded nolo contendere to all charges, we present a summary of the evidence relevant to the challenges on appeal based principally upon information contained in the probation report:

I. *Superior Court Case Number 210852*

A. *Indictment*

In superior court case number 210852, defendant was charged by indictment filed on January 23, 2004, with two counts, namely, perjury by filing a false application for a driver's license or identification card, a felony (§ 118, subd. (a)—count 1); and possession of ammunition by a felon, a felony (§ 12316, subd. (b)—count 2).[2]

[2] The indictment alleged further that defendant had suffered four prior "strike" convictions (§§ 667, subds. (b)-(i), 1170.12).

B. *Underlying Facts*

On October 12, 2000, defendant was cited for driving with a suspended license and other Vehicle Code violations. Defendant's vehicle was impounded and an inventory search disclosed, among other things, one shotgun shell (count 2)

On February 16, 2001, defendant was again stopped for Vehicle Code violations. He presented the officers with a California driver's license with the name of Robert Armstrong; the license contained a photograph of defendant. He was arrested and his vehicle was impounded. In the course of the investigation, the police determined that on October 13, 2000, defendant had submitted a false application for a driver's license to the Department of Motor Vehicles in the purported name of Robert Armstrong, stating that he had made no previous applications for a California driver's license or identification card in a different name (count 1).

II. *Superior Court Case Number CC238138*

A. *Information*

In superior court case number CC238138, defendant was charged by information filed September 12, 2003, with 15 counts, namely, 12 counts of possession of a firearm by a felon (§ 12021, subd. (a)(1)); misdemeanor possession of more than 28.5 grams of marijuana (Health & Saf. Code, § 11357, subd. (c)—count 5); possession of ammunition by a felon, a felony (§ 12316, subd. (b)—count 6); and conspiracy to possess firearms as a felon (§§ 182, 12021, subd. (a)(1)—count 15). Counts 1 through 4 charged defendant with having possessed four different firearms between September 8, 2001, and October 9, 2001. Counts 7 through 9 charged defendant with possession of firearms (rifles) between January 10, 2000, and December 31, 2000. He was charged with possession of a firearm (Kimber pistol) in count 10, occurring between December 1, 1999, and October 9, 2001. And defendant was charged in counts 11 through 14 with possession of four different

handguns between January 1, 2001, and December 31, 2001.[3] Many of the firearms were registered in the name of defendant's wife, Jessica Ann Costa (Jessica), or in the name of one of defendant's known associates.

B. *Underlying Facts*

Defendant was under surveillance by a task force (Santa Clara County Special Enforcement Team [SCCSET]) for suspicion of marijuana trafficking. On October 2, 2001, a search of trash by officers yielded various notes and ledgers that evidenced transactions involving money (hundreds of thousands of dollars) and marijuana, as well as bubblewrap from Mailboxes, Etc. that contained marijuana residue. On the same date, agents of the Internal Revenue Service (IRS) interviewed a former employee of defendant, who stated that he had seen a number of guns, marijuana, and money at defendant's home.

On October 8, 2001, police officers in El Paso, Texas, interviewed defendant and another suspect in an El Paso hotel room. The officers found in the hotel room a loaded Smith and Wesson 10 mm. handgun registered to Jessica (count 1), ammunition for other firearms, cocaine, and a small quantity of marijuana. Defendant possessed over $25,000 in cash. A search of defendant's vehicle yielded, among other things, a loaded .45 caliber Glock handgun (count 2), a loaded Kimber Pro Carry .45 caliber handgun (count 3), and a loaded Mossberg shotgun (count 4). Defendant admitted that he had arranged a cocaine transaction in Texas.

On October 9, 2001, SCCSET officers, having been informed about the events in El Paso the previous day, obtained a search warrant for defendant's home and vehicle. They executed the search warrant and found, among other things, one and one-half ounces of marijuana (count 5), a loaded Kimber .45 caliber firearm registered to Jessica

[3] The information alleged further that defendant had suffered four prior "strike" convictions (§§ 667, subds. (b)-(i), 1170.12).

(count 10), "ammunition for several guns" (count 6), and receipts for over $17,000 worth of guns purchased by defendant's wife and a third party.[4]

On November 2, 2001—based upon receipts found during the prior search of defendant's residence—SCCSET officers interviewed a San Jose gun dealer. The dealer provided transaction records for the seized receipts evidencing the purchase by Jessica of approximately $13,000-worth of weapons, namely, five assault rifles, one handgun, and one match grade rifle (count 15). Steven Bartnek, an associate of defendant, helped Jessica select the weapons, and she reportedly said, " 'They were gifts for her husband' (the defendant)."

A second search of defendant's residence was conducted on April 10, 2002. During the search, photographs were discovered depicting defendant and his associates displaying various rifles (counts 7 through 9). This was consistent with information SCCSET officers had learned previously concerning Jessica's acquisition of rifles from the San Jose gun dealer for her husband.

On December 11, 2002, SCCSET officers met with Adrienne Dell, the attorney for defendant's wife. Dell delivered to the officers a gun case that contained the guns found in defendant's custody and control in El Paso Texas on October 8, 2001, namely, a 10 mm. Smith and Wesson pistol registered to Jessica (count 1), a .45 caliber Glock pistol registered to Michael Sprague, an associate of defendant (count 2), a .45 caliber Kimber pistol registered to Bartnek (count 3), and a .12 gauge Mossberg shotgun registered to Bartnek (count 4).[5]

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[4] The search also disclosed records of various narcotics and gun transactions, a spreadsheet showing that defendant made monthly payments of over $48,000 for various homes in the San Jose area, and a spreadsheet listing 22 vehicles.

[5] The information concerning the weapons possession offenses charged in counts 11 through 14 does not appear in the probation report. We glean it from the prosecution's memorandum in opposition to defendant's motion filed pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

PROCEDURAL BACKGROUND

On September 28, 2004, defendant entered a plea of nolo contendere to both counts charged in the indictment in superior court case number 210852, and to all 15 counts charged in the information in superior court case number CC238138. Defendant also admitted the allegations in both cases that he had suffered four prior "strike" convictions. Defendant filed a motion to strike the prior "strike" allegations, pursuant to *Romero*, *supra*, 13 Cal.4th 497. On October 25, 2005, the court granted the *Romero* motion in part, striking three of the four "strike" convictions. Immediately thereafter, defendant was sentenced to 22 years, eight months in state prison. He was sentenced to eight years in prison in connection with the perjury conviction in superior court case number 210852 (the upper term of four years for the offense, doubled because of his prior "strike" conviction, pursuant to §§ 667, subds. (b)-(i) and 1170.12). Defendant was sentenced to a consecutive one year, four month term for the count 2 conviction in that case. In superior court case number CC238138, the court sentenced defendant to 10 consecutive prison terms of one year, four months for the convictions of the offenses charged in counts 1, and 6 through 14. Defendant was sentenced to three separate concurrent terms of four years for counts 2 through 4, and 10 days in county jail for the count 5 misdemeanor conviction. Lastly, the court sentenced defendant to a four-year term for the count 15 conviction, which it stayed pursuant to section 654. Defendant filed a timely notice of appeal from the judgment.

DISCUSSION

I. *Contentions On Appeal*

Defendant asserts two challenges to the judgment. These claims of error are as follows:

1. The court imposed an upper term sentence for the perjury conviction (§ 118) that was based upon aggravating circumstances that were not part of a jury's

factual findings. Under *Blakely*, *supra*, 542 U.S. 296, this sentence violated defendant's right to a jury trial guaranteed under the United States and California Constitutions.

2. The court should have stayed punishment for the count 6 conviction (possession of ammunition by a felon), because section 654 precluded the imposition of separate punishment for both the ammunition-possession conviction and certain of the weapons-possession convictions (counts 2, and 7 through 10).

We discuss both of these claims of error, *post*.

II. *Claimed Blakely Violation*

A. *Contentions of the Parties*

In superior court case number 210852, the trial court imposed the upper term of four years provided in section 126[6] for the count 1 conviction (perjury by filing a false application for a driver's license or identification card, violation of § 118, subd. (a)), which was doubled based on his prior "strike" conviction, pursuant to section 667, subdivisions (b)-(i) and section 1170.12.[7] The court noted that it was imposing the upper term after reviewing and balancing the factors in aggravation and mitigation. It noted the following factors in aggravation: (1) defendant's "prior prison commitment"; (2) defendant was "in a position of authority and leadership"; (3) "there was planning [and] sophistication"; (4) defendant acquired various weapons; (5) defendant was untruthful in the driver's application and he needed the driver's license obtained through the false application process "for illegal purposes"; and (6) defendant "[b]asically . . . led a life of excessive criminality."

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[6] "Perjury is punishable by imprisonment in the state prison for two, three or four years." (§ 126.)

[7] "If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction." (§ 667, subd. (e)(1).) Section 1170.12, subdivision (c)(1), has language identical to that found in section 667, subdivision (e)(1).

Defendant claims that under *Blakely*, *supra*, 542 U.S. 296, he was deprived of his constitutional right to a jury trial when the trial court imposed an upper term sentence for the perjury conviction. He asserts that because the court based this sentencing determination on finding the existence of factors warranting imposition of the upper term by a preponderance of the evidence, he was deprived of his constitutional right to a jury trial and application of proof beyond a reasonable doubt.[8]

The Attorney General makes four arguments in response to defendant's *Blakely* challenge. First, defendant forfeited the challenge by failing to assert it below. Second, defendant expressly waived any challenge to judicial fact-finding in sentencing at the time he entered his plea of nolo contendere. Third, any *Blakely* challenge is substantively without merit, based upon the California Supreme Court's holding in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*). Fourth, assuming any error, it was harmless.

We address the parties' contentions below.

B. *Discussion of Blakely Challenge*

1. *Forfeiture*

The Attorney General argues that defendant forfeited his claim of *Blakely* error by failing to assert it below. Defendant responds that the claim was not forfeited because it would have been futile for his counsel to have asserted that challenge in the trial court.

As we discuss, *post*, the holding of the California Supreme Court in *Black*, *supra*, 35 Cal.4th 1238, until very recently, compelled the conclusion that a criminal defendant's constitutional rights are not abridged when a court sentences him or her to the upper term

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[8] Defendant acknowledged implicitly that were we to follow the holding in *Black*, we would find defendant's *Blakely* challenge to be without merit. But he noted that after *Black* was decided, the United States Supreme Court granted certiorari in *Cunningham v. California*, No. 05-6551, certiorari granted, February 21, 2006, ___ U.S. ___, 126 S.Ct. 1329; defendant noted that it was his "expectation that *Black* will be overruled in *Cunningham*."

under California's determinate sentencing law (hereafter sometimes referred to as DSL). Our Supreme Court decided *Black* on June 20, 2005, over four months before defendant's sentencing hearing. At that time, the trial court was compelled to follow *Black*. Therefore, any *Blakely* objection that defense counsel might have made concerning the trial court's imposition of an upper term sentence would have been futile. Under these circumstances, defendant's *Blakely* challenge was not forfeited. (*People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6; *People v. Turner* (1990) 50 Cal.3d 668, 703-704.)

2. *Express waiver*

The Attorney General argues that during proceedings in which defendant entered his plea of nolo contendere to all charges, defendant expressly waived his right to assert any *Blakely* challenge to future sentencing by the trial court. Defendant responds that there was no express waiver of his constitutional rights under *Blakely* and, specifically, he did not waive the right to assert under *Blakely* that any factors used in aggravation to impose an upper term sentence must be charged and proved beyond a reasonable doubt.

In assessing whether there has been an express waiver, "[i]t has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' " (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464, fns. omitted, overruled in part on other grounds in *Edwards v. Arizona* (1981) 451 U.S. 477.) "To be enforceable, a defendant's waiver of the right to appeal must be knowing, intelligent, and voluntary. [Citations.]" (*People v. Panizzon* (1996) 13 Cal.4th 68, 80.) " '[T]he valid waiver of a right presupposes an actual and demonstrable knowledge of the very right being waived. [Citations.]' [Citation.] . . . The burden is on the party claiming the existence of the waiver to prove it by evidence that does not leave the matter to speculation, and doubtful cases will be resolved against a waiver." (*People v. Vargas* (1993) 13 Cal.App.4th 1653, 1662.)

In the course of taking defendant's plea of nolo contendere in both cases, the court apprised him of his constitutional rights and the rights he would be waiving by entering the no contest plea. During those proceedings, the court specifically mentioned that defendant might have certain rights under *Blakely*. We have carefully reviewed the transcript of those proceedings. While the record may establish that defendant waived the right to a jury trial on the existence of factors used to impose an upper term punishment, that waiver did not extend to the standard of proof that would be required to establish those factors. There was no mention of defendant giving up the right to have the factors in aggravation upon which an upper term sentence might be based proved—either to a jury or the court sitting without a jury—beyond a reasonable doubt. We therefore conclude that defendant did not waive his *Blakely* challenge because such challenge was beyond the scope of any waiver obtained from defendant at the time of his change of plea. (See, e.g., *People v. Rosso* (1994) 30 Cal.App.4th 1001, 1005-1007 [waiver of appeal rights not found where court, during taking of guilty plea, did not advise the defendant of appellate rights, but only asked if the defendant gave up his right to appeal].)

3. *Merits of Blakely challenge*

Defendant claims that, because the court reached its sentencing determination by finding the existence of factors warranting imposition of the upper term by a preponderance of the evidence, he was deprived of his constitutional right to a jury trial and application of proof beyond a reasonable doubt. He cites the United States Supreme Court's decision in *Blakely*, *supra*, 542 U.S. 296, as authority compelling the conclusion that the upper term sentence for the forgery conviction violated his constitutional rights. In making this contention, however, defendant acknowledges that the California Supreme Court, in *Black*, *supra*, 35 Cal.4th at p. 1244, held *Blakely* inapplicable to the imposition of upper term sentences under California's determinate sentencing law.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), the United States Supreme Court held unconstitutional a New Jersey law that permitted an enhancement that could have resulted in potentially double the maximum sentence for possession of a firearm in the event that the judge determined by a preponderance of the evidence that a hate crime had been committed. It concluded 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." (*Id.* at p. 490.) This principle, the court explained, derives from two constitutional rights, namely, the right to trial by jury, and the prohibition against depriving a person of liberty without due process of law. (*Id.* at pp. 476-477; see also *Ring v. Arizona* (2002) 536 U.S. 584, 603-609.)

In *Blakely*, *supra*, 542 U.S. 296, the Supreme Court considered Washington determinate sentencing laws under which the trial court—after defendant had pleaded guilty to a class B felony—determined that he "had acted with 'deliberate cruelty' " (*id.* at p. 298), and accordingly "imposed an exceptional sentence of 90 months—37 months beyond the standard maximum." (*Id.* at p. 300.) The defendant contended that the Washington sentencing procedure deprived him of his federal constitutional right to a jury trial to determine beyond a reasonable doubt all of the facts required for the sentence imposed. (*Id.* at p. 301) The Supreme Court agreed, holding "that the '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.* [Citations.] In other words, the relevant '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 pp. 303-304.) The judge had relied on a fact not found by the jury or admitted by the defendant; accordingly the Supreme Court concluded that the sentence in *Blakely* was invalid. (*Id.* at p. 304; see also *United States*

v. Booker (2005) 543 U.S. 220 (*Booker*) [*Blakely* holding found applicable to Federal Sentencing Guidelines].)

In *Black*, *supra*, 35 Cal.4th 1238, the California Supreme Court considered the effect of *Blakely* and *Booker* on upper term sentencing under California's determinate sentencing law. After the defendant in *Black* was convicted of one count of continuous sexual abuse of a child (§ 288.5), the court imposed an upper term sentence of 16 years. (*Black*, *supra*, at p. 1245.) It based this sentencing decision on " 'the nature, seriousness, and circumstances of the crime.' " (*Ibid.*) The defendant argued that *Blakely* rendered California's determinate sentencing procedure unconstitutional, inter alia, because the procedure failed to "provide the defendant with a jury trial on the aggravating factors relied upon by the judge in imposing an upper term sentence." (*Id.* at p. 1248.)

The *Black* court noted that under California's determinate sentencing law, "[t]hree terms of imprisonment are specified by statute for most offenses." (*Black*, *supra*, 35 Cal.4th at p. 1247.) The judge's sentencing discretion is guided as follows: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." (§ 1170, subd. (b).) The court may select the upper term "only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation." (Cal. Rules of Court, rule 4.420(b).) The California Supreme Court acknowledged under this scheme, "[t]he sentencing judge retains considerable discretion to identify aggravating factors" (*Black*, *supra*, 35 Cal.4th at p. 1247), and that he or she may base that decision "on aggravating facts that have not been found true by the jury." (*Id.* at p. 1248.)[9] Circumstances in

[9] Rule 4.421 of the California Rules of Court provides a nonexclusive list of 17 factors in aggravation that the sentencing judge may consider. The sentencing judge, however, may consider any "additional criteria reasonably related to the decision being made." (Cal. Rules of Court, rule 4.408(a).)

aggravation or mitigation need be proved to the sentencing judge only by a preponderance of the evidence. (Cal. Rules of Court, rule 4.420(b).)

The *Black* court held that the imposition of an upper term sentence under California's determinate sentencing statute was not unconstitutional under *Blakely*. Our high court reasoned: "[E]ven though section 1170, subdivision (b) can be characterized as establishing the middle term sentence as a presumptive sentence, the upper term is the 'statutory maximum' for purposes of Sixth Amendment analysis. The jury's verdict of guilty on an offense authorizes the judge to sentence a defendant to any of the three terms specified by statute as the potential punishments for that offense, as long as the judge exercises his or her discretion in a reasonable manner that is consistent with the requirements and guidelines contained in statutes and court rules. . . . [T]he upper term is the 'maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict*. . . .' [Citation.]" (*Black*, *supra*, 35 Cal.4th at pp. 1257-1258, quoting *Blakely*, *supra*, 542 U.S. at p. 303.)

The defendant in *Cunningham*, *supra*, 127 S.Ct. 856—like the defendant in *Black*—received an upper term sentence of 16 years after his conviction under section 288.5, the sentencing judge having found six aggravating factors warranting the sentence. (*Cunningham*, *supra*, at pp. 860-861.) The California Court of Appeal (First District) rejected the defendant's *Blakely* challenge, and the California Supreme Court denied review, having decided *Black* nine days earlier. (*Cunningham*, *supra*, at p. 861.)

As a starting point for the court's analysis, Justice Ginsburg, writing for the majority in *Cunningham*, noted: "This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." (*Cunningham*, *supra*, 127 S.Ct. at pp. 863-864.) Accordingly, after discussing California's determinate sentencing law, and its decisions in *Apprendi*, *Blakely*, and *Booker*, the court concluded that "aggravating circumstances

depend on facts found discretely and solely by the judge. In accord with *Blakely*, therefore, the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum. [Citation.] Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt, [citation], the DSL violates *Apprendi's* bright-line rule: Except for 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.' [Citation.]" (*Cunningham*, *supra*, at p. 868.) After discussing *Black* at some length, the *Cunningham* court concluded that the California Supreme Court's reasoning was at odds with the principles of *Apprendi* and *Blakely*: "Because the DSL allocates to judges sole authority to find facts permitting the imposition of an upper term sentence, the system violates the Sixth Amendment. It is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Cunningham*, *supra*, at p. 870.)

Cunningham's holding disposes of defendant's challenge. The sentencing provision with which we are concerned here specifies that "[p]erjury is punishable by imprisonment in the state prison for two, three or four years." (§ 126.) Thus, under *Cunningham*, the middle term of three years was the "statutory maximum" for Sixth Amendment purposes under *Blakely*. (*Cunningham*, *supra*, 127 S.Ct. at p. 868.) We therefore conclude that the court erred by imposing the upper term of four years as provided in section 126 for the perjury conviction, which was doubled based on defendant's prior "strike" conviction (pursuant to §§ 667, subds. (b)-(i), and 1170.12).[10]

[10] *Cunningham* was decided on January 22, 2007, nearly three months after the submission of defendant's reply brief. We are mindful of our obligations under Government Code section 68081. The statute is inapplicable here, because our decision is not "based upon an issue which was not proposed or briefed by any party to the proceeding . . . ." (Gov. Code, § 68081.) The question of whether the upper term sentence imposed by the trial court here violated defendant's constitutional rights under

(continued)

4. *Prejudice*

The Attorney General argues lastly that, assuming there was *Blakely* error, it was harmless because defendant cannot establish prejudice. The Attorney General does not identify the constitutional standard for prejudice, but we conclude that the *Chapman*[11] standard of "harmless beyond a reasonable doubt" applies. In other words, *Blakely* error does not warrant relief if the failure to obtain jury findings on the aggravating factors resulting in the imposition of an upper term sentence was "harmless beyond a reasonable doubt." (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326 [*Chapman* test applied to instructional error with regard to element of sentence enhancement].)

The Attorney General asserts that any *Blakely* error in this instance was harmless beyond a reasonable doubt because the court based its sentencing decision, in part, on a finding that defendant was previously confined to prison and had "led a life of excessive criminality." The implicit argument is apparently that a jury would have similarly found true beyond a reasonable doubt one or more aggravating circumstances, had the issue been submitted for its determination.

We reject this argument. There is little question that defendant served a prior prison term. But we are unwilling to posit that the jury necessarily would have reached the conclusion beyond a reasonable doubt that defendant "led a life of excessive criminality," another aggravating factor upon which the court relied. We simply cannot say that a jury without question would have found aggravating circumstances true.

Blakely was fully briefed by the parties, and we are required to "pass upon and determine all the questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case." (Code Civ. Proc., § 43; see also *Westly v. Board of Administration* (2003) 105 Cal.App.4th 1095, 1113, fn. 14.) Since the United States Supreme Court's decision in *Cunningham* leaves no room for doubt that the imposition of an upper term sentence here was unconstitutional, there is no need for further briefing on that case's impact to the issue raised by defendant and briefed by the parties.

[11] *Chapman v. California* (1967) 386 U.S. 18, 24.

Therefore, under the *Chapman* standard, the error under *Blakely* was not harmless beyond a reasonable doubt.

III. *Sentence For Ammunition Possession Conviction (Section 654)*

A. *Background and Contentions*

In superior court case number CC238138, the court imposed a prison term of one year and four months for the count 6 conviction (possession of ammunition by a felon). It also imposed separate prison terms of one year and four months for the convictions of the offenses charged in counts 7 through 10, and a concurrent four-year term for the count 2 conviction—all five counts charging defendant with possession of firearms by a felon. During sentencing, the court specifically concluded that the weapon-possession offense charged in count 10—involving a weapon found the same date as the ammunition—was separate and distinct from the ammunition-possession charge (count 6).

The ammunition-possession conviction (count 6) was based upon evidence seized from various locations in defendant's Saratoga home on October 9, 2001. That evidence consisted of a loaded magazine for a .45 caliber Kimber handgun, a loaded magazine for .45 caliber Glock handgun, and a magazine for a .223 caliber AR-15 style rifle. At the time of that seizure, there was only one firearm found at the home—a loaded .45 caliber Kimber handgun with a laser site located in a gun safe (count 10). The information alleged that the ammunition possession took place on or about October 9, 2001. The weapons-possession convictions relevant to defendant's challenge under section 654 are as follows: count 2 (possession of a .45 caliber Glock pistol between September 8, 2001, and October 9, 2001); counts 7 through 9 (possession of unspecified rifles between January 10, 2000, and December 31, 2000; and count 10 (possession of a Kimber pistol between December 1, 1999, and October 9, 2001).

Defendant contends that the possession of the ammunition was related to the weapons-possession charges because all charges involved the same criminal intent, i.e.,

the possession of loaded firearms. Citing *People v. Lopez* (2004) 119 Cal.App.4th 132 (*Lopez*), defendant urges that the sentence for the count 6 conviction should have been stayed pursuant to section 654. The Attorney General responds that *Lopez* is distinguishable and that the record supported a finding that defendant possessed multiple criminal objectives.

B. *Penal Code Section 654*

Section 654, subdivision (a), provides: "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 . . . ." The statute thus "precludes multiple punishment for a single act or omission, or an indivisible course of conduct. [Citations.]" (*People v. Deloza* (1998) 18 Cal.4th 585, 591.) The purpose of section 654 "is . . . to ensure that punishment is commensurate with a defendant's criminal culpability. [Citations.]" (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 196.)

As construed by the Supreme Court, "[w]hether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) And as the high court later emphasized, "[t]he initial inquiry in any section 654 application is to ascertain the defendant's objective and intent. If he entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished 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. Beamon* (1973) 8 Cal.3d 625, 639.)

In reviewing the propriety of the imposition of multiple punishments for separate convictions under section 654 based upon a finding that the defendant held more than one

objective in committing those crimes, we evaluate whether there was substantial evidence to support that determination. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731.) The question of whether the defendant entertained multiple criminal objectives being one of fact for the trial court, we will sustain the court's findings if there is substantial evidence to support them. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135-1136.) The trial court "is vested with broad latitude in making its determination. [Citations.]" (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) Our review of the court's determination is made "in the light most favorable to the respondent and [we] presume the existence of every fact the trial court could reasonably deduce from the evidence." (*Ibid.*) Each case is decided in reference to its unique circumstances. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.)

C. *Discussion of Claim of Error*

At the outset, we note that defendant did not challenge the propriety of the sentence for the count 6 conviction below. But this did not constitute a forfeiture of defendant's section 654 argument on appeal. " 'Errors in the applicability of section 654 are corrected on appeal regardless of whether the point was raised by objection in the trial court or assigned as error on appeal.' [Citation.]" (*People v. Hester* (2000) 22 Cal.4th 290, 295; see also *Lopez*, *supra*, 119 Cal.App.4th at p. 138.)

Defendant's argument is that he cannot be subjected to multiple punishment for both the weapons-possession convictions and the ammunition-possession conviction. He links the specific ammunition found on October 9, 2001, with corresponding firearms. the possession of which was charged in other counts, to assert that the ammunition-possession conviction was part of a single criminal objective to possess loaded firearms. He claims that *Lopez*, *supra*, 119 Cal.App.4th 132, is dispositive.

In *Lopez*, the defendant was convicted, inter alia, of unlawful possession of a firearm (§ 12021, subd. (e)), and unlawful possession of ammunition (§ 12316, subd. (b)(1)). (*Lopez*, *supra*, 119 Cal.App.4th at p. 134.) The convictions arose out of an arrest

in which the defendant was found in possession of a loaded handgun. (*Id.* at p. 135.) He received a six-year prison term for the firearm-possession conviction and a concurrent six-year term for the ammunition-possession conviction. (*Id.* at p. 138.) The court in *Lopez* concluded that section 654 prohibited punishment for both offenses: "To allow multiple punishment for possessing ammunition in a firearm would, in our judgment, parse the objectives too finely. . . . Where, as here, all of the ammunition is loaded into the firearm, an 'indivisible course of conduct' is present and section 654 precludes multiple punishment." (*Ibid.*)

Here, in contrast to the circumstances in *Lopez*, the weapons-possession and ammunition-possession charges did not arise out of the seizure of loaded weapons; the police did not seize one or more loaded weapons that resulted in defendant being charged with separate weapons-possession and ammunition-possession offenses. Rather, each of the three items of ammunition stood alone, and was not incorporated into a weapon. The ammunition may (or may not) have been held by defendant for ultimate loading at another time into weapons that he was charged with having possessed. Only one of the items (the magazine for the .45 caliber Kimber handgun) was associated with a weapon seized on October 9, 2001. The fact that the three items of ammunition may have been compatible with certain weapons—the illegal possession of which defendant was charged in other counts—does not mean that defendant's possession of the ammunition could not have been punished separately from possession of the weapons. (Indeed, defendant may have had other weapons at his disposal as of October 9, 2001—the possession of which was not subject to any charges—that could have been compatible with the ammunition.) The crime of possession of ammunition by a felon (§ 12316, subd. (b)) is a crime separate and distinct from possession of a firearm by a felon (§ 12021, subd. (a)(1)). (Cf. *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1410 [noting that a number of cases have rejected the argument that section 654 bars separate punishment for weapons possession and another offense involving weapon].) The blanket conclusion that section 654 bars

multiple punishments for violations of sections 12021 and 12316 would be tantamount to a merger of those two offenses.

Furthermore, the court in *Lopez*, *supra*, did not suggest that section 654 would prevent separate punishment for ammunition- and weapons-possession convictions under the circumstances present here. To the contrary, the court emphasized that its holding was based upon the fact that the defendant's weapon- and ammunition-possession offenses resulted from all of the ammunition having been loaded into the firearm. (*Lopez, supra*, 119 Cal.App.4th at p. 138.) The court expressly noted: "While there may be instances when multiple punishment is lawful for possession of a firearm and ammunition, the instant case is not one of them." (*Ibid.*)

There was substantial evidence to support either an express or implied finding by the court below that there were multiple objectives in the commission of the ammunition-possession and weapons-possession crimes of which defendant was convicted. (See *People v. Blake* (1998) 68 Cal.App.4th 509, 512 [trial court's implied finding of existence of separate criminal intents will not be disturbed if supported by substantial evidence].) *Lopez* is distinguishable. The court therefore did not err by failing to stay the consecutive prison sentence of one year and four months for the ammunition-possession conviction (count 6).

DISPOSITION

The judgment is reversed and remanded to the trial court for limited purpose of resentencing. Consistent with this opinion, *Blakely*, and *Cunningham*, the trial court shall

resentence defendant with respect to the perjury conviction (count 1 in superior court case number 210852).

Duffy, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

McAdams, J.