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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. IRVING LEROY DAVEY, Defendant and Appellant.	A102885 (Marin County Super. Ct. No. SC123734)

Appellant pleaded guilty to one count of annoying a child, and four counts of indecent exposure. The four indecent exposure counts arose from two separate incidents, in each of which appellant exposed himself to two children simultaneously. Appellant contends that his sentences on two of the indecent exposure counts should have been stayed, because each incident involved only one criminal act. We agree, and hold as a matter of first impression that under Penal Code section 654, a single act of indecent exposure constitutes only one crime for the purpose of sentencing, regardless of the number of people who witness it.

During the pendency of this appeal, the United States Supreme Court decided in *Blakely v. Washington* (2004) __ U.S. __ [124 S.Ct. 2531] (*Blakely*) that all facts (other than a prior conviction) allowing a criminal defendant's sentence to be increased beyond an otherwise applicable statutory maximum must be proved to a jury beyond a reasonable doubt. Appellant was sentenced to the aggravated term on his conviction for annoying a child. Having requested supplemental briefs regarding the applicability of *Blakely* to this

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part III.

case, we conclude in the unpublished portion of this opinion that *Blakely* requires reconsideration of that portion of appellant's sentence as well as the portions affected by the Penal Code section 654 issue. We therefore remand the case to the trial court for resentencing consistent with this opinion.

I.

FACTS AND PROCEDURAL BACKGROUND

On April 7, 2001, appellant masturbated openly in front of two 10-year-old girls who were sitting on a bench eating candy.[1] On June 9, he approached a car parked in a grocery store parking lot, and exposed his penis to two girls, aged 10 and 12, who were sitting inside the car. On October 17, he was caught masturbating while looking at a 5-year-old girl in a fast food restaurant.

On October 8, 2002, appellant was charged by information with the following offenses: for the April 7 incident, two counts (counts one and three) of indecent exposure with a prior indecent exposure conviction (Pen. Code, § 314.1[2]), and two counts (counts two and four) of annoying or molesting a child, with a prior conviction for the same (§ 647.6); for the June 9 incident, two counts (counts five and seven) of indecent exposure with a prior indecent exposure conviction (§ 314.1), and two counts (counts six and eight) of annoying or molesting a child, with a prior conviction for the same (§ 647.6); and for the October 17 incident, one count (count nine) of annoying or molesting a child, with a prior conviction for the same (§ 647.6), and one count (count ten) of engaging in lewd conduct in a public place (§ 647, subd. (a)).

On February 7, 2003, pursuant to a negotiated disposition, appellant pleaded guilty to all of the indecent exposure charges (counts one, three, five, and seven) and one of the

[1] All further unspecified references to dates are to the year 2001. Because appellant pleaded guilty, our statement of facts is based on the probation report. (We have also gleaned the ages of some of the complaining witnesses from the information.) We have omitted distasteful details that are irrelevant to the issues presented by the appeal.

[2] All further unspecified statutory references are to the Penal Code.

charges of annoying a child (count nine),[3] and admitted all of the prior conviction allegations in the information. All of the other charges were dismissed with a *Harvey* waiver. (*People v. Harvey* (1979) 25 Cal.3d 754.) Appellant was not promised any specific sentence as an inducement for his guilty plea, and was advised that he faced a maximum potential sentence of eight years eight months in state prison.

On April 9, 2003, appellant was sentenced to the aggravated term of six years on count nine, followed by consecutive eight-month sentences on each of the other four counts to which he had pled guilty (counts one, three, five, and seven), for a total term of eight years eight months in state prison. On June 5, 2003, appellant filed a notice of appeal and received a certificate of probable cause from the trial judge.

II.

SECTION 654 ISSUE

Appellant argues that two out of his four eight-month sentences for indecent exposure should have been stayed under section 654.[4] Section 654, subdivision (a), provides that "[a]n 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

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[3] As appellant's trial counsel pointed out at the change of plea hearing, and the prosecutor conceded, appellant never actually touched the child involved in this count. Accordingly, appellant pleaded guilty only to annoying a child, not to molesting one.

[4] In its brief on this appeal, respondent presented no argument that appellant had waived the section 654 issue. On June 23, 2004, however, some four months after the completion of briefing, respondent sent a letter to this court noting the California Supreme Court's grant of review in *People v. Shelton*, review granted June 16, 2004, S124503 (*Shelton*). *Shelton* presents the question whether a section 654 challenge is waived where, as here, the defendant entered a plea based on a representation as to the maximum possible sentence, but did not agree to a specific prison term. (Cf. *People v. Hester* (2000) 22 Cal.4th 290, 295 [section 654 argument waived where defendant agrees in plea bargain to accept specified prison term].)

In our view, respondent forfeited the right to rely on a waiver argument in the present case by failing to address it in its responsive brief on this appeal. (See *San Mateo County Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523, 558-559 & fn. 28; *Shoemaker v. County of Los Angeles* (1995) 37 Cal.App.4th 618, 633, fn. 17.) Accordingly, we need not, and do not, reach the issue presented by *Shelton*. As a result, we also need not address appellant's alternative contention that his trial counsel's failure to raise the section 654 issue in the trial court constituted ineffective assistance.

potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . ." The purpose of the statute is "to prevent multiple punishment for a single act or omission, even though that act or omission violates more than one statute and thus constitutes more than one crime." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135; see, e.g., *People v. Latimer* (1993) 5 Cal.4th 1203, 1207-1212, 1216-1217 [section 654 required stay of sentence on kidnapping committed for sole purpose of facilitating rape of kidnap victim]; *Neal v. State of California* (1960) 55 Cal.2d 11, 19 (*Neal*) [section 654 precluded consecutive sentence for arson committed for sole purpose of killing persons in building].) Although section 654 by its terms bars only multiple punishment for a single act violating more than one statute, it has long been interpreted also to preclude multiple punishment for more than one violation of a single Penal Code section, if the violations all arise out of a single criminal act. (*Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 349, 353 [section 654 bars multiple convictions for driving under the influence based on one incident, even if driver causes injury to several persons]; see also *Neal*, *supra*, 55 Cal.2d at p. 18, fn. 1.)

Under established case law, there are two limitations on the scope of section 654's ban on multiple punishment. First, when multiple victims are targeted by a single episode of violent criminal conduct, the perpetrator may be punished separately for the crimes committed against each victim. (*Neal*, *supra*, 55 Cal.2d at pp. 20-21; see generally *People v. Hall* (2000) 83 Cal.App.4th 1084, 1088-1090 (*Hall*) [discussing case law under multiple-victim exception].) Second, multiple crimes that arise from a single course of criminal conduct may be punished separately, notwithstanding section 654, if the acts constituting the various crimes serve separate criminal objectives. (See, e.g., *People v. Harrison* (1989) 48 Cal.3d 321, 324-325, 336-338 [consecutive sentences for separate acts of penetration committed during single episode of sexual assault were not barred by section 654, because defendant intended to commit a number of separate criminal acts]; *People v. Jimenez* (2002) 99 Cal.App.4th 450, 456 [upholding conviction of three separate violations of same child molestation statute based on single incident during which defendant fondled three separate portions of victim's body].)

The question posed by the present case is whether, under either of these exceptions to section 654, a single act of indecent exposure witnessed by more than one person may result in sentencing on more than one count. Neither party has cited, and our research has not disclosed, any published California case addressing this specific question.[5]

A. Multiple Victims

Appellant argues in the present case that the exception for multiple victims of violent crime does not apply, because his crime was not one of violence against the person. Respondent's argument does not squarely address this issue, appearing to focus instead on the exception for separate criminal objectives. In any event, we find appellant's argument on the multiple victim issue persuasive.

"A review of the relevant case law since *Neal*[, *supra*, 55 Cal.2d 11,] reveals that in each case where a criminal act qualified for the multiple-victim exception, the criminal act – that is, the crime of which defendant was convicted, including any allegations in enhancement – was defined by statute to proscribe an act of violence against the person, that is, as *Neal* [citation] put it, an act of violence committed 'with the intent to harm' or 'by means likely to cause harm' to a person. [Citations.] Indeed, the California Supreme Court has stated that '[a] defendant may properly be convicted of multiple counts for multiple victims for a single criminal act *only* where the act *prohibited by the statute* is centrally an "act of violence against the person." ' [Citation.]" (*Hall*, *supra*, 83 Cal.App.4th at p. 1089, italics added by *Hall*.) Thus, "in each case where the multiple-victim exception was satisfied, the qualifying crime, at least in conjunction with any allegations in enhancement, was defined to proscribe an act of violence committed against the person." (*Id.* at p. 1091, italics omitted.)

In *Hall*, *supra*, 83 Cal.App.4th 1084, the court held that section 654 precluded consecutive sentences for three counts of exhibiting a firearm in the presence of peace

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[5] We note, however, that the courts of two other states have concluded that a single incident of indecent exposure constitutes only one crime, even if witnessed by more than one person. (*State v. Eisenshank* (Wash. App. 1974) 521 P.2d 239; *Young v. State* (Tex. Crim. App. 1953) 261 S.W.2d 838.) Our research has not disclosed any case from any other state that holds to the contrary.

officers, based on a single incident in which the defendant emerged from his house, which the police had surrounded, holding a loaded shotgun. After analyzing the statute under which the defendant was convicted (§ 417, subd. (c)), the court concluded that it did not define a crime of violence against the person so as to allow consecutive sentences under the multiple-victim exception. (*Id.* at pp. 1091-1095.)

People v. Garcia (2003) 107 Cal.App.4th 1159 provides another recent example of a case holding the multiple-victim exception inapplicable because the underlying crime was not one of violence. In *Garcia*, the defendant drove his car at a high speed for 30 minutes in an attempt to evade three police officers who were chasing him. The trial court convicted him on three felony counts of evading police. On appeal, however, the Attorney General confessed error, and the court reversed two out of the three convictions. The court reasoned that only one conviction could result from the defendant's single course of conduct, even though three police officers were pursuing him, because felony evading, though dangerous, is not a crime of violence against the person. (*Id.* at pp. 1162-1164.)

Respondent argues that *Hall* is distinguishable because the *Hall* court reasoned that the culpability of the defendant in that case did not depend on the number of people who observed him brandishing his firearm (see *Hall*, *supra*, 83 Cal.App.4th at pp. 1095-1096), whereas appellant's culpability here is increased by the fact that he did not exhibit himself to random passersby, but rather chose to do so to young girls who were captive and defenseless, and who were scared and traumatized by his actions. We find this argument unpersuasive, because as the case law makes clear, and as *Hall* squarely held, the applicability of the multiple-victim exception to section 654 does not turn on the defendant's degree of moral blameworthiness, but rather on whether the crime the defendant committed is one defined to involve an act of violence.

In holding that indecent exposure is not a violent crime for the purpose of the multiple-victim exception under section 654, we do not in the least intend to condone appellant's despicable behavior. Nor are we insensitive to the psychological harm it may have caused to the innocent children he chose to victimize. Nonetheless, his crime is not

statutorily defined as involving violence to the person, and the case law clearly limits the applicability of the multiple-victim exception to crimes that are so defined.

B. Separate Criminal Objectives

Perhaps recognizing that the law is as described above, on this appeal respondent does not appear to press for application of the multiple-victim exception. Rather, relying primarily on *People v. McCoy* (1992) 9 Cal.App.4th 1578 (*McCoy*), respondent argues that the judgment should be affirmed because appellant "had separate criminal objectives warranting a consecutive sentence for each conviction."

In *McCoy*, the defendant was estranged from his wife, the mother of his three children. Under orders issued by the family court, the mother had custody of the couple's two daughters, while the defendant had custody of their son, and each parent had visitation rights with the children in the other parent's custody. At one point, when the mother finished a visitation period with the son, she delivered all three children to the defendant with the understanding that the daughters were to be returned to her at the end of the defendant's visitation period a few days later, and the son was to be delivered for another visitation period a week after that. Instead, the defendant absconded with all three children and went to Florida. (*McCoy*, *supra*, 9 Cal.App.4th at p. 1582.)

The defendant was convicted of three counts of violating a child custody order. On appeal, the court rejected the defendant's contention that section 654 precluded him from being given consecutive sentences on each of the three counts, because all three convictions arose from the single transaction of absconding with his children.[6] In so doing, the court reasoned that the defendant's "characterization of his crimes as having a single objective of 'having sole custody of his children . . .' [was] too broad." (*McCoy*,

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[6] The procedural posture of *McCoy* was somewhat unusual, but not in any way that affected the reviewing court's analysis of the section 654 issue. The defendant agreed to a "slow plea" (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592), waiving his right to trial in exchange for a promise not to sentence him to consecutive terms. On appeal, he argued that his plea agreement was invalid because he was not aware that the sentencing promise he received was actually valueless, because consecutive terms would have been barred by section 654 in any event. (*McCoy*, *supra*, 9 Cal.App.4th at pp. 1583-1584.)

supra, 9 Cal.App.4th at p. 1585.) Instead, the court found that the defendant "harbored three separate criminal objectives which were independent and not merely incidental to each other," because "[h]is intent to violate the custody agreements as to [the daughters] and to violate the visitation agreement as to [the son] was personal to each child." (*Id.* at p. 1586.) Moreover, "[i]n depriving his wife of her custodial/visitation rights to all three of her children, defendant acted more culpably than had he deprived his wife of her rights to one of the children." (*Ibid.*)

We have no quarrel with the reasoning or the result in *McCoy*, but find it distinguishable from the present case. "The test for determining whether section 654 prohibits multiple punishment has long been established: 'Whether 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.' [Citation.]" (*People v. Britt* (2004) 32 Cal.4th 944, 951-952, italics added.) Thus, for example, our Supreme Court recently held, in *People v. Britt*, *supra*, that a registered sex offender who changes residence within California cannot be punished separately both for failing to notify authorities in the county of the former residence and for failing to do so in the county of the new residence, because the offender's "objective – avoiding police surveillance – was achieved just once, but only by the combination of both reporting violations." (*Id.* at p. 953.)

Here, respondent argues that in each of appellant's incidents of indecent exposure, he had multiple criminal objectives. Respondent does not, however, identify what those multiple objectives were. It is true that here, as in *McCoy*, appellant's crimes involved multiple children. Unlike the parental abductions involved in *McCoy*, however, appellant's crimes were not *personal* to each of the children separately; rather, the children were strangers to him, and it appears that he chose them more or less randomly based on their age and the existence of an opportunity.

We have also considered *People v. Jimenez*, *supra*, 99 Cal.App.4th 450, although it did not expressly discuss section 654. *People v. Jimenez* held that a child molester who

fondled several *separate* portions of his victim's body was properly convicted of several counts of child molestation under section 288. (*Id.* at pp. 453-456.) In so doing, the court relied on *People v. Harrison*, *supra*, 48 Cal.3d 321, which held that section 654 did not require that sentence be stayed on any of the defendant's multiple convictions for penetration with a foreign object, even though all were committed on the same victim and on the same occasion, because of the "defendant's intent to commit a number of separate base criminal acts upon his victim." (*Id.* at p. 337.) In this case, however, there is nothing in the record to suggest that appellant either intended or achieved any *separate* criminal objective by exposing himself to two girls rather than one.

Rather, the present case is more like *People v. Spirlin* (2000) 81 Cal.App.4th 119, in which the defendant committed three different robberies using the same handgun, while remaining in continuous constructive possession of the gun during the entire period. The defendant was convicted of three counts of being a felon in possession of a gun. The court held that section 654 required that the sentences on two out of the three counts be stayed, because the defendant did not achieve more than one *separate* criminal objective by illegally possessing the same firearm for a continuous period of time. (*Id.* at pp. 128-131.)

Similarly, a single incident of indecent exposure presumably provides a *single* occasion of sexual gratification, regardless of the number of persons in whose presence the exposure occurs. Accordingly, we conclude that the multiple-objectives exception to section 654 does not apply to a single incident of indecent exposure committed in the presence of multiple persons.

III.

***BLAKELY* ISSUE**

In sentencing appellant to the aggravated term on count nine, the trial judge relied on her finding that appellant's "actions were against particularly vulnerable, young children, between the ages of five and 12," whom appellant "apparently targeted . . . as a result of their age." (See Cal. Rules of Court, rule 4.421(a)(3) [circumstances in

aggravation include fact that victim was particularly vulnerable].[7]) The judge also characterized appellant as having "la[in] in wait for them [the victims] with the intent of exposing [him]self." (See rule 4.421(a)(8) [circumstances in aggravation include fact that manner in which crime was carried out indicates planning].) In addition, the judge noted that appellant had previously re-offended while on probation and parole, and had served a prior prison term. (See rules 4.421(b)(3), 4.421(b)(5) [circumstances in aggravation include facts that defendant has served prior prison term and that defendant's prior performance on probation or parole was unsatisfactory].) Finally, the judge remarked that "[s]o far, either in custody or out of custody, treatment hasn't worked. So all I can consider is that you need to be removed from society, and I do believe, for the reasons stated, that this is an aggravated case."

Appellant's opening supplemental brief argues that the judge's selection of the aggravated term on count nine violated the stricture of *Blakely* because it was based in part on the findings that the victims were particularly vulnerable and that the manner in which the crime was committed indicated planning. Appellant recognizes that the other factors relied on by the judge may be considered constitute recidivism-based factors, which might arguably constitute an exception to *Blakely* under *Almendarez-Torres v. U.S.* (1998) 523 U.S. 224 (*Almendarez-Torres*), but contends that even if so, the judge's reliance on two factors clearly falling within *Blakely* requires reversal. Finally, appellant argues that the imposition of consecutive sentences on the other four counts also violated *Blakely*.[8]

Respondent's supplemental brief argues that appellant's *Blakely* argument was forfeited by his failure to object at his sentencing. We recently rejected the same argument, premised on the same authorities, in *People v. Butler* (Sept. 27, 2004, A101799) __ Cal.App.4th __, __ [p. 20]; 2004 WL 2153559; 2004 D.A.R. 12,083

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[7] All further references to rules are to the California Rules of Court.

[8] Our holding on the section 654 issue does not render the consecutive sentence issue moot, because section 654 requires that sentencing be stayed only on two out of the four counts on which appellant received consecutive sentences.

(*Butler*), and we see no reason either to depart from that holding here, or to reiterate its reasoning. Respondent also argues that *Blakely* does not apply to the imposition of an aggravated term under California's determinate sentencing law. Again, we rejected this argument in *Butler*, *supra*, __Cal.App.4th at p. __ [pp. 19-20] and we shall adhere to that holding here without repeating our reasons.[9]

Respondent further argues that even if *Blakely* applies to the trial judge's selection of the aggravated term on count nine, it does not apply to the trial judge's decision to make the sentences on the other counts consecutive rather than concurrent. Appellant cites no authority holding to the contrary, and we have found none. On this issue, which was not addressed in *Butler*, *supra*, __Cal.App.4th __, we agree with the courts that have accepted respondent's position.[10] (See *People v. Sykes* (2004) 120 Cal.App.4th 1331, 1341-1345, petn. for review pending, petn. filed Sept. 1, 2004, S127529; *People v. Ochoa* (2004) 121 Cal.App.4th 1551, 1565-1567; *People v. Sample* (2004) 122 Cal.App.4th 206, 225-227; *People v. Vaughn* (Oct. 5, 2004, B165489) __ Cal.App.4th __, __ [2004 WL 2223299].) Accordingly, subject to our holding on the section 654 issue, *ante*, the trial judge will remain free, on remand, to impose consecutive sentences for the convictions on the indecent exposure counts.

Finally, respondent argues that even if *Blakely* applies, there is no need to reverse, because the judge's choice of the aggravated term was based in part on the fact that appellant served a prior prison term, which (as appellant concedes – arguendo, at least) falls within the *Almendarez-Torres* exception for prior convictions. Again, based on our reasoning in *Butler*, *supra*, __Cal.App.4th at p. __ [pp. 21-22] we disagree with respondent's position that the presence of one non-*Blakely* aggravating factor entirely insulates a sentence from *Blakely* review.

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[9] This issue is currently pending before the California Supreme Court in *People v. Towne*, review granted July 14, 2004, S125677, and *People v. Black*, review granted July 28, 2004, S126182.

[10] This issue is also currently pending before the California Supreme Court in *People v. Black*, *supra*, review granted July 28, 2004, S126182.

In the present case, however, we need not determine whether or not the *Blakely* error was harmless, much less what harmless error standard applies, because we must remand this case for resentencing in any event as a result of the section 654 error. We assume that, upon remand, the trial judge will follow *Blakely* and refrain from relying on any aggravating factor that cannot properly be considered without a jury determination.

IV.

DISPOSITION

The judgment as entered is reversed, and the case is remanded to the trial court for resentencing and entry of a new judgment consistent with this opinion.

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Ruvolo, J.

We concur:

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Kline, P.J.

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Haerle, Acting P.J.

Trial Court:	Marin County Superior Court
Trial Judge:	Hon. Verna A. Adams
Counsel for Appellant:	Alex Green, under the First District Appellate Project Independent Case System
Counsel for Respondent:	Bill Lockyer, Attorney General; Robert R. Anderson, Chief Assistant Attorney General; Eric D. Share, Supervising Deputy Attorney General; Stan M. Helfman, Supervising Deputy Attorney General; Ayana A. Cuevas, Deputy Attorney General