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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT ANDREW DENNIS,

Defendant and Appellant.

F049669

(Super. Ct. No. 1084303)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. David G. Vander Wall, Marie Sovey Silveira and Hurl William Johnson III, Judges.

Robert P. Whitlock, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves and Dane R. Gillette, Chief Assistant Attorneys General, Stan A. Cross, Acting Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Wanda Hill Rouzan and Carlos A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Robert Andrew Dennis (appellant) in count I of being an ex-felon in possession of a firearm (§ 12021, subd. (a)) and in count II of unlawful

possession of ammunition (§ 12316, subd. (b)(1)).[1] The trial court, in a bifurcated proceeding, found true four section 667.5, subdivision (b) prior prison term enhancements. The court sentenced appellant to a total of six years in state prison: the upper term of three years on both counts, count II to run concurrent to count I, plus an additional three years on both counts for the prior prison enhancements, the enhancements in count II to run concurrent to those imposed in count I.

Appellant contends the trial court erred when (1) it denied his section 1538.5 motion to suppress evidence; (2) it refused to instruct with CALJIC No. 2.28; (3) it imposed, rather than stayed, the upper term on count II; (4) it imposed the upper term in counts I and II; and (5) it imposed the prior prison enhancements on count II when it had already done so on count I. We agree only with the last of these contentions and in all other respects affirm.

FACTS

On November 19, 2004, Deputy Joshua Humble and Sergeant Beck of the Stanislaus County Sheriff's Department went to a residence, a mobile home in Riverbank, to conduct a search. When Deputy Humble first arrived, he saw a woman standing next to a car in the driveway of the residence. When she saw the officers approaching, she hurriedly entered the residence. The officers knocked on the front door and announced their presence three times before the woman they had seen earlier answered the door. The woman identified herself as Kristi Bello and told Deputy Humble that there was a man in the residence with her.

Outside the residence, Sergeant Beck announced his presence over the patrol car's public address system. Sergeant Beck ordered the man, whom the officers believed to be appellant, to exit the residence. Appellant came out about seven minutes later.

Deputy Humble then searched the residence. Inside, on the living room couch, Deputy Humble discovered a black duffel bag that contained a box of .380-caliber

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

ammunition and some toiletry items. Deputy Humble discovered a loaded and cocked .380-caliber handgun in a holster in the bathroom medicine cabinet. The ammunition from the handgun and the ammunition in the bag were made by the same manufacturer and had the same markings.

While Deputy Humble searched the residence, Detective Priscilla Woods spoke with Bello, who told her that appellant was carrying the black duffel bag with him when he arrived at the residence about 10 minutes before the deputies did. Bello told the detective that appellant placed the bag on the living room couch, ordered Bello to lock the door and not open it, and then went into the bathroom.

Crystal Fore arrived and spoke with Detective Woods. Fore testified that appellant had borrowed her car the day before for a few hours, but did not return it. A woman telephoned Fore to let her know that her car was parked at a residence in Riverbank. Fore then went to the residence to get her vehicle, where she encountered Detective Woods. While Fore spoke with Detective Woods, she saw Deputy Humble with the black duffel bag, and she identified it as the same black bag appellant was carrying the day before. Fore noticed that appellant had socks, underwear, jeans, and shirts inside the black bag. An inventory of the duffel bag revealed men's toiletries and items of men's clothing, including jeans and underwear which were the same size and brand as those worn by appellant when he was booked into custody. A fingerprint lifted from the lid of a scale found in the duffel bag did not match appellant's prints.

The owner of the residence, Debra Cullum, later told officers that she had left Bello to clean and do laundry while Cullum was at the hospital visiting her boyfriend.

Defense

Detective Woods testified that there were notes, consisting of four letter-sized pieces of paper folded together, in the duffel bag when she originally inventoried the bag's contents but that she did not list them on her inventory report. The notes contained several names and phone numbers, as well as descriptions of different jobs and amounts of money. No attempt was made to contact any of the individuals on the list. Detective

Woods admitted that defense counsel had been informed of the notes only the day before her testimony when she brought the duffel bag to court. She also testified that neither the defense nor the prosecution had asked to examine the bag or its contents at any time prior to trial.

DISCUSSION

1. Did the trial court err when it denied appellant's section 1538.5 motion?

Appellant contends the trial court erred when it denied his motion to suppress evidence. According to appellant, the prosecution "failed to adequately establish [the] deputies' knowledge that appellant was a parolee, and the factual basis for the search of the mobile home and seizure of the gun and black duffel bag."

A. The section 1538.5 motion and hearing

Prior to the preliminary hearing, appellant filed a motion to suppress "on the grounds that the search and seizure was without a warrant[.]" The People filed an opposition to the motion arguing that appellant did not establish that he had a legitimate expectation of privacy in the place searched, and asserting that the search was a proper parole search.

The facts shown by the testimony at the section 1538.5 hearing conducted in conjunction with the preliminary hearing were the same as those revealed at trial and discussed above, with the addition of the following.

When the officers went to the residence to be searched on November 19, 2004, they went to look for appellant, whom they considered a "wanted parolee." When they spoke to Bello, they learned she also was on parole. After speaking to Bello, and learning that appellant was inside, the officers "set up a perimeter on the residence" because they had been informed by parole that appellant might be armed and dangerous.

Deputy Humble testified that a search of the residence was conducted on the basis that appellant was on parole, but he agreed that it was not appellant's residence. It belonged to Debra Cullum. Detective Woods testified that Bello told the officers Cullum

had left her in charge of the residence and that she had the capacity to consent to the search.

Following testimony, defense counsel argued that neither Bello nor appellant "were residents at that address," and that it appeared that Detective Woods relied on Bello's consent to enter, while Deputy Humble testified that it was Bello's parole status that allowed them to enter. The prosecutor, who again described appellant as on searchable parole, argued that appellant had no standing to contest the search because he did not have "any temporary residency or occupancy rights to any of the rooms in the house[.]"

The magistrate denied the motion without comment.

On November 7, 2005, after the filing of the information, appellant renewed the motion to suppress evidence. (See Pen. Code, § 1538.5, subd. (i).) He claimed he had possessed an expectation of privacy in the area searched; he also claimed that no evidence had been presented at the previous hearing to show that the terms of appellant's parole extended beyond the search of his person or residence. The prosecution filed an opposition to the motion, claiming appellant lacked standing and that the search was lawful.

At a hearing on the renewed motion, the prosecutor and defense counsel continued to argue whether appellant had standing to object to the search. After discussion about whether it was proper to admit additional evidence, the trial court did allow Parole Agent Dan Garcia to testify that appellant had been a parolee under his supervision at the time of the search and that conditions of appellant's parole included that "[h]is person was searchable, his residence is searchable, any property under his control was searchable without warrant by an agent of the Department of Corrections or any law enforcement officer." Agent Garcia acknowledged that he did not testify at appellant's preliminary hearing on the original motion to suppress.

At the conclusion of the hearing on the renewed motion, the trial court stated that it would review the preliminary hearing transcript and any additional authorities the parties submitted before ruling on the motion.

On December 12, 2005, the trial court denied the suppression motion, stating that it had "determined that [appellant] had standing but that the search was proper because of the terms of search that he has as a parolee." When asked by defense counsel whether the court found the additional testimony of Agent Garcia was properly admitted, the court stated that the additional testimony was not a factor in its decision, because the terms of a parole search were sufficiently determined at the original section 1538.5 hearing.

B. Applicable law

The Fourth Amendment provides "[t]he right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated …." (U.S. Const., 4th Amend.) This guarantee has been incorporated into the Fourteenth Amendment to the federal Constitution and is applicable to the states. (See *Mapp v. Ohio* (1961) 367 U.S. 643 [federal exclusionary rule applicable to the states].)

When a trial court's ruling on a motion to suppress evidence is challenged on appeal, we review its findings under the deferential substantial evidence standard. We exercise our independent judgment to determine whether, on the facts found, the search was reasonable under the Fourth Amendment. (*People v. Carter* (2005) 36 Cal.4th 1114, 1140-1141; *People v. Leyba* (1981) 29 Cal.3d 591, 596-597.)

C. Parole search

Appellant contends the trial court erred in denying his suppression motion because the evidence presented at the preliminary hearing was not adequate to justify the search as one conducted pursuant to a condition of parole. Though appellant's argument is not entirely clear, it appears to be two-pronged. We will reject both.

First, we reject the argument that the evidence was insufficient to show that the officers knew appellant was on parole when they commenced the search. Deputy

Humble knew appellant was on parole at the time of the search. He testified that he went to the residence to assist in the search of a "wanted parolee" by the name of Robert Dennis. Deputy Humble also stated that, after Bello confirmed that appellant was in the residence, the officers "set up a perimeter on the residence," because they "had received information from parole that he may be armed and dangerous[.]" Detective Woods, who was also there at the time of the search, testified that she had spoken with appellant's parole officer and verified that he was on active parole and that "as a condition of parole," he was "searchable."

Second, we reject appellant's attack on the search based on the *Harvey-Madden*[2] rule. Under the requirements of that rule, when a law enforcement officer relies solely on information obtained from official channels (such as another officer) as the basis for a search or arrest, the prosecutor must establish the source of the information and how it was obtained. (*Remers v. Superior Court* (1970) 2 Cal.3d 659, 667.) "To hold otherwise would permit the manufacture of reasonable grounds for arrest within a police department by one officer transmitting information purportedly known by him to another officer who did not know such information, without establishing under oath how the information had in fact been obtained by the former officer." (*Id.* at pp. 666-667.)

Assuming that the *Harvey-Madden* rule would apply here, we nonetheless reject appellant's argument because he raises the issue for the first time on appeal. Appellant challenged the search on several grounds, but never raised a *Harvey-Madden* or similar type objection. His failure to do so on these grounds waives appellate review. (Evid. Code, § 353, subd. (a); *People v. Rogers* (1978) 21 Cal.3d 542, 547-548.) As stated in *Rogers*,

> "[t]he bar against raising a *Harvey/Madden* issue for the first time on appeal is but an application of the general rule that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be

[2] *People v. Harvey* (1958) 156 Cal.App.2d 516; *People v. Madden* (1970) 2 Cal.3d 1017.

> urged on appeal. (See Evid. Code, § 353; *People v. Welch* (1972) 8 Cal.3d 106, 114-115; *People* v. *De Santiago* (1969) 71 Cal.2d 18, 22.) The contrary rule would deprive the People of the opportunity to cure the defect at [the] trial [level] and would 'permit the defendant to gamble on [success at that level] secure in the knowledge that a conviction would be reversed on appeal.' (*Coy* v. *Superior Court* (1959) 51 Cal.2d 471, 473.)" (*Ibid*.)

Appellant also contends, and we reject the contention, that the suppression motion was denied in error because "[l]acking any particularized suspicion, the officers' search of the [residence] was unreasonable." As stated in *People v. Sanders*, "[a] law enforcement officer who is aware that a suspect is on parole and subject to a search condition may act reasonably in conducting a parole search even in the absence of a particularized suspicion of criminal activity, and such a search does not violate any expectation of privacy of the parolee." (*People v. Sanders* (2003) 31 Cal.4th 318, 333.) And as stated in *People v. Reyes* (1998) 19 Cal.4th 743, "[w]here the search is for a proper purpose, we hold that, even in the absence of particularized suspicion, a search conducted under the auspices of a properly imposed parole search condition does not intrude on any expectation of privacy 'society is "prepared to recognize as legitimate."'" (*Id.* at p. 754.)

Appellant has failed to show that his Fourth Amendment rights were violated by the search. We will therefore not address respondent's assertion that appellant lacked an expectation of privacy or "standing" to contest the search.

2. Did the trial court err when it refused to give CALJIC No. 2.28?

Appellant contends the trial court erred by refusing to give CALJIC No. 2.28 regarding untimely disclosure of certain evidence—to wit, Detective Woods's discovery in the black duffel bag of papers with names and telephone numbers. We disagree.

A. Background information

Prior to Detective Woods's testimony as a defense witness, defense counsel requested that the trial court instruct with CALJIC No. 2.28 because counsel had been informed by the prosecution only the day before that a document containing names and phone numbers had been found by Detective Woods in the black duffel bag when she

first inventoried it several months before trial. Defense counsel argued that the names and phone numbers of the individuals might have provided exculpatory information about the bag's true owner, but that the exculpatory value of the notes had been lost because of the lapse of time. Defense counsel also acknowledged that he had made no attempt to look at the physical evidence in the case prior to trial or to have an investigator do so. Counsel did not ask for a continuance to contact the individuals listed. The trial court denied counsel's request that the instruction be given.

Detective Woods then testified that she did not investigate the names and telephone numbers listed on the notes in the bag because she believed other evidence had already demonstrated that the bag belonged to appellant.

B. Applicable law

Section 1054.1 requires a prosecutor to disclose to the defendant all "relevant real evidence seized or obtained as part of the investigation of the offenses charged," (§ 1054.1, subd. (c)), as well as any "exculpatory evidence" (§ 1054.1, subd. (e)), at least 30 days prior to trial, and "[i]f the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately" (§ 1054.7). If the prosecuting attorney fails to provide such evidence, section 1054.5, subdivision (b) permits a court to advise the jury of any failure, refusal, or untimely disclosure of such pertinent evidence. CALJIC No. 2.28 is designed for that purpose.[3]

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[3]CALJIC No. 2.28 provides, in pertinent part: "[[D]elay in the disclosure of evidence] may deny a party a sufficient opportunity to subpoena necessary witnesses or produce evidence which may exist to rebut the non-complying party's evidence. [¶] Disclosures of evidence are required to be made at least 30 days in advance of trial. Any new evidence discovered within 30 days of trial must be disclosed immediately.… [¶] Although the [People's] [concealment] [or] [failure to timely disclose evidence] was without lawful justification, the Court has, under the law, permitted the production of this evidence during the trial. [¶] The weight and significance of any [delayed disclosure] are matters for your consideration. However, you should consider whether the [untimely disclosed evidence] pertains to a fact of importance, something trivial or subject matters already established by other credible evidence." (CALJIC No. 2.28 (Jan. 2005 ed.).)

C. The court's refusal to give the instruction

Here, the trial court considered whether the prosecution committed a discovery violation in failing to turn over the notes found in the black bag. After defense counsel stated that he had not made any attempt to look at the physical evidence prior to trial, nor had he asked an investigator to do so, the trial court asked for the prosecutor's response. The prosecutor stated the he learned of the notes only "during the course of trial," when he rummaged through the bag.

The trial court then found that there was no failure to "timely produce evidence," as both sides had an opportunity to investigate the black bag's contents prior to trial. And the court determined that "neither side has done anything" to warrant the giving of CALJIC No. 2.28, but that defense counsel could "certainly argue that being given this evidence would have helped." The court also noted that the requested instruction "has been criticized by recent Appellate Courts as being vague and ambiguous." Under these circumstances, we conclude the trial court did not err in refusing to instruct the jury with CALJIC No. 2.28.

We also agree with the trial court that several cases have justifiably criticized CALJIC No. 2.28. For instance, in *People v. Bell* (2004) 118 Cal.App.4th 249, 255-257, the court stated, "The instruction given did invite the jurors to speculate; it told them to evaluate the weight and significance of a discovery violation without any guidance on how to do so …." (See also *People v. Saucedo* (2004) 121 Cal.App.4th 937, 942-943; *People v. Cabral* (2004) 121 Cal.App.4th 748, 752.) Therefore, CALJIC No. 2.28 should be used with caution.

Even if the trial court erred in failing to instruct in accordance with CALJIC No. 2.28, it was not reasonably probable that, without that error, the result would have been different. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Cabral*, *supra*, 121 Cal.App.4th at p. 753.)

Here, appellant was allowed to argue the possibility that the black duffel bag did not belong to him because of the list of names found therein. Called by the defense at

trial, Detective Woods testified that the bag had been in the possession of the sheriff's department since it was seized. She admitted that she failed to include the notes of names and telephone numbers on her inventory sheet and failed to follow up on any of the names listed. Detective Woods also admitted that, while she was aware of the papers, she decided they lacked investigatory value.

Defense counsel argued, in closing, that Detective Woods's failure to turn over the documents harmed appellant's case and that, because of the delayed disclosure of the papers, the defense was unable to prove to the jury that the bag belonged to someone else. Counsel requested that the jury consider the prosecution's failure to deliver the potentially exculpatory evidence.

But the overwhelming evidence presented was that the black duffel bag belonged to appellant. Deputy Humble testified that the bag was found on the couch in the residence, which is where Bello told Detective Woods appellant had placed it. Detective Woods testified that Bello saw appellant carrying the bag when he arrived at the residence 10 minutes before sheriff's deputies arrived.[4] Detective Woods also testified that Fore identified the bag as the one she had seen appellant carrying the day before when appellant borrowed her car. Detective Woods testified that the jeans and underwear found in the bag were the same size and brand as those worn by appellant when he was booked into custody. Finally, the ammunition found in the bag matched the ammunition in the gun found in the bathroom, which is where Bello stated that appellant went prior to the officers' entry into the residence.

In light of these facts, it is unlikely that CALJIC No. 2.28, would have altered the jury's verdict.

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[4]At trial, Bello denied seeing appellant arrive with the bag, but she admitted that she told the detective that she had seen him do so.

3. Must the sentence on count II be stayed pursuant to section 654?

Appellant was convicted of being an ex-felon in possession of a firearm (§ 12021, subd. (a)) in count I and of unlawful possession of ammunition (§ 12316, subd. (b)(1)) in count II. The court imposed a three-year upper term for the possession of a firearm conviction and, without discussing its reasoning, imposed a concurrent three-year upper term for the possession of ammunition conviction. Appellant contends that the term imposed for the possession of ammunition conviction must be stayed pursuant to section 654, citing *People v. Lopez* (2004) 119 Cal.App.4th 132. We disagree.

Subdivision (a) of section 654 provides, in relevant 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."

Section 654 applies not only to the same criminal act, but also to an indivisible course of conduct committed pursuant to the same criminal intent or objective. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1207-1209, citing *Neal v. State of California* (1960) 55 Cal.2d 11, 15, 18-19; see also *People v. Perez* (1979) 23 Cal.3d 545, 551.)

> "On the other hand, section 654 does not apply when the evidence discloses that a defendant entertained multiple criminal objectives independent of each other. In that case, '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. [Citations.] ….' [Citation.]" (*In re Jose P.* (2003) 106 Cal.App.4th 458, 469.)

"The divisibility of a course of conduct depends upon the intent and objective of the defendant." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.)

> "[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.] [¶] If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were

> parts of an otherwise indivisible course of conduct.' [Citation.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)
>
> "'The question of whether the acts of which defendant has been convicted constitute an indivisible course of conduct is primarily a factual determination, made by the trial court on the basis of its findings concerning the defendant's intent and objective in committing the acts.'" (*People v. Nichols* (1994) 29 Cal.App.4th 1651, 1657.)

Here, the question is whether appellant had separate objectives for his acts of being in possession of a firearm and unlawful possession of ammunition.

In *People v. Lopez*, a loaded handgun was found on the defendant after a confrontation with officers. The defendant was convicted of both unlawful possession of a firearm and unlawful possession of ammunition, and the trial court sentenced the defendant to a six-year term in state prison for the firearm possession and imposed a concurrent six-year term for the ammunition possession. The defendant, citing section 654, argued that the sentence for unlawful possession of ammunition should be stayed because possession of the firearm and ammunition was an "'indivisible course of conduct.'" (*People v. Lopez*, *supra*, 119 Cal.App.4th at p. 137.) In addressing what the court noted was an issue of first impression in California, *Lopez* held that section 654 prohibited multiple punishment for both offenses, noting:

> "To allow multiple punishment for possessing ammunition in a firearm would, in our judgment, parse the objective [of section 654] too finely. 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. *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." (*People v. Lopez*, *supra*, at p. 138, italics added.)

Lopez is distinguishable. Here, not all of the ammunition found by the officers during the search of the mobilehome was loaded into the firearm. Besides the ammunition in the firearm, which was found in the bathroom medicine chest, the officers also discovered a box of .380-caliber ammunition in appellant's duffel bag on the living room couch. Clearly, this demonstrates appellant's intent to not only use the ammunition in the firearm, but also the separate intent to reload if needed. As a result, we agree with

the trial court's implied finding that possession of the ammunition and possession of the gun were divisible acts. Accordingly, we affirm the sentence imposed with respect to count II.

4. Did the trial court err in imposing the upper term on counts I and II?

In supplemental briefing, relying on *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856], appellant contends the trial court violated his Sixth and Fourteenth Amendment rights when it "partly based its sentencing choice on impermissible factors" in imposing the upper term on counts I and II. We disagree.

To impose the upper term on counts I and II, the sentencing court relied on appellant's "numerous prior felony convictions" and the fact that he had done "poorly on parole as well as on probation." There is no requirement under the Sixth and Fourteenth Amendments that the fact of a prior conviction be admitted or found true by a jury for this factor to be used in sentencing. (*Cunningham v. California*, *supra*, 549 U.S. at p. __ [127 S.Ct. at p. 868]; *Blakely v. Washington* (2004) 542 U.S. 296, 301; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 488, 490; *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 243.) The controlling principle was announced by the United States Supreme Court in *Apprendi*: "Other 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.) Appellant recognizes that the trial court relied on his prior convictions in imposing the upper term, but argues that the trial court prejudicially erred in relying on other factors relating to his recidivism as well. We disagree.

While the prior conviction 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 a defendant's recidivism as well (see, e.g., *People v. Thomas* (2001) 91 Cal.App.4th 212, 216-223), the law in this area is not settled. We need not, and thus do not, decide here the extent to which extrinsic facts relating to a recidivist aggravating circumstance implicate *Apprendi*.

All that is required by *Blakely* and *Cunningham* is that the upper term be authorized by one or more of three types of fact: (1) facts found by the jury or reflected in its verdict, (2) facts admitted by the defendant, or (3) the fact of prior convictions. (*Blakely v. Washington*, *supra*, 542 U.S. at pp. 301-302; *Cunningham v. California*, *supra*, 549 U.S. at p. __ [127 S.Ct. at p. 868].) Under well-settled California law, only a single aggravating factor is required to impose the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728-729.) Consistent with these requirements, the trial court imposed the upper term based upon the fact of appellant's "numerous prior felony convictions." Thus, no error occurred. Even were we to assume error occurred in relying on other factors as well on the record here, the error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24, and there was no abuse of discretion under *People v. Watson*, *supra*, 46 Cal.2d at page 836.

5. Must the prior prison term enhancement imposed on count II be stricken?

Aside from the concurrent three-year term imposed on count II, the trial court also imposed 3 one-year prison prior enhancements on that count. Appellant contends, and respondent agrees, that the trial court erred in imposing the enhancements on count II because the trial court had already imposed those same prison prior enhancements in count I. They are correct.

A prison prior enhancement can be imposed only once as a component of an aggregate term. (§§ 667.5 & 1170.1; *People v. Tassell* (1984) 36 Cal.3d 77, 90, overruled on other grounds in *People v. Ewoldt* (1994) 7 Cal.4th 380, 398-401.) Our state Supreme Court has explained how section 1170.1 affects the imposition of sentence enhancements:

> "[T]here are at least two types of sentence enhancements: (1) those which go to the nature of the offender; and (2) those which go to the nature of the offense. [Citations.] Prior prison term enhancements, such as those authorized by section 667.5[, subdivision] (b), fall into the first category and are attributable to the *defendant's status* as a repeat offender. [Citations.]" (*People v. Coronado* (1995) 12 Cal.4th 145, 156-157; see *People v. Williams* (2004) 34 Cal.4th 397, 402.)

Enhancements like those arising from the defendant having served a prior prison term, "since they are related to the offender, are added only once as a step in arriving at the aggregate sentence." (*People v. Tassell*, *supra*, 36 Cal.3d at p. 90; accord, *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1163-1164.)

Therefore, the 3 one-year section 667.5, subdivision (b) enhancements imposed in count II shall be stricken.

DISPOSITION

The 3 one-year section 667.5, subdivision (b) enhancements imposed in count II are stricken. The trial court is directed to prepare a corrected abstract of judgment reflecting such change and forward it to the Department of Corrections. In all other respects, the judgment is affirmed.

_____
DAWSON, J.

WE CONCUR:

_____
HARRIS, Acting P.J.

_____
KANE, J.