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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

IOSIF A. GELASHVILI ,

Defendant and Appellant.

D047844

(Super. Ct. No. SCD181804)

APPEAL from a judgment of the Superior Court of San Diego County, Robert F. O'Neill, Judge. Affirmed in part and reversed in part, and judgment modified.

In September 2005 Iosif A. Gelashvili was convicted of kidnapping for ransom (Pen. Code,¹ § 209, subd. (a); count 1); attempted robbery (§§ 664 & 211; count 2); burglary (§ 459; count 3); and two counts of assault with a firearm (§ 245, subd. (b); counts 4 & 5). As to all counts the jury found true the allegation, under sections 12022.5, subdivision (a) and 12022.53, subdivision (b), that Gelashvili personally used a firearm.

¹ All further statutory references are to the Penal Code.

Gelashvili was sentenced to an indeterminate term of life, plus a determinate term of 32 years four months.

On appeal Gelashvili asserts that (1) the sentence imposed on count 4 should have been stayed under section 654 because it was part of an indivisible course of conduct, the kidnapping, and incidental to that crime; (2) because the court did not specify whether the count 1 indeterminate life sentence and the determinate sentences on the other counts should run consecutively or concurrently, the abstract of judgment should be modified to reflect that the indeterminate and determinate sentences imposed are to run concurrently; (3) if the indeterminate and determinate terms were intended to run consecutively, the abstract of judgment should be corrected to reflect that the determinate term is to run prior to the indeterminate sentence; (4) the court's imposition of consecutive and upper term sentences violated *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) and *Cunningham v. California* ___ U.S. ___ [127 S.Ct. 856] (*Cunningham*); and (5) the abstract of judgment must be corrected to reflect the code section under which the enhancement on count 3 was imposed. We conclude that the court erred in failing to stay the sentence on the count 4 charge of assault with a firearm as it was incidental to the count 1 charge of kidnapping for ransom, and we therefore order the sentence on count 4 stayed. We further conclude that the court's imposition of upper term sentences on counts 2 through 4 violated *Blakely* and *Cunningham*, and we must reverse those sentences and remand this matter for further proceedings not inconsistent with this opinion and *Blakely* and *Cunningham*. We also conclude the abstract of judgment must be corrected to specify that (1) the determinate terms be served prior to the indeterminate

life term; and (2) the enhancement on count 3 was pursuant to section 12022.5, subdivision (b). In all other respects, the judgment is affirmed

FACTUAL AND PROCEDURAL BACKGROUND

A. *People's Case*

At approximately 4:00 p.m. on March 26, 2004, Oktai Aliev was home alone at his residence in La Jolla. His wife, Elena, had just left to pick up their two children, ages four and six, from school. Aliev was standing in his driveway in front of his open garage when Gelashvili appeared unexpectedly. Aliev was startled by his sudden appearance.

Aliev recognized Gelashvili because he had helped Aliev finish a remodeling project on his home approximately nine months earlier. After that work was complete, Gelashvili came to Aliev's house a couple times looking for more work. He never promised Gelashvili any jobs, but he had invited him to submit a bid on a new house Aliev was constructing next door.

When Gelashvili arrived on March 26, Aliev told him he still did not have a job for him, but he showed him the construction site next door and talked with him for about five or 10 minutes. When Aliev said goodbye and started to walk back to his house, Gelashvili walked alongside him and asked to use the bathroom. Aliev gave him permission, and Gelashvili went into the first floor bathroom. Aliev walked upstairs.

When Aliev walked back downstairs, Gelashvili jumped onto the staircase landing with a gun. Aliev owned some firearms and recognized Gelashvili's handgun as a full-sized 0.9 millimeter automatic. At first, Aliev did not take Gelashvili seriously, thinking it was a bad joke. However, Gelashvili then hit him in the face with the gun and tried to

wrestle him to the floor. Because Aliev resisted, Gelashvili continued to hit him in the face with the gun. Gelashvili used the gun like a hammer. Gelashvili hit him so many times in the face that his face was "not recognizable."

As Aliev struggled with Gelashvili, he noticed that Gelashvili had a pair of handcuffs. Gelashvili demanded a million dollars from Aliev and handcuffed his hands in front of his body.

Gelashvili then called someone on his cell phone, telling him in Russian to "come in." Aliev, who speaks English, Turkish and Russian, understood Gelashvili, who speaks Russian with a Georgian accent. Shortly thereafter, another individual entered Aliev's home. Gelashvili and the other man put on rubber gloves, picked Aliev up, and ordered him to open the safe in his office. They dragged Aliev into the bathroom, where he heard Gelashvili load his gun. Gelashvili pointed his gun in Aliev's face and told him he would kill him. Aliev only had petty cash in the safe, but kept giving the men a fake combination because a loaded 0.38 revolver was stored in there and because he was handcuffed, he could not grab it. Gelashvili hit Aliev in the face again.

Unable to open the safe, the two men pulled Aliev into the garage and Gelashvili tried to open the trunk to Aliev's Mercedes. Gelashvili ordered Aliev to open the car's trunk, but Aliev lied and told them they needed a key. They hit Aliev, wound his head with tape to keep him quiet, and then forced him into the back seat of the car. The tape was wrapped so tight that Aliev could not see or breathe.

Gelashvili got in the driver's seat and the other man got in the front passenger seat. Gelashvili asked Aliev for the car's ignition key. When he responded that he did not have

the right car keys, Gelashvili jumped out of the car, grabbed some keys that he saw in the garage, and tried unsuccessfully to start the car. Aliev, who was starting to lose consciousness, managed to pull the tape off his mouth. Gelashvili demanded the correct key and Aliev told him he would bring it to him.

At that point Aliev's wife, Elena, drove into the driveway with her two children. Her car blocked the Mercedes's exit route. Gelashvili got out of the car with his gun, opened the driver's side door to Elena's car, and pointed the gun at her and the two children. Aliev jumped out of the Mercedes, ran back to Elena's car and pulled Gelashvili away from her. Aliev shouted at Elena, "Drive away," and she did. Gelashvili and the other man struggled with each other and then Gelashvili's accomplice ran after Elena.

Aliev and Gelashvili continued to struggle and Aliev, who "under[stood] that they [could] get my wife and kids," tried to convince Gelashvili that he would get him some money. The second man called Gelashvili on his cell phone. Gelashvili told Aliev "we got your family," and asked if he would now give them the money. Aliev agreed and convinced Gelashvili to remove his handcuffs. Aliev walked to his safe, thinking Gelashvili was right behind him. However, when he went to open the safe, he looked back and Gelashvili was not there. He opened the safe and grabbed the gun.

Armed with the loaded revolver, Aliev ran down the street after Gelashvili. Aliev screamed for him to stop and then fired one round into the air. He then fired a second shot at Gelashvili, but did not hit him. As Aliev walked back to his house he saw his

next-door neighbor and asked him to call the police. Aliev walked into his garage, put his gun on a shelf, and also called 911.

San Diego Police Officer Brian Freymueller arrived at the scene around 5:30 p.m. and saw some duct tape in the middle of the road and found Aliev sitting on the ground in his driveway. Officer Freymueller approached Aliev and asked what happened. Aliev pointed to a pack of cigarettes on the ground and said they belonged to Gelashvili. He noticed lacerations on Aliev's face and blood on his face and shirt. He was breathing hard, seemed upset, and appeared to be in pain.

Officer Freymueller, along with other officers, entered Aliev's home to check for other victims. Inside the house, Officer Freymueller saw pools of blood on the carpet and blood spatter on the walls.

Aliev was transported to the emergency room where he received treatment for his injuries. He suffered a complex laceration on his face between his lip and nose, a curved linear scalp laceration on the back of his head, some linear red striations on his wrists, and a black eye. The injuries to his face and head were caused by blunt force trauma and required stitches and staples.

Elena Aliev testified that around 5:00 p.m. on the day of the incident, she returned home with her two children. Upon arriving, she noticed the garage door was open. In the garage she saw two men, including Gelashvili, exit Aliev's Mercedes. Aliev had something on his mouth that looked strange.

Gelashvili ran to Elena's car and opened the door. He pointed a gun at her and told her to take the children and get out of the car. Aliev ran to the car, grabbed Gelashvili,

and pulled him away from the car. Elena saw that Aliev had grey tape on his mouth, his face was beaten and bloody, and his arms appeared handcuffed. Gelashvili's accomplice grabbed Aliev from behind. As the men struggled, Elena drove away as fast as possible. After she left, she called 911.

After Aliev was released from the hospital and returned home, he was interviewed by San Diego Police Detective John Keene. Aliev told the detective what had happened and that he knew Gelashvili. Aliev called Karen Arushanyan, who had worked for Aliev with Gelashvili in the past. He obtained Gelashvili's name from Arushanyan and gave it to Detective Keene.

On March 30 Gelashvili's wife, Victoria, gave San Diego Police Detective James McGhee permission to search their apartment. Police discovered a black semiautomatic handgun underneath the bedroom dresser. It was registered to Gelashvili. In a subsequent examination of the gun, five stains tested presumptive for blood. DNA testing of one of the blood stains showed that it was a match to Aliev's DNA.

On April 5 Gelashvili turned himself in at police headquarters.

B. Defense Case

Gelashvili testified that he emigrated to the United States with his family approximately eight years ago. He obtained employment at Alpha Mechanical, working with air conditioning units. To earn some money he took extra jobs on the side. One such job was a home remodeling project in July or August of 2003 that he performed at Aliev's house with a coworker, Arushanyan. After the job was completed, he was not paid the money he was promised by Arushanyan.

Gelashvili later learned that Aliev was building a house. Aliev told him that he could work on the new construction. Gelashvili went to Aliev's house in February 2004 to discuss the new construction. During this meeting Aliev asked him if he could borrow \$5,000 for two weeks. Gelashvili had the money available to loan because he always carried cash in his pocket to buy building materials or tools for his construction jobs. Aliev was to pay back the \$5,000, plus an additional \$1,000. Gelashvili returned two weeks later and asked for his money, but Aliev denied knowing anything about a loan. Gelashvili thought Aliev was joking with him and was very confused. When he returned to Aliev's house a week later he again denied ever borrowing money from Gelashvili and threatened to kill him if he ever came to his house again.

On March 26, 2004, Gelashvili went to Aliev's house with a friend, who drove him there from work. He intended to get his money and leave. His gun was in his car, which was parked at his workplace. When Aliev saw him, he became upset and told him to forget about working on the new construction. Gelashvili told him he was not leaving without his money. Aliev hit Gelashvili and they got into a fistfight.

Gelashvili denied hitting Aliev in the face with a gun. He admitted bringing handcuffs, but he did so only because he was scared Aliev would get one of his guns and shoot him. The handcuffs and tape were a way for Gelashvili to "buy [himself] the time to run away." He only put Aliev in the back seat of the Mercedes to defend himself. He was not thinking about the money by this time. He was only thinking about how he could isolate Aliev so that he could run away.

During this time Gelashvili's friend who drove him there walked up and asked Gelashvili what he was doing. His friend opened up the car door and started to pull Aliev out. At that time, Aliev's wife pulled up in her car. She saw what was happening and backed up and drove away. Gelashvili denied approaching her car and pointing a gun at her.

At this point, Gelashvili was "completely switched off." He removed Aliev's handcuffs and ran away. He heard Aliev shooting a gun and felt the bullets buzzing by his ear.

Gelashvili denied that he went to Aliev's house to kidnap him and testified that Aliev's claim that he demanded \$1 million was a lie.

Gelashvili admitted that before he decided to turn himself in to police, he went to Mexico. On his way to Mexico, he dyed his hair. He was disguising himself because he was scared and thought no one would understand him.

DISCUSSION

I. *STAY OF SENTENCE ON COUNT 4 UNDER SECTION 654*

Gelashvili asserts that the court erred in not staying the sentence on the count 4 assault with a firearm conviction because it was part of an indivisible course of conduct and incidental to one objective, the kidnapping for ransom of Aliev. We conclude that the court erred in failing to stay the sentence on the count 4 assault with a firearm conviction (and its enhancement).

Section 654, subdivision (a) provides in part: "An act or omission that is punishable in different ways by different provisions of law should 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 prohibits multiple punishment for an indivisible course of conduct even though it violates more than one statute. (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) Whether a course of conduct is indivisible depends on the intent and objective of the actor. (*People v. Evers* (1992) 10 Cal.App.4th 588, 602; *People v. Palmore* (2000) 79 Cal.App.4th 1290, 1297.) "If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*People v. Perez* (1979) 23 Cal.3d 545, 551.) The determination the defendant had multiple criminal objectives is a factual question and will be upheld on appeal if supported by substantial evidence. (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466.)

Courts have held in many cases that section 654 prohibits separate punishments where a defendant harmed or threatened a victim during a robbery and was convicted of both robbery and another crime against the victim's person, such as an assault, kidnapping, homicide, or attempted homicide. (See *People v. Milan* (1973) 9 Cal.3d 185, 196-197 [robbing cab driver was sole objective of crimes of robbery, kidnapping for the purpose of robbery with bodily harm, and murder, so only one punishment was permissible]; *In re Henry* (1966) 65 Cal.2d 330, 331 [robbing liquor store owner was sole objective of attempted armed robbery and assault with a deadly weapon]; *People v. Ridley* (1965) 63 Cal.2d 671, 677-678 [robbery and assault with a deadly weapon with intent to commit murder had only one objective]; *People v. Green* (1979) 95 Cal.App.3d

991, 1008 [robbery, kidnapping, and attempted murder all had robbery as their objective]; *People v. Lowe* (1975) 45 Cal.App.3d 792, 795 [robbery and murder of one victim and robbery and attempted murder of another had only one objective each]; *People v. Chapman* (1968) 261 Cal.App.2d 149, 180 [robbery and murder had one objective]; *People v. Logan* (1966) 244 Cal.App.2d 795, 798 [attempted robbery and assault with intent to kill had one objective], overruled on other grounds by *People v. Collie* (1981) 30 Cal.3d 43, 62, fn. 16.) Our Supreme Court has stated in dictum, for example, that "one who uses a deadly weapon in the commission of first degree robbery simultaneously assaults the victim with such weapon but clearly may not be punished for both the robbery and assault with a deadly weapon." (*People v. Beamon* (1973) 8 Cal.3d 625, 637.)

For example, in *People v. Chacon* (1995) 37 Cal.App.4th 52, the defendant kidnapped a California Youth Authority librarian, choking and stabbing her in an effort to obtain a truck in which to escape. (*Id.* at p. 58.) The Court of Appeal concluded that imposing sentence on the defendant for aggravated kidnapping, extortion, escape by force and violence, and assault with a deadly weapon constituted multiple punishment because the kidnapping, extortion, and escape were part of an indivisible transaction having the single objective of escape. (*Id.* at p. 66.)

Likewise in this case, Gelashvili's beating of Aliev with a handgun was part of the indivisible course of conduct that constituted the kidnapping for ransom and had the sole objective of furthering that crime. Aliev testified extensively as to his struggling with Gelashvili and Gelashvili's attempts to subdue him by striking him with the handgun. He

also testified that he was struck by Gelashvili when he gave him an incorrect combination to his safe. This evidence demonstrates that the clear objective of the assault was to further the kidnapping for ransom and had no other separate purpose.

The People cite *People v. Nguyen* (1988) 204 Cal.App.3d 181 for the proposition that multiple punishment was warranted because the assault constituted an act of gratuitous violence against an unresisting victim, and therefore had an objective independent from the kidnapping. In *Nguyen*, the Court of Appeal affirmed the trial court's decision to impose separate punishments for robbery and attempted murder. The defendant and an accomplice entered a market and forced the clerk into a bathroom. The accomplice took the clerk's money and passport and forced him to lie on the floor while the defendant emptied the cash register. The accomplice shot the clerk in the back as he lay on the floor. (*Id.* at pp. 184-185.) The appellate court held that "substantial evidence supports the [trial] court's implied finding of divisibility" of objectives. (*Id.* at p. 190.) Acknowledging that the shooting could have been intended to further the robbery by eliminating the victim as a witness or facilitating the perpetrators' escape, the court nevertheless concluded the trial court's finding of separate objectives was proper: "[A]t some point the means to achieve an objective may become so extreme they can no longer be termed 'incidental' and must be considered to express a different and a more sinister goal than mere successful commission of the original crime. We should not lose sight of the purpose underlying section 654, which is 'to insure that a defendant's punishment will be commensurate with his culpability.'" (*People v. Nguyen, supra*, 204 Cal.App.3d at p. 191.)

This case, however, does not present a situation similar to that in *Nguyen*. Rather than being gratuitous, the assault in this case had the clear objective of subduing Aliev, who struggled throughout the kidnapping, and of making him comply with Gelashvili's demands. The assault was not so unrelated to the crime itself or so extreme as to warrant a finding that it had an object different than the successful completion of the crime.

The People also contend that the assault had a purpose separate from the kidnapping: to prevent Aliev from identifying Gelashvili. However, there is no evidence to support such a proposition. As discussed, *ante*, Aliev knew Gelashvili prior to the kidnapping, Gelashvili having done work on his house. When Gelashvili arrived at Aliev's house on the day of the kidnapping, they met and talked about a future construction job. There is no evidence Gelashvili attempted in any manner to hide his identity during the crime. There is no evidence that the assault had the separate purpose of keeping Aliev from identifying Gelashvili.

Because the assault and kidnapping were part of one indivisible course of conduct, and the assault was incidental to the kidnapping, the court erred in failing to stay the sentence on count 4. As we have the power to modify the judgment in such circumstances (§ 1260), we stay execution of the sentence on count 4.

II. *DETERMINATE AND INDETERMINATE SENTENCES*

Gelashvili asserts the court erred by failing to determine "how the indeterminate life sentence for [count1] would run with reference to the determinate term sentences in this case." He also contends that if we conclude the court intended that they run consecutively, the abstract of judgment must be corrected to reflect that the determinate

terms run first. We conclude that the court intended that the indeterminate life sentence and the determinate sentences were to run consecutively. We further conclude that the abstract of judgment must be corrected to reflect that the determinate sentences run prior to the indeterminate life term.

A. *Background*

At the sentencing hearing, the court laid out Gelashvili's sentence as follows:

"As to count 1, violation of [section 209, subdivision (a)], that's life with parole. There's an enhancement pursuant to [section 12022.53, subdivision (b) of 10 years *consecutive*. That's because of the firearm allegation. *So that is the indeterminate term.* [¶] *The determinate terms are as follows:* As to count [4], violation of [section 245, subdivision (b)], upper term of nine years. There is an enhancement pursuant to [section 12022.5, subdivision (a)] of 10 years *consecutive*. [¶] Count 5, violation of [section 245, subdivision (b)], the court selects the upper term for the reasons indicated. However, I will sentence 1/3rd the mid-term *consecutive*. So that's two years. The enhancement under [section 12022.5, subdivision (a)] is 1/3rd the mid-term *consecutive*. That's one year and four months. [¶] Count 2, the attempted residential robbery, if you will, court selects the upper term of three years for the reasons indicated. That is stayed pursuant to [section 654]. The enhancement of [section 12022.5, subdivision (a)] four years stayed per [section 654]. [¶] Count 3, the court selects the upper term of six years, stayed pursuant to [section 654]. Enhancement is selected, stayed pursuant to [section 654]. [¶] The bottom line to all of that is the defendant is sentenced to the Department of Corrections for the life with parole *plus* a determinate term of 32 years and four months." (Italics added.)

The sentencing minute order reflected the court's statements on the record.

Nothing is explicitly stated as to whether the determinate term is to run consecutive or concurrent to the indeterminate life term. However, the abstract of judgment, in the category "other orders", did state: "The determinate term on counts 4 and 5 are

consecutive to count 1-----See CR 290," in addition to stating Gelashvili's sentence as the court did and as the minute order reflected.

A. *Analysis*

Section 669 provides in part: "When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively. *Life sentences, whether with or without the possibility of parole, may be imposed to run consecutively with one another, with any term imposed for applicable enhancements, or with any other term of imprisonment for a felony conviction. Whenever a person is committed to prison on a life sentence which is ordered to run consecutive to any determinate term of imprisonment, the determinate term of imprisonment shall be served first [¶] . . . Upon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently.*" (Italics added.)

Thus, under section 669, if a court fails to state whether sentences are to run concurrently or consecutively, by operation of law they are deemed to run concurrently. (*People v. Downey* (2000) 82 Cal.App.4th 899, 912-915; *People v. Caudillo* (1980) 101 Cal.App.3d 122, 125-127.) Moreover, where an indeterminate life term and determinate

terms run consecutively, the determinate terms are to be served first. (*People v. Garza* (2003) 107 Cal.App.4th 1081, 1085.)

Gelashvili contends that because the trial court failed to determine how the indeterminate and determinate terms of imprisonment shall run, they should run concurrently under section 669. He also contends that if the court intended those terms to run consecutively, the abstract of judgment must be corrected to reflect that the determinate terms are to be served first. We reject the first contention. However, we also conclude that because the abstract of judgment does not specify that the determinate terms are to be served first, it must be corrected to so specify.

In *People v. Edwards* (1981) 117 Cal.App.3d 436, the Court of Appeal noted that the sentencing court did not expressly state that a robbery conviction was to run consecutive to any other count, but that its statement to counsel indicated an intent that it should do so. The appellate court then noted that the abstract of judgment stated the sentences should run consecutively and from these facts concluded that the "court intended to impose a consecutive sentence." (*Id.* at p. 452.)

Here, the court stated that the enhancement on count 1 was to run consecutively to that count and, as to the counts that were not stayed, the court indicated that they were "consecutive." Moreover, the court, in specifying the total sentence, stated that it was life *plus* 32 years. Consistent with these statements, the abstract of judgment specifies that count 1 is to run consecutively to the determinate terms. The court's statements, taken together with the abstract of judgment, demonstrate that the court intended that the

indeterminate sentence in count 1 was to run consecutive to the determinate terms in counts 4 and 5.

However, the abstract of judgment does not specify that the determinate terms are to run first and be followed by the indeterminate term. If the determinate terms were to follow the indeterminate term, that sentence would be illegal. (*People v. Grumble* (1981) 116 Cal.App.3d 678, 684-685 [sentence purporting to require determinate sentence to follow life term was illegal and subject to correction, even though change produced more severe result]; *People v. Gallegos* (1985) 170 Cal.App.3d 386, 388 [weapon enhancement under § 12022 is part of determinate term under § 1170.1, subd. (e) and must be served prior to beginning of indeterminate term]; *People v. Reyes* (1989) 212 Cal.App.3d 852, 856 [when defendant is sentenced to determinate and indeterminate terms, determinate term must be served first; neither term is "principal" or "subordinate," and each must be considered and calculated independently of the other].)

Accordingly, the abstract of judgment must be corrected to specify that the determinate terms are to run first, to be followed by the indeterminate term.

III. *BLAKELY/CUNNINGHAM*

Citing *Blakely, supra*, 542 U.S. 296, Gelashvili contends he was denied his federal Sixth Amendment constitutional right to a jury trial when the court imposed upper term and consecutive sentences on counts 2 through 4. In light of the United States Supreme Court's recent decision in *Cunningham, supra*, 127 U.S. 856, we conclude the court's imposition of the upper term sentences on counts 2 through 4 based on judicial fact finding denied Gelashvili his federal constitutional rights to a jury trial and proof beyond a

reasonable doubt, and thus the matter must be remanded for resentencing on those counts. We also conclude that the court's imposition of consecutive terms did not run afoul of *Blakely* and *Cunningham*.

A. *Background*

At the sentencing hearing the court stated that it intended to sentence Gelashvili per the recommendation of the probation report. The probation report listed five possible circumstances in aggravation: (1) the crime involved great violence, a high degree of viciousness and included an assault on the victim with a handgun; (2) the manner in which the crime occurred indicated it was planned; (3) the crime involved the attempted theft of \$1 million; (4) Gelashvili took advantage of a position of confidence; and (5) Gelashvili committed a serious felony during which he engaged in tying, binding, or confining the victim. The probation report also listed one possible circumstance in mitigation, the absence of a prior record.

The court then sentenced Gelashvili to an indeterminate term of life, plus 32 years 4 months, consisting of (1) an indeterminate term of life with parole on count 1, plus a consecutive 10-year enhancement under section 12022.53, subdivision (b); (2) an upper term of nine years on count 4, plus a consecutive 10-year enhancement under section 12022.5, subdivision (a); (3) a consecutive one-third the midterm sentence of two years on count 5, plus a consecutive one-third the midterm one year four month enhancement under section 12022.5, subdivision (a); (4) an upper term of three years on count 2, plus a four-year enhancement under section 12022.5, subdivision (a), stayed under section 654;

and (5) an upper term of six years on count 3, plus a four-year enhancement under section 12022.5, subdivision (a), stayed under section 654.

B. *Analysis*

Under California's determinate sentencing law, where a penal statute provides for three possible prison terms for a particular offense, the sentencing court is required to impose the middle term unless it finds, by a preponderance of the evidence, that "there are circumstances in aggravation or mitigation of the crime." (§ 1170, subd. (b));² see also Cal. Rules of Court,³ rules 4.420(a) & (b).⁴ "Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation." (Rule 4.420(b).) "Generally, determination of the appropriate term is within the trial court's broad discretion [citations]." (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) A single aggravating factor is sufficient to impose an aggravated upper prison term where the aggravating factor outweighs the

² Section 1170, subdivision (b) provides in part: "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."

³ All further rule references are to the California Rules of Court.

⁴ Rule 4.420 provides in part: "(a) When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is ordered suspended, the sentencing judge shall select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170[, subdivision](b) and these rules. The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation. [¶] (b) Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."

cumulative effect of all mitigating factors. (*People v. Nevill* (1985) 167 Cal.App.3d 198, 202.) The sentencing court need not list all applicable aggravating factors (*ibid.*) or state reasons for rejecting mitigating factors. (*People v. Combs* (1986) 184 Cal.App.3d 508, 511.)

In *Cunningham, supra*, 127 S.Ct. 856, the United States Supreme Court held that California's determinate sentencing law (DSL), by placing sentence-elevating fact finding within the trial judge's province, violates a criminal defendant's right to a jury trial safeguarded by the Sixth and Fourteenth Amendments to the federal Constitution. (*Cunningham, supra*, 127 S.Ct. at p. 860.) *Cunningham* explained that because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence rather than by proof beyond a reasonable doubt, the DSL violates the bright-line rule in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, that any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. (*Cunningham, supra*, 127 S.Ct. at p. 868.) Quoting *Blakely, supra*, 542 U.S. at pages 303-304 for the proposition 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*," the *Cunningham* court concluded that "[i]n accord with *Blakely*, therefore, the middle term prescribed in California statutes, not the upper term, is the relevant statutory maximum." (*Cunningham, supra*, 127 S.Ct. at p. 868.)

Here, the jury's verdict alone limited the permissible sentence on counts 2 through 4 to the middle term of six years. (*Cunningham, supra*, 127 S.Ct. at p. 868.) The additional judicial fact finding, however, resulted in the upper terms on those counts in violation of Gelashvili's right to a jury trial safeguarded by the Sixth and Fourteenth Amendments to the federal Constitution. (*Cunningham, supra*, 127 S.Ct. at p. 860.)

The People argue that in this case we need not reverse the court's upper term sentences on counts 2 through 4 because (1) one aggravating factor used by the court in selecting the upper term was that Gelashvili, in the course of a serious felony, engaged in tying, binding or confining the victim, a fact that Gelashvili admitted at trial; and (2) any *Cunningham* error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24 because the jury would have found some or all of the aggravating factors true had they been presented to the jury for determination. These contentions are unavailing.

The court imposed the upper term sentences in this case because it found five aggravating factors and only one mitigating factor, that Gelashvili had no criminal record. It is true that a single aggravating factor is sufficient to impose an aggravated upper prison term where the aggravating factor outweighs the cumulative effect of all mitigating factors. (*People v. Nevill, supra*, 167 Cal.App.3d at p. 202.) However, we cannot say with any certainty that the court, if it was limited to consideration of the one aggravating factor Gelashvili admitted to, balanced against the fact that Gelashvili had no previous criminal record, would have selected upper terms in this matter. Likewise, because we can only speculate which, if any, of the aggravating factors relied on by the

court the jury would have found true, and what effect those findings would have had on the court at sentencing, we cannot find the *Blakely* error to have been harmless beyond a reasonable doubt.

As to Gelashvili's contention that the consecutive sentences imposed by the court also violated *Blakely*, the California Supreme Court has held that "a jury trial is not required on the aggravating factors that justify imposition of consecutive sentences." (*People v. Black* (2005) 35 Cal.4th 1238, 1262.) Our Supreme Court has held that a judge's imposition of consecutive sentencing does not run afoul of *Blakely* because it does not implicate "the defendant's right to a jury trial on facts that are the functional equivalent of elements of an offense." (*People v. Black, supra*, at p. 1264.) That holding was not overturned by *Cunningham* as it did not address the issue of imposition of consecutive sentences for separate crimes. Our Supreme Court's holding is binding on this court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Accordingly, we reverse the court's imposition of upper term sentences on counts 2 through 4 and remand this matter for further proceedings not inconsistent with this opinion and *Cunningham*.

IV. CORRECTION OF JUDGMENT ON COUNT 3 ENHANCEMENT

Gelashvili asserts that the abstract of judgment must be corrected as it states that the count 3 enhancement was under section 12022.53, subdivision (b), when in reality the jury returned a true finding on that enhancement under section 12022.5, subdivision (a). The People agree.

A review of the record reveals that on the count 3 enhancement, the abstract of judgment mistakenly states that it was pursuant to section 12022.53, subdivision (b), whereas the jury found true that enhancement under section 12022.5, subdivision (a). Accordingly, the abstract of judgment must be corrected to reflect the proper code section on the count 3 enhancement.

DISPOSITION

The sentence and enhancement on count 4 are stayed. The court's imposition of upper term sentences on counts 2 through 4 is reversed, and we remand this matter for further proceedings not inconsistent with this opinion and *Cunningham*. The abstract of judgment must be corrected to reflect the stay on count 4 and also that (1) the determinate terms are to run before the count 1 indeterminate life term; and (2) the enhancement in count 3 is imposed pursuant to section 12022.5, subdivision (a). The court is directed to send an amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NARES, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.