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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL THOMAS GORMAN, Defendant and Appellant.	A102310 (Humboldt County Super. Ct. No. CR011617CS)

Appellant persuaded friends of his, a man and a woman, to gain entry to a stranger's motel room by offering him the woman's services as a prostitute. Their plan was that once inside the room, appellant's friends would obtain the victim's money either by robbery or by deception. While appellant's friends were in the motel room, one of them killed the victim. Appellant, his friends, and another man returned to the motel room after the victim's death and took the victim's money and belongings. A jury convicted appellant of felony murder and burglary.

On this appeal, appellant argues: (1) that the jury instructions on felony murder did not adequately advise the jury of the need for a causal connection between the felony and the killing; (2) that the trial judge abused his discretion in admitting evidence that appellant used a racial slur to refer to the victim after his death; (3) that appellant's trial counsel's failure to object to the admission of appellant's pretrial statement to the police constituted ineffective assistance of counsel; and (4) that in selecting the upper term on the burglary count and directing that appellant's sentences be served consecutively, the

trial judge inappropriately relied on aggravating factors not found by a jury, in violation of *Blakely v. Washington* (2004) __ U.S. __ [124 S.Ct. 2531] (*Blakely*). We reject all of these contentions except for the *Blakely* argument as to the selection of the upper term for burglary, and affirm the judgment except insofar as resentencing is required on the burglary conviction.

FACTS AND PROCEDURAL BACKGROUND

On April 2, 2001,[1] appellant and his friend Rachael Lane paid a visit to a man they knew named Shawn Harrison who occasionally sold methamphetamine. Troy Russell, Harrison's former brother-in-law, was also visiting Harrison at the time. Harrison told his visitors that, earlier that day, he had sold some methamphetamine to a man (later identified as Bruce James) who was staying at a nearby motel; he added that the man appeared to have a lot of cash and was interested in obtaining the services of a prostitute. Russell and Harrison had committed robberies together before, and the group discussed the idea of taking James's money from him. Russell was not interested in the idea, but appellant asked Harrison for James's room number at the motel. According to Rachael Lane, the discussion about "ripping [James] off" was just a joke, and was not serious. Russell testified that he never heard appellant use the word "rob."

Later that evening, around 7:00 or 8:00 p.m., appellant and Rachael Lane went to the apartment of Amber Ladue, where they encountered Rachael Lane's brother, Michael Lane[2], and his girlfriend, Florence Laurel Anderson, who was a friend of Ladue's. Ladue lived not far from the motel where James was staying. Lane and Anderson were staying with their friend Gordon Combs in another apartment in the same building, and sometimes borrowed Ladue's apartment so they could have some privacy. Lane and

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[1] All further references to dates are to the year 2001 unless otherwise specified.

[2] Michael Lane was also a friend of appellant's and was the actual perpetrator of the murder of which both he and appellant were convicted. He was also a principal witness for the prosecution at appellant's trial. For simplicity and clarity, we refer to Michael Lane as Lane, and to Rachael Lane by her full name.

Anderson asked appellant and Rachael Lane if they had any drugs,[3] and appellant responded by suggesting that they could obtain cash from James, either by fraudulently proposing to get drugs for him and keeping the money, or by offering him Anderson's services as a prostitute.

Lane did not want to feign a drug deal with James. Anderson was willing to act (or at least pose[4]) as a prostitute to get James's money, but Lane did not want her to do so. Nonetheless, Anderson and Lane agreed with appellant that the three of them would go to the motel, that Anderson would offer James her services as a prostitute, and that appellant would receive a share of whatever money Anderson and Lane could obtain from James, or of the drugs they would buy with it. Lane denied that they discussed robbing James.

Before going to the motel, either Lane or Anderson asked Ladue for a knife with which to protect themselves, and told Ladue that appellant was "sending them [Anderson and Lane] on a mission." Appellant was there when they did so, but did not say anything. Ladue gave Lane a knife, and then went to sleep.[5]

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[3] Appellant, Rachael Lane, Russell, Lane, Anderson, Ladue, and Combs were all methamphetamine users at the time of these events.

[4] There was a conflict in the evidence as to whether Anderson had previously worked as a prostitute, and as to whether the plan was that she would really offer her services as such to James, or merely pretend to be willing to do so. Lane testified at trial that Anderson fairly frequently sold her services for drugs or for money to buy drugs, and that he had accompanied her, for her protection, on a few prior occasions when she had conducted such a transaction with a stranger. He had told the police at one point during their investigation that Anderson never worked as a prostitute while she was involved with him, but he testified at trial that this statement was true only in the sense that Anderson prostituted herself solely to obtain drugs (or money for drugs), and not as a regular occupation. In any event, there is substantial evidence in the record that Lane and Anderson gained entry to James's motel room by suggesting to him – whether truthfully or not – that Anderson was available as a prostitute. Appellant does not argue otherwise on this appeal.

[5] There was a conflict in the testimony regarding whether Ladue was in her apartment when appellant, Lane, and Anderson discussed their plan. Lane testified that she arrived just as they were leaving. Ladue testified that she was in the apartment asleep, and they woke her up to ask for the knife.

Lane, Anderson, and appellant then walked together to the motel where James was staying. Lane and Anderson knocked on the door of James's room, telling him that "Shawn sent me," while appellant (as he had told Lane he planned to do) entered the room next door to James's in order to visit his friend Kelly Eyerley. It is undisputed that appellant was not in James's room during the ensuing events, and was not present when Lane killed James.

Lane testified as follows regarding the ensuing events. James appeared to be drunk when he came to the door to let him and Anderson into the room.[6] Lane and Anderson were surprised and upset to learn that James was Black, a piece of information that Harrison had not shared with appellant. Lane did not like or trust Black people, because his grandmother had been raped by a couple of Black men when she was young. Nonetheless, Anderson proceeded to offer James her sexual services for money. James accepted, but was unwilling to allow Lane to remain in the room to protect Anderson during the activity, so Lane went into the bathroom in order to remain nearby. Shortly thereafter, Lane heard Anderson scream, and emerged from the bathroom to see James beating her. Lane then "freaked out," and stabbed James at least five times, killing him. Lane and Anderson then left the motel without taking the only money they saw in James's room, which amounted to only $20. Anderson took James's cigarettes and lighter.

Ladue was, generally speaking, a problematic witness. She suffered from a number of mental disorders, for which she was taking numerous medications at the time she testified against appellant. She acknowledged that her recollection of the relevant events was hazy, and that she was "having problems keeping things straight" in her testimony. For example, although she testified at appellant's trial that she gave the knife to Lane, she admitted that when she testified at Lane and Anderson's trial, she had not remembered whether she gave it to Lane or Anderson. Ladue was originally charged as an accessory after the fact in connection with James's murder, but agreed to testify against Lane, Anderson, and appellant in exchange for immunity.

[6] This testimony was corroborated by a forensic analysis showing that James had a blood-alcohol level of .26 when he died.

According to Ladue, appellant returned to Ladue's apartment alone, some 20 minutes after he had left for the motel.[7] Ladue testified that appellant told her he was worried that something had gone wrong, because Lane and Anderson had not yet returned. Shortly thereafter, Lane and Anderson arrived, awakening Rachael Lane, who had been asleep on Ladue's couch. Both Lane and Anderson were very upset, and Anderson was crying. Lane had a large knife, which he hid under a sofa cushion; he told appellant that he had killed James. Appellant appeared to Lane to be shocked upon hearing this, but he nonetheless asked where James's money was; Lane replied that he did not know.

Upon hearing that James had been killed, appellant called Harrison, at Lane's request, and asked him to come and see him. Appellant and Lane had an argument about whether they should return to the motel room. Rachael Lane testified that it might have been appellant who wanted to do so, but she was not sure. According to Lane, however, he was the one who persuaded appellant to go back.[8] Lane and Anderson were angry because they believed that appellant had set them up by telling them incorrectly that James had a lot of money, and by not telling them that he was Black.

Ultimately, Lane, Anderson, and appellant returned to the motel, accompanied by Harrison. Lane entered James's room by climbing in the bathroom window, and then opened the door to let in the others. Lane went through James's pockets and belongings and took his necklace, shoes, and wallet, and a small sum in cash. Appellant did not take

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[7] Lane also testified that he and Anderson returned to Ladue's separately from appellant. Rachael Lane testified that appellant, Lane, and Anderson all returned to Ladue's apartment together, but she also testified (as did Lane) that she had fallen asleep, and awoke again when they arrived.

[8] Lane told the police shortly after James's death that it was appellant who had insisted they return to the motel, claiming James had $500 or $600 in his possession. In his trial testimony, however, Lane contended that he had been lying when he said this, in an effort to blame someone else for James's death. As discussed *post*, appellant told the police he had gone back to the motel at Lane's insistence because he was afraid of Lane at that point.

anything, but according to Lane, he helped Lane flip over the mattress, and either took James's credit card or accepted it from Lane.[9]

Later, in the early hours of the morning on April 3, Lane and Anderson went to Combs's apartment. Lane testified that he told Combs a version of the events that was consistent with his trial testimony, but he also admitted he might have told Combs (untruthfully, according to Lane's trial testimony) that they had gone to the motel to rob James. According to Combs, Lane not only told him that he had just killed a man at the motel, but also averred that he and Anderson had gone there to rob the man by having Anderson pose as a prostitute. Lane also told Combs that he had remarked to Anderson on the way to the motel that if things got out of hand, he might have to stab the intended robbery victim.

Ladue testified that around noon on April 3, she awoke and found Lane cleaning her knife, which he then wrapped in newspaper. Lane testified that he told Ladue that he had killed a man at the motel with Ladue's knife. Ladue testified that Lane also told her he had gone to the motel to rob the man. Ladue drove Lane and Anderson to a jetty or pier, where Lane threw the knife into the ocean, and then to a remote area in the woods, where Lane and Anderson burned their clothes.

James's body was discovered in his room by the motel housekeeper shortly after 10:00 a.m. on April 3. He had been stabbed four times in the back and once in the elbow, and had bled to death. His room had been ransacked, and there were signs of a forced entry through the bathroom window.

A day or two later, Russell encountered appellant again. By then, word of the killing at the motel had circulated in the area, and appellant appeared to Russell to be

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[9] Lane's testimony was inconsistent regarding how, or even whether, appellant obtained James's credit card. Russell testified that appellant told him he had the card, but Russell never actually saw appellant with it. Russell did see Harrison with the credit card, however; Harrison was holding it when he told Russell that he and appellant had bought gas for Russell's truck, which Harrison had borrowed to give appellant a ride. The prosecution introduced evidence that the credit card had been used to buy gas at a nearby gas station on the morning after James's death.

worried about what had happened. Russell testified that appellant told him he had gone to the motel with Lane and Anderson, but had gone into the room next door to visit Eyerley. Russell said appellant told him that he had heard sounds of a "loud ruckus" from the next room, and that Lane had ended up stabbing the victim during a struggle. Russell interpreted what appellant said as indicating that Lane and Anderson had robbed the victim, but appellant did not actually use the word "rob." Appellant complained to Russell that Lane and Anderson had only given him (or him and Harrison) a credit card and a small sum of money (about $20), and that he believed they were "holding out on him." Russell also testified that appellant and Harrison made racially derogatory remarks about the victim, referring to him as "just another dead nigger, porch monkey, dead cricket, something like that."[10]

On April 10, about a week after James was killed, a police detective interviewed Lane and Anderson, and learned from them that appellant had been involved in the events leading up to the killing. The police spoke with appellant's family and asked them to have appellant to call them. On April 11, appellant voluntarily went to the police station to be interviewed. Appellant was not given any *Miranda*[11] warnings prior to the interview. A tape recording of the interview was played to the jury at appellant's trial. Appellant's trial counsel did not object to the admission of the tape recording.

In his interview with the police, appellant initially told a story about the events that the police told him they knew was not true. The police then told appellant that Lane and Anderson had been arrested, and had told them appellant was not in the room when James was killed. Appellant then acknowledged that he had told Lane and Anderson about Harrison's report that James had a lot of money and wanted a prostitute. He also admitted that he had proposed to Lane and Anderson that they obtain James's money –

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[10] Russell acknowledged at trial that he did not like appellant. Russell had an extensive criminal record and had been granted immunity for as many as 30 uncharged robberies in exchange for his testimony. Lane testified he had never heard appellant use the word "nigger."

[11] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

either by promising to buy drugs with it and not returning, or by stealing it while Anderson distracted James with sex – and give appellant a share of the proceeds. He acknowledged going to the motel with Lane and Anderson, and spending a short time in Eyerley's room before returning to Ladue's apartment. He said he had not heard anything from James's room except a little bang on the wall, and that he had told Eyerley that Lane and Anderson were going to get James's money by pretending they would use it to buy drugs for him.

Appellant also acknowledged in the interview that after finding out that Lane had stabbed James, he went back to the motel with Lane at Lane's insistence; he averred that he was afraid Lane would stab him if he refused. Appellant explained that he called Harrison to accompany them to the motel, and that when they got there, he knocked on James's door but received no response. He said Lane and Anderson then went in through the window and let him and Harrison in through the door. Appellant contended he had only watched while Lane, Anderson, and Harrison rummaged through James's belongings and took his money, shoes, and jacket. Appellant vehemently denied having had any intent that the group would obtain James's money by any means other than pretending to use it to buy drugs for James.

Appellant, Lane, and Anderson were charged with murder and burglary. Appellant's trial was severed from that of Lane and Anderson,[12] and did not begin until October 22, 2002. In an amended information, appellant was charged with felony murder (Pen. Code, § 187, subd. (a)[13]) and second degree burglary (§§ 459; 460, subd. (b)). On December 9, 2002, the jury found appellant guilty on both counts.

On January 24, 2003, appellant was sentenced to an indeterminate term of 25 years to life on the murder conviction, and the upper term of three years on the burglary

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[12] Lane and Anderson were tried jointly, and both had been convicted by the time appellant's trial began. Their convictions were affirmed by Division Five of this court in separate unpublished opinions. (*People v. Lane* (Dec. 1, 2003, A099502); *People v. Anderson* (Dec. 19, 2003, A099476).)

[13] All further unspecified references to statutes are to the Penal Code.

conviction, to be served consecutively to the indeterminate term. This timely appeal followed.

DISCUSSION

A. Jury Instructions on Felony Murder

With respect to the murder charge against appellant, the jury was instructed, based on CALJIC No. 8.27, that "If a human being is killed by any one of several persons engaged in the commission or attempted commission of the crime of robbery or burglary, all persons, who either directly and actively commit the act constituting that crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental." In his opening brief on appeal, appellant argued that this instruction was erroneous because neither it nor any of the court's other instructions informed the jury that the killing had to be in furtherance of a common design or scheme on the part of appellant and the actual killer (i.e., Lane).

During the pendency of the appeal, however, the California Supreme Court decided *People v. Cavitt* (2004) 33 Cal.4th 187 (*Cavitt*), which "clarif[ied] a nonkiller's liability for a killing 'committed in the perpetration' of an inherently dangerous felony under Penal Code section 189's felony-murder rule. [Citation.]" (*Id.* at p. 193, fn. omitted.) In so doing, the court rejected the argument that liability for felony murder requires that the killing be in furtherance of a common design. Rather, the court held that "[t]he causal relationship [required by the felony-murder rule] is established by proof of a logical nexus, beyond mere coincidence of time and place, between the homicidal act and the underlying felony the nonkiller committed or attempted to commit." (*Ibid.*) Thus, although the felony-murder rule does not make a nonkiller liable for "homicidal acts that are completely unrelated to the felony for which the parties have combined" (*id.* at p. 201), neither does "the felony-murder rule . . . require proof that the homicidal act furthered or facilitated the felony[; it requires] only that a logical nexus exist between the

two." (*Id.* at p. 203.) The court therefore rejected the contention that the jury instructions on felony murder given in *Cavitt* were "deficient merely because the 'in furtherance' phrasing was omitted." (*Ibid.*)

In keeping with this analysis, the court held that CALJIC No. 8.27, the source of the felony-murder instruction given in *Cavitt* as well as in the present case, "adequately apprise[s] the jury of the need for a logical nexus between the felonies and the homicide in this case. To convict, the jury necessarily found that 'the killing occurred during the commission or attempted commission of robbery or burglary' by 'one of several persons engaged in the commission' of those crimes. The first of these described a temporal connection between the crimes; the second described the logical nexus." (*Cavitt*, *supra*, 33 Cal.4th at p. 203, italics omitted.)

After the issuance of the Supreme Court's opinion in *Cavitt*, we requested supplemental briefs regarding its impact on the present case. In his supplemental briefs, appellant argues that, even under *Cavitt*, his felony-murder conviction was based on insufficient jury instructions. Specifically, he contends that the jury could have found that Lane's admitted racial animus toward James broke the causal link between the parties' shared plan to steal James's money and Lane's murder of James, and that the jury instructions did not adequately inform the jury that such a causal link was necessary. (See *Cavitt*, *supra*, 33 Cal.4th at pp. 210-212 (Werdegar, J., conc.) [concurring in result on basis of harmless error, but suggesting that felony-murder instructions be clarified "to clearly explain that murder complicity under the felony-murder rule requires not only a temporal relationship between commission of the felony and the killer's fatal act, but also a logical or causal one"]; *id.* at p. 213 (Chin, J., conc. [agreeing that existing instruction is adequate, but suggesting that courts should more clearly inform the jury of the need for a logical connection between the killing and the underlying felony].)

In *Cavitt*, however, the Supreme Court rejected a very similar contention that the causal link needed for felony murder was broken by the animus harbored toward the victim by the person whom the defendants *claimed* was the actual killer. Concededly, there is a factual difference between *Cavitt* and this case, in that here it is undisputed that

appellant was *not* the actual killer. This difference has no bearing, however, on the degree of causal connection between the killing and the predicate felony.

As appellant's supplemental reply brief acknowledges, even if we were to hold that the felony-murder instructions given in this case were ambiguous, and might have been interpreted by the jury so as to be legally erroneous, we would still be obligated to inquire "whether there is a reasonable likelihood that the jury . . . applied the challenged instruction[s] in a way" that violated appellant's constitutional rights. (*Boyde v. California* (1990) 494 U.S. 370, 380.) On the record in this case, we find no such likelihood.

There was strong evidence of a causal connection, "beyond mere coincidence of time and place" (*Cavitt*, *supra*, 33 Cal.4th at p. 213 (Chin, J., conc.)), between the robbery or burglary[14] that appellant helped to plan, and the killing of James – who was the target of that felony – during the course of that crime. Among other facts supporting this connection, perhaps the most telling is that appellant was present when Lane borrowed Ladue's knife to take with him to the motel, and raised no objection to his doing so. The overall record simply does not permit us to discern a reasonable likelihood that the jury found James was killed solely because of Lane's racial animus, rather than because of any causal connection with the robbery or burglary, but nonetheless was misled by the instructions into finding appellant guilty of felony murder.

B. Admission of Evidence of Appellant's Use of Racial Slurs

As already noted, Russell testified that after James was murdered, appellant used a highly inflammatory racial slur to refer to James. Appellant's trial counsel objected to

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[14] There is some ambiguity in the record as to whether the plan in which appellant participated was that Lane and Anderson would rob James, or that they would gain entry to his motel room through the offer (real or feigned) of Anderson's services, and then steal his money without the use of force or fear. Even the latter plan contemplated acts constituting burglary, however (see *People v. Nguyen* (1995) 40 Cal.App.4th 28, 30, 35 [entry into homes with owners' consent, with intent to steal property by giving worthless check in exchange for it, constituted burglary]), and thus constituted a factually sufficient basis for the jury's verdict of felony murder if the requisite causal connection was shown. Appellant does not argue otherwise.

the admission of this evidence as more prejudicial than probative under Evidence Code section 352.[15] The trial judge was unwilling to instruct the witness to use another term in relating what appellant had said to him. The prosecutor argued, in effect, that appellant's overall admission to Russell was relevant to show appellant's guilt, and that his identification of the victim by race bolstered this by demonstrating that appellant was aware of the victim's identity. The trial judge agreed that because the statement was made in the context of a larger conversation in which appellant admitted to Russell that he had helped set up the robbery, it was relevant to the felony murder charge. He also reasoned that in the overall context of the case, appellant's isolated statement was unlikely to cause the jurors to have such a strong emotional reaction that they would not be able to decide the case fairly. Accordingly, he rejected appellant's section 352 argument.

Appellant now argues that this ruling was in error. He acknowledges that the applicable standard of review is abuse of discretion. (See, e.g., *People v. Coddington* (2000) 23 Cal.4th 529, 587, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; *People v. Quartermain* (1997) 16 Cal.4th 600, 628 (*Quartermain*). He urges, however, that in this case the challenged evidence was so inflammatory, and so nearly irrelevant, that this standard was met, and that the error was so prejudicial as to require reversal.

Appellant relies primarily on *People v. Harris* (1998) 60 Cal.App.4th 727 (*Harris*). In that case, the defendant was accused of nonviolent sexual offenses involving licking and fondling an incapacitated woman and a former consensual sexual partner. Under section 1108, which allows evidence of prior sex offenses in prosecutions for sex crimes, the trial court admitted evidence of a violent sexual offense committed by the defendant 23 years earlier. The Court of Appeal reversed, holding that the evidence should have been excluded under section 352 because it's extremely inflammatory nature outweighed its marginal relevance. (*Id.* at pp. 737-742.)

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[15] All references to statutes in this section of our opinion are to the Evidence Code.

In *Harris*, the court discussed five factors to be considered in weighing probative value against prejudicial effect under section 352, and found that all but one of them weighed heavily against admission. The challenged evidence was "inflammatory *in the extreme*" (*Harris*, *supra*, 60 Cal.App.4th at p. 738, italics in original); was likely to confuse the jury (*id.* at pp. 738-739); was very remote in time (23 years earlier) (*id.* at p. 739); and lacked any significant probative value on a disputed issue (*id.* at pp. 739-741). The only factor favoring admission was that the presentation of the evidence did not occupy much time. (*Id.* at pp. 739, 741.)

We find *Harris* distinguishable. In the present case, the challenged evidence, though certainly unfavorable, was nowhere near as inflammatory as the graphic testimony of the defendant's prior victim that was involved in *Harris*. It was not likely to confuse the jury, was closely connected in both time and substance to the crimes of which appellant was accused, and required even less time to present than the evidence at issue in *Harris*. Admittedly, its probative value was fairly negligible, even as part of the overall context of appellant's admissions to Russell, because the latter were essentially cumulative of Lane's extensive eyewitness testimony, as well as appellant's own statements to the police and the testimony of the other witnesses. Nonetheless, we are not persuaded that the section 352 calculus employed by *Harris* yields the same result in the present case.

More to the point is *Quartermain*, *supra*, 16 Cal.4th 600, on which respondent relies. In that case, the Supreme Court rejected a capital defendant's argument that the trial court erred in not excluding evidence of his use of racial epithets to refer to the murder victim during his interviews with police. (*Id.* at pp. 627-629.) The court reasoned that "the racial epithets were not so inflammatory that their probative value was substantially outweighed by their potential for undue prejudice," and that "[w]hile offensive, the use of such language by a defendant is regrettably not so unusual as to inevitably bias the jury against the defendant," especially where "the racial epithets were only a small portion of the evidence," and "the prosecutor did not argue that [the] defendant should be convicted because he was a racist." (*Id.* at p. 628.)

There is one significant difference between this case and *Quartermain*. Here, there is no evidence that appellant knew that James was Black until after his murder. On the contrary, the record indicates that prior to Lane and Anderson's entry into James's motel room, none of them was aware of his race. Thus, even if appellant's use of racial epithets to refer to James after his death indicated that appellant harbored racial animosity in general, there was no evidence indicating that his prejudices played, or even could have played, a role in his complicity for James's murder. Accordingly, the probative value of the evidence here was far more tenuous than it was in *Quartermain*. Nonetheless, when we view the present case in light of the *Quartermain* court's overall analysis of the section 352 issue, we reach the same result here.

Moreover, even if we were to find an abuse of discretion in the admission of the evidence, we still would not find that error to be a basis for reversing appellant's convictions. As the Supreme Court put it in *People v. Coddington*, *supra*, even if a trial court is held to have abused its discretion in admitting evidence, "reversal of the ensuing judgment is appropriate only if the error has resulted in a manifest miscarriage of justice. [Citations.]" (23 Cal.4th at pp. 587-588.) Given the strength of the overall case against appellant here, we are not persuaded that the admission of tangential evidence of his use of a racial epithet on one occasion was "so prejudicial that it denied [appellant] a fair trial in violation of his right to due process." (*Quartermain*, *supra*, 16 Cal.4th at p. 629.)

C. Trial Counsel's Failure to Object to Admission of Appellant's Interview

As already noted, appellant was interviewed at the police station about a week after the murder, and the police did not give appellant any *Miranda* warnings before or during the questioning. Appellant's trial counsel did not object to the playing of a tape recording of the interview for the jury. Before us, appellant argues that the admission of appellant's interview was prejudicial error, and that appellant's trial counsel therefore rendered ineffective assistance in failing to object.

"To secure reversal of a conviction for ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objective standard of reasonableness and that, to a reasonable probability, defendant would have obtained a

more favorable result absent counsel's shortcomings. [Citation.] If the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal. [Citation.] [Wh]ere the record . . . hints at the existence of some tactical reason for counsel's decision . . . [, or a]t least, the record fails to eliminate that possibility[, the] defendant's claim must fail for purposes of [direct] appeal." (*People v. Kraft* (2000) 23 Cal.4th 978, 1068-1069.) Thus, as appellant acknowledges, we cannot reverse his conviction on the basis of ineffective assistance of counsel unless the record precludes the possibility that there was a reasonable, informed tactical basis for his trial counsel's failure to object to the admission of his interview. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-268; *People v. Wilson* (1992) 3 Cal.4th 926, 936.)

Respondent suggests one possible basis in the record indicating that trial counsel's failure to object was a reasonable tactical choice. As respondent points out, the record is clear that appellant went to the police station voluntarily, and was not arrested or handcuffed prior to his interview. Thus, respondent argues, trial counsel may have concluded that any objection would have lacked merit, because appellant's interview did not qualify as a custodial interrogation triggering the need for *Miranda* warnings. We find merit in this suggestion.

We note, in addition, that our review of the record reveals another potential explanation. Appellant's trial counsel made extensive references to the interview both in his opening statement and in his closing argument. Essentially, he used the statement to enable him to explain appellant's side of the story to the jury without requiring appellant to waive his right against self-incrimination and subject himself to cross-examination. Thus, the record here reveals not one but two possible tactical reasons for counsel's decision not to object to the admission of appellant's interview. Accordingly, we must reject appellant's ineffective assistance of counsel claim.

D. Sentencing Issues

For his murder conviction, appellant received an indeterminate sentence of 25 years to life, with the possibility of parole. For his burglary conviction, appellant was sentenced to the three-year upper term. The trial judge ordered the determinate and indeterminate sentences to be served consecutively, starting with the determinate term.

At the sentencing hearing, the trial judge specifically singled out three aggravating factors that he was relying upon "in particular" in imposing the upper term for the burglary conviction: (1) that appellant's prior convictions as an adult were numerous and quite serious; (2) that appellant was on a grant of felony probation when the current offense was committed; and (3) that appellant's prior performance on probation was unsatisfactory. The judge indicated, however, that he was also relying *all* of the aggravating factors identified in the probation report, which included the following additional factors: (4) that the crime involved a high degree of callousness in that appellant returned to the location where the victim was murdered; (5) that appellant induced others, including Harrison, to return to the murder scene and commit burglary; (6) that the crime was carried out in a manner that revealed planning; and, (7) that appellant had engaged in violent conduct that revealed him to be a serious danger to society.

During the pendency of this appeal, the United States Supreme Court decided in *Blakely*, *supra*, __ U.S. __ [124 S.Ct. 2531] 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. We therefore requested supplemental briefs regarding the applicability of *Blakely* to this case.

Appellant's opening supplemental brief argues that both the judge's selection of the aggravated term on the burglary conviction, and the judge's decision to impose consecutive sentences, violated the stricture of *Blakely*, because both decisions were based in part on facts that were not proved to a jury beyond a reasonable doubt. He further contends, citing *Hoffman v. Arave* (9th Cir. 2001) 236 F.3d 523, 541-542, that if this court finds *Blakely* error as to some of the aggravating factors, but not as to others,

the case must be remanded for resentencing if even a single invalid factor had a substantial and injurious effect or influence on the court's sentencing decision.

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 an opinion in which the California Supreme Court has granted review. (*People v. Butler* (2004) 122 Cal.App.4th 910, 918-919, review granted Dec. 15, 2004, S129000.) Pending final word from the California Supreme Court, 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 have rejected this argument previously in other cases, and we shall adhere to that holding here without repeating our reasons.[16]

Alternatively, 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 recidivism-based factors that need not be found by a jury under *Almendarez-Torres v. United States* (1998) 523 U.S. 224 (*Almendarez-Torres*).[17] Again, pending the issuance of the Supreme Court's opinions in *Black* and *Towne*, we adhere to our previously expressed disagreement with respondent's position that the presence of one or more non-*Blakely* aggravating factors entirely insulates a sentence from *Blakely* review.

In our view, when a trial judge's selection of the aggravated term is based in part on factors that *Blakely* requires be decided by a jury, we will apply the "*Chapman* test" (*Chapman v. California* (1967) 386 U.S. 18, 24) for harmless error, which requires us to

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[16] 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.

[17] Appellant recognizes that some of the factors relied on by the judge in selecting the upper term were recidivism-based factors, but contends that the rationale of *Almendarez-Torres* was undercut by *Blakely* and is no longer good law. In light of our conclusion, *post*, that *Blakely* requires resentencing in this case, we need not reach this issue.

determine whether the failure to obtain jury determinations as to the aggravating factors relied upon by the trial court was harmless beyond a reasonable doubt. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326 [*Chapman* standard applicable to claims of sentencing error under *Apprendi*].) The trial judge's selection of the upper term in this case was based in part on factors that plainly must be decided by a jury under *Blakely*, including the degree of callousness involved in the crime, appellant's inducement of others to become involved, and appellant's having engaged in violent conduct making him a serious danger to society. In the present case, we are unwilling to find that, beyond a reasonable doubt, a jury would have made findings to support these aggravating factors. Thus, those aggravating factors cannot be used to support the trial court's sentencing choice in this case.

This conclusion does not end our analysis, however, because "[w]hen a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen the lesser sentence had it known that some of its reasons were improper." (*People v. Price* (1991) 1 Cal.4th 324, 492.) Further, a single factor in aggravation is sufficient to support imposition of an upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728.) Here, of the seven aggravating factors identified in the probation report, only one – appellant's having been on felony probation at the time of the offense – falls within the scope (if broadly construed) of the prior conviction exception recognized in *Blakely*, *supra*, 124 S.Ct. at p. 2536. (See also *Apprendi v. New Jersey* (2000) 530 U.S. 466, 488, 490 (*Apprendi*); *Almendarez-Torres*, *supra*, 523 U.S. 224.) True, two of the other factors (numerousness and seriousness of prior convictions; unsatisfactory nature of performance on probation) are recidivism-related, but they also include potentially subjective elements

that, at least under the circumstances of this case,[18] take them far enough beyond the bare "fact of the prior conviction" (*Blakely*, *supra*, 124 S.Ct. at p. 2536; *Apprendi*, *supra*, 530 U.S. at p. 488) so as to bring them within the province of the jury under *Blakely*.

Because so many of the aggravating factors in the probation report, including two out of the three upon which the trial judge particularly relied, were improperly considered under *Blakely*, we cannot conclude on the record in this case that it is not reasonably probable that the judge would have chosen a lesser sentence if he had considered only the one valid aggravating factor we have identified. Accordingly, we must remand for resentencing on the burglary count.

Finally, respondent argues that even if *Blakely* applies to the trial judge's selection of the aggravated term on the burglary count, it does not apply to the trial judge's decision to make the sentences on the other counts consecutive rather than concurrent. Appellant acknowledges that the weight of authority supports respondent's position on this issue. We concur with all of the other Courts of Appeal that have weighed in on the issue so far, that *Blakely* does not apply to the trial court's determination to impose consecutive rather than concurrent sentences.[19] (See, e.g., *People v. White* (2004) 124 Cal.App.4th 1417, 1441, petn. for review pending, petn. filed Jan. 18, 2005; *People v. Dalby* (2004) 123 Cal.App.4th 1083, 1102-1103, petn. for review pending, petn. filed Dec. 9, 2004; *People v. Jaffe* (2004) 122 Cal.App.4th 1559, 1588-1589, petn. for review pending, petn. filed Nov. 19, 2004.) Accordingly, upon resentencing the trial judge will

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[18] Appellant concedes that the fact of his prior convictions falls within the *Apprendi* exception, but not that their numerousness or seriousness does so. In fact, it appears from the probation report that appellant was convicted of felonies in two earlier cases: in 1997 for receiving stolen property and possession of a controlled substance, and in 1999 for possession of a controlled substance. This record does not permit us to conclude beyond a reasonable doubt that a jury would have found appellant's prior felony convictions to have been either numerous or of increasing seriousness.

[19] This issue is currently pending before the California Supreme Court in *People v. Black*, *supra*, review granted July 28, 2004, S126182, as well as a number of other cases.

remain free to order that the indeterminate sentence for felony murder be served consecutively to the determinate sentence for burglary.

DISPOSITION

The matter is remanded for resentencing on the burglary conviction pursuant to *Blakely*, *supra*, 542 U.S. ___. In all other respects, the judgment is affirmed.

_____
Ruvolo, J.

We concur:

_____
Kline, P.J.

_____
Haerle, J.