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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOEL HERNANDEZ,

Defendant and Appellant.

D047682

(Super. Ct. No. SCN195202)

APPEAL from a judgment of the Superior Court of San Diego County, Richard E. Mills, Judge. Affirmed.

Joel Hernandez was convicted at a jury trial of evading an officer with reckless driving (Veh. Code, § 2800.2, subd. (a); count 1) and resisting an officer's performance of duty (Pen. Code, § 148, subd. (a)(1); count 2; all statutory references will be to the Penal Code unless specified otherwise). In bifurcated proceedings, the trial court found true an allegation that Hernandez had a prison prior offense. (§§ 667.5, subd. (b) & 668.) A total sentence of four years, six months in state prison was imposed: An upper term of

three years for count 1, a consecutive six-month term on count 2, and a one-year term for the prison prior. The court did not stay sentence on count 2 under section 654 as the defense requested.

Hernandez appeals, contending that prejudicial error was committed at trial when the trial court permitted gang evidence to be introduced in the prosecution's case-in-chief. (Evid. Code, § 352.) He also argues that no substantial evidence supports the jury's finding that he was the operator of the vehicle at the time that it was stopped by police, after a car chase and the abandonment of the vehicle by its passengers.

Hernandez also claims sentencing error on several grounds. First, he argues the trial court's imposition of the upper term and the consecutive sentence represented an abuse of discretion, for lack of sufficient proof of aggravating circumstances. Further, he claims the consecutive sentence for count 2 should instead have been stayed under section 654. He also argues that even in light of the holding by our Supreme Court in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*), the imposition of the upper term and consecutive sentences violated his federal constitutional rights under the Sixth and Fourteenth Amendments and *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*). Under the still-existing authority of *Black, supra*, we find the convictions and sentence are supported by the record, and no prejudicial evidentiary error or abuse of discretion occurred. We affirm.

## BACKGROUND FACTS

### A

#### Pursuit of Truck

At trial, the prosecution brought in evidence showing that on May 21, 2005, around 12:45 a.m., a citizen living near a 7-11 store called police, complaining about a gang-related dispute in Escondido. The call included information about two vehicles the caller said were occupied by "gang types": older ones in a black, full-size pickup truck and younger ones in a silver compact car. Detective Luis "Rudy" Rudisell of the Escondido Police Department's gang investigation unit responded to the call, driving his black and white police cruiser, which was outfitted with a steady red light, flashing lights in the front and rear, and the city police insignia on both doors. He was wearing a gang enforcement uniform, including a vest marked with the word "police" and a police badge.

When Detective Rudisell saw the black truck turning north, he started to follow it and used his vehicle spotlight. The truck made an immediate turn without stopping at a stop sign, and from about 15-20 feet away, Rudisell saw the driver of the truck, who was wearing a button-up shirt, and who he later identified as Hernandez. Rudisell turned on his lights and siren and a three to five mile vehicle chase began through a mainly commercial area. The driver accelerated, running several red lights and outdistancing Rudisell's police car. Traffic was light to moderate at the time.

Sergeant Distel, another officer in the vicinity, responded to a broadcast of the truck's description and took over the primary position in the pursuit, which reached speeds of up to 70 miles an hour. Rudisell saw that the black truck ran red lights and stop

signs and went airborne at one point; sparks flew from the pursuing police car as it crossed a dip in the pavement. Distel testified at trial that such vehicle pursuits can create dangers to pedestrians, the pursuing officers, the suspect, and other cars.

At the conclusion of a 10-minute chase, leading to a residential area, Distel saw four or five people leave the truck in a cul-de-sac. He and other officers set up a boundary and used a helicopter and police dogs to search for the vehicle's occupants for about 30 to 45 minutes. Hernandez was found hiding on the roof of a nearby residence, with his shirt off. Another individual, Noe Mendoza, was found hiding at a house nearby, also shirtless. Police found one of the button-up shirts, similar to the one Rudisell had seen the driver wearing, on a roof nearby. Detective Rudisell explained he had been involved in foot pursuits in the past where the suspects removed their shirts to make identification more difficult. A third person, a female juvenile, was also found hiding in the area. Police arrested Mendoza for public drunkenness.

Detective Rudisell told Hernandez to come down from the roof and recognized him as the driver. He also realized he recognized him from 10 to 15 prior contacts, and mistakenly called Hernandez by his brother's name, "Ivan," as he had recently dealt with Ivan (who had recently been incarcerated as of that time), such that Ivan's was the first name that came to mind. At trial, he testified that he knew at the time that he was dealing with this individual, Hernandez, but he misspoke due to his recent contacts with Ivan.

Hernandez was arrested and police officers searched the truck, finding DMV forms, a vehicle title and report of sale, stating Hernandez was the owner of the truck. Two cell phones were also found in the cab of the truck, one on the driver's seat and one

near the passenger's seat. Detective Rudisell tried out the phones and figured out that the phone in the driver's seat belonged to Hernandez, either through viewing the phone's menu and record of calls, or by asking for Hernandez's cell phone number (he was not sure which).

The next day, Mendoza came to the police station and told Officer Paige Woog that he was the driver of the black pickup truck that had evaded police the day before. Woog called Detective Rudisell to explain that Mendoza was at the police station to turn himself in as the driver of the truck. Detective Rudisell told her to let him go, as he was sure that Hernandez was the actual driver.

## B

### Trial Proceedings

At the outset of trial, the court and counsel discussed potential problems with evidence about gang affiliation, regarding the identity defense to be presented by Hernandez, through hearsay statements about Mendoza's confession. Mendoza was unwilling to testify due to Fifth Amendment problems. Also, the prosecutor planned to introduce evidence that Detective Rudisell was previously acquainted with Hernandez, and this vehicle chase had occurred after a report of a gang-related incident. The trial court denied the prosecutor's motion to exclude the hearsay statements. The prosecutor then rejected a defense offer to stipulate that the uniformed officer in a police car had a lawful right not only to follow but also to stop the black truck.

Over a continuing objection by defense counsel, the trial court stated that evidence about gang affiliation would be limited to impeachment evidence of Mendoza and

evidence about the content of the radio call to which officers responded, resulting in the arrest. In his opening statement, the prosecutor told the jury that it would hear gang-related evidence and an effort by a third party to take the blame, but that such evidence would be offered with regard to the credibility of statements to be introduced. Defense counsel said in his opening statement that police had arrested the wrong person, and that Mendoza had admitted to being the driver. The prosecutor then presented testimony from Detective Rudisell about the report that he responded to that night, about a gang-related disturbance, and descriptions and photographs of his uniform and police car. Rudisell also described how he recognized Hernandez from 10-15 prior contacts, and knew of his brother as well.

In his defense case, Hernandez called Officer Woog to describe how Mendoza told her the day after the arrest that he did not want the "wrong guy" to go to jail. He told her he had been in the truck with two of his friends, but no female occupant went along. When Woog asked him why he fled at the time, Mendoza said he had several traffic warrants and did not want to go to jail. When Woog called Rudisell to tell him about Mendoza's admission, he responded that Mendoza was the wrong guy and she should let him go, which she did. Officer Woog did not prepare a report of the incident at that time, but did so later at the request of her department.

In rebuttal testimony, the prosecutor called Detective Rudisell as a gang expert. He explained that as lead investigator of the city's gang unit, he was familiar with the gangs in Escondido, and that to his knowledge, it was very common for gang members to take responsibility for crimes of other gang members in an effort to improve their status

in the gang. He testified Hernandez was a member of the Diablos gang. In response to questioning by the court, he further gave his opinion that Mendoza belonged to the same gang, because Mendoza had a numerical tattoo on his upper arm showing an association with that gang. Before this incident, he was not aware whether Mendoza associated with the Diablos.

In his testimony, Rudisell explained that he told Officer Woog she did not have to follow up on Mendoza's statement, because he had seen Hernandez very clearly during the incident and had no doubt who was the driver of the truck. Also, Mendoza had not said anything about being the driver the night before when he was apprehended, arrested for public drunkenness, and interviewed. Detective Rudisell believed Mendoza must have made such a statement to try to exonerate Hernandez.

The jury returned verdicts of guilty on the two counts charged. Court trial was held on the prison prior, which Hernandez admitted. A new trial motion, based on the admission of gang evidence, was denied. Sentence was imposed as outlined above, including the choice of the upper term based on the lack of mitigating circumstances and various aggravating circumstances, and other terms as will be further discussed. (Pt. III, *post.*) Hernandez appeals the judgment.

## DISCUSSION

We first address Hernandez's claims of evidentiary error, then turn to the sufficiency of the evidence regarding the jury's finding that he was the driver of the truck, which had attempted to evade officers. Finally, we turn to the sentencing issues.

# I

## ADMISSION OF GANG-RELATED EVIDENCE

### A

#### Questions Presented

Hernandez makes several points objecting to the admission of this evidence. He mainly argues it should not have been allowed in the prosecution's case-in-chief, as it was irrelevant and unnecessary to the prosecution's efforts to meet its burden to prove the elements of the charged offenses, evading an officer through reckless driving and resisting an officer. From the outset of trial, he had objected to such proposed evidence and had offered to stipulate that the uniformed officers had a lawful or legal right to follow and stop the truck. He therefore contends that all the references to gang activity, both as to the reason for the traffic stop and to show Mendoza's potential bias as a witness, were unnecessary and prejudicial, and his new trial motion should have been granted accordingly.

To evaluate these arguments that the trial court abused its discretion in admitting this gang-related evidence, we first state applicable standards of review. Where, as here, there is no allegation of a gang enhancement (§ 186.22), "it has been recognized that 'evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.]' [Citation.] Even if gang evidence is relevant, it may have a highly inflammatory impact on the jury. Thus, 'trial courts should carefully scrutinize such evidence before admitting it. [Citation.]' [Citations.] [¶] A trial court's admission of evidence, including gang testimony, is reviewed for abuse of discretion.



[Citations.] The trial court's ruling will not be disturbed in the absence of a showing it exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice. [Citation.]" (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192-193 (*Avitia*).

Evidence of gang membership cannot properly be introduced if it has only tangential relevance to the issues, or if it is offered solely to prove a defendant's criminal disposition. (*People v. Ruiz* (1998) 62 Cal.App.4th 234, 239-240 (*Ruiz*)). "Such evidence has been held admissible only when it was logically relevant to some material issue in the particular prosecution other than as character trait evidence. [Citations.]" (*Id.* at p. 240.)

Due to this potential for prejudice from the admission of gang evidence, the courts will allow it only where the reason for the crime is gang related, or it is relevant to show motive or bias of a witness, "provided it is not cumulative to other properly admitted, and less inflammatory, evidence. [Citations.]" (*Ruiz, supra*, 62 Cal.App.4th 234, 239-240.) Where such evidence is both relevant and probative of an issue in the case, the courts must turn to the question of prejudice, such as an appeal to an emotional bias against defendant, having little to do with the actual issues in the case. (*People v. Karis* (1988) 46 Cal.3d 612, 638.) "The erroneous admission of gang or other evidence requires reversal only if it is reasonably probable that appellant would have obtained a more favorable result had the evidence been excluded. [Citations.]" (*Avitia, supra*, 127 Cal.App.4th 185, 194.) We next apply these standards with regard to the issues specifically raised by the charges, evading a peace officer with reckless driving (Veh.

Code, § 2800.2, subd. (a)) and resisting an officer (§ 148, subd. (a)), to determine whether the evidence was relevant, probative and not unduly prejudicial regarding the nature of the pursuit and the identity of the driver.

## B

### Evidence Regarding Initial Stop

Hernandez claims all the gang-related evidence was unnecessary in light of his proposed stipulation that the uniformed officers had a lawful or legal right to follow and stop the truck. He argues this took care of certain elements of the offense, that any reckless driving took place with awareness of the distinctiveness of the pursuing officer's uniform and markings of the police vehicle. However, the prosecutor was not required to accept the stipulation on those undisputed facts, since other elements of the offense remained to be shown regarding the details of how the pursuit began and continued. (See *Avitia, supra*, 127 Cal.App.4th at pp. 192-193.) Specifically, this gang-related evidence gave substance to the reasons for the police chase and why Hernandez would be likely to flee from the police. Uniformed police officers in marked cars were responding to a call of gang activity, arguably giving rise to a motive on the part of the driver to flee when the spotlight was shined on him and the lights and siren activated. It was not inappropriate to present evidence about the circumstances under which Sgt. Distel took up the chase when Rudisell was unable to keep up.

Also, since Rudisell was previously acquainted with Hernandez, as well as his brother Ivan, through prior professional contacts, and since the defense was mistaken identity, the prosecutor could legitimately seek to prove all the facts regarding the

pursuit, identification and apprehension of Hernandez, instead of accepting the stipulation on that point. These included the facts giving rise to the initial police response to the truck's activities and how Rudisell was able to identify the driver. The evidence that Rudisell mistakenly called him "Ivan" is not an impermissible reference to gang connections, but instead is probative on the identity issues. On balance, the gang evidence was more probative than prejudicial of material issues in the case with respect to how the initial stop and apprehension came about, and did not improperly convert this case into a "gang case" instead of reckless evasion charges.

## C

### Identity of Driver

Next, we review the admissibility of this evidence with reference to the mistaken identity defense presented, that Mendoza volunteered to police the next day that he, not Hernandez, was the driver. The trial court addressed this issue at the outset of trial, and dealt with the defense objections to gang evidence, fully considering the defense position that no such evidence could properly be presented in the case-in-chief. In the opening statement, Hernandez outlined his defense of mistaken identity. Due to this defense to be shown by Woog's testimony about Mendoza seeking to turn himself in, the trial court had an adequate basis to anticipate a need to clarify the motive or intent behind Mendoza's statement to police. The evidence of gang affiliation tends to explain the potential bias of Mendoza and why he would tell police he was the driver.

Thus, once the prosecutor's hearsay objections to Mendoza's statements were overruled, the gang-related evidence could properly come in because Mendoza was

known to be another occupant of the truck at the time Hernandez was arrested, and his motives for later explaining his presence and role in the incident became relevant. We disagree with Hernandez that there was sufficient other impeachment evidence of Mendoza to render the gang-related evidence cumulative or unduly prejudicial. That other available evidence (that Rudisell identified Hernandez and not Mendoza as the driver, and the arrest of Mendoza that night without any such claim being made that he was the driver) was not so strong that the additional information about gang affiliation became cumulative or unduly prejudicial, rather than mainly probative of the identity issue. In light of the eyewitness identification pinpointing Hernandez as the driver, it was appropriate for all the circumstances about Mendoza's later confession to be considered by the jury.

Further, the rebuttal evidence from Rudisell as a gang expert was also properly allowed. Even if we assume the gang evidence should not properly have been admitted until the rebuttal stage, we still cannot conclude its prejudicial effect substantially outweighed its probative value. Any prejudicial effect was minimal in light of the nature of the defense presented, that Mendoza claimed to be the driver. After defense counsel argued in closing to the jury that Hernandez was being tried merely for being a gang member, the prosecutor responded in rebuttal that the gang evidence had been brought in solely to show Mendoza had a motive to lie.

In conclusion, the rulings that admitted this evidence did not represent an abuse of the court's discretion. In any case, there was sufficient evidence absent the gang-related testimony to support the jury finding that Hernandez was the driver and committed the

reckless evasion offense. It is not reasonably probable that a more favorable result would have been reached without the challenged evidence. (*Avitia, supra*, 127 Cal.App.4th at p. 194.)

## II

### SUFFICIENCY OF EVIDENCE

In reviewing a challenge to the sufficiency of the evidence to support a conviction, we apply well-settled rules. " 'An appellate court reviews the record in the light most favorable to the jury's determination' [citation], and determines whether substantial evidence supports the finding [citation]. " "Evidence is substantial if it is reasonable, credible and of solid value." ' [Citation.]" (*People v. Turner* (2004) 34 Cal.4th 406, 425.)

To prove Hernandez was guilty of the conduct forbidden by Vehicle Code section 2800.2, subdivision (a), fleeing or attempting to elude a pursuing peace officer, by means of driving "in a willful or wanton disregard for the safety of persons or property," the prosecution was required to show he was the person driving the vehicle. The evidence on this point mainly consisted of the arresting officer's eyewitness identification of him as the driver, along with the location in the abandoned vehicle of papers identifying Hernandez as the owner. Also, one of the two cell phones found in the vehicle either had the number identified by Hernandez as his own, or showed calls made by him to Mendoza.

Hernandez disputed the weight of this evidence, by showing that the arresting officer originally saw him for only five seconds under a spotlight in dark conditions, with a shirt on, and later called him by his brother's name. Also, the shirt found on the roof of

the house where Hernandez was found, shirtless, was left at the scene and Rudisell was not sure about its color. Four or five people left the truck when it was abandoned, but only three were found, and no physical evidence such as fingerprints was produced to link Hernandez to the truck.

These objections are unpersuasive. Even in light of the challenges to the showing about the driver's identity and the officer's credibility, there is adequate evidence to support the finding Hernandez was the driver of his own truck that was involved in the incident. The officer was familiar with Hernandez from 10-15 prior contacts and, after seeing him up close, positively identified him as the driver. The driver had been wearing a button-up shirt that was similar to one later found nearby. Documents found in the truck showed that it belonged to Hernandez, as did one of the cell phones.

Police later rejected an effort by Mendoza to claim responsibility for being the driver, based on the arresting officer's identification of Hernandez as the driver, and Mendoza's association with the same gang as Hernandez. Mendoza said he had not made this claim on the night of the incident because he did not want to be arrested, but actually he was arrested that night, which further undermined his credibility in the confession. In conclusion, the evidence substantially supports the jury's finding that contrary to his asserted defense, it was Hernandez who was the driver of the truck who was evading a peace officer with reckless driving. (Veh. Code, § 2800.2, subd. (a).)

### III

#### SENTENCING ISSUES

##### A

On appeal, Hernandez contends the sentence represents an abuse of discretion in its imposition of the upper term and consecutive sentences because the evidence did not support the facts upon which the decision was based. California Rules of Court, rule 4.420(b) requires proof by a preponderance of the evidence of the circumstances in aggravation of sentence, and allows the selection of the upper term only if those circumstances in aggravation outweigh the circumstances in mitigation. (All further rule references are to the Cal. Rules of Court.) He claims the aggravating circumstances relied on by the trial court were mainly speculative and were not based on the evidence at trial.

At sentencing, the trial court noted that it had read the probation report, which found no mitigating circumstances to discuss, but set forth a number of proposed aggravating circumstances. The court then enumerated its reasons for rejecting the recommendation of the probation officer that the midterm was appropriate for the reckless evasion offense, and for choosing the upper term. These included the lack of any specified mitigating circumstances, such that the trial judge decided that "ipso facto" the various aggravating circumstances would control. The court stated it was primarily relying on rule 4.421(b) regarding the defendant's background, saying that it provided an overwhelmingly persuasive reason why he should get the upper term, due to repeated violent conduct dangerous to society. The court generally referred to the nature of his

past offenses, his continued association with gang members, and the reckless driving giving rise to these offenses. The court also noted the existence of aggravating factors under rule 4.421(a), by mentioning the lack of regard for public safety, the leadership of the defendant as the driver of his own car, his lack of remorse, and the likelihood that he had something to do with Mendoza's false statement seeking to take responsibility for the offense. (Rule 4.421(a)(1), (4) & (6).)

To impose the upper term, the court relied on the factors identified in rule 4.421(b)(2), Hernandez's prior convictions were numerous; (b)(3), his prior prison term; (b)(4), he was on parole at the time he committed the charged offenses; and (b)(5), his past performance on probation and parole had been unsatisfactory. The one-year prison prior sentence was added on consecutively.

With respect to the decision to run the count 2 sentence consecutively, rather than concurrently, the trial court expressly relied on rule 4.421(a) (rather than rule 4.421(b), which was used to select the upper term). (Rule 4.424.) The criteria set forth in rule 4.421(a) for running these terms consecutively included the facts shown about the circumstances of the crime, which created potential bodily harm to members of the public due to the reckless driving. This factor was evaluated by the court as showing a high degree of callousness. (Rule 4.421(a).)

The court then analyzed the misdemeanor offense of resisting an officer's performance of duty (§ 148, subd. (a)(1)) as representing a separate offense of violence committed against different victims. The court recognized that it could be argued that the public in general was the victim of both charged offenses, but decided instead that the



victims of the Vehicle Code offense were the fellow motorists, pedestrians, and police affected by the pursuit. Regarding the charge of resisting arrest, the second set of victims was deemed to be the neighbors in the location where the truck was abandoned and where police officers with guns had to search for the truck's occupants on the roofs of houses. Contrary to the contention on appeal that the evidence did not support the separate nature of these factors, the court's analysis is well-founded in the record.

Hernandez further argues his sentence was tainted by other factors referred to by the court at sentencing, that are not strongly supported by the record. For example, there were no injuries or crashes caused by the pursuit, arguably reducing to insignificance the threat of great bodily harm represented by his activities. Also, the record was inconclusive about whether the juvenile found hiding at the scene was involved in the pursuit or how she was influenced by Hernandez's leadership and senior status among the truck's occupants. The court also referred to "gang professionalism" all throughout the testimony. (Rule 4.421(a)(8).) However, it was unclear how the incident actually arose in furtherance of street gang activity, with respect to the two missing occupants who fled, or in other respects. Finally, Hernandez complains that the trial court's inference that the lack of mitigating factors meant that the aggravating factors should control is not a logical one.

We disagree. Despite the presence of some additional and arguably inapplicable factors, such as the involvement of the mysterious female juvenile, the evidence strongly supports the remaining aggravating factors on which the trial court based its decision to impose the upper term and consecutive sentences. As shown by the sentencing transcript

and the probation report, and as outlined above, adequate reasons existed and were given under the applicable rules of court for the selection of the upper term and consecutive sentences. The presence of alternative other considerations does not demonstrate a lack of proof by a preponderance of the evidence of the relevant factors, and there was no error committed with regard to the bases for this sentencing choice. (Rule 4.420(b).)

## B

### *Blakely*

At court trial on the prison prior, Hernandez admitted to its terms. At the sentencing hearing, he did not seek trial by jury of any sentencing circumstances not included in the verdict. However, he now contends there was *Blakely* error, involving the right to jury trial, because the court's decisions to impose the upper term, and the consecutive sentences for both the prison prior and the count 2 offense, were based on facts not submitted to the jury. (*Blakely, supra*, 542 U.S. 296.)

This argument raises federal constitutional issues regarding rights to jury trial and proof beyond a reasonable doubt under the Sixth and Fourteenth Amendments and *Blakely, supra*, 542 U.S. 296. The People maintain that any claim of *Blakely* error was forfeited when Hernandez and his counsel did not object below on such grounds, even though the *Blakely* case was filed before the crimes, trial and sentencing occurred in this case. We agree any *Blakely* error is waived.

The United States Supreme Court in *Blakely, supra*, 542 U.S. 296, held that "a defendant in a criminal case is entitled to a jury trial on any fact that increases the maximum sentence to which the defendant is exposed for a particular offense, unless that

fact has been admitted by the defendant or is based on the defendant's prior convictions." (*Black, supra*, 35 Cal.4th at p. 1246.) *Blakely* was decided June 24, 2004, before the August 2005 trial and the October 2005 sentencing in this case. At the time of sentencing, Hernandez did not object on *Blakely* grounds nor inform the court he would object to any aggravating factors not included in the verdict. As mentioned, Hernandez specifically waived his right to a jury trial on his prior conviction allegations.

Generally, issues regarding discretionary sentencing choices that were not raised below are subject to forfeiture. (*People v. Scott* (1994) 9 Cal.4th 331, 351-352.) We therefore conclude any *Blakely* issue was forfeited by Hernandez's failure to raise it in the trial court. (See *People v. Hill* (2005) 131 Cal.App.4th 1089, 1103.) In his opening brief, he states that he is nevertheless raising the issue at this time to preserve it for federal review.

In any event, our Supreme Court in *Black, supra*, 35 Cal.4th 1238, found the reasoning in *Blakely, supra*, 542 U.S. 296, as well as that in *United States v. Booker* (2005) 543 U.S. 220 (*Booker*), to be inapplicable to the California determinate sentencing law (DSL) because "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*Black, supra*, at p. 1244.) Rather, the DSL "authorize[s] a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (*Id.* at p. 1254.)

Specifically with regard to consecutive terms, the court in *Black* stated "When a judge considers the circumstances of each offense and the defendant's criminal history in determining whether the sentences are to be served concurrently or consecutively, he or she cannot be said to have usurped the jury's historical role. Permitting a judge to make any factual findings related to the choice between concurrent or consecutive sentences does not create an opportunity for legislatures to eliminate the right to a jury trial on elements of the offenses. Nothing in the high court's decisions in *Apprendi* [*v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*)], *Blakely*, or *Booker* suggests that they apply to factual determinations that do not serve as the 'functional equivalent' of an element of a crime." (*Black, supra*, 35 Cal.4th at p. 1263.)

Hernandez's arguments challenging the sentencing choices of upper and consecutive terms regarding his prison sentence have thus been resolved against him by the holding in *Black*. We recognize the reasoning in *Black* with regard to upper term sentences may be short-lived in light of the United States Supreme Court's grant of certiorari in *People v. Cunningham* (Apr. 18, 2005, A103501) [nonpub. opn.], cert. granted Feb. 21, 2006, No. 05-6551, *sub. nom. Cunningham v. California* (2006) \_\_\_ U.S. \_\_\_ [126 S.Ct. 1672, 164 L.Ed.2d 395]; [issues argued in Oct. 2006 were whether the current DSL in California, allowing judges to impose enhanced sentences based on their determination of facts not found by the jury, violates the Sixth Amendment].)

At this time, however, we are required to follow *Black's* holding. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Moreover, even assuming (1) Hernandez's claim is not waived, (2) the holding regarding the imposition of upper terms

in *Black, supra*, 35 Cal.4th 1238 is eventually overturned, and (3) the trial court here erroneously relied on the aggravating factors, we would find any *Blakely* error in this case harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

To explain: The trial court imposed an upper term on count 1 after having found no mitigating factors, which were then presumptively outweighed by numerous aggravating factors. Chiefly, the court relied on rule 4.421(b), the defendant's background, saying that it provided overwhelming evidence that he should get the upper term, due to repeated violent conduct dangerous to society. These factors included rule 4.421(b)(2), Hernandez's prior convictions were numerous; (b)(4), he was on parole at the time he committed the charged offenses; and (b)(5), his past performance on probation and parole had been unsatisfactory.

These factors fall within the prior conviction exception preserved by *Blakely, supra*, 542 U.S. 296 and *Apprendi, supra*, 530 U.S. 466. (Cf. *People v. Thomas* (2001) 91 Cal.App.4th 212, 216-223 [prior prison term enhancements are within prior conviction exception of *Almendarez-Torres v. United States* (1998) 523 U.S. 224].) Because any one of these proper factors in aggravation is sufficient to support imposition of an upper term (*People v. Osband* (1996) 13 Cal.4th 622, 728), and the court expressly rejected an available leniency option when it imposed consecutive terms, the court's reliance on other factors was harmless beyond a reasonable doubt. A reversal of the sentence is not required when there is no likelihood a more favorable term would have been imposed in the absence of the error. (*Ibid.*)

## C

With respect to the section 654 issue, Hernandez objects to the court's determination that the misdemeanor conviction of resisting an officer's performance of duty (§ 148, subd. (a)(1)) should represent a separately punishable offense of violence committed against different victims, as opposed to the Vehicle Code offense. He seeks reversal to require the trial court to stay the sentence on the second count, contending both crimes were part of an indivisible course of conduct with a single criminal objective. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1207-1209; rule 4.425.)

"Whether multiple convictions are part of an indivisible transaction is primarily a question of fact. [Citation.] We review such a finding under the substantial evidence test [citation]; we consider the evidence in the light most favorable to respondent and presume the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" (*People v. Martin* (2005) 133 Cal.App.4th 776, 781 (*Martin*).

Under section 654, the courts may not impose multiple punishments for a course of conduct that constitutes an indivisible transaction, but violates more than a single statute. (*Martin, supra*, 133 Cal.App.4th 776, 780-782.) " '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.' [Citation.] If, on the other hand, 'the [defendant] entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.] Section 654 turns on the objective in violating

both provisions, not the Legislature's purpose in enacting them. [Citation.]" (*Id.* at p. 781.)

When interpreting section 654, the courts must apply its "multiple-victim exception," which allows separate conviction and punishment for each crime of violence committed against a different victim, "even though a defendant entertains only one principal objective during an indivisible course of conduct." (*Martin, supra*, 133 Cal.App.4th 776, 780.) Here, the sentencing court declined to accept Hernandez's argument that the public in general was the victim of both charged offenses. Instead, the court imposed a separate punishment, a consecutive term for the resisting arrest charge, on the grounds that its victims were the neighbors in the location where the truck was abandoned, because police officers with guns had to search for the truck's occupants on the roofs of houses, creating a risk of harm. (§ 148, subd. (a)(1).) The court distinguished this group from the victims of the Vehicle Code offense (reckless driving in evading police pursuit), i.e., the motorists and police directly or potentially affected by the high-speed chase. There were separate criminal objectives within the overall course of conduct.

We agree with this analysis of the record. There were two distinct evasions of police, the car chase and the separate effort to evade police by hiding on the roof of a nearby building. Although these events were related, the trial court could reasonably find they were separate efforts to avoid arrest. Substantial evidence supports the determination that these multiple crimes were not part of an indivisible transaction. (Rule 4.425(a).) Separate punishments were properly imposed for these two convictions

because they involved separate criminal acts and separate victims. The judgment must be affirmed in full.

DISPOSITION

The judgment is affirmed.

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HUFFMAN, Acting P. J.

I CONCUR:

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IRION, J.

I CONCUR IN THE RESULT:

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McDONALD, J.