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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER M. HUGGINS et al., Defendants and Appellants.	D042150 (Super. Ct. No. SCN128327)

APPEAL from a judgment of the Superior Court of San Diego County, Joan P. Weber, Judge. Reversed in part, affirmed in part, and remanded.

Defendants Christopher M. Huggins and Robert A. Ortiz were convicted of conspiracy, kidnapping for robbery, two counts of kidnapping for ransom, two counts of robbery in concert, robbery and burglary of an inhabited dwelling. Firearm use allegations were found true as to various counts within the meaning of Penal Code[1]

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1 All further statutory references are to the Penal Code unless otherwise specified.

sections 12022.53, subdivision (b), and 12022.5, subdivision (a)(1). "Great taking" enhancements were found true within the meaning of section 12022.6, subdivision (a)(2), as to the conspiracy and robbery charges. Huggins and Ortiz were sentenced to three consecutive life terms with the possibility of parole and to additional consecutive terms of 32 years.

Huggins appeals, arguing ineffective assistance of counsel and insufficiency of evidence as to the firearm use and great taking allegations. Ortiz appeals, arguing the trial court erred in denying his request for information concerning jurors and in failing to instruct concerning the requirement for unanimity as to the kidnapping charges and that there was insufficient evidence to support the kidnapping convictions. In supplemental briefing both Huggins and Ortiz challenge the imposition of upper term sentences and consecutive sentences, relying on *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531; 159 L.Ed.2d 403]. We will affirm the convictions, but vacate the imposition of the stayed, upper term, determinate sentences and remand for resentencing.

FACTS

A. Prosecution Case

1. Crimes

In November 2000, Michelle Ramskill-Estey was the manager of a bank in Vista. Estey lived in Vista with her seven-year-old daughter Breea at the home of a friend, Kimbra Oliver.

On November 21, 2000, Christopher Butler came to Estey's bank and talked to her about opening large accounts. The two talked for approximately an hour. Butler's

girlfriend Lisa Ramirez entered the bank and told Butler he had missed an appointment. Butler and Ramirez departed.[2]

Later in the day, Estey left work, picked up Breea and arrived home at about 7:00 p.m. Estey and Oliver each had a dog. As Estey approached the house, she noticed a third dog in the yard, a Rottweiler she had not seen before. Estey entered the house. As she put away her groceries, three masked and gloved men carrying handguns broke into the house through a rear door. Estey was thrown to the floor and two of the men put their guns to her head. Based on his eyes, voice and mannerisms, she recognized one of the men as Butler. One of the other men was Black and very large. Huggins is Black, between six-feet and six-feet, one-inch tall and weighs between 225 and 230 pounds. The third man was very skinny and had a lighter complexion. Ortiz is known as "Bones." He is five-feet, seven-inches tall and weighs 140 pounds.

Estey and Breea were tied with duct tape. Butler told Estey if she did not do as she was told, they would kill Breea as Estey watched. Butler told Estey he knew she was a bank manager and they had been following her and another bank employee for months. Butler made comments indicating knowledge of operations at Estey's bank. Butler asked when Estey's roommate would be home. He told Estey that in the morning they were going to strap Estey, Breea and Oliver with dynamite. She was shown an object that looked like sticks of dynamite and was told if she did not do as she was told, the

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2 Butler and Ramirez were tried separately from Huggins and Ortiz.

dynamite would be detonated. She was told that Breea would be disintegrated. Estey could hear Butler talking to a woman via a walkie-talkie.

At about 11:00 p.m., Oliver returned home. As she entered the house two men put guns to her head and took her to her bedroom. Oliver noticed that at all times the three men displayed their guns. She could tell that two of the men were Black and one was Hispanic. Later, Oliver was placed on the couch with Estey and Breea. When Oliver would not calm down, the men taped her and put her on the floor. The men later untaped Estey and Breea. In addition to their guns, the men brought two spears to the house. The men told Oliver they were there to rob Estey's bank.

In the morning Butler told Estey to get ready for work. Butler taped what he told her was dynamite to her back. The dynamite was actually dowels wrapped in red paper. She was told if she tried to remove the dynamite it would explode. "Dynamite" was also taped to Breea and Oliver. Estey was told if she did not do what she was told and if she did not get money from the bank, the dynamite would be detonated.

Estey, with Butler crouched down behind the seat, drove to the bank. Butler communicated with other persons on a walkie-talkie. Estey entered the bank. After the Brink's delivery, she went into the vault with another employee. Estey stated she had to take money because dynamite was strapped to her back and to Breea. Estey took what was later determined to be $360,000 and returned to her car.

Butler gave Estey driving instructions. Eventually, he told her to stop and get out of the car. He told her she could recover her car on a nearby street and drove off. Estey

found her car at the location described. She drove back to her house. The three women removed the dynamite and reported the crime to the police.

2. Investigation

a. Huggins

Because Estey believed Butler was one of the men involved in the robbery, the police developed information concerning him. The officers learned Butler, Ramirez and Huggins lived at the same residence in Oceanside. A search of the residence on December 1, 2000 resulted in the seizure of duct tape, rubber gloves, knit caps with holes cut in them and a revolver.

Huggins was arrested on December 1, 2000. Clothes and gloves that were seized from his car were similar to those used by the large Black intruder at Estey's home. Huggins waived his rights and spoke to officers. Huggins stated Butler recruited him for the robbery several days before it occurred. Huggins explained the plan was to enter a bank manager's house, strap dynamite to her back, her daughter's and her friend's and make the manager go to her bank and get money. Huggins stated Butler forced his way into the house while he waited outside. Once Butler was in the house, Huggins entered. Huggins's description of the events the night and morning of the crime generally agreed with the description given by Estey and Oliver. Huggins admitted taking items from Estey's home, including a CD player and a camcorder.

Huggins's girlfriend testified that in the days following the crime he spent lavishly on his friends. Huggins left a safe with her in which officers found $93,100 in cash.

b. Ortiz

On February 20, 2001, Ortiz was arrested while hiding in the attic of a house in Milwaukee. Officers found a safe containing $32,855 in the house. Ortiz waived his rights and spoke to officers. Ortiz stated he was recruited by Butler to participate in a bank robbery. Butler explained he did not want to enter the bank to commit the robbery. Instead, fake bombs were to be put on bank personnel to compel them to take money from the bank. Over a period of time Butler, Ramirez and Ortiz conducted a surveillance of the bank, the bank manager and her home.

Ortiz explained they were aware that dogs lived at the manager's house. The night of the crime Ortiz took his dog with him to deal with the manager's dogs. When the dogs at the house started to bark, he released his dog. The dogs played together. The men also took two spears to deal with the dogs.

The men were at Estey's house when she arrived with her daughter. The men waited for about 30 minutes, then broke down the door and entered the house. Ortiz's description of the events the night and morning of the crime generally agreed with the description given by Estey and Oliver.

B. Defense Case

Neither Huggins nor Ortiz testified. Their attorneys, however, based on what they perceived as anomalies in the prosecution's case, e.g., Butler's lengthy and very visible appearance at the bank the day of the home invasion, the bringing of a dog to Estey's house, Butler's retaining items used in the crimes and the women's financial difficulties, offered the remarkable and highly speculative defense that a conspiracy existed but

Huggins and Ortiz were not part of it. The defense offered that Estey, Oliver and Butler planned to take a large sum of money from Estey's bank. There was, however, no robbery since Estey was a willing participant in the theft. While the invasion of Estey's and Oliver's home occurred, it was a mere charade played out for the benefit of Huggins, Ortiz and most importantly Estey's daughter, Breea.

Breea was seven years old and could not be relied upon as a consistent or convincing liar. It was necessary, therefore, to actually commit the "crimes." In addition, carrying out the robbery, burglary, kidnappings, and assaults in her presence would make Breea's account of events and the claim such a crime had occurred believable. Leaving Huggins and Ortiz unaware of the true nature of the enterprise would make their "performances" more convincing and tend to protect Estey and Oliver. Defense counsel also suggested the men brought spears to the house because a child of Breea's age would be more frightened by such objects than by guns.

Estey and Oliver were to take none of the proceeds of the theft that would go to Huggins, Ortiz, Butler and Ramirez. It was possible, however, in the defense view, that Estey removed $18,400 from the vault in her underwear the day before the supposed invasion of her home. A discrepancy of that amount–there was evidence that in fact no such discrepancy existed–was discovered in the vault the day before the charged crimes. Counsel suggested Estey might also have removed as much as $60,000 in her underwear. The loss of this money would have been covered by the robbery. Estey's and Oliver's real benefit from the crime was a lawsuit Estey planned to file against her employer arising

from the effects of the robbery and kidnapping on her, Oliver and Breea. By the time of trial Estey had filed such a suit.

Counsel argued it was not difficult to believe a mother would put her seven-year-old daughter through a long night of terror punctuated by three masked and armed men bursting through the door of her home, duct taping her, her mother and housemate, holding them overnight, strapping what she was told was dynamite to her and the others and then taking her mother away. Counsel explained mothers routinely take their daughter to theme parks and go with them on thrill rides. In any case, one night of terror for Breea would be made up for by receiving a settlement or judgment that would pay for her college as well as post-graduate education. Counsel also noted children are resilient.

In the defense view, Estey and Oliver planned to and did "double cross" Butler. Estey would tell the police she recognized one of the men who broke into her house as Butler. Butler and the others would be arrested. The investigation of the crime would be closed and the credibility of her case against the bank would be stronger.

If this interpretation of events was accepted, it would provide a defense as to any crimes in which Estey or Oliver were the alleged victims. Whether as to Huggins and Ortiz it would have provided a defense to the conspiracy charge or the crimes in which Breea was the alleged victim, is, given the verdicts, academic.

DISCUSSION

I

INEFFECTIVE ASSISTANCE OF COUNSEL

While noting trial counsel moved for exclusion of his confession, arguing it was both coerced and taken in violation of *Miranda,*[3] Huggins contends counsel provided ineffective assistance when he failed to argue the confession was also the product of an improper offer of leniency. The issue is also raised in a companion petition for writ of habeas corpus.[4]

In Huggins's motion to suppress his confession, he argued that he requested counsel before questioning, but his request was ignored and his confession was coerced by threats of harm to his children. Attached to the motion was a declaration from Huggins, arguing that during his interrogation he repeatedly requested the assistance of counsel but his requests were ignored. Additionally, he stated he agreed to answer questions only because he believed harm would come to his children if he did not.

The prosecutor's written response to Huggins's motion was expansive. It discussed not only the *Miranda* and coercion claims but argued that nothing said by the officers during the interrogation constituted improper promises of leniency.

A hearing was held on the motion. Kelan Poorman of the Oceanside Police Department, testified Huggins was arrested at a motel in Riverside County at 6:00 a.m.

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3 *Miranda v. Arizona* (l966) 384 U.S. 436.

4 We dispose of this issue separately.

on December 1, 2000. Huggins was transported to a Riverside sheriff's substation where Poorman and FBI Agent Gerald Brown interviewed him. Before being taken to the substation, Huggins was asked no questions. Poorman testified that at no time during the interview did Huggins ask for an attorney. At no time during the interview was Huggins threatened nor were any threats made concerning his children.

Huggins testified he had reviewed the transcript and it contained errors. He identified places where the transcription identified his statements as unintelligible and stated his responses were actually repeated requests for counsel. His requests were ignored. Huggins testified that during the interrogation he was under the influence of marijuana. Huggins testified that contrary to the statement of the officer in the transcript, he was never read his *Miranda* rights. He stated at a place in the transcript that indicated a pause, he was shown a photograph of himself and his girlfriend. While it does not appear on the record, the officers told Huggins if he did not cooperate they were going to arrest his girlfriend. Huggins stated the officers wrote notes to him during the interview stating if he told them he was involved in the crime, they would take it easy on him in court.

Huggins stated he was afraid of the officers. He noted they were armed, in a small room, were loud and made intimidating gestures. Huggins testified the officers threatened his girlfriend and her children. He stated the officers told him they were going to kick in the door of the house where she and the children lived, wave guns and arrest them.

The interview was video and audiotaped. A transcript of the interrogation reveals the following: Huggins was read his *Miranda* rights. He stated he understood them and agreed to talk to the officers. Huggins was told the officers had a great deal of information tying him to a home invasion and bank robbery in Vista. Huggins stated he knew nothing about the crimes. The officers replied they were gathering additional evidence and were arresting other participants. They told Huggins while they did not believe he had a major role in the crimes, his confederates would undoubtedly talk, however, and claim that Huggins had a large role in the enterprise. The officers wanted to know whether his role in the crime was a major one or a minor one. They stated there was a difference.

Huggins replied it was all the same thing.

The officers stated that was not true. Agent Brown stated: "Who would you be more ready to be lenient with . . . , the mastermind, the organizer, or the person who played a very nominal small role . . . . The guy that played a major role or the minor role?" Huggins at first, stated the guy with the major role. After discussing the matter further Huggins agreed the person with the lesser role would be treated more leniently.

When the officer again asked Huggins if they were right in believing his role in the crime was a small one, he stated yes. Huggins stated the person who played the major role in the crime was a man he knew only as KK. When Huggins stated he did not participate in the crime, Agent Brown told him not to lie. He told Huggins: "When you start bull shitting with me and start lying with me and I know the truth, you lose all your

credibility and I won't help you." Huggins then told the officers he did go to the house. His job was to watch and make sure no one was coming.

Huggins then began describing how the crime occurred. While the broad outline he related was accurate, many of his statements were lies, e.g., he insisted Butler was not KK. The officers told Huggins he was not being truthful with them and again asked him how the crime occurred and who was involved.

As the interrogation progressed, Huggins continued to give the officers a series of half-truths concerning the crime. The officers continued to reveal information about the crime to show Huggins they knew he was lying. At one point Agent Brown told Huggins they did not believe he played a major part in the crime and were giving him an opportunity to tell them what occurred. Brown told Huggins: "If you want to help yourself, we need the whole truth."

Huggins continued to tell half-truths, including his continuing insistence that Butler was not involved in the crime. Huggins was then told that Butler and Ramirez were in custody. The officers told Huggins that Butler, Ramirez and others involved in the case were explaining how the crime was committed. Huggins was told Butler had admitted participation in the crime and there was no reason to protect him. Huggins insisted KK and not Butler was involved in the crime. He continued to portray his own part in the crime as a minor one. The officers continued to give Huggins information concerning the investigation, including that both Huggins's and Butler's fingerprints were found on the fake sticks of dynamite.

Huggins eventually agreed the officers were largely correct concerning their version of how the crime occurred and who was involved. He continued to be untruthful concerning details of the crime, including how much he received for participating.

The trial court reviewed the audio and videotapes. The court stated based on that review there was "not one scintilla of evidence" to support Huggins's claims. The court found Huggins was read his rights and waived them. He did not request counsel; he was coherent and understood what was occurring. There was nothing indicating undue coercion. His statements were free and voluntary and his motion to suppress his statements was denied.

A criminal defendant is entitled to the effective assistance of counsel. It is the defendant's burden to demonstrate any claim of inadequacy. A defendant must show that the assistance given was deficient, that is, it fell below an objective standard of reasonableness under prevailing professional norms, and that it was prejudicial. We defer to counsel's reasonable tactical decisions and indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Defendant's burden is difficult to carry on direct appeal. We reverse on the ground of inadequate assistance only if the record affirmatively discloses no rational tactical purpose for counsel's act or omission. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Lucas* (1995) 12 Cal.4th 415, 436-437.)

"A defense counsel is not required to make futile motions or indulge in idle acts to appear competent. [Citations.]" (*People v. Torrez* (1995) 31 Cal.App.4th 1084, 1091-1092.)

"Competent counsel is not required to make all conceivable motions or to leave an exhaustive paper trail for the sake of the record. Rather, competent counsel should realistically examine the case, the evidence and the issues, and pursue those avenues of defense that, to their best and reasonable professional judgment, seem appropriate under the circumstances. [Citation.]" (*People v. Freeman* (1994) 8 Cal.4th 450, 509.)

"Moreover, when 'the record contains no explanation for the challenged behavior, an appellate court will reject the claim of ineffective assistance "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." ' [Citation.]" (*People v. Earp* (1999) 20 Cal.4th 826, 871.)

A confession is involuntary if it is elicited by any promise of benefit or leniency whether express or implied. However, statements by the police that it would be better for the suspect to tell the truth when unaccompanied by a promise of leniency do not render a confession involuntary. There is no improper promise of leniency when the police merely point out the advantages that naturally flow from honest responses. Suggesting to a defendant that his culpability might be less based on certain circumstances is not an implied promise of leniency. Urging a suspect to tell the truth by factually outlining the benefits that flow from a confession is not improper. Impliedly promising lenient treatment in exchange for a confession is improper. (*People v. Holloway* (2004) 33 Cal.4th 96, 115-117.)

Huggins argues trial counsel provided ineffective assistance in failing to argue his confession was involuntary based on improper offers of leniency made during his interrogation.

The comments by the officers cited by appellant as promises of leniency merely suggested to Huggins that if his role in the crimes was, as they suspected, a minor one, it would be best for him to reveal it. There was no express or implied promise of leniency. The officers were merely telling appellant that if his role in the crime was minor, if he were not the planner of the crime or the force behind its commission, that was a factor in appellant's favor that might at least mitigate his culpability. This was not improper. (See *People v. Holloway, supra,* 33 Cal.4th at p. 116.)

Trial counsel could have reasonably concluded that little was to be gained by claiming improper promises of leniency led to Huggins's confession. Huggins has failed to demonstrate he received ineffective assistance of counsel.

II

FIREARM USE

Huggins argues in two respects the evidence was insufficient to support the true finding on the allegations he used a firearm within the meaning of section 12022.53, subdivision (b). First, he argues the evidence was insufficient to prove he was armed with a firearm as the term is defined in section 12001. He contends the evidence presented made it as likely he was armed with, for example, a pellet gun or a toy gun. Second, he argues the nature of the weapon was insufficient to prove that he used it within the meaning of section 12022.53, subdivision (b).

In determining whether the evidence is sufficient to support the verdict, we review the entire record viewing the evidence in the light most favorable to the judgment and presuming in support of the verdict the existence of every fact the jury could reasonably

deduce from the evidence. The issue is whether the record so viewed discloses evidence that is reasonable, credible and of solid value such that a rational trier of fact could find the elements of the crime beyond a reasonable doubt. (*People v. Brown* (1995) 35 Cal.App.4th 1585, 1598.)

As to counts 1 through 7, it was found true Huggins used a firearm within the meaning of section 12022.53, subdivision (b). That section authorizes an enhancement when it is found true that in the commission of certain enumerated offenses the defendant "personally uses a firearm." Section 12001, subdivision (a)(2)(b), defines a "firearm" as "any device, designed to be used as a weapon, from which is expelled through the barrel a projectile by the force of any explosion or other form of combustion."

A jury's task is not simply to choose between pure statements of fact but to draw reasonable conclusions and inferences from the evidence. Criminals seldom offer their weapons for close inspection by those they are victimizing. Further, it is often the case that witnesses are not experts in the identification of firearms. The world is awash not only with real firearms but also with realistic toy firearms, nonfiring, but very realistic replicas of firearms and weapons that resemble firearms. If the only sufficient evidence that an object is a firearm is evidence of the actual physical nature of the object, then few firearm enhancing allegations could be proved. The law does not enforce such a limitation. A jury may, based on the physical appearance of an object, the context in which it is used and the manner of its use, reasonably conclude it is a firearm.

In this case Huggins and his companions conducted a highly dangerous home invasion robbery. They displayed what appeared to be handguns. They told their victims

they were prepared to kill them with the guns. They used the weapons as if they were real, holding them to the heads of the victims. Since their enterprise raised the possible need for firearms not only to terrorize but also to defend themselves from their victims, their victims' dogs and possibly the police, it is reasonable to conclude the objects that appeared to be firearms were in fact firearms. The jury could reasonably conclude that men prepared to commit the crimes in this case would not in the interest of safety arm themselves with nonlethal or less lethal weapons. While Huggins was certainly free to note or present evidence suggesting the object he held was not a firearm, there was sufficient evidence in this case to find it was.

Huggins argues there was insufficient evidence he used the firearm within the meaning of sections 12022.5, subdivision (a)(1), and 12022.53, subdivision (b).

One uses a firearm within the meaning of these sections not only by firing it or pointing it at a victim but also by displaying it in a menacing manner. The term "use" in this context is given a broad meaning and covers actions with a firearm in furtherance of the commission of the crime. (*People v. Granado* (1996) 49 Cal.App.4th 322, 325.)

Huggins argues the evidence was insufficient to prove he used a gun. He concedes Estey testified all three masked men where armed with guns and they never put them down. Huggins argues Estey's testimony concerning his possession of a weapon and the manner in which he held it was very general and gave no specifics that suggested use. He reviews the various counts and notes that while evidence established clear use by Butler and Ortiz, it did not establish use by him.

As noted, the term "use" in this context is given a broad meaning. While Huggins would like to divide the evening of terror into discrete bits and discuss the evidence of his firearm use as to each, such an approach is unrealistic. Huggins and his cohorts planned to rob a bank. Each was armed with a firearm, one purpose of which was to ensure the ready cooperation of their victims. That the plan required they be with the victims for a long period of time and that each may have used his firearm more at one time than another does not in the least change the fact that the firearms they possessed were used to accomplish their plan and each of the crimes they committed to that end. The evidence was sufficient to support the true findings as to Huggins on the firearm use allegations.

III

GREAT TAKING

Huggins notes true findings were made on great taking allegations within the meaning of section 12022.6, subdivision (a)(2). That section allows the imposition of a two-year enhancement when a person takes property and the loss to the victim exceeds $150,000. Huggins concedes a loss in this case of $360,000 but argues since the evidence indicated that at most he personally received $100,000, the evidence was insufficient to support the great taking allegation.

In the context of a great taking allegation, there is no requirement an individual personally take or receive the required amount for the particular enhancement. In *People v. Fulton* (1984) 155 Cal.App.3d 91, 102, Justice Crosby stated: "[A]s the Attorney General convincingly argues, the application of the [holding of cases dealing with being personally armed with a gun] to the great taking enhancement would lead to absurd

results. The criminal who masterminds the offense would be subject to less severe punishment than the minions who actually carry out the crime at his direction." Both Huggins and Ortiz were principals in each crime and jointly acted to take a large sum of money from the bank.

We add it is clearly the amount of loss that is significant and not how many pairs of hands took the money from the till. The evidence was sufficient to support the great taking enhancements.

IV

JUROR RECORDS

Ortiz argues the trial court abused its discretion and failed to follow statutorily required procedures when it denied his Code of Civil Procedure Code section 237 motion seeking juror identification information for the purpose of investigating possible jury misconduct.

Approximately two months after the verdicts were returned, Ortiz sought confidential juror identification information pursuant to Code of Civil Procedure Code section 237 to allow the preparation of a motion for new trial based on a claim of jury misconduct. By declaration attached to the motion, counsel noted three factors that suggested possible improper conduct by the jury and that required he contact jurors.

The first act Ortiz believes might possibly suggest misconduct was an incident in which an alternate juror reported to the court a conversation in which one juror stated to another that the closing argument made by Huggins's counsel was "bullshit." The juror who made the remark was dismissed from the jury. Defense counsel requested the juror

to whom the statement was made also be removed since he had at first denied hearing the statement. The request was denied.

The record reveals the following concerning this incident: After Huggins's counsel finished his highly interesting closing argument a recess was taken. An alternate juror reported to the court that during the recess, Juror No. 7, referring to the argument of defense counsel, stated in the alternate juror's and Juror No. 12's presence: "That was the biggest load of bullshit that I've heard."

At a hearing the next day, Juror No. 7 was asked if during the last recess he had a conversation with other jurors concerning the argument of counsel. He stated he could remember no such conversation. Juror No. 12 stated that during the recess he had talked with Juror No. 7 and an alternate juror. Juror No. 12 stated there might have been some comment by a juror made during the recess concerning argument but he could not recall what was said. He stated he could recall no statement concerning the content of argument or the performance of any attorney by Juror No. 7.

Both defense counsel asked the court to dismiss Juror Nos. 7 and 12. Juror No. 12 was examined again. When asked if at the recess the day before Juror No. 7 stated that the defense closing argument was "bullshit," he stated he remembered something like that but could not remember the exact words. The court asked if anything said by any juror to him during the case would affect his ability to be fair. He stated no.

The trial court dismissed Juror No. 7. The court refused to dismiss Juror No. 12, stating it appeared he was not concentrating on Juror No. 7's comment during the recess and was sincere in saying he could deliberate with an open mind.

Counsel next argued in his request for confidential juror information that the relatively short length of jury deliberations in this very serious case suggested misconduct.

Jury deliberations commenced at 11:38 a.m. on September 11, 2002. Lunch was taken from noon to 1:30 p.m. At 3:40 p.m., the jury asked to have the testimony concerning the defendant's confessions read to them. The jury continued deliberations until 4:27 p.m. September 12 began for the jury at 9:10 a.m. with the reading of the requested testimony. The reading concluded at 10:25 a.m. At 11:29 a.m. the jury notified the court it had reached a verdict.

The verdict forms for conspiracy, kidnapping for robbery and ransom, robbery and burglary are dated September 11, while the verdict forms for the robbery in concert counts as to Oliver and Estey are dated September 12.

As a final basis for seeking juror information, counsel's declaration states that jurors engaged in inappropriate behavior. He states that what while the jury was outside the courtroom waiting to enter with its verdicts, one juror wondered aloud if the jury should do the "wave" when the verdicts were read. This apparently referred to the practice in sports stadiums of fans rising and sitting down in a sequence that to the observer produces a wave-like movement in the stands.

The declaration also states that during the prosecutor's closing argument when Huggins's counsel objected to the prosecutor personally attacking the defense, several jurors appeared to laugh.

The record reveals that at the beginning of closing argument the prosecutor suggested the FBI should hire defense counsel because they figured out the true nature of the crime when no one else had. Huggins's counsel objected that the prosecutor was mischaracterizing the defense argument. The record does not mention any laughter in the courtroom.

The trial court denied the motion for confidential juror information. With regard to the incident in which a juror stated the argument of defense counsel was "bullshit," the court noted a thorough hearing was conducted concerning that matter before deliberations began. The juror who made the statement was dismissed. The court stated there was no basis for excusing any other juror and any further inquiry would be a mere fishing expedition.

The court concluded Ortiz's additional arguments that the jury acted inappropriately or did not fully consider the case were mere speculation based on conclusory statements.

After the recording of a jury verdict in a criminal case, the court record of personal juror identification information is sealed. (Code Civ. Proc., § 237, subd. (a)(2).) A trial court on petition may in its discretion grant access to such information when necessary to the development of a motion for new trial or for any other legal purpose. (Code Civ. Proc., § 206, subd. (g).) Such petition must be supported by a declaration citing facts sufficient to establish good cause for the release of the information. If the declaration establishes a prima facie showing of good cause, the trial court must set the matter for hearing and contact the juror or jurors whose personal identification information is

sought. If the court determines not to set the matter for hearing, it is required to set forth the reasons and make an express finding either of a lack of a prima facie showing of good cause or the presence of a compelling interest against disclosure. (Code Civ. Proc., § 237, subds. (b), (c).)

In an uncodified declaration made as part of the 1995 amendment of Code of Civil Procedure section 206, the Legislature stated jurors who have served on a criminal case have completed their civic duty. The Legislature stated the procedures in Code of Civil Procedure sections 206 and 237 were designed to balance a specifically established need for juror identification information "against the interests in protecting the jurors' privacy, safety, and well-being, as well as the interest in maintaining public confidence and willingness to participate in the jury system." (Stats. 1995, ch. 964, § 1, p. 7375.) The courts have long recognized their inherent power to strike this balance. (*Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1091-1096; *People v. Rhodes* (1989) 212 Cal.App.3d 541, 548-552 (*Rhodes*).)

In this context, to demonstrate the required good cause, a defendant must make a sufficient showing "to support a reasonable belief that jury misconduct occurred." (*Rhodes, supra*, 212 Cal.App.3d at p. 552.) The misconduct alleged must be " 'of such a character as is likely to have influenced the verdict improperly.' [Citation.]" (*People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1322.) Good cause does not exist where the allegations of jury misconduct are speculative, conclusory, vague or unsupported. (*People v. Wilson* (1996) 43 Cal.App.4th 839, 852; *Rhodes, supra*, 212 Cal.App.3d at pp.

553-554.) A trial court's denial of a petition to disclose juror identification information is reviewed for abuse of discretion. (*People v. Jones* (1998) 17 Cal.4th 279, 317.)

Ortiz makes two claims of error. First, he argues the trial court did not follow statutorily required procedures in addressing and resolving his request for confidential juror information, and second, he argues he established good cause for the release of such information and the trial court was required to provide it.

Any person may petition for the release of confidential juror information. If the petition and supporting declaration establish a prima facie showing of good cause for the release, then the matter is set for a hearing unless there is a showing on the record establishing a compelling interest against disclosure. If the matter is not set for hearing, the court is required by minute order to make express findings concerning the basis for such denial. (Code Civ. Proc., § 237, subd. (b).)

If the matter is set for hearing, notice must be given to the parties and to the affected jurors. An affected juror may appear at the hearing to oppose release of the information. (Code Civ. Proc., § 237, subd. (c).)

If a hearing is held, the information must be released unless an affected juror's protest to such disclosure is sustained. (Code Civ. Proc., § 237, subd. (d).) The protest may be sustained if the court finds the petitioner has failed to show good cause, a compelling interest against disclosure is established or the juror is unwilling to be contacted. The court is required to state reasons and make express findings to support the grant or denial of the petition. (*Ibid*.)

Ortiz's disclosure petition was filed on November 15, 2002. The prosecutor responded on December 5, 2002. On March 6, 2003, Ortiz, now represented by new counsel, filed a notice for a hearing on the previously filed petition for disclosure. It appears no new declarations were filed. The prosecutor filed a second response to the request on March 25, 2003.

A hearing was held on April 4, 2003, that in large measure concerned Ortiz's motion for new trial based on his claim of ineffective assistance of counsel. At the beginning of the hearing the trial court addressed the petition for disclosure of juror information. The trial court addressed at length Ortiz's arguments relating to why disclosure was required and gave specific reasons for finding them meritless.

We first note no objection was made below to the manner in which the trial court reviewed the petition for disclosure. In any event, while the matter was handled in a somewhat informal manner, it is clear the trial court, after reviewing the petition and declarations, found no prima facie case showing good cause for the release of confidential juror information. There was no necessity, therefore, to set a hearing or notify affected jurors. While the trial court did err in failing by minute order to make express findings in support of the denial, there is a full record before this court concerning the petition and the reasons it was denied. The trial court's error in failing to make express findings in a minute order is harmless.

The question remains whether the trial court abused its discretion in finding no prima facie showing of good cause. It did not. Ortiz's claim that it was necessary to contact jurors because they allegedly laughed at an objection made by Huggins's counsel

during argument, a juror suggested that when the verdicts were returned the jury do the "wave" and their deliberations were too short did not establish good cause.

It is not clear there was any laughter during argument and if there was it would not suggest misconduct on the part of any juror. Next, that a juror, undoubtedly under some stress, made a joke concerning the jury doing the wave is equally as meaningless. Further, the jury's deliberations were not lengthy. There are, however, no specific amounts of time required in a jury's consideration of a case. With all due respect to appellants and their trial counsel, this was not a close case and the defenses offered, to say the least, were not compelling. Relatively brief deliberations are not inconsistent with the evidence presented.

Neither did the trial court's removal of a juror who made less than complimentary comments concerning defense argument and the refusal to remove another juror to whom the comments were addressed establish good cause for revealing confidential juror information. The comments were discovered before deliberations began. Hearings were held on the matter, the jurors were examined and the trial court gave both appellants a full opportunity to cross-examine the jurors. The trial court could reasonably conclude that no showing was made that the incident required further investigation.

V

KIDNAPPING FOR ROBBERY

Ortiz argues the evidence was insufficient to support his convictions for conspiracy to commit kidnapping for the purposes of robbery (count 1) and kidnapping for the purposes of robbery (count 2). Specifically, he contends that any of the three

movements to which Estey was subjected during the crime, i.e., about her home, from her home to the bank and finally from the bank to the location where she was released, did not increase her risk of harm and, thus, did not satisfy the asportation element of those crimes. In any event, Ortiz argues that since there were three separate acts that could support guilty verdicts on those counts, the trial court erred in failing to instruct concerning jury unanimity in the terms of CALJIC No. 17.01.

A. Sufficiency of Evidence

Section 209, subdivision (b)(1), makes guilty of kidnapping for robbery "[a]ny person who kidnaps or carries away any individual to commit robbery." " 'Kidnapping for robbery, or aggravated kidnapping**,** requires movement of the victim that is not merely incidental to the commission of the robbery, and which substantially increases the risk of harm over and above that necessarily present in the crime of robbery itself.' [Citation.]" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 498.) Ortiz argues there was insufficient evidence of such movement in this case. He is mistaken.

Ortiz argues the evidence showed three movements of Estey that might have amounted to a kidnapping, i.e., movements about her house, being taken to the bank and the drive from the bank to the point she was released. There were in fact only two movements. There is no logical reason to divide her removal from her house into two parts. The purpose of that movement was to complete the robbery. While Estey might have been out of Butler's sight when she went into the bank, she certainly remained under his control.

The prosecutor in both his opening statement and in argument made clear to the jury that the movement supporting the charges of kidnapping to commit robbery and conspiracy to kidnap for the purposes of robbery was the removal of Estey from her house to the point of her release.

The jury could reasonably conclude that movement was not merely incidental to the robbery and substantially increased Estey's risk of harm. Butler did not merely confront Estey at her desk in the bank and tell her to go to the vault and remove money. He made her drive several miles from her home to the bank at gunpoint and strapped with what she was told was dynamite as part of an elaborate scheme to rob the bank. There was nothing merely incidental about such movement. Removing Estey from her house in a state of near panic, at gunpoint, for a movement of considerable distance increased the possibility of contact with other persons and possibly the police and could reasonably be seen by the jury as having substantially increased the risk of harm above that necessarily present in any robbery. The evidence was sufficient to convict Ortiz of kidnapping for the purposes of robbery and conspiracy to kidnap for the purposes of robbery.

B. CALJIC No. 17.01

Ortiz argues because there was one count of kidnapping for the purposes of robbery and one count of conspiracy to kidnap for the purposes of robbery but multiple acts that could support such charges, the court was required to instruct sua sponte in the terms of CALJIC No. 17.01 that the jury was required to unanimously agree on the acts supporting any verdict of guilty.

In criminal cases the jury's verdict must be unanimous. When, therefore, the evidence suggests more than one discrete crime, the prosecution must elect between those crimes or the jury must be instructed it may return a verdict of guilty only if there is unanimous agreement the defendant is guilty of the same crime. Conversely, when the evidence suggests only a single discrete crime, no unanimity instruction is required. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132; *People v. Sanchez* (2001) 94 Cal.App.4th 622, 631.)

No unanimity instruction is required when the crime is a continuing one, i.e., while the crime may involve the doing of individual acts, the conduct is essentially indivisible in a real or evidentiary sense. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199; *People v. Sanchez, supra*, 94 Cal.App.4th at p. 631.) "[N]o unanimity instruction is required when the acts alleged are so closely connected as to form part of one continuing transaction or course of criminal conduct. 'The "continuous conduct" rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them.' [Citations.]" (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 275.)

As noted above, the prosecution made clear to the jury in both opening statement and argument that the conspiracy and kidnapping for the purposes of robbery charges referred only to the movement of Estey from her home to the point she was finally released. This was a sufficient election such that the charges in counts 1 and 2 referred only to the movement of Estey from her house to point of her release. (*People v. Mayer* (2003) 108 Cal.App.4th 403, 418; *People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1455;

People v. Diaz (1987) 195 Cal.App.3d 1375, 1382-1383.) The acts involved in that movement were so closely connected in time and intent they formed a single criminal event and no unanimity instruction was required.

VI

BLAKELY ISSUES

Pursuant to our request the parties have briefed sentencing issues arising in this case from the recent decision in *Blakely, supra,* 124 S.Ct. 2531. Both appellants received the same sentences. Each was sentenced to three consecutive indeterminate life terms. Another life term was stayed pursuant to section 654. A consecutive 32-year determinate term was added to the firearm enhancements and the great taking enhancement. As to the remaining four convictions for crimes punishable under the determinate sentencing law, both appellants were sentenced to the aggravated terms. The determinate sentences on the four counts were stayed pursuant to section 654.

Appellants argue the trial court's decisions that the indeterminate terms would be served consecutively, to impose the aggravated terms on the convictions punishable under the determinate sentencing law and to impose the upper term on the section 12022.5, subdivision (a), firearm use enhancement as to count 8 were discretionary sentencing decisions based on factors not found true by the jury and, thus, pursuant to *Blakely*, violated their right to trial by jury.

The attorney general has responded contending the appellants have waived their rights to challenge the sentences on *Blakely* grounds since they did not raise the issue in the trial court and that *Blakely* is not applicable to California's sentencing law.

We will first conclude that the issues have not been waived, but that *Blakely* does not apply to the trial court's decision to impose consecutive indeterminate terms. As to the upper term sentences, which were imposed and then stayed under section 654, we will conclude that *Blakely* applies to those sentences and that such sentences violated the appellants' Sixth Amendment rights.

A. Waiver

Relying on *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*) and *United States v. Cotton* (2002) 535 U.S. 625, the Attorney General contends the appellants have waived their rights to challenge the upper term sentences on appeal. We reject that contention.

The purpose of the waiver rule articulated in *Scott* is to allow the trial courts the opportunity to correct errors in a timely fashion and to conserve judicial resources. (*Scott*, *supra,* 9 Cal.4th at pp. 351, 353.)[5]

In this case it would have been futile for the appellants to have raised a Sixth Amendment challenge to the court's sentencing decisions. Prior to *Blakely* California courts and many federal courts held there was no right to a jury trial regarding consecutive sentences. (*People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231; *United States v. Harrison* (8th Cir. 2003) 340 F.3d 497, 500; *United States v. Lafayette* (D.C. Cir. 2003) 337 F.3d 1043, 1049-1050; *United States v. Hernandez* (7th Cir. 2003)

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5 Recently the Second District Court of Appeal reviewed the Blakely issues, including the issue of waiver and whether the *Blakely* decision applies to California's determinate sentencing scheme. (*People v. Juarez* (2004) ___ Cal.App.4th ___ [2004 D.A.R. 13887, Nov. 16, 2004].) Although the opinion in *Juarez* is not final, we agree with its analysis and its holdings on these issues.

330 F.3d 964, 982; *United States v. Davis* (11th Cir. 2003) 329 F.3d 1250, 1254; *United States v. Lott* (10th Cir. 2002) 310 F.3d 1231, 1242-1243; *United States v. White* (2nd Cir. 2001) 240 F.3d 127, 136.) No published case in California held that a different rule applied in connection with an upper term sentence.

We conclude there was no reasonable possibility that either appellant would have prevailed on such claim at the time of sentencing in this case. Accordingly, there would no saving of judicial resources, nor would the purposes of the waiver rule be advanced by applying it in this case. (*People v. Barnes* (2004) 122 Cal.App.4th 858, 878-879.)

B. Consecutive Sentences

The trial court sentenced both appellants to three consecutive life terms. The court cited the reasons listed in the probation report as the basis for consecutive sentences. The probation report, in turn, recommended consecutive sentences because there were three separate victims. The appellants argue that *Blakely* applies to the decision to impose consecutive sentences because such decisions are based on the exercise of discretion, for which reasons must be stated. (Cal. Rules of Court, rule 4.425 (CRC).)

Appellants mistakenly rely on section 669, which they contend creates a presumption in favor of concurrent sentences. From such premise, they reason the trial court's decision to depart from the presumed sentence amounts to an increase of the appellants' sentences based on facts, which were not found by the jury.

The first flaw in the appellants' argument is that section 669 does not create a presumption in favor of concurrent sentences. As explained by the court in *People v. Reeder* (1984) 152 Cal.App.3d 900:

> "While there is a statutory presumption in favor of the middle term as the sentence for the offense [citation], there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing." (*Id.* at p. 923.)

Another flaw in appellants' argument is that there is no statutory duty imposed on trial courts to make findings of fact to support consecutive sentences. Section 669 provides that the court "shall direct whether the terms of imprisonment . . . shall run concurrently or consecutively." The section does not require any factfinding. Section 1170, subdivision (c), provides that the court "shall state the reasons for its sentence choice on the record." Even assuming this provision applies to the selection of consecutive sentences (CRC, rule 4.406(b)(5)), the statement of reasons does not require a separate finding of facts beyond those facts, which support the various convictions. The statement of reasons is required in order to facilitate appellate review of the sentencing choice for an abuse of discretion. (*People v. Stewart* (2001) 89 Cal.App.4th 1209, 1215.)

In this case the jury found both appellants guilty of separate kidnapping offenses involving three different victims. The appellants were "entitled" to be separately sentenced for each of the offenses. The trial court's discretionary decision to impose the sentences consecutively did not run afoul of the new Sixth Amendment requirements imposed by *Blakely* and *Apprendi v. New Jersey* (2000) 530 U.S. 466.

C. Imposition of Aggravated Terms

As we have noted, the trial court imposed the aggravated term as to counts 5 through 8 and to the section 12022.5, subdivision (a), firearm enhancement found true as to count 8. The trial court stayed the sentences on counts 5 through 8 under section 654. The probation report noted as factors in aggravation (1) that the crimes were cruel and involved the threat of bodily harm, and (2) the crimes were carried out with planning and sophistication. These were not findings made by the jury.

Although it is highly unlikely the appellants will ever be required to serve any time in custody on the stayed sentences, we are presented with the question of whether the selection of the upper terms for the determinate sentences violated the appellants' rights to jury trial. Recognizing that our discussion is undoubtedly academic, we apply our understanding of *Blakely* to these sentences.

In *Blakely, supra,* 124 S.Ct. 2531, the court held that "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Id.* at p. 2536.) The issue of whether *Blakely* precludes a trial court from making findings on aggravating facts in support of an upper term sentence is currently under review by the California Supreme Court. (*People v. Towne*, review granted July 14, 2004, S125677; *People v. Black*, review granted July 28, 2004, S126182.) Pending resolution of this issue by the court we are required to apply our best judgment as to the applicability of *Blakely* to upper term sentences.

Under our determinate sentencing law, where statutes provide three possible prison terms for a particular offense, the trial court cannot impose a sentence greater than the middle term unless it finds, by a preponderance of the evidence, that the circumstances in aggravation outweigh the circumstances in mitigation. (§ 1170, subd. (b); CRC, rule 4.420(c), (d).) The respondent's position is that the imposition of an upper term sentence under the determinate sentencing scheme is not the same as "the imposition of a penalty beyond the standard range" and thus does not implicate *Blakely.* This is a distinction without a difference. Undoubtedly an upper term is the "statutory maximum" penalty in the sense that it is the highest sentence that a court can impose for any given crime. The fact that the statute authorizes a possible upper term sentence does not necessarily make the "maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant," which is the relevant standard for purposes of applying *Blakely*. (*Blakely*, *supra,* 124 S.Ct. at p.2537; see *Apprendi v. New Jersey, supra,* 530 U.S. 466, 491-497; *Ring v. Arizona* (2002) 536 U.S. 584, 592-593.)

The majority in *Blakely* explained that when the judge's authority to impose a higher sentence depends on the finding of one or more additional facts, "it remains the case that the jury's verdict alone does not authorize the sentence," as required to comply with constitutional principles. (*Blakely*, *supra,* 124 S.Ct. at pp. 2538.) The same is true here. The maximum penalty the trial court could impose for counts 5 through 8 was the middle term, unless it found facts in addition to those implicit in the jury's verdict. Thus, the principles of *Blakely* necessarily apply to the trial court's decision to impose the upper

terms for those offenses. The remaining question then is whether the trial court could properly rely on the cited factors in support of its sentencing decision.

As previously noted, neither of the two factors relied on by the trial court to support the upper term selection was based on the elements of the crimes or the findings by the jury. Applying the principle of *Blakely*, the constitution requires a jury trial on any fact that "the law makes essential to the punishment" other than the fact of a defendant's prior conviction. (*Blakely,* supra, 124 S.Ct. at pp. 2537, 2540.) Applying those standards to the present case, it is clear that there was no jury finding identified by the court that could support the imposition of upper term sentences. Accordingly, we find the upper term sentences imposed on counts 5 through 8 violated the appellants' rights to jury trial as defined by *Blakely.*

DISPOSITION

The sentences on counts 5 through 8 are reversed. The case is remanded to the trial court for resentencing in accordance with the principles expressed in this opinion. In all other respects the judgments are affirmed.

HUFFMAN, J.

I CONCUR:

AARON, J.

BENKE, J., concurring and dissenting.

I concur in the majority opinion except as to the remand for resentencing of counts 5 through 8.

The trial court applied the upper terms on counts 5 through 8 because (1) the crimes were cruel and involved the threat of bodily harm and because (2) the crimes were carried out with planning and sophistication. My colleagues conclude *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*) requires these aggravating factors must be found by a jury. I disagree.

Once the jury finds a defendant guilty of a substantive crime, all of the elements of the crime, the facts upon which the jury verdict depends, have been found true. The Fifth and Sixth Amendments have been satisfied. Thereafter, traditional factors concerning the defendant and the nature of the crime(s) may be used to impose a sentence up to the statutory maximum without implicating the right to jury. (*Harris v. United States* (2002) 536 U.S. 545, 565-566; *Blakely v. Washington, supra,* 542 U.S. _____; also see *People v. Wagener* (2004) 123 Cal.App.4th 424, 430-432 (*Wagener*).) The sophistication, cruelty and threatening nature of the crimes in this case easily pass constitutional muster as traditional sentencing factors.

Acknowledging that the upper term is the statutory maximum, my colleagues conclude California's middle term is the upper term for *Blakely* purposes because additional facts are needed to reach the upper term. They incorrectly assume the middle term is the *mandatory* statutory term in California and some required, intellectual "trial process" is necessary to reach the upper term. I disagree. The middle term is one of

three completely independent discretionary terms available to a trial judge. As is noted in *Wagener*, the legislative history of our middle term, case law and the language of our Penal Code statutes and Rules of Court support this conclusion.

Because there is a basis upon which to declare our statutes constitutional, there is no reason to lower the sentences here. If the interpretation offered by the majority in *Wagener* ultimately proves to be incorrect, appellant and others so situated may still obtain through the writ process the relief granted here by my colleagues. If it is found that *Blakely* does not rule our tripartite sentencing laws unconstitutional, my colleagues have unnecessarily lowered the sentences for the crimes here. If this is the case, then here, as in other cases, an unwarranted window has opened. Sentences will be reduced that need not be. Moreover, some but not all appellants and defendants will receive reduced sentences. With all due respect, I do not consider such systemic problems academic.

I would affirm the judgment without a remand for resentencing pointing out to appellants that the relief they seek may be premature.

BENKE, Acting P. J.