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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

AIRTON MANDARINO,

Defendant and Appellant.

B188473

(Los Angeles County  
Super. Ct. No. GA058400)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Jacqueline H. Nguyen, Judge. Affirmed as Modified.

Patricia A. Andreoni, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney  
General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D.  
Matthews and Adrian N. Tigmo, Deputy Attorneys General, for Plaintiff and  
Respondent.

Airton Mandarino appeals from judgment entered following a jury trial in which he was convicted of one count of grand theft by fraudulent use of access cards or account information, count 1, (Pen. Code, § 484g, subd. (a)) and one count of grand theft of personal property, count 3, (Pen. Code, § 487, subd. (a)). Following a court trial, he was found to have suffered three prior felony convictions within the meaning of Penal Code section 667.5, subdivision (b). He was sentenced to prison for a total of four years, consisting of the upper term of three years for count 1, plus one year for one prior prison term, and a concurrent middle term of two years for count 3. He contends imposition of an upper term sentence violated his federal constitutional rights to a jury trial and proof beyond a reasonable doubt under the Sixth and Fourteenth Amendments and *Blakely v. Washington* (2004) 542 U.S. 296. He also contends the trial court violated Penal Code section 654 by imposing sentence on both counts. For reasons stated in the opinion, we stay the sentence on count 3 and in all other respects affirm the judgment.

### **FACTUAL AND PROCEDURAL HISTORY**

In March 2004, appellant signed a contract to purchase a 2003 Jeep Liberty automobile from Dodge of Alhambra. Appellant paid one dollar in cash and charged \$2,000 on a credit card belonging to Lee Bass. Appellant paid the remaining down payment of \$3,801 with a post-dated check and was allowed to drive the vehicle away from the dealership. The check was drawn on the account of Alvaro and Iracema Mandarino and was later returned with a notation that the checking account had been closed.

Previously, Lee Bass had purchased an air conditioner from appellant using her Discover credit card. The credit card number and expiration date were listed

on the contract for the air conditioner. Ms. Bass had never authorized appellant to use her credit card to purchase a vehicle. She discovered the unauthorized charge of \$2,000 when she received her credit card statement.

At sentencing, the court indicated it had reviewed the probation report. The court stated the upper term in count 1 was appropriate based on the fact that appellant's prior convictions, most of which were theft related, were numerous and ever increasing in seriousness. Appellant had served a prior prison term, which had not deterred him from committing a similar offense; the present offense involved prior and extensive planning and appellant took advantage of an elderly victim, who because of her age was a vulnerable victim. For count 3, grand theft of personal property, the court sentenced appellant to the middle term of two years concurrent to the sentence in count 1. For the prior prison term enhancement, the court sentenced appellant to a consecutive one year.

## **DISCUSSION**

### **I**

Appellant contends imposition of an upper term sentence violated his federal Constitutional rights to a jury trial and proof beyond a reasonable doubt under the Sixth and Fourteenth Amendments and *Blakely v. Washington* (2004) 542 U.S. 296. He acknowledges *People v. Black* (2005) 35 Cal.4th 1238 but argues it may not be the final word on the issue based on *Cunningham v. California* (2005) \_\_\_ U.S. \_\_\_ [126 S.Ct. 1329]. In *People v. Black, supra*, 35 Cal.4th at p. 1254, the California Supreme Court held that *Blakely* does not invalidate California's upper-term sentencing procedure. Appellant's argument

raises no issues not resolved in *Black*.<sup>1</sup> We are bound to follow decisions of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

## II

Appellant contends and respondent agrees the trial court erred by imposing sentences for both counts 1 and 3 in violation of Penal Code section 654.<sup>2</sup> We agree.

The crime in count 1 was appellant's fraudulent use of the credit card information of Lee Bass to make a \$2,000 down payment on the Jeep vehicle. The crime in count 3 was the taking of personal property of Lee Bass, obtaining physical possession and control of the \$2,000.

At sentencing, the prosecution argued that appellant should be sentenced to the upper term on either count 1 or 3 and that Penal Code section 654 applied. The court did not disagree with the assessment that Penal Code section 654 applied but sentenced appellant in count 3 to a concurrent term.

"[Penal Code] section 654 prohibits '[p]unishment for two offenses arising from the same act . . . .' [Citation.] 'Insofar as only a single act is charged as the basis for the conviction . . . , the defendant can be punished only once.'

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<sup>1</sup> The United States Supreme Court has granted certiorari in *People v. Cunningham* (Apr. 18, 2005, A103501) [nonpub. opn.], certiorari granted *sub nom. Cunningham v. California* (Feb. 21, 2006, No. 05-6551) \_\_\_ U.S. \_\_\_ [126 S.Ct. 1329], on the issue whether *Blakely* applies to California's determinate sentencing law. Oral argument was held on October 11, 2006.

<sup>2</sup> Penal Code section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . ."

[Citation.]” (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) Penal Code section 654 ““has been applied not only where there was but one ‘act’ in the ordinary sense . . . but also where a course of conduct violated more than one statute and the problem was whether it comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654.”

[Citation.]’ [Citation.]” (*People v. Latimer, supra*, 5 Cal.4th at p. 1208.)

“Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of 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.]” (*People v. Latimer, supra*, 5 Cal.4th at p. 1208.) “The determination of whether there was more than one objective is a factual determination, which will not be reversed on appeal unless unsupported by the evidence presented at trial. [Citation.] The factual finding that there was more than one objective must be supported by substantial evidence. [Citation.]” (*People v. Saffle* (1992) 4 Cal.App.4th 434, 438.)

Here, there was no substantial evidence that there was more than one objective; and it appears the trial court did not disagree with the parties that Penal Code section 654 applied. Rather than staying the sentence for count 3, however, the court imposed a concurrent sentence. Imposition of concurrent sentences is precluded by Penal Code section 654, and the sentence in count 3 must, therefore, be stayed. (*People v. Miller* (1977) 18 Cal.3d 873, 885.)

## **DISPOSITION**

The sentence imposed on count 3 is ordered stayed pending completion of the sentence on count 1, at which time the stay shall become permanent. As

modified, the judgment is affirmed. The trial court is directed to prepare a new abstract of judgment incorporating the modification and to send a certified copy to the Department of Corrections and Rehabilitation.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.