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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. THOMAS MOORE, et al., Defendants and Appellants.	B166427 (Los Angeles County Super. Ct. No. YA053516)

APPEAL from a judgment of the Superior Court of Los Angeles County, John Vernon Meigs, Judge. Affirmed in part, Reversed in part, Modified, and Remanded with Directions.

Gideon Margolis, under appointment by the Court of Appeal, for Defendant and Appellant Thomas Moore.

Juliana Drous, under appointment by the Court of Appeal, for Defendant and Appellant Dainette Robinson.

Joanna McKim, under appointment by the Court of Appeal, for Defendant and Appellant Wanda Sanders.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Chung L. Mar and Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants Thomas Moore and Dainette Robinson appeal from judgments of conviction for first-degree robbery (Pen. Code, § 211),[1] first-degree burglary (§ 459) and false imprisonment by violence or menace (§ 236). Moore was also convicted of possession of a firearm by a felon (§ 12021, subd. (a)(1)). Wanda Sanders appeals from a judgment of conviction for possession of controlled substances (Health & Saf. Code, § 11350, subd. (a)).

Moore and Robinson each contend the trial court erred in not striking the victim's testimony after he asserted his Fifth Amendment rights regarding an arrest unrelated to the crimes at issue here. They also contend error for failure of the trial court to instruct the jury on the lesser included offense of false imprisonment without violence or menace. Sanders urges the court erred in allowing the prosecution to elicit a statement made by Sanders, previously ruled inadmissible in violation of her *Miranda*[2] rights, during redirect examination of a police officer. Each appellant challenges the sentences received pursuant to the recent United States Supreme Court decision in *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531]. Additional sentencing errors are raised, a number of which respondent concedes.

We conclude that the trial court did not commit prejudicial error in refusing to strike the victim's testimony or in failing to instruct on the lesser included offense. Nor did the court abuse its discretion in allowing admission of Sanders' statement on redirect examination. Accordingly, we affirm the judgments of conviction. But we do find error in sentencing. We modify the sentence of

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

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

Robinson. We reverse the judgments and remand for resentencing with regard to Moore and Sanders.

FACTS

On November 9, 2002, 19-year-old Anthony Sanchez had spent the night at the La Mirage Inn with a young woman, Mirelli. At about 5:30 a.m. the next morning, Sanchez took Mirelli home in his black Chevy Tahoe. But he had inadvertently left his house keys at the hotel and returned to retrieve them. While in his room, Sanchez heard a knock at the door. When he opened the door he saw appellants Robinson and Moore. Moore was holding a pistol aimed at Sanchez. They entered the room and told Sanchez to lie face down on the bed. Sanchez complied. As he was lying down, Sanchez looked quickly at the door and saw two other young women. At trial he identified them as appellant Sanders and Sheimeika Harlston.[3] When Sanchez was face down on the bed, Moore tied Sanchez's arms and legs with the bed sheets and placed a pillow case over his head, all the time holding the pistol to his head. Moore told Sanchez, "Shut the f--- up or I'll kill you." Sanchez also heard one of the women whisper, "Is the black truck outside?" Moore then reached into Sanchez's pockets and took his keys, cell phone and cash. Sanchez heard the door open and close. The incident took about ten minutes. Sanchez managed to untie himself as he heard his truck being started and driven off.

The robbery was reported and Los Angeles County Sheriff's Deputies responded to the scene, where they met Sanchez. He reported that his black Tahoe had been stolen along with personal property. He provided descriptions of the perpetrators.

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[3] Harlston is not a party to this appeal.

About 15 minutes later, deputies drove by El Segundo Boulevard and Broadway where they saw a black Tahoe parked next to a green Honda Prelude and a red Toyota Cressida. Moore was talking to Robinson, who was sitting in the driver's seat of the Tahoe. Sanders and Harlston were sitting in the Toyota. The deputies ordered the suspects to stay where they were. Moore removed what appeared to be a gun from his waistband, threw it into the Honda Prelude, and ran. The women were detained. Deputy Semenez ordered Sanders to drop a green cigarette pack she was holding and she did so. Semenez discovered two cigarettes and two off-white rock-like objects in the pack. Semenez also noted a backpack in the Toyota immediately behind the driver's seat where Sanders had been sitting. A glass tube, the type used for smoking crack or rock cocaine, was found in the backpack. Sanders admitted to Semenez that the backpack was hers. A pistol was recovered from the floorboard of the Honda. Moore was later detained and made the unsolicited statement: "Man, I don't know why I did that this morning. I don't know what made me jack that dude for his truck this morning."

Moore testified in his own defense that he and Sanchez met the previous evening and spent the night looking for women and partaking in drugs. The next morning Moore obtained more drugs from Sanchez who also loaned Moore the Tahoe to use. Moore drove to Athens Park where he met up with the three women. Shortly after he met with the three women, they were confronted by the deputies. Because Moore had just smoked some crack, he "tripped out" and ran.

Further facts will be presented in connection with the discussion.

DISCUSSION

A. Substantive Issues

1. *Motion to Strike the Testimony of Sanchez*

Appellants Moore and Robinson argue that the trial court committed prejudicial error in refusing to strike the entirety of Sanchez's testimony because he asserted his Fifth Amendment rights in connection with evidence admitted regarding a recent arrest Sanchez suffered. Appellants contend their inability to adequately cross-examine Sanchez about his recent arrest tainted the entire trial. We disagree.

Before addressing this argument, we must place the issue in context. Sanchez was the first witness called in the People's case-in-chief. He was fully examined by the prosecutor and all defense counsel on February 20, 2003. During the morning of March 4, 2003, the prosecutor, Steven Belis, informed the court that he had just learned that morning that Sanchez had been arrested a few days before February 20. This arrest had occurred shortly after the District Attorney's office ran a rap sheet on Sanchez, disclosing nothing, and involved drug and firearm charges. Mr. Belis had provided this information to defense counsel that same morning. Counsel for Moore indicated the defense would like to recall Sanchez to the stand but he realized counsel would be appointed to represent Sanchez and that counsel would most likely advise Sanchez to assert the Fifth Amendment. Other defense counsel concurred and the court and counsel discussed how to handle the matter. The court indicated that counsel could inquire of Sanchez about the arrest and matters would then have to develop from there.

The next morning Sanchez was present. Counsel for Moore advised the court that defense counsel wanted to examine Sanchez about the arrest of February 16, 2003, which concerned various gun charges, possession of marijuana and receiving stolen property. As authority, counsel cited the case of *People v.*

Wheeler (1992) 4 Cal.4th 284 (*Wheeler*) and told the court they wished to examine Sanchez about the facts underlying his arrest. The court tentatively concluded it would not allow cross-examination of Sanchez on the arrest until counsel had been appointed to advise Sanchez. Defense counsel argued that if Sanchez were to assert his Fifth Amendment privilege they would make a motion to strike his entire testimony.

Counsel was appointed to represent Sanchez and Sanchez was called to the stand by Harlston's counsel. Counsel was allowed to inquire only whether Sanchez had in fact been arrested on February 16, 2003, to which he answered "yes." The prosecutor then inquired whether Sanchez had told him about the arrest, to which Sanchez replied "no." The prosecutor was allowed one follow up question why Sanchez had not told him about the arrest. Sanchez replied: "Because I didn't think it had nothing to do with this, you know. I thought it was totally a different case."

Defense counsel then moved to be allowed to inquire further with regard to the arrest or in the alternative that the court strike Sanchez's entire testimony. The court denied the motion. Thereafter, the deputies who had arrested Sanchez on February 16th were called to the stand and fully testified about the circumstances of the arrest.

Wheeler stands for the proposition that "[p]ast criminal conduct involving moral turpitude that has some logical bearing on the veracity of a witness in a criminal proceeding is admissible to impeach the witness, subject to the trial court's discretion under Evidence Code section 352. [Citations.]" (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 314, p. 394.) *Wheeler* addressed the issue in the context of a prior misdemeanor conviction. The Supreme Court noted that Evidence Code section 788 contemplated admission of only felony convictions for impeachment purposes. But, the court reasoned, "[m]isconduct

involving moral turpitude may suggest a willingness to lie [citations], and this inference is not limited to conduct which resulted in a felony conviction." (*Wheeler*, *supra*, 4 Cal.4th at pp. 295-296.) The court concluded that evidence of the actual criminal *conduct* was admissible for impeachment purposes, in the discretion of the trial court. (*Id.* at pp. 296-297.)

It is well within the discretion of the trial court to admit, limit or preclude introduction of evidence on collateral matters sought to be introduced to impeach a witness. (Evid. Code, § 352; *People v. Benson* (1982) 130 Cal.App.3d 1000, 1006.) Here, the evidence of Sanchez's arrest was clearly a matter collateral to the charges at issue. Because Sanchez asserted his Fifth Amendment privilege, the trial court could not compel him to testify regarding the arrest. But the court did admit evidence of the arrest through the arresting officers. Thus, the impeaching evidence was before the jury.

But, appellants argue, their inability to cross-examine Sanchez regarding his arrest prevented them from demonstrating to the jury that his entire testimony should be disregarded. We cannot agree. Sanchez was fully and completely cross-examined regarding his testimony relating to the events giving rise to the prosecution of Moore and Robinson. This distinguishes this case from the cases of *People v. Manchetti* (1946) 29 Cal.2d 452 and *Gallaher v. Superior Court* (1980) 103 Cal.App.3d 666, relied upon by appellants.

We find no abuse of discretion by the trial court in denying the motion to strike Sanchez's testimony.

At oral argument, counsel for Robinson suggested the failure of the prosecutor to discover Sanchez's arrest prior to trial and provide the information to the defense was a violation of *Brady v. Maryland* (1963) 373 U.S. 83. We do not address this issue because it was not raised in Robinson's briefing on appeal and it has a factual matrix, whether under the circumstances presented there was a *Brady*

violation, which should have been addressed in the first instance by the trial court. (See *People v. Rogers* (1978) 21 Cal.3d 542, 547-548.)

2. *Instruction on the Lesser Included Offense*

Robinson and Moore argue the trial court committed prejudicial error in not sua sponte instructing the jury on the lesser included offense of false imprisonment without force or violence.

"In criminal cases, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence. [Citation.] This obligation includes giving instructions on lesser included offenses *when the evidence raises a question whether all the elements of the charged offense were present, but not when there is no evidence the offense was less than that charged*. [Citation.]" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085, italics added.)

"Misdemeanor false imprisonment is a lesser and necessarily included offense of felony false imprisonment, which has the additional element of proof the restraint was effected by violence, menace, fraud or deceit." (*People v. Matian* (1995) 35 Cal.App.4th 480, 487.)

The uncontradicted evidence at trial established that the false imprisonment was felonious conduct, nothing less. Moore entered the motel room with a pistol in his hand, aimed at the head of Sanchez; Sanchez felt the pistol against his head while he was being tied up; and Moore threatened to kill Sanchez unless he was quiet. Use of the pistol to control Sanchez while he was gagged and tied up constituted an act of violence (*People v. Babich* (1993) 14 Cal.App.4th 801, 806) and the threat to kill Sanchez constituted menace. (*People v. Bamba* (1997) 58 Cal.App.4th 1113, 1124.)

3. *Sanders' Admission Regarding the Backpack*

Prior to Semenez testifying, the court conducted an Evidence Code section 402 hearing at the request of Sanders' counsel. The prosecutor stated that he intended to establish through Semenez that Semenez had asked Sanders if the backpack containing the cocaine pipe belonged to her, and she answered in the affirmative. Sanders' counsel argued that Semenez's inquiry of Sanders violated *Miranda* because Sanders "was clearly in custody, and he . . . had found what he thought was cocaine in searching this vehicle." The trial court ruled: "unless there's some other indicia in the backpack showing it belongs to her, I'm not going to allow the statement in. I mean, he can certainly testify as to what he found in the backpack. [¶] . . . [¶] But the statement is not admissible, and I find it to be in violation of *Miranda*. She was detained." The court directed the prosecutor to instruct the police officer not to testify about Sanders' statement.

On cross-examination of Semenez, Sanders' defense counsel asked the deputy if he included in his police report that he found the backpack behind the driver's seat of the suspects' vehicle. Deputy Semenez answered, "No, ma'am. I wrote that I located it in the vehicle." Semenez also agreed that that it would have been important to indicate that he found the backpack behind Sanders, if that was true, but that he had not done so.

Prior to his redirect examination of Semenez, the prosecutor argued to the trial court: "the defense has opened the door. The witness didn't put the exact location because he asked Miss Sanders, 'Is this your backpack?' And she said, 'Yes,' and that is why he didn't specifically record the exact location. Counsel's cross-examination, impeaching him on that point, there's a reason why he didn't do that. The People contend they should be able to go into that." The trial court agreed that the cross-examination opened the door. The court instructed the prosecutor that he could ask Semenez, "'Is there some reason that you didn't

indicate where you found the backpack?'" The court said that with a "yes" answer, "the next question would be, 'What is it?'"

On redirect examination, the prosecutor asked Deputy Semenez, "Is there a reason why you did not record specifically where you found the black backpack?" Semenez replied, "She [Sanders] had admitted to me that she -- it had belonged to her." Sanders' attorney then objected to the statement as hearsay and in violation of *Miranda*. The trial court overruled the objection.

We review the trial court's evidentiary ruling for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.) "'It is well settled that when a witness is questioned on cross-examination as to matters relevant to the subject of the direct examination but not elicited on that examination, he may be examined on redirect as to such new matter.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1247-1248, quoting *People v. Kynette* (1940) 15 Cal.2d 731, 752.) "In fact, cross-examination by the defendant may open the door for admission of evidence on redirect examination that is favorable to the prosecution and which may not have been admissible in the prosecution's case-in-chief." (*People v. Sakarias* (2000) 22 Cal.4th 596, 643-644.) That is precisely what occurred here. We find no abuse of discretion, or error.

B. The Sentencing Issues

1. *Background*

The jury found appellants Moore and Robinson guilty of robbery and burglary, each in the first-degree, and false imprisonment by violence. The jury found appellant Sanders not guilty of robbery, burglary and false imprisonment by violence, but found her guilty of felony possession of a controlled substance. The jury also found Moore guilty of possession of a firearm by a felon. On the first three counts, the jury found to be true the allegation that Moore personally used a

firearm within the meaning of section 12022.53, subdivision (b). With respect to Robinson on all three counts against her, the jury found to be true the allegation that "in the commission and attempted commission of the above offense, a principal in said offense was armed with a firearm, to wit, a handgun, said arming not being an element of the above offense, within the meaning of" section 12022, subdivision (a)(1). Both Moore and Sanders were also found to have had one prior serious or violent felony pursuant to the Three Strikes law.

In sentencing Moore, the base term selected was the *upper* term of 6 years for the robbery charged in count 1, doubled as a "second strike" to 12 years, enhanced by an additional 10 years pursuant to the section 12022.53, subdivision (b), finding, plus a consecutive 5 years for the section 667, subdivision (a)(1) prior conviction, for a total of 27 years. On count 2, the trial court selected one-third the mid-term, 16 months, doubled as a second strike to 32 months, and enhanced by the same 10 and 5-year enhancements used in count 1, a total of 17 years 8 months. On counts 3 and 4, the trial court selected one-third the mid-term, totaling 8 months each, doubled to 16 months each. The court added the 10-year enhancement to count 3 and the 5-year enhancement to count 4, for a total of 11 years 4 months for count 3 and 6 years 4 months for count 4. The court ordered the prison sentences on counts 2, 3 and 4 to run concurrent to count 1.

The court selected the mid-term of four years on count 1 as the base term for Robinson and added one year for the principle armed enhancement pursuant to section 12022, subdivision (a)(1), a total of five years. She received the same sentence for count 2. On count 3, Robinson was sentenced to the mid-term of two years plus one year for the principal-armed enhancement, a total of three years. Counts 2 and 3 were ordered to be served concurrently with count 1.

Sanders received the upper term of three years for her conviction on count 5, which was doubled for a total of six years. In addition, the court added

four one-year prison term enhancements pursuant to section 667.5, subdivision (b), which were stayed pending successful completion of the prison sentence imposed on the conviction.

2. *Section 654 and the Sentences Imposed on Counts 2 and 3*

Moore and Robinson argue section 654 requires that the sentences imposed on counts 2 (burglary) and 3 (false imprisonment by violence or menace) must be stayed. The People agree that the sentences on count 2 should have been stayed under section 654, but contend that the concurrent sentences on count 3 were proper. We thus focus on count 3.

Subdivision (a) of section 654 states: "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." "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. [Citation.]" (*Kellett v. Superior Court* (1966) 63 Cal.2d 822, 824-825.)

The People compare the present case to *People v. Cleveland* (2001) 87 Cal.App.4th 263. There the defendant was charged and found guilty of three counts: attempted murder, robbery and assault with a deadly weapon, all arising from the same incident. The trial court sentenced defendant to prison for 29 years to life for attempted murder, and a consecutive sentence of 25 years to life for robbery. The trial court refused to stay defendant's robbery sentence under section 654, but stayed the assault sentence. (*Id.* at p. 267.) We quote from that portion of the opinion which sets out the reasons the trial court concluded that section 654 did not apply. "As the trial court observed, the amount of force used in taking the

[radio] was far more than necessary to achieve one objective. Cleveland repeatedly hit his 66-year-old feeble, unresisting victim on the head and body with a two-by-four board. Cleveland struck [the victim] until the board broke and left him unconscious. While it is true that attempted murder can, under some circumstances, constitute the 'force' necessary to commit a robbery, here, it was not the necessary force. . . . Cleveland beat [the victim] senseless, such that the attempted murder cannot be viewed as merely incidental to the robbery. [¶] The finding Cleveland had separate and simultaneous intents is further bolstered by the evidence that Cleveland and [the victim] had a history of negative interaction. Cleveland had been angered by [the victim's] refusal to give him more money after Cleveland ran the errand to buy [the victim] cigarettes. In addition, shortly before Cleveland attacked [the victim], Cleveland became upset when his attempt to steal [the victim's] walker was foiled. It is this history which motivated the gratuitous violence supporting the finding of two simultaneous intents." (*People v. Cleveland*, *supra*, 87 Cal.App.4th at pp. 271-272.)

The court of appeal upheld the trial court's sentencing decision, concluding the evidence supported the trial court's finding that the objective of the incident was not merely to rob the victim. (*People v. Cleveland, supra*, 87 Cal.App.4th at p. 268.)

This case does not have the same gratuitous violence exhibited in *Cleveland*. While the defendants may have been able to effectuate the robbery without tying up Sanchez, the evidence does not suggest they did so for any purpose other than to carry out the robbery. Immediately upon entering the room, Moore told Sanchez to get face down on the bed, he then tied Sanchez's arms and legs with the sheets and placed the pillow case over his head. It was then that Moore reached into Sanchez's pockets and removed the items taken. The defendants then left and drove off in Sanchez's truck. We cannot discern any

intent other than in aid of the robbery for the false imprisonment. We agree that the sentence on count 3 should be stayed.

3. *Gun-use Enhancements on Counts 2 and 3*

Moore argues the gun-use enhancements pursuant to section 12022.53, subdivision (b) must be stricken as to counts 2 and 3. The People concede, and we agree, that the enhancements must be stricken as to those counts.

4. *Section 667 Enhancement Erroneously Applied more than once*

Moore argues that the five-year enhancement pursuant to section 667, subdivision (a)(1), which was imposed on each of the counts, could only be imposed once and must be stricken from the sentences imposed on counts 2 through 4. The People concede, and we agree, that the court erred in imposing the five-year enhancements to counts 2 through 4.

5. *Blakely Issues*

Moore and Sanders each contend that the trial court's selection of the high term, on count 1 for Moore and count 5 for Sanders, violated their right to a jury trial, citing *Blakely*, *supra*. Moore and Robinson present the same argument with regard to the court's order that counts two and three be served concurrently to count 1. We agree, in part, with their former argument but do not reach the latter issue.

The People argue that appellants forfeited these issues because they did not raise these arguments at sentencing. We disagree. (See *People v. Ochoa* (2004) 121 Cal.App.4th 1551 [because *Blakely* was decided after the defendant had been sentenced, the claim can be raised for the first time on appeal notwithstanding

the lack of objection below]; see also *People v. Vera* (1997) 15 Cal.4th 269, 276-277 [constitutional claim may be raised for the first time on appeal].)

Blakely purports to build on the holding of *Apprendi v. New Jersey* (2000) 530 U.S. 466: "Other 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. 490.) In *Blakely*, the United States Supreme Court explained that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation] [so that] the judge exceeds his proper authority." (124 S.Ct. at p. 2537.) *Blakely* apparently applies to all cases not yet final when it was decided in June 2004. (See *Schriro v. Summerlin* (2004) ___ U.S. ___ [124 S.Ct. 2519, 2522].)

Under the California determinate sentencing law, a sentencing court must impose the middle term unless it finds there are factors in mitigation or aggravation. Only where factors in aggravation are found to exist may the court impose the upper term. (§ 1170, subd. (b).)

Here, on count 1 the trial court imposed the upper term of six years, doubled, against Moore. It relied upon the five aggravating factors listed in the probation officer's report and found no mitigating factors. Those aggravating factors are: "1. The manner in which the crime was carried out, indicates planning, sophistication or professionalism. [¶] 2. The defendant's [*sic*] has engaged in violent conduct which indicates a serious danger to society. [¶] 3. *The*

defendant's prior convictions . . . are numerous or of increasing seriousness. [¶] 4. The defendant was on probation when the crime was committed. [¶] 5. The defendant's prior performance on probation and parole was unsatisfactory." (Italics added.)

With respect to appellant Sanders, the trial court imposed the upper term "based on the fact that the aggravating factors greatly outweigh any factors in mitigation." The aggravating factors were as follows: "1. The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high-degree of cruelty, viciousness or callousness. [¶] 2. The manner in which the crime was carried out, indicates planning, sophistication or professionalism. [¶] 3. The defendant has engaged in violent conduct which indicates a serious danger to society. [¶] 4. *The defendant's prior conviction as an adult or sustained petition in juvenile delinquency proceedings are numerous or of increasing in seriousness.* [¶] 5. The defendant was on parole when the crime was committed. [¶] 6. The defendant's prior performance on probation and parole was unsatisfactory." (Italics added.)

As Moore and Sanders argue, these factors were adjudged true by the judge, not the jury. But pursuant to *Apprendi* the trial court may make findings regarding prior convictions without violation of the right to trial by jury. Here, Moore was found to have suffered one prior serious or violent felony conviction and three separate prison sentences attached to prior convictions not attributed to the prior and serious felony conviction. Sanders was found to have suffered one prior and serious felony conviction and four separate prison sentences for prior convictions not attributed to her prior serious or violent conviction. These findings support factors in aggravation numbers 3 and 4 for Moore and Sanders respectively, and do not violate *Blakely*. A single factor in aggravation can support selection of the upper term. (*People v. Kellett* (1982) 134 Cal.App.3d 949, 963.)

But the sentencing transcript does not indicate whether the trial court would have imposed the upper term absent the other aggravating factors. Thus we must remand this matter to the trial court for resentencing.

Moore, joined by Robinson, argues that his Sixth Amendment rights are also called into play when application of section 654 is determined in connection with counts two and three. He argues that *Blakely* "now suggests that *Apprendi* requires the jury, rather than the trial judge, to determine whether a defendant committed the offenses with multiple objectives." Given our conclusion that section 654 applied and count 3 must be stayed, *infra*, and the People's concession that section 654 applied to count 2, we need not reach this issue.

DISPOSITION

The judgments of conviction are affirmed. Robinson's sentence is modified by ordering the sentences on counts 2 and 3 stayed. The judgments of Moore and Sanders are reversed and the matter is remanded for resentencing in accord with the principles discussed in this opinion.

NOT TO BE PUBLISHED

HASTINGS, J.

We concur:

EPSTEIN, Acting P.J. CURRY, J.