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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. HORACIO NAVARRO, Defendant and Appellant.	F044291 (Super. Ct. No. 88051 & 98496) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. David L. Allen, Judge.

Patricia L. Watkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Kathleen A. McKenna and Brian Alvarez, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II and III.

On June 6, 2002, an information was filed in Tulare County Superior Court case No. CRF020088051 (hereafter No. 88051), charging appellant Horacio Navarro with possession of a short-barreled shotgun (Pen. Code,[1] § 12020, subd. (a); count 1) and misdemeanor carrying a concealed firearm in a vehicle (§ 12025, subd. (a)(1); count 2). He pled not guilty.

On January 31, 2003, an information was filed in Tulare County Superior Court case No. CRF020098496 (hereafter No. 98496), charging appellant with robbery involving the personal use of a firearm (§§ 211; 12022.5, subd. (a)(1); 12022.53, subd. (b); count 1), dissuasion of a witness or victim by threat or force (§ 136.1, subd. (c)(1); count 2), unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a); count 3), receiving a stolen motor vehicle (§ 496d, subd. (a); count 4), evading a peace officer (Veh. Code, § 2800.2, subd. (a); count 5), attempted kidnapping during commission of a carjacking (§§ 209.5, subd. (a); 664; count 6), attempted unlawful driving or taking of a vehicle (§ 664; Veh. Code, § 10851, subd. (a); count 7), receiving stolen property (§ 496, subd. (a); count 8), sale of methamphetamine (Health & Saf. Code, § 11379, subd. (a); count 9), and sale or transportation of marijuana (Health & Saf. Code, § 11360, subd. (a); count 10). With respect to each count, it was alleged that appellant committed the offense while released from custody on bail or own recognizance in case No. 88051 (§ 12022.1). Appellant pled not guilty and denied the special allegations.

Trial in case No. 98496 began on September 15, 2003. Appellant admitted the section 12022.1 allegation with respect to counts 1-9,[2] and changed his plea to no contest

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

[2] The People clarified that count 9 involved transportation, not sale, of methamphetamine, and they moved to amend count 10 to charge misdemeanor transportation of marijuana in an amount less than 28.5 grams (Health & Saf. Code,

on counts 3, 5, 8, 9, and 10. It was agreed that count 4 would be dismissed at sentencing. On September 22, a jury convicted appellant of the remaining counts, and found true the section 12022.53, subdivision (b) allegation with respect to count 1. On September 30, appellant withdrew his not guilty plea in case No. 88051 and pled no contest to count 1. Count 2 was dismissed.

Appellant was sentenced to a total unstayed term of 23 years 4 months and ordered to pay restitution fines and victim restitution. He filed a timely notice of appeal in both cases, and now raises various claims of error. For the reasons which follow, we will modify the judgment on count 6 and remand the matter for resentencing thereon. In all other respects, we will affirm.

FACTS[3]

On the evening of March 16, 2002, appellant entered the Subway store in Goshen, showed clerk Kim Mapel that he had his hand on a gun tucked in his waistband, and demanded the money in the cash register. Mapel complied, and appellant escaped with approximately $200. On March 24 or 26, Mapel saw him at a mini-mart near the Subway. They made eye contact, and she saw him hiding behind a gas pump when she got into her vehicle. Mapel reported the sighting to police, but they were unable to locate appellant.

On the morning of April 2, appellant came up behind Mapel as she was getting books out of her vehicle at San Joaquin Valley College. He asked why she was telling people that he had a gun and said there were no bullets in his gun. He said he knew she

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§ 11360, subd. (b)). By operation of law, this eliminated the section 12022.1 allegation from count 10.

3 In light of the issues raised on appeal, we recite only those facts relevant to case No. 98496.

had two pretty little girls at home, and told her that if she ratted, he would use a gun on her. Mapel took this as a threat to kill her or her children. Appellant then ran. Mapel returned home and contacted the police.

Early that afternoon, Mapel and Joe Martinez, who resided with her, saw a four-door white car containing four young men drive past their house. As this seemed unusual, Martinez got into his truck and drove around. He was about a block from the house when the car passed him. The driver and rear passenger were hanging out the windows, yelling. Martinez reported the incident to Detective Hager, who arrived a short time later and began to check the area for the vehicle.

Hager came upon a vehicle that matched the description given by Martinez and which contained four subjects. He and the driver made eye contact and a vehicle pursuit ensued. Eventually the car slowed, allowing two passengers to exit. When the vehicle pulled into the front yard of what was subsequently determined to be the residence of the registered owner, a member of the driver's family, the driver and remaining passenger were taken into custody. One of the other passengers was apprehended nearby. Mapel came to the scene for a field identification, but stated that none of the three was the person who had contacted her at the college.

A short time later, Lanetta Hogue's car was taken from the area in which the fourth person had been. At some point, this car entered southbound Highway 99 and nearly struck California Highway Patrol (CHP) Officer Duran's marked vehicle. Duran took evasive action, then attempted to stop the car, in which appellant was the driver and sole occupant. Instead of pulling over, appellant accelerated to approximately 100 miles per hour and began passing traffic on the right shoulder. He exited the road at the westbound Highway 198 exit at a high rate of speed and went out of control. The vehicle was disabled, and appellant began to run south from the location. Duran pursued him on foot.

CHP Officer Frakes, who arrived to assist Duran, saw appellant standing in the middle of the transition road between eastbound Highway 198 and southbound Highway 99, waving his arms and trying to stop traffic. When Frakes drove toward him, appellant ran. Frakes followed.

James Petersen was driving east on Highway 198 when he stopped in the middle of the highway because he saw Frakes chasing appellant. Appellant jumped into Petersen's pickup through the unlocked passenger door, then told Petersen, "'Drive or I'll kill you.'" Petersen, who assumed appellant had some type of weapon, put the vehicle in "park," pulled the keys out of the ignition, and got out of the truck. Appellant slid over behind the steering wheel and attempted to drive off. By this time, Frakes had come up on the passenger side and was beating on the window with his pistol, as appellant had locked the door. Petersen was now able to see that appellant did not have a weapon. Not wanting his month-old truck to be damaged, he then "jumped on" appellant and tried to pull him out of the vehicle. He, Frakes, and another individual were able to take appellant into custody. Petersen's truck had to be towed because the transmission was impaired. After appellant got into the truck, the vehicle did not move at all.

Mapel came to the location for a field identification. She identified appellant as the person who had accosted her at the college and who had robbed the Subway store.

Appellant presented evidence that he was in Farmersville at his father's birthday party at the time the Subway was robbed. He also presented evidence that one Andres Escareno was investigated for a number of store robberies which occurred in Visalia and outlying areas between January and May 2002. Escareno lived in Goshen around March and April, but apparently was not questioned about the Subway robbery. In the three robberies to which he confessed, a man entered the business, casually walked up to a clerk or cashier, displayed a portion of a handgun in his waistband, asked for the money underneath the cash drawer as well as in the register (as occurred in the Subway robbery),

and then walked out. The times of the robberies and descriptions of the perpetrator were somewhat similar to those involved in the Subway robbery.[4]

Appellant testified and denied ever being in the Subway store in Goshen or at the gas station nearby. He denied ever going to San Joaquin Valley College. According to him, the first time he ever saw Mapel was when she testified at trial. Appellant admitted taking Hogue's vehicle and attempting to evade officers. He also admitted attempting to take Petersen's vehicle, but denied that he ever intended to kidnap Petersen. According to appellant, he needed a ride on April 2, so he called a friend. As they were driving around, someone started following them. When appellant realized it was a police officer, he jumped out of the car and ran because he had drugs in his pocket. Appellant saw Hogue's car with the keys in it, and he took it so he could get away. He attempted to flee from the CHP officers, then lost control of the car. At that point, he ran. He found himself in front of a truck, so he got in and locked the door. A CHP officer was at the window, telling him to open the door. Appellant was panicking, so he turned toward the driver. He might have told the driver something; he could not recall. The driver jumped out of the vehicle. Appellant moved to the driver's seat and tried to take the vehicle, but it would not move. The driver then pulled him out of the car and he was arrested.

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[4] Booking photographs of Escareno and appellant were admitted into evidence. Visalia Police Detective Lopez, who interrogated Escareno, described his build as that of a football player, while appellant was "kind of thin." On the booking photograph, Escareno's weight was depicted as being 235 pounds. Appellant testified that he himself weighed approximately 140 pounds. Although appellant could not be excluded as the source of fingerprints lifted from the Subway counter, the prints definitely were not those of Escareno.

DISCUSSION

I

SUFFICIENCY OF THE EVIDENCE ON COUNT 6

Appellant was convicted in count 6 of attempted kidnapping in commission of a carjacking, in violation of sections 209.5, subdivision (a) and 664. He now contends the evidence supporting that conviction is insufficient as a matter of law, as there was no evidence of a completed carjacking, an essential element of section 209.5. Respondent agrees that a completed carjacking was required, but asks us to reduce appellant's single conviction for attempted aggravated kidnapping to convictions for *both* attempted kidnapping (§§ 207, subd. (a); 664) and attempted carjacking (§§ 215, subd. (a); 664). Appellant responds that we must either reverse the conviction on count 6, or, at most, reduce the offense solely to attempted carjacking.

Section 209.5, subdivision (a) provides: "Any person who, *during the commission of a carjacking* and in order to facilitate the commission of the carjacking, kidnaps another person who is not a principal in the commission of the carjacking shall be punished by imprisonment in the state prison for life with the possibility of parole." (Italics added.) For reasons which are not clear, the Legislature did not include in the statute language covering the attempted commission of, or goal of committing, a carjacking. (Compare § 190.2, subd. (a)(17) [defendant subject to death or life in prison without the possibility of parole where first degree murder committed "while the defendant was engaged in … the commission of, attempted commission of, or the immediate flight after committing" enumerated felony]; § 209, subd. (b)(1) [defendant subject to life in prison with the possibility of parole where he or she kidnaps "to commit robbery, rape," or other enumerated offense].)

"In construing a statute, our role is to ascertain the Legislature's intent so as to effectuate the purpose of the law. [Citation.] In determining intent, we must look first to the words of the statute because they are the most reliable indicator of legislative intent.

[Citation.] If the statutory language is clear and unambiguous, the plain meaning of the statute governs. [Citation.]" (*People v. Lopez* (2003) 31 Cal.4th 1051, 1056.) In such circumstances, "there is no need for statutory construction '"and courts should not indulge in it." [Citation.]' [Citations.]" (*People v. Bechler* (1998) 61 Cal.App.4th 373, 377.)

There can be no doubt that the relevant language of section 209.5, subdivision (a) is clear and unambiguous, especially since the Legislature unmistakably knows how to include the attempted commission of a crime, or a crime committed with a specific goal or purpose, in such a statute. Accordingly, we are bound by the plain meaning of the statute's words, and are constrained to agree with those courts which have held that a violation of section 209.5, subdivision (a) requires a completed carjacking. (*People v. Contreras* (1997) 55 Cal.App.4th 760, 764-765; accord, *People v. Jones* (1999) 75 Cal.App.4th 616, 624-625.) Thus, a person violates section 209.5, subdivision (a) by committing a kidnapping during a carjacking (assuming the facilitation requirement is met), but not by committing a kidnapping during conduct that goes no further than an attempted carjacking.[5]

In *People v. Jones*, *supra*, 75 Cal.App.4th 616, the appellate court acknowledged that it did not need to decide whether the crime of attempting kidnapping during the commission of carjacking existed, but observed that if such a crime did exist, "under the language of section 209.5, it appears a completed carjacking would be a requirement."

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5 Although *People v. Russell* (1996) 45 Cal.App.4th 1083 states that "a violation of Penal Code section 209.5 may be committed by one who never successfully takes or drives a vehicle" (*id*. at p. 1089), that opinion undertakes no examination of the statute's language or comparison of that language with the wording of other statutes, and antedates the California Supreme Court's decision in *People v. Lopez*, *supra*, 31 Cal.4th 1051, concerning the asportation requirement for carjacking. Accordingly, we decline to follow it on this point.

(*Id*. at p. 627, fn. 3.) This statement was dictum. Faced squarely with the issue, we now hold that such a crime does exist, as section 664 expressly criminalizes an attempt to commit "*any* crime …." (Italics added.) Section 209.5, subdivision (a) establishes a separate crime, not merely enhanced punishment for a form of kidnapping. (See *People v. Martinez* (1999) 20 Cal.4th 225, 232; *People v. Rayford* (1994) 9 Cal.4th 1, 8.) Accordingly, the crime of attempted kidnapping during the commission of a carjacking exists, but, based on the clear statutory language, a conviction for such an offense requires a completed carjacking. As appellant observes, the carjacking element defines the context in which the kidnapping occurs. Under the express language of the statute, that context – as respondent concedes – is a completed carjacking. If the carjacking element is not satisfied, there is no violation, attempted or otherwise, of section 209.5. Thus, a person commits an attempted violation of section 209.5, subdivision (a) by attempting to kidnap while committing a carjacking, but not by attempting to kidnap (or by kidnapping) while merely attempting to carjack. In short, as appellant asserts, attempted kidnapping during commission of a carjacking is itself a crime (§§ 209.5, subd. (a); 664), but attempted kidnapping during the attempted commission of a carjacking is not, at least insofar as section 209.5 is concerned.

A completed carjacking requires movement of the motor vehicle. (*People v. Lopez, supra,* 31 Cal.4th at pp. 1055-1063; *People v. Vargas* (2002) 96 Cal.App.4th 456, 460-463.) In the present case, it is undisputed that the Petersen vehicle did not move once appellant entered it. Accordingly, there was no completed carjacking; hence, a necessary element of the charged offense was not established by the evidence, and so appellant's conviction on count 6 cannot stand.

We turn now to the appropriate remedy. Under certain circumstances, an appellate court has the power to modify a verdict or judgment instead of granting a new trial or

reversing outright. (§§ 1181, subd. 6; 1260.)[6] "The purpose for allowing an appellate court to modify the judgment to a lesser included offense is to 'obviate the necessity of a new trial when the insufficiency of the evidence only goes to the degree of the crime.' [Citation.]" (*People v. Matian* (1995) 35 Cal.App.4th 480, 487.) As long as an appellate court exercises its power to modify a conviction only "where the evidence would support a conviction of a lesser necessarily included offense, a lesser degree offense or an offense that was charged …," there is no due process violation. (*People v. Adams* (1990) 220 Cal.App.3d 680, 688.) "'The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense.' [Citations.]" (*People v. Pearson* (1986) 42 Cal.3d 351, 355.)[7]

Simple kidnapping is a lesser offense included within the crime of kidnapping during the commission of a carjacking. (Cf. *People v. Jackson* (1998) 66 Cal.App.4th

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6 Section 1181 states, in pertinent part: "When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only: [¶] … [¶] 6. When the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed …."

Section 1260 provides: "The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances."

7 Since here the information merely described the crime in the statutory language, we need not separately consider the language of the accusatory pleading. (See *People v. Wolcott* (1983) 34 Cal.3d 92, 99; *People v. Adams, supra,* 220 Cal.App.3d at p. 689.)

182, 189; *People v. Bailey* (1974) 38 Cal.App.3d 693, 699.) "[K]idnapping, be it simple or aggravated, requires a degree of asportation …." (*People v. Reed* (2000) 78 Cal.App.4th 274, 284; see *People v. Martinez, supra*, 20 Cal.4th at pp. 232-235.) Where the asportation is insufficient for a completed crime or where, for example, the kidnapping is thwarted by the victim's escape but the evidence shows an attempted kidnapping, the verdict may be modified to that offense. (See, e.g., *People v. Daly* (1992) 8 Cal.App.4th 47, 57; *People v. Mullins* (1992) 6 Cal.App.4th 1216, 1220-1221.)

Similarly, carjacking is a lesser offense included within the crime of kidnapping during the commission of a carjacking. (*People v. Jones, supra*, 75 Cal.App.4th at p. 626; *People v. Contreras, supra*, 55 Cal.App.4th at p. 765.) Accordingly, attempted carjacking is also a lesser included offense of kidnapping during the commission of a carjacking. (*People v. Jones, supra*, at p. 626.) Where the movement of the motor vehicle required for a completed carjacking is not shown by the evidence, the appropriate offense is attempted carjacking. (*People v. Lopez, supra*, 31 Cal.4th at p. 1063; *People v. Vargas, supra*, 96 Cal.App.4th at pp. 460, 463.)

"An attempt to commit a crime occurs when the perpetrator, with the specific intent to commit the crime, performs a direct but ineffectual act towards its commission. [Citations.]" (*People v. Marshall* (1997) 15 Cal.4th 1, 36.) "The act must not be mere preparation but must be a direct movement after the preparation that would have accomplished the crime if not frustrated by extraneous circumstances. [Citation.]" (*People v. Carpenter* (1997) 15 Cal.4th 312, 387.) Examining the evidence adduced at trial in accordance with standard principles of appellate review (see *Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Johnson* (1980) 26 Cal.3d 557, 578), we conclude it was sufficient to support convictions for attempted kidnapping and attempted

carjacking.[8] Moreover, while the parties and trial court failed to recognize that the offense of attempted kidnapping during the commission of a carjacking requires a completed carjacking, they did recognize that the evidence did not show either a completed kidnapping or a completed carjacking, and this was conveyed to the jury. The jury was instructed on attempt pursuant to CALJIC No. 6.00 (attempt – defined), and reminded by the trial court that completed acts of kidnapping and carjacking were not alleged.[9] Under the circumstances, by convicting appellant on count 6, jurors made the findings necessary to support convictions for attempted kidnapping and attempted carjacking. (See *People v. Jones, supra,* 75 Cal.App.4th at pp. 626-628; *People v. Mullins, supra,* 6 Cal.App.4th at pp. 1222-1223.)

Despite the foregoing, appellant contends that while we may modify his conviction on count 6 to *one* lesser offense, we cannot modify his conviction of a single offense to *two* lesser offenses as respondent requests. A modification of the verdict to attempted carjacking may be proper, appellant says, but a modification to attempted carjacking *and* attempted kidnapping is not. Insofar as we can tell, this is an issue of first impression, and we examine each of appellant's reasons for opposing the requested modification in turn.

Appellant first observes that section 1181, subdivision 6 uses the singular "lesser crime" and not the plural "lesser crimes." When construing the Penal Code, however,

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8 Appellant concedes the issue with respect to attempted carjacking. With respect to attempted kidnapping, he contends that he only told Petersen to drive because the pursuing CHP officer was right behind him and he wanted to get away. In light of Petersen's testimony that appellant did not order him out of the vehicle, but instead told him, "Drive or I'll kill you," a reasonable inference can be drawn that appellant intended to kidnap Petersen.

9 The jury was also given the option of convicting appellant of attempted carjacking as a lesser included offense on count 6.

"the singular number includes the plural …." (§ 7; see *People v. O'Connor* (1927) 81 Cal.App. 506, 510.)

Appellant next points to the apparent absence of any case in which an appellate court has reduced a single offense to multiple lesser included offenses. We readily acknowledge the dearth of authority on this issue; on the other hand, there is an equal lack of authority saying that we cannot undertake such a modification.

Third, appellant complains that the proposed modification would punish him for successfully appealing his wrongful conviction and would violate California's constitutional prohibition against double jeopardy, because it would result in a single conviction being counted as two "strikes" under the three strikes law. We do not find any constitutional prohibition under the circumstances of this case.[10]

"When a defendant successfully appeals a criminal conviction, California's constitutional prohibition against double jeopardy precludes the imposition of more severe punishment on resentencing. [Citation.]" (*People v. Hanson* (2000) 23 Cal.4th 355, 357; see generally *People v. Henderson* (1963) 60 Cal.2d 482, 495-497.)[11] "'It is immaterial to the basic purpose of the constitutional provision against double jeopardy whether the Legislature divides a crime into different degrees carrying different punishments or allows the court or jury to fix different punishments for the same crime.'

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10 Because double jeopardy issues arising in the context of a sentence imposed after a successful appeal also raise related due process concerns about whether an increased punishment reflects a vindictive retaliation for a defendant's having taken a successful appeal (*People v. Craig* (1998) 66 Cal.App.4th 1444, 1447; see *North Carolina v. Pearce* (1969) 395 U.S. 711, 723-726), our discussion subsumes both due process and double jeopardy considerations (*People v. Craig*, *supra*, at p. 1447).

11 The protections afforded by the double jeopardy provisions of the California Constitution are broader than those afforded by the federal Constitution. (*People v. Monge* (1997) 16 Cal.4th 826, 844, affd. *sub nom. Monge v. California* (1998) 524 U.S. 721; compare *North Carolina v. Pearce*, *supra*, 395 U.S. at p. 723.)

[Citation.] In either instance, 'a defendant is not required to elect between suffering an erroneous conviction to stand unchallenged and appealing therefrom at the cost of forfeiting a valid defense to the greater offense.…' [Citation.] '"'[A] defendant faced with such a "choice" takes a "desperate chance" in securing the reversal of the erroneous conviction. The law should not, and in our judgment does not, place the defendant in such an incredible dilemma.'" [Citation.]' [Citations.] In sum, '[a] defendant's right of appeal from an erroneous judgment is unreasonably impaired when he is required to risk his life to invoke that right. Since the state has no interest in preserving erroneous judgments, it has no interest in foreclosing appeals therefrom by imposing unreasonable conditions on the right to appeal.' [Citations.]" (*People v. Hanson, supra,* at pp. 358-359.)

The punishment for a violation of section 209.5 is life in prison with the possibility of parole. (§ 209.5, subd. (a).) Accordingly, the punishment for an attempt is five, seven, or nine years. (§ 664, subd. (a).) Appellant here was sentenced to one-third of the middle term, or two years four months (28 months). The punishment for simple kidnapping is three, five, or eight years. (§ 208, subd. (a).) The punishment for carjacking is three, five, or nine years. (§ 215, subd. (b).) The punishment for an attempt to commit either offense is one-half the specified term. (§ 664, subd. (a).) One-half of the specified middle term of either offense is two years six months (30 months), one-third of which is 10 months. Since the attempted kidnapping and attempted carjacking arose from an indivisible course of conduct, sentence for one must be stayed pursuant to section 654. (See, e.g., *People v. Cline* (1998) 60 Cal.App.4th 1327, 1336; *People v. Austin* (1994) 23 Cal.App.4th 1596, 1613, disapproved on other grounds in *People v. Palmer* (2001) 24 Cal.4th 856, 861, 867; *People v. Saffle* (1992) 4 Cal.App.4th 434,

438)[12] Clearly, then, a modification of appellant's conviction on count 6 to attempted kidnapping and attempted carjacking will result in a reduction of his sentence, not an increase.

It is true that, as the law currently stands, attempted kidnapping and attempted carjacking both constitute "strikes" within the meaning of the three strikes law, as does attempted kidnapping during commission of a carjacking. (§§ 667, subd. (d)(1); 1170.12, subd. (b)(1); 1192.7, subds. (c)(20), (c)(22), (c)(27), (c)(39).) Thus, to modify the verdict on count 6 as respondent proposes could leave appellant, at some future date, subject to two strikes arising from count 6, instead of the one strike he currently faces.[13] However, such a possibility is by no means certain; if, upon appellant's release from prison, he does not reoffend, the possibility will never ripen into reality. A mere potential for increased punishment sometime in the future is not enough to cause us to declare a violation of constitutional principles now.[14]

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[12] Appellant points out that, pursuant to *Neal v. State of California* (1960) 55 Cal.2d 11, 19 "[i]f only a single act is charged as the basis of the multiple convictions, only one conviction can be affirmed, notwithstanding that the offenses are not necessarily included offenses." Here, while there was one indivisible course of conduct, there were two acts: appellant's demand that Petersen drive, and appellant's attempt to drive the truck himself. Accordingly, multiple convictions are proper. (See *People v. Cline, supra,* 60 Cal.App.4th at p. 1336 [multiple convictions for grand theft and commercial burglary proper, but sentence on one to be stayed, where defendant entered store and stole clothing].)

[13] Appellant's convictions for robbery involving the personal use of a firearm and victim intimidation also constitute strikes. (§§ 667, subd. (d)(1); 667.5, subds. (c)(9), (c)(22); 1170.12, subd. (b)(1); 1192.7, subds. (c)(19), (c)(37), (c)(40).)

[14] We note that double jeopardy challenges to recidivist statutes have consistently been rejected "because the enhanced punishment imposed for the later offense 'is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes,' but instead as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.' [Citations.]" (*Witte v. United States* (1995) 515 U.S. 389, 400; accord, *Ewing v. California* (2003) 538 U.S. 11, 25-26.) Although

Appellant's final argument against modification is that respondent should be judicially estopped from requesting a reduction to attempted kidnapping because the People took the opposite position in the trial court. In this regard, "[t]he doctrine of judicial estoppel essentially acts to prevent a party from abusing the judicial process by advocating one position, and later, if it becomes beneficial to do so, asserting the opposite. The doctrine is designed not to protect any party, but to protect the integrity of the judicial process. [Citation.]" (*People v. Watts* (1999) 76 Cal.App.4th 1250, 1261-1262.) "Although the doctrine … has been recognized in California, our courts have not established a clear set of principles for applying it.… Yet, it has long been settled that '[o]ne to whom two inconsistent courses of action are open and who elects to pursue one of them is afterward precluded from pursuing the other.' [Citation.] Further, it is well established that, for the doctrine to apply, the seemingly conflicting positions 'must be clearly inconsistent so that one necessarily excludes the other.' [Citation.] Moreover, the doctrine 'cannot be invoked where the position first assumed was taken as a result of ignorance or mistake.' [Citation.]" (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181-182, fn. omitted; cf. *New Hampshire v. Maine* (2001) 532 U.S.

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some courts have addressed potential increased punishment (see, e.g., *People v. Pearson, supra*, 42 Cal.3d at pp. 362-363), the California Supreme Court has made it clear that, in the case of multiple strikes arising from counts originally stayed under section 654, "'there are some circumstances in which two prior felony convictions are so closely connected … that a trial court would abuse its discretion under section 1385 if it failed to strike one of the priors.' [Citation.]" (*People v. Sanchez* (2001) 24 Cal.4th 983, 993, quoting *People v. Benson* (1998) 18 Cal.4th 24, 36 & fn. 8.) *Sanchez* concerned a situation in which the defendant complained that, if the court decided he could be convicted of two offenses arising out of the same act because those offenses were not greater and lesser included offenses, he could be subject to enhanced punishment under the three strikes law despite a section 654 stay, since he could be treated as having two strikes on the basis of the two convictions. The high court determined it was "not faced with that question in the present case …." (*People v. Sanchez, supra*, at p. 993.)

742, 749-751.) The doctrine is applied only sparingly, if at all, against the prosecution in criminal actions. (*People v. Watts, supra,* 76 Cal.App.4th at p. 1262.)

Assuming the doctrine can be applied against the prosecution in an appropriate case, this is not that case. Although the prosecutor at trial took the position that attempted carjacking was the sole lesser included offense on count 6, it was never his position that there was no attempted kidnapping. Instead, it is apparent he believed the scenario shown by the evidence – no completed kidnapping and no completed carjacking – was covered by giving jurors the option of convicting of attempted kidnapping during commission of a carjacking, or, if they did not find an attempted kidnapping, attempted carjacking.[15] Although the prosecutor opposed the giving of instructions on attempted kidnapping as a lesser included offense, he did so as the result of a mistaken understanding of what the law required with respect to an attempted violation of section 209.5, subdivision (a). Accordingly, and because respondent's position now is not clearly inconsistent with the prosecutor's position at trial such that one necessarily excludes the other, the doctrine of judicial estoppel does not apply. (*Jackson v. County of Los Angeles, supra,* 60 Cal.App.4th at pp. 181-182.)

II*

CONVICTION OF GREATER AND LESSER OFFENSES

Appellant contends that his conviction for attempted unlawful driving or taking of a vehicle (§ 664; Veh. Code, § 10851, subd. (a); count 7) must be reversed because it is a necessarily included offense of attempted carjacking (§§ 215; 664; count 6). We disagree.

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[15] Count 7 also gave jurors the alternative of convicting appellant of attempted unlawful driving or taking of a vehicle.

* See footnote, *ante,* page 1.

It has long been settled in this state that multiple convictions may not be based on necessarily included offenses. (*People v. Ortega* (1998) 19 Cal.4th 686, 692; *People v. Pearson, supra*, 42 Cal.3d at p. 355.) "Generally, two tests are used to determine whether in a particular case a crime is a necessarily and lesser included offense of another crime. The first test looks to the elements of the crime; if, as a matter of legal definition, the greater offense cannot be committed without concomitantly satisfying the elements of the lesser offense, the latter offense is a necessarily lesser included offense. Secondly, a crime is a necessarily lesser included offense if it is within the offense specifically charged in the accusatory pleading. [Citations.]" (*People v. Barrick* (1982) 33 Cal.3d 115, 133.)

"'Carjacking' is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." (§ 215, subd. (a).) By contrast, the crime of unlawful driving or taking of a vehicle is committed by "[a]ny person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing …." (Veh. Code, § 10851, subd. (a).) Recently, the California Supreme Court applied the so-called elements test of lesser included offenses and determined that "the crime of unlawfully taking a vehicle is not a lesser included offense of carjacking because a person can commit a carjacking without necessarily committing an unlawful taking of a vehicle." (*People v. Montoya* (2004) 33 Cal.4th 1031, 1035 (*Montoya*); see *In re Travis W.* (2003) 107 Cal.App.4th 368, 377, fn. 5.)

The *Montoya* court cast strong doubt on using the so-called accusatory pleading test as a means of determining whether multiple convictions are appropriate, but ultimately did not decide the issue (*Montoya*, *supra*, 33 Cal.4th at pp. 1034-1036; see *In re Edward G.* (2004) 124 Cal.App.4th 962, 967). While recognizing that lesser included offenses arise under different circumstances, we have squarely held that "only a statutorily lesser included offense is subject to the bar against multiple convictions in the same proceeding. An offense that may be a lesser included offense because of the specific nature of the accusatory pleading is not subject to the same bar." (*People v. Scheidt* (1991) 231 Cal.App.3d 162, 165-166; accord, *People v. Miranda* (1994) 21 Cal.App.4th 1464, 1467; see *People v. Pearson*, *supra*, 42 Cal.3d at pp. 355-356 & fn. 2.) Accordingly, appellant's contention must fail under *Montoya*.

III*

IMPOSITION OF UPPER AND CONSECUTIVE TERMS

In pertinent part, the trial court imposed the upper term on count 1 (robbery); consecutive terms on count 2 (victim intimidation), count 3 (theft of the Hogue vehicle), count 5 (evading), count 6 (the Petersen incident), and count 9 (transportation of methamphetamine); and, pursuant to subdivision (e) of section 12022.1, ordered that sentences on appellant's two cases run consecutively. The court reasoned:

> "Under mitigating factors, although the defendant did admit some guilt here, number one, he didn't admit guilt until the day of trial. Number two, if you look behind the reasons for his making those admissions, it wasn't because of reasons of contrition. It was so he could avoid having certain facts brought before the jury in that case that he felt would further prejudice his rights.
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> "Under aggravating factors, facts relating to the crime under [case No.] 98496, the crime did involve a threat of great bodily harm or other

* See footnote, *ante*, page 1.

facts disclosing a high degree of cruelty, viciousness and callousness, under [California Rules of Court, rule] 4.421(A)1.[16]

"I do agree with the prosecution that the amount of property damage to Mrs. Hogue's car was significant. I believe the car was totaled or virtually totaled.

"The manner in which the crimes were carried out indicates planning, sophistication or professionalism. Under rule 4.421(A)8 certainly that would apply to a robbery, and to the terrorist threats counts.

"Facts relating to the defendant, he has engaged in violent conduct which indicates a serious danger to society under [rule] 4.421 (B)(1). With regard to there was an instance where the victim Kim Maple [*sic*] was vulnerable. That was at the San Joaquin Valley college where the defendant waited for her until she was alone in a parking lot at her car, came up to her and made threats to her.

"The defendant's prior sustained petitions in juvenile delinquency proceedings … are numerous.

"Under Rule 4.421(B)2, additionally the defendant was on juvenile probation when the crime was committed under [rule] 4.421 (B)4 (H).

"His prior performance on juvenile probation has, obviously, been unsatisfactory under 4.421 (B)5.

"Criteria affecting concurrent or consecutive sentences, I agree that the crimes and their objectives were predominantly independent of each other. Certainly there was a significant gap between the robbery and the threats. They involve separate acts of violence or threats of violence. The crimes were committed at different times in separate places rather than being committed so close in time as to indicate a single period of aberrant behavior, under [rule] 4.421(A)3 the defendant fleeing in a car from the home of one of his friends, stealing Mrs. Hogue's car, leading the highway patrol and the sheriff's department officers on a chase south on 99, crashing Mrs. Hogue's car, running from the police, trying to commandeer the pickup truck that belonged to Mr. Peterson [*sic*], all involved kind of a

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16 All references to rules are to the California Rules of Court.

continuous course of conduct in trying to escape, but they were separate incidents.

"Fleeing from the police, taking Mrs. Hogue's car, trying to commandeer Mr. Peterson's [*sic*] pickup truck are all separate offenses, although committed in a single course of his conduct which I would describe as trying to get away from the police. So I am saying that they were committed at different times and separate places.

"You also note under Penal Code Section 12022.1 (B) any person arrested for secondary offense which was alleged to have been committed while that person was released from custody on a primary offense shall be subject to a penalty enhancement of an additional two years in state prison. This shall be served consecutive to any other term imposed by the Court.

"Also under 12022.1 (E), if the person is convicted of a felony for the primary offense and sentenced to state prison for the primary offense, any state prison sentence for the secondary offense shall be consecutive to the primary sentence."

Appellant now raises several claims of sentencing error.

A. Counts 3, 5, and 6

Appellant first contends the evidence supporting the court's reasons for imposing consecutive terms on counts 5 and 6 is legally insufficient.[17] In a closely related

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[17] As we have already discussed, appellant's conviction on count 6 must be modified to attempted kidnapping and attempted carjacking and, upon remand, sentence on one of those offenses must be stayed pursuant to section 654. Our references in this portion of the opinion to count 6 are to the modified, unstayed offense.

Respondent does not contend that section 12022.1, subdivision (e), mandated imposition of consecutive terms on all counts, nor do we read the trial court's reference to that statute as stating a reason for imposing consecutive terms on various counts, but instead for running the terms imposed in appellant's two cases consecutive to each other. (See *People v. Baries* (1989) 209 Cal.App.3d 313, 317-318.) Accordingly, we do not include it in our discussion.

argument, he further contends that the trial court violated section 654 by punishing him for those counts in addition to count 3.[18]

"[T]he trial court enjoys broad discretion in making its sentencing choices, and these choices will be affirmed unless there is a clear showing that the trial court's actions were arbitrary or irrational. [Citations.]" (*People v. Golliver* (1990) 219 Cal.App.3d 1612, 1616.) "'The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.]" (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977-978.)

Rule 4.425 identifies nonexclusive criteria affecting the decision to impose consecutive rather than concurrent sentences. Facts relating to the crimes include whether the crimes and their objectives were predominantly independent of each other;

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18 At the sentencing hearing, appellant argued that counts 3, 5, and 6 were essentially the same act and should be treated as one offense. Since respondent does not claim waiver, we assume this argument constituted a sufficient objection so as to preserve for appeal the current challenge to the trial court's reasons for imposition of consecutive terms. (See *People v. Scott* (1994) 9 Cal.4th 331, 353.)

Appellant's section 654 contention is raised for the first time in his reply brief. As a general proposition, points raised for the first time in a reply brief will not be considered unless good reason is shown for failure to present them earlier. (*People v. Adams* (1990) 216 Cal.App.3d 1431, 1441, fn. 2; *People v. Jackson* (1981) 121 Cal.App.3d 862, 873.) This rule does not apply in the present case because "'[e]rrors in the applicability of section 654 are corrected on appeal regardless of whether the point was raised by objection in the trial court or assigned as error on appeal.' [Citation.]" (*People v. Hester* (2000) 22 Cal.4th 290, 295; *People v. Spirlin* (2000) 81 Cal.App.4th 119, 129, fn. 8.) Because respondent's reply to appellant's original claim of error essentially subsumes a section 654 analysis, allowing the section 654 claim to be raised late results in no prejudice.

whether the crimes involved separate acts of violence or threats of violence; and whether the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior. (Rule 4.425(a).) In addition, "[a]ny circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except (i) a fact used to impose the upper term, (ii) a fact used to otherwise enhance the defendant's prison sentence, and (iii) a fact that is an element of the crime shall not be used to impose consecutive sentences." (Rule 4.425(b).)

Here, the trial court found that the acts in question, while undertaken in order to elude capture, were committed at different times and separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior. "The determination was for the trial court. We will disturb its finding only if it is not supported by substantial evidence. [Citation.]" (*People v. Oseguera* (1993) 20 Cal.App.4th 290, 294-295.) Under the facts of this case, appellant committed distinct acts at different times and separate places, even though they might be said to overlap to some degree. The trial court did not err in relying on this factor. (See *id*. at p. 295.)

Section 654, subdivision (a) provides in pertinent part: "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." In *People v. Harrison* (1989) 48 Cal.3d 321, 335, the California Supreme Court summarized the law applicable to this statute as follows:

> "It is well settled that section 654 protects against multiple punishment, not multiple conviction. [Citation.] The statute itself literally applies only where such punishment arises out of multiple statutory violations produced by the 'same act or omission.' [Citation.] However, because the statute is intended to ensure that defendant is punished 'commensurate with his culpability' [citation], its protection has been

> extended to cases in which there are several offenses committed during 'a course of conduct deemed to be indivisible in time.' [Citation.]
>
> "It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.] We have traditionally observed that if all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.]
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> "If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.] Although the question of whether defendant harbored a 'single intent' within the meaning of section 654 is generally a factual one, the applicability of the statute to conceded facts is a question of law. [Citation.]"

Generally speaking, the sentencing court determines the defendant's "intent and objective" under section 654. (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 268.) That court "is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence. [Citation.]" (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

In the present case, although the trial court did not directly address section 654, it determined that appellant's overall intent was to get away from the police, but that the offenses in question were divisible as to time and place. We interpret this to be an implicit finding of a divisible course of conduct for purposes of section 654, and we uphold that determination. Characterizing counts 3, 5, and 6 as having a single objective of fleeing from police states the matter too broadly. Appellant stole Hogue's vehicle in an attempt to flee one set of officers. He led a second officer on a high-speed chase, which resulted in his crashing Hogue's vehicle. He attempted to commandeer Petersen's

pickup after the crash, while running from a third officer. Although each attempt to flee may have entailed some common acts, they were not simultaneously committed or incidental to each other. (See, e.g., *In re Jose P.* (2003) 106 Cal.App.4th 458, 469; *People v. McCoy* (1992) 9 Cal.App.4th 1578, 1585-1586.) Even though all three acts may have been committed with the single generalized intent and objective of fleeing from police, "[u]nder section 654, 'a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment. [Citations.]' [Citations.] This is particularly so where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken. [Citation.]" (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.) Such was the situation here.

"The purpose of section 654 is to ensure that a defendant's punishment will be commensurate with his culpability. [Citation.]" (*People v. Saffle* (1991) 4 Cal.App.4th 434, 438.) "It is just as undesirable to apply [section 654] to lighten a just punishment as it is to ignore the statute and impose an oppressive sentence." (*People v. Monarrez* (1998) 66 Cal.App.4th 710, 715.) The conduct of appellant underlying counts 3, 5, and 6 endangered the person or property of a number of people. To punish him only once "would impermissibly 'reward the defendant who has the greater criminal ambition with a lesser punishment.'" (*People v. Harrison*, *supra*, 48 Cal.3d at pp. 335-336; *People v. McCoy*, *supra*, 9 Cal.App.4th at p. 1586-1587.) Accordingly, we conclude that "the court was within the bounds of discretion in imposing consecutive sentences based on conduct divisible in time although arguably directed to one objective; it did not violate the proscription against multiple punishments for a single criminal transaction. [Citations.]" (*People v. Kilpatrick* (1980) 105 Cal.App.3d 401, 415-416, disapproved on other grounds in *People v. Bustamante* (1981) 30 Cal.3d 88, 102.)

B. *Blakely*

By supplemental brief, appellant contends the trial court violated his Sixth Amendment right to trial by jury and Fourteenth Amendment right to due process of law by imposing upper and consecutive terms based on factors not admitted by appellant nor found to be true by the jury beyond a reasonable doubt. This contention is based on the recent United States Supreme Court case of *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*) and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*).

As a preliminary matter, we address respondent's claim that appellant waived his right to challenge his sentence under *Blakely*. Noting that the defendant in *Blakely* objected when the court imposed the sentence beyond the statutory maximum (*Blakely, supra*, 542 U.S. at p. ___ [124 S.Ct. at p. 2535], respondent argues that appellant's failure to object to the imposition of the upper or consecutive terms on constitutional grounds, or to demand a jury determination of sentencing factors, forfeited his right to assert such a claim or challenge now. (Cf. *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060-1061 [defendant waives right to object on *Apprendi* grounds by failing specifically to object on that ground below].)

We disagree. *Blakely* was not decided until after appellant was sentenced. As of that time, there was no reported decision holding that an upper term sentence violated the Sixth Amendment if premised on factors found by the trial court rather than a jury. California courts and numerous federal courts held there was no constitutional right to a jury trial in connection with a court's imposition of consecutive sentences. (See, e.g., *People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231.) Indeed, *Blakely* has been described as having "worked a sea change in the body of sentencing law." (*United States v. Ameline* (9th Cir. 2004) 376 F.3d 967, 973 & fn. 2.) The case extended the *Apprendi* rationale into a new area; there can be no forfeiture or waiver of a legal argument not recognized at the time of trial and sentencing. (See *People v. Cleveland, supra*, 87 Cal.App.4th at p. 268, fn. 2.)

We turn now to appellant's challenge to the trial court's imposition of the upper term on count 1. In our view, the holdings in *Blakely* and *Apprendi* do not apply when the exercise of judicial discretion is kept within a sentencing range authorized by statute for the specific crime of which the defendant is convicted by jury. Based on constitutional history, *Apprendi* advises, "We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion – taking into consideration various factors relating both to offense and offender – in imposing judgment *within the range* prescribed by statute." (*Apprendi*, *supra*, 530 U.S. at p. 481.) *Apprendi* instructs further that a "sentencing factor" is distinguishable from a "sentence enhancement": the former is a "circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense"; the latter is "used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." (*Id*. at p. 494, fn. 19.)

In *Blakely*, while the sentence was within the indeterminate maximum for the category of the offense (class B felony), the sentenced term exceeded the specific range set by Washington state statute for the offense; the trial court's excessive term was based on facts not found by the jury and thus constitutionally excessive. (*Blakely*, *supra*, 542 U.S. at pp. ___ [124 S.Ct. at pp. 2539-2540].)

Given this backdrop, we find California's determinate sentencing law constitutional and appellant's present sentence constitutionally permitted. Under this state's determinate sentencing law, each applicable specific offense is given a sentencing range that includes lower, middle, and upper terms. A defendant's right to a jury trial for that offense is with the understanding that the upper term is the maximum incarceration he or she may be required to serve if convicted of the specific offense for which he or she

faces trial. Should the People allege enhancement charges, those are separately charged and the defendant is entitled to a jury's determination of the truth of such charges.

The determination of the court's choice of term within the particular range allowed for a specific offense is made after an evaluation of factors in mitigation and aggravation. These sentencing factors, consistent with the definition found in *Apprendi*, are weighed by the sentencing judge in determining the term of punishment within the specific offense's sentencing range. If there are no such factors or neither the aggravating nor mitigating factors preponderate, the court shall choose the middle term; additionally, the court retains the discretion to impose either the upper or middle term where it finds the upper term is justifiable. (*People v. Thornton* (1985) 167 Cal.App.3d 72, 77.) Such an exercise of discretion does not violate the constitutional principles set forth in *Apprendi* and followed in *Blakely* because the court's discretion is exercised within the specific statutory range of sentence.[19]

Here, the trial court selected the upper term based upon its analysis of sentencing factors set out, *ante*. This choice of term was within the statutory range allowed for the specific offense of robbery. No constitutional violation occurred.

With respect to the trial court's imposition of consecutive terms on various counts, we note that the imposition of consecutive sentences was not at issue in *Blakely*, and viewed in context there is no indication *Blakely* was intended to apply in that circumstance. *Blakely* (and *Apprendi*) were concerned with the finding of a fact "'that

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19 Our conclusion finds support in the recent amplification of *Apprendi* and *Blakely* found in *United States v. Booker* (2005) 543 U.S. ___ [125 S.Ct. 738]. We distill from that opinion the following refinement for our present purposes: If a fact *necessarily* results in a higher sentence, the fact must be admitted by the defendant or found by the jury. Because California's sentencing law vests in the trial court discretion to choose the middle term even where aggravating factors are found which preponderate, the present sentence is constitutionally permitted.

increases the penalty for *a* crime beyond the prescribed statutory maximum.'" (*Blakely*, *supra*, 542 U.S. at p. ___ [124 S.Ct. at p. 2536], italics added; *Apprendi*, *supra*, 530 U.S. at p. 490.) Relatedly, *Apprendi* advised that the relevant issue was the sentence for a particular crime, not the aggregate effect of the defendant's multiple sentences. (*Id.* at p. 474.) As to each of appellant's convictions, he either pled no contest (the legal effect of which was the same as a guilty plea under § 1016, subd. 3) or a jury found him guilty beyond a reasonable doubt, and he received no more than the statutory maximum for each conviction. Imposing those lawful sentences consecutively does not exceed the statutory maximum penalty for any one of his offenses.

In addition, there is no presumption of concurrent sentencing in California, in the sense that a concurrent term could possibly be construed to be a type of statutory maximum for *Blakely* purposes. When a defendant is convicted of multiple crimes, the trial court has discretion to impose sentence on the subordinate counts consecutively or concurrently. (*In re Hoddinott* (1996) 12 Cal.4th 992, 1000.) We recognize that a sentence in section 669 reads: "Upon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently." This language, however, merely mandates concurrent terms if the court has *failed to indicate* whether a sentence is to be consecutive or concurrent. It does not create a presumption favoring concurrent terms. (See *People v. Reeder* (1984) 152 Cal.App.3d 900, 923.)

We agree that judicial fact-finding does occur in connection with a trial court's exercise of discretion in choosing whether to impose concurrent or consecutive terms.[20]

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20 Section 1170, subdivision (c) requires the trial court to "state the reasons for its sentence choice on the record …." It would appear that this requirement merely creates a record to facilitate appellate review of the sentencing choice for an abuse of discretion, but does not require a finding of additional facts. On the other hand, rule 4.425 sets forth

Nonetheless, unlike the excessive sentence in *Blakely*, the imposition of consecutive sentences does not represent a penalty in excess of a statutory maximum, necessarily based on a fact neither found by the jury nor admitted by the defendant.

DISPOSITION

The conviction of attempted kidnapping during commission of a carjacking (§§ 209.5, subd. (a), 664) in count 6 is modified to attempted kidnapping (§§ 207, subd. (a), 664) and attempted carjacking (§§ 215, subd. (a), 664). The matter is remanded for resentencing on the modified convictions only, with the trial court directed to resentence appellant for those convictions in accordance with the views expressed in this opinion. In all other respects, the judgment is affirmed.

_____
Ardaiz, P.J.

WE CONCUR:

_____
Harris, J.

_____
Dawson, J.

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nonexclusive "[c]riteria affecting the decision to impose consecutive rather than concurrent sentences." Some of these criteria involve the same sort of factfinding that takes place in the determination whether to impose the upper term based on non-prior-conviction-related factors.