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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. GEORGE CARL SAMPLE, Defendant and Appellant.	C044445 (Super. Ct. No. 01F07726)

APPEAL from judgments of the Superior Court of Sacramento County, Talmadge R. Jones and Greta Curtis Fall, Judges. Affirmed with directions.

William I. Parks, 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, Senior Assistant Attorney General, Brian R. Means, David Andrew Eldridge and Brook A. Bennigson, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts I through V.

Defendant George Carl Sample was convicted by jury of corporal injury on a former spouse, with personal infliction of great bodily injury (count one); assault with a deadly weapon (count two); possession of a firearm by a convicted felon (count three); and battery upon a cohabitant (count five). The trial court found that he violated his probation on an earlier conviction for spousal abuse. Defendant was sentenced to an aggregate term of 11 years, eight months in state prison, including the upper term on count one and consecutive terms on count three and on the prior conviction.

On appeal, defendant raises a variety of contentions. Among them is his claim that imposition of the upper term and consecutive terms violated the Sixth Amendment of the United States Constitution as interpreted in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (hereafter *Apprendi*) and *Blakely v. Washington* (2004) 542 U.S. ___ [159 L.Ed.2d 403] (hereafter *Blakely*). Defendant concedes he did not raise this claim of error in the trial court.

As we will explain in the published part of this opinion, *United States v. Cotton* (2002) 535 U.S. 625 [152 L.Ed.2d 860] held that a defendant's failure to object to *Apprendi* error in the trial court forfeits the right to raise it on appeal if the error did not seriously affect the fairness, integrity, and public reputation of the judicial proceedings, i.e., if a factor relied upon by the trial court in violation of *Apprendi* was uncontroverted at trial and was supported by overwhelming evidence. Such is the case here. Defendant did not raise an *Apprendi* objection in the trial court, and factors used in imposing the upper term and consecutive sentencing were uncontested at trial and supported by overwhelming

evidence. Hence, defendant is barred from raising the claim of *Apprendi*/*Blakely* error.

In any event, the rule of *Apprendi* and *Blakely* does not apply to California's consecutive sentencing scheme, and imposition of the upper term here was harmless beyond a reasonable doubt.

In the unpublished parts of the opinion, we reject defendant's other claims of error. Accordingly, we shall affirm the judgment, but direct the trial court to correct clerical mistakes in the abstract of judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The charges against defendant

Count one, committed on September 17, 2001, alleged infliction of corporal injury upon defendant's former spouse, Tamara Sample, resulting in a traumatic condition and with personal infliction of great bodily injury under circumstances involving domestic violence. (Pen. Code, §§ 273.5, subd. (a), 12022.7, subd. (e); further section references are to the Penal Code unless otherwise specified.) As to this count, it was further alleged that defendant was convicted of spousal abuse in June 2000. (§ 273.5, subd. (e)(2).)

Count two, committed on September 17, 2001, alleged assault with a deadly weapon (a noose) upon Tamara Sample by means of force likely to produce great bodily injury. (§ 245, subd. (a)(1).)

Count three, committed on August 22, 2001, alleged possession of a firearm by a convicted felon. (§ 12021, subd. (a)(1).)

Count four, committed on August 22, 2001, alleged resisting officers in the performance of their duties. (§ 69.)

Count five, committed on August 22, 2001, alleged battery on a cohabitant, Tammice Woods, a misdemeanor. (§ 243, subd. (e)(1).)

The convictions

In January 2003, a jury found defendant guilty of counts three and five, but could not reach verdicts on the other counts, as to which a mistrial was declared. In May 2003, defendant was sentenced on counts three and five, and on the prior spousal abuse conviction for which probation was revoked. Thereafter, counts one and two were retried, and a second jury found him guilty of both crimes. Count four was severed and is not at issue here. On June 25, 2003, defendant was sentenced on counts one and two, and on the enhancement to count one, and was resentenced on counts three and five, and on the prior felony conviction. Defendant filed a notice of appeal the next day.

The prosecution's evidence

1. The crimes on August 22, 2001 (counts three and five)

The sheriff's department received a 9-1-1 call reporting that a man was assaulting a woman and pointing a gun at her in an apartment complex.[1] Deputies went to an apartment there and found Tammice Woods upset and crying. Defendant was in the bathroom. After deputies subdued him, they found a loaded gun in a hole in the box spring of the bed in the master bedroom. Defendant's identification

[1] The trial court gave a limiting instruction telling the jurors that the 9-1-1 call was being introduced not for the truth of its contents, but only to explain the officer's actions.

and ammunition (of a caliber suitable for the gun) were found in a duffel bag in a hall closet.

Woods testified defendant "sort of" lived with her, but also was still staying with his wife. Defendant did not live with Woods full-time; he was "just in and out." He had his own key to the apartment, kept personal belongings there, and sometimes spent the night. Before Woods moved to the apartment, she and defendant lived together "[k]ind of off and on" in 2001.

According to Woods, defendant called on August 22, 2001, and wanted her to pick him up at work so he could leave work early. When she arrived there, he was angry because she was late and she brought a friend whom he disliked. Defendant grabbed Woods by the arm and slapped her. After driving home in silence, defendant and Woods went to the community laundry room so they could argue without her friend hearing. Defendant grabbed Woods by the hair, swung her to the ground, and kicked her in the back. Woods testified that defendant did not threaten her with a gun; rather, he pointed his cell phone at her. Shortly after defendant and Woods went back inside the apartment, law enforcement officers arrived.

Woods further testified that, one week earlier, she allowed defendant's brother, Kelcey Sample, who was visiting from Indiana, to keep his gun at her apartment.[2] Kelcey told Woods to store the

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[2] During his visit, Kelcey Sample stayed some nights at Woods's apartment and other nights in a motel or at the home of Tamara Sample, defendant's former wife. For simplicity and to avoid

gun for him. She put it in its case and placed it on the floor under her bed. Although she told Kelcey where she put the gun, she did not tell defendant about it. She denied putting the gun in the box spring, explaining she did not even know about the hole in it. Woods, defendant, and Kelcey all had things stored in the hall closet. Defendant customarily kept his wallet on the kitchen counter or on the bedroom dresser if he did not have it on his person.

2. The crimes on September 17, 2001 (counts one and two)

Tamara Sample and defendant were married in 1996. They separated and reconciled numerous times. In August 2001, Tamara decided to break all ties.

Tamara testified that when she left her mother's apartment and went to her car on the morning of September 17, 2001, defendant was hiding in the backseat. He grabbed Tamara by her hair, pulled her into the car, and asked her to come with him. They struggled, and defendant punched her all over her body. She escaped the car, but defendant caught up with her, "slammed" her against a fence, and pushed her into nearby cars. At one point while Tamara was on the ground, defendant sat on top of her and tried two or three times to put a "zip tie" around her neck. He got the zip-tie "noose" down to her chin before she managed to pull it off. He also hit her in the face with a closed fist, causing a cut under her eye

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confusion, we will refer to Kelcey Sample and Tamara Sample by their first names.

that required stitches to close. The beating stopped when a woman approached and asked if Tamara was alright.

3. Uncharged conduct

Evidence of prior uncharged conduct was introduced pursuant to Evidence Code section 1109, as follows:

In September 1996, Tamara was pregnant and had left defendant because he was having an affair with another woman. Defendant came to the home of Tamara's relatives, banged on the door trying to get in, and threatened to kill Tamara and her family. Tamara told police that on the same day, defendant grabbed her by the wrists and kicked her in the head.

In February 2000, Woods left a male friend's house and found defendant sitting in his car, angry. Defendant grabbed her arm, hit her, and pulled out a gun. They drove to Woods's residence, and while still in the car, defendant hit her several times and told her to remove her pants, which she did out of fear. After they went inside the house, defendant hit Woods with a belt, punched her with a closed fist, and kicked her. He let her go when she said she had to pick up her children at her mother's house. While at her mother's house, Woods saw defendant and his wife, Tamara. Defendant got into the car that he had purchased for Woods and shot a gun into the air. Photographs of her bruises from this incident were shown to the jury.

In August 2001, Tamara and defendant split up. He took her car and said he would not bring it back. After Tamara called the police, defendant returned the car and rammed it into the garage. He went into the house, struggled with Tamara, who was trying to

open the door for police, "busted" her lip, and caused her to suffer a "knot" on her head.

Defense

1. The events on August 22, 2001

Defendant's brother, Kelcey, testified that about two weeks before defendant's arrest in August 2001, Kelcey came to Sacramento, planning to relocate from Indiana. He left most of his belongings at Woods's apartment, where he sometimes slept. He asked Woods to store his gun, and she put it under the bed. Feeling it was not safe there, Kelcey put the gun inside a hole in the mattress while he was alone in the apartment. Kelcey had ammunition in his duffel bag, which was in Woods's living room closet. Although the gun was loaded when the officers found it, Kelcey testified that he did not load it and that he believed it was not loaded when he moved it.

Defendant testified he was aware of the gun and saw it on the bed, but he did not know where it was stored. Defendant knew he was not supposed to possess a firearm, but he was not concerned about it since he did not live at Woods's apartment. However, he acknowledged he had been involved with Woods for a number of years, he had a child with her, and he stayed at her apartment "probably at least twice a week." Although he was not sure where his wallet was at the time the officers entered the apartment, defendant claimed he "never ever" kept it in a duffel bag in the closet. He assumed it was on the bedroom dresser because that was where he took off his clothes preparing for a shower before the officers arrived.

Regarding the alleged battery, defendant admitted he was mad at Woods and "smacked" her when she arrived late to pick him up at work. He also admitted he grabbed her hair and pulled her towards him in the laundry room. According to defendant, she fell and he accidentally kicked her or stepped on her.

2. The events on September 17, 2001

Defendant considered himself divorced from Tamara in August 2001, but he did not know if it was official. As of September 2001, she was seeing other men, and he had been seeing other women for years.

Defendant denied going to the residence where Tamara was staying on September 17, 2001, and denied attacking her. Although he acknowledged that he uses zip ties in his construction job, defendant denied ever trying to place one around Tamara's neck.

3. Uncharged conduct

Defendant admitted that he had physically abused Tamara in the past, and admitted having a prior felony conviction for domestic violence against Woods, for which he was on probation.

Although defendant admitted he had grabbed Tamara's arm during the incident in September 1996, because he wanted to talk with her, he denied threatening Tamara's family, firing a gun, or kicking Tamara.

As to the incident in February 2000, defendant testified he arrived for a barbecue, saw Woods talking to a man, and got angry. He admitted he hit her and later fired gunshots into the air, which he claimed were to fend off Woods's brothers who were gang members.

Defendant admitted pleading guilty to felony domestic violence based upon this incident.

Regarding the August 2001 incident, defendant testified he and Tamara had a fight, and she told him to leave. He loaded some of his belongings in her car, which was bigger than his car, and drove away. Several minutes later, a law enforcement officer called him on his cell phone and said Tamara reported the car stolen. Defendant returned, hit the garage door opener, but pulled in too fast and accidentally ran the car into the garage door.

The judgment

Defendant was sentenced to an aggregate term of 11 years, eight months in prison: The upper term of five years on count one (corporal injury on a former spouse); a consecutive term of five years for the great bodily injury/domestic violence enhancement; four years on count two (assault with a deadly weapon), which was stayed pursuant to section 654; a consecutive term of eight months (one-third the middle term) on count three (possession of a firearm by a convicted felon); a consecutive term of one year (one-third the middle term) on the prior felony conviction of spousal abuse for which probation was revoked; and a concurrent term of one year on count five (battery).[3]

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[3] The abstract of judgment does not reflect the term of one year imposed on the misdemeanor battery, and the abstract incorrectly cites section "12022.7(a)" as the basis for the five-year sentencing enhancement, rather than section 12022.7, subdivision (e), which was charged and found true by the jury. We shall direct the trial court to correct these clerical errors in the abstract.

DISCUSSION

I*

Defendant contends the evidence was insufficient to support the jury's finding that he was guilty of being a convicted felon in possession of a firearm. We disagree.

In considering a claim of insufficiency of the evidence, we must determine only whether, on the record as a whole, any rational trier of fact could find defendant guilty beyond a reasonable doubt. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We view the evidence in the light most favorable to the judgment, and presume in support thereof the existence of every fact the jury could reasonably deduce from the evidence. (*Ibid.*) "'Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. . . .'" (*Ibid.*)

Section 12021, subdivision (a)(1) provides: "Any person who has been convicted of a felony under the laws of the United States, [or] the State of California, . . . who owns, purchases, receives, or has in his or her possession or under his or her custody or control any firearm is guilty of a felony."

The jury was told the element of a prior felony conviction had been established by stipulation, and was further instructed as follows:

"There are two kinds of possession: actual possession and constructive possession. [¶] 'Actual possession' requires that a person exercise direct physical control over a thing. [¶] 'Constructive possession' does not require actual possession, but does require that a person knowingly exercise control over or the right to control a thing, either directly or through another person or persons. [¶] One person may have possession alone, or two or more persons together may share actual or constructive possession. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. The defendant had in his possession or had under his control a firearm; and [¶] 2. The defendant had knowledge of the presence of the firearm." In addition, the jury was instructed on general criminal intent.

The trial court gave a limiting instruction preventing the jury from considering as evidence of defendant's guilt the 9-1-1 call (reporting a man holding a gun). Consequently, we disregard defendant's argument that the call reported a silver gun, whereas the gun found in the bed was dark blue. And we disregard the People's reference to the 9-1-1 call as evidence supporting the conviction.

Defendant acknowledges that possession of an item may be imputed when the item is found in a location immediately accessible to the defendant and subject to his dominion and control. (*People v. Francis* (1969) 71 Cal.2d 66, 71.) Here, the gun was found in

an apartment to which defendant had a key and in a bed in which he slept at least two nights a week. Thus, this case is distinguishable from *People v. Glass* (1975) 44 Cal.App.3d 772, cited by defendant, which held the most that could be inferred from evidence of appellant being discovered half-clad in bed at 11:30 a.m. is that he was a visitor at the residence on the morning police found drugs beneath the living room couch. (*Id.* at p. 776.)

Moreover, defendant admitted he knew the gun was being kept in the apartment and he had seen it on the bed. He claims his mere presence near the gun, without more, is insufficient to support a finding of possession. (*People v. Rodriguez* (1980) 111 Cal.App.3d 161, 166-167.) But there was more than mere presence. Defendant knew the gun was being kept in the apartment; the gun was found loaded, whereas Kelcey (who freely admitted bringing the gun and ammunition into the apartment) said he did not load it and believed it was not loaded when he moved it; and defendant's identification, together with ammunition for the gun, was found in a duffel bag.

Defendant argues the evidence linking his identification to the ammunition was insubstantial because "[n]one of the officers . . . actually saw the identification retrieved nor could they recall who claimed to have located it." However, Deputy Sheriff Christopher Berg testified that, although he could not remember which officer pulled the duffel bag out of the closet and opened it, Berg personally observed the officer remove from the bag defendant's identification and a partial box of nine millimeter ammunition, which was the same caliber as the gun found in the box spring.

Likewise, Deputy Sheriff Steve Fisher testified he was present when defendant's identification was removed from the duffel bag.[4]

Evidence that (1) defendant's identification was in the duffel bag along with ammunition for the gun, (2) defendant admitted he knew the gun was in the apartment, and (3) the gun was found in the bed where defendant slept at least two nights a week, supports the finding that defendant had possession of the firearm within the meaning of section 12021.

Defendant argues there was insufficient evidence that he had any intent to possess a gun. He acknowledges no specific intent is required for section 12021. (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 922 (hereafter *Jeffers*).) But he quotes from *Jeffers* that "[w]rongful intent must be shown with regard to the possession and custody elements of the crime of being a felon in possession of a firearm." (*Ibid.*) However, the point made by *Jeffers* was that a convicted "felon who acquires possession of a firearm through misfortune or accident, but who has no intent to exercise control or to have custody, commits the prohibited act without the required wrongful intent." (*Ibid.*) Jeffers asserted he did not know there was a gun in a package he delivered to a gun shop until he arrived there and the shopkeeper opened the package. (*Id.* at p. 921.) His conviction was reversed because the trial court failed to instruct on general intent and refused his pinpoint

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[4] Cross-examination and redirect revealed some weaknesses in their testimony, but the verdict indicates the jury believed Berg and Fisher in this regard.

instruction relating to his defense. (*Id.* at p. 924.) *Jeffers* concluded the jury may have believed the only issue to be decided was whether the defendant had knowledge a gun was in the package, even if that knowledge was not acquired until after he arrived at the gun shop and even if possession was not intentional. (*Id.* at p. 924.)

No such problem presents itself in this case. Unlike the accused in *Jeffers*, defendant admitted he knew the gun was being kept in the apartment. "[K]nowledge plus physical possession may ordinarily demonstrate an intent to exercise dominion and control" (though knowledge does not conclusively demonstrate such intent as a matter of law). (*Jeffers, supra*, 41 Cal.App.4th at p. 922.)

Substantial evidence supports the jury's finding that defendant was guilty of being a convicted felon in possession of a firearm.

II*

Defendant contends the trial court erred in failing to instruct sua sponte that mere access to a firearm was insufficient to find him guilty of being a convicted felon in possession of a firearm. We disagree.

"[E]ven in the absence of a request, a trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047 (hereafter *Montoya*).)

Here, the jurors were instructed that in order to convict defendant, they must find that he had the gun in his possession (knowingly exercising control over it or the right to control it)

and had knowledge of the gun's presence. Under these instructions, the jury could not convict him based upon a mere finding of access or proximity to the gun. Thus, there is no merit to defendant's contention that the jury may have concluded that his proximity to the gun was sufficient to establish possession.

Defendant claims that *Montoya* imposes a duty to instruct sua sponte that mere proximity to a firearm is not enough. However, *Montoya* dealt with an instruction on aiding and abetting, not possession of a firearm. Moreover, *Montoya* found no duty to give sua sponte the instruction urged by the appellant in that case. (*Montoya, supra*, 7 Cal.4th at pp. 1047-1050.)

Defendant cites *People v. Mardian* (1975) 47 Cal.App.3d 16 (hereafter *Mardian*) (disapproved on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104, 1123, fn. 1). *Mardian* found no reversible error in the trial court's denial of multiple jury instructions proposed by the appellant, including an instruction that more than mere access or proximity must be shown for the crime of possession of a controlled substance. (*Id*. at pp. 45-47.) *Mardian* held the trial court "adequately instructed the jury on the question of whether defendant had actual possession of the contraband (e.g., dominion). The court stated that neither mere proximity to the drug, nor association with those in possession, was sufficient to establish possession under the law. (The three instructions requested by defendant stated that dominion could not be shown by mere access or proximity to the contraband, and were effectively covered by the foregoing instruction.)" (*Id*. at p. 47.) Thus, *Mardian* merely stands for the proposition that a

trial court does not err in refusing proposed instructions which duplicate other instructions.

Defendant notes that with respect to the jury instruction on constructive possession of contraband, FORECITE recommends adding the words "access to the thing, without more, is insufficient to support a finding of possession." (1 FORECITE (3d ed. 2002) Constructive Possession, § F 1.24b, p. 147.) But FORECITE merely recommends the addition should be given "upon request." (*Ibid.*) Here, defendant made no such request.

In sum, the trial court had no duty to instruct sua sponte that mere access, without more, was insufficient to support a finding that defendant possessed the gun.

We also reject defendant's claim that his trial counsel's failure to request the instruction constituted ineffective assistance of counsel.

To establish ineffective assistance, defendant bears the burden of showing (1) counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms, and (2) absent counsel's error, it is reasonably probable that the verdict would have been more favorable to the defendant. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

We need not address the first prong because defendant fails to show a reasonable probability of a more favorable verdict. He merely asserts "[a]s discussed in the previous two arguments, the evidence of proof of possession was not particularly substantial. Had the jury been properly instructed and weighed

each of the critical facts in the light of that instruction, it is indeed reasonably probable that a more favorable outcome would have transpired."

This argument is deficient and is predicated in part on defendant's misstatement that no witness saw defendant's identification retrieved from the duffel bag containing the ammunition. And it ignores that trial counsel argued to the jury that defendant's mere knowledge the weapon was present in the house would not suffice for conviction.

Since defendant's identification was found in the bag along with ammunition fitting the gun, it is not reasonably probable that he would have obtained a more favorable verdict had the instruction been given.

III*

Next, defendant claims the trial court erred in failing to instruct sua sponte that the jurors must agree unanimously on which act(s) formed the basis for the charge of battery of a cohabitant. (§ 243, subd. (e).)

If one criminal act is charged, but the evidence tends to show the commission of more than one such act, then either the prosecutor must elect the specific act relied upon to prove the charge, or the trial court has to instruct the jury that, to convict, it must unanimously agree the defendant committed the same specific criminal act. (*People v. Napoles* (2002) 104 Cal.App.4th 108, 114.)

Section 243, subdivision (e)(1) states: "When a battery is committed against a spouse, a person with whom the defendant is

cohabiting, . . . or a person with whom the defendant currently has, or has previously had, a dating or engagement relationship, the battery is punishable by a fine not exceeding two thousand dollars ($2,000), or by imprisonment in a county jail for a period of not more than one year, or by both that fine and imprisonment. . . ."

Section 242 defines battery as "any willful and unlawful use of force or violence upon the person of another."

Defendant contends there were two sets of facts which might support the charge (1) his "smacking" Woods when she picked him up at work, and (2) his pulling her hair and kicking her at the laundry room; thus, a unanimity instruction was required.

Acknowledging that he was angry because Woods arrived late to pick him up at work on August 22, 2001, defendant testified as follows:

"Q And did you hit her or anything because of your being angry with her?

"A Yes, I did.

"Q And so what did you do to her?

"A When, um, we was [*sic*] in the parking lot outside the stores I was yelling at her. . . . And she just got mad and said you just take your car. You know, and she was like you take your car. She opened up the car door. It hit my knee so I pushed the car door, and at the same time I just -- I just like smacked her once. I didn't hit her with the fist or nothing. I just smacked her.

“Q Okay. So she had opened the car door and hit your knee, then you smacked her?

“A I pushed the car door back and at the same time, same hand, one hand smacked her.”

Defendant further stated: “When she . . . opened the door and hit me, hit me in the knee with it, I closed the door, and I don’t know. I guess it was both, my closing the door, my hand came across, and I wanted to smack her, too, I guess.”

When asked if he hit her intentionally, he said “Yes, I hit her; yes.” He said he hit her across the forehead.

Defendant testified they drove to his job site, where he dropped off his work truck. They then went to the apartment. He wanted to yell at her, but not in front of the children, so they went to the laundry room:

“A We were arguing. Um, more, you know, um, her being late. I’m gonna lose my job. You goofing off with [friends]. And, you know, don’t want nothing else. Said she didn’t want to leave [*sic*], she didn’t want to hear it. I kept grabbing on her arm trying to make her stay and listen. She kept pulling away. [¶] I did, I grabbed her hair. One of the times I reached to grab her I grabbed her hair and I pulled her back towards me.”

Defendant said he was moving forward, she fell, and “people say I stomped on her, stepped on her or tripped over her. But I did kick her, step on her, whatever.

“Q And then after were you on the ground then --

“A She was. And I stumbled over. So if she’s laying down, I pulled her back. She’s pulling forward, she fell and I’m going

forward. And I stepped -- stepped, stumbled over her. I didn't fall, she did."

The prosecutor argued to the jury: "This one is basically easy because, basically, [defendant] basically admitted that he did this. He told you, Yeah, I smacked her, smacked her when she was late picking me up, and when we got home, yes, I pulled her arm. He didn't say kick her. It was more like a trip over her, but [Woods] told you he kicked her, and she was on the ground, and he kicked her. Each [*sic*] without [Woods] telling you what happened, the defendant admitted to this crime in court. All these elements: Defendant used force, yes. He smacked her in the head, yes. It was willful. He pulled her hair. He kicked her when she was on the ground because he had more to say, and yes, she was the mother of his child. He admitted this."

In closing, defense counsel argued: "I agree . . . on one thing, and that was on the . . . misdemeanor battery on Tammice Woods. Uh, I agree that [defendant], uh, committed that. He did that . . . . That's unwanted touching. It doesn't have to hurt anybody. It doesn't have to cause pain, doesn't have to be done violently, doesn't have to be done in anger. If it's just kind of an unwanted touching, then it constitutes that crime. [¶] And [defendant] told you that, when he was, uh, uh, closing the door, that he did kind of smack Tammice Woods and that he did grab her hair and pull her back toward him when he wanted her to talk to him. She fell down, and then he kind of stumbled over her and his foot hit her. All those things constitute that crime, right, so

that one's a no-brainer. You can go back there and find him guilty of that."

Thus, despite his appellate contention that he did not admit the element of willfulness, defendant admitted he intentionally "smacked her" when Woods picked him up at work. He also admitted he grabbed her hair and pulled her towards him in the laundry room, with the intent to make her stay. Both acts constitute battery. Contrary to his view, it does not matter if he hit her because he got hit with the car door. He does not demonstrate that being hit with the car door afforded him any legal defense to his "smacking" Woods. As to the laundry room, defendant focuses on his view that he did not kick her but stumbled over her accidentally. However, the battery was already complete when he pulled her towards him by her hair.

The prosecutor used not only the hair pulling and the "smack," but also the kick, which defendant claims was accidental. However, it is inconceivable that any juror believed defendant intentionally kicked her but disbelieved his admission that he "smacked" her and pulled her hair. It also is inconceivable that any juror believed defendant's admission that he pulled her hair but disbelieved his admission that he "smacked" her (or vice versa).

Under the circumstances of this case, the failure to give a unanimity instruction was harmless beyond a reasonable doubt. (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 186; *People v. Deletto* (1983) 147 Cal.App.3d 458, 472.)

IV*

Defendant contends Evidence Code section 1109, which allows introduction of prior act evidence in domestic violence cases, is unconstitutional on its face and as applied to this case.[5]

Defendant acknowledges his facial challenge to the statute has been rejected by this court in *People v. Johnson* (2000) 77 Cal.App.4th 410, at pages 412-420 (hereafter *Johnson*), and by other courts. However, he argues that *Johnson* was wrongly decided. It was not.

Defendant also argues that admission of prior acts evidence pursuant to Evidence Code section 1109 offended his right under the Fifth and Fourteenth Amendments to a fair trial. Specifically, he contends that evidence of the February 2000 incident (defendant saw Woods with another man, hit her in the car, ordered her to remove her pants, beat her when they got home, and later fired a gun into the air at her mother's home) should have been excluded under Evidence Code section 352.

It is apparent that defendant's contention relates only to the first trial because his counsel says: "While it may fairly be argued that the court acted within its discretion in admitting past

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[5] Evidence Code section 1109 states in part: "(a)(1) Except as provided in subdivision (e) [restriction on prior acts more than 10 years old] or (f) [certain administrative findings], in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 [character evidence inadmissible to prove conduct] if the evidence is not inadmissible pursuant to Section 352. . . ."

conduct pursuant to Evidence Code section 1109 in regard to the assault upon Ms. Sample, the same may not be said in regard to the lesser charge involving Ms. Woods." The battery charge involving Woods was at issue only in the first trial.

We need not address the merits (or whether defendant preserved the issue by requesting a limiting instruction in the trial court), because even assuming for the sake of argument that the evidence was wrongly admitted, defendant fails to show the manifest miscarriage of justice required for a reversal. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

Since defendant admitted the acts constituting the battery of Woods, he cannot attribute his conviction to the prior acts evidence. Moreover, it is obvious that the admission of the prior acts evidence in the first trial did not inflame the jurors against defendant because they did not convict him on the felony counts of domestic violence against his former wife, and instead were unable to reach a verdict.

In sum, defendant fails to show grounds for reversal with respect to admission of evidence under Evidence Code section 1109.

V*

According to defendant, the trial court erred by applying section 2933.1 to limit his presentence custody credits. Not so.

Section 2933.1 states in part: "(a) Notwithstanding any other law, any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 [enhancement of punishment for prior prison terms involving violent felonies] shall accrue no more than 15 percent of worktime credit, as

defined in Section 2933. [¶] . . . [¶] (c) Notwithstanding Section 4019 [time credit for work and good behavior] or any other provision of law, the maximum credit that may be earned against a period of confinement in, or commitment to, a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp, following arrest and prior to placement in the custody of the Director of Corrections, shall not exceed 15 percent of the actual period of confinement for any person specified in subdivision (a). . . .”

Defendant brought himself within the purview of section 2933.1 by his conviction for corporal punishment on his former spouse, Tamara Sample, with personal infliction of great bodily injury. (§ 667.5, subd. (c)(8) [violent felony includes felony in which defendant inflicts great bodily injury as provided in § 12022.7].) He acknowledges the trial court properly applied section 2933.1 to limit his presentence custody credits on this conviction.

His contention is that section 2933.1 should not be applied to limit presentence custody credits with respect to his conviction for the nonviolent felony of being a convicted felon in possession of a firearm.

Defendant says he preserved the issue for appeal by raising it in the trial court. But his citation to the record merely shows that defense counsel said there may be some question about the accuracy of the calculation of jail credits; that the court told him to go over the calculation with the court clerk; and that if the calculation was incorrect, it could be corrected by minute order.

In any event, he fails to show error. As he acknowledges, a similar argument was rejected in *People v. Ramos* (1996) 50 Cal.App.4th 810 (hereafter *Ramos*), where an appellant convicted of eight counts of robbery at gunpoint (triggering section 2933.1), and one count of possession of a controlled substance, argued that section 2933.1 should not be applied to limit credits with respect to the nonviolent felony. (*Id*. at p. 817.) *Ramos* rejected the argument, stating "the language of section 2933.1 does not support [appellant's] position. The statute applies 'notwithstanding Section 4019 or any other provision of the law' and limits to 15 percent the maximum number of conduct credits available to 'any person who is convicted of a felony offense listed in Section 667.5.' That is, by its terms, section 2933.1 applies to the offender not to the offense and so limits a violent felon's conduct credits irrespective of whether or not all his or her offenses come within section 667.5. The Legislature could have confined the 15 percent rule to the defendant's violent felonies if that had been its intention. (Cf. § 2900.5, subd. (b), limiting presentence credits to the custody 'attributable to proceedings related to the same conduct for which the defendant has been convicted.')" (*Ramos, supra*, 50 Cal.App.4th at p. 817.)

Defendant argues *Ramos* was wrongly decided because it implicitly found that section 2933.1 is ambiguous, yet it failed to apply the rule construing ambiguous statutes in favor of criminal defendants. However, while *Ramos* reiterated rules of statutory construction in addressing a different contention, it found

no ambiguity in section 2933.1 on this issue. (*Ramos, supra,* 50 Cal.App.4th at pp. 816, 817.)

We agree with *Ramos* and the other courts that have agreed with *Ramos*. (*People v. Duran* (1998) 67 Cal.App.4th 267; *People v. Palacios* (1997) 56 Cal.App.4th 252.)

Defendant points out that *Ramos* and its progeny involved simultaneous convictions for violent and nonviolent offenses. Defendant further points out that the California Supreme Court has under review cases addressing application of section 2933.1 where violent and nonviolent offenses are the subject of separate prosecutions. (*People v. Marichalar* (2003) 109 Cal.App.4th 1513, review granted [§ 2933.1 limits credit for nonviolent offenses whenever a defendant has a current conviction for a violent felony and the sentences for the two offenses run consecutively, regardless of the timing of the convictions]; *People v. Baker* (2002) 104 Cal.App.4th 774, review granted [§ 2933.1 applied to nonviolent offense, even though defendant had served presentence jail time for the nonviolent offense prior to the commission of the violent felony for which he was later convicted and consecutively sentenced]; *In re Reeves* (2002) 102 Cal.App.4th 232, review granted [§ 2933.1 applied only to portion of sentence attributable to violent felony and not to past or separate convictions for nonviolent crimes]; *In re Black* (2002) 101 Cal.App.4th 1026, review granted [§ 2933.1 did not apply to concurrent drug sentence because statute's phrase "is convicted of" refers only to most recent conviction, and does not apply to a defendant who

was previously convicted of violent felony, but whose current conviction was for nonviolent crime].)

However, this case did not involve separate criminal prosecutions. Rather, it was one prosecution, with one case number, although the jury's inability to reach a verdict on all counts required retrial on some of them. Where a trial court concludes a jury cannot agree on a verdict, the court may discharge the jury, and "the cause may be again tried." (§§ 1140-1141.) Thus, defendant fails to show the applicability of cases which are under review by the California Supreme Court. And we disagree with his assessment that the pendency of those cases means *Ramos* may not be considered to be settled law.

Defendant claims that in applying section 2933.1, the court in *People v. Thomas* (1999) 21 Cal.4th 1122 (hereafter *Thomas*) *narrowly* interpreted section 2933.1 and focused on the *offense* rather than the *offender* (in contrast to the focus of *Ramos* on the offender rather than the offense). *Thomas* construed the provision of section 667.5, subdivision (c)(7), which characterizes as a violent felony "[a]ny felony punishable by death or imprisonment in the state prison for life." (*Id.* at p. 1127.) The felonies at issue were not in themselves punishable by death or life imprisonment, but became so by application of the three strikes law (§ 1170.12). *Thomas* held "sections 2933.1 and 667.5(c)(7) limit a defendant's presentence conduct credit to a maximum of 15 percent only when the defendant's current conviction is itself punishable by life imprisonment, not when it is so punishable solely due to his status as a recidivist." (*Id.* at p. 1130.)

Thomas has no bearing on the case before us. There is no dispute that defendant's section 273.5 conviction with infliction of great bodily injury was, in itself, a violent felony triggering section 2933.1. *Thomas* does nothing to undermine *Ramos*.

The trial court in this case properly applied section 2933.1.

VI

Relying on *Blakely, supra,* 542 U.S. ___ [159 L.Ed.2d 403] and *Apprendi, supra,* 530 U.S. 466 [147 L.Ed.2d 435], defendant claims that the trial court erred in imposing the upper term on count one and consecutive terms on count three and on his prior felony conviction. He concedes he did not raise this issue in the trial court.

For reasons that follow, defendant cannot prevail on his claim of error because he failed to raise it in the trial court.

A

In *Blakely*, the defendant entered a plea of guilty to second degree kidnapping involving domestic violence and use of a firearm. (*Blakely, supra,* 542 U.S. at pp. ___ [159 L.Ed.2d at pp. 410-411].) Under Washington law, second degree kidnapping could be punished by a prison term of up to 10 years, but the law provided a "'standard range'" of 49 to 53 months. (*Ibid.*) The sentencing court could impose a term in excess of the standard range only if it found "'substantial and compelling reasons justifying an exceptional sentence.'" (*Id.* at p. ___ [159 L.Ed.2d at p. 411].) A reason offered in support of an exceptional sentence could be considered "'only if it takes into account factors other than those which are used in computing the standard range sentence for the offense.'"

(*Ibid.*) A court imposing an exceptional sentence is required to set forth findings of fact and conclusions of law supporting the sentence. (*Ibid.*)

Over the defendant's objection, the sentencing court in *Blakely* imposed an exceptional sentence after finding the offense involved deliberate cruelty. (*Blakely, supra,* 542 U.S. at p. ___ [159 L.Ed.2d at p. 411].) Relying on its earlier holding in *Apprendi*, the United States Supreme Court held that the sentence violated the defendant's Sixth Amendment right to a jury trial. The court explained: Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Id.* at p. ___ [159 L.Ed.2d at p. 412].) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on the facts reflected by a jury's verdict or admitted by the defendant. (*Id.* at p. ___ [159 L.Ed.2d at p. 413].) Accordingly, when a sentencing court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Id.* at pp. ___ [159 L.Ed.2d at pp. 413-414].) Since the exceptional sentence imposed in *Blakely* was based on a fact not admitted by the defendant, the sentencing procedure did not comply with the Sixth Amendment. (*Id.* at pp. ___ [159 L.Ed.2d at pp. 414-415].)

Here, defendant contends his sentence violates the holding in *Blakely* because in imposing the upper term on count one and the consecutive term on count three, the trial court relied upon facts

not submitted to the jury and proved beyond a reasonable doubt, thus depriving him of the constitutional right to a jury trial on facts legally essential to the sentences.

B

In *United States v. Cotton* (2002) 535 U.S. 625 [152 L.Ed.2d 860] (hereafter *Cotton*), a case the United States Supreme Court decided after its decision in *Apprendi*, the court held that the Sixth Amendment right to a trial and finding by jury on a fact used to enhance a defendant's sentence may be forfeited by the defendant's failure to timely assert that right in the trial court.

Cotton involved convictions of multiple defendants for the conspiracy to distribute, and to possess with intent to distribute, a "'detectable amount'" of cocaine and cocaine base. Although the indictments did not charge any of the threshold levels of drug quantity that would support enhanced penalties, the district court imposed enhanced sentences based on its finding that the offenses involved a quantity of drugs sufficient to trigger enhancement provisions. (*Cotton, supra,* 535 U.S. at pp. 627-628 [152 L.Ed.2d at pp. 865-866].) While the case was on appeal, the Supreme Court decided *Apprendi*. Based on the holding in *Apprendi*, the Court of Appeals vacated the sentences on the ground that the district court lacked jurisdiction to impose a sentence based on facts not charged in the indictment. (*Cotton, supra,* 535 U.S. at p. 628 [152 L.Ed.2d at p. 866].)

In a unanimous decision, the United States Supreme Court reversed the decision of the Court of Appeals and held (1) the omission from the indictment of facts relied upon for sentencing was

not jurisdictional error that would require vacating the sentence (*Cotton, supra,* 535 U.S. at pp. 629-631 [152 L.Ed.2d at pp. 866-868], and (2) the defendants forfeited their claim of *Apprendi* error because they did not raise the issue in the district court. (*Id.* at pp. 631-634 [152 L.Ed.2d at pp. 868-870].) The court explained the forfeiture as follows:

Since the defendants had not objected in the trial court, their claim of error was forfeited for appeal unless it met the "plain-error" test of Federal Rule of Criminal Procedure 52(b).[6] (*Cotton, supra*, 535 U.S. at p. 631 [152 L.Ed.2d at p. 868].) This would require (1) error, (2) that is plain, (3) that affects substantial rights, and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings. (*Ibid.*) The Supreme Court found the error was plain under the reasoning of *Apprendi*. However, the court found it was unnecessary to determine whether the error affected substantial rights of the defendants, "because even assuming [the defendants'] substantial rights were affected, the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings." (*Id.* at pp. 632-633 [152 L.Ed.2d at pp. 868].)

Recognizing that "the fairness and integrity of the criminal justice system depends on meting out to those inflicting the

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[6] Federal Rules of Criminal Procedure (18 U.S.C.) 52(a) provides: "Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Federal Rules of Criminal Procedure (18 U.S.C.) 52(b) states: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

greatest harm on society the most severe punishments," the Supreme Court held: "The real threat then to the 'fairness, integrity, and public reputation of judicial proceedings' would be if [defendants], despite the overwhelming and uncontroverted evidence that they were involved in a vast drug conspiracy, were to receive a sentence prescribed for those committing less substantial drug offenses because of an error that was never objected to at trial." (*Cotton, supra*, 535 U.S. at p. 634 [152 L.Ed.2d at p. 869-870]; see also *Johnson v. United States* (1997) 520 U.S. 461, 469-470 [137 L.Ed.2d 718, 728-729].)

Thus, the forfeiture rule applied to bar the defendants from complaining about *Apprendi* error. (*Cotton, supra*, 535 U.S. at p. 634 [152 L.Ed.2d at pp. 869-870].)

The reasoning of the United States Supreme Court in *Cotton* is similar to, but not identical with, harmless error analysis. The court previously had explained that invariably to refuse to consider errors when no objection was made would be out of harmony with rules of fundamental justice. (*United States v. Olano* (1993) 507 U.S. 725, 732 [123 L.Ed.2d 508, 518].) Accordingly, if the defendant points to plain error that affected substantial rights, then an appellate court has discretion to correct the error. (*Id.* at p. 735 [123 L.Ed.2d at p. 520].) "Normally, although perhaps not in every case, the defendant must make a specific showing of prejudice to satisfy the 'affecting substantial rights' prong of Rule 52(b)." (*Ibid.*) But such a showing is not itself sufficient. (*Id.* at pp. 736-737 [123 L.Ed.2d at p. 521].) An appellate court should not correct the error unless it "'seriously affect[s] the

fairness, integrity or public reputation of judicial proceedings.'" (*Ibid*.)

It was this latter test the Supreme Court applied in *Cotton*, concluding that when the defendants did not object in the district court to the sentencing proceeding and did not attempt to dispute or controvert the evidence in support of a sentencing factor that justified the sentence imposed, and the evidence of the factor was overwhelming, then forfeiture applies and reversal on appeal is wholly unwarranted. (*Cotton, supra*, 535 U.S. at p. 634 [152 L.Ed.2d at pp. 869-870].)

Although *Cotton* was concerned with Federal Rules of Criminal Procedure (18 U.S.C.) 52(b), which does not govern state court proceedings, California's statutory law includes an analogous provision. Penal Code section 1259 provides in part: "Upon an appeal taken by the defendant, the appellate court may . . . review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done . . . *after objection made in and considered by the lower court*, and which affected the substantial rights of the defendant." (Italics added; see *In re Seaton* (Aug. 23, 2004, No. S067491) ___ Cal.4th ___ [2004 D.A.R. 10,451].)

It is a well established rule in this state that a criminal defendant's right to raise an issue on appeal is forfeited by the failure to have made a timely objection in the trial court. (*In re Seaton, supra,* ___ Cal.4th ___ [2004 D.A.R. 10,451]; *People v. Barnum* (2003) 29 Cal.4th 1210, 1224; *People v. Vera* (1997) 15 Cal.4th 269, 275-276; *People v. Lucas* (1995) 12 Cal.4th 415, 476-477; *People v. Scott* (1994) 9 Cal.4th 331, 352-353; *People v.*

Saunders (1993) 5 Cal.4th 580, 590; *People v. Welch* (1993) 5 Cal.4th 228, 234-235.)[7]

This forfeiture rule extends to claims based on the alleged violations of fundamental constitutional rights. (*People v. Barnum, supra*, 29 Cal.4th at p. 1224; *People v. Saunders, supra*, 5 Cal.4th at p. 590.) And it extends to challenges to the composition and procedure of the jury. (*People v. Holt* (1997) 15 Cal.4th 619, 656; *People v. Vera, supra*, 15 Cal.4th at p. 274; *People v. Johnson* (1993) 6 Cal.4th 1, 23; *People v. Saunders, supra*, 5 Cal.4th at pp. 589-590.)

Accordingly, the forfeiture rule applies to claims of *Blakely* error for the following reasons: First, *Blakely* establishes a rule of federal constitutional law. No state court has held that the discretion granted trial judges by California's sentencing laws violates our state Constitution. Second, the United States Supreme Court has held (1) the *Apprendi* rule is *not* a substantive rule that alters the range of conduct or the class of persons that the law punishes; rather, it is a procedural rule that affects only the manner of determining the defendant's culpability, and (2)

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[7] Until recently, state appellate courts used the terms "waiver" and "forfeiture" interchangeably in discussing the effect of a lack of objection in the trial court. (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371; *People v. Saunders, supra,* 5 Cal.4th at p. 590, fn. 6.) Strictly speaking, a waiver is the intentional relinquishment or abandonment of a known right, whereas a forfeiture results from the failure to timely assert a right; thus, "forfeiture" is the correct legal term to describe the loss of the right to raise an issue on appeal due to the failure to raise it in the trial court. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.)

the *Apprendi* rule is *not* a “watershed rule of criminal procedure” that implicates the fundamental fairness and accuracy of criminal proceedings. (*Schriro v. Summerlin* (June 24, 2004, No. 03-526) ___ U.S. ___, ___ [2004 D.A.R. 7569, 7570-7571].) Third, in *Cotton*, the United States Supreme Court established that the forfeiture rule may properly be applied to claims of *Apprendi* error, and thus by extension to *Blakely* error. Fourth, our state Supreme Court has held that in considering the nature and effect of federal constitutional claims, we must apply federal standards. (*People v. Howard* (1992) 1 Cal.4th 1132, 1178; see also *People v. Flood* (1998) 18 Cal.4th 470, 489-490, 502-503.) Fifth and finally, in *People v. Cahill* (1993) 5 Cal.4th 478 (hereafter *Cahill*), our state Supreme Court expressed a concern identical to that stated by the United States Supreme Court in *Cotton*, which held that the reversal of a judgment despite overwhelming and uncontroverted evidence because of an error to which an objection was not raised in the trial court would pose a real threat to the “fairness, integrity, and public reputation of judicial proceedings.” (*Cotton, supra*, 535 U.S. at p. 634 [152 L.Ed.2d at pp. 869-870].) Abandoning a reversal-per-se rule, the court in *Cahill* stated that in the face of overwhelming evidence clearly establishing the defendant’s guilt, “reversal of the judgment will result either in a superfluous retrial in which the outcome is a foregone conclusion or, even more unfortunately, in a new trial whose result is altered by the loss of essential witnesses or testimony through the passage of time. In either event, public confidence in the operation of the criminal justice system is diminished.” (*Cahill, supra,* 5 Cal.4th at p. 509.)

It follows that, consistent with federal constitutional standards, a forfeiture rule applies to claims of *Blakely* error.[8]

C

As we will explain, the forfeiture rule set forth in *Cotton*, *supra,* 535 U.S. 625 [152 L.Ed.2d 860] applies to defendant's failure to challenge the upper term and consecutive terms in this case.

The trial court's statement of reasons for sentencing choices

The probation report identified various circumstances in aggravation pursuant to California Rules of Court, rule 4.421, and no circumstances in mitigation other than defendant's youth at 25 years of age. (Further rule references are to the California Rules of Court.)

The report reflects that defendant has two prior convictions involving violence. In 1995, he was convicted in the State of Indiana for "criminal recklessness," based upon an incident in which he pulled out a gun, threatened to kill the victim, and then fired at the victim, wounding him in the head, as the victim tried to drive away. In 2000, he was convicted of felony spousal abuse based upon an incident in which he forced "the mother of his children" into a car at gunpoint, hit, kicked, and strangled her, and then fired two shots into the air. The report further showed that defendant was on probation for the 2000 conviction when he

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[8] Indeed, in *People v. Marchand* (2002) 98 Cal.App.4th 1056, this court held the forfeiture rule is applicable to alleged *Apprendi* error when there was no objection in the trial court. (*Id*. at pp. 1060-1061.)

committed the crimes for which he was convicted in this case, and that his performance on probation had been unsatisfactory because, among other things, he had failed to complete a batterers' treatment program, had violated a restraining order, had stolen his former wife's car keys, had lied to probation staff, and had been involved in an altercation at the Changing Courses program.

Defendant did not exercise his right to "submit a statement in aggravation or mitigation to dispute facts in the record or the probation officer's report, or to present additional facts. . . ." (§ 1170, subd. (b).)

The trial court explained its sentencing choices in pertinent part as follows:

"Pursuant to Penal Code Section 1203[, subdivision] (k), the defendant is ineligible for probation. Even if the defendant had been eligible for probation, the court would not have ordered probation in this case based on the defendant's significant prior record of criminal conduct, within the meaning of Rule of Court 4.414(b)(1), as well as the seriousness and circumstances of the crime which warrant a state prison commitment, within the meaning of Rule 4.414(a)(1).

"The court also finds that the defendant inflicted physical injury upon the victim, within the meaning of Rule of Court 4.414(a)(4).

"The court has considered the following circumstances in aggravation:

"Pursuant to Rule of Court 4.421(a)(1), (a)(8), (b)(1), (b)(2), (b)(4) and (b)(5), the court finds that the crime [in count one,

corporal injury on former spouse, Tamara Sample] involved great violence and great bodily injury, disclosing a high degree of cruelty, viciousness or callousness;

"The court finds the manner in which the crime was carried out indicated planning and sophistication;

"The court finds the defendant has engaged in violent conduct, which indicates a serious danger to society;

"The court finds the defendant's prior convictions as an adult are numerous and of increasing seriousness;

"The court finds the defendant was on a grant of formal probation when the crime was committed;

"And the court further finds the defendant's prior performance on probation was unsatisfactory.

"The one circumstance in mitigation under Rule 4.408 is that the defendant was youthful at the time he committed the offense.

"Regarding sentencing, the court has considered the applicability of Penal Code Section 654 and Rule of Court 4.424[], that is, the court finds the commission of the crime in Count Two [assault with deadly weapon] occurred during a continuous course of criminal conduct where the defendant harbored a single criminal objective, and, therefore, sentencing as to that count will be stayed pursuant to Penal Code Section 654.

"The court has considered Rule of Court 4.425 and the criteria affecting consecutive or concurrent sentences under subsection (a)(2) and (a)(3). The court finds that the crimes in Docket 01F07726 involve separate acts of violence or threats of violence.

“The court further finds the crimes in Counts One and Three of Dockets 01F07726 and 00F01775 [a section 273.5 conviction for corporal injury on spouse in 2000, and the August 2001 firearm possession] were committed at different times or separate places rather than being committed so close in time and place as to indicate a single period of aberrant behavior. Therefore, the court finds that consecutive sentencing is appropriate.

“Accordingly, as to Count One, a violation of Penal Code Section 273.5, the court will designate this count as the principal term. As to this count, it is ordered the defendant be committed to state prison for the high term of five years.

“The high term is ordered given the planning and sophistication involved, within the meaning of Rule of Court 4.421(a)(8).

“And the court further finds that the crime and -- the fact the defendant was on probation when the crime was committed under Rule 4.421(b)(4).

“As to the enhancement pursuant to Penal Code Section 12022.7[, subdivision] ([e]), it is ordered the defendant be sentenced to the high term of five years state prison. This is ordered to run consecutive[ly].

“The high term is ordered given the violence and the degree of cruelty, viciousness and callousness, within the meaning of Rule of Court 4.421(a)(1).

“The court finds as to both that count and the enhancement that the aggravating factors substantially outweigh any mitigating factors.

"As to Count Two, it is ordered the defendant be sentenced to four years state prison. Sentencing on this count is stayed pursuant to Penal Code Section 654.

"As to Count Three, for which the defendant was previously sentenced to eight months state prison, it is now ordered that that be set as one-third of the midterm of two years, or eight months, in state prison. It is ordered to be served consecutively.

"In regard to Docket Number 00F01775, of which the defendant was previously sentenced to four years state prison, it is now ordered that this offense become a subordinate term and the defendant be ordered to serve one-third the midterm of three years, or one year, to be served consecutively. Consecutive sentencing is ordered pursuant to Rule of Court 4.425(a)(2) and (a)(3) [crimes involving separate acts of violence, and crimes 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]."

The upper term

We reiterate that in *Cotton, supra,* 535 U.S. 625 [152 L.Ed.2d 860], the United States Supreme Court held that a defendant's failure to object to *Apprendi* error in the trial court forfeits the right to raise the claim on appeal if the error did not seriously affect the fairness, integrity, and public reputation of the judicial proceedings, i.e., if a factor relied upon by the trial court in violation of *Apprendi* was uncontroverted at trial and supported by substantial evidence. Such is the case here.

As noted above with respect to count one, corporal punishment on his former spouse, Tamara Sample, the trial court found five factors in aggravation: the crime involved a high degree of cruelty, viciousness, or callousness; it was carried out in a manner that indicated planning and sophistication; the defendant had engaged in violent conduct, which indicated a serious danger to society; his prior convictions as an adult were numerous and of increasing seriousness; he was on a grant of formal probation when the crime was committed; and his prior performance on probation was unsatisfactory. However, in imposing the upper term, the court relied upon only two of them: the crime involved planning and sophistication; and defendant was on probation when he committed the crime.

Overwhelming evidence presented at trial established defendant was on probation when he committed the crime alleged in count one, that fact was uncontested, and defendant did not object when the fact was used to impose the upper term. One valid factor is sufficient to expose defendant to the upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433.)

Consequently, imposition of the upper term did not seriously affect the fairness, integrity, and public reputation of the judicial proceedings; and defendant has forfeited his right to raise *Apprendi*/*Blakely* error on appeal. (*Cotton, supra,* 535 U.S. at pp. 631-634 [152 L.Ed.2d at pp. 868-870].)

In any event, as a factor in aggravation, the court found that defendant has prior convictions of increasing seriousness as an adult. As the Supreme Court stated in *Apprendi* and reiterated in

Blakely, the Sixth Amendment of the United States Constitution permits the fact of a prior conviction to be used to increase a defendant's sentence without that fact having been tried to a jury and proved beyond a reasonable doubt. (*Blakely, supra,* 542 U.S. at p. ___ [159 L.Ed.2d at p. 412]; *Apprendi, supra,* 530 U.S. at p. 490 [147 L.Ed.2d at p. 455].) We conclude beyond a reasonable doubt that if the trial court had anticipated the holding in *Blakely*, it would have cited defendant's prior convictions as a basis for the upper term. Hence, its reliance on other factors is harmless.

The consecutive sentences

We conclude that the rule of *Apprendi* and *Blakely* does not apply to California's consecutive sentencing scheme. Therefore, not only did the failure to object in the trial court forfeit defendant's right to raise an *Apprendi*/*Blakely* challenge to his consecutive sentences, his contention fails on the merits.

The first paragraph of section 669 states in pertinent part: "When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively."

The second paragraph of section 669 states: "In the event that the court at the time of pronouncing the second or other judgment upon that person had no knowledge of a prior existing judgment or judgments, or having knowledge, fails to determine

how the terms of imprisonment shall run in relation to each other, then, upon that failure to determine, or upon that prior judgment or judgments being brought to the attention of the court at any time prior to the expiration of 60 days from and after the actual commencement of imprisonment upon the second or other subsequent judgments, the court shall, in the absence of the defendant and within 60 days of the notice, determine how the term of imprisonment upon the second or other subsequent judgment shall run with reference to the prior incompleted term or terms of imprisonment. 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."

Thus, section 669 imposes an affirmative duty on a sentencing court to determine whether the terms of imprisonment for multiple offenses are to be served concurrently or consecutively. (*In re Calhoun* (1976) 17 Cal.3d 75, 80-81.) However, that section leaves this decision to the discretion of the sentencing court. (*People v. Jenkins* (1995) 10 Cal.4th 234, 255-256.) "While there is a statutory presumption in favor of the middle term as the sentence for an offense [citation], there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing." (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.)

Section 669 provides that upon the sentencing court's failure to determine whether multiple sentences shall run concurrently or consecutively, then the terms shall run concurrently. This provision reflects the Legislature's policy of "speedy dispatch and certainty" of criminal judgments and the sensible notion that a defendant should not be required to serve a sentence that has not been imposed by a court. (See *In re Calhoun, supra*, 17 Cal.3d at p. 82.) This provision does not relieve a sentencing court of the affirmative duty to determine whether sentences for multiple crimes should be served concurrently or consecutively. (*Ibid*.) And it does not create a presumption or other entitlement to concurrent sentencing. Under section 669, a defendant convicted of multiple offenses is entitled to the exercise of the sentencing court's discretion, but is not entitled to a particular result.

In determining whether to impose concurrent or consecutive terms, a sentencing court should consider whether the crimes and their objectives were predominately independent of each other, whether the crimes involved separate acts of violence or threats of violence, whether the crimes were committed at different times or separate places, any circumstances in aggravation or mitigation, and any other criteria reasonably related to the decision. (Rules 4.408, 4.425.)[9] Upon consideration of relevant criteria, the court is required to "[d]etermine whether the sentences shall be

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[9] The court should not consider an aggravating fact that was used to impose the upper term, used to otherwise enhance the prison sentence, or that is an element of the offense. (Rule 4.425, subd. (b).)

consecutive or concurrent if the defendant has been convicted of multiple crimes." (Rule 4.433, subd. (c)(3).) The sentencing rules do not create a presumption in favor of concurrent sentencing.

A sentencing court is required to state reasons for its sentencing choices, including a decision to impose consecutive sentences. (Rule 4.406(b)(5); *People v. Walker* (1978) 83 Cal.App.3d 619, 622.) "[A] requirement of articulated reasons to support a given decision serves a number of interests: it is frequently essential to meaningful review; it acts as an inherent guard against careless decisions, insuring that the judge himself analyzes the problem and recognizes the grounds for his decision; and it aids in preserving public confidence in the decision-making process by helping to persuade the parties and the public that the decision-making is careful, reasoned and equitable." (*People v. Martin* (1986) 42 Cal.3d 437, 449-450.) But the requirement that reasons for a sentence choice be stated does not create a presumption or entitlement to a particular result. (See *In re Podesto* (1976) 15 Cal.3d 921, 937.)

Therefore, entrusting to trial courts the decision whether to impose concurrent or consecutive sentencing under our sentencing laws is not precluded by the decision in *Blakely.* In this state, every person who commits multiple crimes knows that he or she is risking consecutive sentencing. While such a person has the right to the exercise of the trial court's discretion, the person does not have a legal right to concurrent sentencing, and as the Supreme Court said in *Blakely*, "that makes all the difference insofar as

judicial impingement upon the traditional role of the jury is concerned." (*Blakely, supra,* 542 U.S. at p. ___ [159 L.Ed.2d at p. 417].)

Accordingly, the rule of *Apprendi* and *Blakely* does not apply to California's consecutive sentencing scheme.

For this reason, not only has defendant forfeited his claim of *Blakely* error with respect to his consecutive sentences, the claim fails on the merits.

In any event, consistent with the reasons given by the trial court for imposing the consecutive sentences, the verdicts reflect findings that the crimes covered by counts one, three, and the prior conviction for spousal abuse were committed against separate victims, at different times, and in different places, thus exposing defendant to the sentence imposed.

DISPOSITION

The judgment is affirmed. The trial court is directed to (1) amend the abstract of judgment to show a concurrent sentence of one year was imposed on the battery conviction, and the great bodily injury enhancement was imposed under subdivision (e) of

section 12022.7, and (2) forward a certified copy of the amended abstract to the Department of Corrections.

SCOTLAND, P.J.

We concur:

SIMS, J.

BUTZ, J.