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Opinion following rehearing

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ISREAL SORIA, Defendant and Appellant.	A101084 (Del Norte County Super. Ct. No. 02-9542)

Isreal Soria (appellant) was convicted, after a jury trial, of first degree robbery, assault with a deadly weapon, and attempting to dissuade a witness. On appeal, he contends (1) the trial court erred when it sentenced him to the full midterm consecutive term on the dissuading a witness count, (2) the abstract of judgment must be corrected because it does not reflect the oral pronouncement of judgment, and (3) defense counsel rendered ineffective assistance by failing to request a modification of CALJIC No. 2.92 to reflect the fact that the victim originally misidentified his attacker. We have granted appellant's petition for rehearing to address his claim that the trial court violated his constitutional rights under the recent United States Supreme Court case of *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531] (*Blakely*), by sentencing him to aggravated and consecutive terms based on factors not found by a jury beyond a reasonable doubt. We agree with appellant that the abstract of judgment does not reflect the trial court's oral pronouncement of judgment**.** We further conclude that two of the three factors the court used to impose aggravated terms were invalid and that, therefore, the matter must be remanded for resentencing. We shall otherwise affirm the judgment.

PROCEDURAL BACKGROUND

Appellant was charged by information with one count each of first degree robbery (Pen. Code, § 212.5, subd. (a)),[1] assault with a deadly weapon (§ 245, subd. (a)(1)), and attempting to dissuade a witness (§ 136.1, subd. (b)(1)). The information also alleged that appellant committed robbery by using a deadly weapon (§ 12022, subd. (b)(1)), and that he committed the offenses while released on bail (§ 12022.1).

On November 6, 2002, a jury convicted appellant on all counts and found the deadly weapon allegation to be true. The court then found, in a bifurcated proceeding, the allegation that appellant committed the crimes while on bail to be true.

On December 6, 2002, the court struck the enhancement for committing an offense while released on bail and sentenced appellant to the upper term of six years on the robbery count, the upper term of four years (concurrent) on the assault with a deadly weapon count, the midterm of two years (full consecutive) on the dissuading a witness count, and one year (consecutive) on the deadly weapon allegation, for a total term of nine years in prison.

Appellant filed a timely notice of appeal on December 6, 2002.

FACTUAL BACKGROUND

Prosecution Case

Steven Greer had known appellant for a few years through Greer's good friend, Danny Munoz. Appellant, who was Munoz's nephew, was sometimes at Munoz's house in Crescent City when Greer visited Munoz. Appellant had been arrested on May 14, 2002 on "weapons charges." Greer had an organic brain disorder and a history of abusing inhalants.

In late June 2002, Munoz went to Fresno. Munoz gave Greer permission to be in his backyard while he was away. On June 25, 2002, at about 6:30 p.m., Greer went to Munoz's backyard, where he drank some beer and smoked a bowl of marijuana. At some point, Greer heard music coming from the garage. He knocked on the garage door and

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

appellant let him into the garage. They listened to music and Greer asked appellant about getting him some marijuana. Appellant said he could get some "killer stuff" and asked Greer how much money he had. Greer told appellant he had $20, and appellant went to make a phone call.

Appellant returned to the garage a few minutes later, started asking Greer why he had come to the house, and stabbed him twice in the back with a leather-punching tool.[2] Greer ran to the kitchen door, but appellant caught him and stabbed him again. Appellant then said, " 'You better not tell anybody. Oh, and give me that $20 you got too, man. If you tell anybody I'll find you and I'll get you . . . again.' " Greer gave appellant the $20, and went back to the motel where he was staying.

Motel employees called the police, and Crescent City Police Officers Thomas Burke and Ryan Wakefield arrived almost immediately. Greer told the officers his attacker was named "Indio," that the police had recently arrested the attacker on weapons charges, and that the attacker was Danny Munoz's nephew. Officer Wakefield then asked, " '[a]re you sure you don't mean Isreal instead of Indio?' " and Greer "blurted out, 'Yeah, that's right, Isreal Soria.' " At trial, Greer explained that he had met appellant a few years before, shortly after meeting Indio, and had "got the names mixed up before and it was just like—characterization-type thing or something. . . . [¶] . . . [¶] Word association or something, you know."

Greer was then taken to the hospital by ambulance and the police went to Munoz's house. Appellant's aunt, Susana Tapia, was there. She told the officers that appellant was not at the house, but had been there 45 minutes to an hour earlier. She said appellant was housesitting there for his family. At trial, Tapia claimed she had told the police appellant had been at the house to try to protect him, but it was a lie.

Doctor Sandra Saunders, who treated Greer at the hospital, testified that Greer had suffered two stab wounds to his back and one stab wound to his chest. He was "clinically" sober at the time, in that his behavior was that of a sober person. While

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[2] At the time of the incident, Greer thought the tool was a screwdriver.

Greer was in the hospital, Officer Wakefield showed him a photo lineup containing appellant's picture. Greer immediately identified appellant as his attacker.

Officer Wakefield testified that, on the day of the incident, he had seen appellant in the area shortly after 6:00 p.m. Wakefield was familiar with appellant from several other contacts, and had run a local warrants check on him. Wakefield remembered that this occurred on June 25, because he recalled thinking "that there would be trouble later." He also remembered the date because of the fact that the stabbing and robbery involving appellant happened that same day.

Defense Case

Danny Munoz testified that when he talked about his attacker, Steven Greer repeatedly used the name "Indio." Indio was the nickname of Hoppow Norris, who looks a lot like appellant. Munoz did not know where Indio was and had not seen him for a couple of years.

Appellant's friend, Freddy Bish, testified that on June 22, 2002, appellant called him and asked Bish if he could drive to Crescent City and pick him up. Bish, who lived near Redding, picked up appellant that night and drove him back to Bish's home, where appellant stayed for two or three days.

Appellant's mother, Rachael Luna, and friend, Leslie Lockhart, picked up appellant from Bish's house and drove to the town of Burney. According to both Luna and Lockhart, however, they did not pick him up until June 28, 2002. Lockhart remembered the date because she had to wait until Friday, June 28, after work to leave, due to her job as a teacher's assistant. Appellant, Luna, and Lockhart then went to the town of Burney, where they stayed for a couple of days, and attended a barbecue at the apartment of appellant's stepsister, Belinda Wells. Wells testified that she first saw appellant sometime between June 24 and June 26, 2002. Wells's neighbor, Melody Turner, testified that she saw appellant at their apartment complex in Burney two or three days before June 26, 2002.

DISCUSSION

I.

Appellant contends the trial court erred when it found that section 1170.15 mandated a full consecutive sentence on the dissuading a witness count (§ 136.1, subd. (b)(1)). Respondent concedes that "it appears that the court did not appreciate its discretion to sentence appellant to a concurrent term for the witness dissuasion, and we join appellant's request for a new sentencing hearing."

Early in the sentencing hearing, the trial court stated: "Well, I'll say that I am considering running [count three—dissuading a witness] concurrent if I have that discretion because I feel it really is part and parcel of the robbery as part of that same conversation . . . , [and] whether that should be treated as a separate consecutive felony when it's really part of the same robbery, I question that." The prosecutor then argued, referring repeatedly to an unpublished case from this District, that a full consecutive term was mandatory under both section 1170.15[3] and section 12022.1.[4]

The court ultimately found that it was required to impose a full two-year consecutive term for the witness dissuasion count, and therefore sentenced appellant to the full midterm of two years on that count. The court struck the two-year section

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[3] Section 1170.15 provides in relevant part: "Notwithstanding subdivision (a) of Section 1170.1 which provides for the imposition of a subordinate term for a consecutive offense of one-third of the middle term of imprisonment, if a person is convicted of a felony, and of an additional felony that is a violation of Section 136.1 or 137 and that was committed against the victim of . . . the first felony, . . . the subordinate term for each consecutive offense that is a felony described in this section *shall consist of the full middle term of imprisonment for the felony for which a consecutive term of imprisonment is imposed*, and shall include the full term prescribed for any enhancements imposed for being armed with or using a dangerous or deadly weapon or a firearm, or for inflicting great bodily injury." (Italics added.)

[4] Section 12022.1, subdivision (b), provides: "Any person arrested for a 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 *which shall be served consecutive to any other term imposed by the court*." (Italics added.)

12022.1 enhancement for committing an offense while on bail instead, explaining that it had believed the aggregate term recommended by the probation department "yielded an appropriate sentence for the defendant expecting that I was going to be able to run [the dissuading a witness count] concurrently. If I cannot, then the idea that it's appropriate has to be rethought." From the trial court's comments, it is plain the court believed that a consecutive term both on the witness dissuasion count and the section 12022.1 enhancement was too severe a punishment for appellant's crimes, and that it therefore struck the two-year enhancement to achieve the result it thought just.

In light of the court's clear explanation of its reasoning, it is apparent that even if we were to agree with appellant's contention that the court erroneously failed to exercise its discretion to impose a concurrent term on the witness dissuasion count, the record from the sentencing hearing shows it is highly improbable that a remand would result in a lower overall term of imprisonment. (See *People v. Coelho* (2001) 89 Cal.App.4th 861, 888-890 [in case where trial court misunderstood scope of its discretion, "we nevertheless consider a remand here to be an idle and unnecessary, if not pointless, judicial exercise"].)[5] Since we conclude that, in this case, a remand would be "an idle and unnecessary" act, it is unnecessary to address the merits of appellant's contention.

II.

Appellant contends the abstract of judgment must be corrected because it does not reflect the trial court's oral pronouncement of guilt. We agree.

At the sentencing hearing, the trial court sentenced appellant as follows: count one—the upper term of six years; count two—the upper term of four years, to run concurrent to count one; count three—the midterm of two years, to run consecutive to count one; section 12022, subdivision (b)(1) enhancement—one year, consecutive to count one, for a total of nine years in prison. In the abstract of judgment, the clerk appears to have included the four-year concurrent term on count two and ignored the one-

[5] At our request, the parties submitted supplemental briefing regarding whether remand would be an idle judicial act.

year enhancement to arrive at an erroneous term of 12 years. Although not mentioned by appellant, we also observe that the abstract of judgment erroneously states that appellant was sentenced to the upper term on count three, when in fact he was sentenced to the middle term.

"Courts may correct clerical errors at any time, and appellate courts (including this one) that have properly assumed jurisdiction of cases have ordered correction of abstracts of judgment that did not accurately reflect the oral judgments of sentencing courts. [Citations.]" (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Here, we normally would order that the abstract of judgment be corrected to reflect the court's oral judgment of nine years in prison and the midterm on count three. However, because we find, as discussed in part IV.A of this opinion, that the matter must be remanded for resentencing, a new and correct abstract of judgment will presumably replace the present one.

III.

Appellant contends defense counsel rendered ineffective assistance by failing to request a modification to CALJIC No. 2.92 to reflect the fact that the victim, Steven Greer, had originally misidentified his attacker.

Our Supreme Court has explained that "CALJIC No. 2.92[[6]] or a comparable instruction should be given when requested in a case in which identification is a crucial

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[6] CALJIC No. 2.92 provides: "Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of the crime[s] charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness' identification of the defendant, including, but not limited to, any of the following:

"[The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act;]

"[The stress, if any, to which the witness was subjected at the time of the observation;]

"[The witness' ability, following the observation, to provide a description of the perpetrator of the act;]

"[The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness;]

issue and there is no substantial corroborative evidence." (*People v. Wright* (1988) 45 Cal.3d 1126, 1144.) Although this instruction will usually provide sufficient guidance on eyewitness identification factors, a defendant may also be entitled to a special instruction on eyewitness identification in some circumstances. (*Id*. at p. 1141.) In *People v. Wright*, the Supreme Court found that the trial court erred in refusing to give the defendant's instruction telling the jury that, in evaluating the identification testimony of a witness, it should consider "[a]ny occasions on which the witness failed to make an identification of the defendant or made an identification inconsistent with his or her identification at trial." (*Id*. at p. 1139, fn. 9.)

The court, nonetheless, found the error harmless in that it was not reasonably probable that, had the requested instruction been given, the jury would have reached a verdict more favorable to defendant. The court based its holding on "(a) the overall strength of the evidence; (b) the fact that factors relating to the reliability of the eyewitness identifications were brought to the jury's attention by (i) cross-examination, (ii) opening and closing arguments of counsel, and (iii) the jury instructions given; and (c) the absence of any indication that the jury was uncertain or confused." (*People v. Wright*, *supra*, 45 Cal.3d at pp. 1144-1145, fn. omitted.)

"[The cross-racial [or ethnic] nature of the identification;]

"[The witness' capacity to make an identification;]

"[Evidence relating to the witness' ability to identify other alleged perpetrators of the criminal act;]

"[Whether the witness was able to identify the alleged perpetrator in a photographic or physical lineup;]

"[The period of time between the alleged criminal act and the witness' identification;]

"[Whether the witness had prior contacts with the alleged perpetrator;]

"[The extent to which the witness is either certain or uncertain of the identification;]

"[Whether the witness' identification is in fact the product of [his] [her] own recollection;]

"[_____;] and

"Any other evidence relating to the witness' ability to make an identification."

To prove ineffective assistance of counsel, a defendant must show that "counsel's representation fell below an objective standard of reasonableness . . . [¶] . . . under prevailing professional norms." (*Strickland v. Washington* (1984) 466 U.S. 668, 688.) In addition, the defendant must affirmatively establish prejudice by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id*. at p. 694.) "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Id*. at p. 697.)

In the present case, we need not decide whether appellant's counsel's representation was deficient because we find that appellant was not prejudiced by counsel's failure to request the modification to CALJIC No. 2.92. (See *Strickland v. Washington*, *supra*, 466 U.S. at pp. 694, 697.) That is because the factor regarding misidentification that appellant argues counsel should have requested the court to add to CALJIC No. 2.92 was "put before the jury at trial by means of several vehicles," including witness testimony, counsel's arguments, and the instructions the court gave. (*People v. Wright*, *supra*, 45 Cal.3d at p. 1146; accord, *People v. Earp* (1999) 20 Cal.4th 826, 887.)

The jury plainly understood that Greer's identification of appellant was an important issue in the case. Greer and Officers Burke and Wakefield testified to the fact that Greer initially said that "Indio" had attacked him. Munoz also testified for the defense that Greer repeatedly used the name "Indio" when discussing his attacker. In addition, in his closing argument, defense counsel argued that even some weeks ago Greer still had been saying that it was "Indio" who had attacked him. Counsel also reminded the jury of CALJIC No. 2.91, which places the burden on the prosecution to prove beyond a reasonable doubt that appellant is the person who committed the crime. (See *People v. Wright*, *supra*, 45 Cal.3d at p. 1148.)

Moreover, the court gave several instructions relevant to eyewitness identification. First, the jury was instructed, pursuant to CALJIC No. 2.92, that, inter alia, "[i]n

determining the weight to be given eyewitness identification testimony, you should consider . . . factors which bear upon the accuracy of the witness's identification of the defendant, including, but not limited to, any of the following: . . . The extent to which the witness is either certain or uncertain of the identification . . . , and any other evidence relating to the witness's ability to make an identification." The jury also was instructed with respect to weighing the credibility of witnesses (CALJIC No. 2.20), weighing conflicting testimony (CALJIC No. 2.22), and the prosecution's burden to prove identity beyond a reasonable doubt (CALJIC No. 2.91).

As the court explained in *People v. Wright*, *supra*, 45 Cal.3d at pp. 1149-1150: "Although the giving of the general instructions may not alone preclude reversal for failure to give a specific eyewitness factor instruction [citation], their use is relevant, in combination with counsel's arguments and cross-examination, to a determination of whether the error was prejudicial." (See also *People v. Sanchez* (1990) 221 Cal.App.3d 74, 77 [" '[It] was unmistakable to the jury that defendant was challenging the reliability of [the] identification, and these instructions were sufficient to inform them that the prosecution had the burden of proof on that issue and that defendant should be acquitted if they had a reasonable doubt on that matter.' [Citation.]".)

In addition, the overall evidence against appellant was quite strong. Importantly, while Greer first called his attacker "Indio," he simultaneously described him as Munoz's nephew—which appellant was and Indio was not—and said he recently had been arrested on weapons charges—which appellant had been. Then, when an officer asked if he meant "Isreal," Greer immediately affirmed and gave appellant's full name. Greer also explained that he had misspoken when he said "Indio," and that he had always meant appellant. He also identified appellant positively and without hesitation in a photographic lineup shortly after the incident.

Officer Wakefield testified that he had seen appellant, with whom he was familiar, in the area approximately an hour before the incident. Munoz testified that he had not seen Indio in some two years, which made it highly unlikely that Indio would be hanging out in Munoz's garage at the time of the incident. Although she later claimed to have

been lying on the evening of the incident, appellant's aunt, Susana Tapia, told investigating officers that appellant was housesitting for Munoz and had been at the house until a short while earlier.

Finally, appellant's alibi evidence was not strong in that it was provided by close relatives and friends whose testimony regarding dates was inexact and sometimes conflicting. (See *People v. Wright*, *supra*, 45 Cal.3d at p. 1145.)

Appellant argues that this was a close case as demonstrated by (1) the length of deliberations (four hours twenty minutes, after three and one-half hours of testimony) (see *People v. Woodard* (1979) 23 Cal.3d 329, 341-342), (2) the fact that the jury requested a readback of Officer Wakefield's testimony (see *People v. Day* (1992) 2 Cal.App.4th 405, 420), and (3) the fact that the jury requested clarification of the jury instructions regarding robbery. (See *ibid*.) In the circumstances of this case, we believe the factors discussed by appellant merely show that the jurors were conscientious, that they took their role seriously, and that they carefully reviewed the evidence and instructions before returning a verdict.

In light of the testimony presented, counsel's arguments, and the instructions the court gave at trial, as well as the strong evidence of appellant's guilt (see *People v. Wright, supra,* 45 Cal.3d at p. 1146; *People v. Earp, supra,* 20 Cal.4th at p. 887), we conclude that it is not reasonably probable the result would have been different had defense counsel requested that CALJIC No. 2.92 be modified to reflect the fact that the victim initially identified his assailant as "Indio." (See *Strickland v. Washington*, *supra*, 466 U.S. at p. 694.)

IV.

Sentencing Claims Under Blakely v. Washington

We granted appellant's petition for rehearing to address his claim that the trial court violated his constitutional rights under the recent United States Supreme Court case of *Blakely, supra,* 124 S.Ct. 2531, by sentencing him to aggravated and consecutive terms based on factors not found by a jury beyond a reasonable doubt.

We recently considered the application of *Blakely* to the California determinate sentencing scheme in *People v. Butler* (2004) 122 Cal.App.4th 910 (*Butler*). We explained: "In *Blakely*, the [United States] Supreme Court held that a Washington State court denied a criminal defendant his constitutional right to a jury trial by increasing the defendant's sentence for second-degree kidnapping from the 'standard range' of 49 to 53 months to 90 months based on the trial court's finding that the defendant acted with 'deliberate cruelty.' (*Blakely*, *supra*, 124 S.Ct. at p. 2537.) The *Blakely* court found that the state court violated the rule previously announced in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*) that, ' "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." ' (*Blakely*, *supra*, 124 S.Ct. at p. 2536.)" (*Butler*, at p. 917.)

"Under California's determinate sentencing law, the maximum sentence a judge may impose for a conviction without making any additional findings is the middle term. Penal Code section 1170, subdivision (b), states that 'the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.' Furthermore, [Cal. Rules of Court,[7]] rule 4.420(b), states that '[s]election of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation.' " (*Butler*, *supra*, 122 Cal.App.4th at pp. 917-918.)

As in *Butler*, respondent contends in this case that California's determinate sentencing system does not violate *Blakely* because the Legislature has prescribed three terms of imprisonment for each offense and the choice between these terms is validly left to the trial court's discretion. According to respondent, where the Legislature has established a maximum offense-specific penalty, *Blakely* is not implicated as long as the defendant's sentence does not exceed that maximum. This position, however, "is flatly contradicted by the Supreme Court's holding that the statutory maximum is 'not the

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[7] All further rule references are to the California Rules of Court.

maximum sentence a judge may impose after finding additional facts,' but rather the sentence it may impose without making *any additional findings*. (*Blakely*, *supra*, 124 S.Ct. at p. 2537.) Under California law, the maximum sentence a judge may impose without any additional findings is the middle term. (Pen. Code, § 1170, subd. (b); rule 4.420.)" (*Butler*, *supra*, 122 Cal.App.4th at p. 918.)

Also as in *Butler*, we reject respondent's contention that appellant forfeited his right to claim *Blakely* error by failing to raise this issue in the trial court. "Because of the constitutional implications of the error at issue, we question whether the forfeiture doctrine applies at all. (See *People v. Vera* (1997) 15 Cal.4th 269, 276-277 [claims asserting deprivation of certain fundamental, constitutional rights not forfeited by failure to object].) Furthermore, there is a general exception to this rule where an objection would have been futile. (*People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648, and authority discussed therein.) We have no doubt that, at the time of the sentencing hearing in this case, an objection that the jury rather than the trial court must find aggravating facts would have been futile. (See Pen. Code, § 1170, subd. (b); rules 4.409 & 4.420-4.421.) In any event, we have discretion to consider issues that have not been formally preserved for review. (See 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 36, p. 497.) Since the purpose of the forfeiture doctrine is to 'encourage a defendant to bring any errors to the trial court's attention so the court may correct or avoid the errors' (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060), we find it particularly inappropriate to invoke that doctrine here in light of the fact that *Blakely* was decided after [appellant] was sentenced." (*Butler*, *supra*, 122 Cal.App.4th at pp. 918-919, fn. omitted.)

A. *Imposition of the Upper Term*

1. *Error*

The trial court based its decision to impose upper term sentences on the robbery and assault with a deadly weapon counts on several factors. As it explained: "[U]nder Rule 421(b)(2) [now rule 4.421(b)(2)] the defendant does have numerous and serious prior . . . convictions. [¶] Under Rule 421(b)(4) [now rule 4.421(b)(4)] he was on

probation when the offense was committed, although not for a serious offense, but nonetheless he was on probation and that should have heightened his awareness that he had to obey the law. [¶] And under Rule 421(a)(1) [now rule 4.421(a)(1)], the crime did involve great violence. In that, robberies generally or oftentimes do not involve infliction of physical injury by the actual application of physical force to the victim, but this one did and that's an aggravating factor. [¶] Taken as a whole I find the aggravating factors outweigh any mitigating factors and therefore the aggravated term will be imposed.

Appellant argues that, under *Blakely*, all of these factors must be found by a jury beyond a reasonable doubt before the aggravated term may be imposed. One of the aggravating factors—that the crime involved great violence—plainly required factual findings beyond those "reflected in the jury verdict or admitted by the defendant." (*Blakely*, *supra*, 124 S.Ct. at p. 2537, italics omitted.)

The remaining two factors the court relied on—that appellant has numerous and serious prior convictions and that he was on probation when he committed the present offense—pertain to appellant's recidivist status. "The requirement that a fact which increases a sentence beyond the statutory maximum must be found by a jury does not apply to the fact of a prior conviction. (*Almendarez-Torres v. United States* (1998) 523 U.S. 224; *Apprendi*, *supra*, 530 U.S. at pp. 488, 490; *Blakely*, *supra*, 124 S.Ct. at p. 2536.) This prior conviction exception to the *Apprendi* rule has been construed broadly to apply not just to the fact of the prior conviction, but to other issues relating to the defendant's recidivism. (See, e.g., *People v. Thomas* (2001) 91 Cal.App.4th 212, 216-223.)" (*Butler*, *supra*, 122 Cal.App.4th at p. 920.)

We find that the court was constitutionally entitled to rely on the fact that appellant was on probation at the time of the charged offense as a factor in imposing an upper term sentence. As the Court of Appeal, Fourth Appellate District, explained in reaching this same conclusion in *People v. George* (2004) 122 Cal.App.4th 419: "Because this fact arises out of the fact of a prior conviction and is so essentially analogous to the fact of a prior conviction, we conclude that constitutional considerations do not require that matter to be tried to a jury and found beyond a reasonable doubt. As

with a prior conviction, the fact of the defendant's status as a probationer arises out of a prior conviction in which a trier of fact found (or the defendant admitted) the defendant's guilt as to the prior offense. (*Apprendi*, *supra*, 530 U.S. at p. 488 . . . .) As with a prior conviction, a probationer's status can be established by a review of the court records relating to the prior offense. Further, like a prior conviction, the defendant's status as a probationer ' "does not [in any way] relate to the commission of the offense, *but goes to the punishment only* . . . ." ' (*Almendarez-Torres v. United States*[, *supra*,] 523 U.S. [at p.] 244].)" (*People v. George*, at p. 426.)

We do not believe, however, that the other recidivist-related factor at issue here—that appellant has numerous and serious prior convictions—falls within the "narrow exception" carved out by the Supreme Court. (*Apprendi*, *supra,* 530 U.S. at p. 490 [characterizing *Almendarez-Torrez* as a "narrow exception" arising from "unique facts"].) In some cases, extrinsic facts relating to a recidivist aggravating circumstance may implicate *Apprendi*, and the subjective factors involved in finding this recidivist circumstance appear to involve such extrinsic facts. Although clearly stemming from the fact of prior convictions, this aggravating factor requires additional findings that are not only factual, but subjective, i.e., that the prior convictions were "numerous" and "serious." These additional facts appear to us to require a jury determination and proof beyond a reasonable doubt.

2. *Prejudice*

Since the *Blakely* court rested its holding on *Apprendi*, we measure the prejudice resulting from *Blakely* error by the *Chapman* standard of prejudice applicable to *Apprendi*. (*Butler*, *supra*, 122 Cal.App.4th at p. 919, citing *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.) Under this test, we are required to reverse unless the error is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) We cannot find, beyond a reasonable doubt, that a jury would have made findings to

support the two aggravating factors in question.[8] Accordingly, those aggravating factors cannot be used to support the trial court's sentencing choice. (See *Butler*, at p. 919.)

Although *Blakely* error is evaluated under the *Chapman* test, under California law, "[i]n order to determine whether error by the trial court in relying upon improper factors in aggravation requires remanding for resentencing 'the reviewing court must determine if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* [(1956)] 46 Cal.2d [818, 836].)' [Citation.] However, '[t]he statutory preference for imposition of the middle term, when coupled with the requirement that aggravating circumstances must outweigh mitigating circumstances before imposition of the aggravated term is proper, creates a presumption.' [Citation.] Thus, the reviewing court may not simply ask whether the imposed sentence would be 'wholly unsupported or arbitrary in the absence of error' but must also reverse where it cannot determine whether the improper factor was determinative for the sentencing court. [Citation.]" (*People v. Avalos* (1984) 37 Cal.3d 216, 233.)

Although under California law a single factor in aggravation is sufficient to support imposition of an upper term sentence (*People v. Osband* (1996) 13 Cal.4th 622, 728; *People v. Cruz* (1995) 38 Cal.App.4th 427, 433; see also *People v. Kelley* (1997) 52 Cal.App.4th 568, 581; *People v. Piceno* (1987) 195 Cal.App.3d 1353, 1360; *People v. Lamb* (1988) 206 Cal.App.3d 397, 401), the record in this case does not permit us to conclude the court would have imposed the aggravated term based solely on the fact that appellant was on probation at the time he committed the present offense, without considering the other two factors.

At the sentencing hearing, the trial court noted that appellant was not on probation for a serious offense, but found rule 421(b)(4) [now rule 4.421(b)(4)] applicable

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[8] The record indicates that appellant had three prior convictions, including two misdemeanors. On this record, we plainly cannot say that the trial court's *Blakely* error in finding appellant's prior convictions both numerous and serious was harmless beyond a reasonable doubt.

nonetheless. The court also found appellant's numerous and serious convictions and his use of violence during the offense to be additional factors in aggravation. The court then imposed the aggravated terms because it found that, "[t]aken as a whole I find the aggravating factors outweigh any mitigating factors." Even assuming that the court's failure to state any mitigating factors on the record means that it found none, we cannot determine whether the court still would have sentenced appellant to the upper terms based solely on the fact that he was on probation at the time the present offense was committed. (See *People v. Avalos*, *supra*, 37 Cal.3d at p. 233.)

Because, on this record, we cannot determine what sentence the court would have imposed had it known that two of the three aggravating factors it cited were not valid under *Blakely*, *supra*, 124 S.Ct. 2531, the matter must be remanded for resentencing.

B. *Imposition of Consecutive Sentences*

The court sentenced appellant to two years on the dissuading a witness count, to run fully consecutive to the upper term of six years on the robbery count. The court also imposed a consecutive one-year section 12022 enhancement.

Appellant contends he had the right to a jury trial and proof beyond a reasonable doubt on the factors that the trial court used to impose consecutive sentences. We agree with several published opinions that have rejected the argument that, under either *Blakely* or *Apprendi*, there is a right to jury trial as to factors used to impose consecutive sentences. (See, e.g., *People v. Vaughn* (2004) ___ Cal.App.4th ___ [2004 WL 2223299]; *People v. Ochoa* (2004) 121 Cal.App.4th 1551.) The consecutive sentencing decision can only be made once a defendant has been found beyond a reasonable doubt to have committed two or more offenses. This fully complies with the Sixth Amendment jury trial and Fourteenth Amendment due process clause rights. Those facts that affect the appropriate sentence within the range of potential prison terms for each offense are subject to *Blakely* and *Apprendi.* This constitutional principle does not extend to whether the sentences for charges that have been found to be true beyond a reasonable doubt shall be served consecutively.

We find this reasoning applicable both to the trial court's decision to sentence appellant to a consecutive term on the section 12022 enhancement and to a full consecutive term on the dissuading a witness count.

DISPOSITION

The cause is remanded to the trial court with directions to reconsider appellant's sentence in accordance with the views expressed herein. The judgment is otherwise affirmed.

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Kline, P.J.

We concur:

_____
Lambden, J.

_____
Ruvolo, J.