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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. LARRY JOHN SPRANKLE, Defendant and Appellant.	A103850 (Alameda County Super. Ct. No. H33168B)

I. INTRODUCTION

Defendant Larry John Sprankle was found guilty of receiving stolen property (Pen. Code, § 496, subd. (a))[1] and of grand theft of access card account information (§ 484e, subd. (d)). He was sentenced to the upper term for receiving stolen property. On appeal, he contends that (1) the trial court erred because it did not, sua sponte, instruct the jury on mistake of fact; (2) the trial court abused its discretion in ordering restitution and fines; and (3) the two one-year enhancements imposed for prior prison terms must be stricken because the record does not show that defendant voluntarily and intelligently admitted those prior terms. In a supplemental brief, Sprankle argues that the court's imposition of the upper term for receiving stolen property, without any finding by the jury of the aggravating factors on which this term was based, violates *Blakely v. Washington* (2004) __ U.S. __ [124 S.Ct. 2531] (*Blakely*). We agree that the trial court's restitutionary order

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

must be stricken. In addition, we reverse and remand for reconsideration of the sentence imposed for receiving stolen property, in view of *Blakely*. In all other respects, the judgment is affirmed.

II. FACTUAL AND PROCEDURAL BACKGROUND

The events in this case, which culminated in defendant's conviction for receiving stolen property and of grand theft of access card account information, began on May 9, 2002, when the motor home of a man named Rudolph Vanderwerf was burglarized. In this burglary, personal and legal documents belonging to Vanderwerf were stolen. Several weeks later, on May 26, 2002, Larry Cull's storefront residence was burglarized. Cull reported to the police that about 800 gemstones, jewelry, equipment, a check registry and financial documents were taken.

Less than a week later, during a traffic stop, the police discovered a check for $150 drawn on Cull's account in the purse of the woman stopped. The woman told the police she was holding the check for a "friend," and gave the police defendant's address.

On November 10, 2002, the police searched defendant's residence. In a small backpack they found about 70 gemstones and a few pieces of jewelry, most of which were later identified by Cull as belonging to him. In an oven, the police located a bag which contained about 100 pieces of mail and other documents, including Vanderwerf's stolen credit card statements and other personal and legal documents. Elsewhere, the police found a box of checks belonging to Cull. The police also found a small book which contained personal information (social security and driver's license numbers, credit card information, birth dates and places, home and work addresses, maiden names and dates of military service) about Vanderwerf and others.

In a shed near defendant's residence, the police found mail order packages addressed to defendant. These packages contained music and movie CDs, jewelry, watches and figurines. There was also a bag in the shed that contained hundreds of pieces of mail, some in defendant's name and some in other names. The mail included letters from credit card companies addressed to Vanderwerf and others and financial documents belonging to Vanderwerf. The police found a briefcase that contained about

100 pieces of mail addressed to Vanderwerf and others. The briefcase also contained Cull's personal checks. The people whose property and personal information were found at defendant's house had never given defendant permission to possess their property or information.

Defendant was interviewed by the police after he was arrested. He initially denied having any knowledge of either the Vanderwerf or Cull burglaries. Later, however, he admitted he knew in advance that his friend, Mark Decker, planned to commit a "job" over the Memorial Day weekend. He also told the police that Decker gave him some gemstones in exchange for cigarettes shortly after the burglary was committed. Defendant stated he got rid of some of the gemstones and that the bulk of the gemstones had been given to someone else.

The jury found defendant guilty of receiving stolen property and grand theft of access card account information. The trial court sentenced him to five years and eight months in prison and ordered him to pay restitution to Vanderwerf and Cull. This timely appeal followed.

III. DISCUSSION

A. *Mistake of Fact Instruction*

Defendant contends the trial court had a sua sponte duty to instruct the jury on the principle of mistake of fact pursuant to CALJIC No. 4.35. We disagree.

In order to find defendant guilty of receiving stolen property, the jury was required to find that " 'the property in question was stolen, that the defendant was in possession of it, and that the defendant knew the property to be stolen . . . .' " (*People v. Price* (1991) 1 Cal.4th 324, 464.) A defense to the crime of receiving stolen property is that a defendant had a reasonable or unreasonable, but good faith belief that the property was *not* stolen. (*People v. Navarro* (1979) 99 Cal.App.3d Supp. 1, 8-11; see also *People v. Tufunga* (1999) 21 Cal.4th 935, 943.)

The trial court was required to instruct on this defense only if there was substantial evidence supporting it. (*People v. Barton* (1995) 12 Cal.4th 186, 194-195 and fn. 4; *People v. Montoya* (1994) 7 Cal.4th 1027, 1047; *People v. Flannel* (1979) 25 Cal.3d 668,

684, fn. 12.) When the evidence supporting the defense is minimal and insubstantial, the trial court need not instruct on it. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1145.) Similarly, when the defense is not raised by the parties and is only remotely connected to the facts of the case, no instruction need be given. (*People v. Montoya, supra,* 7 Cal.4th at p. 1050.) The trial court should not measure the evidence's substantiality by weighing witness credibility and should resolve any doubts as to sufficiency in favor of the defendant. (*People v. Barnett, supra,* 17 Cal.4th at p. 1145.)

In his closing argument to the jury, defense counsel contended that defendant did not know the "property was stolen when he received it." His argument was supported almost exclusively by defendant's statements to the police during a taped interview that was admitted into evidence. Viewed as a whole, however, this interview does not provide substantial evidence that defendant had a reasonable or unreasonable, but good faith belief the property was *not* stolen. During the interview, defendant initially denied knowing the property was stolen. However, by the time the interview had concluded, he stated that he knew Decker was planning to commit a burglary over the Memorial Day weekend, and that shortly afterwards Decker gave him the gemstones in exchange for cigarettes. Thus, defendant quite clearly admitted he knew the property had been stolen by his friend Mark Decker.

In a similar case, *People v. Barnett, supra,* 17 Cal.4th at pages 1146-1147, the defendant asserted that he did not know certain property was stolen. Beyond this statement, which the court characterized as "self-serving," there was no other evidence supporting a claim of right instruction. The court held that the trial court did not err in refusing to give the instruction. Here, too, the evidence supporting a claim of right defense is so minimal and insubstantial that the trial court was not required to instruct the jury on this defense.

Moreover, even were we to assume that the trial court should have given this instruction, any such error was not prejudicial, even under the more stringent federal constitutional standard of harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.) It is well established that, when an instructional error removes a

material issue from the jury's consideration, this error may nevertheless be harmless beyond a reasonable doubt if the issue was either necessarily decided under other instructions or if the evidence supporting the issue is so overwhelming that no rational jury could reach a different result. (*People v. Johnson* (1993) 6 Cal.4th 1, 45-47.) Both are the case here.

The court instructed the jury that the prosecution had to prove defendant's guilt beyond a reasonable doubt and in so doing, had to prove that the defendant knew the items were stolen. In finding defendant guilty, the jury necessarily would have concluded defendant did not mistakenly believe the gemstones were not stolen.

Even if the jury may have confined its evaluation of defendant's knowledge to what a reasonable person would have known and thus, failed to consider the unreasonable, but good faith mistake of fact defense, there is also overwhelming evidence that defendant had actual knowledge that the gems were stolen. Defendant admitted as much to the police and his behavior in disposing of some of the gems indicates knowledge that they were stolen. In sum, any instructional error in this case was harmless beyond a reasonable doubt.

B. ***Restitution to Cull for Stolen Gems and Security System***

The trial court ordered defendant to pay $53,613.46 in restitution to Cull. The court's order was based on a "restitution request form" submitted by Cull and received by the court literally in the middle of the sentencing hearing. This form included estimates for stolen or damaged property, time lost from work, and the installation of a security system. Defendant contends that the order should be stricken because it seeks restitution for losses suffered due to the burglary of Cull's storefront home and defendant was neither charged with this burglary nor are there any facts that suggest he was involved in the burglary. We agree.

The trial court's restitutionary order is governed by section 1202.4, subdivision (f). This section provides that "In every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim . . . based on the amount of loss claimed by the victim or victims

or any other showing to the court." Thus, the trial court must order restitution for all losses that were the "result of the defendant's conduct."

Defendant, citing *People v. Scroggins* (1987) 191 Cal.App.3d 502 (*Scroggins*) and *People v. Rivera* (1989) 212 Cal.App.3d 1153 (*Rivera*), argues that defendant's receipt of some of the property stolen from Cull is not sufficient conduct upon which to base the restitution order for *all* items stolen from Cull in the burglary. In *Scroggins*, the defendant pleaded guilty to receiving several items of property stolen during a burglary. Other items were also stolen in this burglary and never recovered. As a condition of probation, the trial court required that the defendant make restitution to the victims of the burglary for all items, including items the defendant did not admit receiving. The court of appeal struck this requirement. In doing so, it pointed out that the defendant was neither charged with nor found criminally responsible for the theft of the items for which he was required to make restitution and that the items of property found in defendant's possession were, the court presumed, returned to the rightful owners. (*Scroggins, supra,* 191 Cal.App.3d at pp. 508-509.)

Rivera involved a similar situation. In that case, the defendant was arrested after tools belonging to a burglary victim were found in his truck. Other tools had also been stolen from the victim and had not been recovered. The defendant was ordered to pay restitution to the victim for the stolen items found in defendant's truck and to which he pleaded guilty of possessing. He was also ordered to pay restitution for items stolen from the victim but not recovered. The court of appeal struck this latter condition, holding that "Here as in *Scroggins*, there was no showing [defendant] was responsible for the losses suffered by the burglary victim []; that property which was the subject of the receiving stolen property conviction was returned to her and does not represent a loss suffered by her." (*Rivera, supra*, 212 Cal.App.3d at p. 1162.) Here, as in *Scroggins* and *Rivera*, the trial court ordered restitution for items stolen in the burglary of Cull's home despite the fact that there was no evidence defendant was responsible for the loss of these items. This was improper.

The Attorney General concedes that there must be some connection between defendant's actions and the claim for restitution, but argues that the loss of the gemstones can, in fact, be traced to defendant's behavior. In making this argument, the Attorney General cites two pieces of evidence: (1) defendant exchanged cigarettes for "the stolen gemstones" and (2) defendant admitted fencing or exchanging some of the stones. Finally, the Attorney General states that nothing in the record indicates the gemstones were returned to the victim.

The evidence, however, does not support the Attorney General's position. Fremont Police Detective Ancona testified that he investigated the Memorial Day burglary of Cull's gem shop. He recovered from defendant's home a small backpack containing a number of gemstones. At trial, he identified the contents of this backpack as containing a number of small boxes and zip lock bags in which a total of approximately 70 stones were stored. Detective Ancona also recovered from defendant's home a silver chain, a magnifying glass, four pairs of earrings, a pendant, a stamp and a brooch. At trial, Cull identified most, but not all, of these items as having been stolen from him. However, Cull also testified that between 700 and 800 stones were stolen during the Memorial Day burglary. Thus, only about ten percent of the items stolen from Cull were found in defendant's possession. Cull's restitution request for the contents of his "inventory" was for $50,822.02. The trial court understood this as requesting the "contents of his house that he alleges were stolen, which were $50,822." The court, therefore, ordered defendant to pay restitution for all of the stolen gems, despite the fact that there was no evidence that defendant participated in the burglary or had possession of more than the approximately 70 stones found in the backpack in his home.

The Attorney General, citing People *v. Collins* (2003) 111 Cal.App.4th 726 (*Collins*), suggests that defendant must pay restitution for the entire loss because there is evidence he fenced the missing stones. Were this the case, the restitution order might well be justified. However, there is no evidence that defendant stole, fenced, or even possessed the majority of these stones. In his interview with the police, defendant stated only that he disposed of three stones and paid a few dollars and some cigarettes for

others. He denied ever having possessed a large quantity of the stones and there is no other evidence that he did in fact possess the bulk of the missing stones. Defendant also told the police he believed Mark Decker and his accomplice had given the rest of the stones to a girl defendant did not know.

Nor does *Collins*, mandate a different result. In that case, the defendant was initially charged with grand theft auto and with receiving property stolen in the car theft. In exchange for the dismissal of the grand theft auto charge, defendant pled guilty to receiving stolen property. Defendant subsequently challenged the imposition of a restitution order for the amount of the stolen items. There was no dispute that the items stolen from the car were the same items that formed the basis of the crime of receiving stolen property to which defendant had pled guilty. Defendant's only contention was that because the stolen items were recovered and booked into evidence, there was no showing that the victim suffered any loss of nonrecovered property. (*Collins, supra,* 111 Cal.App.4th at p. 733.) The court rejected this argument, holding that there was no evidence the victims recovered the property or that the property was undamaged. Here, however, defendant's contention is not that the court ordered restitution for the items recovered, but that the court ordered restitution for *all items* stolen from the victim, including items that were never shown to be in his possession.

On remand, the trial court may indeed choose to impose a restitutionary order that requires defendant to compensate Cull for any gemstones found in defendant's possession and not recovered by Cull. Beyond that, however, the restitutionary order for all stones missing in the burglary is improper.[2]

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[2] The Attorney General also argues this issue has been waived because defendant failed to object to the restitutionary order when it was imposed. We disagree. *People v. Rivera, supra,* 212 Cal.App.3d at pages 1163-1164, holds that such an error cannot be waived. Moreover, Cull's request was received by the court in the middle of the sentencing hearing and counsel objected to it on the ground that the claim for the gemstones was "unsubstantiated," an objection which necessarily includes defendant's argument that the court ordered restitution for items not recovered from defendant.

Defendant also challenges the order for the costs related to installing a home security system. Section 1202.4, subdivision (f)(3)(J) permits the court to order an amount to compensate for "Expenses to install or increase residential security incurred related to a crime, as defined in subdivision (c) of [s]ection 667.5, including, but not limited to, a home security device or system, or replacing or increasing the number of locks." Defendant correctly points out that he was not convicted of a crime under section 667.5, subdivision (c) and, therefore, the restitution order for increased security cannot be based on section 1202.4, subdivision (f)(3)(J).

The Attorney General concedes this point and argues instead that restitution for home security measures is justified, in general, because "the burglary and related disposal of Mr. Cull's property deprived Mr. Cull of peace of mind and security in his own home." While we agree that the statute's description of economic losses for which restitution may be ordered is not exclusive (see *People v. Thygesen* (1999) 69 Cal.App.4th 988, 994), there must be some showing that defendant's conduct deprived the victim of peace of mind and security in his home so as to justify the installation of a home security system. Here, the installation of a home security system was necessitated by the burglary, not by defendant's receipt of some of the property stolen in the burglary. The trial court erred in ordering restitution for these costs.

C. *Fines*

The trial court also imposed a criminal fine, plus penalty assessments, in the amount of $2,000, a fine of $200 for the preparation of the probation report and a $10 fee for conviction of a theft offense. Defendant contends the imposition of the criminal fine was unauthorized. The Attorney General responds that defendant has waived any objection to these fines and, even had he not, the trial court did not err in imposing them.

With regard to the Attorney General's waiver argument, defendant's claim is that the trial court imposed a $2,000 fine without any statutory authority to do so. In *People v. Breazell* (2002) 104 Cal.App.4th 298, 304-305, the defendant made a similar argument, namely, that the trial court had no statutory authority to impose a criminal fine. The court held that defendant's claim that the sentence is unauthorized—is a "narrow exception to

the requirement that the parties raise their claims in the trial court to preserve the issue for appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 354.)" (*People v. Breazell, supra,* 104 Cal.App.4th at p. 304.) This claim, therefore, has not been waived.

Defendant's argument, however, fails on the merits. Although defendant contends that there is no statutory authority for the imposition of the $2,000 "criminal fine," the Attorney General correctly points out that such a fine can be imposed under section 672 which provides that "Upon a conviction for any crime punishable by imprisonment . . . in relation to which no fine is herein prescribed, the court may impose a fine on the offender not exceeding . . . ten thousand dollars ($10,000) in cases of felonies . . . ." Defendant was convicted of receiving stolen property. (§ 496.) Section 496 does not "prescribe" any particular fine. Therefore, the general criminal fine made permissible under section 672 may be imposed. The court did not err in so doing.

Defendant also challenges the $200 fee imposed for preparation of the probation report. He contends this charge is improper because he was not placed on probation. However, section 1203.1b, subdivision (a) provides that such a fee may be imposed "whether or not probation supervision is ordered by the court . . . ." The fee, therefore, was properly imposed.

Finally, defendant argues that the $10 fine for conviction of a theft offense is improper. We disagree. The $10 fine was imposed pursuant to section 1202.5, which provides that a defendant convicted of certain enumerated offenses shall pay an additional $10 fine. The relevant offense for the purposes of this case is section 484, which broadly defines "theft." Defendant contends that, because he was convicted under section 484e (theft of access cards or account information), his sentence is unauthorized. This is simply wrong, because offenses covered by section 484's general definition of theft encompasses section 484e.

D. ***Admission of Two Prior Prison Terms***

Defendant was advised of his right to a jury trial and waived this right before admitting to two prior prison terms following felony convictions within the meaning of section 667.5, subdivision (b). He now argues that the enhancements should be reversed

because he was not advised of his right to confront and cross-examine witnesses or the right against self-incrimination before he admitted the prior prison terms as required under *In re Yurko* (1974) 10 Cal.3d 857, 863-864. We disagree.

A defendant who admits a prior conviction without expressly waiving his rights to remain silent and confront adverse witnesses may nevertheless be found to have made a voluntary and intelligent waiver of those rights so long as "the totality of circumstances surrounding the admission supports such a conclusion." (*People v. Mosby* (2004) 33 Cal.4th 353, 356 *(Mosby)*; *People v. Howard* (1992) 1 Cal.4th 1132, 1178.)

Here, the trial court gave defendant an incomplete advisement of these rights. Defendant argues, citing *People v. Torres* (1996) 43 Cal.App.4th 1073 and *People v. Howard* (1994) 25 Cal.App.4th 1660, that the enhancements must be reversed because "it cannot be said that appellant must have known of, and waived, these rights, without being advised of them on the record and without waiving them on the record." However, these cases were disapproved by our Supreme Court in *Mosby, supra,* 33 Cal.4th at page 365, footnote 3.

In *Mosby*, the defendant admitted the prior convictions immediately after trial. (*Mosby, supra,* 33 Cal.4th at pp. 357-359.) The *Mosby* court observed, "defendant, who was represented by counsel, had *just* undergone a jury trial at which he did not testify, although his codefendant did. Thus he not only would have known of, but had just exercised, his right to remain silent at trial, forcing the prosecution to prove he had sold cocaine. And, because he had, through counsel, confronted witnesses at that immediately concluded trial, he would have understood that at a trial he had the right of confrontation." (*Id.* at p. 364.) The court also cited with approval the Court of Appeal's conclusion that " 'It would exalt a formula (*Boykin-Tahl*) over the very standard that the formula is supposed to serve (that the plea is intelligent and voluntary) to suggest that a defendant, who has just finished a contested jury trial, is nonetheless unaware that he is surrendering the protections of such a trial' when after being advised of the right to a trial on an alleged prior conviction the defendant waives trial and admits the prior." (*Mosby* at p. 364.) In addition, the *Mosby* court pointed out that "'a defendant's prior experience

with the criminal justice system' is . . . 'relevant to the question of whether he knowingly waived constitutional rights.'" (*Id.* at p. 365.)

Here, as in *Mosby*, the defendant had just completed a contested jury trial at which he exercised his right not to testify and observed the confrontation of witnesses against him. The Attorney General also points out that defendant has a lengthy criminal history, dating back 25 years. In fact, he admitted to seven prior convictions. Under the totality of the circumstances, we find that defendant voluntarily and intelligently admitted his prior conviction despite being advised and having waived only his right to a jury trial.

E. *Blakely v. Washington*

The trial court imposed the upper term of four years. We conclude this sentence violates *Blakely, supra,* __ U.S. __ [124 S.Ct. 2531].

In *Blakely,* the 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*, __ U.S. __ [124 S.Ct. at p. 2535].) 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,* __ U.S. __ [124 S.Ct. at p. 2536].) In reaching this conclusion, the court clarified that, for *Apprendi* purposes, the "statutory maximum" is "not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at p. 2537.)

We reject the People's contention that Butler 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); Cal. Rules of Court, 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 Butler was sentenced.[3]

The People also contend that California's "triad" sentencing system does not offend *Blakely* at all; that any one of the three legislatively-authorized terms for an offense, including the upper term, can be imposed by a trial court without violating a defendant's Sixth Amendment rights. Under their view of this system, although there is a "presumptive mid-term sentence," the upper term is the statutory maximum sentence which the trial court has discretion to impose. The People's argument may have been persuasive before *Blakely* was decided. Now, however, it is flatly contradicted by the Supreme Court's holding that the statutory maximum is "not the 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); Cal. Rules of Court, rule 4.420.)

In this case, the trial court imposed the aggravated term based on the following factors, none of which was found by the jury: (1) "the manner in which the crimes were carried out clearly indicates planning, and also a certain degree of sophistication or even professionalism"; (2) "that the quantity of contraband, stolen documents, and the very

number of victims is a strong aggravating factor. [¶] These documents come from at least three documented burglaries, reflecting at least six different unrelated victims and hundreds of pieces of mail, as well as critically important legal and personal documents"; (3) "[t]he defendant's convictions as an adult are numerous and of clearly increasing seriousness. Defendant has dedicated 25 years of his adult life to a dissipated life of substance abuse or theft"; (4) "Defendant has served two prior prison terms already"; and (5) defendant's prior performance on probation or parole was unsatisfactory The court found no mitigating factors.

Under *Blakely*, the court's findings that the crimes involved sophistication and planning, and that there were a large number of victims must be determined by a jury. Accordingly, the court erred under *Blakely* in relying on these factors in sentencing defendant to the aggravated term.

The *Blakely* court rested its holding on *Apprendi* and, therefore, we apply the *Chapman* standard of prejudice applicable to *Apprendi* errors to the trial court's error here. (See *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 conclude, beyond a reasonable doubt that a jury would have made the requisite findings of these aggravating factors had the matter been submitted to them as *Blakely* requires.

The trial court also relied on several other findings in imposing the aggravated term. Among these was the court's finding that the defendant's prior convictions are numerous and of increasing seriousness, and defendant's "unsatisfactory" performance on probation and parole. It is not clear whether these factors are a "fact of a prior conviction" which need not be submitted to the jury (see *People v. Thomas* (2001) 91 Cal.App.4th 212, 216-223) or whether they involve a sufficiently subjective analysis so as to require a jury finding under *Blakely*. Should the former be the case, the trial court appropriately may rely on these factors in aggravation to support imposition of an upper term. (*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.) Finally, the court was, under *Blakely*, permitted to rely on a single recidivist factor, namely, that defendant had served two prior prison terms. In sum, the court relied on two improper factors, two potentially improper factors and one proper factor in imposing the aggravated term.

"[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].)' [Citations.] 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.)

We need not decide whether the trial court (rather than the jury) may, after *Blakely*, find that defendant's crimes were of increasing seriousness or that defendant's parole was "successful," because we cannot determine, from this record, whether the two improper factors were determinative for the trial court. To put it another way, nothing in the record tells us whether the trial court would have imposed the upper term based solely on defendant's recidivist behavior. In the absence of such information, we must reverse defendant's sentence and remand this matter to the trial court for resentencing in light of *Blakely*.

IV. DISPOSITION

The restitutionary order is stricken and the matter is remanded for correction of the restitutionary order in a manner consistent with this opinion and for resentencing in light

of *Blakely, supra,* __ U.S. __ [124 S.Ct. 2531]. In all other respects, the judgment is affirmed.

_____
Haerle, J.

We concur:

_____
Kline, P.J.

_____
Lambden, J.