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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. CESAR VELASQUEZ, Defendant and Appellant.	B171476 (Los Angeles County Super. Ct. No. BA241537)

APPEAL from a judgment of the Superior Court of Los Angeles County, George G. Lomeli, Judge. Affirmed in part; reversed in part and remanded.

Alan Siraco, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc E. Tuchin, Lawrence M. Daniels and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

Cesar Velasquez appeals from the judgment entered after a jury convicted him of 10 offenses ranging from petty theft to attempted murder that was willful, deliberate and premeditated. We reject his contentions that the trial court erred by denying his motion to bifurcate the trial of those offenses from the trial on the criminal street gang enhancement under Penal Code section 186.22[1] and that the evidence is insufficient to support the jury's finding the offenses were committed for the benefit of, at the direction of or in association with a criminal street gang. We also reject his contention the trial court erred by failing to stay pursuant to section 654 his sentences on count 5 for possession of a short-barreled shotgun and count 12 for possession of a firearm by a felon. We agree with Velasquez that the upper terms imposed on count 3 for assault with a firearm and the enhancement related to that count cannot be justified on this record under *People v. Blakely* (2004) 524 U.S. ___ [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*) and, therefore, remand for resentencing on that count. We also direct the trial court on remand to strike the firearm enhancements under section 12021.5, subdivision (a), imposed on counts 5, 10 and 12.

PROCEDURAL BACKGROUND

1. *The Charges*

Velasquez was charged with multiple crimes arising from his participation in four separate incidents: (1) two counts of attempted second degree robbery (§§ 211, 664) (counts 1 and 2); (2) two counts of assault with a firearm (§ 245, subd. (a)(2)) (counts 3 and 4); (3) two counts of possession of a short-barreled shotgun (§ 12020, subd. (a)) (counts 5 and 6); (4) three counts of possession of a firearm by a felon (§ 12021, subd. (a)(1)) (counts 7, 8 and 12); (5) attempted murder that was willful, deliberate and premeditated (§§ 187, subd. (a), 664, subd. (a)) (count 9); (6) second degree robbery (§ 211) (count 10); and (7) petty theft (§ 484, subd. (a)) (count 11). The information specially alleged firearm enhancements as to counts 1, 2, 3 and 9 and in addition a great-bodily-injury enhancement as to count 9. As to all counts except the petty theft charge in

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[1] Statutory references are to the Penal Code unless otherwise indicated.

count 11, the information specially alleged the offenses were committed for the benefit of, at the direction of and in association with a criminal street gang (§ 186.22, subd. (b)(1)). As to counts 7, 8 and 12 the information specially alleged Velasquez carried a firearm on his person during the commission of a street gang crime (§ 12021.5, subd. (a)).

2. *Summary of the Evidence at Trial*

a. *Petty theft* (*count 11*)

On or about August 20, 2002 Velasquez, a member of the 18th Street gang, and some of his fellow gang members were at Thudo Billiards on West Sixth Street in Los Angeles, territory claimed by the 18th Street gang. Velasquez was caught on videotape taking something from the cash register drawer at the pool hall while the manager, Chuc Tran, was distracted by one of Velasquez's associates. Tran discovered between $60 and $70 missing from the drawer. Tran identified Velasquez from a photographic lineup as the person who had removed something from the register.

b. *Robbery* (*count 10*)

A few weeks later, on or about September 13, 2002, Velasquez was shooting pool at Thudo Billiards when Tran requested he come to the counter and pay for his table time. In response Velasquez grabbed Tran by the shirt and punched him in the face. Velasquez then took money from the cash register and asked Tran where he kept additional money. After Tran showed Velasquez that he hid money in a refrigerator in the back of the pool hall, Velasquez took that money as well. Velasquez took a total of approximately $200.

c. *Attempted murder* (*count 9*)*; firearm possession by a felon* (*count 12*)

Concerned about these episodes, Tran hired Hazeem Ismail to work as a security guard. Velasquez approached Ismail on his second day of work, September 29, 2002, and asked if Ismail was a police officer. Ismail responded, "'I am not a police officer. I am security for this area.'" Velasquez then said, "'I am a gang member. Watch out.'" Later that evening Tran went to the table where Velasquez and his friends were shooting pool and asked them to pay for their beer and table time. Tran was ignored. Ismail then asked for payment, but Velasquez and his friends refused. Tran and Ismail then went to

the table together to ask for payment. Velasquez told Tran to leave him alone and said he would pay later. Tran became angry, threw a pool cue and told Velasquez and his friends to either pay or leave.

Tran and Ismail then went back to the counter, and Ismail called his supervisor at the security company. One of Velasquez's friends asked Ismail if he was calling the police. Ismail responded, "'Yes I am talking to my manager.'" Suddenly, Ismail saw Velasquez coming toward him and heard someone yell, "'Shoot him. Shoot him.'" Velasquez shot Ismail several times from approximately nine feet away, wounding him in the stomach, thigh, arm and finger. The bullets lacerated Ismail's liver and a major vein in his intestine and shattered one of his kidneys. Ismail identified Velasquez in a photographic lineup as the person who had shot him.

d. *Attempted second degree robbery* (*counts 1 and 2*)*; assault with a firearm* (*counts 3 and 4*)*; possession of a short-barreled shotgun* (*counts 5 and 6*)*; firearm possession by a felon* (*counts 7 and 8*)

Several months later, on or about January 3, 2003, Velasquez and two other men entered Read's Liquor on Alvarado Street in Los Angeles, also 18th Street gang territory. One of the men pointed a gun at Meeja Ahn, one of the store's owners. The man said, "'Give me the money,'" and motioned toward the cash register with the gun. In the meantime Velasquez went behind the counter with a shotgun and pointed it at Yho Ahn, Meeja Ahn's husband and co-owner of the store. Yho Ahn grabbed his own gun from under the counter and shot Velasquez, wounding him in the head. Velasquez and the two other men fled on foot.

When police arrived at the scene, they followed a trail of blood beginning behind the counter of the liquor store that led them to Velasquez, who was sitting on the curb in front of his apartment building less than a block away. Velasquez had suffered a gunshot wound to his head. The police arrested Velasquez and transported him to a hospital. Velasquez told a detective he had just been injured in a drive-by, gang-related shooting while standing in front of his apartment building. Velasquez, however, immediately changed his story, telling the detective he had gone to Read's Liquor to buy beer and had

been mistakenly shot by the owner when two other men wearing masks tried to rob the store. A shotgun was found in Velasquez's apartment.

The parties stipulated Velasquez had previously been convicted of a felony.

e. *Expert testimony on gang activity*

In addition to evidence of the substantive offenses, Los Angeles Police Department Officer Jonathan Pultz testified as an expert on the 18th Street gang. According to Officer Pultz, the primary activities of the 18th Street gang, one of the largest in the nation with more than 30,000 members, are robbery, murder, carjacking, burglary, extortion and narcotics sales. Gang members are identifiable by hand signs, symbols and tattoos. Within two years prior to the crimes charged against Velasquez, 18th Street gang members had been convicted of attempted robbery and assault with a deadly weapon. Velasquez had 18th Street gang paraphernalia in his apartment when he was arrested and 18th Street gang tattoos on his body.

Officer Pultz opined the offenses at Thudo's Billiards on September 13, 2002 and September 29, 2002 and the crimes at Read's Liquor on January 3, 2003 were committed for the benefit of the 18th Street gang. The robbery of Tran on September 13, 2002 at the pool hall enhanced the reputation of the gang by sending a message that one should not "mess with" its members. The shooting of Ismail on September 29, 2002 demonstrated the gang, not law enforcement, was in control of its turf. The ruthless and violent manner in which the shooting occurred helped the gang rule its turf by intimidating people in the community who might try to turn to law enforcement for protection against the gang. Regarding the January 3, 2003 robbery at Read's Liquor, Pultz testified that robbery benefits the gang because the money obtained is frequently used to bail gang members out of jail or otherwise help them and that the display of the shotgun enhanced the gang's reputation for dangerousness and promoted its ability to intimidate. Moreover, having three gang members undertake the robbery benefited the gang by showing other members the importance of teamwork.

f. *Defense theory*

Velasquez did not present any evidence in his defense but argued the People had not proved the intent-to-kill element for the attempted murder of Ismail in count 9 and reasonable doubt existed as to whether it was indeed Velasquez who had committed the charged offenses.

3. *The Jury's Verdict and Sentencing*

The jury found Velasquez guilty on counts 1 and 2 for attempted second degree robbery, counts 3 and 4 for assault with a firearm, count 5 for possession of a short-barreled shotgun, counts 7 and 12 for possession of a firearm by a felon, count 9 for attempted murder that was willful, deliberate and premeditated, count 10 for second degree robbery and count 11 for petty theft. The jury found Velasquez not guilty on count 6 for possession of a short-barreled shotgun and on count 8 for possession of a firearm by a felon. The jury found true the special allegations regarding firearm use with respect to counts 1, 2, 3 and 9 and the special allegation that Velasquez had inflicted great bodily injury on the victim in committing the attempted murder in count 9. The jury also found true the special allegation that Velasquez had committed all offenses (except the petty theft charge in count 11) for the benefit of, at the direction of or in association with a criminal street gang. The jury did not make findings on the firearm enhancement under section 12021.5, subdivision (a), alleged with respect to counts 7 and 12.

The trial court sentenced Velasquez to a base term of 24 years on count 3 for assault with a firearm (the upper term of four years, plus the upper term of 10 years for the firearm enhancement under section 12022.5, subdivision (a)(1), and 10 years for the criminal street gang enhancement under section 186.22, subdivision (b)(1)), plus a consecutive term on count 9 for attempted murder of life, with a minimum parole eligibility date of 15 years under section 186.22, subdivision (b)(5), plus 25 years to life for the firearm enhancement under section 12022.53, subdivision (d). The court imposed concurrent terms on all other counts; and the sentences on counts 1, 4 and 7 were stayed pursuant to section 654. The court struck all remaining special allegations pursuant to section 1385.

CONTENTIONS

Velasquez contends the trial court erred by denying his motion to bifurcate the trial of the substantive offenses from the trial of the criminal street gang enhancement because the introduction of evidence on the 18th Street gang prejudiced his case. He also contends the evidence is insufficient to support the jury's finding that the crimes for which he was convicted (except the petty theft offense) were committed for the benefit of, at the direction of or in association with a criminal street gang. With respect to sentencing, Velasquez asserts: (1) the imposition of upper terms on his sentence on count 3 for assault with a firearm and on the related firearm enhancement is improper because the trial court failed to state on the record its reasons for imposing upper terms and, additionally, violated his right to a jury trial under *Blakely*; (2) his sentences on counts 5 and 12 should have been stayed under section 654; and (3) firearm enhancements under section 12021.5, subdivision (a), should not have been imposed on counts 5, 10 and 12.

DISCUSSION

1. *The Trial Court Did Not Err By Declining to Bifurcate the Trial of the Offenses from the Trial of the Criminal Street Gang Enhancement*

Prior to trial Velasquez moved to bifurcate the guilt phase of the trial from the trial on the criminal street gang enhancement under section 186.22, subdivision (b),[2] which the People had specially alleged as to all counts except the petty theft offense in count 11. The trial court denied Velasquez's motion, finding evidence of gang affiliation and

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[2] Section 186.22, subdivision (b), provides for an additional sentence to "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." A "criminal street gang" is one whose members "engage in or have engaged in a pattern of criminal street gang activity." (§ 186.22, subd. (f).) A "'pattern of criminal street gang activity'" is "the commission of [listed offenses] provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons." (§ 186.22, subd. (e).)

activity was admissible on the substantive offenses, as well as necessary to prove the street gang enhancement, and could be used to establish a motive for the attempted murder charged in count 9.

The trial court's ruling is consistent with the Supreme Court's recent decision in *People v. Hernandez* (2004) 33 Cal.4th 1040 (*Hernandez*). In *Hernandez* the Court recognized the authority of the trial court to bifurcate trial of a gang enhancement from trial of guilt in a case in which the evidence necessary to establish the requirements of section 186.22, subdivision (b), may be unduly prejudicial. The Court, however, held that "evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation -- including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like -- can help prove identity, motive, modus operandi, specific intent, means of applying force or fear or other issues pertinent to the guilt of the charged crime. [Citations.] To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary. [Citation.]" (*Id*. at pp. 1049-1050.)

In this case, as in *Hernandez*, "[m]uch of the gang evidence . . . was relevant to the charged offense[s]." (*Hernandez, supra*, 33 Cal.4th at p. 1050.) Indeed, with respect to the attempted murder charged in count 9, Velasquez injected his gang status into the crime by identifying himself as a gang member to Ismail, the victim of the attempted murder charge, on the same day as the shooting. More generally, Velasquez's gang-related tattoos were visible both to his victims and those witnessing his crimes. Velasquez's gang affiliation, including his gang's territory, was highly relevant to prove the intent behind and motive for the crimes to intimidate non-gang members in gang territory, establish the gang's dominance on its turf and demonstrate the degree of violence to which the gang would resort to achieve those objectives. In addition, the prior crimes of attempted robbery and assault with a deadly weapon committed by members of Velasquez's gang, used to establish a "pattern of gang activity" as required by section 186.22, subdivision (e), were not particularly inflammatory. (*Hernandez*, at

p. 1051 [evidence admitted solely to prove gang enhancement does not require bifurcation unless it is "so minimally probative on the charged offense, and so inflammatory in comparison, that it threatened to sway the jury to convict regardless of the defendants' actual guilt"].)

In any event, considering the overwhelming evidence of Velasquez's guilt, the denial of Velasquez's motion to bifurcate trial of the gang enhancement from trial of guilt was not prejudicial under any harmless error standard of review. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Tran and Ismail positively identified Velasquez as the person who committed the crimes at the pool hall. Tran knew Velasquez because he frequented the pool hall two or three times a week, had identified Velasquez as the person shown on the surveillance tape taking something from the cash register and was necessarily within inches of Velasquez when Velasquez grabbed his shirt, struck him and demanded money. Ismail had met Velasquez prior to the shooting that led to the attempted murder charge; and Velasquez was only nine feet from Ismail when he fired shots. As to the attempted robbery and other offenses at the liquor store, the undisputed evidence showed Yho Ahn shot one of the robbers and a trail of blood led directly from the store to Velasquez, who was found less than a block away bleeding from the head. Velasquez, moreover, admitted his presence in the liquor store at the time of the attempted robbery after first giving a false explanation that he had been the victim of a drive-by shooting. Based on this significant amount of largely undisputed evidence, the joint trial of the charged offenses and the criminal street gang enhancement did not prejudice Velasquez in the jury's verdicts of guilt.

2. *Substantial Evidence Supports the Jury's True Finding on the Criminal Street Gang Enhancement*

As discussed, to obtain a true finding on an allegation of a criminal street gang enhancement, the People must prove the crimes at issue were "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ."

(§ 186.22, subd. (b)(1).) Velasquez contends the evidence is insufficient to satisfy that standard and, therefore, the punishment imposed under the criminal street gang enhancement on each of his convictions (except the count 11 for petty theft) must be reversed.

In reviewing a claim of insufficient evidence in a criminal case, we determine whether, on the entire record viewed in the light most favorable to the People, any rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; see also *People v. Holt* (1997) 15 Cal.4th 619, 667.) "In making this assessment the court looks to the whole record, not just the evidence favorable to the [defendant] to determine if the evidence supporting the verdict is substantial in light of other facts. [Citations.]" (*Holt*, at p. 667.)

"Substantial evidence" in this context means "evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *People v. Hill* (1998) 17 Cal.4th 800, 848-849 ["'"When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence -- i.e., evidence that is credible and of solid value -- from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt."' [Citations.]"].) "Although the jury is required to acquit a criminal defendant if it finds the evidence susceptible of two reasonable interpretations, one of which favors guilt and the other innocence, it is the jury, not the appellate court, which must be convinced of his guilt beyond a reasonable doubt." (*People v. Millwee* (1998) 18 Cal.4th 96, 132.)

The evidence here was sufficient to support the jury's findings on the criminal street gang enhancement. Officer Pultz, testifying as an expert, opined that the robbery on September 13, 2002 and the attempted murder and possession of a firearm by a felon on September 29, 2002, which all occurred at Thudo Billiards, were committed for the benefit of the 18th Street gang. Officer Pultz explained the pool hall was notorious for the housing, meeting and loitering of 18th Street gang members, particularly the clique of

the gang to which Velasquez belonged. Velasquez's actions in response to requests for payment by the pool hall manager and security guard sent a message that he and his associates could not be told what to do on their own turf and that they would retaliate against community members who confronted them. The attempted murder, committed with a firearm, also furthered the reputation of the gang as violent and ruthless and allowed the gang to "thrive on intimidation." With respect to the offenses at the liquor store on January 3, 2003, Officer Pultz also opined they benefited Velasquez's gang. The attempt to rob the store by Velasquez with two other individuals showed teamwork among the gang members and also promoted name recognition for the gang. Moreover, the use of a short-barreled shotgun during the commission of the crimes at the liquor store demonstrated intimidation; and the dangerousness of that particular firearm made the gang a greater threat.

Contrary to Velasquez's contention, his failure to shout the name of his gang or flash the gang's sign just before committing any of the crimes does not negate the jury's findings that the crimes he committed were for the benefit of his gang. The pool hall was a well-known hangout for 18th Street gang members; and the liquor store also was in 18th Street gang territory. Moreover, Velasquez "announced" his status as an 18th Street gang member by wearing gang tattoos on his arm, chest, ear, wrist and on the back of his head, which were visible to his victims and witnesses of his crimes. With respect to the attempted murder, Velasquez had previously told Ismail on the day of the shooting, "'I am a gang member. Watch out.'" And his confederate at the pool hall yelled to Velasquez just before the shooting of Ismail, "'Shoot him. Shoot him.'" Thus, the location and circumstances of the crimes, indeed Velasquez's own actions, constitute sufficient statements that the crimes were committed "to put local residents on notice of the gang's control of the neighborhood." (*People v. Castenada* (2000) 23 Cal.4th 743, 753.)

Velasquez also argues substantial evidence is lacking because Officer Pultz's opinions were based on assumptions that other gang members were present during the commission of his crimes. With respect to the attempted murder and related gun-carrying

offense, Officer Pultz had in fact witnessed Velasquez and other gang members at the pool hall on the videotape of the pool hall shooting; and one of Velasquez's associates had encouraged him to shoot Ismail. As to the other crimes, given that each had occurred in known 18th Street gang territory while Velasquez was either playing pool with friends or acting with associates, Officer Pultz's inferences were not unreasonable. Moreover, any assumption made by Officer Pultz regarding the presence of other gang members at the scene of Velasquez's crimes was not the only basis for his opinion that the crimes benefited the 18th Street gang. Indeed, more central to Officer's Pultz's opinion was the ruthlessness and violent nature of the attacks, which served to intimidate the community. The gang expert's opinion is thus directly in accord with the legislative finding accompanying the enactment of section 186.22 "that the State of California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods." (§ 186.21.)

Velasquez's final contention that the People failed to offer any evidence on section 186.22's separate requirement that the perpetrator specifically intended to promote, further or assist in the gang's criminal conduct lacks merit. In *People v. Gardeley* (1996) 14 Cal.4th 605 the Supreme Court held that, based on an expert's testimony that the details of an assault conveyed a "'classic' example of gang-related activity" to frighten residents of an area where the gang members sell drugs, a jury "could reasonably conclude that the attack on [the victim] by [gang members] was committed 'for the benefit of, at the direction of, or in association with' that gang, *and* 'with the specific intent to promote, further, or assist in . . . criminal conduct by gang members' as specified in the STEP Act." (*Id*. at p. 619, italics added.) Similarly, in this case Officer Pultz testified the crimes at issue were consistent with the gang's desire to demand respect on its turf and to intimidate community members. Based on that testimony, the jury reasonably could have concluded Velasquez committed the crimes with the specific intent "to promote, further, or assist in . . . criminal conduct by gang members." (§ 186.22, subd. (b)(1).)

3. *A Remand for Resentencing Is Necessary Regarding the Upper Terms Imposed on the Conviction for Assault with a Firearm and the Related Enhancement*

a. *Velasquez forfeited his claim the upper terms are improper because the trial court failed to state on the record its reasons for imposing those terms*

Velasquez contends the imposition of upper terms on count 3 for assault with a firearm and the firearm enhancement related to that count is improper because the trial court failed to state on the record its reasons for imposing upper terms. (See § 1170, subd. (b) ["court shall set forth on the record the facts and reasons for imposing the upper or lower term"].) He, however, made no objection when the trial court failed to state reasons for imposing the upper terms. The record is clear that Velasquez's counsel was well aware of the court's sentencing choices and had a meaningful opportunity to object. Indeed, counsel did object to the court's use of an aggravating factor in ordering the sentence on count 3 to run consecutively with the sentence for attempted murder on count 9. Thus, by failing to object, Velasquez has forfeited his claim the upper terms are improper because the trial court did not state its reasons for selecting those terms.[3] (*People v. Scott* (1994) 9 Cal.4th 331, 353 ["waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices"]; *People v. Zuniga* (1996) 46 Cal.App.4th 81, 84 [finding waiver when counsel had a meaningful opportunity to object to court's sentencing choice but failed to do so].)

b. *A remand for resentencing on count 3 and the related enhancement is required under Blakely*

In *Blakely*, *supra*, 524 U.S. ___ [124 S.Ct. 2531], the Supreme Court reaffirmed its holding in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] (*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*, at p. ___ [124 S.Ct. at p. 2536].)

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[3] Failure to present a claim or objection in a timely fashion results in a "forfeiture," rather than a "waiver," of the point. (*In re S. B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.)

Significantly, the Court emphasized 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." (*Blakely*, at p. ___ [124 S.Ct. at p. 2537]; see also *United States v. Booker* (2005) ___ U.S. ___ [125 S.Ct. 738].)

Velasquez's determinate sentence of 24 years on count 3 for assault with a firearm consisted of the upper term of four years, plus the upper term of 10 years for the firearm enhancement under section 12022.5, subdivision (a), and an additional 10 years for the criminal street gang enhancement. He contends the trial court violated *Blakely* by sentencing him to upper terms for the underlying offense and the firearm enhancement because none of the factors (other than his status as a recidivist) that could justify imposition of his aggravated sentence was submitted to the jury or found to be true beyond a reasonable doubt.

In response the People initially argue that Velasquez waived (more accurately, forfeited) his claim to *Blakely* error by failing to object in the trial court and that *Blakely* does not apply to California's determinate sentencing scheme. Both arguments fail. Because *Blakely* had not yet been decided at the time Velasquez was sentenced, and thus an objection to the imposition of upper terms on *Apprendi* grounds would have been futile, Velasquez may properly raise his constitutional claim of *Blakely* error on appeal notwithstanding the lack of objection in the trial court. (See *People v. Vera* (1997) 15 Cal.4th 269, 276-277 [constitutional claim, including denial of right to a jury trial, may be raised for the first time on appeal]; *People v. Scott, supra,* 9 Cal.4th at p. 353 [purpose of requiring defendant to object to sentencing choices at time sentence is imposed is to allow the trial court to immediately address and remedy correctible errors].)

As to *Blakely*'s general application to California's determinate sentencing law, when a term of imprisonment is to be imposed and the statute specifies three possible terms, the sentencing court must impose the middle term unless it finds and identifies on the records circumstances or factors in mitigation or aggravation. (§ 1170, subds. (b) & (c).) Only when circumstances in aggravation are found to exist may the court impose

the upper term. (§ 1170, subd. (b); see Cal. Rules of Court, rule 4.420(a) ["The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation"].)[4] Because the statute mandates imposition of the middle term absent additional factual findings made by the trial court, not by the jury, and permits those facts to be found true by a preponderance of the evidence, imposition of an upper-term sentence violates *Blakely* principles unless based solely on the defendant's status as a recidivist. (*Blakely*, at p. ___ [124 S.Ct. at p. 2537] [sentence that may be imposed is "not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings"].)[5]

In this particular case, however, the issue of forfeiture is more complicated. As discussed, in selecting the upper terms the trial court failed to articulate on the record its reasons for doing so; and Velasquez failed at that time to object. In an appropriate case, when a defendant does not object to the trial court's failure to state on the record reasons for its sentencing choice, the defendant may in turn forfeit his or her right to claim *Blakely* error because the reviewing court will not be able to determine from the record whether the trial court in fact relied on any improper factors in sentencing the defendant. (See *People v. Green* (1979) 95 Cal.App.3d 991, 1001 [""error is never presumed, but

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[4] References to a rule or rules are to the California Rules of Court.

[5] We previously reached the same conclusions regarding the forfeiture issue and the application of *Blakely* to California's determinate sentencing scheme after extensive analysis in *People v. Juarez* (2004) 124 Cal.App.4th 56 (superseded by grant of review Jan. 19, 2005 (S130032)). Although the Supreme Court has granted review in *Juarez*, we see no reason to diverge from its reasoning. Certainly there is nothing in the United States Supreme Court's recent opinion in *Booker*, *supra*, ___ U.S. ___ [125 S.Ct. 738], that persuades us our analysis in *Juarez* is incorrect. In fact, Justice Stevens's majority opinion in *Booker*, which held that *Blakely* applies to the federal sentencing guidelines, supports our conclusion that at least parts of California's determinate sentencing scheme are implicated by *Blakely*. The lead cases in which the California Supreme Court will address the issue of *Blakely*'s application to California's determinate sentencing scheme are *People v. Towne* (S125677, review granted July 14, 2004) and *People v. Black* (S126182, review granted July 28, 2004).

must be affirmatively shown, and the burden is upon the appellant to present a record showing it, any uncertainty in the record in that respect being resolved against him." . . . [A]ll presumptions and intendments are in favor of the regularity of the action of the lower court in the absence of a record to the contrary'"].) Based on our review of the various presentencing reports and the People's sentencing memorandum presented to the trial court in connection with its sentencing decision in this case, however, we can identify the possible aggravating factors that might have been used to sentence Velasquez to upper terms on count 3 and the related firearm enhancement and can evaluate whether the trial court's imposition of upper terms can withstand scrutiny under *Blakely*.

In deciding to impose the sentence on count 3 consecutively with the sentence on count 9, the trial court stated on the record five aggravating circumstances: (1) the crimes involved great violence, great bodily injury or threat of great bodily injury (rule 4.421(a)(1)); (2) the victims were particularly vulnerable (rule 4.421(a)(3)); (3) Velasquez was armed with a firearm during the commission of some of the crimes (rule 4.421(a)(2)); (4) Velasquez has engaged in a pattern of violent conduct, which presents a danger to society (rule 4.421(b)(1)); and (5) Velasquez had served a prior prison term (rule 4.421(b)(3)). The probation report identified some of the same aggravating factors mentioned by the trial court and also that Velasquez's prior convictions as an adult or adjudication of commission of crimes as a juvenile are numerous or of increasing seriousness (rule 4.421(b)(2)). In the sentencing memorandum the People identified additional factors they believed applicable to the case: (1) Velasquez induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission (rule 4.421(a)(4)); and (2) the manner in which the crime was carried out indicates planning, sophistication or professionalism (rule 4.421(a)(8)).

As an initial matter, the trial court could not properly rely on the fact that Velasquez used a firearm in committing an assault with a firearm at Read's Liquor, as alleged in count 3, to impose upper terms because his sentence on that count was enhanced under section 12022.5, subdivision (a), for firearm use. (§ 1170, subd. (b)

["The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law"].)[6]

With respect to the factors that the assault at the liquor store involved great violence, great bodily harm or threat of bodily harm, that the victim was particularly vulnerable, that Velasquez induced others to participate in the crime or occupied a position of leadership over other participants in its commission, that the manner in which the crime was carried out involved planning, sophistication or professionalism, that Velasquez has engaged in violent conduct indicating a serious danger to society and that his prior adult convictions were of increasing seriousness, the trial court could not properly rely on those factors to impose upper terms because each requires a factual determination separate from and in addition to the findings actually made by the jury. (*Blakely*, at p. ___ [124 S.Ct. at p. 2537] ["statutory maximum" is the maximum sentence a judge may impose without any additional factual findings].)

Only the two remaining factors -- that Velasquez had served a prior prison term and that his prior adult convictions were numerous -- do not implicate *Blakely* because they relate to the defendant's recidivism: "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 [118 S.Ct. 1219, 140 L.Ed.2d 350]; *Apprendi*, *supra*, 530 U.S. at pp. 488, 490; *Blakely*, *supra*, 524 U.S. at p. ___ [124 S.Ct. at p. 2536].) This prior-conviction exception to *Apprendi* has been construed broadly to apply not only to the fact of the prior convictions, but also to other issues relating to the defendant's recidivism, including that the defendant's prior convictions are numerous, that the defendant was on probation or parole at the time the offense was committed and that the defendant had served prior prison terms. (See *People v. Thomas* (2001) 91 Cal.App.4th 212, 216-223.) Thus, the

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[6] Velasquez objected in the trial court to the improper dual use of the gun enhancement in connection with the imposition of consecutive sentences on counts 3 and 9.

trial court could properly have relied on the facts Velasquez had a prior prison term and his prior adult convictions were numerous in deciding to impose upper terms.

Failure to obtain jury determinations as to the aggravating factors that implicate *Blakely* may be harmless beyond a reasonable doubt. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327 [*Apprendi* error reviewable under the harmless error standard of *Chapman v. California*, *supra*, 386 U.S. at p. 24].) Here, however, despite the severity of the assault with a firearm, which also involved an attempted robbery of the liquor store during which Velasquez went behind the counter and pointed a shotgun at one of the store's owners, we cannot say beyond a reasonable doubt the jury would have made the findings necessary to support any of the remaining aggravating factors, although the evidence is certainly sufficient to sustain such findings if they had been made by the jury. Thus, those aggravating circumstances cannot be used to support imposition of upper terms.

As a result, the only two aggravating circumstances that can support imposition of upper terms on both count 3 and the related firearm enhancement are Velasquez's service of a prior prison term and his numerous prior adult convictions. The trial court mentioned on the record Velasquez's prior prison term as an aggravating circumstance when imposing consecutive sentences but did not cite the large number of prior convictions. Given the lengthy indeterminate sentence imposed on Velasquez on count 9 (life, with a minimum parole eligibility date of 15 years, plus 25 years to life), it is reasonably probable the trial court would have chosen a lesser sentence for count 3 had it known that two related factors -- the prior prison term and numerousness of Velasquez's prior convictions -- were the only factors on which it could rely to impose upper terms for both the underlying conviction and the firearm enhancement. (See *People v. Price* (1991) 1 Cal.4th 324, 492.)[7] Thus, a remand for resentencing is required at which the

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[7] Although *Blakely* error is evaluated under the *Chapman* test, under California law "[w]hen a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial

trial court must determine the appropriate term to impose on count 3 for assault with a firearm and the related firearm enhancement based on only the aggravating factors permitted by *Blakely*.[8]

4. *Velasquez's Contention the Sentences on Counts 5 and 12 Should Have Been Stayed Pursuant to Section 654 Lacks Merit*

The trial court imposed sentences of 14 years on both counts 5 and 12, each composed of the middle term of two years, plus two years for the gun enhancement under section 12021.5, subdivision (a), and 10 years for the criminal street gang enhancement. Velasquez contends the sentences imposed on counts 5 and 12, to be served concurrently to the consecutive sentences imposed on counts 3 and 9, should have been stayed pursuant to section 654 because the charge of possession of a short-barreled shotgun in count 5 was indivisible from the robbery charge in count 10 and the charge of possession of a firearm by a felon in count 12 was indivisible from the attempted-murder charge in count 9.

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court would have chosen the lesser sentence had it known that some of its reasons were improper." (*People v. Price*, *supra*, 1 Cal.4th at p. 492.)

[8] Velasquez does not contend the consecutive sentencing on counts 3 and 9 violated his rights under *Blakely*. The application of *Blakely* to California's consecutive sentencing scheme is before the Supreme Court in *People v. Black* (S126182, review granted July 28, 2004). To the extent, if any, *Blakely* applies to California's consecutive sentencing scheme, its requirement for jury findings has been satisfied in this case. The jury by its verdicts expressly found beyond a reasonable doubt that the assault with a firearm in count 3 and the attempted murder in count 9 were committed on separate occasions against different victims. Those jury findings support imposition of consecutive sentences because, as the trial court noted on the record, the crimes in counts 3 and 9 necessarily were committed at different times and separate places and involved crimes of violence against separate victims. (See rule 4.425(a)(2) & (a)(3) [criteria affecting the decision to impose consecutive sentences include that "[t]he crimes involved separate acts of violence or threats of violence" and "were committed at different times or separate places"].)

a. *General principles governing application of section 654*

Section 654[9] prohibits punishment for two offenses arising from the same act or from a series of acts constituting an indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1216; *People v. Harrison* (1989) 48 Cal.3d 321, 335.) "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19; *Latimer*, at p. 1208.) On the other hand, if the defendant entertained multiple criminal objectives that were independent and not incidental to each other, he or she "may be punished for each statutory violation committed in pursuit of each objective" even though the violations were otherwise part of an indivisible course of conduct. (*Harrison*, at p. 335.) "'The principal inquiry in each case is whether the defendant's criminal intent and objective were single or multiple.' [Citation.] 'A defendant's criminal objective is "determined from all the circumstances . . . ."'" (*In re Jose P.* (2003) 106 Cal.App.4th 458, 469.)

Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466.)[10] Its findings will not be reversed on appeal if there is any substantial evidence to

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[9] Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

[10] Because section 654 potentially reduces the defendant's aggregate sentence when it applies and does not increase the statutory maximum term for each separate offense when it does not (see *People v. Cleveland* (2001) 87 Cal.App.4th 263, 270), neither *Blakely*, *supra*, 524 U.S. ___ , nor *Apprendi*, *supra*, 530 U.S. 466, requires that this

support them. (*Hutchins*, at p. 1312; *Herrera*, at p. 1466; *People v. Nichols* (1994) 29 Cal.App.4th 1651, 1657.) "We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143 (*Jones*); see *People v. Cleveland* (2001) 87 Cal.App.4th 263, 271 [trial court's finding of "'separate intents'" reviewed for sufficient evidence in light most favorable to the judgment].)

b. *Application of section 654 to firearm possession offenses*

Section 654's application to a defendant who unlawfully possessed a firearm and used the weapon to commit a separate offense has been analyzed in a number of appellate decisions. As Division Three of this court explained in *Jones*, *supra*, 103 Cal.App.4th at page 1144, "multiple punishment is improper where the evidence 'demonstrates at most that fortuitous circumstances put the firearm in the defendant's hand *only at the instant of committing another offense* . . . .' [Citation.]" (Italics added.) For example, in *People v. Bradford* (1976) 17 Cal.3d 8, after being stopped by a highway patrol officer for speeding, the defendant, who had just robbed a bank, snatched the officer's handgun and shot at the officer and another motorist before fleeing. (*Id.* at p. 13.) Because the defendant's possession of the revolver was not antecedent to and separate from the use of the firearm in assaulting the officer, the Supreme Court held punishment for both assault with a deadly weapon upon a peace officer and possession of a firearm by a felon was prohibited by section 654.

On the other hand, in *People v. Hudgins* (1967) 252 Cal.App.2d 174 the defendant, a felon, broke into his wife's house, shot and killed a male guest and threatened to kill his wife. The Court of Appeal rejected defendant's argument section 654 barred punishments for both murder and gun possession in violation of section 12021, holding, "The acts constituting the offenses were separable. Possession of

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determination be made by the jury. Velasquez does not argue to the contrary in this appeal.

the gun constituted one offense, and this was an act separate and apart from any use that was made of the gun, and would have been a completed offense even if no use had been made of it." (*Hudgins*, at p. 185.)

Similarly, in *Jones, supra*, 103 Cal.App.4th 1139, the court upheld imposition of concurrent sentences for shooting at an inhabited dwelling and possession of a firearm by a felon, holding that, when a felon commits a crime using a firearm and there is no suggestion the defendant accidentally came upon the weapon at the precise moment the primary offense occurred, "it may reasonably be inferred that the firearm possession is a separate and antecedent offense, carried out with an independent, distinct intent from the primary crime." (*Id.* at p. 1141.) The court explained, "[T]he evidence was sufficient to allow the inference that Jones's possession of the firearm was antecedent to and separate from the primary offense of shooting at an inhabited dwelling. It strains reason to assume that Jones did not have possession for some period of time before firing shots at the [victim's] home. . . . Section 12021 is violated whenever a felon intentionally has the weapon in constructive or actual possession. [Citation.] Jones necessarily must have had either actual or constructive possession of the gun while riding in the car, as evidenced by his control over and use of the gun during the shooting. Jones's violation of section 12021 was complete the instant Jones had the firearm within his control prior to the shooting." (*Id.* at p. 1147.)

c. *Substantial evidence in this case supports imposition of additional sentences on the gun-possession charges*

Based on the principles summarized in *Jones, supra*, 103 Cal.App.4th 1139, and the well-established rules limiting the scope of our review in cases questioning the sufficiency of the evidence to support a criminal judgment, substantial evidence supports the trial court's implied findings that Velasquez's possession of the two guns were acts separate and apart from the use that was made of the guns in the attempted murder of Ismail at the pool hall and the robbery of the liquor store. (See *People v. Blake* (1998) 68 Cal.App.4th 509, 512 [trial court's implied finding that defendant harbored a separate

intent and objective for each offense will be upheld on appeal if supported by substantial evidence].)

With respect to the attempted murder of the security guard Ismail, the evidence established that, following a heated argument concerning payment for beer and use of the pool table and while Ismail was telephoning his manager for assistance, Velasquez advanced toward him with the gun in his possession. Velasquez, however, fired only after one of his confederates called out, "'Shoot him. Shoot him.'" Whether Velasquez had the gun with him all night or removed it from a hidden location at the pool hall, he plainly intended to possess the firearm when he first obtained it, which necessarily occurred before he actually shot Ismail. That Velasquez may not have possessed "the weapon for a lengthy period before commission of the primary crime is not determinative." (*Jones*, *supra*, 103 Cal.App.4th at pp. 1147-1148.)

Similarly, with respect to the robbery of the liquor store, the evidence established that one of Velasquez's two accomplices pointed a black handgun at the husband-and-wife owners of the store, demanding money and motioning toward the cash register. While the robbery was in progress, Velasquez went behind the counter with the short-barreled shotgun and pointed it at the husband, who grabbed his own gun and shot Velasquez. Based on these facts, even if the shotgun might have been transported to the scene by one of Velasquez's accomplices, Velasquez necessarily had actual or constructive possession of the short-barreled shotgun antecedent to his personal use of it during the robbery. (See *Jones*, *supra*, 103 Cal.App.4th at pp. 1148-1149.)

Accordingly, the trial court did not err by failing to stay pursuant to section 654 the sentences imposed on counts 5 and 12.

5. *The Enhancements Imposed Under Section 12021.5, Subdivision (a), on Counts 5, 10 and 12 Should Be Stricken*

The November 14, 2003 minute order of the sentencing hearing and the abstract of judgment reflect that the trial court imposed a two-year firearm enhancement under section 12021.5, subdivision (a),[11] on each of counts 5, 10 and 12. Velasquez argues imposition of those two-year enhancements is error because a special allegation under section 12021.5, subdivision (a), was not pleaded as to counts 5 and 10 and was not found true by the jury as to any of the three counts.[12]

"All enhancements shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact." (§ 1170.1, subd. (e).) As to counts 5 and 10, the section 12021.5, subdivision (a), enhancements were neither alleged in the information nor found true by the jury or admitted by Velasquez. Indeed, the robbery of Tran, the pool hall manager, alleged in count 10 did not involve the use of a gun, rendering section 12021.5, subdivision (a), wholly inapplicable. As to count 12, although the enhancement was pleaded in the information,

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[11] Section 12021.5, subdivision (a), provides: "Every person who carries a loaded or unloaded firearm on his or her person, or in a vehicle, during the commission or attempted commission of any street gang crimes described in subdivision (a) or (b) of Section 186.22, shall, upon conviction of the felony or attempted felony, be punished by an additional term of imprisonment in the state prison for one, two, or three years in the court's discretion."

[12] The People concede a special allegation under section 12021.5, subdivision (a), was not pleaded in the information as to counts 5 and 10. They suggest, however, that the trial court did not impose the section 12021.5, subdivision (a), enhancements as to those counts but that the abstract of judgment incorrectly identifies the imposition of such enhancements as to counts 5 and 10. Although it is unclear from the reporter's transcript of the sentencing hearing whether the trial court imposed the section 12021.5, subdivision (a), enhancements as to counts 5 and 10, the imposition of those enhancements is reflected not only in the abstract of judgment but also in the trial court's minute order detailing Velasquez's sentence. Accordingly, we treat the matter as if the enhancements had been imposed. The parties appear to agree the trial court misspoke when it imposed the section 12021.5, subdivision (a), enhancement as to "count 4" instead of count 12.

it was not submitted to the jury. Thus, the section 12021.5, subdivision (a), enhancements must be stricken as to counts 5, 10 and 12. (*Apprendi*, *supra*, 530 U.S. at p. 490 [facts that increase defendant's punishment beyond the statutory maximum must be submitted to the jury and proved beyond a reasonable doubt].)

Relying on *People v. Chevalier* (1997) 60 Cal.App.4th 507 (*Chevalier*), the People contend it was not necessary for the jury to specifically find the section 12021.5, subdivision (a), enhancement allegations true as to count 12 because a true finding can be inferred from the jury's verdict that Velasquez possessed a firearm as charged in count 12 and its true finding on the criminal street gang enhancement as to that count. Whatever the validity of *Chevalier* in light of *Apprendi*, *supra*, 530 U.S. 466, it plainly is distinguishable from the circumstances of this case. In *Chevalier* the defendant argued the weight enhancement imposed on him under Health & Safety Code section 11370.4, subdivision (a)(6), could not be sustained because, although the jury made a finding on the weight of the substance involved, it did not make a specific finding that he "was substantially involved in the planning, direction, execution, or financing of the underlying offense." (Health & Saf. Code, § 11370.4, subd. (a).) The Court of Appeal held the fact the jury had been properly instructed as to the substantial-involvement requirement of the enhancement and had found the weight allegations true was sufficient to support imposition of the enhancement. (*Chevalier*, at p. 513; see also *People v. Williams* (2002) 99 Cal.App.4th 696, 701 [enhancement could be imposed when based on same prior conviction specifically found true by the jury].) Here, in contrast, the jury was neither instructed under section 12021.5, subdivision (a), nor did it make any specific findings as to the requirements of the enhancement. Accordingly, no basis exists for imposing an enhancement under section 12021.5, subdivision (a).[13]

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[13] A section 12021.5, subdivision (a), enhancement was pleaded as to count 7. That enhancement, however, was not imposed by the trial court, as it is not reflected in either the minute order from the sentencing hearing or the abstract of judgment.

6. *The Minute Order and Abstract of Judgment Entered After Resentencing Must Reflect the Stay of the Sentences on Counts 4 and 7*

In sentencing Velasquez the trial court stayed execution of the sentences imposed on counts 1, 4 and 7 pursuant to section 654. As the People note, the abstract of judgment fails to reflect the stay of the sentences on counts 4 and 7. Accordingly, the trial court is directed to indicate in the new minute order and abstract of judgment entered after resentencing on remand that the sentences on counts 4 and 7 are stayed pursuant to section 654.

DISPOSITION

The judgment with respect to the sentence imposed on count 3 is reversed, and the matter is remanded for resentencing on count 3. On remand the trial court is directed to strike the firearm enhancements imposed on counts 5, 10 and 12. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

PERLUSS, P. J.

We concur:

JOHNSON, J.

WOODS, J.