Filed 9/24/04

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JAMES DUPREE BARNES,<br><br>Defendant and Appellant. | H026137<br>(Santa Clara County<br>Super.Ct.No. CC267763) |

From 3 a.m. to 5 a.m., two men lingered in a pedestrian walkway reputed to be the city's "Crack Capital." As a police officer approached, one of the men, Carlos Johnson, dropped a small baggie of cocaine base near his feet. The officer discovered that the other man, defendant James Dupree Barnes, was in possession of numerous plastic baggies and a small baggie of cocaine base was found near his feet. Each man was under the influence of cocaine and each had wadded up currency in most of his pockets. Johnson pleaded guilty to possessing cocaine base for sale and being under its influence. According to expert testimony, this combination of facts indicated that the two men were among the crack cocaine dealers who commonly deal in Fountain Alley. A jury found defendant guilty of the same crimes as his cohort.

We will affirm the judgment after concluding in the published part of this opinion that expert testimony profiling crack cocaine dealers was properly admitted and that defendant's sentence complied with *Blakely v. Washington* (2004) ___U.S. ___ [124

* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts 1B, 1C, 2, and 4.

S.Ct. 2531] (*Blakely*) as it was within the statutory maximum authorized by the jury's verdict and facts admitted by defendant. In the unpublished part of this opinion, we will further conclude that defense counsel was not incompetent in failing to object to this evidence; defendant was not prejudiced by evidence that he was unemployed; no unanimity instruction was required; and the instructions concerning possession for sale were accurate.

**TRIAL EVIDENCE**

Fountain Alley is a pedestrian alley in downtown San Jose that runs between 1st and 2nd Streets, parallel to Santa Clara and San Fernando Streets. "No loitering" signs are posted at both ends of the alley. It is known to San Jose police officers as a mecca for drug dealing. According to San Jose Police Officer Jun Lee, who patrolled the area for 11 months, crack cocaine is the most popular drug in Fountain Alley. According to San Jose Police Officer Jim Lisius, who has conducted surveillance in the area as a member of the Narcotic Covert Investigations Team, Fountain Alley is the "crack capital of the City of San Jose. That's where our crack dealers operate." Dealing "goes 24 hours a day, seven days a week." Hand-to-hand sales occur every 15 minutes.

Lisius, a recognized expert in crack cocaine dealing in Fountain Alley, testified that a popular quantity of crack cocaine is a "20" or "twop," which weighs from .20 to .25 gram and sells for $20. Dealers in that area work in teams of two or more, with one person holding the drugs and the other serving as a lookout for police and buyers. Typically a dealer carries five or six rocks on him. When he runs out, he goes to another location to replenish his supply. Almost every dealer is also a user who is dealing to support his drug habit.

In the typical transaction, a buyer will ask a lookout, "'You got it?'" never naming the drug. The lookout will take the buyer to the dealer. The buyer will have bills wadded up and concealed in his hand. He passes the bills to the dealer in a quick handshake. Everyone in the drug subculture knows that Fountain Alley is a police target, so a person who buys cocaine for personal use does not linger in the area, but leaves after making a buy. The people who remain in the area are dealers.

Around 3 a.m. on Saturday, November 9, 2002, as Officer Lee was driving his marked patrol car on 1st Street, he saw defendant and Carlos Johnson standing together near the light rail benches at one end of Fountain Alley. No one else was around.

Officer Lee drove by again around 5:40 a.m. and saw defendant and Johnson standing together in the same well-lit location where he had first seen them. Defendant made eye contact with Lee. Johnson and defendant walked away down Fountain Alley after defendant said something to Johnson. As Lee circled the block in his patrol car, defendant and Johnson changed directions twice to head away from Lee. As they walked away from Lee, defendant kept looking back in his direction.

Finally, Officer Lee waited until the men were near 2nd Street before driving up to them and getting out of his car. They stopped about 30 feet away. Johnson's right hand was clenched when he took it out of his pocket. As Officer Lee approached, Johnson dropped a small plastic baggie on the ground. It proved to contained .26 gram of cocaine base. Johnson made no other dropping or throwing motion.

As Officer Lee continued to approach, defendant walked about six to ten feet away from Johnson. At Lee's requests, defendant came back to them. Lee talked with the men while he waited for a cover officer whom he had requested by radio. Lee asked what they were doing there. Defendant said he was waiting for the light rail. Lee pointed out that he had just seen a train go by. He asked if they had light rail passes. Defendant said he had no pass and then admitted that he was just hanging out. Lee asked if defendant knew what kind of area he was in. Defendant said he knew people bought and sold drugs there. Officer Lee noticed that defendant exhibited several symptoms of being under the influence of crack cocaine.[1]

San Jose Police Officer Rea Cramer arrived and kept an eye on defendant as Lee requested. Defendant complied with Lee's request to stand near Cramer about six feet

[1] Defendant conceded at trial that he was guilty of this misdemeanor, so we need not detail the symptoms.

from Johnson. Before Lee directed defendant to this position, Lee looked at the ground to make sure there was nothing on the ground.

Lee arrested Johnson for loitering with intent to buy or sell drugs. Before putting Johnson in his patrol car, he searched him. Johnson had a wadded $20 bill in his right front pants pocket and another one in his left front pants pack. A wadded $5 was in a back pocket and a $1 was in the other back pocket. Johnson had a cell phone in a box.

Officer Cramer noticed another plastic baggie on the ground within 30 seconds of walking up to defendant. It was about a foot from where defendant was standing and about six feet from the other baggie.[2] After Officer Lee put Johnson in his patrol car, Cramer called Lee's attention to this baggie. The baggie proved to contain .18 gram of crack cocaine. Lee did not see defendant throw or drop anything.[3] When Lee picked up the baggie, defendant exclaimed, "'Man, that ain't my crack, dog. I'm just fixin' to catch the light rail. You feel me?'" Lee had said nothing about crack.

According to Lee, one does not find drugs abandoned on the ground in Fountain Alley. Crack is like gold or cash. People walk around the area looking for anything that might have been dropped.

Lee arrested defendant. A search revealed that defendant had a cell phone in his jacket pocket. Two wadded $20 bills were in his right front pants pocket. Two wadded $10s were in his left front pants pocket. A $5 was in his back left pocket. A $5 and a $1 were in his back right pocket. Defendant had no wallet. He had 52 Ziploc plastic baggies.[4] Defendant said he had the baggies for separating meat.

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[2] At the preliminary examination Officer Lee testified that he could not be sure that the baggie was not already on the ground before he sent defendant to that location. At trial he testified that he misunderstood the questions at the preliminary examination.

[3] Officer Cramer was not asked at trial if she had seen defendant drop or throw anything.

[4] At trial Officer Lee testified that the baggies were not in a box. At the preliminary examination he said they were.

Defendant and Lee talked more after Lee gave defendant his *Miranda*[5] rights. Defendant said that Johnson had asked him for help in selling cocaine. Johnson dropped the bag at Johnson's feet when they saw Lee coming. Defendant said that he was unemployed.

A urine sample taken from defendant established that defendant had used cocaine within the past 48 to 72 hours.

Officer Lisius concluded, based on hypothetical facts similar to those in evidence, that defendant and Johnson were cocaine dealers. He relied on the following factors. They remained in the Fountain Alley area and repeatedly attempted to avoid Officer Lee. They were in possession of wadded bills typical of cocaine sales in that area. Defendant was in possession of drug packaging material. The cocaine bindles found at their feet were typical of the amounts sold in Fountain Alley.

Lisius conceded that the small quantities of cocaine alone did not prove the drugs were possessed with intent to sell. He had never before testified that such small quantities were possessed for sale.

Carlos Johnson pleaded guilty to possession of cocaine for sale and being under the influence.

**VERDICT AND SENTENCE**

After trial, a jury convicted defendant of possessing cocaine base for sale (Health & Saf. Code, § 11351.5) and of being under its influence (Health & Saf. Code, § 11550, subd. (a)).

Before trial defendant successfully asked for bifurcated proceedings regarding enhancement allegations that he had twice before been convicted of possession for sale (Health & Saf. Code, § 11370.2) with one conviction resulting in a prior prison sentence (Pen. Code, § 667.5, subd. (b)). After trial of the underlying charges, in the bifurcated proceedings defendant waived jury trial and admitted these allegations.

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[5] *Miranda* v. *Arizona* (1966) 384 U.S. 436.

At the sentencing hearing defense counsel submitted the matter for sentencing based on an unreported in camera discussion. The court advised defendant that he had "discussed this at great length with the probation officer, your attorney, and the district attorney." According to the probation report, in October 2000 defendant was placed on probation after being convicted of possession for sale. In June 2001 he was sentenced to prison for three years after another conviction of possession for sale. Defendant's new offenses occurred "in the same exact location" as his prior offenses and less than one month after he was released on parole. The probation report recommended imposing the upper term due to defendant being on parole and striking the prior possession enhancements because they were the basis for the upper term.

The court stated that the maximum possible sentence was 12 years, which was arguably appropriate because "you committed this present offense at the same exact location wherein you had committed the two prior offenses." However, the trial court sentenced defendant to prison for six years, consisting of the upper term of five years for possessing cocaine, enhanced by one consecutive year for the prior prison term. (Pen. Code, § 667.5, subd. (b).) "[T]he court has imposed the aggravated term . . . because you were on parole. You'd just been released from prison by 24 days when this crime was committed. And that, in the court's view, is a sufficient reason to impose the aggravated term. [¶] There are no mitigators the court finds appropriate." The court imposed a three-year term for each of the two prior possession convictions (Health & Saf. Code, §11370.2, subd. (a)) and struck these two enhancements in the interest of justice (Pen. Code, § 1385). Defendant was given county jail time for the misdemeanor commensurate with time served. The court imposed various fines and fees. The court ordered that defendant avoid Fountain Alley in San Jose as a condition of parole.

**1. DEFENSE COUNSEL'S FAILURE TO OBJECT TO EVIDENCE**

On appeal defendant asserts that his trial counsel was constitutionally ineffective in failing to object to two types of evidence, namely defendant's poverty and the profile of a drug dealer. Also, counsel failed to object to late disclosure of the profile expert.

"A meritorious claim of constitutionally ineffective assistance must establish both: '(1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails. Moreover, "'a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.' [Citation.]" ' [Citation.]" (*People v. Holt* (1997) 15 Cal.4th 619, 703.)

"'[C]ompetent counsel may often choose to forgo even a valid objection. "[I]n the heat of a trial, defense counsel is best able to determine proper tactics in the light of the jury's apparent reaction to the proceedings. The choice of when to object is inherently a matter of trial tactics not ordinarily reviewable on appeal." [Citation.]' [Citations.]" (*People v. Farnam* (2002) 28 Cal.4th 107, 202, quoting *People v. Riel* (2000) 22 Cal.4th 1153, 1197.) "The claim that defense counsel failed to object must be rejected on appeal when the record does not establish why counsel acted or failed to act in the manner challenged, unless counsel was asked at trial for an explanation and failed to provide one, or unless there could be no satisfactory explanation." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1037.)

*A. Profile evidence*

On appeal defendant contends that his trial counsel was ineffective in failing to object to expert testimony by Officer Lisius to the effect that defendant "fits the profile of a drug dealer." Defendant does not question similar testimony offered by Officer Lee.

As stated above, Officer Lisius gave an expert opinion that individuals in circumstances like those in evidence at trial "were dealers." The specific circumstances included: the location, Fountain Alley, a notorious open-air market for crack cocaine; the length of time defendant and his companion remained in this dealing area; the time of the morning, 5:40 a.m.; the repeated attempts to avoid a marked patrol car; the change of story about waiting for the light rail; the dumping of crack cocaine bindles; the

possession by both individuals of wadded up bills consistent with hand-to-hand cocaine sales; and being under the influence of cocaine.

The prosecutor relied extensively on the testimony by Officer Lisius in argument to the jury.

The cases that have discussed profile evidence tend to treat it as sui generis. However, we regard it as one facet of the larger topic of expert testimony. *People v. Cole* (1956) 47 Cal.2d 99, 103-104, originally articulated a critical test for admitting into evidence expert opinion. As now codified, the test is whether the opinion relates "to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).)[6] *People v. McDonald* (1984) 37 Cal.3d 351 (overruled on another ground by *People v. Mendoza* (2000) 23 Cal.4th 896, 914) elaborated: "[T]he admissibility of expert opinion is a question of degree. The jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission; if that were the test, little expert opinion testimony would ever be heard. Instead, the statute declares that even if the jury has some knowledge of the matter, expert opinion may be admitted whenever it would 'assist' the jury. It will be excluded only when it would add nothing at all to the jury's common fund of information, i.e., when 'the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness' (*People v. Cole*[*, supra*] 47 Cal.2d [at p.] 103)." (*People v. McDonald, supra,* 37 Cal.3d at p. 367.) The trial court has discretion to determine whether an opinion passes this test.

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[6] Evidence Code section 801 states: "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

"(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

"(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion."

(*People v. Cole*, *supra*, 47 Cal.2d at p. 105; *People v. Bolin* (1998) 18 Cal.4th 297, 321-322.)

Courts have long recognized that experts can assist juries in understanding the physical evidence of crime. "In cases involving possession of marijuana or heroin, experienced officers may give their opinion that the narcotics are held for purposes of sale based upon such matters as the quantity, packaging and normal use of an individual . . . ." (*People v. Newman* (1971) 5 Cal.3d 48, 53, disapproved on another ground in *People v. Daniels* (1975) 14 Cal.3d 857, 862; cf. *People v. Arguello* (1966) 244 Cal.App.2d 413, 420 (*Arguello*); *People v. Martin* (1966) 247 Cal.App.2d 416, 420-421.)

Courts have also recognized that an expert may help a jury understand aspects of criminal behavior, including the defendant's conduct. Experts can describe the "culture, habits, and psychology" of criminal street gangs (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506; cf. *People v. Gardeley* (1996) 14 Cal.4th 605, 617) and also typical methods of committing crimes. (*People v. Brown* (1981) 116 Cal.App.3d 820, 828 [a "runner" is a middleman between a seller and a buyer of drugs]; *People v. Clay* (1964) 227 Cal.App.2d 87, 93, 95-99 [the modus operandi of "till tapping"]; *People v. Crooks* (1967) 250 Cal.App.2d 788, 791-792 [method of stealing from prostitutes' clients]; cf. *People v. Harvey* (1991) 233 Cal.App.3d 1206, 1216-1217, 1226-1228 [hierarchy and operation of Colombian cocaine distribution ring or cell]; *People v. Lopez* (1994) 21 Cal.App.4th 1551, 1554-1555 (*Lopez*) [various roles in methamphetamine laboratory].)

As this court acknowledged in *People v. Valdez*, *supra*, 58 Cal.App.4th at pages 507-508, since the decision in *People v. Wilson* (1944) 25 Cal.2d 341, 349-350, opinion testimony "is not objectionable because it embraces the ultimate issue to be decided by the trier of fact," so long as it is otherwise admissible. (Evid. Code, § 805; *People v. McDonald*, *supra*, 37 Cal.3d at p. 371; *Arguello*, *supra*, 244 Cal.App.2d at pp. 417-418; *People v. Harvey*, *supra*, 233 Cal.App.3d at p. 1227, *People v. Doss* (1992) 4 Cal.App.4th 1585, 1596.) Expert opinion is rarely objectionable for invading the province or usurping the function of the jury or otherwise taking over the jury's role. California criminal juries are ordinarily instructed, as was the jury here, that they are the

exclusive judges of the believability of a witness (CALJIC No. 2.20; Pen. Code, § 1127), that they are not bound by an expert's opinion, but should give it the weight it deserves based on the underlying reasoning (CALJIC No. 2.80; Pen. Code, § 1127b), and that they should consider whether a hypothetical question incorporated facts that the jury later found to be unproved (CALJIC No. 2.82). (*People v. McDonald*, *supra*, 37 Cal.3d at pp. 370-371; *Arguello*, *supra*, 244 Cal.App.2d at p. 417; contra, *Arguello*, *supra*, 244 Cal.App.2d at pp. 418-419, 421; *People v. Brown*, *supra*, 116 Cal.App.3d at p. 828.)

Although expert opinion may embrace the ultimate issue, courts have drawn the line at obtaining an expert opinion that the defendant is guilty of the crime charged. (Cf. *People v. Torres* (1995) 33 Cal.App.4th 37, 46 (*Torres*); *People v. Brown*, *supra*, 116 Cal.App.3d at p. 829; see *People v. Clay*, *supra*, 227 Cal.App.2d at pp. 98-99, and cases there cited). Such an opinion is prohibited because a properly instructed jury after hearing all the evidence is deemed as competent as any expert to determine the defendant's guilt. (*Torres*, *supra*, 33 Cal.App.4th at p. 47; *People v. Brown*, *supra*, 116 Cal.App.3d at pp. 828-829.) While prohibited, this kind of testimony should rarely be prejudicial. "[T]he error in admitting expert testimony where none is needed may be entirely harmless where the expert really adds nothing to what must be apparent to the jury's common sense." (*People* v. *Hernandez* (1977) 70 Cal.App.3d 271, 281.)

*Torres*, *supra*, held that the same rationale that prohibits expert opinions of guilt "also prohibits the witness from expressing an opinion as to whether a crime has been committed." (33 Cal.App.4th at p. 47.) Thus, *People v. Brown*, *supra*, involving a charge of a heroin sale, prohibited an expert from offering an opinion based on the evidence that the defendant was a drug runner. (116 Cal.App.3d at pp. 828-829.) *People v. Hernandez*, *supra*, 70 Cal.App.3d 271 precluded an officer's expert opinion that he had observed the defendant engage in an attempted narcotics transaction. (*Id.* pp. 274-275.) In *Torres*, *supra*, an officer expert described how a street gang collected rent from nonaffiliated dealers who sold drugs on the gang's turf. (33 Cal.App.4th at pp. 43-44.) The court prohibited the officer's opinion that what happened in that case was robbery. (*Id.* at p. 47.)

With these principles in mind, we consider the cases that have discussed profile evidence. "A profile is a collection of conduct and characteristics commonly displayed by those who commit a certain crime." (*People v. Robbie* (2001) 92 Cal.App.4th 1075, 1084 (*Robbie*), and cases there cited; Annot., Admissibility of Drug Courier Profile Testimony in Criminal Prosecution (1999) 69 A.L.R.5th 425, 436.) In certain circumstances, courts have allowed profile evidence, recognizing that a certain collection or combination of individually innocent behaviors may indicate criminal activity to the experienced eye of law enforcement. These behaviors may justify detaining or arresting a suspect, whether or not they are part of a criminal profile. (*United States v. Sokolow* (1989) 490 U.S. 1, 10.) However, courts have been leery of using a criminal profile as evidence of guilt.

Courts have given varying reasons for excluding profile evidence. *People v. Derello* (1989) 211 Cal.App.3d 414 concluded that use of aliases while traveling and unusual movement through an airport concourse was probative of the charge of transporting cocaine. (*Id.* at p. 426.) However, "evidence of the amount of gold jewelry worn by Derello, of the amount of cash defendants carried, of the youth and casual dress of defendants, and of their rental of an expensive car had no tendency in reason to prove any issue in the trial." (*Ibid.*)

In *People v. Castaneda* (1997) 55 Cal.App.4th 1067, testimony that the typical tar heroin dealer in a certain area was a Hispanic adult male was held to be prejudicial because it suggested that the defendant was guilty of more than the simple possession with which he was charged. The evidence invited "a finding of guilt by association" and a conviction not based on the facts of the crime charged. (*Id.* at p. 1072.)

Defendant relies on cases that have criticized profile evidence as nothing more than the opinions of law enforcement personnel. (*People v. Martinez* (1992) 10 Cal.App.4th 1001, 1006 [evidence of operation of auto theft rings when one charge was receiving stolen vehicle]; *Robbie*, *supra*, 92 Cal.App.4th at p. 1084 [conduct by the defendant was consistent with rapists and sex offender when sex offenses were charged].)

Some profile evidence is said to make the innocent look guilty. (*People v. Martinez*, *supra*, 10 Cal.App.4th at pp. 1006-1007; *Robbie*, *supra*, 92 Cal.App.4th at p. 1084.)

*Robbie* elaborated: "[P]rofile evidence is inherently prejudicial because it requires the jury to accept an erroneous starting point in its consideration of the evidence. We illustrate the problem by examining the syllogism underlying profile evidence: criminals act in a certain way; the defendant acted that way; therefore, the defendant is a criminal. Guilt flows ineluctably from the major premise through the minor one to the conclusion. The problem is the major premise is faulty. It implies that criminals, and only criminals, act in a given way. In fact, certain behavior may be consistent with both innocent and illegal behavior, as the People's expert conceded here." (*Robbie, supra,* 92 Cal.App.4th at p. 1085.)

We believe these various criticisms have the same core, that some profile evidence lacks probative value. It fails to prove either that the charged crime was committed or that the defendant committed it. In our view, whether or not it is part of a criminal profile, evidence should be excluded if it is not relevant and probative (Evid. Code, § 350) or if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice (Evid. Code, § 352).

On the other hand, the jury can assess whether the major premise of a syllogism has an evidentiary basis. "'"Where a witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than its admissibility."'" (*People v. Bolin*, *supra*, 18 Cal.4th at p. 322.) Juries are instructed, as this one was, "if the circumstantial evidence as to any particular count permits two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to his guilt." (CALJIC No. 2.01.) Within these parameters, we see no logical flaw in reasoning that if something walks, talks, and quacks like a duck and fits nothing other than a duck's profile, it is a duck.

The Attorney General contends that the testimony by Officer Lisius was the kind of "background testimony" found acceptable in *Lopez*, *supra*, 21 Cal.App.4th 1551, namely how a methamphetamine laboratory is operated and what the roles are involved in manufacturing methamphetamine. *Lopez*, *supra*, distinguished "background testimony" from "profile" evidence in that the former "does not specifically address the guilt or innocence of the defendant. Instead, it enables the jury to understand other evidence that does address guilt or innocence." (*Lopez*, *supra,* 21 Cal.App.4th at p. 1556.) In that case "the testimony served only as background information that allowed the jury to understand the complex cast of characters and events that comprised this months-long conspiracy." (*Id.* at p. 1556.) Defendant disputes this characterization.

So long as the probative value of the expert testimony was not substantially outweighed by the probability it would create substantial danger of undue prejudice, we see no need to classify it as either background or profile evidence. We are confident that the following facts presented by Officer Lisius were "sufficiently beyond common experience" to be of assistance to the jury. (Evid. Code, § 801, subd. (a).) Those interested in selling and buying crack cocaine in San Jose know that Fountain Alley is the place to go. The buyers and dealers also know that the police know this. Accordingly, they conduct their transactions in surreptitious ways. Buyers carry wadded bills and pass them to dealers by a handshake. Dealers work in teams, one holding the drugs and the other serving as a lookout for buyers and the police. Almost all dealers deal to support their own drug habits. Dealers in the Fountain Alley area carry a few small packages of cocaine, sometimes in their mouths. It is common to sell for $20 .20-.25 gram of cocaine packaged in the twisted corner of a plastic baggie. It may be any baggie that is pliable enough to twist and tear off. Once a buyer has completed a purchase, a buyer will leave the area. Dealers remain because it is their place of business.

We recognize that there certainly could be innocent explanations for some of defendant's behavior. He was free to present such evidence at trial. Indeed, defendant told the police that he needed 52 baggies for separating meat and that he was just in the

area to hang around or to catch a light rail train. Defendant was also free to cross-examine Officer Lisius about the bases of his factual premises and he did so.

Though Officer Lisius's observations, based on months of surveillance, painted a portrait of a typical Fountain Alley crack dealer, we conclude that this portrait or profile was helpful to the jury in understanding defendant's continuing presence in Fountain Alley, his continued companionship with Johnson, their joint constructive possession of two bindles of crack cocaine, their possession of wadded bills, and defendant's possession of 52 Ziploc baggies. We see nothing irrelevant or more prejudicial than probative in this testimony. Defense counsel cannot be faulted for failing to object. (*People v. Bolin*, *supra*, 18 Cal.4th at p. 322.)

*B. Late disclosure of expert*[*]

Defendant further contends that his trial counsel was ineffective in failing to object to the late disclosure of Officer Lisius as an expert witness. The People's undated written witness list as trial included an "NCI expert," but did not provide the officer's name. At trial Lisius testified that he worked for the N(arcotics) C(overt) I(nvestigations) Team. The first time he heard about the case was a couple of days before he testified. Defense counsel elicited this information but did not object that there was a discovery violation for not disclosing the expert's name 30 days prior to trial. (Pen. Code, §§ 1054.1, subd. (b); 1054.7.)

From this record we cannot conclude that there was a discovery violation. The deadline applies only to information already in the prosecutor's possession. (Pen. Code, § 1054.7.) The prosecutor may not have determined until shortly before trial which expert was available to testify. Moreover, the most likely outcome of a defense objection would have been a continuance of the trial. (Pen. Code, § 1054.5, subd. (b).) Prohibiting a witness's testimony is the last resort. (Pen. Code, § 1054.5, subd. (c).) Defense counsel may have preferred that defendant proceed to trial without delay and may have felt ready to cross-examine the expert.

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[*] See footnote, *ante.*

We conclude that defendant has demonstrated neither incompetence nor prejudice from defense counsel's omission to assert a discovery violation.

*C. Evidence of defendant's unemployment*[*]

On appeal defendant contends that his trial counsel was ineffective in making the wrong objection to evidence that defendant was unemployed. At trial defendant made an initially successful relevance objection to this evidence. After an unreported bench conference, the trial judge reversed his ruling and allowed the testimony. Trial counsel did not object on the record that the evidence was more prejudicial than probative. (Evid. Code, § 352.)

In opening argument to the jury, the prosecutor asserted: "How else do we know that he intended to sell this crack? Well, the fact that he's unemployed adds to it. How does the man pay his bills? How does he pay his bills? How does he pay for crack? You know crack, one of those tiny little things, this tiny little thing, this is expensive stuff. This costs $20. To use this regularly, that's a lot of money you are talking about. How in the world do you support that kind of habit?"

The Attorney General relies on precedent recognizing that a defendant's employment status was relevant to establishing the defendant's motive or need to sell illegal drugs. (*People v. Martin* (1971) 17 Cal.App.3d 661, 668; *People v. Morales* (1979) 88 Cal.App.3d 259, 264 (*Morales*).)

However, this dictum in *Morales* was criticized as overbroad by *People v. Hogan* (1982) 31 Cal.3d 815, 854, footnote 22 (*Hogan*) (disapproved on another ground by *People v. Cooper* (1991) 53 Cal.3d 771, 836.) *Hogan* said that *Morales* was inconsistent with the "general policy of exclusion of evidence of poverty as motive." (*Ibid*.) "The rule governing evidence of poverty as motive for crime was stated long ago in *People v. Kelly* (1901) 132 Cal. 430, 431-432: 'Generally, evidence of the wealth or poverty of a defendant is not admissible; but the sudden possession of money, immediately after the commission of a larceny, by one who before that had been impecunious, is clearly

[*] See footnote, *ante*.

admissible as a circumstance in the case. [Citation.]' Wigmore states a general policy of exclusion of this type of evidence as motive for crime because 'the practical result of [admission] would be to put a poor person under so much unfair suspicion and at such a relative disadvantage that for reasons of fairness this argument has seldom been countenanced as evidence of the graver crimes, particularly of violence.' (2 Wigmore, Evidence (3d ed. 1940) § 392, p. 341; *People v. Gorgol* (1953) 122 Cal.App.2d 281, 303.)" (*Id.* at p. 854.)

*People v. Edelbacher* (1989) 47 Cal.3d 983 stated: "Evidence of poverty or indebtedness is admissible, however, in a variety of circumstances, such as to refute a defendant's claim that he did not commit the robbery because he did not need the money [citation], or to eliminate other possible explanations for a defendant's sudden wealth after a theft offense [citations]." (*Id.* at p. 1024.) A defendant's financial straits may provide a motive for murdering the defendant's creditor. (*Ibid.*)

The Attorney General contends that defendant's unemployment was used to show that he was likely to be selling crack cocaine to support a crack habit. Though evidence of unemployment can be admissible for certain purposes, we cannot know that it was admitted for a proper purpose here because we are not privy to the unrecorded discussions at bench which dealt with it.

Even if, for purposes of this appeal, we were to assume there to have been error—the evidence should have been excluded on appropriate objection because the prosecutor offered defendant's jobless status for a prohibited purpose (*People v. Wilson* (1992) 3 Cal.4th 926, 939)—we nonetheless conclude that defendant was not prejudiced and that it is unlikely defendant would have received a more favorable verdict had this brief testimony been excluded. (*People v. McDermott* (2002) 28 Cal.4th 946, 999.) The evidence of defendant's guilt was strong. Defendant and his companion, Johnson, who eventually pleaded guilty to possessing cocaine with intent to sell, remained in Fountain Alley in the wee hours of the morning knowing its reputation as a drug market. During that time defendant and Johnson stuck together while repeatedly attempting to avoid an encounter with the police. Defendant was aware that the bindle at his feet contained

crack cocaine. Defendant changed his story to the police about what he was doing in the area before finally admitting that Johnson had asked for his help in selling cocaine. Defendant was in possession of the kind of crumpled bills received by cocaine dealers in exchange for cocaine. Defendant was in possession of 52 plastic baggies. His explanation for the baggies was incredible. We are confident that defendant was convicted based on this strong evidence of guilt and not due to the evidence of his unemployment.

## 2. INSTRUCTIONS*

*A. Unanimity instruction*

On appeal defendant contends that the trial court erred by failing to give a sua sponte unanimity instruction like CALJIC No. 17.01 in connection with the charge that he possessed cocaine base with the intent to sell it.

*People v. Russo* (2001) 25 Cal.4th 1124 explained: "In a criminal case, a jury verdict must be unanimous. (*People v. Collins* (1976) 17 Cal.3d 687, 693; see Cal. Const., art. I, § 16 [expressly stating that 'in a civil cause three-fourths of the jury may render a verdict' and thereby implying that in a criminal cause, only a unanimous jury may render a verdict].) . . . Additionally, the jury must agree unanimously the defendant is guilty of a specific crime. (*People v. Diedrich* (1982) 31 Cal.3d 263, 281.) Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. (*People v. Castro* (1901) 133 Cal. 11, 13; *People v. Williams* (1901) 133 Cal. 165, 168; CALJIC No. 17.01; but see *People v. Jones* (1990) 51 Cal.3d 294.)" (*Id.* at p. 1132.)

"This requirement of unanimity as to the criminal act 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' (*People v. Sutherland* (1993) 17 Cal.App.4th 602, 612.) For example, in *People v. Diedrich*, *supra*, 31 Cal.3d 263, the

* See footnote, *ante*.

defendant was convicted of a single count of bribery, but the evidence showed two discrete bribes. We found the absence of a unanimity instruction reversible error because without it, some of the jurors may have believed the defendant guilty of one of the acts of bribery while other jurors believed him guilty of the other, resulting in no unanimous verdict that he was guilty of any specific bribe. (*Id.* at pp. 280-283.) 'The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count.' (*People v. Deletto* (1983) 147 Cal.App.3d 458, 472.)" (*People v. Russo, supra,* 25 Cal.4th at p. 1132.)

A unanimity instruction should be given sua sponte when appropriate. (*People v. Castaneda*, *supra*, 55 Cal.App.4th at p. 1071; see *People v. Riel* (2000) 22 Cal.4th 1153, 1199.)

Defendant argues that a unanimity instruction was appropriate because the prosecutor advanced the following "two alternative theories of guilt." Either defendant was guilty of actual possession of the cocaine bindle found at his feet or defendant was guilty of joint possession of the bindle dropped by Johnson. The Attorney General responds that "[t]his was a single transaction" and no unanimity instruction is required when the same defense was offered to possessing both baggies.

In *People v. Castaneda*, *supra*, 55 Cal.App.4th 1067 the appellate court concluded that a unanimity instruction should have been given when "[t]he evidence disclosed two different ways in which Castaneda could have violated the single charge of possession of a controlled substance. [Citation.] He could have constructively possessed the heroin found on the television set or actually possessed the heroin later recovered from his pocket at the sheriff's station. [¶] These acts of possession were factually distinct [citation], and Castaneda offered separate defenses to each act: (1) that the heroin found on the television was not his but his son's, and (2) that he did not possess the heroin found in his coin pocket; rather it was planted or otherwise fabricated." (*Id.* at pp. 1070-1071.)

The problem with defendant's argument is that the prosecutor did not present the jury with two alternative factual theories. We note that the trial judge rejected the prosecutor's request to give instructions on aiding and abetting as "an alternate theory of culpability," stating. "It's confusing to me. If it's confusing to me, it's going to be confusing to to [*sic*] the trier of fact." The judge saw no evidence of aiding and abetting.

The prosecutor asserted the following in opening argument. Possession can involve "direct physical control over something, or you can possess constructively. And constructively is when you do it with somebody else. . . . You can exert control or the right to control over something that someone else has."

Defendant possessed the cocaine found at his feet. Circumstantial evidence indicated that defendant was the one who dropped it there, though no one saw him drop it. It was not there before he stood there. He was aware the baggie contained crack.

Defendant was also in constructive possession of the cocaine dropped by Johnson. The evidence indicated that they were working together as a team in dealing cocaine. The bindles were packaged similarly. The size of packages was typical of quantities sold in Fountain Alley. Users do not remain in Fountain Alley after making their purchase. Defendant admitted that Johnson had asked for his help in selling drugs. Johnson pleaded guilty to possessing cocaine for sale. They remained together in the area for almost three hours. They remained together while trying to avoid Officer Lee's patrol car. They both looked back at the patrol car while walking away from it.

The prosecutor stated: "They are working with each other to sell cocaine that is in Mr. Johnson's hand or pocket." "They have an interest in what's in each other's pockets, and what's in each other's pockets is money and drugs. And the reason they have that interest is they both possessed them, because they are both in the business and they are both down there selling." Defendant had the specific intent to sell the cocaine that Johnson tossed.

The defense argument was that "Mr. Johnson threw both of the baggies, and one went farther than the other."

The prosecutor returned to the partnership theme in the following closing argument. Johnson did not throw the cocaine that was found at defendant's feet. Johnson dropped a baggie but did not throw one. They both possessed the cocaine found on the ground. The similarity in packaging and all their coordinated behaviors showed "that they are in business together." "Even if both bindles belong to Mr. Johnson, even if there is [*sic*] still jointly possessed by defendant Barnes, these guys are in business together. Like I talked about earlier, you can constructively possess something."

Thus, the prosecutor never suggested that defendant was not in actual or constructive possession of both bindles of cocaine. The prosecutor repeatedly argued that defendant and Johnson were dealing cocaine together as a team and jointly possessed both bindles. Johnson's guilt was established by his guilty plea. The jury could not have convicted defendant of possession for sale without accepting that he and Johnson were a drug-dealing team.

When the prosecutor elects to rely on multiple acts in a continuous course of conduct as one crime, no unanimity instruction is required. (*People v. Dominick* (1986) 182 Cal.App.3d 1174, 1208 [murder involved one or both defendants striking victim with pole, one defendant snapping his head around, and both defendants pushing him over a cliff in a car]; *People v. Haynes* (1998) 61 Cal.App.4th 1282, 1296 [two encounters minutes apart amounted to one robbery]; *People v. Turner* (1983) 145 Cal.App.3d 658, 681, disapproved on other grounds by *People v. Majors* (1998) 18 Cal.4th 385, 411 and by *People v. Newman* (1999) 21 Cal.4th 413, 422, fn. 6 ["the prosecutor without objection argued the taking of the money, gold chains and the car constituted a single robbery"]; see *People v. Harris* (1994) 9 Cal.4th 407, 431, fn. 14 [four takings supported single robbery count]. We conclude that no unanimity instruction was required in this case because the prosecutor relied on all acts by defendant and both bindles of cocaine.

*B. Specific intent instruction*

Defendant contends that the trial court misstated one of the elements of the offense in responding to jury questions during deliberations. This contention arises from the following facts.

The jury was initially instructed in terms of CALJIC No. 12.01 that it had to find five elements before convicting defendant of violating Health and Safety Code section 11351.5. (1) He exercised control or the right of control over a controlled substance. (2) He knew of its presence. (3) He knew it was a controlled substance. (4) It was a usable quantity of the substance. (5) "That person possessed the controlled substance with the specific intent to sell the same."

During deliberations the jury asked two questions. The first written question was: "Step #5 What was he attempting to sell? (Definition of sell the 'same') (1) Do we have to prove the specific drug that was found in his control was the drug he intended to sell"? After conferring with counsel, the judge answered this question in open court. The judge directed the jury to reread the instruction and stated: "And I assume you are asking for a clarification as to what that means, 'to sell the same.' Because that could import, and it does, that somebody else could, in fact, sell the same. [¶] So here's what the law says that means. You must first be convinced beyond a reasonable doubt that a defendant possessed actually or constructively a controlled substance. Then in order to be convicted of this section, that defendant needs to either possess the specific intent to sell the controlled substance personally or possess the specific intent that someone else will sell the controlled substance."

At a juror's request, the judge repeated that the defendant "needs to either possess the specific intent to sell the controlled substance personally or possess the specific intent that someone else will sell the controlled substance."

The jury submitted a second note. "Assume we find that the defendant possessed a specific rock of cocaine base. Let us call the rock, 'George'. To find that the fifth element of the first count is 'proved', do we need to find that the defendant had specific intent to sell 'George', or is it sufficient to find that defendant had specific intent to sell cocaine base in general?"

In open court, the judge answered that, "for a defendant to be found guilty of possession for sale of George, the defendant must: number one, actively or constructively possess George; two, the defendant must have the specific intent to

personally sell George, or have the specific intent that someone else sell George." A general intent to sell cocaine base would not be sufficient. In the jury's absence defendant objected that its second question "was specific as to the defendant."

The jury returned its verdicts 15 minutes after receiving this instruction.

Health and Safety Code section 11351.5 proscribes "every person who possesses for sale or purchases for purposes of sale cocaine base." Defendant contends that the ambiguity of the phrases "for sale" and "for purposes of sale" must be construed in his favor to require that the possessor must have the specific intent to personally sell the cocaine base.

In our view, it was easy for the Legislature to have stated "personal sale" if that was its intent. There are reasons for the Legislature not to have so stated. "We see no meaningful distinction in culpability between the individual who holds drugs to sell personally and the one who holds them for others to sell." (*People v. Consuegra* (1994) 26 Cal.App.4th 1726, 1732, fn. 4; cf. *People v. Parra* (1999) 70 Cal.App.4th 222, 227.) Defendant contends that these decisions ignored the ambiguity of the specific intent element in the statute. We agree with these decisions that the specific intent that someone sell the cocaine is all that is required to violate the statute.

We perceive no conflict between these decisions and *In re Christopher B.* (1990) 219 Cal.App.3d 455, on which defendant relies. In that case a juvenile court decision was reversed because the trial court announced, "possession of cocaine for sale is not a specific intent crime." (*Id.* at p. 466.) The appellate court stated that the lower court was required to determine whether the defendant "had the specific intent to sell." (*Ibid.*) The court did not discuss whether the intent included personal sale. (Contra, *People v. Parra*, *supra*, 70 Cal.App.4th at p. 226.)

We conclude that the trial court accurately instructed the jury in response to its questions during deliberations.

### 3. SENTENCING

By supplemental opening brief, defendant relies on *Blakely, supra,* ___U.S. ___ [124 S.Ct. 2531] in arguing that his right to a jury trial was violated when the trial court

relied on facts not found by the jury, namely that defendant was a recent parolee, in imposing an upper term sentence of five years. Defendant does not complain of the one-year enhancement due to his prior prison term. (Pen. Code, § 667.5, subd. (b).)

***A. United States Supreme Court precedent***

It is a familiar argument that the punishment imposed by the trial court should fit the crime found by the jury. The United States Supreme Court accepted one aspect of this principle in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), with the court holding, "[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." (*Id.* at p. 490.) This principle derives from two constitutional rights, the right to trial by jury and the prohibition against depriving a person of liberty without due process of law. (*Id.* at pp. 476-477.)

At issue in *Apprendi* was an enhancement under New Jersey law that could potentially double the maximum sentence for firearm possession from 10 to 20 years if a trial judge found a hate crime by the preponderance of the evidence. (*Apprendi, supra,* 530 U.S. at pp. 468-469.) The defendant admitted two counts of firearm possession and another offense under a plea bargain that his maximum sentence could be 20 years for two counts of firearm possession unless the court found a hate crime, in which case the maximum would be 30 years. (*Id.* at p. 470.) The defendant reserved the right to challenge the constitutionality of the enhancement statute. After an evidentiary hearing on the enhancement, the court imposed an enhanced term of 12 years on one possession count with concurrent terms on the remaining counts. (*Id.* at p. 471.)

The United States Supreme Court explained that historically judges had little discretion to determine a sentence after a jury verdict, although there was some discretion "in imposing sentence *within statutory limits* in the individual case." (*Apprendi, supra,* 530 U.S. at p. 481.) Constitutional concerns arise when a statute allows the judge to find "a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would received if punished according to the facts reflected in the jury verdict alone." (*Id.* at p. 483, fn. omitted.) The court had characterized this kind of fact as a "sentencing

factor" in *McMillan v. Pennsylvania* (1986) 477 U.S. 79, 86 (*McMillan*). (*Apprendi*, *supra*, 530 U.S. at p. 485.)

In *McMillan*, the statute at issue required a mandatory minimum sentence of five years if a person "'visibly possessed a firearm'" during the commission of certain offenses. (*McMillan*, *supra*, 477 U.S. at p. 81.) The United States Supreme Court briefly dispatched an argument "that the jury must determine all ultimate facts concerning the offense committed. Having concluded that Pennsylvania may properly treat visible possession as a sentencing consideration and not an element of any offense, we need only note that there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." (*Id.* at p. 93.) Among the indicators that firearm possession was a sentencing factor and not an element of the underlying offenses of robbery, rape, murder, and assault was the fact that the mandatory minimum was well below the maximum sentence provided by statute for each crime. "The statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." (*Id.* at p. 88.)

*Apprendi* minimized the significance of "the constitutionally novel and elusive distinction between 'elements' and 'sentencing factors.'" (*Apprendi*, *supra*, 530 U.S. at p. 494.) The court stated that the relevant inquiry is not whether the fact is called an element or a sentencing factor, but "does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?[19]" (*Id.* at p. 494.) Footnote 19 stated in part: "This is not to suggest that the term 'sentencing factor' is devoid of meaning. The term appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense. On the other hand, when the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." (*Ibid.*) *Apprendi* concluded that the New Jersey statute "is an unacceptable departure from the jury tradition." (*Id.* at p. 497.)

*Apprendi* purported not to overrule *McMillan*, but limited "its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict." (*Apprendi, supra,* 530 U.S. at p. 487, fn. 13.)

*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324 (*Sengpadychith*) recognized that *Apprendi* "treated a sentence enhancement as the functional equivalent of a crime. ([*Apprendi, supra,* 530 U.S.] at pp. 476-477, 483, fn. 10.) To put it more accurately, *Apprendi* treated the crime together with its sentence enhancement as the 'functional equivalent' of a single 'greater' crime. (*Id.* at pp. 490-495, & fn. 19.)" (*Sengpadychith*, *supra*, 26 Cal.4th at p. 326.) California has afforded criminal defendants a right to a jury trial on enhancements (Pen. Code, § 1170.1, subd. (e)), so *Apprendi* did not require a change in the way enhancements were pleaded or proved in California.

The holding of *Apprendi* was applied recently in *Blakely*. In that case the defendant pleaded guilty to second-degree kidnapping involving a firearm and domestic violence. (*Blakely*, *supra*, ___ U.S. at p. ___, 124 S.Ct. at pp. 2534-2535.) The maximum sentence under Washington law for second-degree kidnapping was 10 years, but under other statutory provisions a sentencing judge could only impose 49 to 53 months, unless the judge found an exceptional aggravating factor. The court imposed a sentence of 90 months, finding deliberate cruelty after a three-day evidentiary hearing. (*Id.* at p.___, 124 S.Ct. at pp. 2535-2536.) The defendant objected that this violated his right to a jury trial.

The real issue in *Blakely* was what was the statutory maximum penalty for *Apprendi* purposes. The court concluded "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations.] In other words, the relevant '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, supra,* ___ U.S. at p. ____, 124 S.Ct. at p. 2537.) Since the judge

had relied on a fact not found by the jury or admitted by the defendant, the sentence in *Blakely* was invalid. (*Id.* at p. ___, 124 S.Ct. at p. 2538.)

***B. Waiver and forfeiture***

The Attorney General asserts that defendant has forfeited his *Apprendi* claim by the failure to object in the trial court when the sentencing judge relied on facts not found by the jury.

*Blakely* itself observed, "nothing prevents a defendant from waiving his *Apprendi* rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding. [Citations] If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial." (*Blakely*, *supra*, ___ U.S. at p. ___, 124 S.Ct. at p. 2541.)

The term "waiver" has been applied both to the intentional relinquishment of a known right and the forfeiture of a claim by failing to timely assert it. (*People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. 6.) "'"The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had . . . ."' (*People v. Walker* (1991) 54 Cal.3d 1013, 1023.) '"No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." [Citation.]' (*United States v. Olano* (1993) [507 U.S. 725].)" (*Id.* at p. 590, fn. omitted.)

*People v. Scott* (1994) 9 Cal.4th 331 determined that the "waiver" doctrine applies to a sentencing judge's reasoning in imposing a discretionary sentence. "We conclude that the waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices. Included in this category are cases in which the stated reasons allegedly do not apply to the particular case . . . ."

(*Id.* at p. 353.) "[A] criminal defendant cannot argue for the first time on appeal that the court . . . aggravated a sentence based on items contained in a probation report that were erroneous or otherwise flawed." (*Id.* at pp. 351-352.)

Some courts have concluded that an *Apprendi* argument was forfeited by failing to assert it in the trial court. (*United States v. Cotton* (2002) 535 U.S. 625, 631, 634;[7] *U.S. v. Nance* (7th Cir. 2000) 236 F.3d 820, 824; *U.S. v. Lopez* (6th Cir. 2002) 309 F.3d 966, 969; *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061.[8]) One federal case has found a *Blakely* waiver based on the defendant's failure to raise the issue until supplemental briefing on appeal. (*U.S. v. Curtis* (11th Cir. 2004) 380 F.3d 1308.)[9] The

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[7] *United States v. Cotton*, *supra*, 535 U.S. 625 determined that a defendant's *Apprendi* claim was waived by the defendant's failure to assert it in the trial court. The court first held was that it was not a jurisdictional defect to omit drug quantity allegations from the indictment. (*Id.* at p. 631.) The court proceeded to review this omission under the "plain-error test of Federal Rule of Criminal Procedure 52(b)." (*Ibid.*) "'Under that test, before an appellate court can correct an error not raised at trial, there must be (1) "error," (2) that is "plain," and (3) that "affect[s] substantial rights."'" (*Ibid.*) If all three of those conditions are met, the court can consider a forfeited error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. (*Ibid.*) The court concluded that the error at issue did not pass that fourth test. (*Id.* at pp. 632-634.) We do not regard *Cotton* as dispositive, since the court did not discuss our concern below whether it would have been futile to make an *Apprendi* objection.

For reasons unknown to us, *People v. Cleveland* (2001) 87 Cal.App.4th 263 purported to apply this plain error rule of federal procedure to an *Apprendi* claim. (*Id.* at p. 268, fn. 2.) The court was on more solid footing in also concluding that the claim, arising as it did under Penal Code section 654, was reviewable without an objection. (*Ibid.*)

[8] *Marchand*, *supra*, 98 Cal.App.4th 1056 proceeded to reach the merits of the issue after holding that an *Apprendi* claim was waived. (*Marchand, supra,* at p. 1061.) The court did not consider whether it would have been futile to make an *Apprendi* objection.

[9] Recently the Fourth District Court of Appeal (Division One) has concluded that *Blakely* contentions were not forfeited by the failure to assert them in the trial court. (*People v. Ochoa* (Sep. 2, 2004, D042215) ___ Cal.App.4th ___ [involving consecutive sentencing] [pp. 15-16]; *People v. George* (Sep. 15, 2004, D042980) ___ Cal.App.4th ___ [involving an upper term] [pp. 18-19].) The Third District has concluded that *Blakely* contentions were forfeited by the failure to assert them in the trial court. (*People*

*(Continued)*

federal rule applied in that case appears stricter than California's rule. In California, while a party may need a good reason to present a new issue in a supplemental brief (*People v. Smithey* (1999) 20 Cal.4th 936, 1017, fn. 26), an intervening decision may be a good reason. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 23-24.)

Defendant contends that no objection is required when it is futile under controlling precedent. *People v. Welch* (1993) 5 Cal.4th 228 explained: "Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence. (*People v. Turner* (1990) 50 Cal.3d 668, 703; *People v. Ogunmola* (1985) 39 Cal.3d 120, 123, fn. 4; *In re Gladys R.* (1970) 1 Cal.3d 855, 861.)" (*Id.* at pp. 237-238.)

Prior to *Apprendi*, California courts had expressly rejected the argument that there was any right to a jury trial on sentence aggravating factors (apart from death penalty cases under Pen. Code, § 190.3). (*People v. Williams* (1980) 103 Cal.App.3d 507, 510; *People v. Betterton* (1979) 93 Cal.App.3d 406, 410-413.) California has conferred statutory rights to jury trial on enhancements (Pen. Code, § 1170.1, subd. (e)) and the issue "whether or not the defendant has suffered" an alleged prior conviction. (Pen. Code, § 1025, subd. (b); cf. § 1158.) But the California Supreme Court characterized these statutory rights as "limited" in *People v. Wiley* (1995) 9 Cal.4th 580, 589 (*Wiley*). Relying on *McMillan*, *supra*, 477 U.S. 79, *Wiley* stated that there was no federal or state constitutional right to a jury determination of "the truth of prior conviction allegations that relate to sentencing." (*Wiley, supra,* 9 Cal.4th at p. 586.) *Wiley* explained: "[T]he ability of courts to make factual findings in conjunction with the performance of their sentencing functions never has been questioned. From the earliest days of statehood, trial courts in California have made factual determinations relating to the nature of the crime

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*v. Sample* (Sep. 13, 2004, C044445) ___ Cal.App.4th ___ [involving an upper term] [pp. 35-37, 42]. The Third District did not discuss the futility of making such an objection.

and the defendant's background in arriving at discretionary decisions in the sentencing process . . . ." (*Ibid.*)

"Currently, under the provisions of the Determinate Sentencing Act, trial courts are assigned the task of deciding whether to impose an upper or lower term of imprisonment based upon their determination whether 'there are circumstances in aggravation or mitigation of the crime,' a determination that invariably requires numerous factual findings. [Citation.] Similarly, trial courts are called upon to make factual determinations in their decision whether to impose consecutive sentences." (*Wiley, supra,* 9 Cal.4th at p. 587.) The California Supreme Court restated the lack of a constitutional right to a jury trial on an enhancing factor (*People v. Wims* (1995) 10 Cal.4th 293, 304) and on a prior prison term allegation (*People v. Vera* (1997) 15 Cal.4th 269, 277).

In 2001, the California Supreme Court explained that *Apprendi* had implicitly overruled part of its earlier holding in *People v. Wims*, *supra*, 10 Cal.4th 293. (*Sengpadychith*, *supra*, 26 Cal.4th 316, 326.) But *Apprendi* was understood to apply to sentence enhancements, not to aggravating factors. In light of the above precedent, we conclude that it was reasonable for a defense attorney not to object at sentencing that the court could only rely on facts found by the jury beyond a reasonable doubt. The holding of *Blakely* was sufficiently unforeseeable that we find no forfeiture due to defendant's failure to object at sentencing.[10]

***C. The prescribed statutory maximum***

The first step in applying *Blakely* to the sentencing in our case is to determine what is the "prescribed statutory maximum" sentence. (*Apprendi*, *supra*, 530 U.S. 466,

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[10] In light of this conclusion, we need not consider defendant's argument that his constitutional right to a jury trial cannot be waived by implication or mere failure to assert the right in the trial court. (Cal. Const., art. I, § 16; *People v. Holmes* (1960) 54 Cal.2d 442, 443-444; see *People v. Saunders*, *supra*, 5 Cal.4th at p. 589, fn. 5; *People v. Vera*, *supra*, 15 Cal.4th at pp. 276-277.) We do note that defendant had a jury trial resulting in a jury convicting him of two crimes.

490.) This is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Blakely*, *supra*, ___ U.S. at p. ___, 124 S.Ct. at p. 2537, italics omitted.)

Under California's determinate sentencing law, "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime. . . . In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall set forth on the record the facts and reasons for imposing the upper or lower term. 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." (Pen. Code, § 1170, subd. (b).) California Rules of Court contain a nonexclusive list of 16 possible aggravating factors.[11]

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[11] Rule 4.421 states: "Circumstances in aggravation include:

"(a) Facts relating to the crime, whether or not charged or chargeable as enhancements, including the fact that: [¶] (1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness. [¶] (2) The defendant was armed with or used a weapon at the time of the commission of the crime. [¶] (3) The victim was particularly vulnerable. [¶] (4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission. [¶] (5) The defendant induced a minor to commit or assist in the commission of the crime. [¶] (6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process. [¶] (7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed. [¶] (8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism. [¶] (9) The crime involved an attempted or actual taking or damage of great monetary value. [¶] (10) The crime involved a large

*(Continued)*

The sentencing court is also required to impose sentence on any enhancements. "When the court imposes a prison sentence for a felony pursuant to Section 1170 or subdivision (b) of Section 1168, the court shall also impose, in addition and consecutive to the offense of which the person has been convicted, the additional terms provided for any applicable enhancements. If an enhancement is punishable by one of three terms, the court shall impose the middle term unless there are circumstances in aggravation or mitigation, and state the reasons for its sentence choice, other than the middle term, on the record at the time of sentencing." (Pen. Code, § 1170.1, subd. (d).) Unless a statute provides otherwise, sentencing judges retain authority under Penal Code section 1385 to strike enhancements in the interests of justice. (*People v. Meloney* (2003) 30 Cal.4th 1145, 1155.)

In this case the sentence range for possessing cocaine base for sale was "three, four, or five years." (Health & Saf. Code, § 11351.5.) For a second violation of section 11351.5, the underlying conviction "shall" be enhanced by "a full, separate, and consecutive three-year term for each prior felony conviction." (Health & Saf. Code, § 11370.2, subd. (a).) For a new felony conviction after a defendant has served a "prior separate prison term" for a felony, "the court shall impose a one-year term" of enhancement. (Pen. Code, § 667.5, subd. (b).)

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quantity of contraband. [¶] (11) The defendant took advantage of a position of trust or confidence to commit the offense.

"(b) Facts relating to the defendant, including the fact that: [¶] (1) The defendant has engaged in violent conduct which indicates a serious danger to society. [¶] (2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness. [¶] (3) The defendant has served a prior prison term. [¶] (4) The defendant was on probation or parole when the crime was committed. [¶] (5) The defendant's prior performance on probation or parole was unsatisfactory.

"(c) Any other facts statutorily declared to be circumstances in aggravation."

Rule 4.420(b) provides in part, "Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation."

The jury convicted defendant of possessing cocaine base for sale. This verdict alone authorized a maximum midterm penalty of four years. Except for the alleged enhancements, this midterm was arguably defendant's maximum penalty. (*People v. George*, *supra*, (Sep. 15, 2004, D042980) ___ Cal.App.4th ___, ____ [pp. 20-21].) Defendant ultimately waived jury trial on the alleged enhancements of two prior possession convictions under Health and Safety Code section 11351.5 and a prior prison term under Penal Code section 667.5, subdivision (b), first moving to bifurcate the trial and then admitting these allegations.[12] Based on these facts admitted by defendant the maximum enhancements of the midterm penalty totaled seven more years, including two fully consecutive three-year enhancements required by Health and Safety Code section 11370.2. We conclude that, applying the *Blakely* formula, 11 years was "the maximum sentence a judge *may* impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant" (*Blakely*, *supra*, ___ U.S. at p. ___, 124 S.Ct. at p. 2537; italics added, original italics omitted.) The fact that the sentencing court ultimately exercised its discretion and did not impose all available and admitted enhancements does not impact our calculation of the potential prescribed statutory maximum penalty.

In this case the sentence imposed was only six years. So long as the resulting sentence is within the maximum penalty authorized by the facts found by the jury and admitted by defendant, *Blakely* and *Apprendi* do not prohibit a sentencing court from relying on aggravating or mitigating facts not found by the jury or admitted by the

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[12] Because defendant admitted two prior possession convictions and serving a prior prison term, we need not consider the scope of the exception to *Apprendi* and *Blakely* for the fact of a prior conviction. This exception derives from *Almendarez-Torres v. United States* (1998) 523 U.S. 224 (*Almendarez-Torres*). We note that this has been interpreted broadly to include prior prison terms. (*People v. Thomas* (2001) 91 Cal.App.4th 212, 223.) We also note that *Apprendi* cast doubt on the continuing validity of *Almendarez-Torres* without revisiting the issue. (*Apprendi, supra,* 530 U.S. at pp. 487, 489-490.) The *Apprendi* and *Blakely* majorities consisted of Justices Stevens, Scalia, Souter, Ginsburg, and Thomas. A concurrence by Justice Thomas in *Apprendi* explained that he was mistaken in joining the majority in *Almendarez-Torres*. (*Apprendi, supra,* at pp. 520-521.)

defendant. (*Apprendi*, *supra*, 530 U.S. at p. 494, fn. 19.) We conclude there was no violation of *Blakely* in the trial court imposing an upper term based on defendant's return to crime after only 24 days on parole.[13]

### 4. CUMULATIVE PREJUDICE[*]

Defendant's final contention is that this case is one where "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844-845, and cases there cited.)

Above we have identified only one matter that is even arguable error, namely admission of evidence of defendant's unemployment. In the absence of other errors, there would be nothing for this to cumulate with. Whether or not the trial was perfect, it was certainly fair. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Boyette* (2002) 29 Cal.4th 381, 468.)

### DISPOSITION

The judgment is affirmed.

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[13] The following issues are pending in the California Supreme Court. The court granted review in *People v. Towne*, review granted July 14, 2004, S125677 on the following questions: "(2) Does [*Blakely, supra,*] ___ U.S.___, 124 S.Ct. 2531, preclude a trial court from making findings on aggravating factors in support of an upper term sentence? (3) If so, what prejudicial error standard applies, and was the error in this case prejudicial?" The Court also granted review in *People v. Black*, review granted July 28, 2004, S126182, on the following questions: "(1) What effect does [*Blakely*] have on the validity of defendant's upper term sentence? (2) What effect does *Blakely* have on the trial court's imposition of consecutive sentences?"

[*] See footnote, *ante*.

Walsh, J.*

WE CONCUR:

Rushing, P.J.

Premo, J.

People v. Barnes
H026137

*Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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| Trial Court: | Santa Clara County Superior Court<br>No. CC267763 |
| Trial Judge: | Hon. Thomas C. Hastings |
| Attorney for Defendant and Appellant:<br>(Under appointment by the Court of Appeal) | Cindy A. Diamond |
| Attorneys for Plaintiff and Respondent: | BILL LOCKYER<br>Attorney General,<br><br>ROBERT R. ANDERSON<br>Chief Assistant Attorney General<br><br>GERALD A. ENGLER<br>Senior Assistant Attorney General<br><br>CATHERINE A. RIVLIN<br>Supervising Deputy Attorney General<br><br>ROSS C. MOODY<br>Deputy Attorney General. |