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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JOHN RICHARD CROTEAU, Defendant and Appellant.	D042779 (Super. Ct. Nos. 157199 & 160730)

APPEAL from a judgment of the Superior Court of San Diego County, Michael Kirkman and Joe O. Littlejohn, Judges. Affirmed in part, reversed in part and remanded.

A jury convicted John Richard Croteau of five counts of residential burglary (Pen. Code,[1] §§ 459 & 460; counts 1, 2, 4, 5 & 6)[2] and one count of receiving stolen property (§ 496, subd. (a); count 7). The jury acquitted Croteau of the alleged count 3 residential burglary. (§496, subd. (a).)

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1 All further statutory references are to the Penal Code unless otherwise specified.

The court sentenced Croteau to an aggregate term of 12 years in prison, consisting of the upper term of six years on count 1, consecutive 16-month midterms on counts 2, 4, 5 and 6, and a consecutive eight-month term on count 7.

Croteau appeals, contending the court abused its discretion in refusing to sever for trial the first residential burglary count from the other five residential burglary counts. He, therefore, asserts he was denied a fair trial because the joinder had a substantial influence on the jury's verdicts.

During the pendency of this appeal, we asked the parties for supplemental briefing on the applicability of the recent United States Supreme Court case of *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531; 159 L.Ed.2d 403] (*Blakely*) on the upper term imposed on count 1 and the consecutive sentences on the other counts in this case, and also on the legality of the parole restitution fine imposed under section 1202.45.

After careful consideration of all the briefing, the record and law, we reverse the sentence on count 1, vacate the parole restitution fine and remand for resentencing. In all other respects, we affirm.

FACTS

Although Croteau does not challenge the sufficiency of the evidence, we summarize the pertinent facts brought out at trial regarding each count as background for our discussion.

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2 As to count 1, the jury found someone (other than an accomplice) was inside the residence at the time of the burglary. (§ 667.5, subd. (c)(21).)

COUNT 1

Around midnight on January 24, 2003, as Pamela and David Scott slept in their Rancho Del Mar home, Pamela awoke screaming that someone was coming up the stairs to their bedroom.[3] David saw flashlight beams bouncing around the nearby halls and also began to yell and scream. He ran into the hallway just in time to see the intruder flee out the front door as the alarm went off.

Meanwhile, Pamela had called the police. When San Diego Sheriff's deputies arrived, David reported a digital camera missing, along with his billfold, which contained credit cards, two or three $100 bills, a few $20 bills, and three or four "real crisp, brand new" $5 bills.

During their investigation, deputies found a backpack containing a diver's card with Croteau's picture, name, and birthdate outside a broken window. Deputies also noticed bicycle tracks leading away from the backpack, down the grass, and into the driveway, where they found a clip-on pedal.

The deputies traced information on Croteau's dive card to his residence at 4948 Ladera Sarina, Rancho Santa Fe. They then drove to a single-family residence with a detached barn/loft area, which was less than one mile from the Scotts' home. When they arrived, the main house was dark, but lights were on in the loft.

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[3] The Scotts refer to their neighborhood as Rancho Del Mar. This is synonymous with Rancho Santa Fe, as evidenced by police officers' descriptions of the area as Rancho Santa Fe.

As the deputies approached the barn/loft, they noticed a red bicycle missing its pedals with moist, dirty, grass-covered tires, leaning against the wall. The tire patterns on the bicycle seemed similar to tracks left on the Scotts' driveway. Deputies later walked from Croteau's home to the Scotts' home looking for additional evidence and found a second bicycle pedal on a nearby driveway.

After inspecting the bicycle, one deputy walked upstairs to the loft, home to Michael and Amber Flippen, and knocked loudly until Michael came to the door. He told the deputies Croteau lived in the main house and led the deputies to an unlocked side door, offering to find Croteau himself. After he was told to wait outside, deputies entered the main house, calling, "Sheriff's department. Come out," several times. Two of Croteau's roommates stepped out of a side bedroom and were asked to wait outside. Croteau then poked his head out of a rear bedroom door, darted back inside and slammed the door, yelling, "I don't know who you are. I'm going to call the sheriffs. I'm going to call the cops." One of the deputies responded, "We are the cops."

Shortly afterward, Croteau emerged from the bedroom, sweaty and angry. Without any prompting from the deputies, Croteau told them that if this was about his dive bag, it was stolen from his porch earlier in the day. A deputy then escorted Croteau outside where he was patted down. Croteau again stated his dive bag had been stolen, only this time he claimed the theft occurred on a diving trip. Croteau consented to the removal of some papers from his pocket and the deputy pulled out several $100 bills, some brand new $5 bills and some $1 bills. The denominations roughly matched those David Scott had described as stolen from his billfold.

Deputies then drove Croteau to the Encinitas Sheriff's station. As a deputy walked through the station carrying the dive bag, Croteau called out, "I see you found my dive bag."

Deputies subsequently searched Croteau's home pursuant to a search warrant and found an abundant amount of stolen property throughout the residence, but primarily in Croteau's bedroom.

COUNT 2

On October 21, 2002, Mehraban Iraninejad left his Rancho Santa Fe home for work around 8:30 a.m. and returned around 5:00 p.m., after his father had called to say things looked suspicious. Iraninejad discovered his home had been burglarized and called the sheriff's department.

A deputy sent to Iraninejad's home determined the burglar had probably entered by breaking the screen window to the laundry room and collected latex gloves left nearby. Iraninejad reported his watches, passport, laptop, cameras, and an assortment of foreign currency were missing, including Euros and money from Switzerland and the Bahamas. Deputies later found Iraninejad's Social Security card and currency from those countries in Croteau's bedroom.

DNA testing performed on the gloves from the laundry room revealed two sources of DNA, a male and a female. Croteau could not be excluded as the male, meaning it was 4,400 times more likely the DNA belonged to him than to a random person.

COUNT 3

On November 20, 2002, Joseph Capozzi left his Rancho Santa Fe home around 11:00 a.m. He returned around 5:00 p.m. and discovered the sliding glass door in the kitchen was open and its locking mechanism had been pried apart. When his wife returned home and discovered the chaotic state of their bedroom, they summoned sheriff's deputies and reported they were missing jewelry boxes, credit cards, a wallet, Social Security cards, sterling silver flatware, and heart medication. The deputies collected latex gloves at the scene but were not able to identify a DNA provider. Items stolen from the Capozzis' home were later discovered in the Flippens' loft.

COUNT 4

On December 3, 2002, Theodore and Anabel Mintz left their Rancho Santa Fe home around 4:30 p.m. When they returned around 9:00 p.m., a helicopter was flying overhead and sheriff's deputies informed them their house had been burglarized. The glass door leading into the master bedroom had been smashed in, apparently with a steel stake left nearby. Inside, the master bedroom and a nearby office had been ransacked. The Mintzes determined many things were missing but could not determine the full extent of the theft.

Deputies opined the burglar had probably used latex gloves because fingerprints could not be lifted from powder-lined smudges on the Mintzes' drawers. Similar powder smudges were often left when deputies wore latex gloves to investigate a crime scene.

The Mintzes' Social Security cards were later found in Croteau's bedroom; their flashlight was found in his hallway, and their camera was found in the Flippens' loft.

COUNT 5

On December 22, 2002, Peter F. Newell left his Rancho Santa Fe condominium for a weeklong trip to the Bay area. When a friend stopped by to pick up the mail, she observed the condominium was in a general state of disarray, with Newell's belongings strewn all over the floor. After noticing the sliding glass door was open, she called the sheriff's department.

Newell later reported about $800 missing from his top drawer along with a $600 coin collection, credit card statements and numerous other items of personal property. About $7,000 had been charged to his credit cards over the course of seven days. Newell's pen set, wallet, money clip, cardholder, IBM watch, and NCAA and Olympics memorabilia were later found in Croteau's bedroom. In addition, Croteau's DNA matched DNA found in latex gloves at the scene.

COUNT 6

On January 21, 2003, Russell Ehdaie left his Rancho Santa Fe home to teach martial arts. When he returned home, he found his front door open and his back sliding glass door smashed in.

Upon entering his home with sheriff's deputies, Ehdaie immediately noticed two Persian carpets were missing from the living room, along with a laptop he had left on a recliner. Further inspection revealed the entire house had been ransacked, and items were missing from every room.

Many of Ehdaie's possessions were later found in Croteau's bedroom, including two ornate jewelry boxes, a backpack, handmade crafts from Iran, and two laptops. In addition, his briefcase and credit cards were found in the Flippens' loft.

COUNT 7

Croteau was charged with the count 7 receiving stolen property offense based on the presence of a Social Security card and Goofy watch in his bedroom, which had been stolen from Nina Walker's Rancho Penasquitos home on December 16, 2002. It was also based on the presence of a Social Security card and two watches belonging to Chanda Shaha in his bedroom, whose Tierresanta home had been burglarized on December 17, 2002. In addition, Freling Baker's knife collection, watch, wallet, travel clock, camera and calculator were found in Croteau's bedroom, along with Baker's wife's necklace and ring. The items had been stolen from Baker's La Jolla home on January 16, 2003. Baker's wife's checks and other necklaces were later found in the Flippens' loft. Lastly, the count 7 charge was based on the presence of concert tickets, jewelry, and a jewelry box in Croteau's bedroom, all of which had been stolen from Gerald Blank's La Jolla home on January 17, 2003.

The Defense

Croteau testified in his own defense, denying he had burglarized any of the homes alleged in counts 1 through 6, and denying he had "fenced" stolen property. Croteau, who lived at the residence in Rancho Santa Fe at the time of the burglaries, stated he was a freelance masonry subcontractor, and rented rooms in his house to the Flippens and several others. Oftentimes the Flippens and the other roommates would give him

personal property if they did not have money for rent. Other times, the Flippens would give him "trinkets and things" for use of his computer and leniency on their rent payments. Croteau also "donated half of [his] closet to them" because they had no closet in the loft.

Croteau testified he knew "something was up" and suspected Amber Flippen had stolen purses when he saw $900 price tags on a number of handbags in his bedroom and saw identification in the bags that did not belong to the Flippens. He said nothing to them because he "didn't want to believe" they were involved in illegal activities. Although Croteau admitted he had a fake identification card with Amber's photo pinned on his cork board, he denied he "possessed" false documents or was creating them.

Croteau testified he did not know why the sheriffs had come to his residence. He also denied he brought up the dive bag first. Rather, he claimed that when the sheriffs said they had found a backpack with his identification at the scene of a crime, he asked if it was a dive bag, because his dive bag had been stolen out of his yard earlier that day. According to Croteau, the cash in his pocket at the time of the pat down came from another roommate, who owed him $300 in rent. He claimed he was holding the jewelry found in his safe for other people. He denied needing money.

Croteau conceded all the latex gloves in evidence belonged to him. He explained that he wore gloves in his garage when working with wood, lacquer or varnish. Croteau also acknowledged his DNA was found on one pair of gloves. He further admitted he had been convicted of a felony in 1988 for automobile burglary.

DISCUSSION

I

SEVERANCE MOTIONS

Croteau contends the trial court abused its discretion when it denied his motion to sever count 1 (burglary of the Scotts' residence) from counts 2 through 6 (the remaining burglary counts). He specifically argues the court erred because the evidence was not cross-admissible and the "spillover" effect of aggregating the evidence from count 1, which was strong, with counts 2 through 6, which were weaker, created potential prejudice. Croteau also asserts he was denied a fair trial because the joinder of the counts had a substantial influence on the jury's verdict. After setting out the factual background for these motions, we explain why Croteau's contentions fail.

A. Factual Background

Pretrial, the People brought a motion to consolidate this case (SDSC No. 157199), which charged the count 1 burglary and count 7 receiving stolen property, with a later case (SDSC No. 160730), which charged Croteau with five residential burglaries (counts 2-6). Croteau opposed the motion and brought his own motion to sever the cases, or the counts, for trial.

The court granted the motion to consolidate the later case into the earlier case, which is the case on appeal, noting joinder was appropriate under section 954 because the offenses were of the same class of crimes and committed "within a matter of months of one another." The court left to the discretion of the trial court the issue of severance, taking into account the specific issues related to the evidence in this case and any

prejudice that might be suffered by Croteau. Subsequently, when the matter was before the trial court for in limine motions, Croteau again presented his motion for severance. The trial judge denied the motion, stating:

> "I'll indicate on the record that Penal Code Section 954 expresses the preference for joint trials for similar matters against a single defendant if the crimes charged are an offense of the same class of crime or different offenses connected together in their commission unless the defendant can establish a clear showing of prejudice in this case. [¶] Since there was no evidentiary hearing or no information pursuant to the Court, then the Court's not in a position to assume anything. And there's been no showing of any kind made by the defendant in this case. All of the offenses are the same class of crime, that is they are theft crimes. There are six counts of burglary, one count of receiving property -- receiving the stolen property involving a single defendant, Mr. Croteau. [¶] In this case all of the counts are cross-admissible in that the discovery . . . of all the stolen items took place at the defendant's residence and [gave] rise to an investigation which resulted in the charges which make up the various instant counts in this case. [¶] Defendant states the position that he may be prejudiced if he intends to present a separate defense. And he also states that the jury may use the evidence of one crime charged to infer criminal disposition on the part of the defendant as to the other charges. And he also states that the jury may accumulate the evidence of the various crimes charged implying guilt. [¶] However, the law is that prejudice is not assumed and must be clearly established by the parties seeking the severance. And, again, I have no evidence -- I have argument[s] and legal positions but no evidence before me to determine if there is any prejudice that I can glean from my information that I have. [¶] The defendant must show a substantial danger of undue prejudice, and the prejudice has to be of the nature -- as to the nature so great that the defendant would be denied a fair trial. [¶] And there [has] been no such showing, and consequently the motion to sever is denied."

B. Application of the Law

Generally, the denial of a severance motion is reviewed for abuse of discretion. (*People v. Osband* (1996) 13 Cal.4th 622, 666.) "A court abuses its discretion when its

ruling 'falls outside the bounds of reason.'" (*Ibid.*) We find the court's ruling on the motion to sever was reasonable.

Under section 954, "[a]n accusatory pleading may charge two or more different offenses connected together in their commission . . . or two or more different offenses of the same class of crimes or offenses, under separate counts, . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately . . . ." "Offenses committed at different times and places against different victims are, nevertheless, 'connected together in their commission' when there is a 'common element of substantial importance' among them. [Citations.]" (*People v. Matson* (1974) 13 Cal.3d 35, 39.)

The joinder of such related charges, "whether in a single accusatory pleading or by consolidation of several accusatory pleadings, ordinarily avoids needless harassment of the defendant and the waste of public funds which may result if the same general facts were to be tried in two or more separate trials [citation], and in several respects separate trials would result in the same factual issues being presented in both trials." (*People v. Ochoa* (1998) 19 Cal.4th 353, 409.)

Here, count 1 and counts 2 through 6 were all for residential burglaries and thus were clearly of the same class since all theft offenses are classified as crimes against property. (See *People v. Allen* (1999) 21 Cal.4th 846, 866.) Also, the counts were generally related as a string of residential burglaries in the Rancho Santa Fe area, within a

month or two, which were tied together circumstantially by the stolen property discovered during a search of Croteau's home. Joinder of such counts under section 954 was therefore appropriate and preferred unless Croteau could make "a clear showing of potential prejudice" due to the consolidation of such properly joined counts. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1315 (*Bradford*).) Croteau failed to do so.

"'"The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.'" [Citation.]" (*Bradford, supra,* 15 Cal.4th at p. 1315.) Whether joinder of properly joined counts would cause prejudice depends on the circumstances of each case, "but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever trial." (*Frank v. Superior Court* (1989) 48 Cal.3d 632, 639.) The denial of a severance motion "may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a 'weak' case has been joined with a 'strong' case, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case. [Citations.]" (*People v. Sandoval* (1992) 4 Cal.4th 155, 172-173 (*Sandoval*), distinguished on another point in *People v. Lewis* (2001) 26 Cal.4th 334, 390.)

These criteria, however, are not "equally significant." (*Bradford, supra,* 15 Cal.4th at p. 1315.) "'[T]he first step in assessing whether a combined trial [would have

been] prejudicial is to determine whether evidence on each of the joined charges would have been admissible . . . in separate trials on the others.[4] If so, any inference of prejudice is dispelled.' [Citations.] Cross-admissibility suffices to negate prejudice, but is not essential for that purpose. Although "'we have held that cross-admissibility ordinarily dispels any inference of prejudice, we have never held that the absence of cross-admissibility, by itself, sufficed to demonstrate prejudice.'" [Citation.]" (*Id.* at pp. 1315-1316; fn. added.)

"[T]he propriety of a ruling on a motion to sever counts is judged by the information available to the court at the time the motion is heard." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1284.) In this case, the prosecutor originally argued the evidence of stolen property upon which the count 7 charge was based would be cross-admissible in separate trials on all the other counts. Croteau claimed the evidence in counts 1 and 7 was not cross-admissible with the other counts but recognized that section 954.1 "does not provide the offenses cannot be severed because evidence is not cross-admissible." The court in ruling on the matter stated that "all of the counts are cross-admissible," because the discovery of all the stolen property was at Croteau's residence and gave rise to the investigation, which resulted in all the charges in the consolidated case. The court also found that Croteau had not met his burden of showing "a substantial danger of prejudice" arising from the joinder of the charges. (*Sandoval*, *supra,* 4 Cal.4th at p. 172.)

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4 Although evidence of other crimes is not cross-admissible to establish a disposition to commit crimes under Evidence Code section 1101, it is admissible to

We agree and conclude that on the information before the court at the time of its ruling, there was no abuse of discretion in denying the severance motion.

Croteau disputes the court's conclusion "all the counts were cross-admissible," arguing that like the situation in *People v. Bean* (1988) 46 Cal.3d 919 (*Bean*), where the California Supreme Court held the facial similarities of the murders were not sufficiently distinctive on the issue of identity to be cross-admissible (*id.* at pp. 936-939), the similarities of the various residential burglaries in this case were also not sufficiently distinctive to show modus operandi for cross-admissibility. Croteau's reliance on *Bean* is misplaced.

In a trial on each individual burglary count, evidence of other charged burglaries generally would be admissible to show that Croteau committed the charged burglary as part of a common scheme or plan, which is relevant to the element of intent. (Evid. Code, § 1101, subd. (b); §§ 459, 460.) The burglaries, which were committed within a two and one-half month period, all shared certain characteristics, all being residential, within the Rancho Santa Fe area, within several miles of Croteau's residence, sharing similar methods of entry (through sliding glass doors and windows), with similar items taken (cameras, identification, laptops, credit cards, cash, jewelry and Social Security cards), the burglar frequently left latex gloves behind (twice with Croteau's DNA on them), and the bulk of the stolen property was found in Croteau's bedroom or in areas of his home to which he had access.

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establish other relevant facts, including intent, motive, knowledge, or identity. (Evid. Code, §1101, subd. (b).)

As the California Supreme Court noted in *People v. Ewoldt* (1994) 7 Cal.4th 380:

> "To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual. . . . Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense. [Citation.]" (*Id.* at p. 403.)

Thus, in general, the charged burglary offenses in these cases were sufficiently similar to each other to support an inference Croteau acted according to a plan in committing each crime. Moreover, several aspects of some of the offenses, such as the latex gloves with his DNA on them found at the scenes, in addition to the other similarities, were sufficiently alike to each other as to support cross-admissibility on modus operandi for identity. (See *Bradford, supra,* 15 Cal.4th at p. 1316.) That all of the charged burglaries were not committed in exactly the same manner simply does not preclude cross-admissibility as Croteau argues. (*People v. Kraft* (2000) 23 Cal.4th 978, 1030-1032.)

Although the court did not specifically determine the cross-admissibility of proposed evidence with regard to count 1 as to each other count, it essentially found such possible due to the nature of the string of similar, residential burglaries and the discovery of all the stolen property at Croteau's residence.

However, even assuming the court erroneously stated the evidence regarding all counts was cross-admissible, the potential prejudice Croteau asserted would result by joining count 1 with the other counts, "[does] not rise to the level

of demonstrating that the court's denial of severance was an abuse of discretion. (*Sandoval, supra,* 4 Cal.4th at p. 173.)

Croteau presented no additional argument of prejudice at the motion hearing other than to assert there would be a prejudicial "spillover" effect in joining count 1 with the other counts because it was a stronger case and he might present different defenses to each count. Although the possibility of a "spillover" effect may have existed as to counts 3, 4 and 6, because the evidence in those counts was admittedly weaker than in count 1 (supported mainly by the evidence of the stolen property found in Croteau's home), Croteau's "spillover" argument fails completely as to counts 2 and 5 where the evidence regarding those offenses was independently strong because of the latex gloves with DNA matching Croteau's found at the crime scenes in addition to the items from the burglaries being found in his bedroom. The jury acquitted Croteau of the weakest count, count 3, where the stolen items were found only in the Flippens' loft. This tends to show the jury did not aggregate the stronger evidence from count 1 with the similar counts and that no prejudice to Croteau actually occurred from any alleged "spillover." (See *Bradford, supra,* 15 Cal.4th at p. 1318.) Croteau's claim regarding presenting different defenses was purely speculative.

Moreover, the facts underlying count 1 were not more likely to inflame a jury than any of the other property offenses charges. Nor was this a capital case, or rendered one because of the joinder of the counts. Thus, as the trial judge properly found, Croteau did not meet his burden of showing a "substantial danger

of prejudice requiring that the charges be separately tried" under the elements provided in *Sandoval.* (*Bean, supra,* 46 Cal.3d at p. 938.)

C. Due Process/Fair Trial

Although on this record we cannot find the trial court abused its discretion in denying the severance motion, "[b]ecause the issue is raised on appeal following trial [and Croteau asserts he was denied a fair trial by the denial of his severance motion], we must also consider whether, 'despite the correctness of the trial court's ruling, a gross unfairness has occurred from the joinder such as to deprive the defendant of a fair trial or due process of law.' [Citation.]" (*Sandoval, supra,* 4 Cal.4th at p. 174.) Croteau's bald assertion of gross unfairness caused by joining a strong count with multiple weaker counts is based on several cases factually distinguishable from his. (*Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073; *People v. Grant* (2003) 113 Cal.App.4th 579.) The record shows the trier of fact carefully considered the admissible evidence and acquitted Croteau of the weakest count 3 residential burglary charge. He has not demonstrated any actual prejudice from an alleged "spillover" effect of count 1, resulting from the joinder of the charges for trial. (*Bradford, supra,* 15 Cal.4th at p. 1318.) Rather, Croteau mischaracterizes the record, ignoring the proximity of the burglarized residences to his residence, the similarity of the break-ins and property taken, the closeness in time of the six burglaries, and the presence of latex gloves at several burglaries, two of which contained his DNA. Contrary to Croteau's assertion, more than the cache of stolen property in his bedroom and home tied him to the multiple burglaries.

The jury simply did not believe Croteau's testimony that all the stolen property in his bedroom belonged to the Flippens, or were given to him by the Flippens and his other roommates as gifts or in lieu of rent.

Croteau contends the prosecutor in closing referred to the incredible amount of cumulative evidence and its spillover impact deprived him of due process and a fair trial. We reject that argument. The prosecutor mentioned the latex gloves found at several of the residences which were linked to Croteau, Croteau's incredible testimony, the amazing amount of stolen property found in Croteau's bedroom and throughout his residence. In addition, he discussed each burglary separately, pointing out the strength of the evidence, both direct and circumstantial, as to each count, and the similarities of the burglaries to each other. Both counsel also told the jurors to consider the evidence independently for each count. Because Croteau was acquitted on one of the counts, the record reflects the jury necessarily compartmentalized the evidence and considered each count separately. We, therefore, conclude Croteau has failed to show that denial of severance deprived him of a fair trial. (*Sandoval, supra,* 4 Cal.4th at p. 174.)

II

BLAKELY ISSUES

After considering the probation report and hearing arguments from counsel and testimony from several victims of the residential burglaries, including the Scotts with regard to the emotional trauma they experienced during and since the burglary of their home, the court denied probation and sentenced Croteau to serve 12 years in prison. In doing so, the trial judge stated:

> "[T]he court is of the opinion that there are aggravating factors . . . necessitating [imposition of] the upper term. And those factors are factors that I can consider under the judicial council sentencing rules. [I]t was clear that the defendant inflicted emotional injury on the victims who are involved here, and the court can consider that as a factor to aggravate under [California Rules of Court,] rule 4.414, subdivision (a)(4). [¶] The testimony of the victims who came to testify today obviously have been that. It was my belief even before they testified that there was emotional injury inflicted upon them. [¶] Additionally, the court can consider in aggravation the defendant's involvement, which I consider to be sophisticated. And further, the court can consider whether or not I feel that, if not imprisoned, that he would continue to be a danger. And it appears to the court that I can reasonably infer, based upon his conduct, that if he were not imprisoned, that he would in fact continue this and remain a danger in the community. [¶] So for those reasons, the court is going to aggravate the principal term and define that term as count 1, and impose the upper term of six years."

The court then imposed consecutive sentences of 16 months for counts 2, 4, 5 and 6,[5] and eight months for count 7. The court noted it was "consecutizing the counts based upon the fact that -- certainly the court has the discretion. But it appears that [California Rules of Court,] rule 4.425, subdivision (a)(3) would justify consecutive sentencings since these crimes were committed at different times and at separate places and do not appear to be a single period of abhorrent behavior."

Although Croteau raised no issue on appeal regarding the court's imposition of the count 1 upper term or the consecutive terms, because the decision in *Blakely* recently held that a trial court may not increase a sentence beyond the statutory maximum of the

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5 Although it appears the court misspoke when it imposed only six months for count 6, the court minutes and abstract of judgment correctly reflect the sentence for count 6 is 16 months.

standard range for an offense based on additional facts not found by a jury, we asked for supplemental briefing on the applicability of *Blakely* to such terms imposed in this case.

In his supplemental brief, Croteau contends that the trial court's reliance on factors not found true by the jury for imposition of the count 1 upper term as well as the consecutive terms violated the holding of *Blakely, supra,* 124 S.Ct. 2531, 159 L.Ed.2d 403. The attorney general responds that Croteau has waived both issues by failing to timely object to the court's sentencing choices below, that *Blakely* does not apply to the California sentencing procedure which requires the finding of an aggravating circumstance to impose the upper term, or to the imposition of consecutive sentences, and that, even if *Blakely* error exists and the issue is not waived, such error did not prejudice Croteau.

With regard to the waiver issue, this court recently rejected similar arguments brought by the attorney general as brought here. In both *People v. George* (2004) 122 Cal.App.4th 419 (*George*) and *People v. Lemus* (2004) 122 Cal.App.4th 614 (*Lemus*), we held the waiver rule of *People v. Scott* (1994) 9 Cal.4th 331, did not support the application of the waiver rule in cases claiming *Blakely* error raised for the first time on appeal where *Blakely* had been decided after the sentencing in that case. (*George, supra,* 122 Cal.App.4th at p. 424; *Lemus, supra*, 122 Cal.App.4th at pp. 619-620.) Having reviewed both *George* and *Lemus* in light of this case, we continue to adhere to such holding.

Further, like the defendant in *Lemus*, Croteau vigorously advocated in the trial court for a midterm sentence because such would provide a sufficiently lengthy term of

imprisonment in light of the Scotts being at home when he burglarized their residence. He pointed out that he had never been to prison, he had generally selected houses he believed were empty and, contrary to the probation report, he was not armed at the time he committed the burglaries. As we found in *Lemus*, "[u]nder the circumstances, it would be unreasonable to find that [Croteau] abandoned a constitutional challenge of which he was unaware." (*Lemus, supra*, 122 Cal.App.4th at p. 620.)

Moreover, with regard to "whether *Blakely* precludes a trial court from making findings on aggravating facts in support of an upper term sentence," we noted in *George* and *Lemus* that such issue is currently under review by the California Supreme Court in *People v. Towne* (review granted July 14, 2004, S125677) and *People v. Black* (review granted July 28, 2004, S126182 (*Black*)). (*George, supra,* 122 Cal.App.4th at p. 425; *Lemus, supra*, 122 Cal.App.4th at p. 620.) Nevertheless, we undertook an analysis of whether *Blakely* applied under the circumstances of *George* and *Lemus* where the court had imposed upper term sentences in each respectively, and found that "[b]ecause the maximum penalty the court can impose under California law without making additional factual findings is the middle term, *Blakely* applies. Thus, the question becomes whether the trial court could properly rely on any of the cited factors as the basis for its decision to impose the upper term without violating *Blakely*." (*George, supra,* 122 Cal.App.4th at p. 425; *Lemus, supra*, 122 Cal.App.4th at p. 621.)

In the present case, the trial court relied on a number of aggravating factors as the basis for its decision to impose the upper term as to count 1. The court noted Croteau had inflicted emotional injury on the victims involved, was sophisticated in his involvement

in the crimes, and would continue to be a danger in the community if not imprisoned based upon his conduct. "In accordance with *Blakely,* the Constitution requires a jury trial on any fact that 'the law makes essential to the punishment' other than the fact of the defendant's prior conviction. [Citation.]" (*George, supra,* 122 Cal.App.4th at p. 426; (*Lemus, supra*, 122 Cal.App.4th at p. 621.) Applying that standard to this case, it is clear that there is no finding by the jury on which the trial court could rely for the selection of the upper term sentence. Thus, like the situation in *George* or *Lemus*, the court here stated factors in aggravation that would necessitate a jury trial under the holding of *Blakely, supra,* 124 S.Ct. 2531, l59 L.Ed.2d 403.

The question then becomes whether the error under *Blakely* is harmless. As we noted in response to the attorney general's argument in *Lemus* that any error under *Blakely* is harmless if "any jury would have found the factors in aggravation to be true" (*Lemus, supra*, 122 Cal.App.4th at pp. 621-622), such argument, advanced again here, "misses the point of *Blakely*. [¶] The decision in *Blakely* is premised on the notion that the defendant has a constitutional right under the Sixth Amendment to a jury trial as to any factual determination which increases the sentence which could be imposed based upon the finding of guilt on the offense alone. In this case, we have concluded [Croteau] had a constitutional right to a jury trial on any fact that would justify the trial court increasing the sentence beyond the presumptive middle term for [count 1]. Accordingly, we believe that the loss of the jury trial right cannot be found harmless on the theory that if a jury trial had been held the defendant would have lost on the issue. The point of *Blakely* is that the jury trial must be held." (*Lemus, supra*, 122 Cal.App.4th at p. 622.)

Moreover, whether we apply the traditional harmless error standard or the constitutional harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24, we cannot conclude that the error in this case is harmless. Although the probation report contains several factors which the trial court could have used to impose an upper term without violating *Blakely* because they relate to prior convictions,[6] because the sentencing court did not mention or rely on any of those circumstances, and did not expressly balance the aggravating factors against the mitigating factors or find that there were no mitigating factors, we cannot determine on this record whether the elimination of the improperly relied upon factors would not have made a difference in the court's sentencing decision. (*George, supra*, 122 Cal.App.4th at pp. 426-427.) Accordingly, we reverse the judgment as to the upper term sentence for count 1 and remand for resentencing.

With regard to the consecutive terms imposed for Croteau's other counts we note the issue of whether *Blakely* has any effect on a trial court's imposition of consecutive sentences is also pending before our Supreme Court. (*Black, supra* (review granted July 28, 2004, S126182).) Nevertheless, we have reviewed the opinion in *People v. Sample* (2004) 122 Cal.App.4th 206 (*Sample*), and agree with its holding and reasoning that *Blakely* does not apply to the imposition of consecutive terms. (*Sample, supra*, 122 Cal.App.4th at pp. 225-227.)

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6 The probation report shows that Croteau's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or increasing in

Croteau's claim the court violated *Blakely* when it imposed consecutive sentences for his six counts thus fails, consistent with the reasons given by the court for imposing those consecutive terms, "the verdicts reflect findings that the crimes covered by counts [2, 4, 5 , 6 and 7] were committed against separate victims, at different times, and in different places, thus exposing [Croteau] to the sentence imposed." (*Sample, supra*, 122 Cal.App.4th at p. 227.)

In sum, the upper term sentence for count 1 must be vacated and the case remanded to the superior court to conduct a new sentencing hearing consistent with the principles discussed in this opinion.

III

PAROLE RESTITUTION FINE

During our review of the sentencing record for the *Blakely* issues in this case, we discovered that the trial court had imposed a restitution fine of $2,400 under section 1202.4, subdivision (b) and a parole restitution fine of $600 under section 1202.45. Because section 1202.45 states that "the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional restitution fine *in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4*[,]" which is then suspended unless the person's parole is revoked (§ 1202.45), the court imposed an unauthorized parole restitution fine, or committed an "obvious legal error[] at sentencing[.]" (*People v. Smith* (2001) 24 Cal.4th 849, 852 (*Smith*).) Such legal error is

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seriousness; that he was on probation when the present offenses were committed; and that his past performance on probation had been unsatisfactory.

not waivable and is subject to correction by this court when discovered on appeal. (*Id*. at p. 852.)

Based on this discovery, we requested the parties submit supplemental briefing on the issue. Croteau concedes that because the amount of the restitution fine imposed under section 1202.4, subdivision (b) has not been challenged, the $600 parole revocation fine cannot be lawfully imposed in this case. (*Smith, supra*, 24 Cal.4th at p. 853.) Because we are remanding the matter for resentencing, we direct the trial court at that time to vacate the $600 amount imposed for the parole revocation fine and impose in its place the same amount as that imposed under section 1202.4, subdivision (b). (§ 1260; *Smith, supra*, 24 Cal.4th at p. 852.)

DISPOSITION

The judgment is reversed as to the sentence on count 1 and the parole restitution fine, and the matter is remanded for resentencing in a manner consistent with the views expressed in this opinion. In all other respects, the judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.