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CERTIFIED FOR PARTIAL PUBLICATION[1]

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. KEYON GEORGE, Defendant and Appellant.	D042980 (Super. Ct. No. SCE228278)

APPEAL from a judgment of the Superior Court of San Diego County, Eddie C. Sturgeon, Judge. Affirmed in part, reversed in part and remanded.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Tami Falkenstein Hennick, Deputy Attorney General, for Plaintiff and Respondent.

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1 Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts I and II.

This case presents the issue of whether the trial court's imposition of a discretionary upper term sentence based on certain aggravating facts found by the court violates a criminal defendant's right to a jury trial in accordance with United States Supreme Court's recent decision in *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531] (*Blakely*). In the published part of this opinion, we conclude that *Blakely* precludes a trial court's determination of facts not found by the jury or admitted by the defendant (other than those arising out of a prior conviction) as a basis for imposing an upper term sentence. In the unpublished portion of the opinion, we reject the defendant's arguments that the trial court erred in (1) denying his request to bifurcate trial on the enhancement allegations that he acted for the benefit of a criminal street gang in committing the underlying offense, (2) admitting hearsay and expert evidence relating to the enhancement, and (3) failing to give a limiting instruction regarding the jury's use of such evidence. However, we agree with the defendant's contention that the evidence was insufficient to support his conviction of a second robbery count. We reverse the judgment as to the second robbery count and the sentence and remand the matter for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

Kenyon George and three other young men (Jerry Grinston, Darrow Haygood and Anthony Gardner) robbed Jesse Savage at gunpoint while Jesse was in his bedroom at his parents' home, where Gardner had previously lived for a period of time. The men took $800 in cash, marijuana, CDs, DVDs, a cell phone, a hat, and Jesse's identification. As the men were leaving, Grinston and Gardner confronted Jesse's older brother, Paul, as he emerged from the bathroom; Grinston "jammed" a gun against Paul's chest, telling Paul

to get upstairs and saying "I'm Piru. I'll smoke you." Grinston ordered Paul to lie down in Jesse's bedroom. After Paul complied, all four assailants left the house and ran off in different directions; George carried many of the stolen items with him.

Jesse called 911 and La Mesa Police Officer Malcolm Chambers was in the area on his police motorcycle when he received a dispatch call about the incident. Officer Chambers saw George in a "dead run" and, stepping out from behind a vehicle with his gun drawn, stopped George, who was wearing clothing in colors associated with the Eastside Piru gang and a hat later identified as Jesse's. In a curbside lineup, Jesse identified George as one of the assailants; he also identified the revolver George had used in the incident, which officers found discarded near the Savages' home.

Officer Chambers arrested George, who had Jesse's cell phone and identification and $820 in cash with him. As the officer was putting George into the police car, George sang the word "Piru." Police also arrested Gardner and the district attorney filed an information charging both men with two counts of residential robbery in concert and alleging that they personally used a firearm and acted for the benefit of a criminal street gang as to each count. The information also alleged that George had a serious felony prior and a strike prior. Police subsequently arrested Haygood and Grinston as well. At the time of his arrest, Grinston told the officers he was a member of the Eastside Piru gang

At George's trial, the prosecution introduced evidence of the foregoing, as well as testimony of gang expert Detective John Davis that, based on the circumstances, George committed the robbery to promote, further or assist the Eastside Piru gang. In his

defense, George introduced evidence that he was not a gang member, but had participated in the incident because he thought Grinston, who he knew was a Piru gang member, would kill him, members of his family or his girlfriend if he refused to do so. He also testified that he was highly intoxicated at the time and that he was wearing pants and shoes he had borrowed from Grinston, with whom he was temporarily living, because his clothes were dirty.

The jury convicted George of both counts and made a true finding that George had acted for the benefit of a criminal street gang. It also found that George was not personally armed with a firearm. In a bifurcated proceeding, the trial court found true the allegation that George suffered a serious felony strike prior and thereafter sentenced George to prison for 33 years, consisting of (1) an upper term of 18 years plus 10 years for the gang enhancement on count 1, (2) a concurrent term of 18 years plus a 10 year gang enhancement on count 2, and (3) a 5 year enhancement for George's serious felony prior.

DISCUSSION

I

Admission of Evidence Relevant to the Gang Enhancements

George argues that the trial court violated his constitutional rights to due process and confrontation of witnesses against him by refusing to bifurcate the gang allegation, admitting gang evidence and failing to give a limiting instruction regarding the purposes for which the jury could consider such statements.

1. Denial of Bifurcation of the Enhancements

Prior to trial, George sought bifurcation of the trial of the criminal street gang enhancements from the trial of the underlying offenses, arguing that the gang-related evidence was unduly prejudicial as to the substantive offenses. The prosecutor responded that the enhancement was too intertwined in the underlying offenses to allow bifurcation and that virtually every witness would have to be recalled if the court granted George's request. The trial court denied the request and on appeal George contends that the combined trial of the enhancement and underlying offenses was unduly prejudicial and denied him a fair trial.

The primary consideration for the trial court in ruling on a request to bifurcate a sentence enhancement is whether the admission of evidence relating to the enhancement during the trial on the charged offenses would pose a substantial risk of undue prejudice to the defendant. (*People v. Calderon* (1994) 9 Cal.4th 69, 77-78 [prior conviction enhancement].) The determination of whether the risk of undue prejudice to the defendant requires bifurcation is within the sound discretion of the trial court. (*Id.* at p. 79.) On appeal, we review the trial court's ruling for an abuse of discretion, based on a review of the record that was before the trial court at the time of the ruling. (*People v. Price* (1991) 1 Cal.4th 324, 388.) However, even if the trial court's ruling was correct at the time it was made, reversal is required if the defendant shows that the failure to bifurcate resulted in "'gross unfairness' amounting to a denial of due process." (*People v. Mendoza* (2000) 24 Cal.4th 130, 162, quoting *People v. Arias* (1996) 13 Cal.4th 92, 127.)

Bifurcation of a sentence enhancement is generally not required where the evidence relevant to the enhancement is also relevant and admissible in the trial of the underlying offenses. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048-1051 [criminal street gang enhancement]; *People v. Calderon, supra*, 9 Cal.4th at pp. 78-79 [prior conviction enhancement].) Thus, we consider whether the evidence relating to the gang enhancement was also admissible in the trial of the underlying offenses.

2. Admissibility of the Gang Evidence

At trial, the court admitted the following evidence offered by the prosecution: (a) Jesse's testimony that after Grinston and Gardner arrived at his parents' apartment but before George and Haygood got there, Grinston gave Gardner a "pep talk," saying "I know you're cool. I know you're down. I know you've got heart. You're going to have to prove to these guys"; (b) Jesse's testimony that during the robbery, one of the assailants said "Piru"; (c) Paul's testimony that Grinston told him "I'm Piru. I'll smoke you"; (d) Officer Chambers's testimony that George sang the word "Piru" just after his arrest; and (e) police testimony regarding Grinston's admission about his membership in the Eastside Piru gang. The court also allowed the testimony of the prosecution's gang expert about gangs generally (including the criteria for determining whether someone is a documented gang member and how new gang members "put in work" committing crimes for the gang to gain respect and recognition within the gang and to advance the gang's reputation in the community) and the Eastside Piru gang in particular (its colors and common criminal activities), as well as the expert's opinions that based on the circumstances of the case, the assailants were involved in a conspiracy to commit a gang-related robbery and George

committed the robberies with the specific intent to promote, further or assist the Eastside Piru gang.

George contends that the trial court erred in admitting this evidence because (i) the evidence was not relevant to the underlying charges and was unduly inflammatory and prejudicial, (ii) certain of the evidence was inadmissible hearsay, (iii) the admission of the hearsay evidence violated his state and federal constitutional rights of confrontation and cross-examination, and (iv) the expert testimony regarding the assailants' subjective intent was improper.

A. Gang Evidence Generally

Gang evidence is admissible in the prosecutor's case-in-chief, regardless of whether there is a criminal street gang enhancement allegation, where such evidence is relevant to establish motive, intent or some fact other than the defendant's criminal propensity, provided that the probative value of the evidence is not substantially outweighed by its prejudicial effect. (*People v. Williams* (1997) 16 Cal.4th 153, 193; generally Evid. Code, § 352.) Because the admission of evidence of a defendant's participation in a criminal street gang is potentially inflammatory and creates a risk that the jury will improperly infer the defendant is guilty because he has a criminal disposition, the trial court should carefully scrutinize such evidence before admitting it. (*People v. Williams, supra*, 16 Cal.4th at p. 193.) The trial court is vested with wide discretion in determining the admissibility of evidence and its exercise of discretion under Evidence Code section 352 will not be disturbed on appeal absent a clear abuse. (*People v. Wilson* (1992) 3 Cal.4th 926, 938.)

At the time of the bifurcation motion, when George had not yet admitted his participation in the robbery, the proffered evidence was relevant to show that George and the other assailants were acting in concert in committing the robbery, a necessary element of the underlying offenses. (Pen. Code, §§ 212.5, subd. (a), 213, subd. (a)(1)(A) [residential robbery in concert requires that the defendant act in concert with two or more others to commit a robbery within an inhabited dwelling house or vessel].) More importantly, after George admitted his participation in the underlying offenses, the evidence became relevant to counter his defense that he participated in the crimes only because Grinston, a known gang member, had threatened him and thus he feared for the safety of himself and his loved ones if he failed to comply. In both circumstances, the evidence was also relevant to show that George had a possible motive to participate in the robbery, to gain respect for the gang and in turn to gain respect for himself within the gang. Given the level of significance of the gang evidence, the trial court did not err in concluding that its relevance was not substantially outweighed by its prejudicial effect. (See *People v. Kipp* (2001) 26 Cal.4th 1100, 1121 [evidence is prejudicial if it uniquely tends to evoke an emotional bias against the defendant without regard to its relevance on material issues].)

B. Hearsay

George challenges as inadmissible hearsay: Jesse's testimony about Grinston's "pep talk" with Gardner and that one of the assailants said "Piru"; Paul's testimony that Grinston threatened "to smoke" him; and a police officer's testimony about Grinston's admission, several months after the robbery, that he was a member of the Eastside Piru gang. The

Attorney General responds that the trial court properly admitted this evidence pursuant to the co-conspirator exception to the hearsay rule, which permits the introduction of evidence of a statement that was made (1) by a declarant participating in a conspiracy to commit a crime, (2) in furtherance of the objective of the conspiracy, and (3) by the declarant either prior to or during the time that he was participating in the conspiracy. (Evid. Code, § 1223; *People v. Leach* (1975) 15 Cal.3d 419, 430-431, fn. 10.)

We agree that the trial court did not abuse its discretion in admitting evidence of Grinston's pep talk, his threat to Paul and the use of the word "Piru" during the course of the first robbery pursuant to the co-conspirator exception to the hearsay rule. However, as the prosecutor admitted in offering the evidence, Grinston's statements to the police long after the robbery was complete were not made while Grinston was participating in a conspiracy to commit the robbery and thus do not meet the statutory prerequisites to the application of the co-conspirator exception. Because the officer's testimony about such statements was inadmissible hearsay (regardless of whether the gang enhancement allegation was bifurcated), the trial court erred in admitting such evidence.

However, the admission of the evidence was not in any way prejudicial to George given that Grinston's gang membership provided the cornerstone for his defense at trial. The admission of Grinston's statements was not prejudicial error and does not support a reversal of George's convictions. (See *People v. Welch* (1999) 20 Cal.4th 701, 749.)

C. Confrontation Clause

Historically, the federal Confrontation Clause (U.S. Const., VI Amend.) has been held to preclude the admission of hearsay statements implicating the defendant in a

criminal proceeding unless the prosecution demonstrates that the statements possess "adequate indicia of reliability." (*Ohio v. Roberts* (1980) 448 U.S. 56, 66; *People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1373.) Hearsay evidence was deemed to be reliable if it fell within a firmly rooted exception to the hearsay rule (*People v. Waidla* (2000) 22 Cal.4th 690, 726, fn. 8) or if the proffering party showed that the evidence had particularized guarantees of trustworthiness "such that adversarial testing would be expected to add little, if anything, to the statement's reliability." (*Lilly v. Virginia* (1999) 527 U.S. 116, 124-125.)

Statements by a coconspirator that implicate the defendant, as well as himself, in criminal activity are deemed unreliable and hence inadmissible in a joint trial, even with a limiting instruction, unless the defendant has an opportunity to cross-examine the co-conspirator. (*Bruton v. United States* (1968) 391 U.S. 123 [holding that admission of such evidence in a joint trial violates the Confrontation Clause]; *People v. Aranda* (1965) 63 Cal.2d 518 [holding admission of such evidence is a violation of state law].) However, this *Aranda*/*Bruton* rule does not apply where a defendant is tried alone (see *People v. Carter* (2003) 30 Cal.4th 1166, 1209) and further does not apply to statements of a co-conspirator made in furtherance of the conspiracy, which fall within a "firmly rooted" exception to the hearsay rule. (*Bourjaily v. United States* (1987) 483 U.S. 171, 183; *People v. Williams* (1997) 16 Cal.4th 635, 682.) The admission of such co-conspirators' statements generally does not violate the Confrontation Clause. (See *People v. Roberts* (1992) 2 Cal.4th 271, 304, and authorities cited therein.)

During the pendency of this appeal, the United States Supreme Court issued its opinion in *Crawford v. Washington* (2004) 541 U.S. ___ [124 S.Ct. 1354] (*Crawford*), holding that the federal Confrontation Clause precludes the admission of "testimonial" hearsay statements unless the declarant is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine the declarant regarding those statements, even if the statements possess "adequate indicia of reliability" in accordance with *Ohio v. Roberts, supra,* 448 U.S. 56. (*Crawford, supra,* 124 S.Ct. at pp. 1363-1369, 1373.) This new rule regarding the admissibility of "testimonial" hearsay statements applies retroactively "to all cases, state or federal, pending on direct review or not yet final . . . ." (*Griffith v. Kentucky* (1987) 479 U.S. 314, 328.)

Although *Crawford* does not purport to provide a comprehensive definition of what statements are "testimonial," it does make clear that statements made in legal proceedings that are part of a criminal prosecution and statements made to law enforcement officers during an investigation or prosecution of the defendant qualify as "testimonial." The opinion also makes clear that statements made in furtherance of a conspiracy are generally not "testimonial" for Confrontation Clause purposes. (*Crawford, supra*, 124 S.Ct. at p. 1367.)

As discussed above, the trial court properly admitted evidence of Grinston's "pep talk" to Gardner, his threat to Paul and one assailant's use of the word "Piru" as co-conspirator's statements in furtherance of the conspiracy. Pursuant to the principles set forth in *Crawford*, such statements are not testimonial and fall within a firmly rooted exception to the hearsay rule and thus their admission did not violate George's right of

confrontation. (See *Crawford, supra*, 124 S.Ct. at p. 1367.) Although it is not clear whether Grinston's statements about his gang membership were also nontestimonial for Confrontation Clause purposes, we need not address this issue because in any event the admission of Grinston's statements was harmless beyond a reasonable doubt given the nature of George's defense, for the reasons previously discussed.

D. Expert Testimony Regarding Subjective Intent

George argues that the trial court erred in admitting Detective Davis's expert opinion testimony that the men engaged in a conspiracy to commit robbery for the benefit of a criminal street gang and that in committing the robbery George specifically intended to assist the Eastside Piru gang. The People concede that the admission of the testimony about George's subjective intent was improper (see *People v. Killebrew* (2002) 103 Cal.App.4th 644, 651-659 [admission of expert testimony about gang members' subjective knowledge and intent improper]), but argue that the error was harmless because there was other substantial evidence to support the jury's findings relating to the gang enhancement. In determining whether the error requires reversal, the relevant question is whether there is a reasonable probability that George would have received a more favorable verdict absent the evidence. (Cal. Const., art. VI, § 13; see generally *People v. Crayton* (2002) 28 Cal.4th 346, 364.)

The uncontroverted evidence showed that George was staying with Grinston, his close friend who he knew was a member of the Eastside Piru gang and that he was wearing Eastside Piru colors at the time of the robbery. There was also evidence that when Officer Chambers stopped him, George looked around for a way to escape rather

than complying with Chambers's repeated instructions to get down on the ground; George also admitted at trial that he did not tell Chambers he had been forced to participate in the robbery against his will, but instead lied that he was staying with his aunt and did not know anything about the robbery.

The evidence also showed that during the robbery, George called Jesse "Blood," a word that members of a blood gang (like Eastside Piru) would often use in referring to others to whom they were speaking and after his arrest, George sang the word "Piru" as he was getting into the patrol car. Jesse and Paul testified that the assailants made several other references to the Piru gang during the course of the robbery and Detective Davis properly testified that gang members (or those who want to become part of the gang) commit crimes to increase the gang's "credibility" or enhance its reputation in the community, through fear and intimidation.

Under these circumstances, there is no reasonable probability that the jury would have rendered a more favorable verdict on the gang enhancement if the court had excluded Detective Davis's expert testimony regarding that participants' subjective intent in carrying out the robbery. Likewise, the admission of the evidence did not render George's trial fundamentally unfair.

3. Failure to Give a Limiting Instruction

George also argues that the trial court exacerbated its errors in failing to bifurcate the gang enhancement and admitting the gang evidence by failing to give a limiting instruction that the gang evidence could not provide a basis for inferring that he had criminal propensity. However, as George admits, a trial court is generally not required to

give a sua sponte instruction limiting the use of evidence (Evid. Code, § 355; *People v. Hernandez, supra*, 33 Cal.4th at pp. 1051-1052; *People v. Macias* (1997) 16 Cal.4th 739, 746, fn. 3) and he did not request such an instruction at trial. He nonetheless contends that the introduction of the prosecution's gang expert testimony was "so prone to misuse and so potentially prejudicial" that the court was required to give the instruction even without a request. However, we conclude that this is not one of those "occasional extraordinary case[s]" in which the trial court is required to give a sua sponte limiting instruction because the evidence was "a dominant part" of the case against the defendant and was both "highly prejudicial and minimally relevant to any legitimate purpose." (*People v. Hernandez, supra*, 33 Cal.4th at pp. 1051-1052, quoting *People v. Collie* (1981) 30 Cal.3d 43, 64.) For the same reasons that we concluded the gang evidence in this case was not so prejudicial as to require its exclusion (as set forth above), we similarly conclude that the evidence was not of such a nature as to require the trial court to give an instruction that was not requested by the defense. (See *People v. Jones* (2003) 30 Cal.4th 1084, 1116 [holding that the trial court had no sua sponte duty to give a limiting instruction regarding the use of gang evidence in a capital case].)

4. Conclusion

The trial court did not abuse its discretion in denying George's motion to bifurcate the gang enhancements or in admitting at trial gang evidence other than Grinston's post-arrest admissions and the expert testimony regarding the assailants' subjective intent in carrying out the charged offenses. Although the admission of the latter evidence was

error, the error did not result in any prejudice to George, nor did it render George's trial fundamentally unfair.

II

Sufficiency of the Evidence to Support the Second Robbery Conviction

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Pen. Code, § 211.) A single taking of property, by force or fear, from the joint possession of more than one victim will support multiple robbery convictions. (*People v. Ramos* (1982) 30 Cal.3d 553, 587, reversed on other grounds in *California v. Ramos* (1983) 463 U.S. 992.) However, George contends there was insufficient evidence to establish that there was a separate robbery relating to Paul because the stolen property was in Jesse's possession rather than Paul's and there was no evidence that Paul was even aware what property the assailants took from Jesse.

Robbery occurs only as to those who have actual or constructive possession of the property that is ultimately taken. (*People v. Nguyen* (2000) 24 Cal.4th 756, 764.) A person who does not have immediate physical control may nonetheless have constructive possession of property if he has the right to control it, either directly or through another person. (*People v. Frazer* (2003) 106 Cal.App.4th 1105, 1112.) Constructive possession may exist based on the existence of a special relationship in which the property owner has entrusted another with the custody of the property. (Generally *People v. Hamilton* (1995) 40 Cal.App.4th 1137, 1143.)

A special relationship is most frequently recognized where the robbery involves business property taken from the presence of an agent or employee of the business. (See, e.g., *People v. Miller* (1977) 18 Cal.3d 873, 880 [store security guard]; *People v. Estes* (1983) 147 Cal.App.3d 23, 27 [same]; *People v. Gilbeaux* (2003) 111 Cal.App.4th 515, 522 [janitors employed by business's cleaning company]; *People v. Jones* (1996) 42 Cal.App.4th 1047, 1054 [store truck driver]; *People v. Poindexter* (1967) 255 Cal.App.2d 566, 568-569 [barmaid]; compare *People v. Ngyuen*, *supra*, 24 Cal.4th at p. 761 [no special relationship between business and social visitor]; *People v. Galoia* (1994) 31 Cal.App.4th 595, 597-599 [no special relationship between business and Good Samaritan]; *Sykes v. Superior Court* (1994) 30 Cal.App.4th 479, 484 [no special relationship between business and security guard from a neighboring business].)

In several instances, the courts have recognized a special relationship in a non-business context. For example, in *People v. Bekele* (1995) 33 Cal.App.4th 1457 (disapproved of on other grounds by *People v. Rodriguez* (1999) 20 Cal.4th 1, 13-14), a car owner saw the defendant stealing personal property from the vehicle and asked his co-worker to help him stop the defendant. The co-worker struck and chased the defendant, demanding that the defendant drop the property, until the defendant threatened him with a weapon. The court found that the circumstances were sufficient to support the defendant's conviction of robbery from the co-worker because the owner's request for help impliedly authorized the co-worker to act in a representative capacity in striking and chasing down the defendant, thus giving his co-worker constructive possession of the stolen property. (*Id*. at p. 1462.)

The People rely on *People v. Gordon* (1982) 136 Cal.App.3d 519 (*Gordon*), in which two armed robbers entered the home of Mr. and Mrs. Lopes, bound them and took $1,000, marijuana and a shoulder bag belonging to their adult son, who lived with them but was not at home at the time of the robbery. The court found the evidence that the Lopeses owned and lived in the residence sufficient to support the jury's findings that they possessed their son's property within the meaning of the robbery statute. It reasoned that the jury could properly conclude from such facts that the Lopeses had custody of, and were responsible for protecting, their son's personal property. (*Id*. at pp. 528-529.)

George suggests that *Gordon* is distinguishable because the adult son was not at home at the time the robbery occurred. Although we are not entirely convinced that this fact alone is determinative (see contra *People v. Nguyen*, *supra*, 24 Cal.4th at p. 762, fn. 2; *People v. Bekele, supra,* 33 Cal.App.4th 1457), we agree that neither *Gordon* nor the other cases finding constructive possession support a finding that Paul had constructive possession of Jesse's property. In this case, the assailants took Jesse's property from Jesse's room, where Jesse was present but Paul was not; the assailants confronted Paul as they were leaving Jesse's room, after George had already taken the property out; Paul was not aware that the assailants had taken Jesse's property, Jesse did not ask Paul to retrieve the property and Paul made no attempt to reacquire the property. Under these circumstances, Paul did not have custody or control of Jesse's property and did not exercise any right of custody or control and thus, although a crime was certainly committed against Paul, it was not a robbery. For this reason, we reverse the conviction on the second robbery count.

III

Imposition of Upper Term Sentence

During the pendency of this appeal, the United States Supreme Court issued its decision in *Blakely*, which held that a state trial court's imposition of a sentence that exceeded the statutory maximum of the standard range for the charged offense on the basis of additional factual findings made by the court violated the defendant's Sixth Amendment right to trial by jury. Based on the trial court's imposition of upper term sentence on count one in this case, we requested further briefing from the parties on the effect of *Blakely* on this case.

In his brief, George contends that pursuant to the analysis of *Blakely*, the court's finding of facts to justify its imposition of upper term sentences violated his right to a jury trial. The Attorney General responds that George has waived the issue by failing to raise a challenge to the sentences in the proceedings below, that there is no constitutional violation pursuant to the analysis of *Blakely* and that, even if a *Blakely* error existed, it was harmless beyond a reasonable doubt.

1. Waiver

In *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*), the California Supreme Court held that a defendant's failure to challenge in the trial court the imposition of an aggravated sentence based on erroneous or flawed information waived that issue for purposes of appeal. The Attorney General argues that the holding of *Scott* is equally applicable here. However, the *Scott* court reasoned that its waiver rule was necessary to facilitate the prompt detection and correction of error in the trial court, thus reducing the number of

appellate claims and preserving judicial resources (*id*. at pp. 351, 353), a pragmatic rationale that does not support the application of the waiver rule here. Prior to *Blakely*, California courts and numerous federal courts consistently held that there was no constitutional right to a jury trial in connection with a court's imposition of consecutive sentences. (*People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231; *U.S. v. Harrison* (8th Cir. 2003) 340 F.3d 497, 500; *U.S. v. Lafayette* (D.C.Cir. 2003) 337 F.3d 1043, 1049-1050; *U.S. v. Hernandez* (7th Cir. 2003) 330 F.3d 964, 982; *U.S. v. Davis* (11th Cir. 2003) 329 F.3d 1250, 1254; *U.S. v. Chorin* (3rd Cir. 2003) 322 F.3d 274, 278-279; *U.S. v. Lott* (10th Cir. 2002) 310 F.3d 1231, 1242-1243; *U.S. v. White* (2nd Cir. 2001) 240 F.3d 127, 136.) No published case in California held that a different rule applied in connection with the imposition of an upper term sentence. (See *People v. Sykes* (2004) 120 Cal.App.4th 1331, 1344-1345.) In light of this state of the law, George's assertion of a challenge to the imposition of an upper term sentence would not have achieved the purpose of prompt detection and correction of error in the trial court. Further, because *Blakely* was decided after George's sentencing, George cannot be said to have knowingly and intelligently waived his right to a jury trial. (See *Blakely, supra*, 124 S.Ct. at p. 2541 [noting that, "if appropriate waivers are procured," a state is free to utilize judicial factfinding in its sentencing scheme].) For these reasons, we find the waiver rule of *Scott* inapplicable.

2. Application of *Blakely* to an Upper Term Determination

In *Blakely,* the United States Supreme Court held that " '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed

statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " (*Blakely, supra*, 124 S.Ct. at p. 2536.) The question of whether *Blakely* precludes a trial court from making findings on aggravating facts in support of an upper term sentence is currently under review by the California Supreme Court. (*People v. Towne,* review granted July 14, 2004, S125677; *People v. Black,* review granted July 28, 2004, S126182.) Pending resolution of the issue by the high court, we must undertake a determination of whether *Blakely* applies under the circumstances presented.

Under California's determinate sentencing law, where a penal statute provides for three possible prison terms for a particular offense, the court is required to impose the middle term unless it finds, by a preponderance of the evidence, that the circumstances in aggravation outweigh the circumstances in mitigation. (Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rule 4.420(c), (d).) The Attorney General argues that the imposition of an upper term sentence under the California determinate sentencing scheme is not the same as the imposition of a penalty beyond the standard range and thus does not implicate *Blakely*. The attempted distinction, however, is one without a difference. Although an upper term is a "statutory maximum" penalty in the sense that it is the highest sentence a court can impose for a particular crime, it is not necessarily the "maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*," which is the relevant standard for purposes of applying *Blakely*. (*Blakely, supra*, 124 S.Ct. at p. 2537, italics in original; see *Apprendi v. New Jersey* (2000) 530 U.S. 466, 491-497 (*Apprendi*) [state hate crime statute authorizing the imposition of an enhanced sentence based on a judge's finding of certain

facts by a preponderance of the evidence violated the due process clause]; *Ring v. Arizona* (2002) 536 U.S. 584, 592-593.)

As explained in *Blakely*, when the judge's authority to impose a higher sentence depends on the finding of one or more additional facts, "it remains the case that the jury's verdict alone does not authorize the sentence," as required to comply with constitutional principles. (*Blakely, supra*, 124 S.Ct. at pp. 2538-2539.) The same is true here. Because 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*.

Here, the trial court relied on five aggravating factors as the basis for its decision to impose the upper term, to wit, that (1) the crime was serious and involved threats of great bodily injury to the victims; (2) the crime involved planning, sophistication and professionalism; (3) the current offense was more serious than the offense underlying George's prior conviction, which was itself serious; (4) at the time George committed the current offenses, he was on felony probation; and (5) George's prior performance on probation was poor. 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 a defendant's prior conviction. (*Blakely, supra,* 124 S.Ct. at p. 2537 and fn. 5, also p. 2540 [any fact that "pertain[s] to whether the defendant has a legal *right* to a lesser sentence"].)

Applying this standard here, we conclude that the trial court was constitutionally entitled to rely only on the fact that George was on probation at the time of the charged

offense as a basis for imposing an upper term sentence. Because this fact arises out of the fact of a prior conviction and is so essentially analogous to the fact of a prior conviction, we conclude that constitutional considerations do not require that matter to be tried to a jury and found beyond a reasonable doubt. As with a prior conviction, the fact of the defendant's status as a probationer arises out of a prior conviction in which a trier of fact found (or the defendant admitted) the defendant's guilt as to the prior offense. (*Apprendi, supra,* 530 U.S. at p. 488; see also *Jones v. United States* (1999) 526 U.S. 227, 233.) As with a prior conviction, a probationer's status can be established by a review of the court records relating to the prior offense. Further, like a prior conviction, the defendant's status as a probationer "does not [in any way] relate to the commission of the offense, *but goes to the punishment only* . . . ." (*Almendarez-Torres v. U.S.* (1998) 523 U.S. 224, 244, italics in original.) Thus, in accordance with the analysis of *Blakely*, the trial court was not required to afford George the right to a jury trial before relying on his status as a probationer at the time of the current offense as an aggravating factor supporting the imposition of the upper term.

The Attorney General suggests that the propriety of this single factor as a basis for imposing an upper term sentence is sufficient to withstand George's constitutional challenge to the sentence. There is no question that under California law, a court may rely on a single aggravating factor as a basis for imposing an upper term sentence, so long as that factor outweighs any circumstances in mitigation. (Cal. Rules of Court, rule 4.420(b); *People v. Osband* (1996) 13 Cal.4th 622, 728, citing *People v. Castellano* (1983) 140 Cal.App.3d 608, 614-615.) Further, the probation officer and the prosecutor

contended here that there were no mitigating circumstances, a contention with which the court implicitly agreed. However, assuming without deciding, that resentencing is only required if it "is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error" (see *People v. Osband, supra,* 13 Cal.4th at p. 728; compare *People v. Collins* (2001) 26 Cal.4th 297, 311-313 [recognizing that the denial of a right to a jury trial constitutes a "structural defect" that results in a miscarriage of justice]; *People v. Ernst* (1994) 8 Cal.4th 441, 448-449 [same]), we cannot conclude that the elimination of four of the cited factors would not have made a difference in the court's sentencing decision here.

DISPOSITION

The judgment is reversed as to the second robbery count and as to the sentence on the first robbery count, but is otherwise affirmed. The matter is remanded for resentencing.

CERTIFIED FOR PARTIAL PUBLICATION

McINTYRE, J.

WE CONCUR:

McCONNELL, P.J.

HALLER, J.