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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>HAYTHAM GHANEM et al.,<br><br>Defendants and Appellants. | B171636<br><br>(Los Angeles County<br>Super. Ct. No. KA062341) |

APPEALS from judgments of the Superior Court of Los Angeles County. Abraham A. Kahn, Judge. Affirmed in part, reversed in part, and remanded for resentencing.

Tara K. Allen, under appointment by the Court of Appeal, for Defendant and Appellant Haytham Ghanem.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant Samer Ghanem.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc J. Nolan,

Supervising Deputy Attorney General, Lawrence M. Daniels and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.

In a joint jury trial, brothers Haytham and Samer Ghanem[1] were convicted of three counts of possessing a forged or altered check with fraudulent intent (Pen. Code, § 475, subd. (a), counts 1, 2, and 7), three counts of possessing a blank or unfinished check with fraudulent intent (§ 475, subd. (b), counts 4, 5, and 8), two counts of unauthorized possession of access card information (§ 484e, subd. (d), counts 3 and 6), and two counts of unauthorized possession of personal identifying information (§ 530.5, subd. (d), counts 9 and 10). Both appellants were sentenced to terms of five years.

Appealing, Samer contends that the evidence was insufficient to support his convictions, while Haytham, joined by Samer, contends that the six counts of violating section 475 constituted a single offense, so that five counts must be reversed. In addition, both appellants challenge their upper base term sentences, as imposed in violation of the jury trial rights recognized in *Blakely v. Washington* (2004) 542 U.S. __ [124 S.Ct. 2531] (*Blakely*), and Haytham similarly challenges his consecutive sentences.

We conclude that the evidence was sufficient to support Samer's convictions on all counts, but we also conclude that, factually and legally, the six counts of violating section 475 actually reflected only four violations. We therefore reverse the judgments with respect to two of those counts, and remand for resentencing. For guidance on resentencing, we explain that the consecutive sentencing previously imposed did not violate *Blakely*, but that the upper term sentence, based on a fact (other than a prior conviction) not found by the jury, was improper under that decision.

## FACTS

Viewed in accordance with the governing rules of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence at trial showed that at about noon on

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[1] To avoid redundancy, we refer to appellants hereafter by their first names. Undesignated section references herein are to the Penal Code.

June 13, 2003, Claremont Police Officer Henry Valdez stopped a car with no license plates, driven by Haytham, with Meghan Cloe as a passenger. Haytham identified himself as Samer, and stated that the car was his, but he was in the process of registering it. After Officer Valdez conducted an investigation, Haytham admitted his true name.

Officer Valdez arrested Haytham and searched the car. In a black carry-on bag that Haytham stated was his, the officer found clothing, checks, and a tin container enclosing check 2058 from Bizarre Arts & Graphics (hereafter Bizarre) for $150, purportedly signed by Fatima Hernandez, and payable to Sam Ghanem. A green folder contained checks and check-printing stock, papers bearing the personal identifying information of several persons, and a receipt from the nearby Claremont Hotel, showing the name of Samer, room 115, and a June 4, 2003 arrival date. The folder also contained check 1047 from the account of Hernandez, purportedly signed by her and payable to Samer, for $200. Hernandez's signature also appeared on a sheet of paper.

The search also yielded six pages of Bizarre checks, in various stages of printing, as well as check 3867. The folder further contained papers bearing an account number and address of Deborah and Cory Williams. The same account number appeared on the Bizarre checks. There also were four checkbooks of Walter Stock, and, separately, his check 651, for $126, made out to Sam Ghanem and purportedly signed by Stock. Officer Valdez transported Haytham to the station and impounded the car.

While searching the stopped car, Officer Valdez dispatched Officer Rick Varney, who had been assisting him, to room 115 at the Claremont Inn. When he arrived, Officer Varney knocked, and Samer admitted him. Varney asked for identification, and Samer handed him a credit card, which he was holding wrapped in a piece of paper that he placed on a bed. Officer Varney eventually retrieved the paper. It was a check for $807.96, payable to Haytham and drawn on an account of Clean Image. On a desk in the room were a computer, printer, and blank check paper. Officer Varney arrested Samer for possession of a counterfeit check. (Ultimately, appellants were charged with possession of this check under section 475, subdivision (b), in count 5.)

After Samer's booking, Officer Varney returned to the hotel room. Megan Cloe now was present, as was Sona Ghamer, appellants' mother. The computer, and other items, were now on a luggage cart. Varney told the women to depart, as he was securing the room for a search warrant.

A few hours later, Officer Valdez appeared at the hotel room and searched it. He found the computer still on the cart, which also had cotton swabs and personal items on it. In a trash can were torn-up "test" checks and plastic paper with initials on it, as in a signature. On the desk were two pieces of mail addressed to Samer. A cardboard box on the cart contained a U-Haul invoice with the name Deborah Williams. A plastic bag there held a swab, a paint brush, and documents with Samer's name. Blank check stock also was in the room, and a cigar box contained another swab, a bottle of nail polish remover, a software disc, and a credit card of Samer's.

Officer Valdez returned to the impounded vehicle, and searched its trunk. In a blue bag inside, he found Bizarre checks 3868 and 3869, bearing purported signatures that appeared to match those on the plastic film found at the hotel room. Also inside were software discs, including one for Probiz Check Writer Plus. A suitcase contained a K-Mart employment application, by Deborah Marshall. There also were papers containing identifying information of Pat Goodwin, including a Visa card number, and a receipt for Volvo repairs with the address and phone number of Helen Phillips.

At trial, Fatima Hernandez testified that she worked at a school cafeteria, with appellants' mother, Sona Ghanem. Hernandez had written her check 1047 for $5, as a contribution to a gift for an ill coworker, and had given it to Sona, without filling in the payee, as she hadn't known the spelling of Sona's name. Hernandez identified the check, which now was payable to Sam Ghanem, for $200. She had not authorized either appellant to alter or complete the check, and the signature now on it was not hers but a tracing. The check's date too had been changed. Hernandez's account number also appeared on the Bizarre check no. 2058, payable to Samer, but she had no knowledge of that company. Nor had she written her name on the separate piece of paper.

Sona Ghanem confirmed that Hernandez had given her the check as described. She had put it in her car, but had found it missing when police contacted her. Samer occasionally drove this car, but Haytham, whose car was the one impounded, did not have access to it. Sona had lent a computer to Samer a week before his arrest, and after receiving Hernandez's check she had driven Samer and Meghan Cloe, his girlfriend, to Fry's. Sona testified that in June 2003 Haytham had been living in room 115 of the Claremont Inn, while Samer lived at Sona's house, but spent the night at the hotel room a few times. On June 3, Sona had gone to the hotel after being summoned by Cloe. Hotel management had told Sona they wanted the room vacated, and they had placed its contents on a cart.

Claremont Police Detective Rick Luginbill opined that Fatima Hernandez's check had been "washed," meaning that its ink inscriptions had been removed by soaking the check with either acetone, nail polish remover, or brake fluid. The detective had successfully tested this technique using a Q-tip and nail polish remover.

Upland Police Detective Barry Belt, trained in computer analysis, examined the computer seized from room 115. Its hard drive contained two editions of Probiz check writing software, and reflected the printing of Bizarre and Clean Image checks. The program had been accessed between June 5 and 13, 2003, and it contained numerous references to Haytham's name (but not Samer's).

Cory Williams identified his checking account number on Bizarre and Clean Image checks. He had not authorized its use, nor had he authorized appellants to have the number and his name and address, which were written on two seized papers. The U-Haul receipt included his wife Deborah's name and former credit card number. Around June 13, 2000, the Williamses' bank had notified them that it suspected illegal use of the card to access the account.

Walter Scott testified he had not written the $126 check on his account, payable to Samer. Four of his checkbooks had been stolen from his vehicle. Patricia Goodwin identified her personal information, including Visa card number, on pieces of paper

which she had not written. Nor had she authorized others to possess this information. In 2002, she had had a credit card replaced after not receiving the mailed original.

Deborah Marshall testified that she had never given or authorized appellants to have her K-Mart employment application, from 1993, which contained identifying information that was still applicable, except for her address. Helen Phillips identified the Volvo repair invoice as a copy she had received when servicing her car in April 2003. She had never authorized Haytham to have the personal information it contained.

Neither appellant presented an affirmative defense.

## DISCUSSION

*1. Sufficiency of Evidence.*

Samer challenges the sufficiency of the evidence to support his convictions. He does not dispute that the elements of the offenses were sufficiently proven. But he contends that the evidence of his involvement in and connection with the incidents of unlawful possession does not satisfy the requirement that, viewing the evidence and indulging all inferences in favor of the judgment, there be substantial evidence from which a rational, reasonable trier of fact could have found him guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) We disagree.

Officer Varney found Samer in actual, physical possession of the Clean Image check, bearing the Williamses' account number, which grounded the violation of section 475, subdivision (b) charged in count 5. The checks and documents that were the subjects of the other nine counts were found in the immediate possession of Haytham, in his auto. But the jury was instructed that either appellant could be guilty as an aider-abetter, if he aided the other's commission of the offense with intent to facilitate it. (See *People v. Beeman* (1984) 35 Cal.3d 547, 560.) And there was substantial evidence so connecting Samer with Hayman's possession of the papers.

First, room 115 at the Claremont Inn was registered to Samer, and personal mail of his was found it. Appellants' mother testified that Samer spent some nights there, and of course he was present when Officer Varney arrived. Inside this room was a computer, borrowed by Samer, which was used to generate the Bizarre checks, which underlay

counts 1 and 4. Also at the room were materials for "washing" checks, such as had been done to Hernandez's (the subject of count 2), to which Samer had had access when it was removed from Sona Ghadem's car. The room's contents further included the U-Haul invoice of Deborah Williams, which contained the access card information that, as found transcribed in Haythem's car, was the basis of count 3. Other materials integral to a fraudulent check operation also were in the room of which Samer had possession, and three of the checks at issue, representing counts 1, 2, and 7, were made payable to him.

Beyond Samer's direct connection to the instruments involved in the first five counts, the overall evidence just related was plainly susceptible to the strong inference that Samer was engaged with his brother in the production or accumulation of the documents found both in the room and in Haytham's car, and thus that Samer aided and abetted Haytham's actual possession of them. The evidence of Samer's guilt was sufficient.

*2. Multiple Violations of Section 475.*

Appellants both contend that the six counts of violating section 475 actually comprised a single violation and offense, so that five must be reversed. Appellants rely on *People v. Bowie* (1977) 72 Cal.App.3d 143 (*Bowie*), a decision of Division Five of this court, and *People v. Carter* (1977) 75 Cal.App.3d 865 (*Carter*), in which Division Four followed and slightly expanded upon *Bowie.* We first summarize those decisions.

In *Bowie,* the defendant was convicted of 11 counts of possessing blank or unfinished checks with intent to defraud, in violation of former section 475, the essence of which now appears in section 475, subdivision (b). "The 11 counts involved 11 checks of a defunct corporation . . . , each in the amount of $198.45," which Bowie had together sold to an undercover agent. (*Bowie, supra,* 72 Cal.App.3d at p. 146.) "[A]ppellant moved to consolidate the 11 counts into one count, on the ground that his possession of the 11 identical blank checks was a single act which constituted but one violation of the statute." (*Id.* at p. 156.) Holding that the denial of this motion was error, the court found "determinative" (*ibid.*) *People v. Puppilo* (1929) 100 Cal.App. 559, which had held that two counts of unlawful firearms possession, allegedly committed at

the same time and place with respect to two guns, involved a single offense. The court in *Puppilo* noted that the criminal act was possession of a firearm, and that although the statute referred to firearms in the singular, the singular included the plural. (*Id.* at pp. 563-564.) The *Bowie* court found unpersuasive the argument "that there were 11 'potential victims'" of the checks (*Bowie*, at p. 157), and it cited authority that a single receipt of properties stolen from separate victims also constituted one offense. On the other hand, the court noted, receipt of such property at separate times had been held to constitute separate offenses. The court reversed 10 of the 11 counts of conviction. (*Ibid.*)

*Carter, supra*, 75 Cal.App.3d 865, involved three counts of possessing a completed check with fraudulent intent, in violation of former section 475a, presently covered by section 475, subdivision (a). In a car search, the appellants were found in possession of three groups of checks, drawn on the same account but made out to three different payees. Appellants were charged and convicted of three counts, each involving a check to a different payee. The court found *Bowie, supra*, 72 Cal.App.3d 143, indistinguishable. The court concluded that the similarity of the offenses addressed and the identity of punishment prescribed by former section 475a and former section 475 (the statute in *Bowie*) signified that the Legislature must have intended no difference between them as to the number offenses encompassed by a single possession of several offending checks. The number of victim payees was again not considered significant. The court therefore reversed two of the three convictions. (*Carter, supra*, at p. 872.)

Appellants urge that we follow *Bowie* and *Carter*, and that we reverse all but one of their convictions under section 475. But the rationale of the two cases does not compel that result. First, the present case involves convictions – three each – of both of the distinct statutory offenses that were respectively involved in *Bowie* and *Carter*. Even assuming that simultaneous possession of several checks in violation of one of the statutes constitutes one offense, here appellants possessed different checks in violation of each statute. Hence, at a minimum, appellants' conduct amounted to two offenses.

Second, in this case, unlike *Bowie* and *Carter*, there were two instances of possession. One occurred at Haytham's car. The other transpired at the Claremont Inn,

where, about an hour later, Samer was discovered in possession of the Clean Image check, payable to Haytham, as charged in count 5. The second act of possession, in violation of section 475, subdivision (b), was an offense distinct from the violations of subdivisions (a) and (b) at the car. Like the separate receipts of stolen property in the case *Bowie* cited (*People v. Roberts* (1960) 182 Cal.App.2d 431, 436-437), the possession at the hotel and those at the car constituted separate offenses. (*People v. Municipal Court (Marandola)* (1979) 97 Cal.App.3d 444, 447 [following *Bowie* but holding that a defendant charged with possession of various obscene films on one day and others the next day could be charged with two counts of possession].) Hence, even in light of *Bowie* and *Carter*, at least three possession offenses were proven here.

The remaining question is whether the remaining three counts of possession at the car should be reversed, as duplicative under *Bowie* and *Carter*, or whether there exist reasons for further distinguishing, or departing from, those decisions. Respondent urges that all six counts should be treated as involving separate offenses, because there were separate victims, and because the checks involved a variety of different fraudulent methods.[2] The latter feature does differ from the circumstances in *Bowie* and *Carter*, but we do not consider it significant, given that subdivisions (a) and (b) of section 475 address numerous alternative characteristics of checks and other instruments.

The final factor respondent propounds is that "the counts involved separate victims." By this, respondent means the individuals whose checks, checking account numbers, or forged signatures were employed with respect to the six counts. In fact, the six violations of section 475 involved in that fashion three such account holders: Fatima Hernandez, Deborah and Cory Williams, and Walter Stock. This circumstance did not appear in either *Bowie* or *Carter*, in each of which all of the checks had been drawn on a

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[2] Respondent also urges that the several instruments were "obtained or created at different times." This was not established, and in any event the offenses at bench involve possession.

single corporate account. Neither case considered the divisibility of possession of checks fraudulently attributable to multiple innocent persons. We believe that the potential and actual injury to such victims, financial or personal, from the unauthorized use of their financial instruments does provide a reason for treating separately offenses involving them. (Cf. *People v. Butler* (1996) 43 Cal.App.4th 1224, 1248.)

However, multiplicity of such victims does not mandate separate treatment of every count involving one of them. Rather, consistent with the distinctions discussed above, the single possession holdings of *Bowie* and *Carter* accurately reflect generally prevailing rules regarding separate possession offenses. Thus, with respect to the checks possessed at Haytham's auto, only one of the two counts involving and affecting Hernandez requires separate treatment. Accordingly, count 2 will be affirmed, but count 1 will be reversed. Similarly, as to Stock's checks, count 7, representing a forged check, will be affirmed. But count 8, involving blank checks, will be reversed, just as count 4, also involving blank checks (with the Williamses' account number), will be affirmed. Finally, count 5, involving the separate check possession at the Claremont Inn, must also be affirmed.

*3. Sentencing.*

At sentencing, the trial court imposed identical five-year sentences on both Haytham and Samer, consisting of a three-year upper base term for count 1, and consecutive eight-month (one-third midterm) sentences on counts 2, 3, and 4, with concurrent sentences for the remaining six counts. In imposing the upper base term and the consecutive terms, the court cited four aggravating factors under California Rules of Court (hereafter rules), rule 4.421. The upper term was based on the fact that the crime was carried out in a manner indicating planning, sophistication, and professionalism (rule 4.21(a)(8); for the consecutive terms, the court relied on the facts that each appellant's prior convictions were numerous or of increasing seriousness (rule 4.421(b)(2)), each appellant was on felony probation when he committed the crime (rule 4.421(b)(4)), and their prior performance on probation or parole was unsatisfactory (rule 4.421(b)(5)).

Relying on *Blakely v. Washington* (2004) 124 S.Ct. 2531 (*Blakely*), both appellants contend that the upper term sentence was unconstitutionally imposed, because based on an aggravating factor that was not found by the jury, beyond a reasonable doubt. Haytham makes the same contention with respect to his three consecutive, subordinate terms. Disposition of these contentions is affected by our direction that the conviction on count 1, for which the principal, upper term was imposed, be reversed. This reversal technically moots the *Blakely* claim with respect to that count. Moreover, our disposition of the various counts will require resentencing on appellants' remaining convictions. But to provide necessary guidance for that occasion, we indicate our view of the *Blakely* issues that have been presented.

Preliminarily, respondent argues that appellants forfeited their claims, by failing to raise them at sentencing. Not so. Appellants could not then have made a claim under *Blakely*, because it had not yet been decided. That the Supreme Court had already decided *Apprendi v. New Jersey* (2000) 530 U.S. 466 is not controlling, because appellants' contentions, to the extent they are substantively viable, arise from *Blakely*'s clarification of *Apprendi*'s reference to the "statutory maximum" sentence. (See *Blakely*, 124 S.Ct. at p. 2537.) Moreover, this court would be entitled in any event to consider issues that may arise upon remand.

Turning to the merits, we conclude that the upper term sentencing below ran afoul of *Blakely*, but the consecutive sentencing did not. Regarding the latter, *Blakely's* requirement of jury determination of aggravating facts extends to facts that increase the penalty for a particular offense, beyond the statutory maximum. The consecutive sentences here, however, were for separate offenses, and each was only one-third of the midterm, which constitutes the statutory maximum, as noted below.

On the other hand, *Blakely* precludes imposition, without qualifying jury findings, of a sentence greater than the statutory maximum for an offense, meaning the maximum that may be imposed based on the facts of the conviction, without additional findings. (*Blakely*, *supra*, 124 S.Ct. at p. 2537.) Under section 1170, subdivision (b), the court must impose the middle term, unless it finds "circumstances in aggravation . . . of the

crime." (Accord, rule 4.420(a).) Thus, just as the upper term requires additional findings in aggravation, the middle term necessarily constitutes the statutory maximum term as defined in *Blakely*. Accordingly, imposition of the upper term based on a judicial finding in aggravation – as occurred here – does not comport with *Blakely* and its jury trial guarantee.

Like its predecessor *Apprendi*, *supra*, 530 U.S. at page 490, *Blakely* does not prohibit sentence aggravation based on the fact of a prior conviction, even if not found by the jury. We believe that this exception logically also extends to the aggravating facts described in rules 4.421(b)(2), (3), and (4). Otherwise, however, *Blakely* dictates that on remand appellants may not be sentenced to the upper term based on aggravating factors found only by the court.

**DISPOSITION**

The judgments are reversed with respect to counts 1 and 8, which the superior court shall order dismissed. With respect to all other counts, the judgments of guilt are affirmed, and the case is remanded for resentencing, in accordance with this decision.

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COOPER, P.J.

We concur:

BOLAND, J.

FLIER, J.