

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DOYLE D. JORDAN,

Defendant and Appellant.

D042720

(Super. Ct. No. SCE226816)

APPEAL from a judgment of the Superior Court of San Diego County, Allan J. Preckel, Judge. Affirmed in part and reversed in part.

A jury convicted Doyle D. Jordan of robbery (Pen. Code, § 211),¹ assault with a firearm (§ 245, subd. (a)(2)), burglary of a building (§ 459), unlawful taking of a vehicle (Veh. Code, § 10851, subd. (a)) and possession of a firearm by a felon (§ 12021, subd. (a)(1)), and found true the allegations that Jordan personally used a firearm during the commission of the first three charges (§§ 12022.53, subd. (b), 12022.5, subd. (a)). The court sentenced Jordan to prison for a term of 25 years.

In Jordan's original appeal, he challenged the first three convictions, contending the evidence was inherently improbable and thus insufficient as a matter of law to establish his guilt beyond a reasonable doubt. The day before we filed our original opinion in this matter, the United States Supreme Court issued its decision in *Blakely v. Washington* (2004) 542 U.S. ____ [124 S.Ct. 2531] (*Blakely*), which held a state trial court's imposition of a sentence exceeding the statutory maximum of the standard range for the charged offense based on additional factual findings made by the court violated the defendant's Sixth Amendment right to trial by jury. (*Blakely, supra*, 124 S.Ct. at p. 2538.) Because the trial court imposed upper term for the robbery conviction, we granted rehearing and requested further briefing from the parties on the effect of *Blakely* in this case. We affirm the convictions but conclude it is necessary to remand for resentencing.

I

FACTS

On December 16, 2002, a man later identified as Jordan entered a shoe store in Rancho San Diego wearing a green trench coat and carrying a shotgun. The man approached the manager, cocked the shotgun, causing a shell to fall to the floor, and demanded money. After taking \$153 from the manager, the man left the store, entered a white truck with out-of-state license plates and drove away. The next day, the San Diego County Sheriff's Department recovered a stolen white GMC Sierra truck with out-of-state license plates in front of a residence in Lemon Grove. A green trench coat, a shotgun and

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

shells of the same color and type found in the shoe store were found in the Sierra.

Deputies arrested Jordan in a motor home parked in the driveway of the same residence.

The shoe store manager believed the man who robbed the store had a lightning bolt or flame tattoo on his neck and a starburst or compass tattoo on his left hand. Jordan does not have a tattoo on his neck but does have a tattoo with points on his left hand. The manager did not identify Jordan in a pretrial photographic lineup. A customer in the store at the time of the robbery identified Jordan in a pretrial photographic lineup as the man who committed the robbery. Both the manager and the customer identified Jordan at trial as the man who committed the robbery.

When shown photographs of the Sierra seized in front of the home where Jordan was staying, the manager identified the truck as the "very same" truck involved in the robbery. The customer identified it as similar to but not the same truck. The customer was certain the truck involved in the robbery was a Ford F-150. Both the manager and the customer described the truck involved in the robbery as having out-of-state license plates.

II

THE SUBSTANTIAL EVIDENCE ISSUE

Jordan argues because the manager initially identified the robber as having a tattoo on his neck and a starburst or compass tattoo on his left hand, and was unable to identify him in a photographic lineup, the manager's in-court identification is inherently improbable. Further, Jordan urges that because the customer was certain the truck involved in the robbery was a white Ford F-150, both his photographic lineup and in-

court identifications of Jordan are inherently improbable; because the witnesses' identifications are inherently improbable, the evidence was insufficient as a matter of law to establish he was the robber.

In reviewing a claim of insufficiency of evidence, we review the record in its entirety, viewing the evidence most favorably to the respondent, to determine whether it contains substantial evidence to support the trial court's factual determinations. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) We do not sit as the trier of fact and determine whether the evidence proves guilt beyond a reasonable doubt. Rather, we determine if substantial evidence supports the conclusion of the trier of fact. (*Ibid.*) Substantial evidence is evidence that is reasonable, credible and of solid value. (*Id.* at p. 578.)

We reverse a conviction if the evidence supporting the conviction is inherently improbable. (*People v. Thornton* (1974) 11 Cal.3d 738, 754, overruled on other grounds by *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12; *People v. Headlee* (1941) 18 Cal.2d 266, 267.) To warrant rejection of testimony of a witness as inherently improbable, the witness's statements must either be plainly false without resorting to any inferences or deductions, or there must exist physical impossibility that they are true. (*People v. Thornton, supra*, 11 Cal.3d at p. 754.) Conflicts or inconsistencies in the testimony do not justify reversal, " 'for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.' " (*Ibid.*)

Considering the standard of appellate review, neither the manager's nor the customer's testimony is inherently improbable. Both positively identified Jordan in court

as the robber. Both described the getaway vehicle as a white pickup truck with out-of-state license plates. Both described the robber's shotgun and identified the green trench coat. The jury was entitled to determine the credibility of these and other witnesses and to resolve discrepancies in testimony. The factual determinations in this case are supported by substantial evidence, which is not inherently improbable.

III

THE *BLAKELY* ISSUE

A. Background

The prosecution sought the upper term on the robbery conviction and the probation report recommended the upper term, citing numerous aggravating factors. At sentencing, Jordan sought the low term, arguing the factors in mitigation militated in favor of the low term. The trial court sentenced Jordan to the five-year upper term on the robbery conviction (which it doubled under the Three Strikes law), citing numerous aggravating facts: the crime involved a high degree of callousness (Cal. Rules of Court, rule 4.421(a)(1)),² the manner of its commission indicated substantial planning (rule 4.421(a)(8)), Jordan's prior record of convictions (rule 4.421(b)(2)), Jordan's prior prison terms (rule 4.421(b)(3)), and Jordan's unsatisfactory performance while on federal supervised release (rule 4.421(b)(5)).

In his brief on rehearing, Jordan contends that pursuant to the analysis of *Blakely*, the court's finding of facts to justify its imposition of upper term sentence violated his

² All rule references are to the California Rules of Court.

right to a jury trial. The Attorney General responds that Jordan waived or forfeited the issue by not raising a challenge to the sentence in the proceedings below, *Blakely* is inapplicable to California's sentencing scheme, and even if *Blakely* applies to California's sentencing, any error was harmless beyond a reasonable doubt.

B. The Issue Is Preserved

In *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*), the California Supreme Court held 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 appeal. However, *Scott's* reasons for its waiver rule--the necessity 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)--is 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 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. Lott* (10th Cir. 2002) 310 F.3d 1231, 1242-1243; *U.S. v. White* (2d Cir. 2001) 240 F.3d 127, 136.) No published case in California held a different rule applied in connection with the imposition of an upper term sentence. Because of this state of the law, an assertion of a constitutional 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 Jordan's sentencing, Jordan 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 "[i]f appropriate waivers are procured," a state is free to utilize judicial fact-finding in its sentencing scheme].)

The Attorney General argues Jordan forfeited his right to assert the sentence was error because he did not object below.³ However, Jordan advocated in the trial court for a mitigated sentence. Under the circumstances, it would be unreasonable to find Jordan forfeited a constitutional challenge of which he was unaware, and we find the forfeiture rule inapplicable.

³ The Attorney General argues *U.S. v. Cotton* (2002) 535 U.S. 625 held that a defendant's failure to object at trial can forfeit his right to assert improper sentencing under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) even though *Apprendi* had not been decided at the time of trial. The Attorney General argues, by extension, Jordan's failure to object at trial forfeited his right to assert improper sentencing under *Blakely* even though his trial pre-dated *Blakely*. However, the Attorney General does not articulate how the forfeiture doctrine is distinct from *Scott's* waiver doctrine, or why such distinctions should call for a different analysis. Moreover, *Cotton* evaluated a distinct claim--whether a grand jury indictment alleging conspiracy to possess and distribute drugs but omitting any quantity allegation--deprived the court of the ability to sentence the defendant to the higher sentence based on the amount possessed when the defendant did not object *and it was* " 'essentially uncontroverted' " the amount possessed by the defendant qualified for the higher sentence. (*Cotton*, at pp. 632-633.) *Cotton* effectively concluded the omission was harmless because, considering the evidence, "[s]urely the grand jury, having found that the conspiracy existed, would have also found that the conspiracy involved [the requisite amount]." (*Id.* at p. 633.) Thus, the forfeiture analysis in *Cotton* turned on its conclusion the omission was harmless to the defendant's rights. Here, however, Jordan did contest some of the facts on which the sentence was based and it was not " 'essentially uncontroverted' " all of the aggravating factors cited by the trial court were present.

C. Blakely Applies 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 [of the standard range] 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 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 Supreme Court, we must determine whether *Blakely* applies here.

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, the circumstances in aggravation outweigh the circumstances in mitigation. (§ 1170, subd. (b); rule 4.420(c), (d).) The Attorney General argues imposition of an upper term 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*. We conclude this distinction is one without a difference. Although an upper term is a "statutory maximum" penalty in the sense 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 applying *Blakely*. (*Blakely, supra*, 124 S.Ct. at p. 2537; see *Apprendi v. New Jersey*

(2000) 530 U.S. 466, 491-497 [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 p. 2538.) 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.⁴ Thus, the question becomes

⁴ The Attorney General correctly notes *Blakely* and *Apprendi* expressly preserved *Almendarez-Torres v. U.S.* (1998) 523 U.S. 224, which held a defendant has no right to have a jury determine the truth of a prior conviction allegation. From this foundation, the Attorney General argues Jordan's record of multiple convictions automatically qualified him for the upper term under rule 4.421(b)(2), regardless of the presence of other aggravating factors (because a single factor in aggravation may qualify a defendant for the upper term, see *People v. Cruz* (1995) 38 Cal.App.4th 427, 433), and under *Almendarez-Torres* a court may determine the truth of this "upper-term-eligible" factor for sentencing purposes without offending the federal Constitution. The Attorney General's argument is that because the combined impact of the jury's verdict and the court's *Almendarez-Torres* finding makes the upper term a permissible sentence, the trial court's remaining decision of *whether* to impose the maximum term may be guided by consideration of traditional sentencing factors unencumbered by *Blakely's* requirements for jury findings. There is authority that rule 4.421(b)(2)'s "numerous" or "increasing seriousness" issues are *Blakely* issues. (*People v. George* (2004) 122 Cal.App.4th 419, 425-426 [increasing seriousness is a *Blakely* issue].) It appears premature to reach this question because the trial court on remand might elect either to impose the mid-term or to rely on aggravating factors outside the ambit of *Blakely*.

whether the trial court could properly rely on the cited factors as the basis for its decision to impose the upper term without violating *Blakely*.

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 for the robbery conviction. Under *Blakely*, the constitution requires a jury to determine any fact "the law makes essential to the punishment" other than the fact of the defendant's prior conviction. (*Blakely, supra*, 124 S.Ct. at pp. 2537, fn. 5, 2540 [any fact that pertains to whether the defendant has a legal right to a lesser sentence].) Applying those standards to the present case, there is no finding by the jury to support all of the factors relied on by the trial court in its selection of the upper term. Accordingly, we find on this record the court's decision to select the upper term for the robbery conviction violated Jordan's Sixth Amendment right to a jury trial, as defined in *Blakely*.

D. The Harmless Error Argument

The Attorney General makes two arguments that are essentially harmless error arguments to support its position that the sentence should be affirmed under *Blakely*. First, even if *Blakely* requires jury findings on facts justifying selection of the upper term sentences in some cases, the error was harmless beyond a reasonable doubt because the jury would have found the fact-based aggravating factors present. The Attorney General does not argue the harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 should be applied, but instead argues that under *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327, the error is tested by the constitutional harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24. The Attorney General argues the

evidence at trial provided overwhelming or uncontradicted proof of the aggravating circumstances relied on by the trial court for the upper term, and therefore there is no doubt the jury would have found true each of the aggravating factors cited by the trial court had those issues been presented to the jury.

We doubt denial of a jury trial on the existence of fact-based aggravating factors is subject to a harmless error analysis. Ordinarily, the denial of a right to a jury trial is a structural defect resulting in a miscarriage of justice and is reversible per se. (*People v. Collins* (2001) 26 Cal.4th 297, 311-313.) Therefore, it is irrelevant whether on appeal we are of the opinion beyond a reasonable doubt a jury would have found those factors to be established. Certainly the denial of a jury trial on the issue of guilt of the charged offense is not subject to a harmless error analysis and in a criminal case the trial court cannot issue a judgment of conviction after a jury acquittal, regardless of the overwhelming evidence of guilt. We see no reason the principle should be different when the denial of a jury trial relates to the existence beyond a reasonable doubt of fact-based aggravating sentencing factors under *Blakely*.

Even were we to apply the *Chapman* harmless error standard suggested by the Attorney General, we cannot say, beyond a reasonable doubt, the factors cited by the trial court would have been found true by the jury based on the evidence submitted at trial. Several of the factors cited by the trial court (e.g. Jordan's history of convictions and his unsatisfactory performance on parole) were *not* part of the evidence at trial, and therefore Jordan had no occasion to subject those issues to challenge, rebuttal or explanation. Two other factors relied on by the trial court were Jordan's callousness because he menaced

the victim by "racking" a shell and pointing the shotgun at the victim (rule 4.421(a)(1)) and because Jordan's use of a stolen truck as his getaway vehicle showed substantial planning (rule 4.421(a)(8)). Because a rational trier of fact could conclude Jordan's method of displaying his weapon was not significantly more callous than a standard armed robbery, or that his mere use of a stolen vehicle does not necessarily show a greater level of planning than other similar robberies, we cannot conclude beyond a reasonable doubt these factors would have been found true were they submitted to a jury.

Second, the Attorney General argues the trial court could have imposed the upper terms even disregarding the fact-based aggravating factors. Here the trial court did rely on one factor--Jordan served prior prison terms (rule 4.421(b)(3))--that appears outside the ambit of the types of aggravating factors *Blakely* requires be submitted to a jury.

(*People v. Thomas* (2001) 91 Cal.App.4th 212, 216-223 [prior prison term enhancements are within *Almandarez-Torres* exception].) The Attorney General appears to suggest the propriety of this single factor as a basis for imposing an upper term sentence is sufficient to withstand Jordan's constitutional challenge to the sentence. 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. (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.) Indeed, the prosecutor contended here the aggravating factors far outweighed any mitigating circumstances, and the trial court agreed. However, assuming without deciding resentencing is required unless we are convinced beyond a reasonable doubt the court would have imposed the same sentence

even without consideration of the improper factors (but see *People v. Collins*, *supra*, 26 Cal.4th 297, 311-313 [recognizing 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 the elimination of most of the cited factors would not have made a difference in the court's sentencing decision here. (*People v. Avalos* (1984) 37 Cal.3d 216, 233 ["reviewing court may not simply ask whether the imposed sentence would be 'wholly unsupported or arbitrary in the absence of error' but must also reverse where it cannot determine whether the improper factor was determinative for the sentencing court"].)

DISPOSITION

The sentence, insofar as the court imposed the upper term for the robbery conviction, is vacated; in all other respects, the judgment is affirmed. The case is remanded to the superior court to conduct a new sentencing hearing consistent with the principles discussed in this opinion.

McDONALD, J.

I CONCUR:

O'ROURKE, J.

BENKE, J., concurring and dissenting.

I concur in the majority opinion insofar as it concludes there is sufficient evidence to support the verdict. For reasons set forth in *People v. Wagener* (Oct. 22, 2004, D042896) ____ Cal.App.4th ____ [04 D.A.R. 12970], I conclude the sentence imposed was proper and I would not remand this case for resentencing.

BENKE, Acting P. J.