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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

THE PEOPLE, Plaintiff and Respondent, v. DAVID S. LIDDELL, Defendant and Appellant.	B168810 (Los Angeles County Super. Ct. No. KA060591)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark G. Nelson, Judge. Affirmed in part, reversed in part, and remanded.

John A. Colucci, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lawrence M. Daniels, Marc J. Nolan and A. Scott Hayward, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant David S. Liddell appeals from the judgment entered following a jury trial that resulted in his conviction of three counts of second degree robbery and one count of attempted second degree robbery. He contends: (1) his post-arrest statement to police was obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*); (2) the out-of-court identification process was unduly suggestive; (3) the fact of firearm use cannot be used both as an enhancement and to impose the upper term; and (4) the trial court abused its discretion in refusing to strike one of the alleged three strikes priors (Pen. Code, §§ 667, subds. (b) through (d), 1170.12, subds. (a) through (d)).[1] In a supplemental brief, appellant contends that the trial court's selection of the upper term violated his Sixth Amendment right to a jury trial under *Blakely v. Washington* (2003) 532 U.S. ___, 124 S.Ct. 2431 (*Blakely*). We remand for resentenceing in accordance with *Blakely*, but otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Viewed in accordance with the usual rules on appeal (*People v. Kraft* (2000) 23 Cal.4th 978, 1053), the evidence established that Independent Community Resources (ICR) is located in San Dimas. At about 4:15 p.m., on February 6, 2003, ICR employees Angela Vilches and Lisa Escobedo were at Escobedo's desk when they were confronted by a mask-wearing, gun-wielding man who demanded their purses and instructed them to get on the ground. Both women got on the ground, and Vilches gave the man her purse, but Escobedo managed to hide hers under her desk. When ICR employee Gary Franck heard female screams, he walked down the hall and saw a man pointing a gun at Escobedo and Vilches. Franck complied when the man turned the gun on Franck, told him to get down on the ground, and said, "Give me your wallet and your keys or I'll kill

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[1] All further undesignated section references are to the Penal Code unless otherwise noted.

you."[2] Another co-worker, Amie Bunker, also entered the office.[3] After a few minutes, the man instructed his four victims to crawl into the hallway, lay face down and wait three to five minutes before getting up. After the man left through a backdoor, they got up and called the police.

Meanwhile, employees Esther Herrera and Rose Rios were in a conference room when they heard women screaming and a male voice say, "get on the floor" and "to hand purse and keys." Leaving through a staff exit, Herrera and Rios went into a dentist's office across the exterior hall or breezeway. While in the dentist's office speaking to the 9-1-1 operator, Herrera was looking through a window onto the breezeway when she saw defendant come out of the ICR office. Herrera noticed he was holding a green duffle bag that Herrera had earlier seen in the staff area of her office, as well as two other bags. Rios also noticed defendant walk by the window carrying the duffle bag and two purses. Rios was able to see his face for about five seconds.

Mary Ann Meek was sitting in the waiting room of the dentist's office, opposite the window, while Herrera and Rios were calling the police. Meek saw defendant walk by the window holding several items. Meek was taken to a field-identification a short time later, where she identified defendant from his profile.[4]

Daryl Castro lived about half a block from the ICR offices. The afternoon of the robbery, Castro was in front of his home talking to a neighbor who told him that the

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[2] Franck told the man where his car was parked, but Franck's car was not taken.

[3] Vilches testified that the man took Bunker's purse. Bunker testified that she told the man several times that she did not have a purse and he eventually left without getting the purse.

[4] The only witness put on by the defense was reserve deputy sheriff David Chelske, who testified that he interviewed various witnesses at the scene that day. Both Meek and Rios told him that they saw defendant remove a ski mask from his face. At trial, Meek and Rios each testified that, when they saw defendant pass by the dentist's office window, they did not see a ski mask.

police were looking for someone. During this conversation, Castro noticed an unfamiliar Black man, wearing green pants and a cream colored shirt, walk out of a neighbor's driveway. Castro looked away and when he looked back, the man ran away, arousing Castro's suspicions and causing him to call the police. At a field show-up abut 10 minutes later, Castro identified defendant as the man he saw coming out of the neighbor's driveway.

Deputy Edward Mackenzie of the Los Angeles County Sheriff's Department was looking for evidence near the ICR offices when he saw two purses, a ski cap or mask and a black semi-automatic handgun all shoved into the space between a retaining wall and some wood on the side of Magno Katigbak's home. A few days later, Katigbak found a bag, which the police came and took away. The green duffle bag that Deputy George Contreras retrieved from Katigbak's home was the same duffle bag that Herrera and Rios had seen defendant carrying. Inside the duffle bag, Contreras found a magazine, two gloves, Nike sweat pants, a pair of white tennis shoes and some papers. Defendant's name appeared on some of the papers.

Defendant was charged with the robberies of Vilches, Franck, and Bunker, and the attempted robbery of Escobedo. As to all four counts, it was further alleged that defendant personally used a firearm (§ 12022.53, subd. (b)); that he suffered three prior convictions within the meaning of the Three Strikes Law, and three prior convictions within the meaning of section 667, subdivision (a)(1). In bifurcated proceedings, a jury convicted defendant as charged, including true findings on the section 12022.53 gun use enhancement allegations, and the trial court found the priors true. After denying defendant's motion to strike one of the three strikes priors, the trial court sentenced defendant to 55 years to life in prison, the details of which we set forth in our subsequent discussion of the claimed sentencing errors.

DISCUSSION

Defendant's *Miranda* Rights Were Not Violated

Defendant contends the trial court erred in admitting into evidence his post-arrest statement to investigating officers: "What, did I rob some purses or something?" He argues that the statement was "the product of the functional equivalent of police interrogation and because it was the result of continued police badgering, coercion and manipulation in the face of appellant's refusal to waive" his *Miranda* rights. We disagree.

In *People v. Bradford* (1997) 14 Cal.4th 1005 (*Bradford*), our Supreme Court observed: "In considering a claim that a statement or confession is inadmissible because it was obtained in violation of a defendant's rights under *Miranda* . . . , the scope of our review is well established. 'We must accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported. However, we must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement was illegally obtained.' We apply federal standards in reviewing defendant's claim that the challenged statements were elicited from him in violation of *Miranda*. . . . [¶] . . . [¶] If the defendant receives *Miranda* warnings, and thereafter requests counsel, ' "the interrogation must cease until an attorney is present." ' Interrogation consists of words or actions on the part of the police that they should know are 'reasonably likely to elicit an incriminating response.' However, if the defendant thereafter initiates a statement to police, 'nothing in the Fifth and Fourteenth Amendments . . . prohibit[s] the police from merely listening to his voluntary, volunteered statements and using them against him at the trial.' " (*Id.* at pp. 1033-1034, citations omitted.)

Here, Deputy Jose Reveles of the Los Angeles County Sheriff's Department testified at an Evidence Code section 402 (§ 402) hearing that, after defendant was arrested, Reveles and his partner, Kevin Fulkes, interviewed defendant in a holding cell. Reveles told defendant that he had been arrested for armed robbery, but did not give

defendant any specifics of the crime. Reveles attempted to advise defendant of his constitutional rights by having defendant read a "waiver sheet." Reveles asked defendant for his name, so that Reveles could put it on the waiver sheet. Defendant refused to give his name or sign the waiver sheet.[5] After defendant refused to do so, Fulkes told defendant that the officers wanted to hear defendant's side of the story, but could not do so until defendant signed the waiver sheet. Defendant said that he would not sign the waiver sheet unless the officers told him everything they knew about the case. Reveles reiterated that he could not talk to defendant "unless he read his rights and signed the waiver form." Defendant then said to call him "Trey," Reveles wrote "Trey" on the waiver sheet, and defendant signed the sheet. Shortly thereafter, a sergeant familiar with defendant from another matter entered the room and identified defendant by his true name. All the while, defendant complained that he was being harassed because he was a Black man in San Dimas, and continued to ask what evidence there was against him. At one point, defendant said, "What, did I rob some purses or something?" Once defendant made this statement, the officers made no further attempt to interview defendant because he would not sign a waiver sheet with what the officers now knew was his true name. Defendant never asked for an attorney, or indicated that he would not speak to the officers without an attorney being present. He refused to sign a waiver sheet with his true name, but never categorically refused to speak to the officers.

Defendant testified that he did not give arresting officers his true name when he was arrested, transported to the police station and put in a holding tank. During the trip to the station, defendant asked why he was being arrested. While in the holding tank,

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5 We note that the United States Supreme Court in *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County* (2004) ___ U.S. __ [124 S.Ct. 2451], recently reaffirmed that " '[I]nterrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure.' [Citation.]" Moreover, the court held that a suspect can be prosecuted for refusing to identify him or herself under an appropriate state law, where such information is not itself incriminating. (*Id.* at p. ___ [124 S.Ct. at p. 2458.)

Officer Reveles and his partner asked defendant to sign a waiver of rights form. Defendant declined to do so, explaining to the officers that he had been wrongly arrested. He then asked what evidence they had against him. The officers told defendant that they wanted to talk to him about what had occurred, but could not do so unless defendant signed the waiver. Defendant testified: "I told them I wasn't going to talk to them anyway because I didn't have a lawyer present, and I didn't feel at that time – they were trying to give me – they weren't trying to give me any information about what was going on and really why they were truly detaining me, so I didn't want to talk to them without somebody being present." Defendant refused several requests to sign the waiver form and to give his true name, during which time he continued to ask what evidence the officers had against him. At some point, the officers mentioned a robbery. Eventually, defendant signed the form with the false name of "Trey" because he got tired of arguing. After doing so, defendant told the officers he needed representation in order to speak to them. Over the course of his conversations with the officers, defendant repeatedly asked the officers what evidence they had against him. When the officers told defendant that some women had been robbed, defendant said, "What did I do, rob some purses or something?" Defendant intended the comment to be facetious. Before defendant said anything about purses, he had already told the officers several times that he did not want to sign the waiver form.

Based upon this evidence, the trial court found the challenged evidence admissible, reasoning that, although defendant was under arrest at the time he made the statement, it was not made in response to any questions or "baiting" by the officers. The trial court found that, "regardless of whether or not defendant had invoked his right to have counsel present before and during questioning, which assertion the court does not find to be a proven fact, that the defendant continued baiting for and eliciting information from the detectives."

Substantial evidence supports the trial court's factual findings that defendant's challenged statement was initiated by defendant himself, and not made in response to any

police interrogation. Because " 'nothing in the Fifth and Fourteenth Amendments . . . prohibit[s] the police from merely listening to his voluntary, volunteered statements and using them against him at the trial[]' " (*Bradford, supra*, 14 Cal.4th at p. 1034), the trial court did not err in admitting the statement.

We are not persuaded to the contrary by defendant's assertion that the officer's refusal "to inform [defendant] of the nature of the charges worked as a coercive factor which induced him to inquire further." There is substantial evidence that defendant was told that the officers were investigating a robbery. It was not incumbent upon the officers to give defendant details of the crime or the evidence so far collected against him.

The Out-of-Court Identification Process was Not Unduly Suggestive

Defendant contends the trial court erred in denying his motion to suppress all of the out-of-court identifications, including those made by Rios, Meek, Castro and Knight, as well as these witnesses' in-court identifications. He argues that, although each of the witnesses was instructed that the individual being detained may or may not be the person who committed the offense, the single-person filed show-ups were unduly suggestive because the defendant was in handcuffs and surrounded by police. We find no error.

"An identification may be so unreliable that it violates a defendant's right to due process under the Fourteenth Amendment. [Citations.]" (*People v. Nguyen* (1994) 23 Cal.App.4th 32, 37 (*Nguyen*).) In determining whether an identification violates a defendant's due process rights, the court must ascertain (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification was nevertheless reliable under the totality of the circumstances. (*People v. Carpenter* (1997) 15 Cal.4th 312, 366-367.) Generally, a pretrial identification procedure is deemed unfair only if it suggests the identity of the person suspected by the police before the witness has made an identification. (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052.) In *In re Carlos M.* (1990) 220 Cal.App.3d 372 (*Carlos M.*), the court held that a one-person show-up, during which the defendant was handcuffed, was not unduly

suggestive where the record was "devoid of any indication that police told the victim anything to suggest the people she would be viewing were in fact her attackers." (*Id.* at p. 386.)

" 'It is unsettled whether suggestiveness is a question of fact (or a predominantly factual mixed question) and, as such, subject to deferential review on appeal, or a question of law (or a predominantly legal mixed question) and, as such, subject to review de novo. [Citations.]' . . . Factual determinations by the trial court will be upheld on appeal if supported by substantial evidence. [Citations.]" (*Nguyen, supra*, 23 Cal.App.4th at p. 38.) Under either standard, we find the procedure used here was not unduly suggestive.

As in *Carlos M.*, the record is devoid of any indication that the police told any of the witnesses anything to suggest the person they were viewing was in fact the robber. (*Carlos M., supra*, 220 Cal.App.3d at p. 386.) On the contrary, defendant acknowledges that the witnesses were each advised that the person they were viewing may not be the robber.

That Castro and Knight were brought to the field show-up together does not compel a contrary result.[6] Relying only on several federal district court cases, defendant argues that Castro's identification was tainted because he was with Knight at the time it was made. Preliminarily, we observe that, while decisions of the United States Supreme Court are binding on state courts on federal questions, " '. . . the decisions of the lower federal courts, while persuasive, are not binding on us. [Citation.] Thus, in the absence of a controlling United States Supreme Court opinion, we make an independent determination of federal law.' . . ." (*Forsyth v. Jones* (1997) 57 Cal.App.4th 776, 782-

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6 Castro testified at trial that he and Knight were brought to the field show-up together in a single police car. Castro was 100 percent sure that defendant was the person he saw walking out of his neighbor's driveway. Knight did not testify.

783; citing *People v. Bradley* (1969) 1 Cal.3d 80.) In any event, the cases upon which defendant relies do not persuade us that Castro's identification was tainted.[7]

The Trial Court Did Not Abuse Its Discretion in Refusing to Strike One of the Alleged Three Strikes Prior Convictions

Defendant contends the trial court abused its discretion in refusing to strike one of the priors alleged pursuant to the Three Strikes Law. He argues that defendant's personal history, character letters, as well as the facts that no one was physically injured in the offense and his prior offenses lacked "the depravity and gratuitous violence reflected in the records of so many career criminals," all established that defendant fell outside the spirit of the Three Strikes Law. We disagree.

Trial courts have limited discretion under section 1385, subdivision (a) to strike findings made under the Three Strikes Law. (*People v. Williams* (1998) 17 Cal.4th 148, 158 (*Williams*); see also *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530-

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[7] In *United States v. Bagley* (9th Cir. 1985) 772 F.2d 482, 494, the court held that, although a joint confrontation is a disapproved procedure, the identification may nevertheless be sufficiently reliable where there is evidence the witnesses had a good opportunity to view the perpetrator and testify that their identification is independent of that of any other witnesses. In *United States v. Field* (9th Cir. 1980) 625 F.2d 862, 870, the fact that the witness/bank teller was with several other tellers when an FBI agent identified the defendant as one of the arrested suspects was just one of several factors contributing to the court's conclusion that the witness's identification lacked sufficient indicia of reliability. Finally, in *United States v. Wilson* (D.C. Cir. 1970) 435 F.2d 403, 405, the court observed: "There is one aspect of the identification in this case that gives us concern. It appears probable from the record that at least to some extent the two victims were together when they identified appellant as the assailant. If it is feasible for each witness, victim or otherwise, to stand alone when asked to make the identification, aye nor nay, this is the course that should be followed. While the benefit of a prompt on-the-scene confrontation makes acceptable the necessary suggestiveness of presentation of a single subject (a 'showup'), there is ordinarily no need for the additional element of suggestiveness of identification made at the same time by two or more witnesses in each other's company. However, that particular point was not focused at trial, and the pertinent facts are by no means clear. Following the 'totality of circumstances' approach, we do not think this defect warrants reversal or remand of this case."

531 (*Romero*).) We review the trial court's exercise of its discretion to *not* strike a prior conviction under the deferential, abuse-of-discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 373.) Under this standard, we must determine whether the ruling in question " 'falls outside the bounds of reason' under the applicable law and the relevant facts [citations]." (*Williams, supra*, at p. 162.)

To strike a Three Strikes finding requires consideration "both of the constitutional rights of the defendant, and the interests of society represented by the People." (*Williams, supra*, 17 Cal.4th at p. 162, italics omitted.) To strike a strike solely for the reason of " '. . . personal antipathy for the effect that the Three Strikes Law would have on [a] defendant,' while ignoring 'defendant's background,' 'the nature of his present offenses,' and other 'individualized considerations[,]' " would be an abuse of discretion. (*Ibid*.)

Here, after observing that psychological trauma could be as serious as physical trauma, the trial court noted that defendant had two prior robbery convictions, as well as an assault with a firearm conviction; these prior convictions and the underlying offense demonstrated that defendant had failed to learn that using a gun was a bad thing; and the six years between completion of parole and the current offense, during which defendant did not run afoul of the law, was a relatively short span in the life of a 26-year-old man.[8] The trial court concluded that the circumstances of this case did not warrant striking any prior conviction findings under the reasoning of the courts in *Romero* and *Williams*. We find no abuse of discretion.

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8 Our own review of the record, including defendant's probation report, reveals a criminal history that began with a 1990 sustained Welfare and Institutions Code section 602 petition for trespassing. This was followed by a May 1991 conviction for burglary and an October 1991 conviction for assault with a firearm and burglary. In October 1993, defendant was convicted of robbery, fraudulent use of a credit card and taking a vehicle without the owner's consent. In July 1995, defendant was once again convicted of robbery. In April 2002, defendant was convicted of misdemeanor driving under the influence.

Dual Use

Defendant next contends that "[a]t least three of the six [aggravating] factors [identified by the trial court in support of its choice to impose the high term] violate the dual-use prohibition . . . ."[9] We disagree.

Pursuant to section 1170, subdivision (b) where a statute specifies three possible terms of punishment, the trial court must impose the middle term "unless there are circumstances in aggravation or mitigation of the crime. . . . The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law." (See also Cal. Rules of Court, rule 4.420(c)[10] ["To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so."]; *People v. Scott* (1994) 9 Cal.4th 331, 350 [court cannot use single fact both to aggravate base term and impose enhancement].) Specifically, "the fact of gun use may be used only once, either as an aggravating circumstance warranting imposition of the upper term, or as an enhancement, but not for both. [Citations.]" (*People v. Davis* (1980) 103 Cal.App.3d 270, 279, disapproved on another ground in *People v. Wolcott* (1983) 34 Cal.3d 92, 106, fn. 6.)

Rule 4.420(e) requires the trial court to orally state on the record its reasons for selecting the upper or lower term. It is sufficient if the trial court paraphrases the language of the relevant rule in reciting its reasons for the sentencing choice. (*People v. Garcia* (1995) 32 Cal.App.4th 1756, 1771.) The statement of reasons need not eliminate

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9 Defendant also contends that the other aggravating factors are not supported by substantial evidence. Defendant's failure to object on these grounds in the trial court constitutes a waiver of this issue on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 348-349.)

10 All rules cited herein are to the California Rules of Court.

every conceivable possibility of error and the trial court's ruling is entitled to a presumption of correctness. (*Id.* at p. 1774.)

Here, before announcing its sentencing choice, the trial court initially identified the following six aggravating factors: (1) defendant's prior convictions as an adult and sustained delinquency petitions are numerous or of increasing seriousness (rule 4.421(b)(2)); (2) the manner in which the crime was carried out indicates planning, sophistication, or professionalism (rule 4.421(a)(8)); (3) the crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness (rule 4.421(a)(1)); (4) defendant was armed with or used a weapon in the commission of the crime (rule 4.421(a)(2)); (5) the victim was particularly vulnerable in that they were in their place of business where they would have felt safe (rule 4.421(a)(3); and (6) defendant had engaged in conduct which indicates he is a serious danger to society (rule 421(b)(1)). This colloquy followed: "[THE PROSECUTOR]: Your Honor, out of an abundance of caution, I would ask the court whether or not it can legally consider the fact that the defendant was armed or used the firearm in the commission of his crimes since it is also a factor that's based upon the enhancements. I would also point out that under [rule] 4.421(1)(B)(4), the defendant has also served prior prison terms. [¶] And I submit it. [¶] THE COURT: We have 667(a)(1). Actually, those aren't prior prison priors.[11] You are correct. I think there's probably sufficient number." From this colloquy, it appears that the trial court agreed with the prosecutor that use of a firearm could not be used as an aggravating factor (rule 4.421(a)(2)) under the circumstances of this case, but that the fact defendant had served prior prison terms (rule 4.421(b)(3)) could be so used. The inference that the trial court replaced the gun use factor with the prior prison term factor is bolstered by the fact

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11 A section 667, subdivision (a) enhancement involves prior *convictions*, not prior prison terms. (Compare § 667, subd. (a) with § 667.5 [sentence enhancement because of prior prison terms].) Here, defendant was charged with section 667, subdivision (a) enhancements, not section 667.5 enhancements.

that the trial court subsequently referred to "six factors" in aggravation. If the trial court had continued to consider the firearm use as well as the prior prison terms as aggravating factors, there would have been *seven* such factors, not six.

After stating the factors in aggravation, and denying the motion to strike, the court selected option three under the Three Strikes laws rather than imposing a 25 to life or trebled sentence. Pursuant to section 1170.12, subdivision (c)(2)(A)(iii), defendant was sentenced to an initial indeterminate sentence of 30 years to life, comprised of the 5 year high term for robbery, plus a consecutive 10 years for the section 12022.53(b) gun use enhancement, plus a consecutive 5 years for each of three priors found true within the meaning of section 667, subdivision (a)(1). To this 30-year basic sentence, the trial court added the relevant enhancements of a consecutive 15 years for the three section 667, subdivision (a)(1) prior convictions (5 years for each conviction), plus a consecutive 10 years for the section 12022.53 (b) enhancement.[12]

Defense counsel objected: "We think it's dual use of the firearm and the priors. It's actually triple use of the priors."[13] The trial court responded that its sentencing choice was supported by *People v. Byrd*.[14] As we explain more fully below, we find no error.

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[12] Identical sentences imposed on the other robbery counts, counts three and four, were ordered to run concurrently with the sentence imposed on count one. As to the attempted robbery count, count two, the trial court imposed a concurrent 53-year term, comprised of the three-year high term, plus the same consecutive enhancement imposed on the other counts.

[13] Contrary to the People's assertion, we find this objection sufficient to preserve the issue for appeal.

[14] Presumably, the trial court was referring to *People v. Byrd* (2001) 89 Cal.App.4th 1373. In that case, the defendant was convicted of 12 counts of robbery, one count of mayhem, one count of attempted premeditated murder, and one count of possession of a firearm by a convicted felon. Firearm enhancements under section 12022.53, subdivisions (b) and (d) were found true, as were three prior "strikes" under the Three Strikes Law. (*Id.* at p. 1375.) The defendant contended that the trial court erred in computing his sentence on 10 robbery counts pursuant to section 667, subdivision

a. Gun use

Defendant argues that the trial court improperly used gun use both as an aggravating factor to impose the high term on the robbery counts (rule 4.421(a)(2)), and as the subject of the section 12022.53, subdivision (b) enhancement. But as we have already explained, the trial court replaced the gun use aggravating factor (rule 4.421(a)(2)) with the prior prison term aggravating factor (rule 4.421(b)(3)).

b. Prior convictions

We are also not persuaded by defendant's argument that the trial court improperly used the number and increasing seriousness of his prior convictions to impose the high term (rule 4.421(b)(2)), because those prior convictions had already been used both as "strikes" and to impose the section 667, subdivision (a) enhancements.

Three prior convictions were alleged in support of the Three Strikes allegation: a 1992 assault with a deadly weapon, a 1993 robbery, and a 1995 robbery. The 1995 robbery and 1992 assault convictions also each formed the basis of separate section 667, subdivision (a)(1) enhancements. In addition to these three prior convictions, defendant's probation reflects a sustained juvenile conviction in 1990 for trespassing, a 1991 burglary conviction, and a 2002 conviction for misdemeanor driving under the influence. Thus, the trial court's aggravation finding is supported by the entire record, not just the prior convictions underlying the Three Strikes and prior conviction enhancement allegations.[15]

(e)(2)(A)(iii), which is substantially identical to section 1170.12, subdivision (c)(2)(A)(iii). In pertinent part, the appellate court rejected the defendant's contention that the trial court erred in imposing consecutive terms on each of the 10 robbery counts, and in not imposing one-third the middle term for each robbery and each firearm use enhancement. (*Id.* at pp. 1379-1381.)

[15] Defendant also argues that the trial court improperly used the fact that defendant engaged in violent conduct which indicates a serious danger to society to impose the high term (rule 4.421(b)(1)) because such conduct is "a restatement of his criminal history which is comprised primarily of the prior convictions used to enhance his sentence, and of his weapon use, already punished under section 12022.53, subdivision (b)." As we

Blakely Error

After the matter was submitted, we vacated the submission and granted defendant's application to file a supplemental brief addressing the single issue of whether, under *Blakely, supra*, 124 S.Ct. 2431, defendant's Sixth Amendment right to a jury trial was violated by the trial court's use of the above-described aggravating factors to impose the high term.[16] We conclude that, while two of the factors do not fall within the scope of *Blakely*, or its antecedent, *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), four do fall within *Blakely*. Accordingly, we remand for resentencing in light of *Blakely*.[17]

In *Apprendi,* the United States Supreme Court held that any fact, other than a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be charged, submitted to a jury, and proved beyond a reasonable doubt. In *Blakely*, the Supreme Court clarified that the relevant " 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (124 S.Ct. at p. 2537, italics original.) For the reasons stated by our colleagues in *People v. White,* 2004 WL

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explain more fully below, this was an improper aggravating factor under *Blakely*. Accordingly, we need not address appellant's dual-use contention regarding this factor.

16 We note that the question of whether, under *Blakely*, the trial court is precluded from making factual findings on aggravating factors in support of an upper term is currently under review by the California Supreme Court. (*People v. Towne*, review granted July 14, 2004, S125677.)

17 In coming to this conclusion, we recognize that a single proper aggravating factor is usually sufficient to support imposition of the upper term even where the trial court has also articulated improper factors. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433-434; *People v. Levesque* (1995) 35 Cal.App.4th 530, 548.) And when a trial court has given both proper and improper reasons for a sentence choice, the sentence may be set aside "only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper." (*People v. Price* (1991) 1 Cal.4th 324, 492.)

2896571 (Cal.App.2d Dist.), *Blakely* applies to the imposition of the upper term in those circumstances where the middle term is the effective maximum term a trial court may impose without finding additional facts. (See also *People v. Juarez* (2004) 124 Cal.App.4th 56, 86; but see *People v. Picado* (2004) 123 Cal.App.4th 1216, 1235-1243.) We must, therefore, determine whether any of the aggravating factors relied upon by the trial court were found by the jury, admitted by defendant, or fall outside the scope of *Apprendi* and *Blakely*. And, if so, whether these aggravating factors are sufficient to establish that it is not reasonably probable the trial court would have pronounced a different sentence if it knew that these were the only aggravating factors which could be properly considered. (*People v. White, supra* [cannot determine whether sentencing judge would have imposed upper term in the absence of three of the four cited aggravating factors].)

Here, two of the six aggravating factors articulated by the trial court fall within the exception for prior conviction articulated by the court in *Almendarez-Torres v. United States* (1998) 523 U.S. 224. The first was the finding that defendant's prior convictions as an adult and sustained delinquency petitions were numerous or of increasing seriousness (rule 4.421(b)(2)). Another was that defendant had served prior prison terms. (Rule 4.421(b)(4).) That prior convictions are of increasing seriousness is a matter peculiarly within the competency of the court. (Cf. *People v. Kelii* (1999) 21 Cal.4th 452, 455-456; *People v. Wiley* (1995) 9 Cal.4th 580, 589.) Thus, the trial court's reliance on the increasing seriousness of defendant's prior convictions and sustained juvenile petitions as an aggravating factor did not violate *Apprendi* or *Blakely*. Likewise, since service of a prior prison term necessarily involves a prior conviction, reliance on that factor also did not violate *Apprendi* or *Blakely*.

However, the four other factors relied upon by the trial court to impose the upper term did fall within *Blakely*. These are: (1) planning, sophistication, or professionalism (rule 4.421(a)(8)); (2) great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness

(rule 4.421(a)(1)); (3) particular vulnerability of the victims (rule 4.421(a)(3); and (4) conduct indicating defendant is a serious danger to society (rule 421(b)(1)). None of these involved defendant's recidivism and none was based solely upon facts reflected in the jury verdict or admitted by the defendant. We cannot say with any confidence that the elimination of four of the six cited factors would not have made a difference in the court's sentencing choice. The trial judge can solve this dilemma at the time of resentencing.

DISPOSITION

The upper term sentences imposed on all three robbery counts (counts one, three, and four) and the attempted robbery count (count two) are reversed; 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 views expressed herein.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RUBIN, J.

We concur:

COOPER, P.J.

BOLAND, J.