Filed 3/29/05 P. v. Mendez CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. RAMIRO MENDEZ, Defendant and Appellant.	B171826 (Los Angeles County Super. Ct. No. VA 064699)

APPEAL from a judgment of the Superior Court of Los Angeles County. Peter Espinoza and Robert J. Higa, Judges. Affirmed in part; remanded in part.

Donald R. Tickle, 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, Assistant Attorney General, Marc J. Nolan and A. Scott Hayward, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Appellant Ramiro Mendez was sentenced to prison for two life terms plus 43 years for committing murder, attempted murder, assault with a deadly weapon, and other crimes. He contends that the trial court committed reversible error by (1) failing to modify CALJIC instructions sua sponte to include references to out-of-court statements, and (2) introducing hearsay statements from the murder victim and his father. He also maintains that his sentence must be reconsidered due to *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531] (*Blakely*).

Respondent raises an additional issue: Due to what appears to be a mistake, appellant was sentenced for second degree murder, even though the jury convicted him of first degree murder.

We find no error as to guilt, but remand for resentencing.

PROCEDURAL HISTORY

Count 1 of the amended information alleged that appellant murdered Rudy Saucedo on October 30, 1999, while using a knife. Appellant and Feliciano Marentes were charged jointly on counts 2 through 11, which contained allegations that the crimes were committed to further criminal gang activity. Count 2 alleged assault with a deadly weapon (a knife) on Daniel M. on December 17, 1999, enhanced by personal use of a deadly weapon and infliction of great bodily injury. Count 3 alleged criminal threats against Martin S. on December 22, 1999. Counts 4 through 8 alleged crimes on December 24, 1999: the attempted murder of Martin S. (count 4), attempted murder of Paul S. (count 5), assault with a semiautomatic firearm on Martin S. (count 6), assault with a firearm on Paul S. (count 7), and discharging a firearm at an inhabited dwelling (count 8). Counts 9 through 11 alleged crimes on January 9, 2000: the attempted murder of Patrick R. while personally discharging a handgun (count 9), assault with a semiautomatic firearm on Patrick R. (count 10), and shooting at an inhabited dwelling (count 11).

Trial on the murder charge in count 1 was bifurcated from the trial on counts 2 through 11.

The jury trial on counts 2 through 11 occurred before Judge Peter Espinoza. Marentes was acquitted on all charges. Counts 3 and 8 were dismissed before the case went to the jury. Appellant was acquitted on counts 4 through 7, the charges involving Martin S. and Paul S. He was convicted on count 2 (the Daniel M. assault) and counts 9 through 11 (the Patrick R. crimes). The jury also found the gang allegation to be true.

The separate jury trial on count 1 occurred before Judge Robert Higa. The result was a verdict of first degree murder and personal use of a knife. The sentencing memorandum by the prosecutor erroneously indicated that the conviction on count 1 was for second degree murder. Apparently relying on that memorandum, Judge Higa sentenced appellant to prison on count 1 for 16 years to life (15 years to life for second degree murder plus one year for knife use), consecutive to the other counts.

Judge Espinoza imposed sentence on the remaining counts, after striking the gang allegation on the People's motion. Further details of that sentence will be provided in the discussion of appellant's *Blakely* issue.

A timely notice of appeal was filed.

FACTS

The facts are summarized only for the counts on which appellant was convicted.

A. The Murder of Rudy Saucedo (Count 1)

In August 1999, 17-year-old Rudy Saucedo and his family lived in Pico Rivera. Their home was near Rivera Park, a "hang out" for members of the "Rivera Trece" or "Rivera 13" street gang.[1] Appellant, who was known as "Trippy," was a member of Rivera 13.[2] Rudy had complained to his parents that he was having problems with appellant and appellant's friend, "Spooky."[3] Rudy said that every time he encountered

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[1] "Trece" is Spanish for "13."

[2] According to the probation report, appellant was 16 years old at the time of the offenses.

[3] Spooky was a different gang member than from codefendant, Marentes, whose gang name was "Felix."

Trippy and Spooky, they would fight or argue with him. He also stated that he had joined the Rivera 13 gang so that Trippy and Spooky would not hurt his parents.

On an unspecified day in August 1999, Rudy and his father, Francisco C., were working on Rudy's bicycle in their garage. Rudy's mother, Josie C., had just walked out of the house. Appellant and Spooky walked up to them. Rudy said something to Francisco. Francisco asked appellant and Spooky to leave Rudy alone, as they fought with him every time they saw him. Francisco said he was going to call the police the next time. He complained that appellant and Spooky continued to fight with Rudy even though Rudy won most of the fights, as he was "a husky kid."

Appellant and Spooky became upset. They both called Rudy's mother, Josie, a "b----." Appellant said, "I'm going to come back and kill you." Rudy stood up and said, "Don't you talk to my dad like that." Appellant and Spooky walked away, saying, "We'll be back."

After that, when Josie encountered either appellant or Spooky, they would call her a "b----." Josie encountered appellant and Spooky near a market. They frightened her by yelling, "We're going to get you, b----." She went to the park and asked some older gang members to tell appellant and Spooky to leave her family alone.

Rudy and his family moved to an adjacent community, Whittier. Around 1:00 a.m. on October 30, 1999, Rudy's dead body was found draped over some railroad tracks in Pico Rivera. He died from approximately 60 stab wounds. The body also had blunt force traumatic injuries, scrapes, abrasions, and defense wounds on the hands and arms. It had probably been moved to the tracks from a dirt area where there was more blood. Spray-painted on nearby buildings and a post were the words "Trippy" (appellant's gang name), the names of other gang members, "Rivera 13," "R13 kills," "Killers," and other gang-related terms.

Appellant was questioned several days later at the sheriff's station. He had a cut over his eyebrow and writing there which said "R13V," which was a symbol for the Rivera 13 gang. Lacerations on his hands, wrist and finger were consistent with a knife's

slipping as it was used to penetrate a victim. His blood matched samples of blood which were taken from the crime scene.

At the trial, the prosecution called appellant's mother, Victoria R. She testified that she herself was a member of the Rivera 13 gang herself, as was appellant and Marentes. She did not remember telling investigators that she did not know where appellant was the night Rudy was killed and did not know how he got the wounds on his hands. She also did not recall saying that she sometimes did not know where he was for long periods of time. A homicide detective testified that Victoria had made such a statement. Victoria also had said that appellant experienced an attitude change after he was shot earlier in 1999. Following that incident, he considered the Pico Nuevo gang his enemy, carried a knife for protection, and sang modified rap songs in which he referred to himself as a drive-by shooter.

B. The Attack on Daniel M. (Count 2)

On December 17, 1999, Daniel M. was approached outside of El Rancho High School in Pico Rivera by a friend, Matthew, who had an injured lip, black eye and bloody nose. Matthew said he had been assaulted by people who "were coming back to get him." A car drove up. Its occupants yelled out a gang-related challenge. A person got out of the car and approached Matthew, as if to assault him again. Daniel intervened and started fighting with the person. Matthew ran away. Daniel started to run away. He was stabbed in the ear and then was cut off by the car. He fell on the car's hood and was stabbed once in the back. The stabber got back into the car, which drove away. Daniel required stitches for the stab wounds.

At the trial, Daniel M. testified he could not describe the stabber. He denied telling a sheriff's deputy that he was attacked by a member of the Rivera 13 gang. However, he had immediately identified appellant as the stabber when he was shown a photographic lineup. At trial, he claimed he identified the photograph because the deputies kept tapping on the picture and urging him to make an identification. He also denied that he feared retaliation by the Rivera 13 gang and repudiated his prior statement that, two weeks before the stabbing, he had a confrontation in front of the high school

with a Rivera 13 gang member. He claimed that he did not belong to the Pico Nuevo gang. However, several months after he was stabbed, he and two Pico Nuevo gang members were involved in the shooting of a member of another rival gang, Pico Viejo.

Pretrial identifications of appellant as the stabber of Daniel M. were also made by Soledad S. and Martin S., who had no gang associations.

Soledad was waiting outside the high school to pick up Martin, who was a student there. Soledad and Martin saw a person get out of a brown car, run up to a boy at the bus stop, say something, stab him, return to the brown car, and ride away. Soledad testified that she did not remember the face of the stabber. She and Martin separately identified appellant as the stabber from live and photographic lineups.[4]

At the trial, a sheriff's department gang expert explained that El Rancho High School is in the territory of the Pico Nuevo gang. That gang is an intense rival of the Rivera 13 gang. Pico Nuevo gang members were suspects in an April 1999 shooting incident in which appellant was wounded and a fellow Rivera 13 gang member was killed.[5] Status and intimidation are a central aspect of such gangs. It would be a bold move for a Rivera 13 gang member to assault a Pico Nuevo gang member in front of El Rancho High School. The derogatory gang terms which were used in front of the high school were designed to provoke a reaction. Daniel was at least an associate of the Pico Nuevo gang, as several months after he was stabbed, he drove two members of the Pico Nuevo gang to the area of another gang, Pico Viejo, where a member of Pico Viejo was shot. Based on the code of behavior of gangs, it was not surprising that Daniel would be uncooperative in the investigation of a crime against him by Rivera 13. Also, in general, victims and witnesses did not cooperate with investigations of gang activity.

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[4] In contrast, Soledad and Martin did not identify appellant's photograph as to the charges on which he was acquitted, which concerned the firing of shots at their home on a later date. Martin testified that appellant was the shooter for the incident at his home, but he had been afraid to identify his picture until his family moved away.

[5] According to the probation report, appellant was shot in the stomach and right leg during a drive-by incident. A bullet remained in his spine.

The trial evidence also included photographs of appellant in which he flourished a pistol while making a symbol for the Rivera 13 gang with his other hand.

C. The Attack on Patrick R. (Counts 9, 10 & 11)

Around 3:30 p.m. on January 9, 2000, Patrick R.'s girlfriend parked in the driveway while Patrick walked into his Pico Rivera home to retrieve a box of clothing. When Patrick came outside, a brown car was blocking his girlfriend's car in the driveway. The passenger of the brown car started shooting at him. The shots continued as Patrick ran back into the house. Twelve rounds were fired, but none hit him. Numerous bullet holes were left in the house. Sheriff's deputies recovered shell casings from a semiautomatic pistol.

At the trial, Patrick was positive that appellant was the shooter. He further testified that he did not belong to a gang. However, about a month before the shooting, he had had a problem with codefendant Marentes and other Rivera 13 gang members at a 7-Eleven store. Marentes falsely told his companions that Patrick belonged to the Pico Nuevo gang. They threw a bottle at Patrick, who left at that point.

A day before the shots were fired at Patrick, an off-duty police officer went to a swap meet in Pico Rivera. He watched a young man point a gun at the occupants of a car. He followed the young man, saw him enter a brown car, and wrote down its license plate number.

Two days after the Patrick shooting incident, appellant and codefendant Marentes were arrested in the brown car. The officer from the swap meet picked out a photo of appellant as possibly being the gunman he had followed. Soledad and Martin identified the car as the one that had been used for the stabbing of Daniel at the high school.

DISCUSSION

1. Instructional Issues

A. Modification of CALJIC No. 2.13

Appellant argues that there should have been a modification to CALJIC No. 2.13, the instruction on prior inconsistent testimony, based on Daniel's testimony that he did not remember what his stabber looked like, and appellant's mother's testimony that she

did not recall what she told the investigators. He maintains that the absence of such a modification violated his state and federal constitutional rights to trial by jury because it impaired the jury's role as the exclusive judge of witness credibility.

CALJIC No. 2.13 states:

"Evidence that at some other time a witness made a statement or statements that are inconsistent or consistent with his or her testimony in this trial may be considered by you not only for the purpose of testing the credibility of the witness but also as evidence of the truth of the facts as stated by the witness on that former occasion.

"If you disbelieve a witness's testimony that he or she no longer remembers a certain event, that testimony is inconsistent with a prior statement or statements by him or her describing that event."

Appellant maintains that the trial court had a sua sponte duty to add an additional sentence which would have stated: "If you believe a witness's testimony that he or she no longer remembers certain events, then you should disregard that witness' extrajudicial statements regarding those events." Alternatively, he argues that he was denied his right to effective assistance of counsel because counsel failed to request the modification. (U.S. Const., 6th Amend.; Cal. Const., art I, § 15.)

Appellant does not establish either error or ineffective assistance of counsel through lack of an additional sentence to CALJIC No. 2.13.

The trial court is required to instruct sua sponte on the general principles of law which are closely and openly connected with the evidence and necessary for the jury's understanding of the case. (*People v. St. Martin* (1970) 1 Cal.3d 524, 531; 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 609.) However, it need not give instructions on specific points or special theories (sometimes called "'pinpoint' instructions"), unless a defendant has requested clarifying or amplifying language. (5 Witkin & Epstein, *supra*, § 610.) "'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying

language.'" (*People v. Guiuan* (1998) 18 Cal.4th 558, 570, quoting *People v. Andrews* (1989) 49 Cal.3d 200, 218.)

The instruction which was given was a correct statement of law. (1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, §§ 156-161.) Technically, a witness who testifies that he or she does not remember an event has not made a statement which is inconsistent with a prior statement by the witness which describes the event. However, inconsistency is implied, and admission of the prior statement is appropriate, where there is a reasonable basis for concluding that the "claim of lack of memory amounts to deliberate evasion." (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219-1220.) There were reasonable grounds for such a conclusion here, based on the expert testimony that gang members do not like to testify against each other, and the obvious reasons why appellant's mother might fabricate a lack of memory of prior statements which aided the prosecution's case.

Moreover, the jurors were instructed that all of the instructions were not necessarily applicable. The added sentence appellant now seeks was unnecessary because, if the jurors believed a witness's failure of memory was real, CALJIC No. 2.13 would not apply. (See *People v. Smithey* (1999) 20 Cal.4th 936, 987.)

Since CALJIC No. 2.13 was a correct statement of the applicable law, no modification was requested, and the problem suggested by appellant was covered by another instruction, appellant has failed to establish error.

For the same reasons, appellant has not proven that counsel was ineffective in failing to request the additional instruction. To establish ineffective assistance of counsel, appellant would have to show that his counsel's conduct fell below prevailing professional norms or that the ineffectiveness was so prejudicial that it is reasonably probable that there would have been a different verdict absent the error. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215-216.) Since the jury was adequately instructed on the pertinent principles, appellant has made no such showing. (*People v. Smithey*, *supra*, 20 Cal.4th at p. 987.)

Finally, we disagree with appellant's repeated assertions that the out-of-court statements by Daniel and Victoria were the critical evidence on the stabbing of Daniel in

front of the high school. Out-of-court identifications of appellant on that crime were also made by Soledad and Martin, who had no gang associations. The fact the jurors acquitted appellant on the counts involving the shooting at Soledad and Martin's home does not mean they rejected Soledad's and Martin's strong identifications of appellant as the perpetrator of the stabbing of Daniel (see footnote 4, *ante*).

B. Proposed Modifications to Other Instructions

For similar reasons, we reject appellant's contention that the trial court had a sua sponte duty to modify, or that defense counsel rendered ineffective assistance by failing to request a modification to, CALJIC No. 2.20 ("Believability of Witness"),[6] CALJIC

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[6] CALJIC No. 2.20 states:

"Every person who testifies under oath is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness.

"In determining the believability of a witness you may consider anything that has a tendency to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following:

"The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness testified;

"The ability of the witness to remember or to communicate any matter about which the witness has testified;

"The character and quality of that testimony;

"The demeanor and manner of the witness while testifying;

"The existence or nonexistence of a bias, interest, or other motive;

"The existence or nonexistence of any fact testified to by the witness;

"The attitude of the witness toward this action or toward the giving of testimony[.][;]

"[A statement [previously] made by the witness that is [consistent] [or] [inconsistent] with [his] [her] testimony][.][;]

"[An admission by the witness of untruthfulness][;]."

No. 2.21.1 ("Discrepancies in Testimony"),[7] CALJIC No. 2.22 ("Weighing Conflicting Testimony")[8] and CALJIC No. 2.27 ("Sufficiency of Testimony of One Witness").[9] Appellant complains that these instructions refer only to evaluating trial testimony, and do not explain that the same factors should be utilized for extrajudicial statements. He maintains that omission violated his state and federal constitutional rights to due process, trial by jury, and proof beyond a reasonable doubt. (Cal. Const., art. I, §§ 7, 15, 16, 24; U.S. Const., 6th & 14th Amends.)

As with the CALJIC No. 2.13 issue, no error was committed. Appellant is basically claiming that a pinpoint instruction should have been given, when none was requested. (*People v. Mayfield* (1997) 14 Cal.4th 668, 778-779.) No ineffective

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7 CALJIC No. 2.21.1 states:

"Discrepancies in a witness's testimony or between a witness's testimony and that of other witnesses, if there were any, do not necessarily mean that [any] [a] witness should be discredited. Failure of recollection is common. Innocent misrecollection is not uncommon. Two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to an important matter or only to something trivial should be considered by you."

8 CALJIC No. 2.22 states:

"You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses [who have testified on the opposing sides]. The final test is not in the [relative] number of witnesses, but in the convincing force of the evidence."

9 CALJIC No. 2.27 states:

"You should give the testimony of a single witness whatever weight you think it deserves. Testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of that fact depends."

assistance of counsel occurred, as the jury was properly instructed on the principles of law which applied to the case, and there is no showing of substandard conduct by defense counsel.

2. Evidentiary Issues

A. Evidence of Why Rudy Joined the Gang

Appellant complains that introduction of evidence of why Rudy joined the Rivera 13 gang violated state law and the confrontation clause of the Sixth Amendment of the U.S. Constitution. The state law issue invokes an abuse of discretion standard of review; the federal issue is a legal question which requires independent review. (*People v. Rowland* (1992) 4 Cal.4th 238, 264; *People v. Schmaus* (2003) 109 Cal.App.4th 846, 856, citing *Lilly v. Virginia* (1999) 527 U.S. 116, 136-137.) If the confrontation clause argument is deemed waived because trial counsel failed to object on that basis, appellant further argues that he received the ineffective assistance of counsel.

Josie, Rudy's mother, testified on cross-examination that Rudy told her that he was a member of the Rivera 13 gang. She further testified that he told her he had won fights with appellant and Spooky.

On redirect examination, the prosecutor asked Josie what Rudy had said about his problems with appellant. Defense counsel's hearsay objection was overruled on the ground the defense had brought up the subject. Josie then testified that Rudy told her that every time he met with appellant and Spooky, there would be a fight or an argument. He did not tell her why. The problems had occurred in the street and also at school. The court sustained an objection to a question which sought further details about the problem at the school.

At that point, the prosecutor asked if Rudy explained why he joined Rivera 13. The defense hearsay objection was sustained. The prosecutor argued that the question fell within the hearsay exception for state of mind. At bench, he explained that the answer would explain Rudy's conduct, as Josie would testify that Rudy told her he joined the gang so that appellant and Spooky would leave him alone. He further argued that the question was within the scope of cross-examination. Defense counsel maintained that he

had only asked if Rudy was in the gang. The trial court sustained the objection at that point.

During continued questioning, the judge at first sustained additional hearsay objections, and then stated that, upon further thought, he would allow the questioning. Over objection, Josie testified that Rudy told her he had to join the gang, "in order for them, Trippy and Spooky, not to hurt us, me and his father."

Rudy's statement was hearsay. It was an out-of-court statement offered for its truth, to show the reason why he had joined the gang. (Evid. Code, § 1200.)

Respondent maintains that it caused no prejudice. We agree.

The applicable standard is the test for federal constitutional error of *Chapman v. California* (1967) 386 U.S. 18.

Any error in letting the jury hear why Rudy said he joined the gang was harmless beyond a reasonable doubt, given the overwhelming evidence that appellant murdered Rudy, as shown by the abundant evidence that appellant felt animosity towards Rudy and his parents, his threat to kill, the 60 stab wounds, the presence of appellant's blood and gang nickname at the murder site, and the cuts on his hands after the killing. The record does not support appellant's assertion that the jury might have found second degree murder without the hearsay evidence.

Similarly, given the nature of the evidence and the strenuous objection which counsel did make, appellant has not demonstrated that his counsel was ineffective because he did not object on the federal constitutional ground.

B. Josie's Testimony About What Francisco Said About Prior Fights

Josie was the only witness who described a problem with appellant and Spooky a couple of months prior to the stabbing, when she, her husband Francisco, and Rudy were outside of their house. For unexplained reasons, Francisco did not testify. Appellant maintains that the trial court should have excluded Josie's testimony about what Francisco said as inadmissible hearsay.

According to Josie, as appellant and Spooky were passing by along the street, Rudy looked up and said something to Francisco. Based on what Rudy said, Francisco

stood up and "asked Spooky and Trippy [appellant] to please leave [Rudy] alone." Francisco also said, "Every time you see him, you fight him."

The court at first struck this testimony as hearsay. It then allowed it, after the prosecutor argued that it was either an adoptive admission or was not offered for its truth, but rather, to show the reactions of appellant and Spooky.

Josie then testified that Francisco complained to appellant that every time appellant and Spooky saw Rudy, they fought with him, even though Rudy always won. Francisco also said that the next time a fight occurred, he was going to call the police.[10] Appellant and Spooky became upset. Spooky called Josie a "b----." Appellant said, "I'm going to come back and kill you." Francisco told Josie to get into the house. There were more bad words, and another threat to return. Rudy stood up angrily and said "Don't you talk to my dad like that." Appellant and Spooky walked off, saying, "We'll be back."

Josie's testimony of what Francisco said to appellant was properly admitted. It appears from the context that appellant's threat to kill was directed at Francisco, and not Rudy. Still, the fact he had expressed such an intent towards Rudy's father was highly relevant, after Rudy was found dead. The hearsay rule excludes out-of-court statements only when they are offered for their truth. (1 Witkin, Cal. Evidence, *supra*, Hearsay, § 5, p. 684.) "An out-of-court statement is properly admitted if a nonhearsay purpose for admitting the statement is identified, and the nonhearsay purpose is relevant to an issue in dispute." (*People v. Turner* (1994) 8 Cal.4th 137, 189, overruled on another ground in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.) Here, Josie's testimony about what Francisco said was not offered for its truth (to show that Rudy had won fights with appellant), but rather to show appellant's reaction and to "supply context" to his threat to kill. (*Turner*, at p. 188.)

Also, assuming there was any error in admitting what Francisco said about previous fights, it can have caused no possible prejudice, given the weight of the

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10 Josie explained at that point that Rudy was a husky boy while appellant was very thin.

evidence against appellant, including in particular the 60 knife wounds on Rudy and the cuts on appellant's hands.

3. Sentencing Issues

A. Blakely *Issue*

We agree with appellant that his sentence must be remanded for resentencing under *Blakely, supra,* 124 S.Ct. 2531, and the subsequent decision by the United States Supreme Court in *United States v. Booker* (2005) ___ U.S. ___ [125 S.Ct. 738] (*Booker*).[11]

Sentence was imposed on the counts other than murder in this manner:

The attempted murder of Patrick R. in count 9 was utilized as the base count. On that count, appellant received an indeterminate life term, plus an additional 20 years for personally discharging a firearm. (Pen. Code, § 12022.53, subd. (c).) A consecutive term of seven years was imposed on count 2 for assault with a deadly weapon on Daniel M. (§ 245, subd. (a)), based on the upper term of four years for the offense, plus three years for the great bodily injury enhancement (§ 12022.7, subd. (a)). The court imposed and stayed a 19-year term on count 10, resulting from the upper term of nine years for assault with a semiautomatic firearm on Patrick (§ 245, subd. (b)), plus the upper term of 10 years for personal use of a firearm (§ 12022.5, subd. (a).) It also imposed and stayed a 17-year term on count 11, utilizing the upper term of seven years for shooting at an inhabited dwelling (§ 246), plus the upper term of 10 years for the firearms use enhancement. It further ruled that the sentence on the counts which were not stayed, counts 9 and 2, would be served consecutively to the life sentence already imposed on the murder count.

The judge used the following aggravating factors for counts 10, 11 and 2:

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11 Similar issues are presently pending before the California Supreme Court in *People v. Towne*, review granted July 14, 2004, S125677, and *People v. Black*, review granted July 28, 2004, S126182.

"Rules of Court 4.421, subsection (a)(1), the crime involved the threat of great bodily harm or other acts disclosing a high degree of cruelty, and I'm referring to the defendant's entire course of conduct on the date that these crimes were committed;

"Subsection (a)(3), [Patrick R.] was particularly vulnerable to the crime which was committed against him;

"Subsection (8) [*sic*], the manner in which the crimes were carried out indicated planning and sophistication;

"Subsection (b)(1), the defendant has engaged in violent conduct which indicates that he is a danger to society. I think anybody who would interpret his behavior differently is missing the point.

"Relying on those factors in aggravation, the Court finds there are no factors in mitigation under the circumstances of this case."

We analyze those aggravating factors in terms of recent decisions by the U.S. Supreme Court.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), the court set aside an enhanced sentence which was imposed after the sentencing court found, by a preponderance of the evidence, that the defendant's conduct was racially motivated. *Apprendi* held: "Other 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."

The holding of *Apprendi* was extended in *Blakely*, *supra*, 124 S.Ct. 2531. *Blakely* found a violation of the Sixth Amendment's right to trial by jury where the defendant received a penalty greater than the standard range for the crime due to a finding by the judge that defendant acted with "deliberate cruelty." Under *Blakely*, "the '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.* [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely*, *supra*, 124 S.Ct. at p. 2537.) The case

was reversed and remanded "for further proceedings not inconsistent with this opinion." (*Id.* at p. 2543.)

In *Booker*, *supra*, 125 S.Ct. 738, the jury convicted the defendant Booker of possession with intent to distribute at least 50 grams of crack cocaine, based on evidence that he possessed 92.5 grams. The maximum sentence on the basis of the jury's finding was 21 years 10 months. However, a sentence of 30 years was imposed because, at a posttrial sentencing hearing, the judge made the additional findings that Booker had possessed an additional 566 grams and was guilty of obstructing justice.

Justice Stevens delivered a partial opinion for the court, joined by Justices Scalia, Souter, Thomas and Ginsburg. That opinion held that the Sixth Amendment as construed in *Blakely* applies to the federal sentencing guidelines. (*Booker*, *supra*, 125 S.Ct. at pp. 748-756.) Those guidelines were similar to the Washington State sentencing scheme which was involved in *Blakely*, as both systems had the premise that the sentencing rules imposed mandatory, binding requirements on sentencing judges. That premise led to a violation of the Sixth Amendment where the sentence was increased beyond the standard range based on a fact which was not found by the jury nor admitted by the defendant. On the other hand, if the guidelines were merely advisory, the Sixth Amendment would not be implicated. Because of the substantial increase to sentences which may be caused by enhancements, they must be decided by a jury, to preserve the meaning of the right to trial by jury. "Regardless of whether the legal basis of the accusation is in a statute or in guidelines promulgated by an independent commission, the principles behind the jury trial right are equally applicable." (*Booker*, at p. 753.) It similarly did not matter whether the fact was labeled a "sentencing enhancement" or an "element." The holding of *Apprendi* was reaffirmed: "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*Booker*, at p. 756.)

The separate opinion for the court by Justice Breyer, who was joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy and Ginsburg, dealt with the question

of remedy. (*Booker*, *supra*, 125 S.Ct. at pp. 756-769.) Justice Breyer's opinion held that, in order to make the federal sentencing guidelines compatible with the constitutional holding by the court in Justice Stevens's opinion, it was necessary to excise the provisions of the federal sentencing statutes which made the guidelines mandatory. Justice Breyer wrote: "Application of these criteria indicates that we must sever and excise two specific statutory provisions: the provision that requires sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure), see 18 U.S.C. § 3553(b)(1) (Supp. 2004), and the provision that sets forth standards of review on appeal, including de novo review of departures from the applicable Guidelines range, see § 3742(e) (main ed. and Supp. 2004) . . . . With these two sections excised (and statutory cross-references to the two sections consequently invalidated), the remainder of the Act satisfies the Court's constitutional requirements." (*Id*. at p. 764.) The Supreme Court remanded the case so that the lower court could impose sentence in accordance with the Supreme Court's two opinions. The holdings were to be applied to all cases on direct review or not yet final.[12]

A preliminary issue raised by respondent is whether appellant forfeited any *Blakely* claim by failing to raise such an objection below. Justice Breyer's opinion in *Booker* expressly states that the court's holding is applicable to all cases currently on direct review. (*Booker*, *supra*, 125 S.Ct. at p. 769.) However, the opinion also states, "we expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below . . . ." (*Ibid*.) While the issue was not raised below, we believe application of the waiver doctrine of *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*) would be inappropriate. *Scott* held that, to facilitate prompt

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[12] In addition to the two opinions by the Supreme Court, multiple other opinions were filed. Justice Stevens dissented in part, joined by Justice Souter and partly joined by Justice Scalia; Justice Scalia dissented in part; Justice Thomas joined in Justice Stevens' opinion for the court, dissented from Justice Breyer's opinion for the court, and agreed with most of Justice Stevens' dissent regarding remedy; and Justice Breyer dissented in part, joined by Chief Justice Rehnquist and Justices O'Connor and Kennedy.

correction of error, a defendant must make a challenge at the trial court level, in order to pursue a claim that an aggravated sentence was imposed based on erroneous or flawed information. That rationale cannot apply to lack of an objection on *Blakely* grounds. Before *Blakely*, there was no right to a jury trial on aggravating factors, so assertion of a challenge to the sentence on that basis would have been futile. Also, since *Blakely* was decided after appellant was sentenced, the lack of an objection cannot be construed as a knowing and intelligent waiver of a right to jury trial which did not then exist.

We believe that the California sentencing scheme may have the same problem which occurred in *Blakely* and *Booker*. The "maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict" is, under California law, the middle term. (*Blakely*, *supra*, 124 S.Ct. at p. 2537, italics omitted.) The middle term in this state is like the "standard range" in the State of Washington, in that, "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court *shall order* imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." (Pen. Code, § 1170, subd. (b), italics added; Cal. Rules of Court, rule 4.420(a).) The "shall order" language in Penal Code section 1170, subdivision (b) also resembles the mandatory "shall impose" language in 18 United States Code section 3553(b)(1).

We are bound by the decisions of the United States Supreme Court. The aggravating factors which were involved in *Apprendi*, *Blakely* and *Booker* (racial motivation, deliberate cruelty, and the amount of drugs) related to the facts of the crimes. Similarly here, the aggravating factors cited by the trial court all concerned the crimes: great violence or cruelty, a particularly vulnerable victim, planning and sophistication, and violent conduct showing a danger to society. None of the factors related to "the fact of a prior conviction." (*Apprendi*, *supra*, 530 U.S. at p. 490.) They were not "admitted by the defendant or proved to a jury beyond a reasonable doubt." (*Booker*, *supra*, 125 S.Ct. at p. 756.) We cannot conclude that the error was harmless as, despite the violence of the crimes, appellant was only 16 years old when they occurred.

The circumstances require a remand for resentencing, in accordance with *Blakely* and the two opinions by the Supreme Court in *Booker*.

B. The Mistake Regarding the Degree of Murder

Respondent asks us to modify the sentence on count 1 from second degree murder, which carries a penalty of 15 years to life in prison, to first degree murder, which carries a penalty of 25 years to life in prison, because the second degree murder sentence results from an inadvertent mistake which is contrary to the jury's finding of degree.

The record supports respondent's claim that a mistake occurred.

At the trial before Judge Espinoza, the jury found appellant guilty on counts 2, 9, 10 and 11, with numerous enhancements.

At the subsequent trial on count 1 before Judge Higa, defense counsel argued to the jury that the People had proven second degree murder but not first degree murder. However, the jury found appellant guilty of first degree murder.[13]

Since sentencing would be complicated, Judge Espinoza asked the prosecutor to prepare a sentencing memorandum to assist the court.

The prosecutor's sentencing memorandum contains a glaring mistake. It states: "The sentence for Defendant's conviction of *second-degree murder* under count one is simple: 15 years to life for the murder plus one year for the enhancement of using a deadly weapon (PC 12022(b)(1))." (Italics added.)

That mistake was repeated when appellant was sentenced on October 16, 2003. There was no discussion regarding the degree of murder. Counsel for both sides declined to make a statement. Judge Higa apparently relied on the prosecutor's sentencing memorandum. He simply stated: "Mr. Mendez, on Count 1, which is the murder charge, you're committed to the -- it's murder of the second degree, so you're committed to the state prison for 15 years to life. [¶] Plus, for the enhancement for using a deadly

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[13] As appellant puts it, "the salient dispute was whether a murder without a witness was first degree murder or second degree murder."

weapon, which is a knife, that's an additional one year consecutive, so that's 16 years to life."

When Judge Espinoza sentenced appellant later that morning on the remaining counts, he mentioned that sentencing had already occurred "on the second-degree murder conviction."

It therefore appears that appellant's sentence on count 1 is 16 years, rather than 26 years, because the prosecutor made a mistake which was relied on by the court.

Appellant maintains that the People are barred by the doctrines of waiver, estoppel or invited error from seeking a correction of the sentence, because they requested the sentence for second degree murder, and did not appeal from imposition of an unlawful sentence.

In *Norgart v. Upjohn Co*. (1999) 21 Cal.4th 383, 403, our Supreme Court explained: "The 'doctrine of invited error' is an 'application of the estoppel principle': 'Where a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal' on appeal. (9 Witkin, Cal. Procedure [(4th ed. 1996)] Appeal, § 383, p. 434, italics omitted.) We said as much in *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 420-421. At bottom, the doctrine rests on the purpose of the principle, which is to prevent a party from misleading the trial court and then profiting therefrom in the appellate court."

The doctrines appellant attempts to invoke are inapplicable because there is no reason why the prosecutor would try to mislead the court into imposing a sentence which was less than the jury found. The sentence of second degree murder resulted from an obvious mistake which came to light because appellant chose to pursue an appeal. Respondent seeks correction of an unauthorized sentence, rather than reversal of the conviction. Claims involving unauthorized sentences can be raised at any time, and have been routinely corrected by reviewing courts. (*Scott*, *supra*, 9 Cal.4th at p. 354; *People v. Welch* (1993) 5 Cal.4th 228, 235-236.)

Respondent ask us to order a modification in the abstract of judgment, to reflect first degree rather than second degree murder. However, since the case must be

remanded for resentencing due to *Blakely* error, it is more appropriate to have the trial court address this problem at the new sentencing hearing.

DISPOSITION

Appellant's sentence is reversed and remanded to the trial court for resentencing, consistent with the views expressed in this opinion. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

FLIER, J.

We concur:

COOPER, P.J.

BOLAND, J.