Filed 1/25/05 P. v. Powell CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GREGORY ANTHONY POWELL, Defendant and Appellant.	A103286 (Solano County Super. Ct. No. VCR161797)

I. INTRODUCTION

This is an appeal from appellant Powell's conviction, after a jury trial, of attempted voluntary manslaughter and assault with a deadly weapon. The jury found two charged enhancements true: one for a personal use of a firearm and the other for infliction of great bodily injury. Appellant also admitted the truth of an allegation of two prior felony convictions. He was sentenced to a total prison term of 19 years, six months. He appeals, initially claiming error (1) in admission of the preliminary hearing testimony of the victim, (2) application of *Wheeler/Batson* principles, (3) an instruction on attempted voluntary manslaughter, and (4) denial of presentence custodial credits.

Via a supplemental brief, appellant urges that the court's imposition of the upper terms on one of the counts and one of the enhancements violates the United States Supreme Court's recent ruling in *Blakely v. Washington* (2004) ___ U.S.___, [124 S.Ct. 2531] (*Blakely*). We reverse and remand for reconsideration of the sentence imposed (1) in view of *Blakely* and (2) regarding custody credits. Otherwise we affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND[1]

Starkisha Green was shot and wounded in the parking lot of the Motel 7 in Vallejo at about 7 p.m. on July 5, 2002. She told a Vallejo police officer, who responded to reports of the shooting, that the man who shot her was an African American named "G". Both Green and Melissa Lujan, who had driven Green to the motel, later identified the shooter as appellant from photo lineups.

When Lujan's car entered the parking lot of the Motel 7, they encountered a car exiting the parking lot driven by one Nicole Fonseca, with whom Green had had a prior altercation. Appellant was a passenger in Fonseca's car.

As the cars pulled alongside each other, Green and Fonseca started arguing, and soon an argument developed between Green and appellant, with Green accusing appellant of stealing some jewelry. As Lujan tried to drive away, Fonseca's car blocked Lujan's car from leaving. Appellant and another African-American male then jumped into the back seat of Lujan's vehicle, whereupon Green tried to get out of the car. While Green was attempting to get out of the vehicle, two shots were fired. Appellant continued to shoot at her as she ran away from the cars.

Green was helicoptered to John Muir Hospital in Walnut Creek, where doctors found two bullets in her, one in her stomach and one in her arm. A .22 caliber bullet was removed from Green's stomach.

The following day, July 6, 2002, another Vallejo police officer stopped appellant for driving without a license plate. A female was in the car with him. Appellant lacked identification. He said his name was John Lashawn Harris, but did not know his own age. The officer arrested him and, thereafter, found a loaded .22 caliber revolver under the right-front passenger seat. The gun held nine bullets, but had four bullets and four empty casings inside. In the passenger's purse was another single round.

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[1] In view of the limited number and nature of the issues appellant raises on appeal, we will detail only those facts relevant to a consideration of those issues.

On September 19, 2002, the Solano County District Attorney filed an information charging appellant with two counts, the first for attempted murder and the second for assault with a deadly weapon. Both counts included allegations of personal use of a firearm and personal infliction of great bodily injury, as well as an allegation of two prior felony convictions after which appellant had not remained free from prison custody for five years. (Pen. Code, §§ 187, subd. (a), 245, subd. (a)(2), 664, 667.5, subd. (b) & (c)(8), 1192.7, subd. (c)(8) & (23), 1203.095, 12022.5, subd. (a)(1), 12022.53, subd. (b), (c) & (d), 12022.7, subd. (a).)[2]

Appellant pled not guilty and denied the various allegations on September 30, 2002.

The case was tried to a jury over three days starting on May 7, 2003. Lujan, who had driven Green to the motel, testified for the prosecution. Green herself could not be located, according to the prosecution; accordingly, her preliminary hearing testimony was read to the jury.

The prosecution also called the motel's manager, three Vallejo police officers involved in the events of July 5 and 6, 2002, and a deputy sheriff/criminalist who testified regarding the similarity between the bullet recovered from Green's stomach and the .22 revolver found in the car appellant was driving. On the last trial day, the prosecution called the court's own bailiff and a Solano County correctional officer who, in combination, testified that, during the trial, appellant had passed a note to another African-American detainee, one Andre Bryant, asking him to "be my alibi witness" for July 5, 2002. This note was read to the jury.

Appellant's trial counsel presented three witnesses, a motel employee named Summerville and two John Muir Medical Center doctors. Summerville testified that, after Green had been shot, she did not identify the shooter by name or other identification. One of the doctors testified that Green told her she used both heroin and

[2] All subsequent statutory references are to the Penal Code, unless otherwise noted.

methamphetamine, and the other that she had admitted smoking heroin earlier on July 5, 2002.

The prosecution recalled one of the Vallejo police officers who had previously testified as a rebuttal witness. He testified that, when he interviewed Summerville immediately after the shooting, he recalled Green identifying the shooter as "G."

After a day and a half of deliberation, the jury returned verdicts finding appellant not guilty of attempted murder as charged in count I, but guilty of attempted voluntary manslaughter and also guilty of assault with a deadly weapon as charged in count II. Additionally, it found true each of the charged enhancements, except that relating to the two charged prior felony convictions (for which appellant was imprisoned at the same time). Appellant admitted those.

The trial court denied appellant's motion for a new trial on July 2, 2003; on July 11, 2003, it sentenced him to a total prison term of 19 years and six months. This consisted of the upper term of five years, six months, for attempted voluntary manslaughter, an upper term of ten years for personal use of a firearm, three years for the infliction of great bodily injury, and one year for the prior prison term enhancement. All of these sentences pertained to count I of the information; the court stayed any sentence under count II pursuant to section 654.

Appellant filed a timely notice of appeal.

III. DISCUSSION

A. *Use of the Preliminary Hearing Testimony of Green*

Before trial, the prosecution moved for permission to read Green's testimony at the preliminary hearing to the jury. This motion (which was opposed by appellant) was accompanied by many pages of exhibits from the files of the district attorney's investigator showing extensive but unsuccessful efforts to subpoena Green in both Vallejo and Sacramento. That investigator testified at a pretrial hearing as to these efforts. The trial court found there was due diligence in attempting to serve Green, a finding which appellant does not challenge here. Rather, appellant argues he did not have an adequate opportunity to cross-examine Green at the preliminary hearing.

That hearing took place on September 9, 2002; appellant was represented by the same counsel that defended him at trial. Green testified for the prosecution as to the events of July 5, 2002, at the Vallejo Motel 7. That direct examination is recorded in approximately 10 pages of the transcript of that hearing. Appellant's counsel's cross-examination of Green covers 12 pages of the same transcript. He got her to admit that she was in possession of heroin on the day in question and that she knew appellant only as "G."

During the course of this cross-examination, the prosecutor made seven objections to questions posed to Green by appellant's counsel; four of them were sustained and the other three overruled. One of the objections sustained was that the question posed was compound—which it clearly was. The other three were sustained on the basis that they sought discovery of issues not directly relevant to the crimes charged and, in one instance, also asked for hearsay.

On appeal, appellant claims his counsel was denied an opportunity to adequately cross-examine Green at the preliminary hearing. More specifically, he contends that the magistrate's "rulings restricting cross-examination at the preliminary hearing denied appellant an adequate opportunity to cross-examine this shaky witness."

The governing statute on this issue provides: "(a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and . . . [¶] (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." (Evid. Code, § 1291, subd. (a)(2).)

Our Supreme Court's most recent interpretation of this statute was in *People v. Zapien* (1993) 4 Cal.4th 929, 974-976. There, a convicted defendant contended he had been denied his right to confront an important witness because, based on her assertion of her privilege against self-incrimination, she had been declared unavailable and her preliminary hearing testimony read to the jury. The defendant argued on appeal that his motive for cross-examining that witness at the preliminary hearing "differed materially

and substantially" from his motive for doing so at trial, and thus admission of her preliminary hearing testimony was error.

The court, in an opinion authored by then Associate Justice George, disagreed, holding: "Frequently, a defendant's motive for cross-examining a witness during a preliminary hearing will differ from his or her motive for cross-examining that witness at trial. For the preliminary hearing testimony of an unavailable witness to be admissible at trial under Evidence Code section 1291, these motives need not be identical, only 'similar.' [Citation.] Admission of the former testimony of an unavailable witness is permitted under Evidence Code section 1291 and does not offend the confrontation clauses of the federal or state Constitutions—not because the opportunity to cross-examine the witness at the preliminary hearing is considered an exact substitute for the right of cross-examination at trial [citation], but because the interests of justice are deemed served by a balancing of the defendant's right to effective cross-examination against the public's interest in effective prosecution. [Citations.] [¶] Defendant's interest and motive for cross-examining Inez Blanco during the preliminary hearing were sufficiently similar to those existing at trial so as to permit the admission of Blanco's preliminary hearing testimony. On both occasions, Blanco's testimony relating her contacts with defendant the day preceding the murder, defendant's need for money, and the disappearance of Blanco's automobile near the time of the murder, had the same tendency to establish defendant's guilt. Defendant's interest and motive in discrediting this testimony was identical at both proceedings. Defense counsel's testimony that he chose, for strategic considerations, not to vigorously cross-examine Blanco does not render her former testimony inadmissible. As long as defendant was given the opportunity for effective cross-examination, the statutory requirements were satisfied; the admissibility of this evidence did not depend on whether defendant availed himself fully of that opportunity. [Citations.]" (*People v. Zapien, supra,* 4 Cal.4th at p. 975; to the same general effect, see: *People v. Smith* (2003) 30 Cal.4th 581, 611-612; *People v. Samayoa* (1997) 15 Cal.4th 795, 849-852; *People v. Jones* (1998) 66 Cal.App.4th 760,

766-769; *People v. Lepe* (1997) 57 Cal.App.4th 977, 982-985 (*Lepe*), disapproved on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3)

As noted above, three substantive objections by the prosecution to defense counsel's preliminary hearing cross-examination of Green were sustained. They were to these questions: (1) "Do you know if Nicole [Fonseca] had any of her stuff located in room 135?"[3]; (2) "Do you know Andre Bryant?"; and (3) "Was that relationship [with Fonseca] based on the drug transactions?"

Appellant argues that precluding defense counsel from getting answers to these questions prevented him from attacking Green's credibility as to, e.g., why she was at the motel at all, her denials that she was there looking for drugs, and her assertion that she did not know why appellant shot her. We disagree. First of all, the trial court was clearly correct in ruling that inquiries during the course of a preliminary hearing which are apparently motivated by a desire for discovery regarding tangential issues are inappropriate. This does not, however, preclude the use of preliminary hearing testimony at trial provided all of the other requirements of Evidence Code section 1291, subdivision (a)(2) are met. (See, e.g., *Lepe, supra*, 57 Cal.App.4th at pp. 982-985.)

Two of the questions to which objections were sustained (nos. (1) and (3) above) related to whether Green's relationship with Fonseca was connected with drugs.[4] Appellant contends he should have been permitted to pursue this point to undermine Green's credibility. We are unpersuaded. The jury in this case was well-acquainted with the fact that Green was a regular drug user. She admitted during cross-examination in the preliminary hearing that, contrary to her answer to a question from the prosecutor a few minutes earlier, she was indeed in possession of some "tar heroin" on the day in question.

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[3] Green had testified earlier that she went to the Motel 7 to visit her aunt, who was in room 135.

[4] The third question to which an objection was sustained ("Do you know Andre Bryant?") was clearly lacking in relevance, absent some offer of proof by defense counsel—or even a slight verbal hint to the court—as to who Bryant was, his possible connection with the events of July 5, or some other reason as to why Green's knowledge of him was at all relevant to the issue of who shot her.

In the actual trial, Lujan, the driver of the car in which Green was riding, admitted on her direct examination that Green had told Lujan she was "looking for . . . drugs" on the day in question. On cross-examination, Lujan admitted seeing Green use both heroin and "meth" that day. Additionally, two John Muir Medical Center doctors were, as noted above, called as defense witnesses. One testified that, after her admission there, Green admitted using both heroin and methamphetamine; the other testified that Green admitted using heroin.

Further, defense counsel's closing argument to the jury concentrated heavily on Green's credibility. He cited inconsistencies in her preliminary hearing testimony, her absence from the trial, and the possible impact on her powers of observation and recollection of her apparent regular drug use.

As a result of all this, the jury could not have been under any illusions concerning Green's involvement with drugs or even the possibility that her desire to visit Motel 7 and/or her altercation with Nicole Fonseca may have had something to do with that subject. Thus, the fact that defense counsel was not permitted to pursue these topics at the preliminary hearing was not prejudicial. And, in any event, the issue before the jury was not Green's drug use or why she was at Motel 7 on July 5 but, rather, whether appellant shot and wounded her then and there. Defense counsel was not foreclosed from cross-examining Green on any aspect of that issue at the preliminary hearing.

B. *Alleged Wheeler/Batson Error*

During voir dire, the prosecutor peremptorily challenged an African-American juror, Patricia G. She was one of 12 jurors excused at the behest of the prosecution; 16 were challenged by the defense.

After the challenge to Patricia G., defense counsel asked to approach the bench where an unreported conversation occurred. A few minutes later, after the jury panel had been excused, the following reported exchange took place:

"THE COURT: . . . Mr. Spieckerman [defense counsel], you had an issue you would like to put on the record?

"MR. SPIECKERMAN: Yes, your Honor. Just very briefly. When Ms. Moore [prosecutor] dismissed Patricia G[.] after having passed a few times, and Ms. G[.] is an African-American, she has a close personal friend in the Department of Corrections, answered all of the questions that are asked on the questionnaire as well as the questions that Counsel may have posed to her in a fashion that certainly showed she would be a fair and impartial juror, and then was disqualified or dismissed by Ms. Moore, I realized, as I indicated to the Court under Wheeler, I need to show a series of that sort of conduct. But it is also incumbent upon me to state when I think there is a problem. Any of the other witnesses or jurors that may have been African-Americans, I would understand any kind of a reason she had for those because hearing their answers. But this particular person I think would have been a very good juror, and I wanted to just make the record to get it started.

"THE COURT: And that is all you are asking of the court at this time?

"MR. SPIECKERMAN: Yes, your Honor.

"THE COURT: You have made your record."

Appellant now contends the trial court committed prejudicial error by failing to find a prima facie case of error under *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) or, alternatively, to make further inquiry into that issue. We disagree; we agree, rather, with the People that there was both no proper objection on *Wheeler/Batson* grounds[5] and no trial court error in any event.

A simple reading of the excerpt from the voir dire transcript quoted above makes clear that there simply was no *Wheeler* motion made, much less a proper one. Our

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[5] Preliminarily, the People take the position that we should not even consider whether there was any objection raised on *Batson* grounds, because defense counsel did not mention that case. We do not need to reach this issue, because of our holding (see the following paragraphs) that no *Wheeler* motion was properly made. But, if we found it had been, we would not agree with the People. We read our Supreme Court's latest statements on this subject as effectively saying that once a *Wheeler* motion is made, a *Batson* motion is also. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.) Besides, and as our Supreme Court has also recently made clear, the two cases articulate the same standard. (See, e.g., *People v. Johnson* (2003) 30 Cal.4th 1302, 1312-1318.)

Supreme Court has been consistent in putting the burden *on the defendant in the trial court* to raise the issue of discriminatory exclusion of prospective jurors in the proper way. In *Wheeler* itself, the court wrote: "If a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First, as in the case at bar, he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third, from all the circumstances of the case he must show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias." (*Wheeler, supra*, 22 Cal.3d at p. 280, fn. omitted.)

What transpired here does not comply with these *Wheeler* mandates. Rather, this record is similar to what the same court was faced with in *People v. Gallego* (1990) 52 Cal.3d 115 (*Gallego*), where it unanimously affirmed murder and kidnapping convictions of the defendant. One of the issues he raised on appeal was *Wheeler*, asserting that "the trial court committed prejudicial error by failing to make inquiry into his claim that the prosecutor was using his peremptory challenges to remove Blacks from the jury." (*Id.* at p. 166.) There, the defendant, who was representing himself, brought a motion claiming that there had been an under-representation of both African-Americans and ex-convicts on the jury panels sent to the trial department. (See *People v. Buford* (1982) 132 Cal.App.3d 288.) At the conclusion of the hearing on that motion, he noted "that the prosecution had disqualified all Blacks who 'did hit the jury box.'" (*Gallego, supra*, 52 Cal.3d at p. 166.) On appeal, he claimed that the trial court's failure to "'inquire into his comment requires reversal under *Wheeler* . . . .'" (*Id.* at p. 166.) The court disagreed, stating: "Defendant failed even to raise a *Wheeler* claim, let alone establish a prima facie case of misuse of peremptory challenges." (*Ibid.*)[6]

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[6] Similarly, in *People v. Montiel* (1993) 5 Cal.4th 877, 909, the court held: "A party who suspects improper use of peremptory challenges must raise a timely objection and make a prima facie showing of strong likelihood that the opponent has excluded one

Even if there was no clear-cut *Wheeler* motion, appellant argues that, at the minimum, his counsel's "for the record" statement "was more than sufficient to trigger the court's duty to inquire into the sufficiency of the prima facie showing." Again, we disagree. As the Supreme Court held in *People v. Bolin* (1998) 18 Cal.4th 297, 316-317 (*Bolin*), such a proposition "conflicts with the procedure set forth in *Wheeler* allocating to the aggrieved party the burden of raising the point in a timely fashion and making a prima facie case of impermissible discrimination. [Citation.] Whatever the obligations of the trial court to control the jury selection process, the defendant must comply with procedural prerequisites to preserve any error for appeal. [Citation.] Absent an appropriate challenge to the prosecutor's exercise of peremptories, the issue is not preserved. [Citation.]"

Further, even if we could construe defense counsel's "for the record" comment during voir dire as an appropriate *Wheeler* motion, there is no possible way that, based on the record before us, we could review that issue. For example, we know that the prosecution peremptorily challenged 11 other jurors besides Patricia G., but we do not know how many of them, if any, were African-American. Similarly, we do not know the racial mix of the 16 prospective jurors challenged by appellant. Finally, we do not know how many, if any, African-Americans were ultimately seated as jurors or anything else about the racial make-up of the jury.

Simply put, a *Wheeler/Batson* issue is not properly before us for appellate review.

Nor is appellant's "fall-back" argument that defense counsel rendered ineffective assistance by not making a *Wheeler* motion persuasive. As our Supreme Court has ruled several times in similar situations, "the record affords no basis for concluding that counsel's omission was not based on an informed tactical choice." (*People v. Anderson* (2001) 25 Cal.4th 543, 569-570; see also *Bolin, supra,* 18 Cal.4th at p. 317.) The "tactical choice" possibility is especially pertinent here because the juror in question had

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or more jurors on the basis of group or racial identity." (See also *People v. Fuentes* (1991) 54 Cal.3d 707, 714.)

an aunt employed by the U.S. Customs Service and a "best friend" who worked for the California Department of Corrections and whom she saw "[t]wo or three times a week."

Finally on this subject, and because the record before us contains no evidence regarding either the use of other peremptory challenges or the ultimate make-up of the jury, it is highly unlikely that any prima facie case of racial discrimination could have been, much less could now be, established. As a result, no prejudice from any conceivable ineffective assistance of counsel could be established. (See, e.g., *People v. Farnam* (2002) 28 Cal.4th 107, 136-138; *People v. Turner* (1994) 8 Cal.4th 137, 167-168.)

C. *The Allegedly Defective Modification of CALJIC No. 8.40*

Although the charge against appellant in count I of the information was attempted murder, the prosecution provided the court with proposed instructions on the lesser-included offense of attempted voluntary manslaughter. Defense counsel stated that he "had no problem with that." But then, a minute or so later, he noted that most of the relevant voluntary manslaughter instructions used the words "killing of a human being," and that such was inappropriate when what was possibly at issue was *attempted* manslaughter. After some dialogue back and forth between the court and counsel, all agreed that the court could and would add to the pertinent proposed instructions (CALJIC Nos. 8.40, 8.42, 8.43, and 8.50) the words "attempts," "attempts to," or "attempted."

The ultimate problem with all of this was that, in the modified version of CALJIC No. 8.40 given to the jury,[7] the "conscious disregard for human life" language was

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[7] The modified version of CALJIC No. 8.40 given to the jury read (italics showing addition): "Every person who unlawfully *attempts to* kill another human being without malice aforethought but either with an intent to kill, or with conscious disregard for human life, is guilty of *attempted* voluntary manslaughter in violation of Penal Code section 192, subdivision (a). [¶] There is no malice aforethought if the *attempt to kill* occurred upon a sudden quarrel or heat of passion. [¶] 'Conscious disregard for life,' as used in this instruction, means that an *attempted* killing results from the doing of an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his or her conduct endangers the life of another and who acts with conscious disregard for life. [¶] In order to prove this

retained. Clearly, neither the court nor counsel recognized that, whereas this language would have been pertinent and proper in a pure voluntary manslaughter instruction, it was not appropriate in one pertaining to *attempted* voluntary manslaughter.[8]

The People argue that any error here was both invited and harmless. We disagree with the former argument but agree with the latter.

It is clear that defense counsel wanted the words "attempt," "attempt to," or "attempted" added throughout the voluntary manslaughter instructions originally proposed by the prosecutor. That, and only that, was the point of his insistence on changes being made to the original CALJIC instructions. He never addressed the issue of whether the modified version of CALJIC No. 8.40 which was going to be read to the jury should or should not retain the "conscious disregard for human life" words used in the first and third sentences of the instruction. The only reference to those words was by the court, which indicated an intent to retain them but add the word "attempted" to the third sentence. Defense counsel was never asked if he agreed with that intention, nor did he either volunteer or imply such agreement. In those circumstances, we cannot and do not find invited error, because "merely acceding to an erroneous instruction does not constitute invited error." (*People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20; cf. also *People v. Wickersham* (1982) 32 Cal.3d 307, 333-335, overruled on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 201; *People v. Viramontes* (2001) 93 Cal.App.4th 1256, 1264.)

The situation is different, however, regarding whether the modified version of CALJIC No. 8.40 with which the jury was instructed was prejudicial to appellant. First

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crime, each of the following elements must be proved: [¶] 1. *An attempt was made to kill* a human being; [¶] 2. The *attempted* killing was unlawful; and [¶] 3. The perpetrator of the attempted killing either intended to kill the alleged victim, or acted in conscious disregard for life; and [¶] 4. The perpetrator's conduct resulted in the *attempted* unlawful killing.

[8] A specific intent to kill is required for a conviction for *attempted* voluntary manslaughter; a "conscious disregard for life" is insufficient. (See, e.g., *People v.*

of all, our standard of review of errors in instructions concerning lesser-included offenses is whether it is reasonably probable that the erroneous instruction affected the outcome. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Our Supreme Court so held in *People v. Breverman* (1998) 19 Cal.4th 142, 164-179 (*Breverman*), overruling *People v. Sedeno* (1974) 10 Cal.3d 703. It reaffirmed that point even more recently in the highly-pertinent *People v. Lasko* (2000) 23 Cal.4th 101, 111-113 (*Lasko*).[9] (Cf. also *People v. Montes*, *supra,* 112 Cal.App.4th at p. 1552).

Under the *Watson* test, it is simply not "reasonably probable" that the erroneous retention of the "conscious disregard" language in the modified version of CALJIC No. 8.40 affected the outcome here. In the first place, in closing argument the prosecution discussed the attempted voluntary manslaughter possible alternate verdict in all of two sentences. More importantly, it did so by urging its *rejection* by the jury and, rather, their conviction of appellant of the charged offense, attempted murder. The defense never addressed the issue at all, its position being that the prosecution had never established that appellant was the shooter, principally because of the unreliability of Green's and Lujan's testimony.

But even more importantly, the evidence that appellant was (1) the shooter and (2) shot Green with intent to kill was very substantial. On the first point, and in addition to the testimony of Green and Lujan, the jury heard from the officer who arrested appellant the day after the shooting and found in the car he was driving a .22 caliber revolver containing four empty casings. It then heard from a Vallejo police detective that both Lujan and Green (the latter twice) had picked out appellant's picture from photo line-ups.

Gutierrez (2003) 112 Cal.App.4th 704, 710; *People v. Montes* (2003) 112 Cal.App.4th 1543, 1546-1552 (*Montes*).)

[9] *Lasko* makes clear that, since *Breverman*, the state, and not the federal (see *Chapman v. California* (1967) 386 U.S. 18) standard applies in circumstances such as those present here, i.e., misinstruction regarding a lesser included offense. Although appellant's counsel cites *Lasko* once in his opening brief, he does not in his reply brief, notwithstanding the People's substantial (and in our opinion correct) reliance on *Lasko* regarding the relevant standard of review in the instant circumstances.

It also heard from a county criminalist that the .22 caliber bullet removed from Green's stomach was ballistically consistent with the revolver found in appellant's car. Finally, the jury had read to it the note that appellant, during the trial, apparently passed to Andre Bryant asking Bryant to provide an alibi for him. During less than two days of deliberation, the jury asked only one question of the court (regarding whether Bryant had been listed as a potential witness for either side) and for the re-reading of the testimony of only Green and Lujan.

On the second point, intent to kill, the jury knew that Green had had one .22 caliber bullet removed from her stomach but still had another in her arm and that, according to her, four shots had been fired by appellant.[10]

Under these circumstances, we have no difficulty in concluding that the erroneous inclusion of the two references to "conscious disregard for human life" in the modified version of CALJIC No. 8.40 with which the jury was instructed was not prejudicial to appellant.

D. *Alleged Blakely Error*

As noted above, via a supplemental brief appellant asks us to also consider whether *Blakely* error was committed when the trial court sentenced appellant to the upper terms on both count I and the enhancement alleged pursuant to section 12022.5, subdivision (a), pertaining to personal use of a firearm during the commission of the attempted voluntary manslaughter. We agree that there was and that, therefore, the case must be remanded to the trial court for resentencing.

In *Blakely*, a 5-4 majority of the United States Supreme Court held that a Washington State court had denied a criminal defendant his constitutional right to a jury trial by sentencing him to 90 months in state prison for the crime of second-degree kidnapping. The defendant had pled guilty to that charge, as well as to accompanying allegations of domestic violence and use of a firearm. (*Blakely, supra,* ___U.S.___, [124

[10] Lujan testified that she had definitely heard two shots but that it was "possible" there were more.

S.Ct. at p. 2536-2537.) Although the maximum prison term allowable for second-degree kidnapping under Washington statutes was 10 years, those statutes also provided that the "standard range" for such a crime committed with a firearm would be between 49 and 53 months. The trial judge, however, sentenced the defendant to the 90-month term because of the "deliberate cruelty" and other aspects of the crime. (*Ibid.*) Citing its decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) the majority of the Court reversed because the Washington trial court, and not the jury, heard the testimony and made the determination to increase the defendant's sentence from the "standard range" of 49 to 53 months to 90 months. (*Blakely, supra,* ___ U.S. ___ [124 S.Ct. at p. 2536.)

Although here there was not, as there was in *Blakely,* a hearing complete with testimony before the trial judge, there was clearly a judicial, rather than a jury, determination that both of the two upper terms should be imposed. Although the trial judge here was careful and precise in the way he identified and articulated the various aggravating factors under rule 4.421 of the California Rules of Court, the fact remains that, to quote from *Blakely*, "the judge . . . imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding." (*Blakely, supra,*___ U.S. ___ [124 S.Ct. at p. 2537].) In this state, of course, that maximum was and is the middle term in each case. (See § 1170, subdivision (b), and Cal. Rules of Court, rule 4.420.)

We are aware, of course, that our Supreme Court has granted review of two decisions from our sister courts raising *Blakely* issues. (See *People v. Towne*, review granted July 14, 2004, S125677, and *People v. Black*, review granted July 28, 2004, S126182.) We have considered postponing issuance of our decision in this case to await the court's decision in these cases. We believe, however, that such a postponement is unnecessary because the two upper terms imposed here seem clearly to contravene *Blakely.*

First of all there was not, as there was in *Blakely,* any sort of a plea of guilty or no contest by appellant; he was convicted of the offenses charged after a jury trial. Second, it is clear from the record of the sentencing hearing that appellant's admitted two prior

felony convictions (which resulted in one prison term) were not considering by the trial court as an aggravating factor. Indeed, the trial court expressly disclaimed any such reliance during the sentencing hearing. Rather, citing subdivisions (a)(1), (2), (3) & (4) and (b)(1) & (2) of California Rules of Court, rule 4.421, the court articulated many aggravating factors which caused it to impose the upper term for both the attempted voluntary manslaughter conviction *and* the personal use of a firearm enhancement. Included among these were that appellant's crime involved "great violence," "a threat of great bodily harm," were "perpetrated by Mr. Powell [with] a high degree of cruelty, viciousness, as well as callousness," as well as the fact that appellant "did use a weapon at the time" directed at a victim who "was particularly vulnerable," and the additional facts that appellant was on parole at the time of the offenses and had attempted to suborn perjury during the course of the trial.

These findings by the trial court, although clearly supported by the record and tied directly by it to the aggravating factors spelled out in rule 4.421 of the California Rules of Court, fail the *Blakely* test that the presence of any fact or factor which is used to increase the amount of prison time a defendant serves above the "standard range" (per the Washington State statutes) or the "middle term" (per § 1170, subd. (b), of our statutes and Cal. Rules of Court, rule 4.420(a)) must be determined by a jury and not a judge.

Although the sentence in this case was pronounced over a year before *Blakely* was handed down, the ruling in that case clearly applies here because this case was on appeal during that period and hence its result was not final. (See, e.g., *Griffith v. Kentucky* (1987) 479 U.S. 314, 328; *People v. Ashmus* (1991) 54 Cal.3d 932, 991.) In this connection, we simply cannot agree with the People's contention, in their post-*Blakely* brief, that appellant "forfeited" his right to claim *Blakely* error by not raising that issue below. Because of the constitutional implications of the error at issue, we question whether the forfeiture doctrine applies at all. (See *People v. Vera* (1997) 15 Cal.4th 269, 276-277 [claims asserting deprivation of certain fundamental, constitutional rights not forfeited by failure to object].) Furthermore, there is a general exception to this rule where an objection would have been futile. (*People v. Abbaszadeh* (2003) 106

Cal.App.4th 642, 648, and authority discussed therein.) We have no doubt that, at the time of the sentencing hearing in this case, an objection that the jury rather than the trial court must find aggravating facts would have been futile. (See Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rules 4.409 & 4.420-4.421.) In any event, we have discretion to consider issues that have not been formally preserved for review. (See 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Reversible Error, § 36, p. 497.) Since the purpose of the forfeiture doctrine is to "encourage a defendant to bring any errors to the trial court's attention so the court may correct or avoid the errors" (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060), we would find it particularly inappropriate to invoke that doctrine here in light of the fact that *Blakely* was decided after appellant was sentenced.

There remains only the issue of whether appellant was prejudiced by the *Blakely* error. Since the *Blakely* court rested its holding on *Apprendi*, we will apply the standard of prejudice applicable to *Apprendi* error, which is whether such error was harmless beyond a reasonable doubt. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 326, citing *Chapman v. California, supra,* 38 U.S. at p. 24.) The People make two arguments in support of their contention that, here, any *Blakely* error was harmless beyond a reasonable doubt. First of all, they contend that, under the United States Supreme Court's decision in *Almendarez-Torres v. United States* (1998) 523 U.S. 224, appellant had no right to a jury trial regarding whether his prior convictions constituted aggravating circumstances. As noted earlier, appellant admitted two prior convictions which resulted in one prison term. And, of course, both "prior convictions as an adult or sustained petitions in juvenile delinquency proceedings" and a prior prison term are included among "circumstances in aggravation" under rule 4.421 (b)(3) & (4) of the California Rules of Court. Because, the People contend, "a single aggravating factor is sufficient to support the imposition of an upper term" (see *People v. Osband* (1996) 13 Cal.4th 622, 728), the presence of *both* of these factors means that there is no prejudicial *Blakely* error.

The People also argue that, when all is said and done, there is also no prejudicial *Blakely* error because there was "overwhelming or uncontradicted evidence" at trial of

such aggravating circumstances as appellant's use of a firearm, that the crime involved great violence and was "cruel, vicious and callous" and, therefore, there was "no real dispute at trial" regarding the presence of these aggravating factors.

The People have a point, but not enough of one to convince us that we should not remand the case for resentencing. Here, the trial court could have, but did not, use appellant's admitted prior convictions and prison term as an aggravating factor. Instead it relied on others which, we agree again, were amply supported by the trial record although, for the reasons noted above, contrary to *Blakely*. We think it imprudent for us to assume that, post-*Blakely*, the trial court would determine to impose the same upper terms based on factors not subject to the *Blakely* rule; perhaps it would but perhaps not.[11]

Under these circumstances we believe the proper course of action is for us to remand this case to the trial court to reconsider the appropriate sentence for appellant in light of *Blakely*.

E. *The Issue of Appellant's Custody Credits*

Appellant claims he was deprived of his constitutional rights because, at a point of time when he was not present in court, the trial court denied him presentence credits to which, he asserts, he was entitled.

The sentencing hearing in this matter was held, as noted earlier, on July 11, 2003. Three days before that date, appellant's trial counsel filed a "Defendant's Sentencing Brief" which devoted itself principally to arguing against the imposition of the upper term. The document did, however, briefly discuss the issue of custody credits to which

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[11] Two knowledgeable California trial court judges have written that under "Rule 4.4.08 (a), for example, the court may be able to impose an aggravated term simply because the defendant has a certain number of felony and/or misdemeanor convictions" and an "upper term may be imposed, for example, if the defendant . . . has a prior prison term (Rule 4.421(b)(3)." (Couzens & Bigelow, *Application of Blakely v. Washington to California Courts* (2004) www/fdap.org/blakely.html.) We cannot, however, hold that either of these options is automatically applicable here. First of all, those authors were careful to use the term "may" regarding both options and, secondly, we are reluctant to assume that this trial court would have given appellant the same upper term sentence it did based only on appellant's admitted prior convictions and prison term.

appellant might be entitled, stating: "[O]n the issue of credits Mr. POWELL was taken into custody because of a weapon found in an automobile which he was driving. His parole status alone did not result in his arrest. Thus, the Court should give Mr. POWELL the credits to which he was entitled."

This reference in the brief was, clearly, in response to a "Pre-Sentence Report" prepared by a deputy probation officer which, although marked filed as of July 11, 2003, was in the hands of defense counsel before then.[12] That report recommended that appellant receive no custody credits because he was "not eligible for these credits in that he was in-custody on a parole hold for absconding and not related to the instant offense." Some of those last-quoted words appear as underlined, apparently by the court, in our copy of the record.

At the sentencing hearing, appellant and his counsel were both present. The court noted that it had read and considered both parties' briefs plus the probation report on the issue of sentencing, and asked defense counsel if he had anything he wished to add. He did not. The prison sentence, noted above, was then pronounced, but in so doing the court said nothing one way or the other regarding custody credits. Nor was the subject brought up by either counsel thereafter. Both the court's minute order, issued the same day, and its abstract of judgment, filed the same day, specifically stated that appellant would not receive custody credits.

Because the issue was not specifically dealt with orally by the court during the July 11, 2003, hearing, appellant contends the denial of custody credits was done "outside appellant's presence, denying appellant due process of law and his right to the assistance of counsel."

If this were the only sentencing issue before us, we would reject it out of hand. Clearly, the issue of presentence credits was understood by the parties and the court and, although not verbally dealt with by the court at the hearing, it was (1) expressly briefed

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[12] We know this because that document is specifically referenced in "Defendant's Sentencing Brief."

by both sides before the sentencing hearing, (2) not raised by defense counsel at that hearing, and (3) expressly determined by the court in its minute order of the same day. However, and as discussed in the preceding portion of this opinion, this is not the only sentencing issue before us. Therefore, in connection with the remand which we are ordering regarding the *Blakely* issue, the court should also specifically consider and resolve, in the presence of appellant and his counsel, the issue of appellant's entitlement, or lack thereof, to presentence custody credits.

IV. DISPOSITION

The sentence imposed is vacated and the matter remanded to the trial court for reconsideration of its sentence, more specifically (1) its imposition of the upper terms on count I and the personal use of a firearm enhancement in light of *Blakely* and (2) whether appellant is entitled to any presentence custody credits. Otherwise, the judgment is affirmed.

_____
Haerle, Acting P.J.

We concur:

_____
Lambden, J.

_____
Ruvolo, J.