Filed 5/18/07 P. v. Shields CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JONATHAN EARL SHIELDS, Defendant and Appellant.	E039693 (Super.Ct.No. INF050366) OPINION

APPEAL from the Superior Court of Riverside County. Graham Anderson Cribbs, Judge. Affirmed in part; reversed in part.

Vicki Marolt Buchanan, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Rhonda Cartwright-Ladendorf, Supervising Deputy Attorney General, and Annie

Featherman Fraser and Scott Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Jonathan Earl Shields appeals from his conviction of taking property from another, receiving stolen property, possessing methamphetamine, and possessing a device for unlawfully smoking a controlled substance. He argues the trial court prejudicially erred in (1) refusing to sanitize a prior conviction before the prosecutor used it for impeachment; (2) failing to instruct the jury on the believability of a witness convicted of a felony; (3) refusing to allow all statements he made in a conversation with a deputy after the prosecution was allowed to use one statement from that conversation; (4) refusing to instruct the jury on the lesser included offense of petty theft; (5) giving and erroneous instruction on theft from a person; and (6) failing to give a unanimity instruction because there were two separate acts that might have supported a conviction for possession of methamphetamine. Defendant further contends his conviction for possession of stolen property must be reversed because he was convicted of the theft of the property he possessed, and the trial court erred in punishing him twice for the same conduct. The parties submitted supplemental briefing to address defendant's aggravated sentence for count 1 in light of *Cunningham v. California* (2007) 549 U.S. __ [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*).

The People concede that the conviction for receiving stolen property must be reversed. We find no other errors.

II. FACTS AND PROCEDURAL BACKGROUND

In the evening of March 25, 2005, Toni Amigliore was unloading bags of groceries from a shopping cart into the trunk of her car in the parking lot of a supermarket in Palm Desert. She had her hand on the cart, and she felt a small jerk. She turned around to see a man leaning out of a car window and holding her purse, which had been in the child seat of the shopping cart. Amigliore got the license plate number, 4WAN785, before the car, driven by a blond woman, sped away. At trial, Amigliore identified defendant as the man who had grabbed her purse.

Riverside County Deputy Sheriff Michael Tapp responded to the scene. Amigliore described the vehicle and gave him the license plate number. She described the person who had taken her purse only as a White male adult, and she said she could not identify him if she saw him again. Deputy Tapp ran the license plates and learned that the vehicle was registered to Jodi Smith at 39-344 Ciega Creek. He went to that residence but was told Smith was not there.

On March 27, 2005, Rene Godinez, a security guard at the Palm Desert Greens Country Club, received a report of a suspicious vehicle in a driveway on Ciega Creek. Godinez approached the vehicle and saw that it was filled with boxes and clothing. A blond woman and a man were in the driver's seat and front passenger seat, respectively, under a yellow blanket. Godinez told them to leave or he would call the sheriff.

In the next few minutes, the man, whom Godinez identified as defendant, and the woman got out of the car, reached into the back seat, got their clothing and dressed. Defendant opened the trunk and reached inside.

Deputies Sean Freeman and Tommy Mix arrived at the scene. Defendant explained to Deputy Mix that he and the woman were staying in the car at her mother's trailer, and her mother had given them permission to be there. Deputy Freeman learned that the woman's name was Jodi Smith. Defendant told Deputy Freeman that he and Smith "had recently met and that it was love at first sight and they were planning on getting married."

The car's license number was 4WAN785. Deputy Freeman asked if there was anything illegal in the car, and defendant replied, "No." Deputy Freeman asked if the deputies could search the car, and Smith and defendant agreed. Defendant and Smith acted nervous and tried to whisper to one another. Deputy Mix told them that if there was anything illegal in the car, they should tell him. Defendant, said there was "something illegal wrapped up on my side of the car."

The deputies searched the car and found a glass pipe commonly used to smoke methamphetamine. The pipe was wrapped up in a yellow blanket behind the front passenger seat; there was no other yellow blanket in the car. A small amount of white crystal methamphetamine was in the pipe. Deputy Mix asked defendant if the pipe was the illegal item he was talking about, and defendant replied, "Yeah, that's mine." Inside the passenger door, Deputy Freeman found a glue container stuffed with a clear plastic bag of methamphetamine. The pipe contained .17 grams of methamphetamine, and the glue container contained .86 grams. Deputy Mix testified that the amount of methamphetamine found in the pipe was "a very usable quantity." Deputy Freeman

testified that the methamphetamine found in the glue container was the equivalent of two to three doses.

Defendant was arrested. When Deputy Freeman was putting defendant in the back of Deputy Mix's vehicle, defendant shouted to Smith, "I love you."

The deputies continued searching the car. Men's and women's possessions were intermingled in the car. In the trunk filled with women's clothes, they found a duffle bag with a Social Security card, credit cards, and identity cards belonging to Amigliore.

At the station, after receiving *Miranda*[1] warnings, defendant admitted the drugs in the car were his. He told Deputy Mix that "there was no reason to arrest both of them, so he would claim the drugs." Deputy Mix told him that Smith had already been arrested. Defendant told Deputy Mix that he and Smith had found Amigliore's credit cards and other identity cards in a trash dumpster.

Before the preliminary hearing, Deputy Tapp was told defendant's case might be suspended because Amigliore could not identify defendant. Deputy Tapp spoke to Amigliore, who was seated in the courtroom, and she told him she could identify defendant among the inmates seated in the jury box. Amigliore testified she had recognized defendant in the courtroom that day. Amigliore later identified his photograph from a photographic lineup, but she could not identify Smith from another photographic lineup.

---

[1] *Miranda v. Arizona* (1966) 384 U.S. 436.

Defendant testified in his own behalf. He said he had run into Smith, an acquaintance, at a fast food restaurant the night before their arrest; he had not seen her for about a week before that. Smith invited him to go to her mother's house, but when they arrived at around 1:00 a.m., the house was locked and no one was there, so they decided to sleep in the car. Defendant said he had told the officer at the police station he would "take claim for the drugs" and there was therefore no reason to arrest both him and Smith. He did not want Smith to get into trouble for the drugs. Defendant also testified he did not know about the methamphetamine in the glue container, and that he had told the officers more than once that "the stuff" was not his. He testified he did not know that Amigliore's credit cards and other identity cards were in the trunk of Smith's car. Defendant denied having taken Amigliore's purse, and he denied telling Deputy Mix that he and Smith had found Amigliore's documents in a dumpster. He denied telling Deputy Freeman that he and Smith were getting married, and he denied saying, "I love you," to Smith when he was being placed in the patrol car after his arrest.

Deputy Tapp testified about what Amigliore had told him at the scene regarding whether she had control of the shopping cart when the purse was taken. (This testimony is set forth at more length in the discussion below.) He testified that when he told Amigliore at the preliminary hearing that the case was going to be suspended, she became nervous and upset and pointed to defendant and said, "That's him, I see him."

The jury found defendant guilty of taking property from the person of another (Penal Code[2] section 487, subdivision (c) (count 1)); receiving stolen property (section 496, subdivision (a) (count 2)); possession of methamphetamine (Health and Safety Code section 11377, subdivision (a) (count 3)); and possession of a device for unlawfully smoking a controlled substance (Health and Safety Code section 11364 (count 4)). In a bifurcated proceeding, the trial court found true that defendant had a prior strike and a prior conviction under section 667.5, subdivision (a). The trial court sentenced him to eight years four months in prison, consisting of the aggravated term of three years for count 1, doubled to six years based on the prior strike, and one year four months for count 3. The sentence on count 2 was stayed under section 654. A concurrent sentence of six months was imposed for count 4.

III. DISCUSSION

A. Sanitizing Prior Conviction

Defendant admitted in cross-examination that in February 2004 he had pleaded guilty to "first degree burglary, a felony conviction." Defendant contends the trial court prejudicially erred in refusing to sanitize his conviction before allowing the prosecutor to use the conviction to impeach defendant's testimony. He argues the prosecutor should have been allowed to elicit evidence only that defendant had been convicted of an unspecified prior felony.

---

[2] All further statutory references are to the Penal Code unless otherwise specified.

When the trial court weighs the probative value of evidence against its prejudicial effect under Evidence Code section 352, we review the trial court's determination under the abuse of discretion standard. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

Defendant argues that the four factors set forth in *People v. Beagle* (1972) 6 Cal.3d 441, 453, superseded by statute as stated in *People v. Reza* (1984) 152 Cal.App.3d 647, 653, fn. 1, among other cases, should guide a trial court's discretion in deciding whether to allow impeachment of a defendant with a prior conviction. Those factors are: (1) whether the prior conviction reflects adversely on honesty or veracity; (2) the nearness or remoteness in time of the prior conviction; (3) whether the prior conviction is for the same or substantially similar conduct to the charged offense; and (4) what the effect will be if the defendant does not testify out of fear of prejudice from impeachment with prior convictions. Defendant concedes that "the first, second, and fourth factors weigh in favor of admitting the prior conviction." He argues, however, that the third factor, the similarity of the conduct, is prejudicial and weighs against admission. We disagree.

First, defendant fails to acknowledge that section 28(f) of article I of the California Constitution, which was added by Proposition 8, provides in pertinent part that "[a]ny prior felony conviction . . . shall subsequently be used without limitation for purposes of impeachment . . . in any criminal proceeding." The California Supreme Court held in *People v. Castro* (1985) 38 Cal.3d 301, 306, "that--always subject to the trial court's discretion under [Evidence Code] section 352--[Proposition 8] authorizes the use of any felony conviction which necessarily involves moral turpitude, even if the immoral trait is

one other than dishonesty." And in *People v. Hinton* (2006) 37 Cal.4th 839, 887, the court rejected the defendant's objection that prior convictions should have been excluded as too similar to the charged crime. The court explained, "'While before passage of Proposition 8, past offenses similar or identical to the offense on trial were excluded, now the rule of exclusion on this ground is no longer inflexible.' [Citations.]" (*Id.* at p. 888.)

Thus, prior convictions for even an *identical* offense are not automatically excluded. Rather, "'"[t]he identity or similarity of current and impeaching offenses is just one factor to be considered by the trial court in exercising its discretion."' [Citations.]" (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 926.)

Here, the prior conviction for burglary was not for an identical offense -- the current charges included drug offenses, theft from the person of another, and receiving stolen property. Moreover, the prior offense was not even particularly similar to the charged theft offenses (and it bore no similarity whatever to the drug-related offenses). The elements of first degree burglary are entry into an inhabited dwelling or other structure with the intent to commit theft "or any felony." (§§ 459, 460.) The prosecutor did not elicit any of the details of the prior conviction, and no evidence showed that the prior burglary was committed with the intent to commit theft.

Thus, we conclude the trial court did not abuse its discretion in allowing evidence of the prior burglary conviction for impeachment without sanitizing that conviction.

B. Failure to Instruct Jury on Believability of Witness Convicted of Felony

Defendant contends the trial court prejudicially erred in failing to instruct the jury sua sponte with CALJIC No. 2.23[3] regarding the believability of a witness who has a prior felony conviction. This court has held that trial courts do not have a sua sponte duty to instruct the jury with CALJIC No. 2.23. (See *People v. Kendrick* (1989) 211 Cal.App.3d 1273, 1278.) In *People v. Mayfield* (1972) 23 Cal.App.3d 236, 245 (*Mayfield*), on which defendant relies, the Fifth District Court of Appeal held that the trial court did have a duty to give a limiting instruction sua sponte. However, defendant fails to point out that *Mayfield* was disapproved in *People v. Hernandez* (2004) 33 Cal.4th 1040, 1052, fn. 3, as to the holding that a sua sponte duty exists to give a limiting instruction.

Defendant did not request CALJIC No. 2.23 at trial, and the trial court did not have a sua sponte duty to give that instruction. (*People v. Kendrick*, *supra*, 211 Cal.App. 3d at p. 1278.) We therefore reject defendant's contention of error.

C. Refusing to Allow Evidence of Defendant's Statement to Deputy

Before trial, the trial court granted the prosecution's motion to exclude defendant's statement to the arresting deputy that "I'm taking the fall for [Smith's] dope. It's her shit, ask her." Defendant now contends the trial court prejudicially erred in excluding

---

[3] CALJIC No. 2.23 provides, "The fact that a witness has been convicted of a felony, if this is a fact, may be considered by you only for the purpose of determining the believability of that witness. The fact of a conviction does not necessarily destroy or impair a witness's believability. It is one of the circumstances that you may consider in weighing the testimony of that witness."

evidence of that statement. He argues his statement was admissible under Evidence Code section 356 because it was part of the same conversation in which defendant told Smith he loved her, which the prosecutor introduced into evidence.

Evidence Code section 356, on which defendant relies, provides that when part of a conversation is introduced into evidence by one party, "the whole *on the same subject* may be inquired into by an adverse party." (Italics added.) Evidence Code section 356 is not helpful to defendant because the statement he sought to admit was made to the deputy, whereas the statement that the prosecution admitted was made to Smith. Thus, the two statements were not part of the same conversation.

Defendant's statement to Smith that he loved her was admissible as the admission of a party opponent when offered by the prosecutor (Evid. Code, § 1220; *People v. Richards* (1976) 17 Cal.3d 614, 617, disapproved on other grounds in *People v. Carbajal* (1995) 10 Cal.4th 1114, 1126.) The statement was relevant and probative to contradict defendant's contention that he and Smith were merely acquaintances. In contrast, defendant's denial that the drugs were his was self-serving hearsay which the defendant could not elicit. (*People v. Jurado* (2006) 38 Cal.4th 72, 130.) The trial court did not err in excluding that evidence.

Finally, even if the evidence had been admitted, it is not reasonably probable that the result would have been different. Defendant himself testified and denied the drugs were his. He testified that he had told the deputy the drugs were not his and had further told the deputy he would claim the drugs were his so there was no reason to arrest both him and Smith. Thus, his statements to the deputy were presented to the jury. Any error

in excluding the statement was not prejudicial. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

D. Instructing Jury on Lesser Included Offense

Defendant was charged with and convicted of grand theft from the person of another under section 487, subdivision (c). He contends the trial court prejudicially erred in failing to instruct the jury on the lesser included offense of petty theft. He contends the evidence was inconsistent as to whether Amigliore had her hand on the shopping cart at the time of the theft, and if she had not then had her hand on the shopping cart, the jury could have found him guilty only of petty theft. (The purse contained only about $50 in cash, in addition to the credit cards and other identification documents.)

The trial court must instruct on a lesser included offense when substantial evidence exists indicating that the defendant is guilty only of the lesser offense. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) We apply a de novo standard of review to determine whether an instruction on a lesser included offense should have been given. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.)

Our review of the record establishes that Amigliore testified unequivocally that she had her hand on the shopping cart at all times. Specifically, she testified, "With my hand on the cart, I was putting the groceries into my trunk. As I was putting the groceries in, I felt a small jerk on the cart . . . ." When the prosecutor later asked, "So going back, I want to take it step by step, you said you had your hand on the cart; correct?" Amigliore responded, "Yes, I did." She clarified that she was holding the cart on the side rather

than on the handle. She repeated that when she "was holding onto the cart, . . . [she] felt the cart move."

Despite this testimony, defendant contends an issue of fact was created by Deputy Tapp's testimony, during which the following exchange took place:

"[Defense attorney]: In your report you indicate that she said that she felt somebody pulling on her cart; correct?

"A. Yes.

"Q. And then Amigliore grabbed the cart and pulled it back?

"A. Yes. [¶] . . . [¶]

"Q. So she didn't have control – she didn't hold onto the cart. She had to grab it and pull it back? [¶] . . . [¶]

"[Deputy Tapp]: She had control of the cart. She had one hand on the cart.

"[Defense attorney]: When she says she grabbed the cart which means that she didn't have ahold of the cart?

"A. Okay.

"Q. That is correct?

"A. That's correct."

On cross-examination, the following exchange took place:

"[Deputy District Attorney]: I am going to ask you about your report what [defense counsel] asked you about. . . . 'Amiglior[e] bent over the edge of her trunk and was controlling the shopping cart with her purse inside with one hand while she put the grocery bag inside the trunk with the other hand.' That is what you wrote; correct?

"A. That is correct.

"Q. 'When she felt somebody pulling on her cart, [A]miglior[e] grabbed the cart and pulled it back when she saw a light colored vehicle license 4 WAN785.' That is what you wrote; correct?

"A. Yes.

"Q. To the best of your recollection, she told you she was holding the cart with one hand?

"A. Yes."

After further discussion about the meaning of the phrase "she grabbed it back when she felt the pull," Deputy Tapp testified that Amigliore had told him at the scene that "[s]he had her hand on the cart while she was putting her grocery bags in the trunk of her car." Further, she told him "she knew her purse had been stolen initially because she felt a tug on her cart."

The trial court concluded there was no conflict in the evidence and refused the defense request to instruct on the lesser included offense of petty theft. We agree. Defendant's argument hinges on the isolated phrase in the police report that Amigliore grabbed the cart. He asserts that that phrase indicates she was not holding onto the cart when her purse was taken. However, his argument overlooks the context of that phrase. The entire statement was that "'*When she felt somebody pulling on her cart*, [A]miglior[e] grabbed the cart and pulled it back when she saw a light colored vehicle license 4WAN785.'" Unless she was holding onto the cart, she could not have felt the tug or pull when her purse was being removed. Thus, like the trial court, we find no

conflict in the evidence sufficient to require an instruction on the lesser included offense of petty theft.

E. Instruction on Theft from Person

Defendant contends the trial court prejudicially erred in its instruction to the jury on theft from a person. We apply a de novo standard of review in assessing whether an instruction correctly states the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) "'"In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. [Citation.]"' [Citation.] 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111-1112; accord *People v. Clair* (1992) 2 Cal.4th 629, 663.)

Here, the trial court instructed the jury, over defense objection, with the prosecutor's requested special instruction as follows: "Stealing a purse from a shopping cart[,] which cart was at the time of the theft[,] under the control and in the present possession of the victim[,] constitutes a taking from the person." The special instruction was based on *In re George B.* (1991) 228 Cal.App.3d 1088 (*George B.*) and *Mack v. State* (Tex.Cr.App. 1971) 465 S.W.2d 941 (*Mack*).) In both *George B.* and *Mack*, the courts found that property was taken from the person of another because, at the time of the takings, both victims had their hands on the shopping cart from which the property was taken. Thus, considered in isolation, the prosecutor's special instruction appears to

omit the requirement that the victim had to have been in physical contact with the shopping cart from which her purse was snatched.

However, as noted, we must consider the instructions as a whole. Here, the trial court also instructed the jury based on CALJIC No. 14.02, grand theft person, in pertinent part as follows: "1. A person took personal property of any value from the person of another." The trial court also instructed the jury with CALJIC No. 14.23 as follows: "[T]he theft of personal property of any value from the person of another is grand theft. A taking of property is from the person if the property was either on the body or in the clothing worn, or in a container carried by the person from whom it was taken." (CALJIC No. 14.23.)

Thus, based on CALJIC Nos. 14.02 and 14.23, the jury was required to find that the victim was touching the shopping cart when her purse was taken. And, as discussed above, the evidence was unequivocal that Amigliore kept her hand on the shopping cart. Thus, even if the jury was not specifically instructed that the victim had to have had her hand or foot on the cart, it is not reasonably probable defendant would have achieved a more favorable result had such instruction been given. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

F. Unanimity Instruction

Defendant contends the trial court prejudicially erred in failing to give a unanimity instruction because there were two acts that might have supported a conviction for possession of methamphetamine. The deputies found methamphetamine in two places: .17 grams in the pipe wrapped in a yellow blanket and .86 grams in a glue container

inside the right passenger door. In closing argument, the prosecutor told the jury it could convict defendant based on either act or on both acts.

When a defendant is charged with a single criminal count, but the evidence reveals more than one criminal act, either the prosecution must select the act upon which it relies to prove the charge or the jury must be instructed that it must unanimously agree beyond a reasonable doubt the defendant committed the same specific criminal act. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) The unanimity requirement is based on the constitutional principle that a criminal defendant is entitled to a verdict in which all 12 jurors concur, beyond a reasonable doubt, as to each count charged. (*People v. Brown* (1996) 42 Cal.App.4th 1493, 1499-1500.) However, a unanimity instruction is not required when the criminal acts are so closely connected as to form a single transaction or when the offense itself consists of a continuous course of conduct. (*People v. Sanchez* (2001) 94 Cal.App.4th 622, 631.)

In *People v. Casteneda* (1997) 55 Cal.App.4th 1067, the court found prejudicial error in the trial court's failure to give the unanimity instruction. The defendant in *Castaneda* was charged with a single count of possession of heroin. The evidence showed that one amount of heroin had been found in the defendant's pants and a second amount had been found on a television set. The court explained why the unanimity instruction was required under those circumstances: "[S]ome jurors could have found Castaneda guilty of possession based on the heroin found in his pocket, but had a reasonable doubt as to whether he possessed the heroin found on the television; while others could have thought the heroin in his pocket was planted (or otherwise had a

reasonable doubt as to whether he knowingly possessed it) and based their guilty verdict on the heroin found on the television. Thus, all the jurors could have found Castaneda guilty of possession of a controlled substance without unanimously agreeing upon which act constituted the offense. This constitutes a violation of the right to a unanimous verdict in criminal cases. [Citations.]" (*Id.* at p. 1071.)

Defendant argues the circumstances of his case are identical to those of *Castaneda*. However, we find the circumstances more similar to those of *People v. Wright* (1968) 268 Cal.App.2d 196 (*Wright*). In *Wright*, the court held that the unanimity instruction was not required in a prosecution for possession of marijuana. When police officers pulled up to investigate a group of parked cars on private property in a high crime area, a passenger in one car jumped out and threw a package off a nearby cliff. The package opened and 10 to 15 "fat, blunt, yellowish hand-rolled cigarettes" fell out, two of which were retrieved the next day. The officers found three additional similar cigarettes in the ashtray. Both the cigarettes recovered from the cliff and those found in the ashtray contained marijuana. (*Id.* at p. 197.) On appeal, the court rejected the defendant's argument that a unanimity instruction should have been given. The court explained, "The act of possession here was not fragmented as to time or space. The evidence showed all of the marijuana came from the car, some of it remained there and some was thrown over the cliff." (*Id.* at p. 198.) The court continued, "We hold here it was not necessary to instruct the jury its members must all agree which specific items of narcotics [the defendant] possessed so long as they all agreed at the time and place he possessed, separately, jointly or constructively, a usable amount of marijuana." (*Ibid.*)

A unanimity instruction may also be required when the defendant raises separate defenses to separate acts. (See, e.g., *People v. Gordon* (1985) 165 Cal.App.3d 839, 855-856, disapproved on other grounds in *People v. Lopez* (1998) 19 Cal.4th 282, 291-292.) Here, although defendant claimed at trial that neither the methamphetamine in the pipe or in the glue container was his, he argues that he had a separate defense to possession of the methamphetamine in the pipe, specifically, that it was not a usable quantity. Deputy Freeman testified that the .86 grams of methamphetamine in the glue container was two to three "doses" of methamphetamine. From this evidence, defense counsel argued that the .17 grams of methamphetamine found in the pipe was only a fraction of a "dose" and therefore not a usable quantity. However, Deputy Mix testified without objection that the .17 grams was a usable quantity. No evidence was introduced to show that a "dose" is the same as a usable quantity.

Rather, the jury was instructed that, to find defendant guilty of possession of methamphetamine, it had to find that "[t]he substance was in an amount sufficient to be used as a controlled substance." As the Supreme Court explained in *People v. Morales* (2001) 25 Cal.4th 34, 48, "'the . . . usable-quantity rule prohibits conviction only when the substance possessed simply cannot be used, such as when it is a blackened residue or a useless trace. It does not extend to a substance containing contraband, even if not pure, if the substance is in a form and quantity that can be used. No particular purity or narcotic effect need be proven.' [Citation.]" (Fn. omitted.) The evidence was uncontroverted that the methamphetamine in the pipe was a usable quantity. Defendant's purported defense was not viable.

G. Conviction of Receiving Stolen Property

Defendant contends his conviction of possession of stolen property must be reversed because he was convicted of the theft of the same property he possessed. Section 496, subdivision (a) provides that "a principal in the actual theft of the property may be convicted pursuant to this section. However, no person may be convicted both pursuant to this section and of the theft of the same property." The People concede error. When a person is convicted of both theft and possession of the same property, the conviction for possession must be reversed. (*People v. Stephens* (1990) 218 Cal.App.3d 575, 586.)

H. Punishment for Possession of Both Drugs and Paraphernelia for Smoking Drugs

The jury found defendant guilty of possession of methamphetamine (Health and Safety Code section 11377, subdivision (a)) and possession of paraphernalia for smoking methamphetamine (Health and Safety Code section § 11364), and the trial court sentenced him to eight months for the drug possession and to a concurrent six months for the paraphernalia possession. Defendant contends the two convictions were based on the same conduct, and the separate sentences violated section 654.

Section 654 bars multiple punishment for "[a]n act or omission that is punishable in different ways by different provisions" of the Penal Code. (§ 654, subd. (a).) However, a defendant may be separately punished for offenses that share common acts and that are part of an indivisible course of conduct when the defendant entertained multiple criminal objectives. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

"The question whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination. Its findings on this question must be upheld on appeal if there is any substantial evidence to support them. [Citations.]" (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.)

Here, the trial court impliedly found that the two crimes were not incident to one purpose when the trial court imposed separate sentences. We uphold a trial court's implied finding that a defendant had a separate intent and objective if that finding is supported by substantial evidence. (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

The trial court could reasonably have found that defendant possessed the drug paraphernalia not only for using the drugs the defendant presently possessed, but also for using other drugs on prior occasions. Similarly, the trial court could reasonably have found that defendant might have consumed the drugs he presently possessed by means other than the pipe that was found, such as by snorting it. In the absence of evidence of simultaneous use, the trial court could reasonably infer that defendant's possession of the pipe was not necessarily related to his possession of the methamphetamine in the glue container. The pipe was not being used at the time it was found, and the evidence showed only that it had been used at some point to smoke methamphetamine.

Defendant argues, however, that his case is analogous to those in which courts have held that possessing a firearm and possessing ammunition that was loaded in the firearm was pursuant to one intent, and one could therefore not be punished for both. (*People v. Lopez* (2004) 119 Cal.App.4th 132, 137-138 (*Lopez*).) If the conviction were

based solely on the methamphetamine found in the pipe, the facts would be more similar to those in *Lopez.* In *Lopez*, however, the court suggested that under some circumstances, multiple punishment would be lawful for both possessing a firearm and ammunition, such as when the firearm was unloaded. (*Id*. at p. 138.) Here, methamphetamine was found both in the pipe and in the glue container. Therefore, the trial court did not err in impliedly finding that defendant had separate objectives and in punishing defendant for both offenses.

I. Aggravated Sentence

Defendant contends the trial court erred by imposing the aggravated term for his conviction of grand theft person because the court based its sentencing decision on facts not found by the jury. (*Cunningham*, *supra*, 127 S.Ct. 856; *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*); *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*).)

In pronouncing sentence, the trial court adopted count 1 as the principal term and imposed the upper term based on defendant's "extensive criminal history." The court explained, "[H]e has a criminal history that leaves a trail across four states. . . . I believe those states were Alaska, Washington, the [S]tate of Florida, and obviously, the State of California; a substantial criminal history . . . ."[4] Defense counsel did not object on the basis that a jury trial was required on factors in aggravation.

---

[4] The probation report reflects that defendant, born in 1970, had had juvenile petitions sustained in 1984 and 1987 in Alaska for a total of 3 first degree burglaries and one attempted first degree burglary; and a juvenile petition sustained in Washington in 1988 for 3 second degree burglaries. As an adult, defendant sustained a felony conviction in 1991 in Alaska for second degree burglary, two misdemeanor convictions

[footnote continued on next page]

The People contend that because defendant failed to object in the trial court on the basis now urged on appeal, he has forfeited any challenge based on *Blakely*, *supra*, or *Apprendi*, *supra*. (See *People v. Hill* (2005) 131 Cal.App.4th 1089, 1103 [holding that a *Blakely* challenge was forfeited by the defendant's failure to raise it in the trial court].) However, to forestall any claim of ineffective assistance of counsel based on failure to raise a timely objection, we will address the issue on the merits. (*People v. Norman* (2003) 109 Cal.App.4th 221, 229-230.)

In *Cunningham*, the United States Supreme Court held that California's procedure for selecting upper terms violates the defendant's Sixth and Fourteenth Amendment right to jury trial because it "assigns to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence." (*Cunningham*, *supra*, 127 S.Ct. at p. 860.) The court explained that "the Federal Constitution's jury-trial guarantee

---

[footnote continued from previous page]
for driving while intoxicated, a misdemeanor conviction for driving with a suspended license, and a misdemeanor conviction for minor in possession of or consumption of alcohol. In 1993, defendant sustained a felony conviction in Alaska for misconduct involving weapons in the third degree. In 1996, defendant sustained felony convictions in Florida for assault on a law enforcement officer and resisting an officer with violence, and misdemeanor convictions for possession of drug paraphernalia, possession of cannabis, and disorderly intoxication. In 2000, defendant sustained felony convictions in Florida for grand theft vehicle, possession of cocaine, resisting an officer with violence, burglary of an unoccupied structure, and petit theft and two misdemeanor convictions for trespass. In 2001, defendant sustained misdemeanor convictions in Florida for trespass and resisting an officer without violence. In 2002, defendant sustained felony convictions in Florida for attempted burglary of an unoccupied structure, fraudulent use of a credit card, grand theft, and theft of a credit card. In 2003, defendant sustained a misdemeanor conviction in Florida for use or possession of drug paraphernalia. In 2004,
[footnote continued on next page]

proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, *other than a prior conviction*, not found by a jury or admitted by the defendant." (*Ibid.*, citing *Apprendi*, *supra*, 530 U.S. 466, and *Blakely*, *supra*, 542 U.S. 296, among other cases.)

Both *Apprendi*, *supra*, and *Blakely*, *supra*, recognized that "the fact of a prior conviction" may be found by a judge, even though any *other* fact that increases the maximum statutory penalty for a crime must be found by a jury. (*Apprendi*, *supra*, 530 U.S. 466, 490; *Blakely*, *supra*, 542 U.S. 296, 302.) California courts have interpreted broadly *Apprendi*'s exception for prior convictions. (See *People v. Thomas* (2001) 91 Cal.App.4th 212, 221-222 (*Thomas*) [holding that the *Apprendi* exception for prior convictions refers broadly to recidivism enhancements].) Moreover, the California Supreme Court in *People v. Epps* (2001) 25 Cal.4th 19, held the *Apprendi* exception applied not only to the determination that the defendant had suffered a prior conviction, but also to the determination that the conviction was for a serious felony for purposes of the Three Strikes law: "[[O]nly the bare fact of the prior conviction was at issue, because the prior conviction (kidnapping) was a serious felony by definition under section 1192.7, subdivision (c)(20).]" (*Epps*, *supra*, 25 Cal.4th at p. 28.)

Defendant argues that the jury was required to find the facts related to his criminal history. However, based on *Thomas*, *supra*, 91 Cal.App.4th at pp. 221-222 and *Epps*,

---

[footnote continued from previous page]
defendant sustained a felony conviction in California for first degree burglary. In addition, defendant had sustained five convictions between 1991 and 2000 for motor
[footnote continued on next page]

supra, 25 Cal.4th at p. 28, we conclude that constitutional considerations did not require that the fact that defendant had suffered numerous prior convictions be tried to a jury beyond a reasonable doubt. (*Apprendi*, *supra*, 530 U.S. at p. 490; *Blakely*, *supra*, 542 U.S. at p. 302; *Cunningham*, *supra*, 127 S.Ct. at p. 860.)

We further conclude that even if error occurred, it was harmless under any standard of review. Defendant had suffered 7 adjudications of criminal offenses as a minor and 12 misdemeanor and 14 felony convictions as an adult, as well as 5 Vehicle Code violations. At the sentencing hearing, defendant did not contest that he had suffered such convictions; rather, in his statement to the court, defendant admitted he had been incarcerated most of his life. The probation report listed no factors in mitigation. Thus, there is no reasonable likelihood that a different sentence would have been imposed if the jury, rather than the trial court, had been asked to determine defendant's prior criminal history.

We therefore reject defendant's contention that *Apprendi*, *Blakely*, and *Cunningham* require that his sentence be reversed or remanded.

IV. DISPOSITION

Defendant's conviction of receiving stolen property is reversed. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

[footnote continued from previous page]
vehicle violations.

HOLLENHORST
Acting P. J.

We concur:

MCKINSTER
J.

RICHLI
J.