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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. WALLACE W. VAUGHN, Defendant and Appellant.	B165489 (Los Angeles County Super. Ct. No. NA049682)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard R. Romero, Judge. Affirmed.

Mark D. Greenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Joseph P. Lee and A. Scott Hayward, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts B and C of the Factual and Procedural Background and parts A, B, C, and D of the Discussion.

Appellant Wallace W. Vaughn contends on appeal that the trial court erred in admitting into evidence his taped confessions to several crimes because the confessions were obtained after he invoked his right to remain silent. Appellant further argues that substantial evidence of intent to kill does not support the jury's findings on two of the attempted murder charges; that the trial court should have enunciated reasons on the record for imposition of consecutive sentences; and, in a supplemental brief, that the sentence in this matter was the result of improper factual findings by the court in violation of recent United States Supreme Court authority. We address appellant's claim of sentencing error in the published portion of this opinion. His other claims are treated in the unpublished portion. We conclude that his contentions have no merit, and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Information

Appellant was accused in a 13-count information of two counts of murder with special circumstances and eleven counts of attempted murder. Count one charged the murder of Jesus Bicuna on July 21, 2001. Counts two through four charged the "willful, deliberate, premeditated" attempted murder of Juan Espinoza, Francisco Espinoza, and Fidela Acevedo, respectively, on July 21, 2001.

Count five charged the murder of Fernando Rubio on May 28, 2000. Counts six through eight charged the "willful, deliberate, premeditated" attempted murder of Henry Cifuentes, Fidel Rosales, and Copitzy Rodriguez, respectively, on May 28, 2000.

Counts nine through thirteen charged the "willful, deliberate, premeditated" attempted murder of Enrique Anaya, Criscencio Jaramillo, Rigoberto Bernal, Manuel Contreras, and Vicente Molina, respectively, on May 29, 2000. Appellant pled not guilty to all charges.

B. Motion to Suppress

Appellant moved to suppress statements he made to the Long Beach Police Department on July 25 and 26, 2001, on the ground that the statements were taken in violation of his *Miranda* rights.[1]

1. Appellant's Declaration

In a declaration filed in support of the motion, appellant set forth the following facts. He was arrested on July 25, 2001. After being left alone in an interview room for 20 to 30 minutes, Detectives Richard Conant and Mark McGuire entered. Detective Conant told appellant he had to fill out papers so they could talk. Appellant replied "I have nothing to say" and "I'm not filling out any papers, can I go now." Detective Conant informed him he had been arrested for murder. Appellant told the detectives: "I didn't kill anybody and I'm not talking to you." Detective Conant said he was going to get the death penalty. The detectives left the room. When they returned, appellant "agreed to talk because I was afraid I would get the death penalty if I did not talk and Detective Conant had said I was going to get the death penalty but he could help me if I agreed to talk." The next morning, appellant was told the detectives wanted to talk to him again. He said he "did not want to talk to anyone anymore." He claimed to have not been fed or given a mattress to sleep on and denied having been given any sort of form to sign. He claimed to have agreed to "everything [he] thought they wanted [him] to agree with" because he was "tired, sleepy and hungry and just wanted to get the interview over with."

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

2. Hearing

a. The Detectives' Testimony

A hearing was held on appellant's motion to suppress. Detective Conant testified that he interviewed appellant in connection with the death of Jesus Bicuna on July 25, 2001, at around 1:30 p.m. Detective McGuire was also present. They had with them an advisement of rights form, a probable cause declaration form, and a booking form. They advised appellant of his *Miranda* rights. Appellant refused to talk to the detectives, and that was written on the rights form. The detectives left.

Detective Conant returned after a few minutes to fill out the probable cause form. Appellant asked him what he was doing. Detective Conant told him, and read what had been written on the form--that appellant was placed under arrest after he was positively identified by a six-pack of photographs as the person who had shot Bicuna and three others. Appellant asked what the charges were, and was told he was being charged with murder. Appellant asked for details about the shooting, but Detective Conant told appellant that he would have to waive his *Miranda* rights to discuss the case. Detective Conant did tell appellant about the range of penalties for murder in response to another question from appellant, and got a copy of the Penal Code so that appellant could read about the subject himself. Appellant again asked about his case, and was told he would have to waive his rights to discuss it. At that point, appellant agreed to waive his right to remain silent.

The detectives interviewed appellant and tape-recorded his statement approximately two hours after the interview began. They did not tell appellant what to say or give him details about the crime so he could recite them on the tape. They did not tell appellant he would get the death penalty if he did not talk to them. On the first tape, appellant agreed that he had initially refused to talk, but

then "decided that [he] wanted to talk to [the detectives] before [he was] taken down and . . . booked."

Detective Michael Edwards testified that he and Detective Hector Nieves interviewed appellant on July 26, 2001. They reminded him he had been read his rights the day before. He agreed to talk to them. They started speaking to him at around 10:30 a.m., and began taping at around 1:50 p.m. At some point, appellant told the detectives he had been threatened that he would get the death penalty if he confessed to more than one murder. They talked to him about how the decision is made to seek the death penalty, but did not make him any promises. The detectives told appellant they were aware that a Toyota van was used in the shootings, that there were three shootings, the addresses where the shootings occurred, that there were three people involved, that an assault-type rifle was used, and that some casings had been recovered. On the second tape, appellant stated he remembered being read his rights the day before and remembered agreeing to talk and waive his rights. Appellant further stated on the tape that he had been treated fairly, and supplied with drinks and bathroom breaks.

b. Appellant's Testimony

Appellant testified that he was arrested at around 11:00 a.m. and taken to an interview room where he was joined by Detectives Conant and McGuire. He asked what he was there for, and Detective Conant said he had to fill out some papers before they could talk to him. Appellant told the detectives he did not want to talk to them. Detective Conant started to fill out some papers, and acted like he was angry at appellant. He said "We have you now. You can't get away from us. . . . [Y]ou're gonna get the death penalty, you little mother fucker." Both detectives left the room. Detective Conant returned and started filling out papers. Appellant asked him what he was filling out. Detective Conant said he could not

tell him unless he agreed to talk to the detectives. Appellant asked about the death penalty, and Detective Conant gave him a book. Detective Conant told appellant they would help him, and if he cooperated and talked to them, he would not get the death penalty. Appellant agreed to talk to them.

The next day, appellant was told to talk to Detectives Edwards and Nieves or he would be thrown in "the hole." He did not want to talk to them, but he did not tell them that. Instead, he told the jailer he did not want to talk to them.[2] The detectives told him his rights had been waived and that they could talk to him without going through the procedures that he went through the day before. Appellant claimed not to understand that he could have an appointed attorney with him during questioning by police or that things he said to police could be used in court against him.

3. Court's Ruling

The court denied the motion to suppress. The court "did not find [appellant] credible when he claimed he did not understand the plain language in the waiver forms." The court found that the detectives "scrupulously honor[ed]" appellant's invocation of his right to remain silent, and that Detective Conant's actions in reentering the interview room to fill out forms was not the equivalent of interrogation or conduct designed to elicit comments from appellant. The court further found that appellant had not been threatened with the death penalty in order to induce him to talk or promised consideration if he cooperated. The court ruled that the form used to give appellant his *Miranda* rights was adequate. The court concluded that there was no requirement that appellant be re-*Mirandized* prior to questioning on the 26th.

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[2] Appellant did not testify that he had been deprived of sleep or sustenance as set forth in his declaration.

C. Evidence at Trial

1. Appellant's Taped Confessions

The tapes were played to the jury. On the tape dated July 25, 2001, describing the July 2001 shootings, appellant said that he had a 44 caliber gun and was driving with a friend in a Blue Cutlass, and spotted a "Mexican guy with [a] bumble-bee on his neck" on the curb in front of a house. Appellant believed he recognized the man as having shot his (appellant's) cousin. Appellant jumped out of the car and fired two shots. The man ran, and appellant chased and shot at him. Appellant claimed to have been trying to paralyze the victim rather than kill him and to not wanting anybody innocent to be wounded. As appellant and his companion drove away, they saw the police behind them. Appellant jumped out. As he ran, the gun in his waistband slid out onto the ground.

On the tape dated July 26, 2001, appellant was interviewed concerning the May 2000 shootings. Appellant testified he had been drinking and smoking PCP with some acquaintances. They got into a van and told appellant they were "fixin' to . . . hunt . . . this 'bald head' down," by which they meant someone of Mexican descent. When the group spotted the victim riding in a car, appellant recognized him as someone who had pulled a gun on appellant in the past. Appellant grabbed a gun belonging to someone else in the van and opened fire out the window. He fired both at the car and at people standing nearby. The van door was opened momentarily and some casings fell out. The driver of the van took them to another location where there was a party going on. The people at the party were older Hispanics. Another member of the group shot at the house. Someone shot back. They drove off, and a few moments later, shot a Hispanic man parking a dark colored Honda on Eighth Street. Appellant did not fire the shot, but encouraged his companion to "hurry up" and do it. Appellant identified the van from a

photograph of a grayish Toyota van with a brown stripe down the side shown to him by the detectives. He was also shown photographs of some of the victims and identified them as people who had been at the party or who had yelled at or shot at the van and its occupants.

2. First May 2000 Shooting (Counts Six Through Eight)

Henry Cifuentes, a former Eastside Longos gang member, testified that he was shot in May 2000 while riding in a car with his girlfriend and two friends, Fernando Rubio and Fidel Rosales. Fidel Rosales testified to being shot, and hearing a total of between six and eight gunshots. Neither saw the assailant. Eva Cornejo, a nearby resident, saw a van drive past her window and observed gunshots coming from it.

Copitzy Rodriquez, Cifuentes' girlfriend, testified that she was driving at the time of the incident. She heard shots. She saw a white van. She saw the other occupants of the car lying on the ground after the shooter or shooters left.

A detective for the Long Beach Police Department searched the area and found an "S and B 762 caliber shell casing."

Kham Vin testified that his van was stolen in May 2000. He did not own a gun and had never fired a gun from his van. Bullet casings, bullet fragments and fingerprints were found inside his van when it was impounded by the police. A ballistics expert testified that the shells were designed to be fired from an assault-type rifle, and were fired by the same gun as the shell found on the ground near the first May 2000 shooting and shells found in the area of the second May 2000 shooting (discussed below).

3. Second May 2000 Shooting (Counts Nine Through Twelve)

Enrique Anaya testified to being shot while standing in front of his house in May 2000. Criscencio Jaramillo, Rigoberto Bernal, and Manuel Contreras were with him.[3] He heard from six to eight shots, but did not see where they were coming from. Jaramillo testified that he was also shot that day. He did not see the assailant.

Detective Victor Feria was called to the scene and observed wounds on Anaya, Jaramillo, Contreras, and Bernal. He picked up eight 762 caliber casings at the scene.

4. Third May 2000 Shooting (Count Thirteen)

Vicente Molina was shot in May 2000, while parking a car. A small van pulled up alongside him containing a single Black man. A gun was sticking out the window. One shot was fired. The bullet passed through his head, but he survived.

5. July 2001 Shooting (Counts One Through Four)

Juan Espinoza testified that he was shot in front of the apartment house where his nephew's baptism party was being held. He was standing with his uncle, Juan Carlos Espinoza, and "Francisco Javier."[4] Juan Espinoza heard someone yell "[l]ook out, careful" and saw a Black man pointing a gun. He identified appellant as the man he saw. He had previously identified appellant out of a photographic

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[3] Anaya testified that Bernal's first name was "Dagoberto" and could not remember Manual Contreras's last name.

[4] The full name of Francisco Espinoza, the victim named in count three, is "Francisco Javier Espinoza."

six-pack and at a prior hearing. After being shot once, Juan Espinoza ran and appellant chased him and shot him again.

Francisco Espinoza testified that he was struck three times while standing in front of the apartment house with "Juan" and "Jesus." He heard about five shots. Just before the shooting, he saw a dark car containing two Black men pull up. One of the men got out and began shooting. The witness identified appellant as the shooter.

Fidela Acevedo was leaving the party with her father, Jesus Bicuna, and her mother when the shooting started. She did not see the man who was doing the shooting. She was struck with a bullet. Her father was shot and killed.

Guillermo Cruz, who lived near the house where the party was taking place, heard gunshots and saw a Buick with a dark vinyl top stopped in the middle of the street. He observed an occupant of the vehicle get out and shoot a young man in the face. He could not identify the shooter other than as a dark man.

Long Beach Police Officer Robert Bernsen received a call describing a light blue Buick Regal leaving the scene of a shooting. He and his partner saw a vehicle matching that description. There were two Black male occupants. The officer called for back up, and when it arrived, signaled the vehicle to stop by activating the patrol car's siren and lights. The Buick stopped, the passenger jumped out, and then the Buick started to pull away. Officer Bernsen and his partner followed the vehicle, and ultimately arrested the driver. The driver was identified as Santawn Miller. Fingerprints lifted from the Buick matched appellant's.

Sergeant Joel Cook heard the description of the Buick Regal and the report that a vehicle matching that description had been spotted. He drove to the area where the car was stopped. He saw a Black male run past his car. The sergeant repeatedly ordered him to stop, but the man did not comply. The sergeant retraced the suspect's route and discovered a semi-automatic pistol on the sidewalk. He

was later shown a photographic six-pack and identified appellant as the man he had seen that night.

Officer Ronald Burgess was called to the scene and discovered three .44 Magnum shell casings and a copper-jacketed slug. A police criminalist later determined that the shell casings collected from the scene of the shooting were fired from the gun found by Sergeant Cook.

D. Verdict and Sentencing

The jury found appellant guilty on counts one through eight and thirteen, and acquitted him on counts nine through twelve. With respect to the murder charges (counts one and five), appellant was found guilty of murder in the first degree. The jury further specifically found the special circumstances that appellant committed multiple murders of the first or second degree, and that the murder charged in count five was perpetrated by means of discharging a firearm from a vehicle. With respect to the attempted murder charges, the jury found true that the attempt was committed willfully, deliberately, and with premeditation with respect to counts two, six, seven, eight, and thirteen, and not true with respect to counts three and four. The jury further found that appellant personally used a firearm in committing the offenses.

During the sentencing hearing, the prosecution asked that all sentences be consecutive. Defense counsel asked that the sentencing for counts one, two, three, and four be concurrent because they all arose from the same incident, and asked that the sentencing for counts six, seven, and eight be concurrent for the same reason.[5]

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[5] Counsel did not include count five with that group, because counsel believed it should be combined with count one for a single life without possibility of parole sentence.

The court sentenced appellant to life without possibility of parole plus 25 years to life for counts one and five; life with the possibility of parole plus 25 years to life for counts two, six, and seven; the upper term of nine years plus 25 years to life for count three; one-third the mid-term (two years, four months) plus 25 years to life for count four; life with the possibility of parole plus 20 years for count eight; and life with the possibility of parole plus one year for count thirteen. The court stated that count three could be the high term of nine years because "the circumstances in aggravation greatly outweigh[] those in mitigation for the violence and the number of victims and injuries shown here."

DISCUSSION

A. July 25 Taped Confession

Appellant contends that the police failed to scrupulously honor his invocation of his right to remain silent, and that the taped confessions should therefore have been suppressed. Appellant alleges that his rights were "circumvented by a ploy used by Detective Conant to provoke further conversation that would lead ultimately to a waiver." Specifically, appellant states that Detective Conant's "gratuitous act of doing routine paperwork on appellant's case in the close quarters of that interview room was not, by any reasonable measure, consistent with the letter or spirit of *Miranda*, which requires not only that express interrogation cease upon a clear invocation of the right to silence, but requires the 'complete shutdown of *any* interrogation, persuasions, or other operations which might have the effect of pressuring [the accused] to change his mind.'" (Quoting *People v. Sunday* (1969) 275 Cal.App.2d 473, 479-480.)

"In *Miranda v. Arizona*, *supra*, 384 U.S. 436, the United States Supreme Court promulgated standards to safeguard the right against compelled self-incrimination guaranteed by the Fifth and Fourteenth Amendments. Before a

person in custody may be questioned by police, he must be informed that he has the right to remain silent, that any statement he makes may be used against him, and that he has the right to the presence of an attorney, either retained or appointed. [Citation.] 'Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.' . . . [¶] . . . In *Michigan v. Mosley* (1975) 423 U.S. 96 . . . , the court held that *Miranda* does not create a 'proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent.' [Citation.] It is the suspect's 'right to cut off questioning' that *Miranda* identified as crucial. [Citation.] Hence, '. . . the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his "right to cut off questioning" was "scrupulously honored."'" (*People v. DeLeon* (1994) 22 Cal.App.4th 1265, 1269.)

In determining whether the suspect's right to cut off questioning was scrupulously honored, the courts look at whether the person in custody was subjected to further direct questioning or its functional equivalent. "[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. . . . A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 301-302.)

Here, the detectives ceased interrogating appellant as soon as he indicated his desire to remain silent. Appellant maintains, however, that Detective Conant's actions in returning to the interview room to complete the paperwork was the "functional equivalent" of interrogation. We do not see how an officer's silence for a few minutes while filling out a necessary form can be considered tantamount to interrogation. Appellant points out that Detective Conant "did not have to use the interview room to fill out the probable cause form." But the issue is not whether another place was available, but whether *Miranda* and its progeny forbid an officer from quietly filling out a single form in the presence of the suspect because the psychological pressure caused thereby is so intense, the suspect will feel impelled to incriminate himself or waive rights previously invoked. We do not believe that such a routine booking action should be construed in that manner. (See *United States v. Vega-Figueroa* (1st Cir. 2000) 234 F.3d 744, 749 [routine police activities of fingerprinting and photographing suspects was not the functional equivalent of interrogation, and statement made by defendant to another arrestee during the process and overheard by federal agents was admissible]; *United States v. Dougall* (5th Cir. 1990) 919 F.2d 932, 936 [where agents quietly remained in interview room for a brief period after appellant invoked his *Miranda* rights, confession blurted out by appellant was admissible].)

Appellant further faults Detective Conant for reading him the form when he asked what Detective Conant was doing. In *People v. Sims* (1993) 5 Cal.4th 405, our Supreme Court held that police cannot use an offhand question by the suspect as an excuse to reopen discussions about the case or pressure the suspect to waive his *Miranda* rights. In *Sims*, the suspect was arrested in Nevada for a crime committed in Glendale, California, and asked a California officer about extradition. The officer launched into a lengthy narrative. He "explained that there was a [prior] warrant for [the suspect's] arrest in South Carolina for the murder of two

Domino's Pizza employees"; that "a warrant for [his] arrest for the murder of a Domino's Pizza employee had been issued in California"; that the officer "intended to commence proceedings for [the suspect's] extradition to California"; that the officer had been present in a motel room where the body of a male was discovered; that the officer had "'reason to believe that [the suspect] and a female companion occupied that room prior to the demise of [the victim]'"; and that "the murder victim had delivered a pizza to that motel room." (*Id*. at p. 438.) At that point, the suspect said: "'I had to kill that boy.'" (*Ibid*.)

The trial court in *Sims* found that the suspect's statement "was a spontaneous utterance and not the product of police interrogation." (*Id*. at p. 439.) The Supreme Court disagreed: "Contrary to the finding of the trial court, the record establishes defendant's . . . confessional statement . . . was not spontaneous or volunteered, but rather the product of the 'functional equivalent' of interrogation. In reply to defendant's inquiry, Officer Perkins pursued a line of conversation far exceeding the scope of any answer legitimately responsive to a question concerning extradition. The record reflects that at the time he met with defendant, Officer Perkins was aware defendant already had been advised by the Nevada authorities that they were arresting him for a murder committed in Glendale. Under such circumstances, and viewed from an objective perspective, Officer Perkins's conduct in describing the motel-room crime scene, and asserting that defendant had occupied that motel room and that the victim had delivered a pizza to the room before his death, would not reasonably have been understood as simply informing defendant of the charges pending against him or of the next step in the extradition proceedings." (*Id*. at p. 442.)

In the present case, in response to appellant's question about what he was doing, the detective told appellant what the form was and what was being written

on it.[6] This was a legitimate response. He limited himself to the form, and did not launch into a general discussion of the crime, the witnesses, or the evidence. If he had been more curt or dismissive, he might now be accused of deliberately inviting follow up questions and prolonging the conversation in that fashion. As it was, appellant said nothing incriminating in response to the detective's statement and the topic changed to penalties and the Penal Code. Incriminating statements were made only after appellant expressly agreed to waive his *Miranda* rights and signed a statement to that effect. On these facts, we agree with the trial court's decision to deny the motion to suppress and admit the taped confessions.

B. July 26 Taped Confession

Appellant argues that the July 26 taped confession should have been excluded because it was "tainted" by the "illegality of the July 25 statement." Although, for the reasons discussed, we do not agree that the July 25 statement was illegally obtained, we address the July 26 confession separately because its admission was justified on another ground assuming arguendo that the July 25 statement was invalid.

The basic approach to distinguishing admissible subsequent confessions from inadmissible subsequent confessions was discussed in *People v. Sims*, *supra,* 5 Cal.4th 405. After the defendant there made the incriminating statements deemed inadmissible by the court as discussed above, the officer whose name was Perkins, told him that because he had refused to waive his *Miranda* rights, the officer could not discuss the facts of the case with him further and that any further

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[6] Respondent's brief points out that Detective Conant "clarified" the nature of the conversation with appellant at trial, where he testified that appellant specifically asked what information was being written on the form. Because this testimony was not before the trial court in connection with the suppression hearing, we do not consider it.

contact would have to be initiated by defendant. The next day, the defendant advised jailhouse authorities that he wished to speak with the officer again. Initially, the defendant complained about being unable to obtain cigarettes and about being perceived as suicidal or crazy. He said something about knowing he "shouldn't of done it," but the officer changed the subject to cigarettes and extradition. (*Sims*, at p. 439.) When the defendant tried to talk about the South Carolina crime, the officer reminded him that he could not discuss the facts of the case with defendant because defendant had not waived his rights. Subsequently, the defendant was readvised of his rights and waived them. He then admitted to having robbed a Domino's Pizza parlor in South Carolina and further described the events in the Glendale case. He gave as a reason for waiving his rights and making the confession the desire to clear his companion from complicity in the South Carolina crime.

The court recognized that oftentimes a subsequent confession can be seen as "the product of the first because of the psychological or practical disadvantages of having '"let the cat out of the bag by confessing."'" (*Sims*, at p. 445.) This leads to a rebuttable presumption that they are connected, "with the prosecution bearing the burden of establishing a break in the causative chain between the first confession and the subsequent confession." (*Ibid*.) The court cited *People v. Sesslin* (1968) 68 Cal.2d 418, 428, for the proposition that "[t]he degree of attenuation that suffices to dissipate the taint 'requires at least an intervening independent act by the defendant or a third party' to break the causal chain in such a way that the second confession is not in fact obtained by exploitation of the illegality." (*Ibid*.) The court nonetheless agreed with the trial court that, in the case before it, the second confession was admissible and free of taint based on the following facts: "Officer Perkins readvised defendant upon leaving him on December 25 that the officers could not and would not speak to him again unless

defendant himself sought further contact. Defendant thereafter unilaterally initiated further communication the following day, specifically requesting to speak with the officers. To defendant's knowledge, the December 25 statements had not been tape-recorded or in any other way formally memorialized, and the officers did not refer or allude to defendant's December 25 confession at any time during the December 26 meeting. [¶] Furthermore, prior to the commencement of any interrogation on December 26, defendant volunteered that he wished to exculpate [his companion] with regard to the South Carolina crimes; Officer Perkins readvised defendant of his *Miranda* rights, and defendant expressly waived those rights, thereby further dissipating any taint of the improper police conduct that had occurred the preceding day." (*Id*. at p. 446.)

Appellant argues in his brief that there is a conflict between *People v. Sims* and the more recent case of *People v. Storm* (2002) 28 Cal.4th 1007. In *People v. Storm*, the defendant after being arrested and advised of his rights, made an incriminating statement later deemed inadmissible because he mentioned a desire to talk to an attorney during the course of the questioning. He was let go, and questioned by officers several days later. The Supreme Court ruled that because of the break in custody, statements made in the second interview were admissible. In so holding, the court disavowed the above-quoted statement made in *Sims* that to overcome the presumption of taint, "the People must demonstrate '"at least an intervening independent act by the defendant or a third party" to break the causal chain in such a way that the second confession is not in fact obtained by exploitation of the illegality [of the first].'" (*People v. Storm*, *supra*, at p. 1031.)

We need not address this purported conflict because we do not agree with appellant that the July 26 statement was tainted by the July 25 statement even under the arguably more stringent rule of *People v. Sims*. The crimes that appellant confessed to on July 26 were separate and distinct from the crimes

discussed in his July 25 statement based on the same type of factors relied on by the Supreme Court. The July 26 statement discussed the May 2000 incidents, whereas the earlier statement addressed only the July 2001 shootings. Not only were the crimes discussed at the two interviews separated by time, they involved different companions, different victims, different potential witnesses, a different vehicle, and different weapon or weapons. Moreover, the questioning on July 26 was performed by a new set of detectives. Nothing said on July 25 let "the cat out of the bag" with regard to the unsolved shootings that had taken place almost a year earlier that were the subject of the second interview. Under these circumstances, there could have been no exploitation of the first confession to produce the second, and no need for the prosecution to demonstrate an intervening act or break in the causal chain to justify the admissibility of the latter. The July 26 statement was admissible without regard to the validity of the earlier statement.

Respondent cites *People v. DeLeon*, *supra*, and *Michigan v. Mosley*, *supra*, as resolving the issue. While not precisely on point because they do not involve two confessions, the cases are instructive. In *Michigan v. Mosley*, the court recognized a distinction between a suspect's invocation of his or her right to remain silent and invocation of the right to counsel. Where the suspect indicates a desire for an attorney, all questioning must cease with respect to any offense until an attorney is present. If, on the other hand, the suspect merely declines to talk when confronted with a specific offense, he or she still may be questioned later about another crime as long as certain procedural safeguards are maintained. As the opinion in *People v. DeLeon* explained: "In *Michigan v. Mosley*, *supra*, the suspect was properly advised of his *Miranda* rights, and upon his statement that he did not want to discuss certain robberies, the initial questioning ceased. In our case, after appellant received *Miranda* warnings in Buena Park, he 'invoked his

rights not to talk' about the Buena Park case, and his right to cut off questioning was honored by the Buena Park police. Neither the suspect in *Mosley* nor the appellant in this case ever indicated a desire to consult with an attorney. [Citation.] After more than two hours, the suspect in *Mosley* was again advised of his *Miranda* rights, and was then questioned by another police officer at another location about an unrelated holdup murder. [Citation.] In our case, five days elapsed between appellant's invocation of his right to remain silent in Buena Park and his subsequent questioning by the Los Angeles sheriffs, and the later interview involved crimes other than the Buena Park armed robbery." (22 Cal.App.4th at pp. 1271-1272.)

Both courts held that the described factual situations were not tantamount to failing to honor the decision of a person in custody to remain silent by continuing to interrogate him or making repeated efforts to persuade him to change his mind. As long as the police "'immediately cease[] the [initial] interrogation [upon invocation of the right to remain silent]'"; "'resume[] questioning only after the passage of a significant period of time'"; provide "'a fresh set of warnings'"; and "'restrict[] the second interrogation to a crime that had not been a subject of the earlier interrogation,'" there is no violation of the suspect's *Miranda* rights. (*People v. DeLeon*, *supra*, at p. 1272, quoting *Michigan v. Mosley*, *supra*, 423 U.S. at pp. 105-106.)

Appellant here was given a second warning and reminded of his rights prior to the start of the second interview and was given a significant period of time to reflect. In addition, as we have said, the second interrogation was restricted to the May 2000 shootings, which had not been discussed in the initial interview. The holdings in *People v. DeLeon*, *supra*, and *Michigan v. Mosley*, *supra*, make clear that a second interview will be permitted despite an earlier invocation of the right

to remain silent when these factors are present. This provides further support for our conclusion that the second interview was untainted.

C. Intent to Kill

Appellant contends that the attempted murder convictions in counts three and four must be reversed due to insufficient evidence of intent to kill. Appellant points to the evidence that the shooter chased Juan Espinoza from the front of the apartment building down a passageway when the three other victims, Francisco Espinoza, Fidela Acevedo, and Jesus Bicuna, were shot. Because Bicuna was killed, the doctrine of transferred intent provides the requisite mental state for murder. But in the case of Francisco Espinoza and Fidela Acevedo, both of whom survived, the doctrine of transferred intent does not apply. Appellant maintains that no other theory provides the appropriate mens rea. That is incorrect.

There is no dispute that "[m]urder does not require the intent to kill" since "[i]mplied malice--a conscious disregard for life" can supply the requisite mental state. (*People v. Bland* (2002) 28 Cal.4th 313, 327.) Conviction of an attempt to commit a crime, on the other hand, requires a specific intent to commit that crime. (1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, § 53, pp. 262-263.) Thus, "implied malice [or conscious disregard] cannot support a conviction of an *attempt* to commit murder." (*People v. Bland*, *supra*, at p. 327; accord, *People v. Gutierrez* (2003) 112 Cal.App.4th 704, 710.) In addition, the doctrine of transferred intent does not apply to attempted murder. (*People v. Bland*, *supra*, at p. 326.) That is, if the defendant shoots intending to kill one person and kills another, he may be guilty of murder of the unintended victim because of the doctrine of transferred intent. But if he shoots intending to kill one person and inflicts a nonfatal injury on another "'the intent to kill should be evaluated

independently as to each victim, and the jury should not be instructed to transfer intent from one to another.'" (*Id*. at p. 327.)

Appellant overlooks the specific rule that applies when the defendant fires wildly into a group where the intended target is standing. As explained by the Supreme Court in *People v. Bland*: "[A]lthough the intent to kill a primary target does not *transfer* to a survivor, the fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within what [one court] termed the 'kill zone.' 'The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity. For example, an assailant who places a bomb on a commercial airplane intending to harm a primary target on board ensures by this method of attack that all passengers will be killed. Similarly, consider a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. The defendant has intentionally created a "kill zone" to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim. When the defendant escalated his mode of attack from a single bullet aimed at A's head to a hail of bullets or an explosive device, the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in A's immediate vicinity to ensure A's death. The defendant's intent need not be transferred from A to B, because although the defendant's goal was to kill A, his intent to kill B was also direct; it was concurrent with his intent to kill A. Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that

the defendant intended that harm to all who are in the anticipated zone. This situation is distinct from the "depraved heart" [i.e., implied malice] situation because the trier of fact may infer the actual intent to kill which is lacking in a "depraved heart" [implied malice] scenario.'" (28 Cal.4th at pp. 329-330, quoting *Ford v. State* (1992) 330 Md. 682 [625 A.2d 984, 1000-1001].)

Applying the quoted reasoning to the case before it, the Supreme Court in *People v. Bland* affirmed convictions for the attempted murder of the passengers of a vehicle because, even if the defendant sought primarily to kill the driver of the vehicle, the jury "could reasonably also have found a *concurrent* intent to kill [the] passengers when defendant and his cohort fired a flurry of bullets at the fleeing car and thereby created a kill zone." (28 Cal.4th at pp. 330-331.) Under the same reasoning, assuming arguendo appellant's intended target was murder victim Juan Espinoza--a proposition that is by no means clear since it is equally plausible that appellant sought to kill any or all the members of the group due to their ethnicity--the manner in which the shooting took place supports a finding of intent to kill everyone within the kill zone or zone of harm. The fact that Juan Espinoza moved from one location to another in his attempt to escape means that there may have been a shifting kill zone. The passageway where Francisco Espinoza, Fidela Acevedo, and Jesus Bicuna were shot would qualify as a separate kill zone on the evidence presented.

D. Imposition of Consecutive Sentences Without Stated Reasons

Appellant contends that the trial court erred in failing to state reasons for imposing consecutive sentences on all of the crimes for which he was convicted. Appellant concedes that this type of error may be waived by failing to lodge an objection before the trial court, but claims that the failure to object was excused in this instance. To support this proposition, appellant cites *People v. Scott* (1994) 9

Cal.4th 331. There, the court held that "the waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices" such as its failure to state reasons for consecutive sentencing. (9 Cal.4th at p. 353.) In so holding, the court further stated: "Of course, there must be a meaningful opportunity to object to the kinds of claims otherwise deemed waived by today's decision. This opportunity can occur only if, during the course of the sentencing hearing itself and before objections are made, the parties are clearly apprised of the sentence the court intends to impose and the reasons that support any discretionary choices." (*Id*. at p. 356.) Appellant believes this means the trial court should "announce an indicated sentence before imposing judgment."

In *People v. Gonzalez* (2003) 31 Cal.4th 745, the Supreme Court held that a meaningful opportunity to object does not require either a tentative sentence or advance notice by a trial court of its intended sentence. (*Id*. at p. 754.) As long as defendant is given an opportunity to object to the sentence after it is pronounced, due process is satisfied, and he or she may not raise objections on appeal that were not stated below. This holding precludes appellant from raising the objection to consecutive sentencing set forth in the brief.

E. *Blakely/Apprendi*

In a supplemental brief, appellant contends that the trial court committed sentencing error as outlined in *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531] and *Apprendi v. New Jersey* (2000) 530 U.S. 466. In *Apprendi*, defendant's sentence had been doubled because the trial court found the crime to have been motivated by racial animus. The court held that was improper because "[o]ther 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." (*Apprendi v. New Jersey*, *supra,* at p. 490.)

The trial court in *Blakely* increased the defendant's sentence for kidnapping because it believed he had acted with "deliberate cruelty." (*Blakely*, *supra*, 124 S.Ct. at p. 2535.) Defendant, a resident of Washington, had been charged with first degree kidnapping, and pled to second degree. Under Washington law, second degree kidnapping was a class B felony, and state law provided that "'no person convicted of a [class B] felony shall be punished by confinement . . . exceeding . . . a term of ten years.'" (*Ibid*., quoting Wash. Rev. Code Ann. § 9A.20.021(1)(b).) The "standard range" for a sentence for second degree kidnapping with a firearm was 49 to 53 months. (*Ibid.*, quoting Wash. Rev. Code Ann. § 9.94A.320.) However, a separate statutory provision permitted judges to impose a sentence above the standard range if they found "'substantial and compelling reasons justifying an exceptional sentence.'" (*Ibid.*, quoting § 9.94A.120(2).) Under Washington decisional authority, reasons used to justify an exceptional sentence had to "'take[] into account factors other than those which are used in computing the standard range sentence for the offense.'" (*Id*., quoting *State v. Gore* (2001) 143 Wn.2d 288, 315-316 [21 P.3d 262].)

In *Blakely*, the court explained that the rule in *Apprendi* applied to the situation before it because: "[T]he '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. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation] [so that] the judge exceeds his proper authority." (124 S.Ct. at p. 2537.) The danger, according to the court, was that such a judicial factfinding could relegate the jury to "making a determination that the defendant at

some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish." (*Id*. at p. 2539.)

Ultimately, the Supreme Court concluded that the *Blakely* trial judge acted improperly because the facts supporting the finding of deliberate cruelty "were neither admitted by [the defendant] nor found by a jury." (124 S.Ct. at p. 2537.) The court compared the situation before it to that in *Ring v. Arizona* (2002) 536 U.S. 584, where it had "applied *Apprendi* to an Arizona law that authorized the death penalty if the judge found one of ten aggravating factors" and held that "the defendant's constitutional rights had been violated because the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding." (124 S.Ct. at p. 2537.) In the court's final analysis, "Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact." (*Id*. at p. 2538.)

Appellant claims that two aspects of his sentence are invalidated by the *Blakely/Apprendi* rule: the upper term of nine years imposed for count three and the decision that all sentences would run consecutively. Respondent contends, as a preliminary matter, that appellant waived this contention by failing to object to the sentencing at the time of trial. Addressing the procedural issue first, we start with *United States v. Cotton* (2002) 535 U.S. 625. In that case, the federal district court had imposed enhancements based on the defendants' possession of certain drug quantities, but the facts relied on were neither found by the jury nor included in the indictments. The court held that defendants' failure to raise *Apprendi* at the district court level resulted in forfeiture of their claim of *Apprendi* error. In a recent decision, the Third District cited *Cotton* for the proposition that failure to raise

Apprendi in the trial court resulted in forfeiture of the right to argue *Blakely* on appeal. (*People v. Sample* (Sep. 13, 2004, C044445) ___ Cal.App.4th ___, ___ [18 Cal.Rptr.3d 611].) But in *People v. George* (Sep. 15, 2004, D042980) ___ Cal.App.4th ___ [18 Cal.Rptr. 654], the Fourth District rejected a similar argument, citing *People v. Scott*, *supra*, 9 Cal.4th 331, in support of a more "pragmatic" approach. As we have seen, in *Scott*, the defendant was held to have waived his right to challenge his consecutive sentence for failure to announce a statement of reasons, because he did not raise it at the trial court level.

As explained in *George*, "[T]he *Scott* court reasoned that its waiver rule was necessary to facilitate the prompt detection and correction of error in the trial court, thus reducing the number of appellate claims and preserving judicial resources [citation], a pragmatic rationale that does not support the application of the waiver rule here. Prior to *Blakely*, California courts and numerous federal courts consistently held that there was no constitutional right to a jury trial in connection with a court's imposition of consecutive sentences. [Citations.] No published case in California held that a different rule applied in connection with the imposition of an upper term sentence. [Citation.] In light of this state of the law, [defendant's] assertion of a challenge to the imposition of an upper term sentence would not have achieved the purpose of prompt detection and correction of error in the trial court." (*Id*. at p. ___; accord, *People v. Barnes* (Sep. 24, 2004, H026137) ___ Cal.App.4th ___ [2004 Cal.App.Lexis 1601] [holding that because "*Blakely* was sufficiently unforeseeable" there was "no forfeiture due to defendant's failure to object at sentencing"].)

We agree with the decisions in *George* and *Barnes*. The Supreme Court's decision in *Blakely* extended the *Apprendi* rationale into a new area, and created an opportunity for reviving the debate over *Apprendi's* ultimate meaning and impact. Indeed, after reviewing *Blakely*, the court in *People v. George*, *supra*, held that the

trial court's reliance on certain factors as the basis for its decision to impose the upper term was inappropriate. Appellant cannot have forfeited or waived a legal argument that was not recognized at the time of his trial.

Turning to substantive matters, with respect to the contention that his right to a jury trial was violated with regard to imposition of the upper term on one count, appellant concedes that "the upper term was chosen [for count three] because of the violence and multiplicity of appellant's crimes." Multiplicity and violence were inherent in the jury's verdict, and required no separate findings by the trial court. In contrast, in *People v. George*, *supra*, the court found *Blakely* error where the trial judge had specified five bases for its decision to impose the upper term: "that (1) the crime was serious and involved threats of great bodily injury to the victims; (2) the crime involved planning, sophistication and professionalism; (3) the current offense was more serious than the offense underlying [the defendant's] prior conviction, which was itself serious; (4) at the time [the defendant] committed the current offenses, he was on felony probation; and (5) [the defendant's] prior performance on probation was poor." The Court of Appeal concluded that "the trial court was constitutionally entitled to rely only on the fact that [the defendant] was on probation at the time of the charged offense as a basis for imposing an upper term," and remanded the matter for resentencing. Here, the trial court gave valid reasons for imposing the upper term based on facts found by the jury to be true. We see no violation of *Blakely* or *Apprendi* in imposing that sentence.

The issue of whether appellant's consecutive sentencing can be challenged under *Blakely* is more complex. Section 669 of the Penal Code requires the trial court "[w]hen [the defendant] is convicted of two or more crimes" to "direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively." If the court fails "to determine how the

terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently." (Pen. Code, § 669.) Despite this language, courts have held "there is no . . . statutory presumption in favor of concurrent rather that consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing." (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923; accord *People v. Sample, supra,* ___ Cal.App.4th ___, ___ [18 Cal.Rptr.3d 611].)

The statute does not specify the grounds on which the court's decision to impose consecutive sentencing must lie. Rule 4.425 of the Rules of Court lists the following "[c]riteria affecting the decision to impose consecutive rather than concurrent sentences": "(a) [Criteria relating to crimes] Facts relating to the crimes, including whether or not: [¶] (1) The crimes and their objectives were predominantly independent of each other. [¶] (2) The crimes involved separate acts of violence or threats of violence. [¶] (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior. [¶] (b) [Other criteria and limitations] Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except (i) a fact used to impose the upper term, (ii) a fact used to otherwise enhance the defendant's prison sentence, and (iii) a fact that is an element of the crime shall not be used to impose consecutive sentences." Aggravating and mitigating circumstances are listed in rule 4.421 and rule 4.423, and include such matters as the violence involved in the crime, the degree of cruelty, viciousness, or callousness evidenced by the perpetrator, the vulnerability

of the victim, threats made to witnesses, the perpetrator's active or passive role in committing the offense, and the presence or absence of a prior record.

Although a trial court contemplating whether or not to impose consecutive sentencing may and often does consider aggravating and mitigating factors as part of its decisionmaking process, the courts that have addressed the issue therefore have uniformly held that consecutive sentencing is not impacted either by *Blakely* or its predecessor, *Apprendi*. In *People v. Sykes*, *supra*, 120 Cal.App.4th 1331, for example, defendant argued that *Blakely* "requires that a jury, not a judge, find whether the factors which warrant consecutive sentencing are present." (120 Cal.App.4th at p. 1343.) The court concluded that "[n]either *Blakely* nor *Apprendi* purport to create a jury trial right to the determination as to whether to impose consecutive sentences." (*Id*. at p. 1344.) The court reasoned that the consecutive sentencing decision does not involve the facts necessary to constitute a statutory offense and that the decision "can only be made once the accused has been found beyond a reasonable doubt to have committed two or more offenses." (*Id*. at p. 1345.) Therefore, *Blakely* and *Apprendi* do not extend to "whether the sentences for charges which have been found to be true beyond a reasonable doubt shall be served consecutively." (*Ibid*.)

Numerous decisions that had reached the same conclusion in the wake of *Apprendi* were cited in support of the court's decision in *Sykes*, including *People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231, wherein the court stated: "If the specific fact at issue is not an element of the crime but is a factor that comes into play only after the defendant had been found guilty of the charges beyond a reasonable doubt and no increase in sentence beyond the statutory maximum for the offense established by the jury is implicated, then the state may consider this factor based on a lesser standard of proof."

Similarly, in *People v. Vonner* (2004) 121 Cal.App.4th 801, the court held that the consecutive sentencing scheme "is an alternate sentencing scheme, not an enhancement" and "does not increase the penalty beyond the prescribed statutory maximum." (*Id*. at p. 811.) The court in *Vonner* concluded that *Apprendi* and *Blakely* are "relevant only where a judge-made factual determination increases the maximum statutory penalty for the particular crime'" and that "[t]hat did not happen" in the case before it. As the court saw it, "Here the guilty verdicts subjected the appellant to consecutive sentencing which the trial court was authorized to impose. The sentence was not based on any 'fact' that the trial court found. The decision was based on the guilty verdicts and the statutory discretion given to the trial court by the Legislature." (121 Cal.App.4th at p. 811.)

The court's decision in *People v. Vonner* was based in part on the rationale of *People v. Cleveland* (2001) 87 Cal.App.4th 263. The issue in *Cleveland* was whether the rule announced in *Apprendi* was implicated by the trial court's refusal to apply Penal Code section 654. "Section 654 precludes multiple punishment for a single act or indivisible course of conduct punishable under more than one criminal statute. Whether a course of conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the 'intent and objective' of the actor. [Citation.] If all of the offenses are incident to one objective, the court may punish the defendant for any one of the offenses, but not more than one. [Citation.] If, however, the defendant had multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct. [Citation.]" (87 Cal.App.4th at pp. 267-268.)

Because of the requirement that the trial court determine the offender's "intent and objective," the defendant in *Cleveland* contended that application of section 654 ran afoul of *Apprendi*. (87 Cal.App.4th at p. 270.) The Court of Appeal disagreed: "Unlike in the 'hate crime' provision in *Apprendi*, section 654 is not a sentencing 'enhancement.' On the contrary, it is a sentencing 'reduction' statute. Section 654 is not a mandate of constitutional law. Instead, it is a discretionary benefit provided by the Legislature to apply in those limited situations where one's culpability is less than the statutory penalty for one's crimes. Thus, when section 654 is found to apply, it effectively 'reduces' the total sentence otherwise authorized by the jury's verdict. The rule of *Apprendi*, however, only applies where the nonjury factual determination *increases* the maximum penalty beyond the statutory range authorized by the jury's verdict." (*Ibid*.)

We agree that a trial court's imposition of consecutive sentences does not result in a usurpation of the jury's factfinding powers or appellant's due process rights as long as each sentence imposed is within each offense's prescribed statutory maximum. Appellant committed a multitude of crimes against a multitude of victims. Although our laws permit the trial judge to order the separate sentences imposed for each crime to run concurrently, its decision in this regard is similar to the discretion afforded under section 654, and results in a lessening of the prescribed sentence--not an enhancement. For these reasons, we do not agree that the sentence imposed is invalid under *Blakely* or *Apprendi*.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

CURRY, J.

We concur:

EPSTEIN, Acting P.J.

HASTINGS, J.