Filed 9/27/04

**CERTIFIED FOR PARTIAL PUBLICATION***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

| | |
|---|---|
| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>WILLIAM FELTON BUTLER,<br>Defendant and Appellant. | A101799<br><br>(Humboldt County<br>Super. Ct. No. CR024877S) |

**PUBLISHED PART**

## I. INTRODUCTION

William Felton Butler was convicted by a jury of kidnapping, first degree robbery, second degree robbery, making criminal threats, offering to sell or selling a substance in lieu of a controlled substance, assault, and battery. He was sentenced to a total term of 11 years and eight months in state prison.

Butler contends his conviction for offering to sell or selling a substance in lieu of a controlled substance must be stricken because Lysergic Acid Diethylamide (LSD) is not a controlled substance identified in Health and Safety Code section 11355, the statute he was charged with violating. Butler also contends the entire judgment must be reversed because the trial court abused its discretion and violated due process by permitting a witness named Parrish Pike to invoke his privilege against self-incrimination and then by precluding Butler from calling an investigator to testify about statements Pike allegedly made. Finally, Butler contends his sentence is unconstitutional and must be reversed

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

pursuant to *Blakely v. Washington* (2004) __U.S. __, [124 S.Ct. 2531] (*Blakely*). We reject both of Butler's substantive challenges to the judgment and find that the sentencing error that occurred in this case does not require us to remand the matter for resentencing.

## II. STATEMENT OF FACTS

At around 8:00 p.m. on September 30, 2002, Chris Edwards met Butler in the hallway of the Arcata apartment building where they both lived. Edwards invited Butler into his apartment which he shared with his friend, Alexander Dinwiddie. Butler introduced himself as "Billy Bad Ass," and asked Dinwiddie for a ride to Garberville in southern Humboldt County. Dinwiddie agreed to give Butler a ride. Dinwiddie's friend, Michael Smith, agreed to join them. At trial, Dinwiddie testified that Butler agreed to pay him $200 for the ride. Smith testified that Butler agreed to pay Dinwiddie $500 and Smith $200 in exchange for the ride.

The three men left in Dinwiddie's car at around 8:30 p.m., after Butler put his backpack in the car trunk. During the ride, Dinwiddie and Butler smoked marijuana and Butler also used methamphetamine. Smith had smoked marijuana before the car ride. At some point during the drive, Butler became hostile and threatening and demanded that Dinwiddie drive him to Pismo Beach so he could sell some LSD he had with him. Dinwiddie and Smith said they had school the next day and could not go that far. Butler said he had a loaded weapon in the car and he was not afraid to use it. He threatened to kill Dinwiddie and Smith or to have the Hell's Angels kill them if they did not take him to Pismo Beach. Butler also punched Dinwiddie in the face causing him to swerve on the highway. Dinwiddie was afraid and continued to drive south.

Somewhere south of Willits, Dinwiddie stopped at a casino because Butler wanted to gamble. Butler took the car keys and told Dinwiddie and Smith that if they spoke to anyone he would call the police and report that the contraband in Dinwiddie's car belonged to them. Dinwiddie and Smith did not try to escape but accompanied Butler into the Casino and waited while he gambled for around twenty minutes. When the group began driving again, Dinwiddie repeated that he did not want to go any farther south. Butler punched him in the face, arm and chest. Dinwiddie was afraid and

continued to drive. Butler insisted on driving part of the time and acted paranoid and looked for police. Whenever the group stopped, Butler either took the keys or he took Smith with him and threatened to kill Smith if Dinwiddie left.

The group arrived in Pismo Beach early on the morning of October 1, 2002. Butler made Dinwiddie and Smith walk with him on a pier and elsewhere to help him look for a man named Jack, but they never found him. At one point Butler went in the water but Dinwiddie and Smith did not try to get away. Before leaving Pismo Beach, Dinwiddie called the radio station where he worked to report he would not be at work the next day. Dinwiddie said he was involved in an emergency but did not say anything more because Butler had threatened to cut off his fingers and to drag him behind a motorcycle if he told anyone at the station what was happening.

When the group started driving again, Dinwiddie decided he had had enough and started driving north. Butler became irate, said Dinwiddie had "messed up his deal," and demanded that Dinwiddie give him $5,000 and title to his car which Dinwiddie refused to do. Butler instructed Dinwiddie to stop in Fairfax, so he could try to sell LSD on the street. Butler took Smith with him while Dinwiddie waited in the car. Butler made Smith carry his backpack and said if the police stopped them he would say the drugs belonged to Smith. During the thirty-minute walk around Fairfax, Butler repeatedly offered to sell LSD but did not make any sales although he did sell some marijuana. Butler again blamed Dinwiddie for messing up his deal and demanded $5,000 and title to the car, threatening that if Dinwiddie did not comply something bad would happen and he would not see Humboldt again. When Dinwiddie argued back, Butler hit him several times forcing him to stop the car.

Butler told Dinwiddie to stop at a bar in Santa Rosa. He pointed out a Harley Davidson motorcycle that he said would have been his if Dinwiddie had not "screwed up [his] deal." He also pointed out a man he claimed was his uncle and said that he and his uncle would kill Dinwiddie unless he went to an Automatic Teller Machine (ATM) and withdrew as much money as possible. Butler also claimed his friends would tie Dinwiddie to the back of a motorcycle and drag him. Dinwiddie withdrew $400 from an

ATM machine and gave it to Butler who threatened to kill him if he refused. Butler complained it was not enough but said it would "do for now."

The group arrived back at Dinwiddie's apartment building in Arcata at around 3:00 a.m. on October 2. Butler forced Dinwiddie to get and then sign over the title to his car by threatening to come looking for him and to hurt him if he refused. Butler also threatened to cause a "world of pain" if Dinwiddie or Smith told anybody about what happened. After leaving Butler, Dinwiddie called his father and told him what had happened. Dinwiddie's father called the police who contacted Dinwiddie at around noon. He was scared to talk but did eventually tell the police what happened. Later that day, Butler's roommate returned the car keys to Dinwiddie. Dinwiddie gave police permission to search the car where they discovered Butler's backpack which contained serrated colored sheets which appeared to be more than 50,000 hits of LSD. Presumptive tests showed the sheets were LSD. However, subsequent test results established that the substance was not LSD.

Butler offered a substantially different version of these events when he testified at his trial. Butler testified that he asked Dinwiddie for a ride to Pismo Beach so he could pick up some money from his friend Jake. Initially, Butler testified that Jake was going to pay him for some "blotter art paper" that another friend had given him. However, later during his testimony, Butler denied that he planned to sell or give the paper to Jake and claimed that Jake was simply going to pay back some money he owed Butler.

Butler testified Dinwiddie became very "excited" when Butler showed him the art paper. So Butler agreed to give him ten sheets of the paper in exchange for a ride. Butler testified that he did not ever tell Dinwiddie the paper was LSD but that it was clear that Dinwiddie thought it was. Butler also testified that Dinwiddie sold some of the paper to a friend who was present in the apartment for $200 and that Butler let Dinwiddie keep the money as partial payment for the ride to Pismo Beach. Butler testified that he also gave some of the paper to Smith who agreed to come along on the drive for company because Butler had said he might decide to stay in Pismo Beach.

Butler testified that, although he was not very familiar with LSD, he knew the art paper was not LSD. However, Butler subsequently testified that he thought the paper might have been LSD when he saw how people reacted after taking it. Indeed, Butler admitted he may even have told someone the paper was LSD. Still, Butler denied that he ever tried to sell the paper to anyone.

Butler also denied that he kidnapped Smith and Dinwiddie, that he threatened them or that he forced them to do anything. He further denied that he robbed Dinwiddie, hit him or forced him to sign over title to the car. Butler testified that, after the car trip, Dinwiddie offered to sell him the car in exchange for cash and 10 additional sheets of paper. Butler gave Dinwiddie the sheets but said he would have to pay the cash later. According to Butler, Dinwiddie said "no problem," and gave Butler the keys and signed over the title.

**END PUBLISHED PART**

## III. DISCUSSION

### A. *Sale or Furnishing Substance Falsely Represented to Be LSD*

Butler contends that his conviction for violating section 11355 of the Health and Safety Code must be stricken because LSD is not a controlled substance specified in any of the provisions of that statute.[1] The People disagree and maintain Butler's conviction is proper because lysergic acid is a controlled substance "'classified in Schedule III' to which Health and Safety Code section 11355 refers."

Section 11355 states: "Every person who agrees, consents, or in any manner offers to unlawfully sell, furnish, transport, administer, or give (1) any controlled substance specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (13), (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in *Schedule*

[1] All statutory references are to the Health and Safety Code unless otherwise indicated.

*III*, IV, or V *which is a narcotic drug* to any person, or who offers, arranges, or negotiates to have any such controlled substance unlawfully sold, delivered, transported, furnished, administered, or given to any person and who then sells, delivers, furnishes, transports, administers, or gives, or offers, arranges, or negotiates to have sold, delivered, transported, furnished, administered, or given to any person any other liquid, substance, or material in lieu of any such controlled substance shall be punished by imprisonment in the county jail for not more than one year, or in the state prison." (Emphasis added.)

As noted, the list of controlled substances set forth in subdivision (2) of section 11355 includes any controlled substance "classified in Schedule III, . . . which is a narcotic drug . . . ." Lysergic acid is classified in Schedule III, *but* as a "Depressant," not as a "narcotic drug." (§ 11056, subd. (c)(5); compare § 11056, subd. (e).) Thus we agree with Butler that section 11355 does not preclude the sale or furnishing of a substance falsely represented to be LSD. However, we disagree that this fact requires us to reverse Butler's conviction. In this regard, we note that Butler does not offer any authority or analysis to support his contention that this particular conviction must be stricken. The People's superficial treatment of this issue is equally deficient.

The crucial fact which the parties before us either ignore or overlook is that selling or offering to sell a substance falsely represented to be LSD is unlawful conduct. (§ 11382.) Section 11382 states: "Every person who agrees, consents, or in any manner offers to unlawfully sell, furnish, transport, administer, or give any controlled substance which is (1) classified in Schedule III, IV, or V and *which is not a narcotic drug*, or (2) *specified in subdivision (d) of Section 11054*, except paragraphs (13), (14), (15), and (20) of subdivision (d), specified in paragraph 11 of subdivision (c) of section 11056, or specified in subdivision (d), (e), or (f) of Section 11055, to any person, or offers, arranges, or negotiates to have that controlled substance unlawfully sold, delivered, transported, furnished, administered, or given to any person and then sells, delivers, furnishes, transports, administers, or gives, or offers, or arranges, or negotiates to have sold, delivered, transported, furnished, administered, or given to any person any other liquid, substance, or material in lieu of that controlled substance shall be punished by

imprisonment in the county jail for not more than one year, or in the state prison." (Emphasis added.) As noted above, lysergic acid is a controlled substance specified in Schedule III and is *not* a narcotic drug. (§ 11056, subd. (c)(5).) In addition, lysergic acid diethylamide is a controlled substance specified in paragraph (12) of subdivision (d) of section 11054.

Because Butler does not acknowledge section 11382, he mischaracterizes (or, indeed, fails to characterize) the error that occurred in this case. That error, as we see it, is that the amended information erroneously charged Butler with violating section 11355 instead of 11382. In other words, the error was a pleading defect, and reversal for such an error is proper only upon a showing of prejudice. (*People v. Thomas* (1987) 43 Cal.3d 818, 826-827 (*Thomas*); *People v. Rivers* (1961) 188 Cal.App.2d 189, 193-196 (*Rivers*); Pen. Code, § 960 ["No accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits."]; Cal. Const., art. VI, § 13 ["No judgment shall be set aside, . . . for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."].)[2]

---

[2] This court requested that the parties file supplemental letter briefs addressing whether Butler violated section 11382 and, if so, whether he was prejudiced by the erroneous reference to section 11355 that appeared in the accusatory pleading in this case. In his supplemental letter brief, Butler concedes that section 11382 is a "parallel" offense which "proscribes the same conduct [as section 11355] and applies to other drugs, including LSD." Aside from this concession, Butler's letter brief is not responsive to our inquiry.

Rather, in it Butler constructs a new and confusing argument as to why the count five conviction must be reversed. First of all, the argument is not timely since it does not relate to any issue raised in Butler's opening or reply brief. Second, Butler rests his conclusion on a series of unsupported if not incorrect assertions. He contends that the sole theory of culpability alleged by the prosecution was that Butler committed the offense alleged in count five by attempting to "sell the bunk in Fairfax and Pismo Beach." Neither the accusatory pleading itself nor any other evidence before us reflects

To establish that an error in an accusatory pleading was prejudicial, the defendant must show that it denied him notice of and/or the opportunity to defend against the offense of which he was convicted. (*Thomas, supra*, 43 Cal.3d at p. 823.) In making this assessment, which is designed to protect the defendant's due process rights, we begin from the premise that "'[t]he specific allegations of the accusatory pleading, rather than the statutory definitions of offenses charged, constitute the measuring unit for determining what offenses are included in a charge.' [Citation.]" (*Id.* at p. 826; see also Pen. Code, § 960.) Therefore, "a valid accusatory pleading need not specify by number the statute under which the accused is being charged. [Citations.]" (*Thomas, supra*, 43 Cal.3d at p. 826.) Furthermore, even a reference to the wrong statute can be "'of no consequence'" if other circumstances establish that the defendant has received adequate notice of the actual charge(s). (*Ibid*.)

Applying this test here, we find several circumstances which preclude Butler from showing he was prejudiced by the erroneous reference to section 11355 in the present case. First, although Butler was charged in count 5 of the amended information with a violation section 11355, the controlling factual allegation made clear that Butler was charged with offering to sell or selling a substance falsely represented to be LSD. The amended information expressly alleged: "That the said defendant on or about the 30th day of September, 2002 through the 2nd day of October, 2002, at and in the said County of Humboldt did willfully, unlawfully and feloniously agree, consent, and offer to

---

any such limitation on the prosecution case. Butler also contends he was prejudiced because the prosecution changed its theory of culpability. Again, the record does not support this assertion. Nor do we find any indication that Butler ever complained about a change of theory in the trial court. For example, Butler's counsel did not object during closing argument when the prosecutor argued that Butler's own testimony established a violation because Butler admitted he gave Dinwiddie counterfeit LSD in exchange for a ride. Finally, Butler contends there is no evidence that he engaged in "some activity in apparent consummation of a deal" to sell fake LSD in Fairfax and Pismo Beach. If such evidence was required, which Butler has failed establish, it existed in the form of testimony that Butler forced Dinwiddie to drive him to these locations where Butler then attempted to sell the substance he falsely represented to be LSD.

unlawfully sell, furnish, transport, administer, and give a controlled substance, to wit, Lysergic Acid Diethylamide (LSD)." Second, all the evidence offered in connection with the drug charge against Butler pertained to the counterfeit LSD and not to any other controlled substance. Third, the jury was instructed, pursuant to a joint request by the prosecutor and defense counsel, with CALJIC No. 12.04, the model instruction which sets forth the elements for determining whether a defendant has violated *either* section 11355 or 11382. This model instruction was tailored to incorporate the factual allegation that the controlled substance at issue in this case was LSD.

That the same standard jury instruction covers both of these statutes reflects the fact that the statutory language in section 11355 and section 11382 is virtually identical, except for the specific language which dictates which controlled substance is governed by what statute.[3] Even the punishment for violating each statute is the same. Thus, by employing CALJIC No. 12.04, and then tailoring it to this case by instructing that the controlled substance at issue was LSD, the trial court accurately instructed the jury as to the offense alleged in count 5 of the amended information and the jury made all the findings necessary to sustain Butler's conviction for committing the offense made unlawful by section 11382.

These circumstances establish that Butler was not prejudiced at all by the fact that the prosecutor who filed the amended information and, apparently, everyone else involved in the lower court proceeding erroneously believed that the conduct charged in count 5 of the amended information violated section 11355 rather than section 11382.

Our conclusion is supported by *Thomas, supra,* 43 Cal.3d 818. There the defendant was convicted by a jury of involuntary manslaughter notwithstanding that the information that was filed against him "specifically and exclusively charged him with voluntary manslaughter" and expressly referenced Penal Code section 192.1, which did

---

[3] The fact that the pleading error went undiscovered throughout the trial court proceedings, and perhaps even by the parties on appeal, suggests that the procedure for determining whether a controlled substance is governed by section 11355 or section 11382 could be more clear.

not pertain to involuntary manslaughter. (*Thomas,* at p. 824.) However, the information also set forth the following factual allegation in support of the charge: "The said defendant(s), . . . did willfully, unlawfully, and with/o[ut] malice aforethought kill [the victim], a human being." (*Ibid*.) The *Thomas* court found that, by including an allegation of an unlawful killing of a human being without malice, the information made out a "general charge of manslaughter" which put the defendant on notice that he could be convicted of involuntary manslaughter. (*Ibid*.)

The *Thomas* court reasoned that, since the information gave notice of the involuntary manslaughter charge, the erroneous reference to Penal Code section 192.1 was simply not relevant. (*Thomas, supra*, 43 Cal.3d at pp. 827-828.) The court also found that, even if the defendant could have shown that errors in the information made the charges against him too difficult to discern, the defendant received actual notice that those charges included involuntary manslaughter at the preliminary hearing where evidence and argument to support that specific charge was presented by the prosecutor. (*Id*. at p. 829.) Furthermore, the defendant had not objected to an involuntary manslaughter instruction that was proposed by the prosecutor and read to the jury. (*Id*. at p. 828.)

As in *Thomas*, the erroneous statutory reference in the present case did not prejudice Butler. The controlling allegations in the amended information made clear that Butler was charged with selling or offering to sell a substance falsely represented to be LSD. The record makes equally clear that (1) the defendant understood and defended against this particular charge, and (2) the jury found Butler committed this offense. Thus, as in *Thomas*, the erroneous statutory reference in this case was simply irrelevant.

*Rivers, supra*, 188 Cal.App.2d 189 also reinforces our conclusion. In *Rivers* the defendant was charged by means of an information that alleged the defendant "'did unlawfully sell, furnish and give away a narcotic.'" (*Id*. at p. 193.) Further, the judgment clearly indicated the defendant was found guilty of the sale of narcotics. However, both the information and judgment also erroneously referred to section 11500 of the Health and Safety Code which, at that time, prohibited the possession but not the sale of

narcotics. (*Rivers,* at p. 194.) This court found the defendant was not prejudiced by this defect. As we explained: "The purpose of the requirement of certainty in an indictment or information is to apprise the accused of the charges against him so that he may adequately prepare for his defense. It is clear from the language of the information quoted above that the defendant knew he was being charged with the sale of narcotics. Furthermore, the evidence presented at the trial was concerned only with the sale of narcotics. Thus, the appellant was plainly informed of the nature of his offense, and the designation of the wrong code section is immaterial. [Citations.] The defect was merely one of artificiality rather than substance." (*Id*. at p. 195.)

As in *Rivers*, the designation of the wrong code section in the present case was immaterial and one of artificiality rather than substance. Butler, like everyone else involved in this case, understood he was charged with selling or offering to sell a substance which was falsely represented to be LSD. All of the evidence presented with respect to this charge concerned the counterfeit LSD, not any other controlled substance. The fact that both sides erroneously believed that the crime Butler was expressly charged with and found guilty of committing violated section 11355 rather than 11382 had absolutely no prejudicial effect on these proceedings.

Since Butler was not prejudiced by the fact that the parties and court erroneously labeled the offense he was charged with and found guilty of committing, the conviction for selling or offering to sell a substance falsely represented to be LSD will not be stricken. (*Thomas, supra*, 43 Cal.3d at pp. 826-827; *Rivers, supra*, 188 Cal.App.2d at pp. 193-196; see also *People v. Winning* (1961) 191 Cal.App.2d 763, 768-770 [conviction for attempted extortion affirmed when defendant was not prejudiced by fact that he was indicted, convicted and sentenced under erroneous section of the Penal Code].)

However, we note that the trial court imposed a $1,000 fine in this case pursuant to section 11372. Although the punishment for violating section 11355 and section 11382 is otherwise identical, only section 11355 provides for the imposition of a section 11372 fine in addition to a term of imprisonment. Since, the offense Butler was charged

with and found guilty of committing is proscribed by section 11382 rather than section 11355, the section 11372 fine must be stricken.

**B. *Pike's Refusal to Testify***

The defense intended to call Parrish Pike to testify at trial. The court permitted Pike to exercise his Fifth Amendment privilege against self-incrimination. Thereafter, the court precluded the defense from calling an investigator to testify about statements Pike allegedly made to him regarding events at Dinwiddie's house on the night of September 30, 2002. Butler challenges both of these rulings.

**1. *Background***

During trial, Parish Pike and his attorney, Kevin Robinson, appeared before the court outside the presence of the jury. Robinson advised the court that he represented Pike in an unrelated criminal proceeding in which Pike was charged with multiple robberies and that Pike had recently entered into a plea agreement pursuant to which he was sentenced to a 13-year prison sentence. Robinson further stated that Pike had talked to him about a statement Pike made to an investigator employed by the public defender's office that was relevant to this case. In light of these facts, Robinson advised that Pike would assert his Fifth Amendment privilege not to testify in this case.

The trial court conducted an Evidence Code section 402 hearing during which Pike refused to answer any questions. Defense counsel then made an offer of proof as to the testimony he expected to elicit from Pike by submitting a copy of his investigator's report. That report states: "I met with Parrish Pike in a room by control. I identified myself and told him we represented William Butler. He said he knew 'Billy.' I asked him if he was present when any agreement between William and Alex Dinwiddie were present [sic.]. Pike said that he was present when Billy offered Alex 200 hits of acid to drive Billy somewhere down south. I asked if Alex agreed and Pike said Alex agreed. I asked Pike where down south and he said he didn't remember the name of the place but it was pretty far. I asked Pike if it was further then [sic] San Francisco and he said yes. [¶] I had Pike sign the attached document and thanked him. At that point he asked me who

would be his public defender in 'my 6 armed robberies.' I told him I didn't know anything about that and left."

Robinson argued that compelling Pike to testify about the subject of his prior statement could potentially incriminate him by showing that Pike was "aware of the plans and whatever happened afterwards would implicate him in that conspiracy." Robinson also argued that the time to appeal certain sentencing determinations in the unrelated criminal action against Pike had not passed and if a future appeal of those determinations was successful, Pike's testimony in this case could be used against him.

The prosecutor stated that Pike would not be offered immunity and, if he testified, the prosecutor would impeach him with the prior robberies. The prosecutor further argued that he would have the right to cross-examine Pike not just about the statement to the investigator but about Pike's relationship with Butler. According to the prosecutor, Pike and Butler were living in the same apartment at the time the events relevant to this case occurred and the prosecutor had a right probe Pike's knowledge about a variety of issues relevant to this case.

The trial court indicated that it did not find anything in the investigator's statement that would incriminate Pike, but it acknowledged that it could conceive of ways in which a more probing examination of Pike's relationship with Butler might lead to incriminating disclosures. Ultimately, the court decided to conduct an in camera proceeding with Robinson and Pike during which Robinson would make an offer of proof as to how Pike could be incriminated if he was subject to cross-examination in this case. The record of that in camera hearing was sealed. Thereafter, the court made the following statement on the record: "[B]ased on that offer of proof I do find that the invocation of the Fifth Amendment of Mr. Pike is clearly a proper invocation and so we will not do that in front of the jury and he will not be called as a witness."

After the court determined that Pike was unavailable, Butler's defense counsel attempted to call his investigator to testify about Pike's statement. The trial court ruled that testimony about Pike's statement was hearsay and not admissible pursuant to Evidence Code section 1230 as a declaration against penal interest.

### 2. *The Fifth Amendment Privilege*

Butler contends the trial court erred by permitting Pike to invoke his privilege against self-incrimination.

The Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself . . . ." (U.S. Const., Fifth Amend.; See also Cal. Const., art. I, § 15.) "'[T]he privilege is properly invoked whenever the witness's answers "would furnish a link in the chain of evidence needed to prosecute" the witness for a criminal offense.'" (*In re Marriage of Sachs* (2002) 95 Cal.App.4th 1144, 1151.) "It is 'the duty of [the] court to determine the legitimacy of a witness'[s] reliance upon the Fifth Amendment. [Citation.]'" (*People v. Lopez* (1999) 71 Cal.App.4th 1550, 1554.) We review the trial court's ruling under the abuse of discretion standard. (*In re Marriage of Sachs, supra,* 95 Cal.App.4th at p. 1151; *United States v. Castro* (1st. Cir. 1997) 129 F.3d 226, 229.)

"'[A] trial court may compel the witness to answer only if it "clearly appears to the court" that the proposed testimony "cannot possibly have a tendency to incriminate the person claiming the privilege."' [Citation.]" (*In re Marriage of Sachs, supra*, 95 Cal.App.4th at p. 1151; see also Evid. Code, § 404.) "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.'" (*Hoffman v. United States* (1951) 341 U.S. 479, 486-487.) In the present case, the trial judge's discretionary determination was based, at least in part, on the sealed record containing Robinson's offer of proof. Butler and the People agree that this court should review the entire record including the sealed portion in order to determine whether the trial court abused its discretion. (See *People v. Collins* (1986) 42 Cal.3d 378, 395, fn. 22.)

Butler argues that testimony potentially linking Pike to the sales or attempts to sell fake LSD could not have incriminated Pike because section 11355 does not make it

unlawful to possess fake LSD. He further contends that, if our independent review of the sealed record discloses that the trial court based its ruling on a concern about Pike's potential liability under section 11355, then the trial court abused its discretion because Butler himself did not violate section 11355.

As discussed above, selling or offering to sell a substance falsely represented to be LSD is unlawful conduct under section 11382. Thus, if there was a possibility that Pike's testimony would potentially incriminate him by implicating him in an illegal scheme to sell fake LSD, he was entitled to assert the privilege. Such a *possibility* is clearly evident to us even without considering the sealed portion of the record. The circumstances suggest Pike and Butler were roommates and perhaps friends and that Pike was present when Butler and Dinwiddie entered into an agreement which may have constituted an illegal enterprise. Exposing Pike to cross-examination could have incriminated him by establishing a link either to Butler directly or to the criminal enterprise that may have been formed between Butler and Dinwiddie.

In any event, the sealed portion of the transcript sets forth additional circumstances which establish independent grounds pursuant to which the trial court could properly have affirmed Pike's invocation of the privilege in this case. Therefore, there was no abuse of discretion.

**3. *Due Process***

Butler contends that the trial court's refusal to permit the defense counsel's investigator to testify about Pike's statement "may have been error." Butler maintains that, since this evidence was crucial to his defense, excluding it violated due process *if*: (1) the trial court engaged in a "mechanistic application" of state evidentiary rules, and (2) the excluded evidence "possessed the indicia of reliability attendant upon statements made despite the risk of criminal prosecution." (Citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) Butler asks this court to review the sealed portion of the transcript in order to determine whether the trial court made an "implied finding that, judging from the 'totality of the circumstances,'" Pike's statement to the investigator was reliable.

First, Butler has not established that this evidence was crucial to his defense. His argument on appeal is that Pike's statement to the investigator was important because it would have corroborated Butler's claim that he "did not forcibly transport Dinwiddie during the events of September 30 through October 1, 2002, and therefore was not guilty" of kidnapping. But it was undisputed at trial that Dinwiddie agreed to give Butler a ride and that Smith came along voluntarily. The kidnapping charge and conviction was based on Butler's conduct after Dinwiddie and Smith stated that they did not want to drive any further south. Thus, although Pike's testimony might arguably have corroborated Butler's testimony that Dinwiddie initially agreed to drive further south than Humboldt, it would not have corroborated Butler's claim that he did not "forcibly transport" Dinwiddie and Smith to Pismo Beach. Furthermore, Butler overlooks the fact that Pike's statement was inconsistent with Butler's trial testimony. Butler testified that he showed the fake LSD to Dinwiddie and Edwards when the three men were alone in Dinwiddie's bedroom. According to Butler, Dinwiddie became excited and agreed to give him a ride in exchange for some of the LSD. After the agreement was reached, the men went into the living room and joined other people including Pike. Thus, under Butler's version of the events, Pike did not witness the agreement between Butler and Dinwiddie.

Second, the trial court did not engage in a mechanistic application of the state evidentiary rules. Butler's defense counsel argued his inspector's testimony was admissible under Evidence Code section 1230 because (1) Pike was unavailable and (2) the court ruled that Pike could exercise his Fifth Amendment privilege. The court responded that, for this hearsay exception to apply, there had to be some showing that making the statement to the investigator was contrary to Pike's interest; that he would not likely have made the statement unless it were true.[4] In response, defense counsel

[4] Consistent with the court's observation, Evidence Code section 1230 states: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to

conceded that "I'm not aware of anything incriminating in the statement." The prosecutor agreed the statement was not against Pike's interest. She maintained that Pike invoked the privilege because he feared cross-examination, not because the statement itself contained information that would incriminate him. After both defense counsel and the prosecutor expressly stated that the statement itself did not incriminate Pike, the court ruled that Pike's alleged statement to the investigator was not "so far contrary to Mr. Pike's interest that a reasonable person in that position would not have made the statement unless he believed it to be true."

Third, there is no evidence in the record that the statement Pike made to the defense investigator possessed indicia of reliability that the trial court ignored or overlooked. There was evidence that Pike may have been Butler's friend and roommate. Further, he made the statement to an investigator employed by the public defender's office while he was looking for help to defend against unrelated criminal charges pending against him. Further, as noted above, his statement was not consistent with Butler's own testimony at trial. Nothing about these circumstances suggests that Pike's statement was particularly reliable. Our review of the sealed portion of the record does not alter our conclusion. The trial court made no express or implied finding that Pike's statement was reliable.

**PUBLISHED PART**

**C. *Sentencing Error***

**1. *Background***

As noted in our Introduction, the trial court sentenced Butler to a total prison term of 11 years and 8 months. Included therein was an upper term sentence of eight years for kidnapping. The trial court imposed this upper term based on its findings of several aggravating factors and no mitigating factors. The aggravating factors identified by the

---

render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

court were: (1) the kidnapping involved the threat of great bodily harm; (2) the crime involved a large quantity of contraband; (3) Butler took advantage of a position of trust or confidence; (4) Butler engaged in violent conduct; (5) Butler's prior convictions are both numerous and of increasing seriousness. (See Cal. Rules of Court, rule 4.421.[5])

While this appeal was pending, Butler obtained leave of this court to file a supplemental brief alleging a sentencing error based on the United States Supreme Court's recent decision in *Blakely*, *supra*, 124 S.Ct. 2531. Butler contends that the trial court violated *Blakely* by imposing an upper term sentence for the kidnapping conviction.[6]

**2. *Error***

In *Blakely,* the Supreme Court held that a Washington State court denied a criminal defendant his constitutional right to a jury trial by increasing the defendant's sentence for second-degree kidnapping from the "standard range" of 49 to 53 months to 90 months based on the trial court's finding that the defendant acted with "deliberate cruelty." (*Blakely, supra*, 124 S.Ct. at p. 2537.) The *Blakely* court found that the state court violated the rule previously announced in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*) that, "'[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.'" (*Blakely, supra,* 124 S.Ct. at p. 2536.) In reaching this conclusion, the court clarified that, for *Apprendi* purposes, the "statutory maximum" is "not the maximum sentence a judge may impose after

---

[5] All further references to rules are to the California Rules of Court.

[6] Butler and the People agree that the ruling in *Blakely* applies here because the appeal in this case was pending when *Blakely* was decided. (See *Griffith v. Kentucky* (1987) 479 U.S. 314, 328 ["a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."]; see also *People v. Ashmus* (1991) 54 Cal.3d 932, 991.)

finding additional facts, but the maximum he may impose *without* any additional findings." (*Id*. at p. 2537.)

Butler contends that the trial court violated *Blakely* to the extent it relied on four "non-recidivist" aggravating factors to impose the upper term for his kidnapping conviction. Butler does not question the validity of the fifth aggravating factor articulated by the trial court, i.e., Butler's record of numerous and increasingly serious prior convictions.

Under California's determinate sentencing law, the maximum sentence a judge may impose for a conviction without making any additional findings is the middle term. Penal Code section 1170, subdivision (b), states that "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." Furthermore, rule 4.420(b), states that "[s]election of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation." In the present case, the trial court followed these directives; it found five aggravating circumstances and no mitigating circumstances and that the aggravating circumstances warranted imposing an upper term sentence for kidnapping. Nevertheless, the court violated *Blakely* because four of the aggravating factors that it articulated (1) did not relate to a prior conviction and (2) were additional findings made by the court rather than by a jury.

The People contend that California's "triad" sentencing system does not offend *Blakely* at all; that any one of the three legislatively-authorized terms for an offense, including the upper term, can be imposed by a trial court without violating a defendant's Sixth Amendment rights. Under their view of this system, although there is a "presumptive mid-term sentence," the upper term is the statutory maximum sentence which the trial court has discretion to impose. The People's argument may have been persuasive before *Blakely* was decided. Now, however, it is flatly contradicted by the Supreme Court's holding that the statutory maximum is "not the maximum sentence a judge may impose after finding additional facts," but rather the sentence it may impose without making *any additional findings*. (*Blakely, supra*, 124 S.Ct. at p. 2537.) Under

California law, the maximum sentence a judge may impose without any additional findings is the middle term. (Pen. Code, § 1170, subd. (b); rule 4.420.)

We also reject the People's contention that Butler forfeited his right to claim *Blakely* error by failing to raise this issue in the trial court. Because of the constitutional implications of the error at issue, we question whether the forfeiture doctrine applies at all. (See *People v. Vera* (1997) 15 Cal.4th 269, 276-277 [claims asserting deprivation of certain fundamental, constitutional rights not forfeited by failure to object].) Furthermore, there is a general exception to this rule where an objection would have been futile. (*People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648, and authority discussed therein.) We have no doubt that, at the time of the sentencing hearing in this case, an objection that the jury rather than the trial court must find aggravating facts would have been futile. (See Pen. Code, § 1170, subd. (b); rules 4.409 & 4.420-4.421.) In any event, we have discretion to consider issues that have not been formally preserved for review. (See 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 36, p. 497.) Since the purpose of the forfeiture doctrine is to "encourage a defendant to bring any errors to the trial court's attention so the court may correct or avoid the errors," (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060), we find it particularly inappropriate to invoke that doctrine here in light of the fact that *Blakely* was decided after Butler was sentenced.[7]

Thus, we find that the trial court violated *Blakely* by relying on four "non-recidivist" factors to impose the upper term for the kidnapping conviction. However, we reject Butler's contention that this error requires reversal of his sentence.

---

[7] We are not persuaded otherwise by the People's misleading references to two federal cases which, they contend, characterize *Apprendi* claims that were not raised in the trial court as forfeited notwithstanding the fact that *Apprendi* was decided while the cases were on appeal. (See *United States v. Cotton* (2002) 535 U.S. 625; *United States v. Ameline* (2004) 376 F.3d 967.) As these cases illustrate, under federal appellate procedure, characterizing a claim as forfeited does not mean that the claim may not be reviewed on appeal. Rather, such a claim is reviewed for plain error. (*Ibid*.)

### 3. *Prejudice*

Since the *Blakely* court rested its holding on *Apprendi*, we apply the standard of prejudice applicable to *Apprendi* errors which is the "*Chapman* test." (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.) Applying that test, we must determine whether the failure to obtain jury determinations as to the aggravating factors discussed above was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) We are unwilling to find that, beyond a reasonable doubt, a jury would have made findings to support the aggravating factors discussed above. Thus, those aggravating factors cannot be used to support the trial court's sentencing choice in this case. However, this conclusion does not end our analysis.

Although *Blakely* error is evaluated under the *Chapman* test, under California law, "[w]hen a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen the lesser sentence had it known that some of its reasons were improper." (*People v. Price* (1991) 1 Cal.4th 324, 492; see also *People v. Osband* (1996) 13 Cal.4th 622, 728.) Further, a single factor in aggravation is sufficient to support imposition of an upper term. (*People v. Osband, supra,* 13 Cal.4th at p. 728; *People v. Cruz* (1995) 38 Cal.App.4th 427, 433; see also *People v. Kelley* (1997) 52 Cal.App.4th 568, 581; *People v. Piceno* (1987) 195 Cal.App.3d 1353, 1360; *People v. Lamb* (1988) 206 Cal.App.3d 397, 401.)

Thus, although we disregard the aggravating factors discussed above, because we cannot say beyond a reasonable doubt that a jury would have made findings to support them, we must also consider whether there is one or more aggravating factors which support Butler's upper term sentence, and, if so, whether it is reasonably probable the trial court would have imposed a lesser sentence had it realized that some of the aggravating factors upon which it relied were not valid.

As noted above, the trial court in this case identified five aggravating factors to support the upper term sentence. However, Butler has successfully challenged only four of those factors. The fifth factor was a finding pursuant to rule 4.421(b)(2), that Butler

has a record of numerous and increasingly serious prior convictions. In contrast to the other factors upon which the trial court relied, this trial court finding is, to use Butler's terminology, a "recidivist factor."

We underscore the fact that Butler has not challenged the validity of this fifth aggravating factor. We add that there is authority that this factor was properly used by the trial court to support the upper term sentence. The requirement that a fact which increases a sentence beyond the statutory maximum must be found by a jury does not apply to the fact of a prior conviction. (*Almendarez-Torres v. United States* (1998) 523 U.S. 224; *Apprendi, supra*, 530 U.S. at pp. 488, 490; *Blakely, supra*, 124 S.Ct at p. 2536.) This prior conviction exception to the *Apprendi* rule has been construed broadly to apply not just to the fact of the prior conviction, but to other issues relating to the defendant's recidivism. (See, e.g., *People v. Thomas* (2001) 91 Cal.App.4th 212, 216-223.) We recognize that, in some cases, extrinsic facts relating to a recidivist aggravating circumstance may implicate *Apprendi*. However, we face no such issue here since Butler has not challenged the validity of the fifth aggravating factor identified by the trial court in this case.

Under these circumstances, there was one proper aggravating factor articulated by the trial court. As noted above, that factor was sufficient to support the upper term sentence. Further, the trial court expressly found that there were no mitigating factors in this case and that "the aggravating factors *and any of them in and of themselves* outweigh the lack of any mitigating factors." (Emphasis added.) Since the court clearly expressed its intent to impose the upper term even if only one of the aggravating factors it identified was proper, we find no likelihood that the court would have imposed a lesser term had it known that some of the aggravating factors upon which it relied were improper. Therefore, we reject Butler's contention that *Blakeley* requires that Butler's sentence be reversed.

## IV. DISPOSITION

The judgment is affirmed. This case is remanded to the superior court with the direction that it correct the abstract to show a conviction under section 11382 rather that 11355, and that it strike the section 11372 fine.

_____
Haerle, J.

We concur:

_____
Kline, P.J.

_____
Ruvolo, J.

A101799, *People v. Butler*

Trial Court: Superior Court of Humboldt County

Trial Judge: Hon. Timothy P. Cissna

| | |
|---|---|
| Attorney for Appellant | Louisa Havstad<br>P. O. Box 1407<br>Occidental, CA |

By appointment of the Court of Appeal under the First District Appellate Project Independent Case System

| | |
|---|---|
| People | Bill Lockyer<br>Attorney General<br>Robert R. Anderson<br>Chief Assistant Attorney General<br>Gerald A. Engler<br>Senior Assistant Attorney General<br>Eric D. Share<br>Supervising Deputy Attorney General<br>Ann P. Wathen<br>Deputy Attorney General |

A101799, *People v. Butler*