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CERTIFIED FOR PARTIAL PUBLICATION[†]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. STEVEN ROBERT JAFFE, Defendant and Appellant.	H026265 (Santa Clara County Super.Ct.No. EE220540)

Defendant Steven Robert Jaffe made a public spectacle of himself by passing out from drinking in a restaurant parking lot at dinnertime. Unfortunately for defendant, an ex-felon, he was the sole occupant of a car containing his clothing, his personal papers, and a briefcase with two handguns, a pellet gun, and loose ammunition inside. Methamphetamine was discovered in defendant's wallet. When informed of the pending charges, defendant asked if the police had found the cocaine in his jacket pocket in the car, which they subsequently did. Seven possession convictions resulted.

We will modify and affirm the judgment after concluding in the published part of this opinion that possession of cocaine is a lesser included offense of armed possession of cocaine, that California has prohibited gun possession by federal robbery convicts, that a pinpoint instruction on access to contraband was adequately covered by other

[†] Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts 2, 3B, 5, and 7.

instructions, and that sentencing defendant to an upper term based on his admission of certain aggravating factors and imposing a consecutive sentence do not violate *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531] (*Blakely)*. Our opinion addressing the remainder of defendant's contentions does not require publication. By separate order filed today we are disposing of defendant's habeas corpus petition, which we have considered together with this appeal.

TRIAL EVIDENCE

On Tuesday, January 15, 2002, at about 6:30 p.m., a passerby, Gaddi Ittah, found defendant unconscious in a parking lot at a strip mall in Sunnyvale. Defendant was face down on the ground with his feet in the open driver's door of a running BMW. Since defendant was unresponsive, Ittah called 911 on his cellular telephone. Other passersby tried to rouse defendant and determined that he was drunk.

Paramedics and Sunnyvale public safety police and fire officers responded to the emergency call. A fire official found defendant slumped over inside the car, which was no longer running. Defendant, who smelled strongly of alcohol, regained consciousness and vomited more than once.

Lieutenant Randal French, a fire officer, asked if anyone had the keys to the car. A bystander handed Lieutenant French the keys, saying they were taken from the car's ignition.

Officer David Miller, the crime scene investigator, retrieved defendant's wallet from defendant's back pocket. Officer Miller handed the wallet to Officer Kathryn Debeaubien, who looked through it for identification. She found defendant's driver's license and credit cards bearing defendant's name. Defendant's address was in Topanga in southern California. Officer Debeaubien did not look closely at the contents of the wallet, which was bulging with numerous papers. Officer Debeaubien handed the wallet to Officer Christopher Kassel, who quickly perused it before handing it back to Officer Miller.

Defendant was arrested for public intoxication and transported to a hospital in an ambulance. After searching the car, Officer Kassel gave the car keys to the company that towed the BMW.

The BMW was registered to a Thomas Miller who lived in southern California. Before the car was towed, Officers Debeaubien and Kassel did an inventory search. The car looked lived in, with numerous articles of clothing and papers strewn about the passenger compartment. In the car's trunk were more clothing and 12 to 15 pieces of mail addressed to defendant.

On the floor of the front passenger seat were empty vodka bottles and a briefcase. Opening the briefcase revealed that it contained a nine-millimeter semiautomatic handgun loaded with seven rounds in its magazine, a .25-caliber semiautomatic handgun loaded with six rounds in its magazine, a .177-caliber pellet gun, and 58 loose rounds of ammunition, consisting of 33 nine-millimeter rounds, 23 .25-caliber rounds, and 2 .22-caliber birdshot long bullets. Five of the rounds were hollow point, a type of bullet designed to do more damage on impact. The serial number was scratched off the nine-millimeter gun. Also in the briefcase were a sock and a wallet containing the business card of someone other than defendant. No paper identifying defendant was in the briefcase. All three guns were in evidence, secured with plastic straps by the police so that the guns could not be fired.

Defendant stipulated that he "has been convicted of an offense enumerated in Penal Code section 12021.1([b])."[1]

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[1] In this case the prosecutor sought to prove that defendant had a prior violent offense conviction of robbery that precluded him from possessing weapons or ammunition. (Pen. Code, § 12021.1.) Defendant argued in limine that he could prevent the jury from hearing the details of his prior conviction by stipulating that he had a qualifying conviction. The prosecutor agreed under *People v. Valentine* (1986) 42 Cal.3d 170, 177, and defendant entered the quoted stipulation.

Further unspecified statutory references are to the Penal Code.

Officer David Miller's preliminary examination testimony was read to the jury. Officer Miller found a bindle containing .48 grams of methamphetamine in defendant's wallet. An expert testified that this was a usable amount of methamphetamine. Neither officer, Debeaubien or Kassel, had observed a bindle in the wallet. As the crime scene investigator, Officer Miller took the wallet and briefcase and their contents and booked them into evidence at the Sunnyvale Department of Public Safety.

A blood sample was taken from defendant at the hospital at 10:23 p.m. The blood test revealed a blood alcohol level of .23 and the presence of cocaine metabolites, which meant that defendant had consumed cocaine sometime between six to 72 hours earlier. No methamphetamine was found in his blood.

Officer Debeaubien stayed with defendant at the hospital from about 7:30 p.m. until 1 a.m. Defendant asked her what he was being charged with. She said possessing firearms and methamphetamine and being drunk in public. Defendant asked if she had found the cocaine. She said she had not. Defendant said it was in his jacket. She said there were several jackets in the car. Defendant specified a black sport coat on the front seat. Officer Debeaubien called this information in to Lieutenant Tim Davis, who asked Officer Miller to check it out.

Officer Miller found a bindle containing 2.89 grams of cocaine in the pocket of a jacket that was draped over the driver's seat and covered with vomit. An expert testified that this was a usable amount of cocaine.

The parties stipulated, "David Miller was an officer with the Sunnyvale Department of Public Safety. On July 23rd, 2002 he was fired for his alleged involvement in helping houses of prostitution in the City of Sunnyvale. Charges have been filed against him, but they do not include the allegations of fabrication of evidence. The charges against him are allegations and are not evidence."

Defendant made a telephone call from the hospital to someone named "Tom." Officer Debeaubien dialed the number for him and recognized the area code as from southern California.

TRIAL ARGUMENT

Defense counsel conceded that defendant had access to the car and its contents. He argued to the jury that others also had access to the car and they abandoned their efforts to help defendant when they heard the police had been called, because they knew what the briefcase contained. Among these "fair weather friends," he asserted, was the car's registered owner, Tom Miller. He further argued that the jury should distrust the hearsay evidence of fired Officer David Miller about finding the methamphetamine in defendant's wallet and the cocaine in his jacket.

Based on defendant's hospital telephone call to "Tom," the prosecutor argued that defendant had called Tom Miller, the car's owner, in southern California, so Tom Miller could not have been among those present when defendant was discovered intoxicated in the car. We summarize additional argument where relevant to the discussion.

JURY DELIBERATIONS AND VERDICT

During deliberations the jurors asked for and received readbacks of the testimony of Officers Debeaubien, Kassel, and Miller, focusing on Officer Debeaubien's hospital time with defendant and Officer Kassel's description of the vehicle tow sheet and his examination of the wallet. The jurors also asked for and received the three guns in evidence.

The jury convicted defendant of seven counts arising out of his simultaneous possession of five items, methamphetamine (Health & Saf. Code, § 11377, subd. (a)—count 1), cocaine (Health & Saf. Code, § 11350, subd. (a)—count 2), a nine-millimeter handgun, a .25-caliber handgun (§ 12021.1, subd. (a)—counts 5 & 6), and ammunition (§ 12021—count 7). Possessing cocaine while armed with a loaded, operable nine-millimeter handgun and a loaded, operable .25-caliber handgun (Health & Saf. Code, § 11370.1—counts 3 & 4) were his remaining convictions.

THE SENTENCE

The probation report recommended "the aggravated term of eight years as to Count Three, since [defendant] was on United States Probation at the time of the offenses" following a robbery conviction. Defendant responded by letter in which he

admitted his prior bank robbery, but argued that it involved "no actual violence." He asserted that the federal probation should be converted to state specifications. "It would be 'parole' (post prison)—I was placed on this 'probation' (parole) in Oct of 1999—I reformed well untill [*sic*] my 1st violation in Dec 2000." At sentencing defense counsel conceded the robbery conviction, acknowledging that defendant was on federal parole and asserting the "robbery conviction was not one of violence . . . . It was a note. Nobody was hurt."

The court sentenced defendant, then age 42, to nine years, four months in prison, including the aggravated term of four years on count 3 (possessing cocaine while armed with a nine-millimeter handgun) after finding as aggravating factors: defendant was on parole at the time of the current offense (Cal. Rules of Court, rule 4.421(b)(4));[2] he had served a prior prison term (rule 4.421(b)(3)); his "prior convictions . . . are numerous and of increasing seriousness" (rule 4.421(b)(2)); and defendant was convicted of other crimes for which he was receiving concurrent sentences (rule 4.421(a)(7)). The term was doubled to eight years due to defendant's prior strike. (§§ 667, subd. (e)(1); 1170.12, subd. (c)(1).) The court imposed a consecutive sentence of one-third the midterm, one year, four months, for count 7, possessing ammunition, finding "an extra degree of risk to the community took place by the defendant's possession of hollow point ammunition within the car."

The remaining aggravated terms were imposed for the same reasons and made concurrent, eight years on count 4 (possessing cocaine while armed with the .25-caliber handgun) and six years each on the remaining possession counts: count 1 (methamphetamine), count 2 (cocaine), count 5 (nine-millimeter gun) and count 6 (.25-caliber handgun). The cocaine term was stayed pursuant to section 654.

Defendant did not object during sentencing to the court's reliance on any of these circumstances in imposing the upper term or a consecutive sentence.

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[2] Further rule references are to the California Rules of Court.

The court also ordered a restitution fine of $10,000 (§ 1202.4), a suspended fine in the same amount (§ 1202.45), a $50 lab analysis fee for each of the two drug possession counts (Health & Saf. Code, § 11372.5) plus penalty assessments of $170 on those fees ($100 under § 1464 and $70 under Gov. Code, § 76000), and a $150 drug program fee for each of the two drug possession counts (Health & Saf. Code, § 11372.7) plus penalty assessments of $510.

ISSUES ON APPEAL

On appeal defendant asserts: (1) he cannot be convicted of armed possession of cocaine and the lesser included offense of possession of cocaine; (2a) there was insufficient evidence that the firearms were operable; (2b) his trial attorney should have objected when the prosecutor argued that operability was not an element of the offense; (3a) his trial attorney should not have conceded that defendant's prior federal robbery conviction qualified under section 12021.1; (3b) his trial attorney should have persisted in objecting to hearsay evidence about car keys being found in the ignition; (4) the trial court should not have refused to give his requested pinpoint instruction on access to contraband; (5) we should review the trial court's ruling on his *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 motion; (6) the judge erred by imposing an upper term and a consecutive sentence based on facts not found by the jury beyond a reasonable doubt; and (7) these errors had a cumulative prejudicial impact.

ANALYSIS

1. POSSESSION OF COCAINE

Defendant contends that possessing cocaine (count 2) is a lesser included offense of possessing cocaine while armed with a loaded, operable firearm (counts 3, 4), so he cannot be convicted of both offenses. The California Supreme Court "has long held that multiple convictions may *not* be based on necessarily included offenses. [Citations.]" (*People v. Pearson* (1986) 42 Cal.3d 351, 355.) This was not an argument made in the trial court. The trial court, however, did stay the prison sentence on count 2 pursuant to section 654, though it imposed related fines.

People v. Lopez (1998) 19 Cal.4th 282 has explained: "To determine whether a lesser offense is necessarily included in the charged offense, one of two tests (called the 'elements' test and the 'accusatory pleading' test) must be met. The elements test is satisfied when ' "all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense." [Citation.]' [Citations.] Stated differently, if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former. [Citations.] [¶] Under the accusatory pleading test, a lesser offense is included within the greater charged offense ' "if the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed." [Citation.]' [Citations.]" (*Id.* at pp. 288-289.) "When, as here, the accusatory pleading describes a crime in the statutory language, an offense is necessarily included in the greater offense when the greater offense cannot be committed without necessarily committing the lesser offense." (*People v. Marshall* (1997) 15 Cal.4th 1, 38; *People v. Wolcott* (1983) 34 Cal.3d 92, 99.)

Health and Safety Code section 11350 prohibits, among other things, possession of listed controlled substances. Section 11350 does not specify any particular amount of the controlled substance. As the jury was instructed here, one of the elements of simple possession is that "the substance was in an amount sufficient to be used as a controlled substance." (CALJIC No. 12.00.)

The phrase "usable quantity" was well established in case law (*People v. Leal* (1966) 64 Cal.2d 504, 512, and cases cited in *People v. Rubacalba* (1993) 6 Cal.4th 62, 64-66) when Health and Safety Code section 11370.1 was enacted in 1989. (Stats. 1989, ch. 1041, § 1, p. 3609.) The jury here was instructed orally and in writing in terms of CALJIC No. 12.52: "Every person who possesses any amount of a substance containing cocaine while armed with a loaded, operable firearm is guilty of a violation of Health and Safety Code [section] 11370.1." The phrase "any amount" was added to the statute in 1991. (Stats. 1991, ch. 469, § 1, p. 2280.)

Simple possession is a lesser offense under the elements test only if armed possession requires a usable amount of the controlled substance. Defendant suggests that all drug statutes have a usable quantity requirement. This is not true of the statutes prohibiting sale of a controlled substance. (*People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524; *People v. Mata* (1986) 180 Cal.App.3d 955, 959.) However, possession is not an element of the sale offense. (*People v. Peregrina-Larios*, *supra*, 22 Cal.App.4th at p. 1524.)

The Attorney General contends that the plain meaning of "any amount" does not require any judicial construction and does not mean "any usable amount." Under this interpretation, the target of this statute is every person with a loaded, operable firearm and any useless trace quantity of a controlled substance. Courts are not required to give statutes a literal interpretation when an absurd consequence would result. (*In re Michele D.* (2002) 29 Cal.4th 600, 606.)

People v. Edwards (1991) 235 Cal.App.3d 1700 (criticized by *McDowell v. Watson* (1997) 59 Cal.App.4th 1155, 1161, fn. 3) explained: "The legislative intent behind section 11370.1 was to address a deficiency in California law which did not specifically make it a public offense for a person to possess or be under the influence of a small amount of a controlled substance while in the immediate possession of a firearm. (Enrolled Bill Rep. of the Office of Criminal Justice Planning, dated Sept. 25, 1989.) As stated in a memorandum from Department of Justice Legislative Advocate Carolyn McIntyre, dated February 7, 1990: '[T]he bill accomplishes what the author, Ex-Senator Stirling, the sponsors, San Diego SD, and the Committee on Public Safety intended it to accomplish. It was intended to provide an enhanced punishment for individuals that are convicted of possessing small quantities of drugs for *personal use* while possessing a loaded operable firearm . . . .' " (*Id.* at pp. 1706-1707; fn. omitted.)

We conclude that it is consistent with this legislative purpose to construe "any amount" as meaning "any usable amount." Accordingly, defendant cannot stand convicted of the lesser offense of possessing cocaine. This conviction and the fees and penalties attached to count 2 must be stricken.

2. OPERABILITY OF FIREARMS[†]

As stated above, the jury was instructed orally and in writing in terms of CALJIC No. 12.52 that among the elements of a violation of Health and Safety Code section 11370.1 is that the defendant was armed with a loaded and operable firearm. After examining the weapons during deliberations, the jury convicted defendant of two violations of this statute, one (count 3) for being armed with the nine-millimeter handgun and the other (count 4) for being armed with the .25-caliber handgun.

A. Sufficiency of the evidence

On appeal defendant contends that there was no evidence showing that either gun was operable. No one testified about their operability. Due to the safety straps, the jury could not determine that the guns were operable.

People v. Rodriguez (1999) 20 Cal.4th 1 stated at page 11: "In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.) The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) '"Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which

[†] See footnote, *ante*.

suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. '"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment."' [Citations.]"' (*Id.* at pp. 792-793.)"

The California Supreme Court has observed, "A defendant's own words and conduct in the course of an offense may support a rational fact finder's determination that he used a loaded weapon." (*People v. Rodriguez*, *supra*, 20 Cal.4th at p. 13.) In *People v. Lochtefeld* (2000) 77 Cal.App.4th 533, the court concluded that "[defendant's] acts in threatening persons on the street and in pointing the gun at officers demonstrated his implied assertion the gun was sufficiently charged to inflict injury." (*Id.* at p. 542.) In other words the defendant's conduct was evidence that a pellet gun was sufficiently charged to be "operable." (*Id.* at p. 541.)

People v. Smith (1974) 38 Cal.App.3d 401 noted, "A jury could easily infer that defendant would not have carried a loaded shotgun with additional shells, if the weapon were inoperable." (*Id.* at p. 410.) In that case the defendant had committed a robbery using a shotgun and a loaded shotgun was found in the vehicle containing the defendant.

In our case, though defendant was not seen to operate either handgun, there was circumstantial evidence that the guns were operable. Both guns were loaded when the police found them. Extra rounds for each gun were nearby. The guns and ammunition were in a briefcase on the floor near the driver's seat occupied by defendant. It would be irrational for someone to have obtained, loaded, and kept extra rounds for an inoperable weapon. Moreover, the jury examined the guns during deliberations. Though plastic straps prevented firing the guns, their appearance presumably raised no reasonable doubt about their inoperability. Viewing this evidence in a light favorable to the judgment (*People v. Rodriguez*, *supra*, 20 Cal.4th at p. 12), we conclude that there was substantial evidence each gun was operable. (*People v. Gonzales* (1936) 14 Cal.App.2d 537, 539 [jury's view of gun barrel was substantial evidence of its length]; *People v. Cruz* (1931) 113 Cal.App. 519, 520-521 [same].)

B. Prosecutorial misconduct

On appeal defendant contends that he was prejudiced by his trial counsel's failure to object to the prosecutor's misstatement of the law in arguing that operability was not an element of the offense.

Argument to the jury followed the court's instructions about the elements of the charged offenses. In opening argument to the jury, the prosecutor displayed CALJIC No. 12.52 and mentioned the five elements, including possession of cocaine "while they were armed with a loaded, operable firearm." Defense counsel conceded that the guns were loaded, but argued to the jury that there was no expert testimony about the guns being operable. In closing argument, the prosecutor responded, "There's no dispute either that, real dispute, these guns aren't operable. And, by the way, the word 'operable' isn't in the jury instructions. You can look through them. [¶] But if there's a doubt, fire one. Ask the judge for permission. It's not in the instruction anyway. But they have the opportunity to ask questions about that if they thought they weren't real weapons."

There was no objection to the prosecutor's misstatement of the instruction. Defendant asserts that this misstatement served "to obscure the very weakest point in [the prosecutor's] case."

We note that the jury was accurately instructed by the court that operability of the firearm is an element of the offense. The prosecutor so stated in opening argument. The court also instructed the jurors that they must accept the law as stated in the court's instructions if "anything concerning the law said by the attorneys in their argument or at any other time during the trial conflicts with my instructions." (CALJIC No. 1.00.)

A prosecutor's isolated misstatement of the law in argument is ordinarily found not to be prejudicial when the point of law was accurately covered by the court's instructions and the jury was instructed to take the law from the court's instructions and not the attorneys' arguments. (*People v. Medina* (1995) 11 Cal.4th 694, 760; *People v. Mayfield* (1993) 5 Cal.4th 142, 179; *People v. Cash* (2002) 28 Cal.4th 703, 735-736; cf. *People v. Barnett* (1998) 17 Cal.4th 1044, 1157.) The jury's examination of the handguns during deliberations indicates that they were concerned about the weapons'

operability, despite the prosecutor's misstatement. Because the jury was properly instructed, we conclude that there is no reasonable probability that an objection by defense counsel would have yielded a more favorable verdict on these counts. (*People v. Cash*, *supra*, 28 Cal.4th at pp. 735-736.)

3. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Stipulation to prior conviction

On appeal defendant contends that his trial counsel was ineffective in stipulating to an unprovable prior conviction.

The information alleged that defendant's possession of two handguns (counts 5, 6) and ammunition (former count 9)[3] was prohibited under section 12021.1[4] because of his prior federal conviction of robbery. In the jury's absence, defense counsel stipulated, as the jury was later informed, that defendant "has been convicted of an offense enumerated in . . . section 12021.1([b])."

Section 12021.1 lists a number of "violent" offenses, the conviction of which precludes possession of a firearm.[5] Defendant argues that this lengthy list does not

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[3] At trial in the jury's absence, the prosecution dismissed two other possession charges (§ 12025), former counts 7 and 8. Count 9 was renumbered to count 7.

[4] Section 12021.1 provides in part: "(a) Notwithstanding subdivision (a) of Section 12021, any person who has been previously convicted of any of the offenses listed in subdivision (b) and who owns or has in his or her possession or under his or her custody or control any firearm is guilty of a felony."

Section 12021, subdivision (a) states in part: "(1) Any person who has been convicted of a felony under the laws of the United States, of the State of California, or any other state, government, or country, or of an offense enumerated in subdivision (a), (b), or (d) of Section 12001.6, or who is addicted to the use of any narcotic drug, who owns, purchases, receives, or has in his or her possession or under his or her custody or control any firearm is guilty of a felony."

[5] Subdivision (b) of section 12021.1 lists: "(1) Murder or voluntary manslaughter. [¶] (2) Mayhem. [¶] (3) Rape. [¶] (4) Sodomy by force, violence, duress, menace, or threat of great bodily harm. [¶] (5) Oral copulation by force, violence, duress, menace, or threat of great bodily harm. [¶] (6) Lewd acts on a child under the age of 14 years. [¶] (7) Any felony punishable by death or imprisonment in the state prison for life.

(Continued)

include crimes committed in other jurisdictions because, unlike other recidivist statutes, it does not expressly mention crimes in other jurisdictions. (Compare § 667, subd. (a)(1) ["any offense committed in another jurisdiction which includes all the elements of any serious felony"]; § 667.5, subd. (f) ["a conviction in another jurisdiction for an offense which, if committed in California, is punishable by imprisonment in the state prison"]; § 1170.12, subd. (b)(2) ["A conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison"]; § 12021, subd. (a)(1) [see fn. 4, *ante*].)

As this court has stated before, "We are familiar with the principle ' " ' "[w]here a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed." ' " ' (*People v. Duran* (2001) 94 Cal.App.4th 923, 941; cf. *People v. Drake* (1977) 19 Cal.3d 749, 755.)" (*People v. De Porceri* (2003) 106 Cal.App.4th 60, 70.) We observe that most of these cited statutes, apart from section

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[¶] (8) Any other felony in which the defendant inflicts great bodily injury on any person, other than an accomplice, that has been charged and proven, or any felony in which the defendant uses a firearm which use has been charged and proven. [¶] (9) Attempted murder. [¶] (10) Assault with intent to commit rape or robbery. [¶] (11) Assault with a deadly weapon or instrument on a peace officer. [¶] (12) Assault by a life prisoner on a noninmate. [¶] (13) Assault with a deadly weapon by an inmate. [¶] (14) Arson. [¶] (15) Exploding a destructive device or any explosive with intent to injure. [¶] (16) Exploding a destructive device or any explosive causing great bodily injury. [¶] (17) Exploding a destructive device or any explosive with intent to murder. [¶] (18) Robbery. [¶] (19) Kidnapping. [¶] (20) Taking of a hostage by an inmate of a state prison. [¶] (21) Attempt to commit a felony punishable by death or imprisonment in the state prison for life. [¶] (22) Any felony in which the defendant personally used a dangerous or deadly weapon. [¶] (23) Escape from a state prison by use of force or violence. [¶] (24) Assault with a deadly weapon or force likely to produce great bodily injury. [¶] (25) Any felony violation of Section 186.22. [¶] (26) Any attempt to commit a crime listed in this subdivision other than an assault. [¶] (27) Any offense enumerated in subdivision (a), (b), or (d) of Section 12001.6. [¶] (28) Carjacking. [¶] (29) Any offense enumerated in subdivision (c) of Section 12001.6 if the person has two or more convictions for violating paragraph (2) of subdivision (a) of Section 417."

12021, are not that similar to section 12021.1, which prohibits possession of a firearm by certain ex-felons. Most of these statutes do not define a crime. Instead, they provide for sentence enhancements for other crimes.

The list of 29 "violent" offenses in subdivision (b) of section 12021.1 is comparable, though not identical, to the list of 23 "violent" felonies in section 667.5, subdivision (c) and the list of 42 "serious" felonies in section 1192.7, subdivision (c). As we have explained before, "It has long been established that the serious felony list describes criminal conduct as well as specific crimes." (*People v. De Porceri*, *supra*, 106 Cal.App.4th at p. 67.) The same is true of the list of violent offenses. Subdivision (b) of section 12021.1 mentions a few penal statutes by section number ((25), (27), (29)), but otherwise gives common names for some crimes and describes the means of committing other felonies ((8), (22)). Indeed, as we have observed before, section 12021.1 is not limited to crimes that are felonies. (*People v. Sanchez* (1989) 211 Cal.App.3d 477, 482-484.)

In our view, the logic of construing section 12021.1 as limited to California state convictions would lead to the absurd result that even a California murderer's continued right to bear firearms would depend on whether he or she was convicted in federal or state court. We are confident that the Legislature did not intend to prohibit firearm possession by only those murderers and other violent criminals who happen to have been convicted in California state courts. Defendant offers no legislative history indicating an intent "to exclude out-of-state convictions from the purview" of section 12021.1. (*People v. Hazelton* (1996) 14 Cal.4th 101, 108 [construing three-strikes initiative].) We seek to avoid absurd consequences in construing statutes. (*People v. Butler* (1998) 68 Cal.App.4th 421, 439-440 [sexually violent predator law applies to out-of-state crimes]; *People v. Johnson* (1995) 33 Cal.App.4th 623, 631-633 [sex crime enhancement applies to out-of-state crimes].) The use of common names for many of the crimes described in subdivision (b) of section 12021.1 suggests that there was no intent to limit "(18) Robbery" to violations of California Penal Code section 211. We conclude that "robbery" in section 12021.1 was intended to apply to robbery convictions in other

jurisdictions. Since defendant's federal robbery conviction qualifies under this statute, defense counsel cannot be faulted for so stipulating.[6]

B. Evidence of car key[†]

On appeal defendant contends that his trial counsel was ineffective for failing to object to hearsay evidence regarding the car keys.

The court initially sustained defense counsel's hearsay objection to testimony by Lieutenant Randal French that, when he asked for the keys to the car in which he found defendant, a bystander handed them over and said, " 'we took them out of the ignition.' " Although the prosecutor asserted it was a contemporaneous statement, the court struck this testimony. After the prosecutor asked what the bystander had said, defense counsel again made a hearsay objection. After a bench conference, the court sustained the objection, but then allowed French to answer "yes" without objection to the question whether the bystander had said the keys were retrieved from the ignition.

The prosecutor asserted in opening argument that one of the issues in the case was whether defendant knew about the guns in the car. The prosecutor argued that defendant's possession of the car key was evidence that he had knowledge of the contents

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[6] Section 668 states: "Every person who has been convicted in any other state, government, country, or jurisdiction of an offense for which, if committed within this state, that person could have been punished under the laws of this state by imprisonment in the state prison, is punishable for any subsequent crime committed within this state in the manner prescribed by law and to the same extent as if that prior conviction had taken place in a court of this state. The application of this section includes, but is not limited to, all statutes that provide for an enhancement or a term of imprisonment based on a prior conviction or a prior prison term."

We believe that section 668 bolsters our conclusion that defendant's federal robbery conviction is the equivalent of a California robbery conviction for purposes of punishing subsequent crimes committed in California. However, we recognize that the California Supreme Court, in the context of discussing death penalty qualifying factors, has indicated that former versions of section 668 applied only to determinate sentence enhancements. (*People v. Lang* (1989) 49 Cal.3d 991, 1038; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1261.)

[†] See footnote, *ante*.

of the car, including the guns. "If he is using this car, it's much more likely he had knowledge of it." The prosecutor also argued that there were other indicia that defendant had driven the car up from southern California and spent some time in the car. Business cards from defendant's wallet were from southern California. Defendant's mail was in the car trunk.

Defendant asserts, "the presence of the key in the ignition was a highly damaging fact since it tended to show that [defendant] was in possession of the car." The Attorney General responds that it was reasonable for defense counsel to conclude that "the bystander's statement did not have great importance."

People v. Rodrigues (1994) 8 Cal.4th 1060, reiterated at page 1121: " 'Whether to object to inadmissible evidence is a tactical decision; because trial counsel's tactical decisions are accorded substantial deference [citations], failure to object seldom establishes counsel's incompetence. [Citations.] To establish ineffective assistance, a defendant must show that counsel's actions "fell below an objective standard of reasonableness under prevailing professional norms." [Citation.]' (*People v. Hayes* (1990) 52 Cal.3d 577, 621-622.)"

The Attorney General asserts that defense counsel may have withdrawn his objection to the bystander's statement because it was admissible under Evidence Code section 1241. "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Is offered to explain, qualify, or make understandable conduct of the declarant; and [¶] (b) Was made while the declarant was engaged in such conduct."

We need not resolve this issue. Even if we assume for the sake of discussion that this statement should have been excluded from evidence, we are convinced that there is no reasonable probability that defendant would have obtained a more favorable verdict. (*People v. Rodrigues*, *supra*, 8 Cal.4th at pp. 1121-1122.) The statement put the key in the ignition, not on defendant's person. That the key was in the ignition originally was also inferable from the testimony of Gaddi Ittah that the car was running when he first found defendant. In argument to the jury, defense counsel acknowledged that, when

defendant was found, "the key is there, and it's running." The existence of a key in the ignition did not establish that defendant put it there.

Defendant's connection to the car was shown by his presence in the car, his mail in the trunk, his clothing in the passenger compartment, his knowledge of cocaine in the pocket of his jacket in the car, and defendant's southern California residence being near where the car was registered to another owner. In light of this strong evidence of defendant's long use of the car, we conclude that defendant was not prejudiced by the admission of the bystander's explanation for having the car keys.

4. REFUSED INSTRUCTION

On appeal defendant contends that the trial court erred in refusing to give the following instruction requested by defendant. " 'Access to the items at issue, without more is insufficient to support a finding the defendant was in possession of those items.' "

The court rejected this request, explaining: "The court feels, given the evidence I've heard in this case, that this—giving this instruction would be actually more confusing than helpful to the jury in the way it's worded, including—in the way it's worded it would be, I think, vague and confusing." Noting that other instructions spelled out the knowledge requirement and elements of possession, the court continued, "I will say in the event it is clear and not vague, as I think it is, it certainly adds nothing to what is already in the CALJIC instructions and is duplicative."

The court instructed the jury that possession and knowledge were both elements of each of the seven charged offenses. The instructions explained actual and constructive possession. Regarding the charges of possessing the guns and ammunition, the jury was instructed, "One person may have possession alone, or two or more persons together may share actual or constructive possession." (CALJIC Nos. 12.00, 12.52, 12.44.)

People v. Bolden (2002) 29 Cal.4th 515 stated: "We have suggested that 'in appropriate circumstances' a trial court may be required to give a requested jury instruction that pinpoints a defense theory of the case by, among other things, relating the reasonable doubt standard of proof to particular elements of the crime charged.

[Citations.] But a trial court need not give a pinpoint instruction if it is argumentative [citation], merely duplicates other instructions [citation], or is not supported by substantial evidence [citation]." (*Id.* at p. 558.)

It is true that mere access or proximity to contraband that is also accessible to others is not enough, without more, to prove possession. (Cf. *People v. Mardian* (1975) 47 Cal.App.3d 16, 47, disapproved on another ground by *People v. Anderson* (1987) 43 Cal.3d 1104, 1123, fn. 1 [jury was so instructed]; *People v. Rice* (1970) 10 Cal.App.3d 730, 744 [same].) *Williams v. Superior Court* (1974) 38 Cal.App.3d 412 summarized the law at page 422. "' "The accused has constructive possession when he maintains control or a right to control the contraband." [Citation.] "Possession may be imputed when the contraband is found in a location which is immediately and exclusively accessible to the accused and subject to his dominion and control" [citation] or which is subject to the joint dominion and control of the accused and another [citations].' (*People v. Francis* (1969) 71 Cal.2d 66, 71.) However, '[w]hen contraband is found in a place to which a defendant and others have access and over which none has exclusive control "no sharp line can be drawn to distinguish the congeries of facts which will and that which will not constitute sufficient evidence of a defendant's knowledge of the presence of a narcotic. . . ." [Citation.]' (*People v. Hutchinson* (1969) 71 Cal.2d 342, 345.) '[P]roof of opportunity of access to a place where narcotics are found, without more, will not support a finding of unlawful possession.' (*People v. Redrick* (1961) 55 Cal.2d 282, 285.)"

While the requested instruction stated the general principle about mere access clearly enough, its application in this case would have been confusing, since defendant did not have mere access to the drugs. There was evidence that defendant had used cocaine. He told the police it was in his jacket. Methamphetamine was in his wallet. The requested instruction was irrelevant to this part of the evidence.

Defendant contends that his access to his own wallet and jacket was in question, because Officer Miller could have planted methamphetamine in the wallet and cocaine in the jacket. Defendant does not explain how Officer Miller planted the cocaine in defendant's blood. To the extent this was the defense theory regarding the drugs,

defendant was contending he had no access to the drugs. The requested instruction was irrelevant to this view of the evidence.

Defendant's theory at trial was that his mere access to the guns and ammunition did not establish possession. Even if the court could have tailored the requested instruction to fit this evidence (*People v. Fudge* (1994) 7 Cal.4th 1075, 1110), we conclude that defendant was not prejudiced by the lack of a modification. Defendant contends that the failure to instruct the jury on the theory of the defense is prejudicial per se. But the refusal of requested pinpoint instructions has repeatedly been found harmless under the *People* v. *Watson* (1956) 46 Cal.2d 818, 836 standard where defense counsel's jury argument pinpointed the defense and the given instructions sufficiently covered the topic. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1144; *People v. Hughes* (2002) 27 Cal.4th 287, 363; *People v. Earp* (1999) 20 Cal.4th 826, 887; *People v. Fudge*, *supra*, 7 Cal.4th at p. 1112.)

People v. Mendoza (1986) 183 Cal.App.3d 390 concluded that the trial court properly rejected a defense request to instruct the jury that access alone does not prove possession. The court reasoned that this theory was adequately embodied in the standard instructions about knowledge and possession. (*Id.* at pp. 399-400.) Even if the standard instructions in this case did not highlight defendant's theory as his requested instruction would have, we conclude that the concept was sufficiently presented by the given instructions and defense counsel's argument. There is no reasonable probability that a more favorable verdict would have resulted had this instruction been modified and given.

Defendant contends that the error to instruct on a defense theory is reversible per se in the Ninth Circuit, relying on *United States v. Escobar De Bright* (9th Cir. 1984) 742 F.2d 1196. However, that court has held that it is not reversible error to reject a defendant's proposed instruction on his theory of the case if other instructions adequately cover that theory, as they did here. (*United States v. Del Muro* (9th Cir. 1996) 87 F.3d 1078, 1081.)

5. DISCOVERY REQUEST[†]

In advance of trial defendant filed a motion under *Pitchess v. Superior Court*, *supra*, 11 Cal.3d 531 asking to discover any complaint about Officer David Miller lying or fabricating evidence. On September 20, 2002, a judge reviewed Miller's personnel file in camera and determined that it contained no discoverable complaints. Defendant, who has no access to this sealed transcript, asks us to review it. Having done so, we find no abuse of discretion. (*People v. Hughes, supra,* 27 Cal.4th at p. 330; *People v. Mooc* (2001) 26 Cal.4th 1216, 1232.)

6. SENTENCING

By supplemental opening brief, defendant relies on *Blakely, supra,* ___ U.S. ___, 124 S.Ct. 2531 in arguing that his right to a jury trial was violated when the trial court relied on facts not found by the jury in imposing an upper term of four years on count 3 (armed possession of cocaine) and a consecutive sentence of eight months, one-third the midterm, on count 7 (possession of ammunition by an ex-felon) based on facts not found by the jury.[7] Defendant does not object under *Blakely* to the term-doubling of both terms required under the "Three Strikes" law (§§ 667, subd. (e)(1); 1170.12, subd. (c)(1)) due to his prior strike.

[†] See footnote, *ante*.

[7] The following issues are pending in the California Supreme Court. The court granted review in *People v. Towne*, review granted July 14, 2004, S125677 on the following questions: "(2) Does *Blakely[, supra,]* __ U.S. __, 124 S.Ct. 2531, preclude a trial court from making findings on aggravating factors in support of an upper term sentence? (3) If so, what prejudicial error standard applies, and was the error in this case prejudicial?" The Court also granted review in *People v. Black*, review granted July 28, 2004, S126182, on the following questions: "(1) What effect does [*Blakely*] have on the validity of defendant's upper term sentence? (2) What effect does *Blakely* have on the trial court's imposition of consecutive sentences?"

A. United States Supreme Court precedent[8]

It is a familiar argument that the punishment imposed by the trial court should fit the crime found by the jury. The United States Supreme Court accepted one aspect of this principle in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), with the court holding, "[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." (*Id.* at p. 490.) This principle derives from two constitutional rights, the right to trial by jury and the prohibition against depriving a person of liberty without due process of law. (*Id.* at pp. 476-477.)

At issue in *Apprendi* was an enhancement under New Jersey law that could potentially double the maximum sentence for firearm possession from 10 to 20 years if a trial judge found a hate crime by the preponderance of the evidence. (*Apprendi, supra,* 530 U.S. at pp. 468-469.) The defendant admitted two counts of firearm possession and another offense under a plea bargain that his maximum sentence could be 20 years for two counts of firearm possession unless the court found a hate crime, in which case the maximum would be 30 years. (*Id.* at p. 470.) The defendant reserved the right to challenge the constitutionality of the enhancement statute. After an evidentiary hearing on the enhancement, the court imposed an enhanced term of 12 years on one possession count with concurrent terms on the remaining counts. (*Id.* at p. 471.)

The United States Supreme Court explained that historically judges had little discretion to determine a sentence after a jury verdict, although there was some discretion "in imposing sentence *within statutory limits* in the individual case." (*Apprendi, supra,* 530 U.S. at p. 481.) Constitutional concerns arise when a statute allows the judge to find "a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum

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[8] Our analysis of United States Supreme Court precedent and possible forfeiture of *Blakely* objections reiterates our conclusions in *People v. Barnes* (Sep. 24, 2004, H026137) ___ Cal.App.4th ___ [pp. 23-29].) Our discussion here differs slightly as it includes citations to opinions filed since *Barnes*.

he would received if punished according to the facts reflected in the jury verdict alone." (*Id.* at p. 483, fn. omitted.) The court had characterized this kind of fact as a "sentencing factor" in *McMillan v. Pennsylvania* (1986) 477 U.S. 79, 86 (*McMillan*). (*Apprendi*, *supra*, 530 U.S. at p. 485.)

In *McMillan*, the statute at issue required a mandatory minimum sentence of five years if a person " 'visibly possessed a firearm' " during the commission of certain offenses. (*McMillan*, *supra*, 477 U.S. at p. 81.) The United States Supreme Court briefly dispatched an argument "that the jury must determine all ultimate facts concerning the offense committed. Having concluded that Pennsylvania may properly treat visible possession as a sentencing consideration and not an element of any offense, we need only note that there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." (*Id.* at p. 93.) Among the indicators that firearm possession was a sentencing factor and not an element of the underlying offenses of robbery, rape, murder, and assault was the fact that the mandatory minimum was well below the maximum sentence provided by statute for each crime. "The statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." (*Id.* at p. 88.)

Apprendi minimized the significance of "the constitutionally novel and elusive distinction between 'elements' and 'sentencing factors.' " (*Apprendi*, *supra*, 530 U.S. at p. 494.) The court stated that the relevant inquiry is not whether the fact is called an element or a sentencing factor, but "does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?[19]" (*Id.* at p. 494.) Footnote 19 stated in part: "This is not to suggest that the term 'sentencing factor' is devoid of meaning. The term appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense. On the other hand, when the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." (*Ibid.*)

Apprendi concluded that the New Jersey statute "is an unacceptable departure from the jury tradition." (*Id.* at p. 497.)

Apprendi purported not to overrule *McMillan*, but limited "its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict." (*Apprendi, supra,* 530 U.S. at p. 487, fn. 13.)

People v. Sengpadychith (2001) 26 Cal.4th 316, recognized at page 326 that *Apprendi* "treated a sentence enhancement as the functional equivalent of a crime. ([*Apprendi, supra,* 530 U.S.] at pp. 476-477, 483, fn. 10.) To put it more accurately, *Apprendi* treated the crime together with its sentence enhancement as the 'functional equivalent' of a single 'greater' crime. (*Id.* at pp. 490-495, & fn. 19.)" California has afforded criminal defendants a right to a jury trial on enhancements (§ 1170.1, subd. (e)), so *Apprendi* did not require a change in the way enhancements were pleaded or proved in California.

The holding of *Apprendi* was applied recently in *Blakely*. In that case the defendant pleaded guilty to second-degree kidnapping involving a firearm and domestic violence. (*Blakely*, *supra*, ___ U.S. at p. ___, 124 S.Ct. at pp. 2534-2535.) The maximum sentence under Washington law for second-degree kidnapping was 10 years, but under other statutory provisions a sentencing judge could only impose 49 to 53 months, unless the judge found an exceptional aggravating factor. The court imposed a sentence of 90 months, finding deliberate cruelty after a three-day evidentiary hearing. (*Id.* at p.___, 124 S.Ct. at pp. 2535-2536.) The defendant objected that this violated his right to a jury trial.

The real issue in *Blakely* was: what was the statutory maximum penalty for *Apprendi* purposes? The court concluded "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional

findings." (*Blakely, supra,* ___ U.S. at p. ____, 124 S.Ct. at p. 2537.) Since the judge had relied on a fact not found by the jury or admitted by the defendant, the sentence in *Blakely* was invalid. (*Id.* at p. ___, 124 S.Ct. at p. 2538.)

B. Waiver and forfeiture

The Attorney General asserts that defendant has forfeited his *Apprendi* claim by the failure to object in the trial court when the sentencing judge relied on facts not found by the jury.

Blakely itself observed, "nothing prevents a defendant from waiving his *Apprendi* rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding. [Citations] If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial." (*Blakely*, *supra*, ___ U.S. at p. ___, 124 S.Ct. at p. 2541.)

The term "waiver" has been applied both to the intentional relinquishment of a known right and the forfeiture of a claim by failing to timely assert it. (*People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. 6.) "'"The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had . . . ."' (*People v. Walker* (1991) 54 Cal.3d 1013, 1023.) '"No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." [Citation.]' (*United States v. Olano* (1993) [507 U.S. 725].)" (*Id.* at p. 590, fn. omitted.)

People v. Scott (1994) 9 Cal.4th 331 determined that the "waiver" doctrine applies to a sentencing judge's reasoning in imposing a discretionary sentence. "We conclude that the waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices. Included in this category

are cases in which the stated reasons allegedly do not apply to the particular case . . . .” (*Id.* at p. 353.) “[A] criminal defendant cannot argue for the first time on appeal that the court . . . aggravated a sentence based on items contained in a probation report that were erroneous or otherwise flawed.” (*Id.* at pp. 351-352.)

Some courts have concluded that an *Apprendi* argument was forfeited by failing to assert it in the trial court. (*United States v. Cotton* (2002) 535 U.S. 625, 631, 634;[9] *U.S. v. Nance* (7th Cir. 2000) 236 F.3d 820, 824; *U.S. v. Lopez* (6th Cir. 2002) 309 F.3d 966, 969; *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061.[10]) One federal case has found a *Blakely* waiver based on the defendant’s failure to raise the issue until supplemental briefing on appeal. (*U.S. v. Curtis* (11th Cir. 2004) 380 F.3d 1308.)[11] The

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[9] *United States v. Cotton*, *supra*, 535 U.S. 625 determined that a defendant’s *Apprendi* claim was waived by the defendant’s failure to assert it in the trial court. The court first held was that it was not a jurisdictional defect to omit drug quantity allegations from the indictment. (*Id.* at p. 631.) The court proceeded to review this omission under the “plain-error test of Federal Rule of Criminal Procedure 52(b).” (*Ibid.*) “‘Under that test, before an appellate court can correct an error not raised at trial, there must be (1) “error,” (2) that is “plain,” and (3) that “affect[s] substantial rights.”’” (*Ibid.*) If all three of those conditions are met, the court can consider a forfeited error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. (*Ibid.*) The court concluded that the error at issue did not pass that fourth test. (*Id.* at pp. 632-634.) We do not regard *Cotton* as dispositive, since the court did not discuss our concern below whether it would have been futile to make an *Apprendi* objection.

For reasons unknown to us, *People v. Cleveland* (2001) 87 Cal.App.4th 263 purported to apply this plain error rule of federal procedure to an *Apprendi* claim. (*Id.* at p. 268, fn. 2.) The court was on more solid footing in also concluding that the claim, arising as it did under section 654, was reviewable without an objection. (*Ibid.*)

[10] *Marchand*, *supra*, 98 Cal.App.4th 1056 proceeded to reach the merits of the issue after holding that an *Apprendi* claim was waived. (*Marchand, supra,* at p. 1061.) The court did not consider whether it would have been futile to make an *Apprendi* objection.

[11] Recently the Fourth District Court of Appeal (Division One) has concluded that *Blakely* contentions were not forfeited by the failure to assert them in the trial court. (*People v. Ochoa* (2004) 121 Cal.App.4th 1551, 1564-1565 [involving consecutive sentencing]; *People v. George* (Sep. 15, 2004, D042980) ___ Cal.App.4th ___ [involving an upper term] [pp. 18-19].) The First District (Division Two) has reached the same

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federal rule applied in that case appears stricter than California's rule. In California, while a party may need a good reason to present a new issue in a supplemental brief (*People v. Smithey* (1999) 20 Cal.4th 936, 1017, fn. 26), an intervening decision may be a good reason. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 23-24.)

Defendant contends that no objection is required when it is futile under controlling precedent. *People v. Welch* (1993) 5 Cal.4th 228 explained: "Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence. (*People v. Turner* (1990) 50 Cal.3d 668, 703; *People v. Ogunmola* (1985) 39 Cal.3d 120, 123, fn. 4; *In re Gladys R.* (1970) 1 Cal.3d 855, 861.)" (*Id.* at pp. 237-238.)

Prior to *Apprendi*, California courts had expressly rejected the argument that there was any right to a jury trial on sentence aggravating factors (apart from death penalty cases under § 190.3). (*People v. Williams* (1980) 103 Cal.App.3d 507, 510; *People v. Betterton* (1979) 93 Cal.App.3d 406, 410-413.) California has conferred statutory rights to jury trial on enhancements (§ 1170.1, subd. (e)) and the issue "whether or not the defendant has suffered" an alleged prior conviction. (§ 1025, subd. (b); cf. § 1158.) But the California Supreme Court characterized these statutory rights as "limited" in *People v. Wiley* (1995) 9 Cal.4th 580, 589 (*Wiley*). Relying on *McMillan*, *supra*, 477 U.S. 79, *Wiley* stated that there was no federal or state constitutional right to a jury determination of "the truth of prior conviction allegations that relate to sentencing." (*Wiley, supra,* 9 Cal.4th at p. 586.) *Wiley* explained: "[T]he ability of courts to make factual findings in conjunction with the performance of their sentencing functions never has been

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conclusion (*People v. Butler* (Sep. 27, 2004, A101799) ___ Cal.App.4th ___ [involving an upper term] [p. 20]), as has the Fourth District (Division Two) (*People v. Vaughn* (Oct. 5, 2004, B165489) ___ Cal.App.4th ___ [involving an upper term and consecutive sentencing] [pp. 27-28]). The Third District has concluded that *Blakely* contentions were forfeited by the failure to assert them in the trial court. (*People v. Sample* (Sep. 13, 2004, C044445) ___ Cal.App.4th ___ [involving an upper term] [pp. 35-37, 42]. The Third District did not discuss the futility of making such an objection.

questioned. From the earliest days of statehood, trial courts in California have made factual determinations relating to the nature of the crime and the defendant's background in arriving at discretionary decisions in the sentencing process . . . ." (*Ibid.*)

"Currently, under the provisions of the Determinate Sentencing Act, trial courts are assigned the task of deciding whether to impose an upper or lower term of imprisonment based upon their determination whether 'there are circumstances in aggravation or mitigation of the crime,' a determination that invariably requires numerous factual findings. [Citation.] Similarly, trial courts are called upon to make factual determinations in their decision whether to impose consecutive sentences." (*Wiley, supra,* 9 Cal.4th at p. 587.) The California Supreme Court restated the lack of a constitutional right to a jury trial on an enhancing factor (*People v. Wims* (1995) 10 Cal.4th 293, 304) and on a prior prison term allegation (*People v. Vera* (1997) 15 Cal.4th 269, 277).

In 2001, the California Supreme Court explained that *Apprendi* had implicitly overruled part of its earlier holding in *People v. Wims*, *supra*, 10 Cal.4th 293. (*People v. Sengpadychith*, *supra*, 26 Cal.4th 316, 326.) But *Apprendi* was understood to apply to sentence enhancements, not to aggravating factors. In light of the above precedent, we conclude that it was reasonable for a defense attorney not to object at sentencing that the court could only rely on facts found by the jury beyond a reasonable doubt. The holding of *Blakely* was sufficiently unforeseeable that we find no forfeiture due to defendant's failure to object at sentencing.[12]

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[12] In light of this conclusion, we need not consider defendant's argument that his constitutional right to a jury trial cannot be waived by implication or mere failure to assert the right in the trial court. (Cal. Const., art. I, § 16; *People v. Holmes* (1960) 54 Cal.2d 442, 443-444; see *People v. Saunders*, *supra*, 5 Cal.4th at p. 589, fn. 5; *People v. Vera*, *supra*, 15 Cal.4th at pp. 276-277.) We do note that defendant had a jury trial resulting in a jury convicting him of two crimes.

C. Upper term

The first step in applying *Blakely* to the sentencing in our case is to determine what is the "prescribed statutory maximum" sentence. (*Apprendi*, *supra*, 530 U.S. 466, 490.) This 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." (*Blakely*, *supra*, ___ U.S. at p. ___, 124 S.Ct. at p. 2537, italics omitted.)

Under the Penal Code, the range for felony imprisonment unless otherwise specified is "16 months, or two or three years." (§ 18.) This range applies to possession of cocaine (Health & Saf. Code, § 11350, subd. (a)) and methamphetamine (Health & Saf. Code, § 11377, subd. (a)), and possession by an ex-felon of firearms and ammunition (§ 12021.1, subd. (a)). The sentence for armed possession of cocaine is "two, three, or four years." (Health & Saf. Code, § 11370.1.)

Under California's determinate sentencing law, "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime. . . . In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall set forth on the record the facts and reasons for imposing the upper or lower term. The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law." (§ 1170, subd. (b).) California Rules of Court contain a nonexclusive list of 16 possible aggravating factors.[13]

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[13] Rule 4.421 states: "Circumstances in aggravation include:

"(a) Facts relating to the crime, whether or not charged or chargeable as enhancements, including the fact that: [¶] (1) The crime involved great violence, great

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Ordinarily, under section 1170, subdivision (b), a sentencing judge cannot impose a sentence greater than the midterm without finding the existence of an aggravating factor. We conclude that, under *Blakely*, the midterm is the relevant statutory maximum in the absence of "the fact of a prior conviction," the jury's finding of an aggravating factor, or the defendant's admission of one. (Cf. *People v. George*, *supra*, ___ Cal.App.4th ___ [pp. 20-21]; *People v. Butler*, *supra*, ___ Cal.App.4th ___ [pp. 19-20].) However, as we explain more fully below, the upper term is the relevant statutory maximum if the jury finds an aggravating factor,[14] the defendant admits one, or the fact of a prior conviction permits an upper term sentence.

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bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness. [¶] (2) The defendant was armed with or used a weapon at the time of the commission of the crime. [¶] (3) The victim was particularly vulnerable. [¶] (4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission. [¶] (5) The defendant induced a minor to commit or assist in the commission of the crime. [¶] (6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process. [¶] (7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed. [¶] (8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism. [¶] (9) The crime involved an attempted or actual taking or damage of great monetary value. [¶] (10) The crime involved a large quantity of contraband. [¶] (11) The defendant took advantage of a position of trust or confidence to commit the offense.

"(b) Facts relating to the defendant, including the fact that: [¶] (1) The defendant has engaged in violent conduct which indicates a serious danger to society. [¶] (2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness. [¶] (3) The defendant has served a prior prison term. [¶] (4) The defendant was on probation or parole when the crime was committed. [¶] (5) The defendant's prior performance on probation or parole was unsatisfactory.

"(c) Any other facts statutorily declared to be circumstances in aggravation."

[14] In some cases the jury's verdict may reflect the finding of an aggravating factor. For example, it is aggravating if "[t]he defendant was armed with or used a weapon at the time of the commission of the crime." (Rule 4.421(a)(2).) If a jury found true an

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Here the court imposed the upper term of four years for armed possession of cocaine in reliance on the following four factors: defendant was on parole at the time of the current offense (rule 4.421(b)(4)), he had served a prior prison term (rule 4.421(b)(3)), his prior convictions are numerous and of increasing seriousness (rule 4.421(b)(2)), and defendant was convicted of other crimes for which he was receiving concurrent sentences (rule 4.421(a)(7)).

(1) The jury's findings

In this case the jury was informed that defendant stipulated "he has been convicted of an offense enumerated in . . . section 12021.1([b])." The jury was not informed of the nature of defendant's prior conviction or whether he had served a prison term or was on probation or parole. We do not understand the Attorney General to argue that the jury found any of the factors upon which the trial court relied in imposing the upper term.

(2) The fact of a prior conviction

The Attorney General contends that the first three of the four aggravating factors just stated fit within the *Apprendi* exception for "the fact of a prior conviction."

The "fact of a prior conviction" exception derives from *Almendarez-Torres v. United States* (1998) 523 U.S. 224 (*Almendarez-Torres*). *Almendarez-Torres* confronted the issue whether a provision in a federal statute prohibiting the return of a deporting alien "defines a separate crime or simply authorizes an enhanced penalty." (*Id.* at p. 226.) The maximum prison term for returning was two years, unless the deportation followed a conviction of an aggravated felony, in which case the maximum prison term was 20 years. (*Ibid.*) The court realized that the provision, unlike the minimum sentence requirement in *McMillan*, altered the maximum penalty for the crime. (*Almendarez-Torres, supra,* at p. 243.) But the court found no constitutional significance in this difference, explaining that "the sentencing factor at issue here—recidivism—is a

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enhancement for being armed or personally using a weapon under section 12022, this finding could justify the court's reliance on it as an aggravating factor, so long as the court strikes the punishment for the enhancement. (Rule 4.420(c); § 1170, subd. (b).)

traditional basis, if not the most traditional for a sentencing court's increasing an offender's sentence." (*Ibid.*) There is a longstanding tradition that recidivism is not an element, but goes only to the punishment. (*Id.* at p. 244.) The court concluded that recidivism was not an element of the offense. (*Id.* at p. 247.) The court noted that there was no standard of proof claim "because he admitted his recidivism at the time he pleaded guilty." (*Id.* at p. 248.)

Four Justices (Scalia, Stevens, Souter, and Ginsburg) dissented, concluding that it was a matter of serious doubt whether "the Constitution requires the recidivism finding in this case to be made by a jury beyond a reasonable doubt." (*Almendarez-Torres*, *supra*, 523 U.S. at p. 260 (dis. opn. of Scalia, J.).) To avoid this potential constitutional problem, the dissent would have construed the federal statute "as establishing a separate offense rather than a sentence enhancement." (*Id.* at p. 270 (dis. opn. of Scalia, J.).)

Apprendi described *Almendarez-Torres* as "at best an exceptional departure from the historic practice" of having a jury determine the facts necessary for sentencing. (*Apprendi*, *supra*, 530 U.S. 466, 487.) *Apprendi* characterized *Almendarez-Torres* as based partly on the defendant having "*admitted* the three earlier convictions for aggravated felonies—all of which had been entered pursuant to proceedings with substantial procedural safeguards of their own." (*Id.* at p. 488.) *Apprendi* stated, "Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, Apprendi does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule" that the court applied. (*Id.* at pp. 489-490, fn. omitted.)

Defendant points out that the *Apprendi* and *Blakely* majorities consisted of Justices Stevens, Scalia, Souter, Ginsburg, and Thomas. A concurrence by Justice Thomas in *Apprendi* explained, "one of the chief errors of *Almendarez-Torres*—an error to which I succumbed—was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase the offender's sentence. [Citation.] . . . [T]his approach just defines away the real issue. What matters is the way by which a

fact enters into the sentence." (*Id.* at pp. 520-521 (conc. opn. of Thomas, J.).) Defendant suggests that, with its majority gone, *Almendarez-Torres* is ripe for overruling and he "reserves the right to take this issue to the U.S. Supreme Court."

The Attorney General relies on *People v. Thomas* (2001) 91 Cal.App.4th 212, in which the Second District Court of Appeal (Division Five) concluded, " '[o]ther than the fact of a prior conviction,' refers broadly to recidivism enhancements which include section 667.5 prior prison term allegations. Notably, the recidivism enhancement in *Almendarez-Torres* had elements apart from the mere fact of a prior conviction," namely, it involved an aggravated felony. (*Id.* at p. 223.) "Also, the same reliability factors identified in *Apprendi* are applicable here." (*Ibid.*) Specifically, the prior prison terms were well documented. (*Ibid.*) The court concluded that prior prison terms were included in "the fact of a prior conviction." Defendant responds that *Thomas* has ignored the precise phrasing of *Apprendi*.

As an intermediate appellate court, we must follow the law as stated in *Almendarez-Torres* and *Apprendi*. Contrary to *Thomas*, we do not perceive the phrase "the fact of a prior conviction" to have a broad meaning including all recidivist circumstances. On the other hand, evidence of a prior conviction in the form of an abstract of judgment reflecting a prison commitment, together with evidence that defendant has committed a new offense, has been held sufficient proof that a defendant has served a prior prison term, absent contrary evidence showing that official duty was not performed. (*People v. Tenner* (1993) 6 Cal.4th 559, 566.) We agree with the result of *Thomas,* though not its reasoning. The fact of a prior conviction may include the resulting prison term if the documents relied on by the trial judge reflect a prison commitment as well as a conviction. We need not consider whether defendant being on parole is another fact of his prior conviction, because, as we explain below, he admitted it.

(3) Facts admitted by defendant

We need not determine the exact scope of the phrase "the fact of a prior conviction" in this case, because we find that defendant admitted at sentencing the

existence of two aggravating factors, namely, that he had gone to prison for bank robbery (rule 4.421(b)(3)) and that he was on "'probation' (parole)" (rule 4.421(b)(4)) at the time of his current offenses.

We repeat, "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge *may* impose solely on the basis of the facts reflected in the jury verdict or *admitted by the defendant*." (*Blakely*, *supra*, ___ U.S. at p. ___, 124 S.Ct. at p. 2537; first italics added, italics omitted.) Under California law, once a jury finds or the defendant admits the existence of a single aggravating factor, the maximum sentence a judge *may* impose is the upper term. (§ 1170, subd. (b); *People v. Osband* (1996) 13 Cal.4th 622, 730.) We recognize that the ultimate sentence may represent a weighing and balancing of a variety of aggravating and mitigating factors.[15] However, *Blakely*'s calculus requires ascertaining the potential statutory maximum available according to the jury's findings and the defendant's admissions. As footnote 19 of *Apprendi* explained, there is no problem with the sentencing judge considering additional facts not found by the jury so long as the resulting sentence is within the range established by the jury's findings and the defendant's admissions. (*Apprendi*, *supra*, 530 U.S. 466, 494, fn. 19.) A sentence within this maximum allowed under the verdict and the facts admitted by defendant does not violate *Blakely*. (*United States v. Lucca* (8th Cir. 2004) 377 F.3d 927, 934; *United States v. Salvidar-Trujillo* (6th Cir. 2004) 380 F.3d 274; cf. *United States v. Silva* (9th Cir. 2001) 247 F.3d 1051, 1060 [no *Apprendi* error when sentence is within range under facts admitted by the defendants in guilty pleas].)

To be sure, defendant here did not admit the existence of every aggravating factor on which the trial court ultimately relied in its discretion, but the maximum term under *Blakely* is dependent on what facts the defendant admits, not on any fact the defendant does not admit. Since the four year upper term was the statutory maximum for *Blakely*

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[15] Rule 4.420(b) provides in part, "Selection 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."

purposes based on facts admitted by defendant, defendant cannot complain about the sentencing court also relying on other facts as additional justification for this upper term. We conclude that there was no *Blakely* error under these circumstances, where the upper term imposed on defendant was within the maximum penalty under California law based on the facts found by the jury and the additional facts admitted by defendant. In other words, the prosecutor was not required to prove to a jury beyond a reasonable doubt what defendant was willing to admit to the sentencing judge.[16]

D. Consecutive sentencing

We note that neither *Apprendi* nor *Blakely* indicates what the statutory maximum is for two or more offenses. Indeed, *Apprendi* stated that the possibility of that defendant receiving consecutive sentences was irrelevant to determining whether the enhanced sentence on one count was constitutional. (*Apprendi*, *supra*, 530 U.S. at p. 474.)

Under California's determinate sentencing law, the usual consecutive sentence is one-third of the middle term for the second offense (§ 1170.1, subd. (a)) and it is optional with the court whether to impose a consecutive or a concurrent term (§ 669).[17] California Rules of Court list a number of factors relevant to determining whether a sentence should be concurrent or consecutive.[18] These include any circumstances in aggravation or mitigation.

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[16] In light of this conclusion, we need not consider how the following aggravating factor could ever be presented to a jury. "The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed." (Rule 4.421(a)(7).)

[17] Some statutes allow or require full consecutive sentences. (E.g., § 667.6, subds. (c), (d) [sex crimes]; § 1170.1, subd. (b) [kidnapping]; Health & Saf. Code, § 11370.2 [controlled substances].)

[18] Rule 4.425 states: "Criteria affecting the decision to impose consecutive rather than concurrent sentences include:

"(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. [¶]

(Continued)

However, under the Three Strikes statutes, consecutive sentencing is mandatory "[i]f there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts." (§§ 667, subd. (c)(6) & (7); 1170.12, subd. (a)(6) & (7); *People v. Casper* (2004) 33 Cal.4th 38, 42; *People v. Lawrence* (2000) 24 Cal.4th 219, 233; *People v. Hendrix* (1997) 16 Cal.4th 508, 513.) The sentencing court has discretion to impose a concurrent term under the Three Strikes statutes only if the court finds the current crimes were committed on the same occasion and arose from the same set of operative facts. (*People v. Lawrence*, *supra*, 24 Cal.4th at p. 233; *People v. Deloza* (1998) 18 Cal.4th 585, 599; *People v. Hendrix*, *supra*, 16 Cal.4th at pp. 512-513.) In this case where defendant was convicted of seven felonies after a prior strike, the trial court made six of the sentences concurrent and only imposed a consecutive sentence of eight months (doubled to one year, four months) for possessing ammunition.

These statutes confer no right on defendant to concurrent sentencing. (*People v. Sykes* (2004) 120 Cal.App.4th 1331, 1344; *People v. Reeder* (1984) 152 Cal.App.3d 900, 923; cf. *United States v. White* (2nd Cir. 2001) 240 F.3d 127, 135.) The usual statutory maximum penalty for two offenses is the principal term on one plus a subordinate, consecutive sentence of one-third the midterm for the other offense. (§ 1170.1, subd. (a).) We see no *Apprendi* problem in imposing a consecutive sentence based on facts not found by the jury so long as the total sentence is within this statutory maximum for the two crimes. (*People v. Sykes*, *supra*, 120 Cal.App.4th at pp. 1344-1345; *People v. Vonner* (2004) 121 Cal.App.4th 801, 811; *People v. Groves* (2003) 107 Cal.App.4th

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(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."

1227, 1231-1232; *United States v. White*, *supra*, 240 F.3d at p. 135; *United States v. Diaz* (8th Cir. 2002) 296 F.3d 680, 684; *United States v. Davis* (11th Cir. 2003) 329 F.3d 1250, 1254.)[19] The one year, four-month consecutive sentence imposed on defendant here was one-third the midterm for possessing ammunition. Since this sentence does not exceed the statutory maximum for a consecutive sentence, defendant is unable to establish a violation of *Blakely*.

7. CUMULATIVE IMPACT[†]

Defendant finally asserts that even if none of the alleged errors was prejudicial individually, they had a cumulative prejudicial impact.

In some cases, "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844-845, and cases there cited.) Above, we have assumed it was error for defense counsel not to object to the car key evidence and to the prosecutor's misstatement of the law regarding operability of a weapon. We have also assumed that defendant's pinpoint instruction should have been modified and given.

We do not see how these arguable independent errors had a cumulative effect. Their whole did not outweigh the sum of their parts. (*People v. Roberts* (1992) 2 Cal.4th 271, 326.) While the trial may not have been perfect, it was fair. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Boyette* (2002) 29 Cal.4th 381, 468.)

DISPOSITION

Defendant's conviction on count 2 (possessing cocaine) is stricken. The drug laboratory fee of $50, the attached penalty assessment of $85, the $150 drug program fee,

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[19] More recent cases have also concluded that consecutive sentencing does not violate *Blakely*. (*People v. Ochoa*, *supra*, 121 Cal.App.4th at pp. 1565-1567; *People v. Sample*, *supra*, ___ Cal.App.4th ___ [pp. 43-47]; *People v. Shaw* (Sep. 15, 2004, C043228) ___ Cal.App.4th ___ [pp. 18-22]; *People v. Vaughn*, *supra*, ___ Cal.App.4th ___ [pp. 28-32].)

[†] See footnote, *ante*.

and the attached penalty assessment of $255 are also stricken. As so modified, the judgment is affirmed. The trial court is directed to prepare a new abstract of judgment and forward it to the Department of Corrections.

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Walsh, J.*

WE CONCUR:

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Rushing, P.J.

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Premo, J.

*Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Trial Court:	Santa Clara County Superior Court No. EE220540
Trial Judge:	Hon. John J. Garibaldi
Attorney for Defendant and Appellant: (Under appointment by the Court of Appeal)	Dallas Sacher Sixth District Appellate Program
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