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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **CHI CHENG et al.,** **Defendants and Appellants.**	**A106563** **(Humboldt County** **Super. Ct. No. CR036563)**

Chi Cheng and Peng Her appeal the sentences imposed following their convictions by jury verdict of two counts each of assault with a deadly weapon. (Pen Code, § 245, subd. (a)(1).) They assert *Blakely* (*Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*)) and Penal Code section 654 error. Cheng also contends that the court based its imposition of the upper term on unreliable information in the presentence report.

BACKGROUND

The victim, Joseph Posey, was a janitor at a shopping mall. He was in the mall's family restroom when he heard a commotion in the adjacent men's restroom. As he went into the corridor to investigate, he saw a minor, later identified as Sunny Dass, flee the restroom, followed a minute or two later by appellants. Posey blocked appellants' path and asked, "What's going on?" They told him to mind his own business, asked if he "want[ed] some of this too?" and took "aggressive stances," Her positioning himself on Posey's left and Cheng positioning himself on Posey's right, as if ready to attack.

Her took a knife from his pocket, opened the four-to-five inch blade, and held it behind his own back. Posey backpedaled into the family restroom, followed by appellants. Cheng picked up Posey's broom, wielding it in a "menacing" fashion. He hit Posey across the face with the broom; the broom shattered in several pieces. Posey approached Cheng, who attempted to fend him off with the sharp point of the broom handle stump. Her stabbed Posey in the back, and Cheng ran away. Her flashed the knife at Posey, asked several times if he "wanted some more," and departed. Posey pursued appellants to the parking lot, where Her continued to threaten him with the knife. Cheng pulled up in a car, Her got in, and appellants drove away.

Posey had a stab wound in his lower back and his face was swollen.

The commotion in the men's restroom that had attracted Posey's attention involved Cheng and Her threatening Sunny Dass and a friend of Dass. The friend had been a witness to a gang rape in which Her's younger brother had been charged.

Each appellant was convicted of two counts of assault with a deadly weapon. They were each sentenced to an upper term of four years on count I and to one-third the midterm (one year) on count II, to be served concurrently with the sentence on count I.

DISCUSSION

I. *Presentence Report Information--Cheng Only*

Cheng contends the court erroneously imposed the upper term based, in part, on "raw detention data" in the presentence report, and he is therefore entitled to a resentencing based solely on reliable information.

Cheng was 21 years old at the time of this October 2003 offense. His presentence report contained a section entitled "juvenile referral history." Entries in this section included: "challenging other minors to fight" in October 1996, disposed of in January 1997 as "closed after investigation"; burglary, count V in a first amended petition, in January 1998, disposed of in May 1998 as "dismissed outright" after appellant admitted three other counts in the petition; burglary, vandalism, hit and run, and speeding on March 30 and 31, 1998, all disposed of on March 31, 1998 as "Not filed by District

Attorney. Case closed," and curfew violation on March 5, 1999, disposed of the same day as "Information only."

The section of the presentence report entitled "ADULT ARREST RECORD" listed a petty theft citation in January 2001, "No disposition listed"; battery on a noncohabitating former spouse in April 2003, disposed of on May 1, 2003 as "detention only; Prosecution released"; battery on a cohabitant, unlawful sexual intercourse with a minor, and forcible lewd act with a child in May 2003, disposed of as "detention only. Prosecution released. Victim unavailable/declined to testify"; and infliction of corporeal injury on a cohabitant in October 2003, disposed of as "Referral rejected by District Attorney's Office."

At sentencing, Cheng argued that all these references should be stricken from the presentence report because they constituted an unfair representation of his record, insofar as none of them resulted in juvenile or adult criminal adjudications. The court did not specifically rule on his argument.[1]

The court imposed the upper term for reasons paralleling the recommendation of the presentence report. It found no factors in mitigation. It enumerated the same six factors in aggravation enumerated in the presentence report: (1) the crimes involved great violence and threat of great bodily harm, disclosing a high degree of cruelty, viciousness and callousness (Cal. Rules of Court, rule 4.414(a)(1)[2]); (2) victim Posey was particularly vulnerable because he was unarmed and alone in a confined space with two assailants who each had a weapon (rule 4.414(a)(3)); (3) the manner of the crime indicated criminal sophistication (rule 4.414(a)(8)); (4) defendant engaged in violent conduct indicating a serious danger to society (rule 4.414(b)(1)); (5) defendant's prior sustained petitions in juvenile proceedings were numerous and of increasing seriousness (rule 4.414(b)(2)); and

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[1] At the request of Cheng's appellate counsel, the trial court subsequently struck these references from the probation report to mitigate the harm they were causing Cheng in prison.

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

(6) defendant's prior performance on juvenile probation was unsatisfactory (rule 4.414(b)(5)).

The gravaman of Cheng's contention is that there is insufficient evidence in the presentence report to support factor four, engaging in violent conduct, and factors five and six, relating to his juvenile history. He argues the court impermissibly based these findings on police contacts that did not result in adult convictions or petitions sustained in juvenile delinquency proceedings. He further contends that it is reasonably probable the court's reliance on these erroneous factors was decisive in its imposition of the upper term.

The People argue in response that Cheng's failure to secure a ruling on his request to strike portions of the presentence report precludes his making this claim on appeal. The People's argument is strained. Cheng clearly asserted his lack-of-criminal-adjudication objections to the presentence report. As discussed below, the trial court, even though it did not order the challenged factors physically stricken from the presentence report during sentencing, impliedly did so, because these factors in aggravation may reasonably be construed as based on improper information, which the court presumably knew.

Alternatively, the People argue the trial court did not base the upper term on information improperly included in the presentence report.

Rule 4.411.5(a)(3) provides that the probation officer's presentence report shall include a summary of the defendant's record of prior conduct, including convictions as an adult and petitions sustained in juvenile delinquency proceedings, but records of an arrest or charge not leading to a conviction or the sustaining of a petition shall not be included unless supported by facts concerning the arrest or charge. This rule derives from cases holding that evidence of police contacts that have not led to an arrest or conviction should not be included in a presentence report without supporting factual information, given the unreliability, inherent prejudice, and potential for an unfair sentencing hearing from such evidence. (See *People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 719; *People v. Calloway* (1974) 37 Cal.App.3d 905, 908-909.)

Subsequent cases explained that this rule does not stand for the proposition that it is improper to include data regarding an arrest in the probation report. Rather, the rule requires that such data "should be clearly labeled so that the trial judge will not *mistake* an arrest for a conviction. . . . [W]here arrest data [are] presented in a manner which is not likely to mislead the judge, there is no error in the court's receiving and considering it. [Citations.] [¶] Thus the fact the probation report contains arrest data is no basis for reversal in the absence of evidence in the record that the trial judge was actually misled into mistaking arrests for convictions. [Citations.]" (*People v. Phillips* (1977) 76 Cal.App.3d 207, 215.) "[W]here the sentence was based on other factors any possible confusion of this nature is not prejudicial. [Citations.]" (*Ibid.*) The burden lies with the defendant to demonstrate error. (*Ibid.*)

The instant presentence report identifies 14 contacts between the police and Cheng as a juvenile, half of which resulted in sustained petitions. Even discounting the contacts where the disposition was dismissal of charges or no filing of charges by the district attorney, there remained seven sustained petitions, a sufficiently high number to constitute substantial evidence to support the court's finding of "numerous" prior sustained petitions in juvenile proceedings (factor five).

There is also substantial evidence to support the court's finding that Cheng's performance on juvenile probation was unsatisfactory (factor six). His 1996 informal probation (Pen. Code, § 654) was not completed successfully. He was declared a ward of the juvenile court in February 1997, after admitting burglarizing several parked cars with four cohorts; he was placed with his parents. In July 1997 he violated his probation by involving himself in a physical altercation between a group of Asian juveniles and a group of non-Asian juveniles. In January and March 1998 he again violated probation by an admitted burglary and possession of burglary tools and by findings that he stole a vehicle and evaded a peace officer. In September 1998 he violated again by an admitted vehicle theft; in the disposition of this matter his probation officer noted that he "'is loyal to his peers and cannot turn away from their criminal actions.'" He was then placed in a residential placement facility until returned to placement with his father in August 1999.

Cheng's unsuccessful informal probation and his several violations of formal probation support a finding of unsatisfactory probation performance.

Cheng asserts that the finding that he engaged in violent conduct that indicates a serious danger to society (factor four) is based on his adult arrest record in the presentence report. Insofar as none of these arrests resulted in a conviction, he argues they cannot support the finding. If the record demonstrated that the court's finding was based on this adult arrest record, we would agree, because the presentence report does not contain any descriptive information about these arrests. However, we must presume that, absent evidence to the contrary, the trial court knew and applied the applicable law. (*People v. Mack* (1986) 178 Cal.App.3d 1026, 1032.) Therefore, pursuant to rule 4.411.5(a)(3), the court would not have considered this adult arrest record because the record lacked the requisite factual support.

Nothing in this record suggests the court based its finding on this improper information. The presentence report nowhere suggests that the probation department identified "engaged in violent conduct [etc.]" as a factor in aggravation based on Cheng's previous arrest record. The prosecutor did not refer to his prior arrest record in arguing for the upper term. Rather, she emphasized how the shopping mall setting of the assaults exacerbated their danger—public place, busy night, other people in the vicinity—and how the public expects to feel safe and protected in such a setting without concern for being placed at risk of physical attack. In other words, she argued for the "engaged in violent conduct indicating a serious danger to society" factor based on Cheng's conduct in the instant offense. We may reasonably presume that the court also based its "engaged in violent conduct" finding on his behavior constituting his current conviction, not his past arrests that did not result in convictions.

Finally, we observe that, even assuming the trial court erroneously relied on Cheng's adult arrest record and his juvenile police contacts that did not result in sustained petitions to find aggravating factors four, five and six, it also found three other factors in aggravation, which are well supported by the record, and no factors in mitigation. A single factor in aggravation, if supported by substantial evidence, will support an upper

term. (*People v. Osband* (1996) 13 Cal.4th 622, 730.) The court's error, if any, in relying on improper material in the presentence report to support imposition of the upper term was harmless. (See *People v. Dancer* (1996) 45 Cal.App.4th 1677, 1695.)

II. *Penal Code Section 654—Cheng and Her*

Appellants were each convicted of two assaults with a deadly weapon. Their convictions were based on perpetrating one assault, i.e., Cheng attacking with the broom handle, Her attacking with the knife, and each aiding and abetting his cohort in the perpetration of the other assault. The presentence report recommended that they be committed for the aggravated term of four years for the first conviction (count I) and one-third the midterm (one year) for the second conviction (count II), to be served concurrently with the sentence on count I. At sentencing appellants argued, pursuant to Penal Code section 654, that the two offenses constituted a single course of conduct, limiting the maximum term to four years. The court found that concurrent sentencing was appropriate because the assaults were committed "almost" (Cheng's sentencing) and "virtually" (Her's sentencing) simultaneously and had "the same objective."

Cheng now contends that his act of hitting Posey with the broom and aiding Her in stabbing Posey was a single act that can be punished only once. Her contends the two assaults can be punished only once because they were on one victim incident to a single objective.

Penal Code section 654 precludes multiple punishments, including concurrent sentences, for a single act, or an indivisible course of conduct. (*People v. Deloza* (1998) 18 Cal.4th 585, 591-592.) Whether a course of criminal conduct is divisible depends on the actor's intent and objective. If all offenses were merely incidental to or the means of accomplishing or facilitating one objective, the defendant may be found to have harbored a single intent and may be punished only once. If he harbored multiple or simultaneous objectives that are independent of and not merely incidental to each other, he may be punished for each violation committed in pursuit of each objective, even though the violations share common acts or were parts of an otherwise indivisible course of conduct. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

"Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.]" (*Jones, supra*, 103 Cal.App.4th at p. 1143.) Although the appellate court reviews the trial court's determination in the light most favorable to the respondent and presumes the existence of every fact the trial court could reasonably deduce from the evidence, there must be substantial evidence to support the findings. (*Ibid.*)

Given the trial court's own statements that the two assaults occurred essentially simultaneously and had the same objective, we cannot infer that it impliedly found that each defendant harbored multiple, independent objectives in acting as both perpetrator and aider/abettor of his cohort. The presentence report recommended concurrent sentences for the same reason: "the two assaults were committed so closely in time and place and had the same objective." Nor can we discern on this record any objective on the part of either defendant other than a joint-venture assault on Posey for preventing them from chasing after Sunny Dass, the minor they had been threatening in the men's restroom. Consequently, the court erred in imposing multiple punishments, in the form of concurrent sentences, for the two convictions.[3]

III. *Blakely*

Relying on *Blakely, supra,* 124 S.Ct. 2531, appellants contend that imposition of the upper term is constitutionally invalid because the factors in aggravation were neither admitted nor determined by a jury.

Blakely held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a

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[3] When a defendant suffers multiple convictions, and punishment for each of them is precluded by Penal Code section 654, the appropriate procedure is to impose sentence on all convictions, then stay execution of sentence on all but one of the offenses. (*People v. Deloza*, *supra*, 18 Cal.4th at pp. 591-592; *People v. Avila* (1982) 138 Cal.App.3d 873, 879.) This practice ensures that the defendant will not receive a '"windfall of freedom from penal sanction"' should the conviction on which punishment was imposed be reversed. (*People v. Salazar* (1987) 194 Cal.App.3d 634, 640.) For this reason, fractional sentences, e.g., one-third the midterm, for the offenses for which execution of sentence is to be stayed are inapplicable in the ambit of Penal Code section 654.

reasonable doubt." (*Blakely, supra,* 1245 S.Ct. at p. 2538.) It explained that the relevant "statutory maximum is not the maximum sentence a court may impose after finding additional facts, but the maximum it may impose based solely on the facts reflected in the jury verdict or admitted by the defendant." (*Id*. at pp. 2537-2538.) This language provoked conflicting California Court of Appeal opinions that endeavored to determine its effect on California's determinate sentencing scheme, which provides a statutory maximum for most offenses, but a maximum based on aggravating actors found by the judge, not the jury.

As appellants candidly acknowledge, our Supreme Court has recently resolved the issue of *Blakely's* effect on California's determinate sentencing law; consequently, they raise the issue to preserve it for federal court review. *People v. Black* (2005) 35 Cal.4th 1238 concluded "that the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*Id*. at p. 1244.) Given this holding, we must conclude there was no constitutional infirmity in the imposition of the upper terms based on an application of *Blakely*. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

The abstract of judgment for each appellant is ordered modified to reflect imposition of the midterm of three years on count II. That sentence is stayed, pursuant to Penal Code section 654, the stay to become permanent upon each appellant's completion

of the sentence imposed on count I. The superior court shall forward the modified abstracts of judgment to the Department of Corrections.

In all other respects the judgments are affirmed.

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Jones, P. J.

We concur:

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Stevens, J.

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Gemello, J.