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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

LEOPOLDO PANTOJA CERVANTES,

Defendant and Appellant.

A131298

(San Mateo County
Super. Ct. No. SC070400A)

Appellant Leopoldo Pantoja Cervantes was convicted, pursuant to a plea agreement, of possessing heroin for sale, possessing methamphetamine for sale, and willful cruelty to a child. On appeal, he contends the trial court erred in denying his motion to suppress evidence because (1) the warrant to search his apartment was secured based on information obtained by an improper warrantless entry into his residence, not justified by exigent circumstances; (2) the officers' inserting appellant's keys in the door locks of his apartment constituted an illegal search; and (3) his sentence was unauthorized because the trial court erroneously failed to select the longest term of imprisonment imposed as the principal term. We shall affirm the judgment.

PROCEDURAL BACKGROUND

On February 24, 2010, appellant was charged by information with possession of heroin for sale (Health & Saf. Code, § 11351—count one), with the additional allegation that, in the commission of the offense, he possessed at least 14.25 grams of a substance

containing heroin (Pen. Code, § 1203.07, subd. (a)(1));¹ possession of cocaine salt for sale (Health & Saf. Code, § 11351—count two); possession of methamphetamine for sale (Health & Saf. Code, § 11378—count three), with the additional allegation that appellant possessed for sale or sold at least 28.5 grams of methamphetamine or at least 57 grams of a substance containing methamphetamine (§ 1203.073, subd. (b)(2)); transportation of heroin (Health & Saf. Code, § 11352—count four); transportation of cocaine salt (Health & Saf. Code, § 11352—count five); transportation of methamphetamine (Health & Saf. Code, § 11379—count six); and three counts of willful cruelty to a child (§ 273a, subd. (a)—counts seven, eight, and nine). The information further alleged, as to counts one through three, that appellant had a prior narcotics conviction within the meaning of section 1203.07, subdivision (a)(11), and, as to counts one through six, that appellant had three prior narcotics convictions, within the meaning of section 11370.2, subdivisions (a) and/or (c).

On October 28, 2010, appellant filed a motion to suppress evidence and disclose the identity of a confidential informant. On November 30, 2010, the trial court denied appellant's motion for disclosure of the identity of the confidential informant. On December 10, 2010, following a hearing on appellant's motion to suppress evidence, the trial court denied that motion as well.

On January 14, 2011, appellant pleaded no contest to count one, possession of heroin for sale; count three, possession of methamphetamine for sale; and count seven, willful cruelty to a child. He also admitted one of the prior conviction allegations (§ 11370.2, subd. (a)).

Also on January 14, 2011, the trial court sentenced appellant to a total of eight years and eight months in state prison.

On February 9, 2011, appellant filed a notice of appeal.²

¹ All statutory references are to the Penal Code unless otherwise indicated.

² Because the sole issue on appeal concerns the propriety of the trial court's denial of appellant's motion to suppress evidence, the factual background will be limited to the evidence presented at the hearing on the motion to suppress. (See pt. I.A., *post.*)

DISCUSSION

I. Denial of Appellant's Motion to Suppress

Appellant contends the trial court erred when it denied his motion to suppress evidence because (1) police secured the warrant to search his apartment based on information obtained by an improper warrantless entry into his residence, not justified by exigent circumstances, and (2) the officers' insertion of appellant's keys into the door locks of his apartment constituted an illegal search.

A. Trial Court Background

Two witnesses testified at the hearing on appellant's motion to suppress evidence. San Francisco Police Officer Luis DeJesus testified that, on January 28, 2010, he executed a search warrant for appellant's person and his Honda automobile. Police had previously been watching appellant and had seen him coming to and going from an apartment building on Pine Street in South San Francisco. DeJesus had seen him entering a narrow passageway in the building, but he could not see which apartment was his.

On the afternoon of January 28, 2010, DeJesus saw appellant enter the passageway of the Pine Street building with a female child, but could not see where they went beyond the passageway. DeJesus then saw appellant leave the building alone and drive a couple of blocks in his car before DeJesus and other officers pulled him over. To the best of DeJesus' knowledge, appellant did not make any phone calls after he was pulled over. Police found evidence of narcotics trafficking in the car. DeJesus did not search the car for indicia of address. Three other officers searched the car, but he did not know if they searched for paperwork indicating appellant's address. Appellant said he lived in San Jose. DeJesus obtained keys from appellant, which he wanted to use to find out which apartment was appellant's.

DeJesus testified that he did not know whether appellant was working with a confederate, but he "assumed that on a lot of occasions people that are involved in the trafficking markets are usually part of a hierarchy where there are subordinates and superiors and [a] distribution chain." DeJesus believed "there could possibly be a source

of supply of narcotics” at the Pine Street address. On a number of occasions, DeJesus had previously seen appellant leave that residence, drive to locations, meet with people for very short amounts of time, walk away, and get back in his vehicle.

When he took appellant’s keys, DeJesus planned to try to identify the apartment appellant had been coming from to locate the source of supply of narcotics or to locate other people involved in the distribution operation. He felt time pressure because “[a] lot of times it is my experience when I have arrested people not a lot of time passes before there are people in their operating circle [who] are aware of the arrest, whether it is phone calls or they were suppose [sic] to check in. Whatever the reason being, a very short amount of time passes before other people in their circle are aware of the arrest. ¶¶ If that happens, if there was a source of supply in a specific location, you could lose it if the other people are aware he was arrested. They could move it, destroy it, things of that nature.”

With that in mind, DeJesus and other officers went to the Pine Street apartment building. There were five or six doors to apartments inside the building. DeJesus, Sergeant Hart, and Officer Ellis went first to apartment number one, put a key in the door’s deadbolt lock, and noticed that the key turned in the lock. He and Sergeant Hart immediately “began to bang on the door and shout ‘San Francisco Police. Open the door.’” They were shouting loud enough for anyone inside the apartment to hear. He was pounding on the door to alert the people inside the apartment that the police were outside, to announce their presence, and to hopefully keep anyone inside from shooting them.

As they pounded on the door and shouted, DeJesus could clearly hear footsteps inside the apartment. He then put the key into the lock on the doorknob, which “began to turn and there was resistance on the door. I couldn’t open it. . . . I wasn’t able to turn the knob and I wasn’t able to push the door open. There was resistance I could feel pushing back against me.” At that point, DeJesus was concerned about, first, officer safety in that the people inside could be arming themselves and, second, the destruction of possible evidence inside the apartment. He therefore forced the door open with his shoulder. A

woman was standing on the other side of the door and he also noticed a female child close to the age of ten.

Sergeant Hart explained to the woman the reason for their presence while DeJesus and Officer Ellis walked through the apartment for officer safety reasons. The woman and child were the only people present in the apartment, and they sat down on the living room couch and watched television while Ellis went to obtain a search warrant. He returned about an hour and a half later. Once Ellis returned with the search warrant, the officers carefully searched the apartment, where they found evidence of narcotics trafficking.

San Francisco Police Officer Mike Ellis also testified at the suppression hearing. Once appellant had been arrested,³ Ellis was concerned about locating his residence right away because of the circumstances, especially the fact that appellant was stopped in close proximity to what was believed to be his residence. He lived in what “appeared to be a multi-unit apartment building. We were unaware whether or not he had any associates inside his residence. And also feared that maybe one of his neighbors might drive by as we were a few blocks away from his residence on their way home and notify the people in his residence that we had stopped him.” Ellis was concerned that this could result in the destruction of evidence and other possible suspects escaping before police arrived.

Ellis was present when Officer DeJesus was trying the door locks in the apartment building. He “could hear some running around in the apartment.” The officers knocked and announced their presence. When DeJesus tried the door locks and found they worked, the officers felt some resistance inside the door. They “were attempting to gain entry, do a quick protective sweep, and then freeze the residence so I could respond.” They did not wait for someone to answer the door because they were fearful that they could lose evidence or that someone could be getting a weapon. Once in the apartment, he saw no sign of distress on the part of the woman or the female child who were there.⁴

³ When he was stopped, police obtained a Mexican I.D. from appellant, which gave his name as “Navarro.”

⁴ Officer Ellis did not recall if there was a second child inside the apartment.

As the officers did their sweep, Ellis saw a photograph of appellant on a wall and also saw some packaging materials and scales that were in plain view. When Ellis returned from getting a search warrant, appellant was also sitting inside the apartment.

In denying the motion to suppress, the trial court ultimately found that the entry was proper based on exigent circumstances: “So I think when you look at the totality of the circumstances, you look at the surveillance of the residence, the fact that the police didn’t know the specific apartment number and therefore couldn’t get a search warrant; based on that information alone when they had arrested the defendant; the fact that the defendant lied about his name and address; the fact that when the police went there, there was force against the door when they tried to open it; certainly circumstantial evidence. They had announced they were the police; circumstantial evidence that whoever was inside didn’t want them inside and they were doing something else; the testimony that there were sounds of running in the apartment. [¶] So when you look at all that, I agree it’s a close call, I certainly do, but I think there’s sufficient evidence to justify the entry for exigent circumstances so the Court is going to deny the motion to suppress.”

B. Legal Analysis

The Fourth Amendment of the United States Constitution requires state and federal courts to exclude evidence obtained from unreasonable government searches and seizures. (*People v. Williams* (1999) 20 Cal.4th 119, 125.) Pursuant to section 1538.5, a defendant can move to suppress evidence obtained in an improper search or seizure. “In reviewing the trial court’s denial of a motion to suppress evidence, we view the record in the light most favorable to the trial court’s ruling, deferring to those express or implied findings of fact supported by substantial evidence. [Citations.] We independently review the trial court’s application of the law to the facts. [Citation.]” (*People v. Jenkins* (2000) 22 Cal.4th 900, 969.)

1. The Warrantless Entry

A warrantless search within a home is “ ‘ ‘presumptively unreasonable.’ ” [Citations.]” (*Kentucky v. King* (2011) ___ U.S. ___, 131 S.Ct. 1849, 1856 (*King*).) But this presumption may be overcome in certain circumstances, if one of a number of

exceptions apply. (*Ibid.*) One such exception to the warrant requirement is exigent circumstances, which, as relevant here, involves the need “ ‘to prevent the imminent destruction of evidence.’ ” (*Ibid.*) In such a case, the question is whether “ ‘the circumstances, viewed *objectively*, justify the action.’ [Citations.]” (*Id.* at p. 1859; accord, *People v. Ortiz* (1995) 32 Cal.App.4th 286, 292.)

The California Supreme Court has set forth the factors relevant to a determination of exigency in the context of imminent destruction of evidence: “ ‘When Government agents . . . have probable cause to believe contraband is present and, in addition, based on the surrounding circumstances or the information at hand, they reasonably conclude that the evidence will be destroyed or removed before they can secure a search warrant, a warrantless search is justified. The emergency circumstances will vary from case to case, and the inherent necessities of the situation at the time must be scrutinized.

Circumstances which have seemed relevant to courts include (1) the degree of urgency involved and the amount of time necessary to obtain a warrant [citations]; (2) reasonable belief that the contraband is about to be removed [citations]; (3) the possibility of danger to police officers guarding the site of the contraband while a search warrant is sought [citation]; (4) information indicating the possessors of the contraband are aware that the police are on their trail [citation]; and (5) the ready destructibility of the contraband and the knowledge “that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic” [citations].’ ” (*People v. Bennett* (1998) 17 Cal.4th 373, 385.)

In the present case, the evidence presented at the suppression hearing shows that the following relevant circumstances were known to police before they went to the Pine Street address: in prior surveillance, police had seen appellant coming to and going from an unknown apartment in the apartment building at that address; appellant had made numerous trips from that residence to meet with people for very short amounts of time; the police had just arrested appellant, pursuant to a warrant, within a few blocks of the apartment building after finding evidence of narcotics trafficking in his car; upon his arrest, appellant provided police with a false name and address; and appellant had left a

child at the residence shortly before his arrest, which led officers to believe that at least one adult was still at the residence.

In the experience of the testifying officers, there is usually a hierarchy of people involved in a drug distribution operation and both officers felt time pressure because of a concern that other people involved in the operation would quickly become aware of the arrest, either from a neighbor passing by as appellant was arrested and telling someone at the residence or because appellant would not check in with someone who could be expecting to see or hear from him. Once associates became aware of the arrest, they could move or destroy evidence or escape before police obtained a search warrant.⁵

In light of the facts known to police and the experience of the two officers who testified, we find that the concern about the possible destruction of evidence was reasonable in the circumstances. (See, e.g., *People v. Camilleri* (1990) 220 Cal.App.3d 1199, 1210-1211 [exigent circumstances found where police assumed, based on information obtained in arrest of one suspect, that there was evidence of drug trafficking in house, dealer was located there and would shortly become alarmed when suspect did not return, and would likely conceal or destroy contraband].)

In addition, even were we to conclude that the foregoing information was too speculative, without more, to show exigent circumstances, adding the following facts to the equation further buttresses the trial court's finding of exigent circumstances: after the officers tested the key in the deadbolt lock, knocked and announced their presence, they heard footsteps—what Officer Ellis described as “some running around”—inside the apartment.⁶ This led to the officers' reasonable concern that someone in the apartment was about to destroy evidence. (See *King, supra*, 131 S.Ct. 1849, 1862-1863; *People v. Freeny* (1974) 37 Cal.App.3d 20, 26, 32-33 (*Freeny*); see also pt. I.B., *post*.)

⁵ It also bears noting that, as the trial court stated, the police would have had difficulty obtaining a search warrant without knowing the apartment number of the apartment to be searched.

⁶ In part I.B.2, *post*, we will discuss the propriety of the officers testing the key in the lock of appellant's apartment door.

In *Freeny, supra*, 37 Cal.App.3d 20, which the trial court in the present case cited when it denied appellant's motion to suppress, the defendant was arrested and drugs were found in his car. An officer believed, based on his experience, that there were likely more drugs at the defendant's home and that his wife, who was also involved in the drug trafficking, would learn of his arrest and destroy evidence. (*Freeny*, at pp. 26, 32-33.) Added to this evidence of time urgency, the court noted that when officers knocked on the door, announced their identity, and said to open the door, they heard "shrill female sounds emanating from within the house and the sound of footsteps running away from the door." (*Id.* at p. 26.) These sounds indicated to the officers that the defendant's wife "had begun the destruction of evidence." (*Id.* at p. 33.) All of these circumstances justified the trial court's denial of the defendant's suppression motion based on exigent circumstances. (*Ibid.*)

Appellant argues nonetheless that DeJesus' demand to open the door was improper and constituted a threat to violate the Fourth Amendment. (See *King, supra*, 131 S.Ct. at pp. 1858, fn. 4 & 1862-1863.)

In *King, supra*, 131 S.Ct. 1849, 1854, police officers approached an apartment, banged on the door, and announced their presence. As soon as they began banging on the door, they could hear people moving around and the sound of things being moved inside the apartment. This led the officers to believe that drug-related evidence was about to be destroyed. They therefore announced that they were going to enter the apartment and kicked in the door, where they found several people and, in a protective sweep of the apartment, saw marijuana and cocaine in plain view. (*Ibid.*)

The United States Supreme Court held: "Where, as here, the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed." (*King, supra*, 131 S.Ct. p. 1858.) The Court explained: "When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has

no obligation to open the door or to speak.” (*Id.* at p. 1862.) However, “[o]ccupants who choose not to stand on their constitutional rights but instead elect to attempt to destroy evidence have only themselves to blame for the warrantless exigent-circumstances search that may ensue.” (*Ibid.*)

The Court also observed, however, that when police without a warrant or a legally sound basis for a warrantless search “threaten that they will enter without permission unless admitted,” there would be a strong argument “that, at least in most circumstances, the exigent circumstances rule should not apply.” (*King, supra*, 131 S.Ct. p. 1858, fn. 4.) The Court in *King* did find, in that case, that there was “no evidence of a ‘demand’ of any sort, much less a demand that amounts to a threat to violate the Fourth Amendment.” (*Id.* at p. 1863.) “Given that the announcement [that they were going to enter] was made *after* the exigency arose, it could not have created the exigency.” (*Ibid.*) The Court remanded the case to the state court—which had assumed for purposes of argument that the sounds inside the apartment were sufficient to establish that evidence was being destroyed—to determine whether an exigency had in fact existed and whether the police had taken any action that violated or threatened to violate the Fourth Amendment. (*King, supra*, 131 S.Ct. at pp. 1862-1863.)

Here, we do not agree with appellant that Officer DeJesus’ statement, “open the door,” as officers knocked and identified themselves, constituted a threat to violate the Fourth Amendment. The Court in *King* did not state that such a statement amounted to a threat to violate the Constitution. Rather, in express dictum, the Court said that, in most circumstances, “there [was] a strong argument” that the exigent circumstances rule should not apply when police—without a warrant or another legal basis for a warrantless entry—*threaten to enter* without permission unless admitted. (*King, supra*, 131 S.Ct. at p. 1858, fn. 4.) Later in the opinion, the Court stated that a threatened Fourth Amendment violation could be shown where police announce “that they would break down the door if the occupants did not open the door voluntarily.” (*Id.* at p. 1863.) Here, there is no evidence of such an improper threat to enter. We do not believe, in the context of the officers’ knocking and identifying themselves, that the statement “open the

door” amounted to a threat to violate the Fourth Amendment. (See *King*, at p. 1862 [when officers without a warrant knock on a door and request an opportunity to speak, they are not engaging in conduct violating Fourth Amendment]; *United States v. Hendrix* (10th Cir. 2011) 664 F.3d 1334, 1339-1340 [relying on *King* in finding that officers without a warrant who went to a motel room at night, gave a false name, and “continually demand[ed] entry after initially being refused” did not create exigency by engaging or threatening to engage in conduct violating Fourth Amendment]; see also *People v. Freeny*, *supra*, 37 Cal.App.3d at pp. 26, 33 [exigent circumstances finding based in part on sounds officers heard inside apartment after they knocked on door, announced their identity, and said to open door].)

Thus, we conclude that all of the various circumstances known to the officers which, on their own, might not have justified a finding of exigent circumstances, in their totality support a finding that circumstances existed in this case which, viewed objectively, justified their actions. (See *King*, *supra*, 131 S.Ct. at p. 1859; *People v. Ortiz*, *supra*, 32 Cal.App.4th at p. 292.)

2. Inserting Appellant’s Key Into The Door Locks of His Apartment

As a preliminary matter, respondent argues that appellant has forfeited the issue of whether Officer DeJesus’ insertion of the key into the door lock of appellant’s apartment constituted an illegal search because he failed to argue in the trial court that the suppression motion should be granted on this theory. (See *People v. Kennedy* (2005) 36 Cal.4th 595, 612, overruled in part on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459 [failure to object in trial court on ground raised on appeal forfeits issue on appeal].) We agree with respondent that, having failed to ask the trial court to address this ground for granting his suppression motion, appellant is precluded from raising it now.

In addition, even were we to address the issue based on the evidence in the record, we would find it to be meritless. Recently, in *United States v. Jones* (2012) 132 S.Ct. 945, 948 (*Jones*), government agents had attached a global positioning system (GPS) tracking device to the defendant’s vehicle and used the device to monitor the vehicle’s

movements on public streets over a four-week period. The United States Supreme Court held that the government’s “installation of a GPS device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a ‘search.’ ” (*Id.* at p. 949, fn. omitted.) This is because “[t]he Government physically occupied private property for the purpose of obtaining information,” and such a common-law trespass would have been considered a “search” when the Fourth Amendment was adopted. (*Id.* at p. 949.) The Court explained that the reasonable expectation of privacy standard (see *Katz v. United States* (1967) 389 U.S. 347) added to, but did not substitute for, the common-law trespass test. (*Jones*, at p. 951.) The Court did not resolve the question whether the warrantless search in that case was reasonable under the Fourth Amendment because the government had not raised it below and the appellate court had not addressed it. (*Id.* at p. 954.)

In supplemental briefing, the parties addressed whether, in light of *Jones*, the insertion of the key in appellant’s deadbolt lock constituted a search. Appellant argues that this act *was* a search because it “was a trespass upon appellant’s home for the purpose of obtaining information—i.e., whether the home was his home.” Respondent disagrees and argues that the officers’ momentary testing of the lock with a key that had lawfully come into their possession did not constitute a search. (Compare, e.g., *United States v. Salgado* (6th Cir. 2001) 250 F.3d 438, 456 [“mere insertion of a key into a lock, by an officer who lawfully possesses the key and is in a location where he has a right to be, to determine whether the key operates the lock, is not a search”]; *United States v. Concepcion* (7th Cir. 1991) 942 F.2d 1170, 1171 (*Concepcion*) [inserting and turning key in lock was a search, but officers were entitled to learn a suspect’s address without probable cause and, therefore, use of key to accomplish that objective did not violate Fourth Amendment]; see also *United States v. Flores-Lopez* (7th Cir. 2012) 670 F.3d 803, 807 [finding that *Concepcion*’s holding “survives *Jones*, which declined to decide whether the search entailed in attaching a GPS device requires a warrant”]; cf. *United States v. Grandstaff* (9th Cir. 1987) 813 F.2d 1353, 1358, fn. 5 [“ ‘when our court has considered an officer’s physical intrusion upon a vehicle . . . even for the limited purpose

of its identification, we have been unable to define a bright line between “no search” and “search but not unreasonable.” . . . [W]e find that the distinction is not crucial.”.]

We need not attempt to resolve this question because we conclude that, even assuming testing the key in the deadbolt lock was a search, it did not violate the Fourth Amendment. That is because, balancing the intrusion on appellant against the justification for that intrusion, the officer’s testing of the key was reasonable. (Cf. *Skinner v. Railway Labor Executives’ Assn.* (1989) 489 U.S. 602, 619.)

When Officer DeJesus inserted the key into the apartment door’s deadbolt lock, he was attempting to ascertain whether the apartment was appellant’s, which officers reasonably believed was connected to the crime they were investigating. (See *United States v. Moses* (4th Cir. 2008) 540 F.3d 263, 272 (*Moses*) [testing key in lock “served the discrete investigative purpose of confirming that” defendant had access to residence].)⁷ In addition, testing the key in the lock did not intrude on the home itself or disclose any information about its contents. (See *Concepcion, supra*, 942 F.2d at pp. 1172-1173.) Given the justification for and the minimal intrusiveness of testing the key, this extremely brief and limited action did not violate the Fourth Amendment. (See *Moses*, at p. 272 [“discrete act of inserting the key into the lock and discovering whether or not it fit did not offend the Fourth Amendment”].) Moreover, as previously discussed, the record reflects that when DeJesus—after learning that the key fit into the deadbolt lock of the apartment—subsequently turned the key in the second lock, he was reasonable in believing that exigent circumstances justified that entry for the reasons previously discussed. (See pt. I.B.1, *ante*.)

Accordingly, whether or not testing the key in the lock amounted to a search, appellant’s claim that Officer DeJesus’ action violated his Fourth Amendment rights would fail on the merits.

⁷ Indeed, it appears that, other than needing to confirm appellant’s apartment number, the police had probable cause supporting issuance of a search warrant. (Cf. *Concepcion, supra*, 942 F.2d at p. 564.)

In conclusion, the trial court properly denied appellant's motion to suppress evidence.

II. The Allegedly Unauthorized Sentence

Appellant contends his sentence was unauthorized because the trial court erroneously failed to select the longest term of imprisonment imposed as the principal term.

A. Trial Court Background

At the sentencing hearing, the trial court chose the four-year middle term for count seven (the § 273a conviction for willful cruelty to a child) as the principal term. In addition, the court imposed terms of one-third the midterm on count one (one year for the Health & Saf. Code, § 11351 conviction for possession of heroin for sale) and on count three (eight months for the Health & Saf. Code, § 11378 conviction for possession of methamphetamine for sale). The court also imposed a separate three-year term for the section 11370.2, subdivision (a), prior conviction enhancement that related to the conviction on count one.

B. Legal Analysis

Appellant claims that the trial court's use of the four-year middle term on count seven as the principal term violated section 1170.1's requirement that the principal term "consist of the greatest term of imprisonment imposed by the court for any of the crimes" (§ 1170.1, subd. (a).) Instead, according to appellant, the court should have added the three-year enhancement term under Health and Safety Code section 11370.2, subdivision (a), to the three-year middle term for count one—the violation of Health and Safety Code section 11351—for a total of six years. Appellant asserts that this combined six-year term, as the greatest term imposed, should have been treated as the principal term. This scenario would have resulted in an eight-year sentence, rather than the eight-year, eight-month sentence that was imposed here. Appellant thus argues that the total sentence in this case of eight years, eight months was unauthorized and must be corrected now, even though defense counsel did not object at the sentencing hearing.

An unauthorized sentence is a “narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal.” (*People v. Scott* (1994) 9 Cal.4th 331, 354 (*Scott*)). “[A] sentence is generally ‘unauthorized’ where it could not lawfully be imposed under any circumstance in the particular case.” (*Ibid.*) By contrast, “claims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner.” (*Ibid.*)

Section 1170.1, subdivision (a), “plainly and unambiguously provides that the trial court must designate as the principal term the longest term actually imposed by the court” (*People v. Miller* (2006) 145 Cal.App.4th 206, 215-216.) Health and Safety Code section 11370.2, subdivision (a), provides that any person convicted of a violation of, inter alia, section 11351, shall receive “a full, separate, and consecutive three-year term for each prior felony conviction of . . . Section 11351.” The question here is whether the court should have attached the three-year term for the Health and Safety Code section 11370.2, subdivision (a), enhancement to the three-year term for the violation of Health and Safety Code section 11351, which would make their combined six-year term the longest term imposed and, therefore, the principal term. (See § 1170.1, subd. (a).)

Our Supreme Court has explained that there are two types of sentence enhancements: “(1) those which go to the nature of the offender; and (2) those which go to the nature of the offense.” (*People v. Coronado* (1995) 12 Cal.4th 145, 156.) “An enhancement which is based on the defendant’s conduct in committing the charged offense, such as the personal use of a weapon or the infliction of great bodily harm, is imposed on the count to which it applies. [Citation.] Enhancements based on prior convictions are status enhancements. Because they are related to the status of the offender, rather than the manner of commission of a crime, they are applied only once, in arriving at an aggregate sentence. [Citations.]” (*People v. Edwards* (2011) 195 Cal.App.4th 1051, 1057 (*Edwards*)). The appellate court in *Edwards* further explained that section 11370.2 enhancements “are status enhancements, in that they

pertain to defendant’s status as a drug conviction recidivist.” (*Edwards*, at p. 1058; accord, *People v. Tillotson* (2007) 157 Cal.App.4th 517, 542 [as a status enhancement, enhancement under section 11370.2 “could be imposed but once to aggregate [defendant’s] sentence”]; *People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1310 [describing section 11370.2 as a type of enhancement that adds generally to aggregate term of imprisonment, rather than one that attaches to a particular offense].)

Here, since the three-year section 11370.2, subdivision (a), enhancement did not attach to the three-year term for count one (violation of Health & Saf. Code, § 11351), the trial court properly chose the four-year term for count seven (violation of § 273a) as the principal term. (See § 1170.1, subd. (a).)

DISPOSITION

The judgment is affirmed.

Kline, P.J.

We concur:

Lambden, J.

Richman, J.