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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JESSE LEE SYKES, Defendant and Appellant.	B168042 (Los Angeles County Super. Ct. No. BA229844)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronni B. MacLaren, Judge. Affirmed in part, reversed in part, and remanded for resentencing.

Marleigh A. Kopas, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, Erika D. Jackson, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, parts I-III (B) are certified for publication.

I. INTRODUCTION

Defendant, Jesse Lee Sykes, appeals from his convictions for: arson of an inhabited structure (Pen. Code,[1] § 451, subd. (b)); misdemeanor indecent exposure (§ 314, subd. (1)); stalking (§ 646.9, subd. (a)); three counts of making terrorist threats (§ 422); and three counts of making misdemeanor annoying telephone calls. (§ 653m, subd. (a).) The jury also found that defendant had previously been convicted of two serious felonies. (§§ 667, subds. (a)(1), (b)–(i), 1170.12.) Defendant argues the trial court improperly: refused to instruct the jury regarding in-court identifications; admitted evidence of his prior serious felony convictions; and imposed consecutive sentences. The Attorney General argues that several sentencing errors occurred and the abstract of judgment should be corrected. In the published portion of this opinion we discuss two issues. First, we conclude the trial court did not abuse its discretion in permitting the victim of defendant's terrorist threats to testify she knew he had previously been convicted in federal court of two counts of bank robbery. Second, we conclude the imposition of consecutive sentences did not violate the holding of *Blakely v. Washington* (2004) 542 U.S. ___, ___ [124 S.Ct. 2531, 2537-2539, 2543]. We affirm in part, reverse in part, and remand for resentencing.

II. FACTUAL BACKGROUND

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Osband* (1996) 13 Cal.4th 622, 690; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) On October 29, 2001, Christiane B. was employed as a treatment coordinator at Vinewood Corrections, a federal halfway house. Christiane had a masters degree in clinical psychology.

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

Christiane's position at Vinewood was as an intern responsible for treating drug and alcohol clients residing at the facility. Christiane met in group and individual therapy sessions with the clients. Defendant was one of the clients who was required to participate in drug and alcohol counseling by the federal Bureau of Prisons. Christiane had seen defendant in approximately five individual counseling sessions between September and October 2001. She had also observed defendant in two or three group sessions in that time frame. Christiane had reviewed defendant's file, observed him in the halfway house setting, was familiar with his handwriting, and listened to his voice on the foregoing occasions.

Christiane was in her office at approximately 9:15 p.m. on October 29, 2001. Defendant walked into Christiane's office. Defendant closed the door behind him. Defendant took an aggressive posture in front of the door. Christiane asked defendant to leave and indicated she was scheduled for another appointment. Defendant stated: "No, you don't. I checked your schedule." Thereafter, defendant unzipped his pants and exposed his penis. Christiane feared that defendant intended to rape her. Christiane hit the wall in an attempt to get the attention of coworkers. Defendant informed her that there was no one else around the office. A door slammed outside Christiane's office. Defendant ran out. Christiane locked her office door and attempted to summon a supervisor. When she could not reach anyone, she waited until other staff performed a perimeter check. Christiane left the building and went home. Christiane reported the incident to her supervisor the following morning. An incident report was prepared. Christiane consulted with her clinical supervisor and returned home.

Christiane was informed the following day, October 30, 2001, that defendant escaped from the halfway house. Christiane feared that defendant would retaliate against her. Christiane maintained records in her office that included an address at the beach, her phone number, and her birth date. Christiane returned to work on November 1, 2001. As Christiane unlocked her office, she found a folded note that appeared to have been slid under her door. Christiane recognized defendant's handwriting on the note, which stated,

"To be continued." Christiane feared defendant was coming back to harm her. Christiane took a brief leave of absence from work. When she left her office it was locked. The windows were closed.

At approximately 2:00 a.m. on November 3, 2001, a fire occurred at the Vinewood facility. After arriving at the facility, Los Angeles City Fire Department Captain Philippe Delbar saw a fire through a broken window in Christiane's office. The office was completely involved in the fire. There were residences located on the second floor of the facility as well as adjacent to the administrative offices on the first floor. Captain Delbar suspected arson based on: burn patterns on the wall; a substantial burn on the floor; an odor of gasoline; and indications of explosion in Christiane's office. Fire Chief Thomas Ottman concluded that Christiane's office was the point of origin for the fire. Chief Ottman also determined that the fire was caused by a flammable liquid explosion. The burn pattern suggested that the fire ignited just under the broken window. Chief Ottman noted that in his experience someone in the vicinity of a flammable liquid explosion would suffer burns. The burns would injure uncovered parts of the individual's body such as hands, arms, face, and chest.

David Lohrli was a resident at the Vinewood facility at the time of the fire on November 3, 2001. Mr. Lohrli's room was on the second floor above the offices. Two other individuals slept in the same room as Mr. Lohrli. Defendant had been Mr. Lohrli's roommate prior to November 2001. Mr. Lohrli went to bed at approximately 10:00 p.m. on November 2, 2001. Mr. Lohrli was awakened by what he thought was a gunshot. Mr. Lohrli smelled smoke. Mr. Lohrli went to the window. Mr. Lohrli saw a man standing next to the fence of an adjacent apartment building. Mr. Lohrli did not recognize the man. Another resident, Aaron Brown, was also awakened by what he characterized as a "major explosion." Mr. Brown was able to see flames when he looked out the window. Mr. Brown also saw someone scaling the fence. Defendant fit the description of the person he saw "falling over the gate." Mr. Brown ran to another window and saw the same man running down the street.

On approximately November 4 or 5, 2001, Larry Obando, saw defendant at American Medical Wholesale Supply, their mutual place of employment. Mr. Obando was working on his truck. Defendant called out to Mr. Obando. Defendant had bandages on his arms. Defendant's hair was burned off. Defendant had scars or scabs on his head, face, arms, and legs. Defendant asked Mr. Obando to speak to a supervisor. Defendant wanted to pick up his paycheck. Mr. Obando inquired about the check. Mr. Obando then spoke to defendant about the paycheck.

Dr. Heather Flaherty worked as a resident at the Olive View Medical Center emergency room on November 5, 2001. Dr. Flaherty treated defendant for burns at approximately 9:30 p.m. on November 5, 2001. Defendant had second-degree burns to his face. Defendant had a few patches of hair that had been burned. The remainder of defendant's hair had been shaved. Defendant also had second to third-degree burns on his hands and wrists. Defendant also had second-degree burns to his abdomen area. Defendant told Dr. Flaherty that he had been working on a car when the engine exploded and burned him. However, Dr. Flaherty believed the injuries were more likely to have been incurred in a flash fire.

On November 19, 2001, defendant telephoned Christiane at her home. Christiane feared for her safety. Christiane testified defendant told her: "[H]e had done something really stupid. Because — he had been — because he was very pissed off at [her] for the write-up." Defendant also said, "[B]ecause he had done something stupid, he got into a really bad accident." When Christiane asked whether it was a car accident, defendant said, "No, not that kind of accident." Christiane told defendant that she had to get off the phone. Christiane asked defendant for a phone number where she could call him right back. Defendant gave Christiane a phone number. Defendant also told Christiane: "I am not done with you yet. I am coming to pay you a visit." Christiane feared that defendant would rape, maim, or kill her. Christiane believed this because of his prior history and he was an escapee. Christiane immediately went to the police station and reported the telephone conversation with defendant.

Defendant continued to leave telephone messages on Christiane's answering machine. Four of the messages were heard by Christiane on November 22, 2001. The fifth message was heard on January 8, 2002. Tapes of those messages were played for the jury at trial. Christiane was very alarmed by defendant's calls because he knew her telephone number and made reference to her recent birthday. In addition, one message made reference to the monthly rent for the beach apartment she had just vacated. Christiane felt defendant must have been to the apartment. Christiane also believed defendant had obtained access to her personal records kept in her office. In the first message, defendant cautioned: "[P]retty nervous by now, [h]uh? . . . give me A+ for effort. Let me just say this, make right what you did wrong. You know you lied. You know you're just as guilty as I am. [¶] I'm not going to do anything to you. But you'll never have any peace until you tell the truth. You'll lose your job. You'll lose your peace. You'll be looking over your shoulder. You'll be thinking who's following me. . . ." Defendant also made reference to the fact that Christiane was on a leave of absence for stress. Christiane had believed that was a personnel issue known only to her boss and the vice president of the agency. Defendant also stated, "What do you think you are going to do, hide out [at] friends' houses?" Christiane had been staying with friends. Christiane believed he knew that she was not at home. Defendant told Christiane, "I'm going to take your life." Christiane believed she and her father could be harmed. Christiane also believed a friend, Tina Musial, was in harm's way. Christiane believed defendant was hunting her to cause her harm. In addition to the messages played for the jury, Christiane received between five and seven additional calls from defendant on November 26, 2001. Christiane packed some belongings and traveled to various places. Christiane stayed in hotels and moved around to avoid defendant. Christiane learned from Ms. Musial that defendant had called on Christmas Eve. Christiane became very frightened because defendant did not seem to be giving up on his fixation.

On January 6, 2002, Christiane returned to her apartment. She moved the same day to another location. On January 7, 2002, Christiane went to a doctor's appointment

in Beverly Hills. Thereafter, Christiane learned that Ms. Musial had received a message at their apartment from defendant. Christiane was on her way to the old apartment following her doctor's appointment. Defendant's message was: "Keep looking over your shoulder. I am right behind you, believe me. Beverly Hills is a nice area. See you soon." Christiane had made the doctor's appointment at the last minute. As a result, no one knew about the appointment. Christiane believed defendant must have followed her from her new address. Based on defendant's conviction for armed bank robbery, his behavior in her office, and his persistent harassment, Christiane feared he would harm her. Christiane was afraid to return to her new apartment. After spending the day at the police station, she made arrangements to move out of state. Christiane did not return to Los Angeles until after defendant had been arrested. Christiane received worker's compensation benefits for stress until June 2002, when she began work as a therapist at a different agency.

III. DISCUSSION

A. Prior Convictions Evidence

Defendant argues the trial court improperly admitted evidence of his prior federal bank robbery convictions to establish the reasonableness of Christiane's fearful state of mind. Defendant filed a pretrial motion to exclude the use of his prior conviction for impeachment and other purposes pursuant to Evidence Code section 352.[2] Thereafter, the prosecution moved to admit the prior convictions for purposes of impeachment and to demonstrate Christiane's perception of defendant's credible threat to her safety as

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[2] Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

required in both the stalking and the terrorist threat charges. At the Evidence Code section 402 hearing on the admissibility of the prior conviction evidence, Christiane testified that she was fearful of defendant because of her familiarity with his case file. Christiane knew that defendant had committed armed bank robberies. The nature of defendant's crimes, when coupled with his indecent exposure, escape status, and the threatening note that he left in her office, led Christiane to believe he was capable of violence and even murder. On November 3, 2001, a fire was set in Christiane's office. Christiane also received threatening phone calls from defendant between November 19, 2001, and January 7, 2002. In those phone calls, defendant told Christiane he was "pissed off" at her because of the "write-up" against him. Defendant told Christiane he had done something stupid that resulted in an accident. Defendant said he was not done with Christiane. Defendant said: he would pay her a visit; she would have to look over her shoulder for the rest of her life; he knew where she lived, her birthday, the name of her "significant other"; and the status of her leave of absence for stress. As a result, Christiane feared for her life. The last message left by defendant for Christiane indicated that he knew she had been in Beverly Hills that day. Defendant said, "I'm right behind you." Christiane was so distraught that she moved out of state.

Following Christiane's testimony, defense counsel argued that if the trial court permitted Christiane to testify regarding what she learned from reading defendant's file, the inquiry should be brief. Further, defense counsel argued any such testimony should be restricted to Christiane's knowledge that defendant had been convicted of bank robbery. The trial court noted: "All this evidence goes to the elements of [section] 422, the threatening statement caused the person reasonably to be in sustained fear of her own safety or her immediate family's safety regardless of whether the defendant actually intended to carry out the threats, right?" The prosecutor added that the evidence was also relevent to the stalking charge. In ruling that Christiane would be allowed to testify regarding the prior convictions, the trial court noted: "At a minimum, this court is going to allow [Christiane] to testify that [defendant] is a convicted felon because that's just—

it's misleading to the jury. It's not fair. [¶] Perhaps if he was convicted of petty theft, there wouldn't be a basis for reasonable fear. He's convicted of bank robbery in which she thought was armed robbery, which it was. It was a pellet gun. It is far more probative than prejudicial. [¶] At a minimum, this jury is going to know she's fearful because he's a convicted bank robber." The trial court directed the prosecutor to, "[I]nstruct [Christiane] not to mention anything she reviewed in the file as a basis for her view, that the review of the file be limited only to the handwriting issue at this point."

The California Supreme Court has repeatedly held: "Rulings under Evidence Code section 352 come within the trial court's discretion and will not be overturned absent an abuse of that discretion. [Citations.]" (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070; *People v. Kipp* (2001) 26 Cal.4th 1100, 1121; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125; *People v. Cudjo* (1993) 6 Cal.4th 585, 609.) Moreover, the Supreme Court has described the words "undue prejudice" as used in Evidence Code section 352 thusly: "'[P]rejudicial' is not synonymous with 'damaging,' but refers instead to evidence that '"uniquely tends to evoke an emotional bias against defendant"' without regard to its relevance on material issues. [Citations.]" (*People v. Kipp*, *supra*, 26 Cal.4th at p. 1121, quoting *People v. Bolin* (1998) 18 Cal.4th 297, 320; *People v. Karis* (1988) 46 Cal.3d 612, 638.) In this case, the trial court could properly admit the evidence of defendant's prior convictions for armed bank robbery. The trial court could reasonably conclude that Christiane's knowledge of defendant's prior bank robbery convictions was probative on the issue of the reasonableness of her fear for her safety or that of her family. As the trial court explained at the time it ruled on the issue, it would be unfair for the prosecution to be constrained from proving the elements of the stalking and terrorist threat charges because the true substance for Christiane's fear could not be revealed. The trial court's limitation to the fact that defendant had suffered such convictions without further elaboration of Christiane's familiarity with defendant's treatment file, provided ample protection from undue prejudice. Moreover, the jury was instructed to consider the prior convictions for limited purposes and to not consider them

to determine whether defendant had a propensity to commit the crimes charged in this case or possessed any traits of character. Moreover, the California Supreme Court has consistently stated that on appeal it is presumed that the jurors obeyed the instructions they are given. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1337; *People v. Osband*, *supra*, 13 Cal.4th at p. 714; *People v. Kemp* (1961) 55 Cal.2d 458, 477.)

In any event, even if it was a mistake to admit the evidence in question, any such error was harmless. Evidence Code section 353 states: "A verdict or finding shall not be set aside . . . by reason of the erroneous admission of evidence unless: [¶] . . . [¶] (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice." As noted previously, the evidence of defendant's guilt in this case was significant: defendant escaped from the correctional facility immediately after he exposed himself to Christiane; the threatening note left in Christiane's office matched his handwriting; defendant suffered second and third-degree burns around the time that the arson occurred; defendant's voice was recognizable in the calls made to Christiane and phone messages left for her; defendant's messages revealed that he had discovered personal information about Christiane that had been in her office; and defendant's messages suggested he had followed Christiane to locations only she knew about. Therefore, it is not reasonably probable that defendant would have received a better result if the challenged evidence had been excluded. (*People v. Ayala* (2000) 23 Cal.4th 225, 271; *People v. Sakarias* (2000) 22 Cal.4th 596, 630.)

Defendant further argues that the evidence of his prior convictions should have been excluded pursuant to Evidence Code section 1101, subdivision (a).[3] However,

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[3] Evidence Code section 1101, subdivision (a) provides: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct o a specified occasion."

defendant has waived this argument. It was not asserted in the trial court. (Evid. Code, § 353, subd. (a); see *People v. Kipp*, *supra*, 26 Cal.4th at p. 1122; *People v. Earp* (1999) 20 Cal.4th 826, 878.)

B. Jury Trial Issue Concerning Consecutive Sentences

Defendant argues, based upon the holding of *Blakely v. Washington*, *supra*, 542 U.S. at pages __ [124 S.Ct. at pp. 2538-2543], that he was entitled to a jury trial as to those factors which determine whether consecutive sentences may be imposed. Section 669[4] grants trial courts the authority to impose consecutive sentences. (*In re Hoddinott* (1996) 12 Cal.4th 992, 1000; *People v. Fain* (1983) 34 Cal.3d 350, 354 & fn. 3.) The individual sentences on each count were subject to enhanced sentencing because of defendant's prior federal bank robbery convictions. Section 667, subdivisions (b)(6) and (7) state: "(6) If 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, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e). [¶] (7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6), the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law." (See *People v. Casper* (2004) 33 Cal.4th 38, 45-46; *People v. Hendrix* (1997) 16 Cal.4th 508, 513.) Section 1170.12,

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[4] Section 669 states in part: "When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively. Life sentences, whether with or without the possibility of parole, may be imposed to run consecutively with one another, with any term imposed for applicable enhancements, or with any other term of imprisonment for a felony conviction."

subdivisions (a)(6) and (7) contain the same language. Defendant argues that the "not committed on the same occasion, and not arising from the same set of operative facts" are factual predicates which *Blakely* mandates be found by a jury before mandatory consecutive sentences may be imposed.

Defendant was convicted of the following offenses. In count 1, defendant was convicted of arson of an inhabited structure in violation of section 451, subdivision (b) which he committed on November 3, 2001. In count 2, defendant was convicted of stalking in violation of section 646.9, subdivision (a), which was alleged to have occurred between October 29, 2001, and April 4, 2002. In count 3, defendant was convicted of misdemeanor indecent exposure in violation of section 314, subdivision (1), which was alleged to have been committed on October 29, 2001. In count 4, defendant was convicted of making a criminal threat in violation of section 422 on or about November 19, 2001. In count 5, defendant was convicted of making a criminal threat on or about November 22, 2001. In count 6, defendant was convicted of making a criminal threat on or about January 6, 2002. In count 7, defendant was convicted of misdemeanor making an annoying telephone call in violation of section 653m, subdivision (a) on or about November 19, 2001. In count 8, defendant was convicted of misdemeanor making an annoying telephone call on or about November 22, 2001. In count 9, defendant was convicted of a third misdemeanor charge of making an annoying telephone call on or about January 6, 2002. Finally, defendant was found to have been convicted of two prior serious felony convictions thereby qualifying him for enhanced sentencing pursuant to sections 667, subdivision (e), and 1170.12, subdivision (c).

Relevant to the issue before us, defendant was sentenced as follows. As to count 1, the arson of a structure charge, defendant received a sentence of 25 years to life pursuant to sections 667, subdivision (e)(2)(A)(ii) and 1170.12, subdivision (c)(2)(A)(ii).[5] As to the remaining felony counts, the trial court dismissed one of the two

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[5] Section 667, subdivision (e)(2)(A)(ii) provides: "For purposes of subdivisions (b) to (i), inclusive, and in addition to any other enhancement or punishment provisions

prior serious felony conviction findings pursuant to section 1385, subdivision (a). As to count 2, the stalking charge, the sentence was stayed pursuant to section 654, subdivision (a). As to counts 4, 5, and 6, the criminal threat convictions, the trial court imposed consecutive sentences. As required by sections 667, subdivision (e)(1), and 1170.12, subdivision (c)(1),[6] the criminal threat sentences for counts 4, 5, and 6 were doubled. In other words, the doubled determinate sentences for the three criminal threat counts were ordered to run consecutively to the indeterminate 25-year-to-life sentence imposed as to count 1, the arson charge.

Defendant argues he was entitled to a jury trial on the issue as to whether the determinate criminal threats sentences were required by section 667, subdivisions (c)(6)

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which may apply, the following shall apply where a defendant has a prior felony conviction: [¶] . . . [¶] (2)(A) If a defendant has two or more prior felony convictions as defined in subdivision (d) that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of: [¶] . . . [¶] (ii) Imprisonment in the state prison for 25 years." Section 1170.12, subdivision (c)(2)(A)(ii) states similarly: "For purposes of this section, and in addition to any other enhancements or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction: [¶] . . .[¶] (2)(A) If a defendant has two or more prior felony convictions, as defined in paragraph (1) of subdivision (b), that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of [¶] . . . [¶] (ii) twenty-five years . . . ."

[6] Section 667, subdivision (e)(1) provides: "For purposes of subdivisions (b) to (i), inclusive, and in addition to any other enhancement or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction: [¶] (1) If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction." Section 1170.12, subdivision (c)(1) states similarly: "For purposes of this section, and in addition to any other enhancements or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction: [¶] (1) If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction."

and (7) and 1170.12, subdivisions (a)(6) and (7) to run consecutively to the arson of a structure count. Defendant reasons that the United States Supreme Court's holding in *Blakely* requires that a jury, not a judge, find whether the factors which warrant consecutive sentencing are present. Associate Justice Antonin Scalia set forth the pertinent procedural status of *Blakely* as follows: "[The defendant] pleaded guilty to the kidnap[p]ing of his estranged wife. The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months. Pursuant to state law, the court imposed an 'exceptional' sentence of 90 months after making a judicial determination that he had acted with 'deliberate cruelty.'" (*Blakely v. Washington*, *supra*, 542 U.S. at p. __ [124 S.Ct. at p. 2534].) In a fashion similar to California's determinate sentencing statutes, Washington law allowed the trial court to impose a sentence within a range of terms.[7] The trial judge was allowed to increase a sentence within a range based upon facts which

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[7] The Supreme Court described the Washington sentencing law thusly: "In Washington, second-degree kidnap[p]ing is a class B felony. [Wash. Rev. Code Ann.] § 9A.40.030(3). State law provides that '[n]o person convicted of a [class B] felony shall be punished by confinement . . . exceeding . . . a term of ten years.' § 9A.20.021(1)(b). Other provisions of state law, however, further limit the range of sentences a judge may impose. Washington's Sentencing Reform Act specifies, for petitioner's offense of second-degree kidnap[p]ing with a firearm, a 'standard range' of 49 to 53 months. See § 9.94A.320 (seriousness level V for second-degree kidnap[p]ing); App. 27 (offender score 2 based on § 9.94A.360); § 9.94A.310(1), box 2-V (standard range of 13-17 months); § 9.94A.310(3)(b) (36-month firearm enhancement). A judge may impose a sentence above the standard range if he finds 'substantial and compelling reasons justifying an exceptional sentence.' § 9.94A.120(2). The Act lists aggravating factors that justify such a departure, which it recites to be illustrative rather than exhaustive. § 9.94A.390. Nevertheless, '[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense.' *State v. Gore,* 143 Wash.2d 288, 315-316, 21 P.3d 262, 277 (2001). When a judge imposes an exceptional sentence, he [or she] must set forth findings of fact and conclusions of law supporting it. § 9.94A.120(3). A reviewing court will reverse the sentence if it finds that 'under a clearly erroneous standard there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence.' *Gore, supra,* at 315, 21 P.3d, at 277 (citing § 9.94A.210(4))." (*Blakely v. Washington*, *supra*, 542 U.S. at p. __, fn. omitted [124 S.Ct. at p. 2535].)

may not have been the subject of a jury finding or an admission by the accused. The Supreme Court held that when a term greater than the specified statutory *maximum for the offense* is imposed because of a fact not admitted by the accused during the plea process or found to exist by jurors, the defendant's jury trial right as established in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 was violated. Associate Justice Scalia explained: "Our precedents make clear, however, 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*. See *Ring* [*v. Arizona*], *supra*, [536 U.S.] at 602, 122 S.Ct. 2428 ('"the maximum he would receive if punished according to the facts reflected in the jury verdict alone"' (quoting *Apprendi*, *supra*, at 483, 120 S.Ct. 2348)); *Harris v. United States* [(2002] 536 U.S. 545, 563 [] (plurality opinion) (same); cf. *Apprendi*, *supra*, at 488, 120 S.Ct. 2348 (facts admitted by the defendant). In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [1 J. Bishop, Criminal Procedure, § 87, p. 55 (2d. ed. 1872)] and the judge exceeds his [or her] proper authority." (*Blakely v. Washington*, *supra*, 542 U.S. __, __, original italics [124 S.Ct. at p. 2537].)

Neither *Blakely* nor *Apprendi* purport to create a jury trial right to the determination as to whether to impose consecutive sentences. Both *Blakely* and *Apprendi* involve a conviction for a single count. The historical and jurisprudential basis for the *Blakely* and *Apprendi* holdings did not involve consecutive sentencing. (*Blakely v. Washington*, *supra*, 542 U.S. at p. __ [124 S.Ct. at pp. 2534-2536]; *Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 476-483, 489-490, fn. 15.) Further, in *Apprendi*, Associate Justice John Paul Stevens explained the jury trial right at issue: "We do not suggest that trial practices cannot change in the course of centuries and still remain true to the principles that emerged from the Framers' fears 'that the jury right could be lost not only

by gross denial, but by erosion.' *Jones* [*v. United States* (1999)], 526 U.S. [227,] at 247-248 []. But practice must at least adhere to the basic principles undergirding the *requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable doubt*." (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 483-484, fn. omitted, italics added.) The consecutive sentencing decision does not involve the facts, in Justice Stevens' words, "necessary to constitute a statutory offense." (*Id*. at p. 483.) In fact, the consecutive sentencing decision can only be made once the accused has been found beyond a reasonable doubt to have committed two or more offenses—this fully complies with the Sixth Amendment jury trial and Fourteenth Amendment due process clause rights. Those facts which affect the appropriate sentence within the range of potential terms of incarceration for each *offense* are subject to *Blakely* and *Apprendi*; this constitutional principle does not extend to whether the sentences for charges which have been found to be true beyond a reasonable doubt shall be served consecutively. In this respect, we are in full accord with the numerous courts that have held that *Apprendi* does apply to the decision to impose consecutive sentences. (*United States v. Harrison* (8th Cir. 2003) 340 F.3d 497, 500; *United States v. Lafayette* (D.C. Cir. 2003) 337 F.3d 1043, 1049-1050; *United States v. Hernandez* (7th Cir. 2003) 330 F.3d 964, 982; *United States v. Davis* (11th Cir. 2003) 329 F.3d 1250, 1254; *United States v. Chorin* (3rd Cir. 2003) 322 F.3d 274, 278-279; *United States v. Lott* (10th Cir. 2002) 310 F.3d 1231, 1242-1243; *United States v. White* (2nd Cir. 2001) 240 F.3d 127, 136; *United States v. Henderson* (S.D.W.V. 2000) 105 F.Supp.2d 523, 536-537; *People v. Clifton* (Ill. 2003) 795 N.E.2d 887, 902; *People v. Carney* (Ill. 2001) 752 N.E.2d 1137, 1144-1145; *People v. Wagener* (Ill. 2001) 752 N.E.2d 430, 441; *People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231.)

[The portion of the opinion that follows, part III (C) is deleted from publication. See *post* at page 30 where publication is to resume.]

C. In-Court Identification Instruction

Defendant argues the trial court improperly refused to amplify CALJIC No. 2.92[8] to include the admonition, "in-court identifications are inherently suggestive." Defendant bases his argument on Mr. Brown's identification testimony. The prosecutor inquired, "Do you see anyone in the courtroom that you saw at that wall by that tree?" Mr. Brown responded: "Well, [defendant] looks like that person. He fits that description of what I saw."

At the time the trial court discussed the proposed jury instructions with the attorneys, defense counsel requested that the trial court, "[A]dd the [CALJIC No.] 2.92 in the space provided at the end, admonition to the jury that in-court identifications are inherently suggestive." The trial court responded, "No I'm not going to amend 2.92 to add that." Thereafter, defense counsel requested that he be allowed to "proffer a special instruction to the same — " The trial court responded, "Mr. Rodriguez, you had your opportunity to provide the court with your specials, and now while the jury is outside

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8 CALJIC No. 2.92 was given as follows: "Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of the crime charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness, as well as other factors which bear upon the accuracy of the witness's identification of the defendant, including, but not limited to, any of the following: [¶] The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act; [¶] The stress, if any, to which the witness was subjected at the time of the observation; [¶] The witness's ability following the observation to provide a description of the perpetrator of the act; [¶] The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness; [¶] The cross-racial nature of the identification; [¶] The witness's capacity to make an identification; [¶] The period of time alleged between the criminal act and the witness's identification; [¶] Whether the witness had prior contacts with the alleged perpetrator; [¶] The extent to which the witness is either certain or uncertain of the identification; [¶] The witness's identification is, in fact, the product of his own recollection; and [¶] Any other evidence relating to the witness's ability to make an identification."

waiting, we are throwing in more?" The prosecutor noted that the trial court had asked for jury instructions the previous Thursday. The trial court inquired if defense counsel had any other requests. Thereafter, the jury was instructed.

Defense counsel argued to the jury that both Mr. Brown and Mr. Lohrli were very stressed by the explosion and their observation of someone outside the building was brief. Defense counsel further argued that the description of the individual was "generic" and did not clearly link defendant. Defense counsel argued: "[Mr. Brown] did not claim certainty. I submit to you, the way [Mr. Brown] articulated his view about whether or not [defendant] was the person he saw is not certainty and cannot, should not, ought not, please do not, find it to have satisfied the reasonable doubt standard. . . . [¶] . . . Courtroom identifications are highly suggestive by their nature. . . . [T]he fact that it occurred here in the courtroom is something you should consider seriously before you place credence on [Mr.] Brown's characterization, to the extent it was one, that [defendant] was the person he saw outside the building."

A trial court is obliged to instruct, even without a request, on the general principles of law which relate to the issues presented by the evidence. (§§ 1093, subd. (f), 1127; *People v. Breverman* (1998) 19 Cal.4th 142, 154; *People v. Wims* (1995) 10 Cal.4th 293, 303; *People v. Turner* (1990) 50 Cal.3d 668, 690; *People v. Grant* (1988) 45 Cal.3d 829, 847; *People v. Melton* (1988) 44 Cal.3d 713, 746.) When the evidence is minimal and insubstantial, there is no duty to instruct. (*People v. Barton* (1995) 12 Cal.4th 186, 196, fn. 5; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1232; *People* v. *Mayberry* (1975) 15 Cal.3d 143, 151.) We conduct independent review of issues pertaining to instructions. (*People v. Waidla* (2000) 22 Cal.4th 690, 733, 737; *People v. Shaw* (2002) 97 Cal.App.4th 833, 838.)

The California Supreme Court has held: "'[T]he general rule is that a trial court may refuse a proffered instruction if it . . . is . . . duplicative.' [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 564, quoting *People v. Gurule* (2002) 28 Cal.4th 557, 659; *People v. Sanders* (1995) 11 Cal.4th 475, 560.) In *People v. Frye* (1998) 18 Cal.4th 894,

957, the California Supreme Court held, "[W]e are mindful that '"a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge."'" (*Ibid.*, quoting *Boyde v. California* (1990) 494 U.S. 370, 378; see also *People v. Burgener* (1986) 41 Cal.3d 505, 538, overruled on another point in *People v. Reyes* (1998) 19 Cal.4th 743, 753.) In this case, the jurors were also instructed with CALJIC Nos.: 2.20, believability of witness; 2.23, believability of witness-conviction of a felony; 2.21.1, discrepancies in testimony; 2.22, weighing conflicting testimony; 2.90, reasonable doubt; 2.91, burden of proving identity based solely on eyewitnesses; and 2.92, factors to consider in proving identity by eyewitness testimony. Those instructions could be construed to appropriately inform the jurors of the various factors to be considered in evaluating a witness's identification. As a result, the trial court could properly refuse the proffered instruction as duplicative. Moreover, Mr. Brown did not specifically identify defendant. Rather, as the prosecutor argued, Mr. Brown testified he had seen a man who looked "very similar to defendant." As a result, no further instruction was warranted.

Even if the trial court should have further instructed the jury on the inherent suggestiveness of in-court identifications, any error in failing to do so was harmless. As previously noted, other instructions cautioned the jurors regarding identifications. In addition, defense counsel argued that in-court identifications were inherently suggestive. Both defense counsel and the prosecutor argued that Mr. Brown's testimony did not specifically identify defendant. There was substantial evidence to support the arson verdict: defendant had fled the halfway house following exposing himself to Christiane; defendant left Christiane a note stating, "To be continued"; defendant had second and third-degree burns immediately following the arson involving Christiane's office; defendant said that he was burned as a result of being trapped in a car after an accident; defendant told Dr. Flaherty that he was burned when an engine exploded while he worked on a car; and defendant told Christiane that an accident resulted after he did something stupid. (*People v. Ervin* (2000) 22 Cal.4th 48, 91 [any error in failing to

instruct was harmless in light of other instructions given]; *People* v. *Watson* (1956) 46 Cal.2d 818, 836.)

D. Other Sentencing Issues

1. Imposition of sentence on count 3

Following our request for further briefing, both defendant and the Attorney General agree that the trial court was obliged to impose a sentence as to count 3. The trial judge had a duty to impose sentence in accord with the law. (§ 12; *People v. Cattaneo* (1990) 217 Cal.App.3d 1577, 1588-1589; *People* v. *Floyd P.* (1988) 198 Cal.App.3d 608, 612; *People v. Superior Court* (*Himmelsbach*) (1986) 186 Cal.App.3d 524, 537, overruled on another point in *People v. Norrell* (1996) 13 Cal.4th 1, 7, fn. 3; *People v. Santana* (1986) 182 Cal.App.3d 185, 190-191.) The refusal to sentence is not a legally authorized disposition. As a result, this matter must be remanded to allow the trial court to impose a sentence as to count 3. Upon remand and resentencing, the clerk of the court shall prepare an amended abstract of judgment reflecting the sentence imposed. (§ 1213; *People v. Mesa* (1975) 14 Cal.3d 466, 471.)

2. Selection of a base term

Following our request for further briefing, the Attorney General argues that the trial court should have selected a base term from amongst counts 2, 4, 5, and 6 and ordered that determinate base term and those subordinate terms imposed consecutive to it be served prior to the indeterminate term imposed as to count 1. In *People v. Nguyen* (1999) 21 Cal.4th 197, 201-202, the California Supreme Court held: "If a defendant is convicted in a single proceeding of more than one felony carrying a determinate sentence, the sentencing court may order that the terms be served either concurrently or

consecutively. If the sentencing court imposes consecutive terms, subdivision (a) of section 1170.1 specifies the normal method for calculating the overall prison term. It provides that, with certain exceptions, 'the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions, prior prison terms, and Section 12022.1.' (§ 1170.1, subd. (a).) It explains that the 'principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements' and that, with certain exceptions, '[t]he subordinate term for each consecutive offense . . . shall consist of one-third of the middle term of imprisonment prescribed for each' felony and 'shall exclude any specific enhancements.' [Citation.]" The *Nguyen* court further explained that in those cases where the defendant is sentenced pursuant to section 667, subdivision (e)(1) for a second serious felony conviction, both the principal and the subordinate terms are doubled. (*Ibid.*; *People v. Morales* (2003) 106 Cal.App.4th 445, 456.) In this case, defendant was sentenced to consecutive determinate terms in counts 4, 5, and 6. The sentence imposed as to count 1 constituted an indeterminate term pursuant to sections 667, subdivision (e)(2)(A)(ii) and 1170.12, subdivision (c)(2)(A)(ii), and was ordered to run consecutive to the determinate terms imposed as to counts 4, 5, and 6. Hence, the trial court should have: selected one of the determinate counts as the principal term; selected a base term; and imposed the remaining determinate counts to be served consecutively thereto. Further, each unstayed determinate sentence is to be doubled. In addition, the Supreme Court has held: "[T]he determinate term 'shall be served first and no part thereof shall be credited toward the person's eligibility for parole as calculated pursuant to Section 3046 or pursuant to any other section of law that establishes a minimum period of confinement under the life sentence before eligibility for parole.'" (*People v. Felix* (2000) 22 Cal.4th 651, 659, quoting § 669; *People v. Garza* (2003) 107 Cal.App.4th 1081, 1085.) We therefore remand for resentencing on counts 2, 4, 5, and 6.

Further, defendant argues that the trial court was unaware it had the authority not to impose consecutive sentences as to counts 4, 5, and 6. We disagree. It is presumed the trial court was aware of its sentencing authority. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977; *People v. Stewart* (2004) 117 Cal.App.4th 907, 911.) There is no basis for concluding that the trial court was unaware of its sentencing responsibilities. Further, although the three offenses shared the same elements and victim, they were clearly committed on different occasions with considerable time for reflection between such acts. As a result, the trial court was required to impose consecutive sentences. (§§ 667, subds. (c)(6), (7), 1170.12, subds. (a)(6), (7); *People v. Jenkins* (2001) 86 Cal.App.4th 699, 705-707; see Couzons & Bigelow, Cal. Three Strikes Sentencing (2004) p. 8.1.) Finally, any error in failing to state reasons for consecutive sentences has been waived and would be entirely harmless in any event. (*People v. Scott* (1994) 9 Cal.4th 331, 357-358, fn. 19 [waiver]; *People v. Avalos* (1984) 37 Cal.3d 216, 233 [sentencing rules violation subject to Cal. Const., art. VI, § 13 harmless error analysis].)

After the sentencing in the present case, the trial court resentenced defendant for his conviction for assault with a deadly weapon in case No. PA040676. The trial court purported to impose a consecutive low term of 16 months in case No. PA040676. However, the proper consecutive sentence in case No. PA040676, a conviction for a violation of section 245, subdivision (a), was one year doubled to two years pursuant to section 667, subdivision (e)(1). However, the notice of appeal refers only to the present case. Hence, we have no jurisdiction over case No. PA040676. (See *People v. Mendez* (1999) 19 Cal.4th 1084, 1094; *People v. Perez* (1979) 23 Cal.3d 545, 554.) But we are remanding for further sentencing in case No. BA229844. A jurisdictional error such as occurred on case No. PA040676 can be corrected at any time. (*People v. Serrato* (1973) 9 Cal.3d 753, 763, disapproved on another point in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1; *People v. Acosta* (1996) 48 Cal.App.4th 411, 428, fn. 8.) Hence,

upon remand in case No. BA229844, the trial court can correct the sentencing error in case No. PA040676.

E. Abstract of Judgment

The trial court imposed a five-year enhancement pursuant to section 667, subdivision (a)(1). But the abstract of judgment reflects five one-year prior prison term enhancements pursuant to section 667.5, subdivision (b). The parties are in agreement that the abstract of judgment should reflect the five-year enhancement was imposed pursuant to section 667, subdivision (a)(1). (Cal. Rules of Court, rule 12(c)(1); *People v. Mitchell* (2001) 26 Cal.4th 181, 186-188.)

[The balance of the opinion is to be published.]

IV. DISPOSITION

The matter is reversed in part and remanded for resentencing on the following particulars: First, a specific sentence shall be imposed as to count 3. Second, the trial court shall select a principal term from amongst counts 2, 4, 5, and 6, and set the base term. Third, the trial court shall impose consecutive terms of the midterm doubled for the unstayed determinate term counts. The judgment is affirmed in all other respects. Upon

the completion of sentencing proceedings, the clerk of the superior court is to prepare an amended abstract of judgment which reflects the newly imposed sentences. The corrected abstract of judgment is to be forwarded to the Department of Corrections.

CERTIFIED FOR PARTIAL PUBLICATION

TURNER, P.J.

We concur:

GRIGNON, J.

ARMSTRONG, J.