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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RICHARD CARRASCO, Defendant and Appellant.	H026049 (Santa Clara County Super. Ct. No. 173067)

A jury convicted appellant of one count of murder, seven counts of rape, two counts of robbery, two counts of burglary and three counts of injury to telephone lines. (Pen. Code, §§ 187, 261, subd. (2), 211, 459, & 591.) The jury found true various enhancements that alleged that appellant used a knife and inflicted great bodily injury during the commission of certain counts. (Pen. Code, §§ 12022.3, subd. (b), 12022, subd. (a), & 12022.8.) The trial court sentenced appellant to a state prison term of 98 years and eight months and a consecutive term of 25 years to life. On appeal, he contends the trial court erred when it denied his challenges below in which he argued that the trial court had no jurisdiction to proceed with this prosecution by way of an indictment because these crimes were alleged to have been committed when he was a juvenile. He contends the trial court erred in failing to hold a hearing on his motion for self-representation. He contends that the trial court erred in admitting evidence of his prior bad acts and that

certain jury instructions were erroneous. In supplemental briefing appellant contends the trial court erred under *Blakely v. Washington* (2004) __ U.S. __ [124 S.Ct. 2531], in imposing aggravated terms and consecutive sentences. We remand for resentencing and otherwise affirm the judgment.

EVIDENCE AT TRIAL

In April 1990, the body of Elaine Rothwell, a 63-year-old homeless woman who lived near a fence bordering the Aetna Casualty parking lot in San Jose, was found by an Aetna employee. Rothwell was lying face up in the dirt, naked from the waist up. She had a laceration from the bottom of her vaginal opening to her anal opening, and a six-inch laceration along the back of her vagina almost to her cervix. These injuries caused her to bleed to death. A DNA expert testified that appellant was the source of semen taken from Rothwell's vagina.

In May 1990, 70-year-old Jeanne W. was raped by a man with a knife who entered her apartment at night, cut her telephone lines, and took her purse. She sustained a two-centimeter tear on her interior vaginal wall and bled a great deal. An expert witness testified that appellant was the source of semen found on Jeanne W.'s nightgown.

In August 1990, 39-year old Lisle H. was raped at night in her apartment by a man with a knife who cut her telephone lines and stole her jewelry and coin purse. She sustained three one-centimeter tears at the bottom of her vaginal opening. Expert witnesses testified that appellant's fingerprint and palm print were on the window screen outside Lisle H.'s apartment, that appellant was a possible contributor to the "minor" DNA allele in the sample taken from Lisle's H.'s bed sheet, and that the probability of a random person matching would be one in 280 million Hispanics.

The prosecution introduced evidence of several prior bad acts by appellant. In January 1989, 66-year old Diep T. was raped and robbed at night in her apartment by someone who took two wallets. Appellant's fingerprints and palm print were on the point of entry, a bathroom window. In April 1992, 42-year old Teresa R. was sexually

assaulted by a man she identified that night as appellant, who grabbed her, tore her bra, and tried to pull her into a secluded area. Two witnesses testified concerning incidents of indecent exposure by appellant, and appellant's ex-girlfriend testified concerning sexual abuse in their relationship.

Other witnesses testified concerning the investigation of other possible suspects in the Rothwell murder and to discredit the testimony of appellant's ex-girlfriend.

GRAND JURY INDICTMENT

Appellant contends the trial court erred "in denying Mr. Carrasco's pre-trial motions to dismiss the grand jury indictment and for a preliminary hearing, as well as his post-trial motion for arrest of judgment."

Background

The offenses charged in this case were alleged to have occurred in April, May and August of 1990, when appellant was 16 years old. According to appellant's demurrer, petitions were filed in juvenile court concerning some of these offenses, and, in August 1993, appellant was found unfit to be dealt with in the juvenile court system.[1] A complaint was filed alleging the commission of 23 counts. Subsequent investigation led to the prosecution of counts 1 and 2, the Rothwell murder and rape. Grand jury proceedings were held and an indictment was returned on July 7, 1994, alleging 31 counts. Before appellant was arraigned on the indictment, the court suspended criminal proceedings and returned appellant to juvenile court for fitness proceedings on counts 1 and 2. Appellant was returned to adult court and arraigned.

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[1] This court has taken judicial notice of the record in *People v. Carrasco*, H018722. Much of this procedural history is taken from appellant's statement of facts in his demurrer. The clerk's transcript in appellant's first case (H018722) does not include an express finding of unfitness by the juvenile court.

The court commenced appellant's first jury trial in November 1997. The jury found appellant guilty of 16 counts on February 5, 1998. This court reversed the judgment in November 2000 and remanded the case to the trial court.

In December 2001, appellant filed a demurrer, a motion to dismiss the indictment and a motion for a preliminary hearing. Appellant argued that the court had no jurisdiction because appellant had been a juvenile at the time of the offenses. He asked the court to dismiss the indictment or grant a preliminary hearing. The trial court overruled the demurrer and denied the motion to dismiss the indictment. Following his convictions, appellant filed a motion in arrest of judgment raising the same issues. The trial court denied this motion as well.

Analysis

Appellant contends the trial court had no jurisdiction to proceed with a prosecution under an indictment because the crimes were alleged to have been committed when he was a juvenile and he was found unfit for juvenile court treatment. He contends he could not be prosecuted without the benefit of a preliminary hearing. He relies on *People v. Superior Court (Gevorgyan)* (2001) 91 Cal.App.4th 602, which held that the prosecution of a minor may not proceed by indictment. *Gevorgyan* said that when a minor has been found unfit for treatment by the juvenile court, there is no statutory authorization for an indictment, and the prosecution can only proceed by way of a preliminary hearing before a magistrate and the filing of an information.

In *Guillory v. Superior Court* (2003) 31 Cal.4th 168, our Supreme Court specifically disapproved of *Gevorgyan. Guillory* held that a prosecution under Welfare and Institutions Code section 602, subdivision (b), as amended by Proposition 21, mandating that minors who are at least 14 years of age at time they allegedly commit certain offenses, such as those with which appellant was charged here, be prosecuted in

adult criminal court, may be initiated by grand jury indictment. The trial court properly denied appellant's challenges to these proceedings.[2]

MOTION FOR SELF-REPRESENTATION

Appellant contends the trial court erred in failing to hear his motion for self-representation.

Background

This trial was appellant's second on these charges. This court reversed his convictions in the first trial because the trial court, after granting appellant's motion for self-representation, abused its discretion in refusing to grant him a continuance of his trial date. In April 2001, appellant appeared with Patrick Kelly, who had been trial counsel during appellant's first trial. In June appellant filed a "request for pro per status and library privileges." He acknowledged that Kelly was representing him in this case, but requested "pro per status so that I can have access to the library related to the charges that are being filed in Sacramento County for which I do not have an attorney." The court granted this request. In August, appellant appeared with Kelly and the court set this case for February 25, 2002, on the master trial calendar for jury trial.

The clerk's transcript contains a letter dated Wednesday, November 28, 2001, in which appellant stated he was putting the court on notice that he would move the court "to proceed in propria persona." He asked the court to file the letter and the attached "petition to proceed in pro-per status" and he requested a hearing one week later, on Wednesday, December 5, 2001 at 1:00 p.m. "or as soon as the matter may be heard on the

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[2] The direct filing of an indictment in this case was proper. However, we note that, consistent with *People v. Aguirre* (1991) 227 Cal.App.3d 373, even assuming that the trial court in this case did not originally have jurisdiction over appellant, once appellant was found unfit by the juvenile court, his case was properly tried in adult court through the indictment.

petition."[3] He also requested that "copies be made of [the] letter/petition & provided to defendant." On the upper corner of the letter is a notation, apparently made by a court clerk, stating "MTC 2-25-02 8:30 D24," indicating that the next court appearance scheduled in the matter was the master trial calendar on the date previously set, February 25, 2002 in Department 24.

On December 24, 2001, Kelly filed a demurrer and various pre-trial motions. The notice requested a hearing date of January 11, 2002.

The clerk's transcript also contains a letter from appellant dated December 16, 2001, and stamped "received" on December 31, 2001. In this letter, appellant complained, "the clerk has failed to set a court date to hear [his] petition" for self-representation and asks the court "to rectify this matter and order a date for such petition."[4]

Appellant's next court appearance was January 11, 2002. The court called appellant's case and asked Kelly, "Is there some other motion being brought by Mr.

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[3] The petition reads, "I am the defendant in the above-entitled case, and I certify to the court that I can read and write. I understand my constitutional rights. [¶] Understanding all of my constitutional rights, it is my personal desire that I be granted permission by the court to proceed in propria persona (acting as my own attorney) and that by making this request I am giving up the right to be represented by a lawyer appointed by the court. [¶] In support of my application to proceed in pro-per I will offer in open court biographical information [¶] The defendant requests a date be set for Wed. the 5th day of Dec 2001. 1 p.m. in Department 24 of the Superior Court. [¶] I hereby certify that I understand all my constitutional rights and hereby give up my right to counsel. I declare under penalty of perjury the forgoing is true and correct."

[4] The letter states, "Dear Judge: [¶] I am writing this letter/complaint to put the court on notice that on November 28th 2001 I did send via U.S. mail, to the clerk's office, Petition to Proceed in Pro-Per along with a letter. My main complaint is the clerk has failed to set a court date to hear my petition. As a result, I am being denied my constitutional right to self representation. [¶] I implore you to rectify this matter and order a date for such a petition. [¶] If the court continues to disregard my letters and allow time to elapse it will cause me irreparable injury. Please file this & place in the court's record."

Carrasco?" Kelly responded, "We don't know about that." The court said, "Okay. We'll have Mr. Carrasco come out for a moment, and we'll see what we have before us. Judge Ball said there was something going on, and I said I would call your matter first and try to get you out of here." Kelly said, "He may have done something on his own, and I don't know." Appellant was then brought into the courtroom and the court proceeded to hear the demurrer and the motions brought by trial counsel. At the conclusion of the hearing, the court asked counsel, "Maybe if you can ask Mr. Carrasco, do you have a hearing this morning or not?" Counsel responded, "No. He's not aware of any." The court said, "The judge was mistaken as to the time, and we'll leave it as previously set and let you go on about your business."

On February 25, 2002, appellant's case was continued until March 18.[5] On March 18, attorney Eric Conner filed a motion asking to continue the trial date and stating, "counsel was retained last Thursday to represent defendant at trial [and] needs time to prepare for trial." Conner appeared that same day and announced, "I have recently been retained to represent" appellant. He waived appellant's appearance. Other counsel appeared for appellant and for Kelly commenting that Kelly was "still counsel of record at this point." The prosecutor said, "Apparently the defendant at the last minute wants to hire counsel for trial. . . . It took about three and a half years to get this case to trial in the late 90's. It only went to trial after numerous delays by the defendant. [¶] The defendant at different times was represented by the public defender, conflicts, and represented himself. [¶] The defendant has a long history of using procedural maneuvers to delay the trial . . . . [¶] The People do not think that this is the time for new counsel, and the prejudice to our case is substantial." Conner assured the court he "could be ready to go in 60 days."

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[5] The Clerk's Transcript indicates that appellant was not present and that other counsel appeared for Kelly. The Reporter's Transcript indicates that Kelly appeared and stated that appellant was in custody.

On March 20, 2002, appellant appeared with Conner. The prosecutor objected to the substitution of counsel and the request for a continuance. The record contains a lengthy discussion on the issue of discharging appointed counsel to allow the substitution of privately retained counsel. Conner told the court, "There's no evidence that Mr. Carrasco has been attempting to manipulate the Court in any way." The court granted the request for substitution.[6] Conner continued to represent appellant throughout the proceedings. Appellant's trial commenced with in limine motions on October 8, 2002.

Analysis

Appellant contends that the trial court erred in failing to hold a hearing on his written motion for self-representation. Respondent argues that appellant's request for self-representation was equivocal, or, if unequivocal, was abandoned. We agree that appellant's request for self-representation was abandoned.[7]

The Sixth Amendment to the federal Constitution grants a defendant the right to self-representation. (*Faretta v. California* (1975) 422 U.S. 806, 819.) "When 'a motion to proceed *pro se* is timely interposed, a trial court must permit a defendant to represent himself upon ascertaining that he has voluntarily and intelligently elected to do so,

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6 Referring to this court's recitation of the procedural history in appellant's first trial, the court said, "That is the most absurd set of proceedings that I've ever seen in my life." Although clearly reluctant to permit the substitution of retained counsel, the court said, "I'm willing to allow him in because of the mine field in on this. Unfortunately, because of certain interpretations by certain courts of certain rights, and I say that in a general way on purpose, and the purpose should be obvious."

7 Respondent argues, "Appellant has failed to provide a record demonstrating trial court error" because "[n]either appellant's November 28, 2001, letter requesting self-representation, nor his December 31, 2001, follow-up letter sent to the court were filed with the trial court. Given appellant's failure to file his request with the court and the lack of evidence that appellant orally raised his *Faretta* motion with the trial court, we cannot presume the trial court was required to hold a *Faretta* hearing in the first instance." We will assume that appellant's unfiled petition, accompanied by a letter asking the clerk to file it, combined with the follow-up letter, constitute a valid request for self-representation.

irrespective of how unwise such a choice might appear to be. . . .' [Citations.] Erroneous denial of a *Faretta* motion is reversible per se. [Citation.]" (*People v. Dent* (2003) 30 Cal.4th 213, 217.)

The United States Supreme Court has indicated that a waiver of the right of self-representation may be presumed from conduct. In *McKaskle v. Wiggins* (1984) 465 U.S. 168, defendant's motion for self-representation was granted, but the court also appointed standby counsel. Both before and during trial, defendant frequently changed his mind about standby counsel's participation, sometimes objecting to that participation, but sometimes soliciting counsel's help. After his conviction, defendant argued that standby counsel's conduct had deprived him of his *Faretta* right to present his own defense. Rejecting that argument, the court reasoned in part, "A defendant can waive his *Faretta* rights . . . . [¶] . . . Once a *pro se* defendant invites or agrees to any substantial participation by counsel, subsequent appearances by counsel must be presumed to be with the defendant's acquiescence, at least until the defendant expressly and unambiguously renews his request that standby counsel be silenced." (*Id.* at pp. 182-183.)

Brown v. Wainwright (5th Cir.1982) 665 F.2d 607, held that after a defendant has asserted the right of self-representation, a waiver may be found if it reasonably appears from the conduct of the defendant that he has abandoned his request to represent himself. (*Id.* at p. 611.) In *Brown*, appointed counsel moved to withdraw after the defendant indicated he wanted to represent himself. A hearing was held, but the court deferred its ruling and asked counsel to see whether his differences with his client could be worked out. Counsel then informed the court that those differences had been resolved, and that the defendant had changed his mind and wanted counsel. The defendant worked with counsel and an investigator to prepare a defense, but on the third day of trial, he unsuccessfully renewed his request to represent himself. Later, the defendant sought

habeas corpus relief on the ground that he was denied his right to self-representation. (*Id.* at pp. 609-610.)

Brown compared the right of self-representation and the right to counsel, and reasoned that while the right to counsel is in force until waived, the right of self-representation does not attach until asserted. "A waiver may be found if it reasonably appears to the court that defendant has abandoned his initial request to represent himself." (*Brown v. Wainwright, supra,* 665 F.2d at p. 611.) *Brown* concluded that the defendant's subsequent conduct after his initial request to represent himself supported a finding of waiver. The court noted that after the initial hearing, the defendant did not inform the trial court of his continuing desire to conduct his own defense, despite opportunities to do so. (*Ibid.*)

In *People v. Kenner* (1990) 223 Cal.App.3d 56, after the defendant requested self-representation, the trial court stated that it would hold the *Faretta* hearing that very afternoon. The *Kenner* defendant then affirmatively objected to the afternoon hearing, asking for a continuance of at least four weeks, because he was not "ready right now" to have the motion for self-representation heard. (*People v. Kenner, supra*, 223 Cal.App.3d at p. 58, fn. 3.) The motion was never acted on due to confusion caused by defendant's changing custody situation. The *Kenner* court said that the case "present[ed] a stark judicial choice: who should bear the burden of the omission - the trial court or the mysteriously silent defendant?" (*Id*. at p. 59.) The *Kenner* court said that a defendant's right of self-representation may be impliedly and silently waived. (*Id*. at p. 60.) The court observed that the defendant had ample opportunity to call the court's attention to the neglected motion but did not. A defendant's conduct may thus indicate an abandonment or withdrawal of a request for a *Faretta* hearing and the defendant's conduct throughout the proceedings indicated unequivocally that he agreed to and acquiesced in being represented by counsel. (*Id.* at p. 61.)

Appellant relies on *U.S. v. Arlt* (9th Cir. 1994) 41 F.3d 516. In *Arlt*, the defendant had made an unequivocal waiver of the right to be represented by an attorney by repeatedly requesting and on one occasion "demanding" that he represent himself. After the trial court denied the request and forced him to accept court-appointed counsel, the defendant subsequently moved for substitution of counsel of his choice. The *Arlt* court held that the defendant did not abandon his request to represent himself when he moved to substitute his chosen attorney for counsel that had been assigned by court because the court had absolutely foreclosed the option of self-representation, leaving the defendant with the choice of continuing to be represented by appointed counsel or one of his own choosing.

Appellant's situation differs from that of the defendant in *Arlt* in the important respect that the *Arlt* defendant's motion for self-representation was actually denied by the trial court. Here, the record shows that appellant's motion was not heard, and that appellant knew that the reason for that was the clerk's failure to calendar the matter. Appellant's original petition requested a specific court date "or as soon as the matter may be heard." In his letter received December 31, 2001, he complained, "the clerk has failed to set a court date to hear my petition." Thus, appellant knew that his petition simply had not been calendared by the clerk, as opposed to having been denied by the court. Appellant's next appearance in court was January 11, 2002, following the presumable holiday slowdown in court business and coming less than two weeks after his complaint about the calendaring oversight was received. That day, he was specifically invited by the court to say whether he himself, as opposed to trial counsel, had a hearing scheduled. Appellant's response through counsel, that he was not aware of any matter set, is, at best, coy. His failure to mention his motion for self-representation in response to the court's

inquiry or at any subsequent appearances, or at least to alert the court to the clerk's failure to set a hearing date, smacks of gamesmanship.[8]

This is not to say the court or the clerk's office is free to ignore correspondence and moving papers received from a defendant. As appellant puts it, "[t]his would indeed be a tidy way of ridding oneself of these troublesome *Faretta* issues." We would expect that the court or the clerk's office will examine what transpired here to avoid a recurrence of this lapse. However, it is plain on this record that the court did not purposely disregard appellant's petition, but solicited appellant's response as to whether he had a pending matter. Given the extraordinary delays that had already occurred in this case, the amount of time between the receipt of appellant's original petition in late November and the hearing on January 11 was insignificant and in accordance with appellant's request to hold a hearing on either the date he requested or "as soon as the matter may be heard." If appellant had truly wanted a hearing on his petition, it is inconceivable that he would not have mentioned it in response to the court's question. By declining to inform the court of his continuing desire to represent himself, despite numerous opportunities to do so, by acquiescing in the participation of attorney Kelly and by affirmatively retaining attorney Conner as trial counsel, appellant abandoned his motion for self-representation.

PRIOR BAD ACTS

The trial court permitted the prosecutor to introduce evidence of several prior bad acts by appellant. Appellant contends that Evidence Code section 1108, in allowing the introduction of evidence to prove "propensity," violated the Fourteenth Amendment Due

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[8] This conclusion is bolstered by appellant's demonstrated sophistication with self-representation. The Clerk's Transcript documents appellant's self representation in bringing a civil rights action in federal court concerning the medical treatment he was receiving while in the Santa Clara County jail. An observation in *Kenner* seems apt here: "One interpretation of this record is that appellant realized that the trial court forgot the *Faretta* motion . . . and slyly saved his *Faretta* ace to play triumphantly on appeal." (*Kenner, supra*, 223 Cal.App.3d at p. 62.)

Process Clause. He contends that CALJIC 2.50.02 and 2.50 offend the Due Process Clause. He further contends that the admission of the evidence was error under Evidence Code section 1101, subdivision (b), and under the Due Process Clause.

Background

Before trial, appellant sought to exclude evidence of the assault on Teresa R., the rape of Diep T., and acts of indecent exposure involving Luna J. and Laura R. Appellant also sought to exclude evidence of "rough" sexual activity with his former girlfriend, Deborah G. Sixty-six-year-old Diep T. was raped and robbed at night in her apartment by someone who took two wallets. Appellant's fingerprints and palm print were on the point of entry, a bathroom window. Defense counsel argued that Evidence Code section 1108 did not apply to these offenses by a juvenile at age 15, and that the use of this evidence would violate federal and state due process. Forty-two-year-old Teresa R. was grabbed, was dragged toward a secluded area, and was sexually battered by having her bra torn and being groped by a man she identified that night as appellant. Defense counsel argued that this assault was too different from the charged offenses to be admitted. In the Luna J. incident of indecent exposure, appellant exposed himself in a rental car office. In the Laura R. incident, appellant was on his porch in his robe when he exposed himself to Laura R. both while she walked her children to school and on her way back. Counsel argued that this evidence, despite qualifying for admission under Evidence Code section 1108, was inadmissible under Evidence Code section 1101 and should be excluded under Evidence Code section 352. The trial court admitted evidence of all of these prior bad acts and permitted appellant's ex-girlfriend to testify concerning forced sex during their relationship.

In ruling that this evidence was admissible, the trial court said, "And so that the record is clear, this court is not acting as a rubber stamp to prior [trial] court rulings [in the first trial] but rather arriving at an opinion with respect to the admissibility of the

evidence based on this court's analysis of the proffered evidence in light of [Evidence] Code section 1101 (b) and 1108 together with Evidence Code section 352."

Evidence Code Section 1108

Appellant contends, "Evidence Code section 1108, in allowing the introduction of evidence to prove 'propensity,' violates the Fourteenth Amendment Due Process Clause." He contends that Evidence Code section 1108 is unconstitutional. Appellant acknowledges that *People v. Falsetta* (1999) 21 Cal.4th 903 held that Evidence Code section 1108 has no constitutional flaw. We are bound to respect this ruling. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

CALJIC Nos. 2.50 and 2.50.02

Appellant contends, "CALJIC No[s]. 2.50.02 [evidence of domestic violence] and 2.50 [definition of preponderance of evidence] given here violated his due process and fair trial rights." He acknowledges the California Supreme Court's approval of CALJIC No. 2.50.01 [evidence of sexual offenses] in *People v. Reliford* (2003) 29 Cal.4th 1007. In *Reliford*, the California Supreme Court approved the 1999 version of CALJIC No. 2.50.01, which is analogous to CALJIC No. 2.50.02. The instructions are identical except that CALJIC No. 2.50.01 refers to "sexual offense" and CALJIC No. 2.50.02 refers to "domestic violence." In *Reliford*, the court held that CALJIC No. 2.50.01 correctly states the law regarding the limited purpose for which the jury may consider evidence of the prior offenses and the prosecution's burden of proof. (*Id.* at pp. 1012-1013, 1016.) Thus, we conclude that the principles are correctly stated in the instructions given.

Evidence Code Section 1101/Due Process

The trial court admitted all of the prior bad acts under Evidence Code section 1101, subdivision (b), on "common design or plan," and the jury was instructed that it could consider all of the prior bad acts evidence for that purpose. Appellant asserts, "none of this evidence shed light on the charged crimes, except as 'identi[t]y' evidence,

and only the Diep T. evidence was similar to a charged offense. None of it should have been admitted under section 1101, subdivision (b). [¶] Under the circumstances of this case, the jury was going to treat this evidence as proof of 'identity,' regardless of what limiting instruction was given. Moreover, under the circumstances of this case, 'common design or plan' was merely a euphemism for 'identity.' " Respondent argues that the facts underlying each of the uncharged offenses were sufficiently similar to support their admission under Evidence Code section 1101, subdivision (b).

Evidence Code section 1101 provides in pertinent part: "(a) 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 on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act."

The trial court's determination regarding the admissibility of evidence pursuant to section 1101 is essentially a determination regarding relevance. (*People v. Kipp* (1998) 18 Cal.4th 349.) "When a trial court overrules a defendant's objections that evidence is irrelevant, unduly prejudicial and inadmissible character evidence, we review the rulings for abuse of discretion," examining the evidence in the light most favorable to the trial court's ruling. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1118; *People v. Kipp*, *supra*, 18 Cal.4th at p. 370.)

Diep T., Jeanne W. and Lisle H. all had entry to their homes gained through prying open outside windows. After raping each, appellant went through their homes searching for money or jewelry. Diep T., Jeanne W. and Rothwell were over 50 years old at the time they were raped, and all three suffered internal vaginal injuries. Based on the

degree of similarity between the facts underlying the uncharged acts committed against Diep T. and those underlying the charged crimes, the trial court's admission of this evidence as establishing a common design or plan was not an abuse of discretion.

Teresa R., a middle-aged woman, was attacked at night when she was alone. Appellant grabbed her breasts, tore her bra, and tried to drag her to a secluded area, indicating rape was his likely motive until nearby residents intervened. This evidence had a sufficient degree of similarity to the Rothwell homicide, in which the victim was raped outdoors and was found naked from the waist up.

The trial court admitted evidence of two incidents of indecent exposure involving appellant. This evidence was admissible under Evidence Code section 1108. The trial court also admitted this evidence under Evidence Code section 1101, subdivision (b). The prosecutor argued that this evidence was admissible under the portion of that subdivision that permits the admission of evidence "when relevant to prove some fact other than his or her disposition to commit such crime." The prosecutor argued that this evidence was relevant to explain how the police connected appellant to the charged offenses. In investigating these two indecent exposure cases, the police contacted appellant, who fled to Texas. As for the testimony of appellant's ex-girlfriend, the court admitted evidence "with respect to the forced sex acts with Deborah G[.] as it's relevant to the nature of the offenses that are charged."

Even if we were to assume that the trial court erred in admitting evidence of the indecent exposure incidents and Deborah G.'s testimony pursuant to Evidence Code section 1101, this evidence was admissible under Evidence Code section 1108. Furthermore, any error in admitting any of the prior bad acts under Evidence Code section 1101 would be harmless given the strength of the evidence supporting appellant's guilt, including the expert testimony that he was the source of the semen found at the three crime sites. It is not reasonably probable that appellant's verdict would have been more favorable had the evidence of the prior bad acts been excluded.

Appellant argues that the admission of the uncharged acts under Evidence Code section 1101 violated his federal constitutional due process rights. Given the proper admission of this evidence under Evidence Code section 1108, and the overwhelming evidence of appellant's guilt of the charged offenses, even assuming error, it would be harmless beyond a reasonable doubt.

SENTENCING

Background

Citing *Blakely v. Washington, supra*, ___ U.S. ___ (124 S.Ct. 2531), appellant contends, "[t]he trial court made multiple factual 'findings' at sentencing which mandate substantial modification of the judgment, because those findings were required under the Fifth, Sixth, and Fourteenth Amendments to be made by a jury beyond a reasonable doubt."[9]

At sentencing, the trial court said, "You, sir, are one of the most [base], predatory, callous individuals that I have ever seen in my 16 years on the bench. [¶] And your actions and the damage and the injuries that you inflicted on the victims in this case are indescribable. And for me to sit here and try to tell you anything further beyond that would fall on deaf ears, because you are the type that has total disregard for any human life. [¶] I can see by your sneer and your grin that I'm correct in my assessment, that you do have total disregard for human life, for people, for values, for morals. And as far as you're concerned, the people on this Earth are here for your taking and nothing more and nothing less. [¶] So as I've indicated to you . . . the Court is going to impose the aggravated term as to each of the cases. And the reason I'm going to impose the

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[9] We reject respondent's claim that appellant has forfeited this claim of error by failing to object to this sentence. It was reasonable for this defense attorney not to object at sentencing that the court could only rely on facts found by the jury beyond a reasonable doubt. The holding of *Blakely* was sufficiently unforeseeable that we find no forfeiture due to defendant's failure to object at sentencing.

aggravated term is because as to the crimes for which there are sentencing ranges, the victims were particularly vulnerable at the time you conducted your criminal activity. [¶] Each victim was asleep at the time that you assaulted them. You exhibited a degree of planning and sophistication where you knew exactly what you wanted to do. [¶] You picked your victims out because of the fact that they're so vulnerable. And the type of cruelty that you exhibited towards each victim and just your overall general conduct with respect to each of the crimes that you committed in this case warrant the aggravated term."

The trial court sentenced appellant to a state prison term of 98 years, eight months, plus a consecutive term of 25 years to life. The trial court arrived at this sentence in this way: count 1: Penal Code section 187 (Rothwell homicide) 25 years to life, to be served consecutively to the determinate term imposed on other counts; count 2: Penal Code section 261, subdivision (2) (rape of Rothwell), upper term of eight years plus five-year enhancement for infliction of great bodily injury for a total of 13 years, stayed under Penal Code section 654; count 3: Penal Code section 261, subdivision (2) (rape of Jeanne W.) upper term of eight years plus five years for great bodily injury enhancement and a five-year enhancement for use of a weapon for a total term of 18 years to be served consecutively; count 4: Penal Code section 261, subdivision (2) (second rape of Jeanne W.) 18 years, calculated as in count 3, and ordered to be served consecutively to count 3 under Penal Code section 667.6, subdivision (c); count 6:[10] Penal Code section 211 (robbery of Jeanne W.) upper term of six years with a one-year enhancement for use of a weapon; count 7: Penal Code section 459 (burglary of Jeanne W.'s residence) upper term of six years, stayed under Penal Code section 654; count 8: Penal Code section 591 (injury to Jeanne W.'s telephone lines) one-third of the mid-term for eight months to be served consecutively; count 9: Penal Code section 591 (injury to Jeanne W.'s telephone

[10] Appellant was acquitted of count 5, charging the third rape of Jeanne W.

lines) one third of the mid-term for eight months to be served consecutively; count 10: Penal Code section 261, subdivision (2) (rape of Lisle H.) upper term of eight years plus a five-year enhancement for use of a weapon for a total term of 13 years; count 11: Penal Code section 261, subdivision (2) (second rape of Lisle H.) upper term of eight years plus a five-year enhancement for use of a weapon for a total term of 13 years to be served consecutively to count 10; count 12: Penal Code section 261, subdivision (2) (third rape of Lisle H.) upper term of eight years plus a five-year enhancement for use of a weapon for a total term of 13 years to be served consecutively; count 13: Penal Code section 261, subdivision (2) (fourth rape of Lisle H.) upper term of eight years plus a five-year enhancement for use of a weapon for a total term of 13 years to be served consecutively; count 14: Penal Code section 211 (robbery of Lisle H.) one-third of mid-term plus one-third of the one-year enhancement for use of a weapon for a consecutive term of one year and eight months; count 15: Penal Code section 459 (burglary of Lisle H.'s residence) upper term of six years; count 16: Penal Code section 591 (injury to Lisle H.'s telephone lines) one-third of the mid-term for eight months to be served consecutively.

As to counts 6, 7, 8, 9, 14, 15 and 17, the court said "these crimes are committed against separate victims on separate occasions and the Court is going to impose consecutive sentencing in that regard." This resulted in a term of 10 years and eight months for offenses sentenced under Penal Code section 1170.1. As to counts 17 and 15, the court stayed punishment under Penal Code section 654. As to counts 3, 4, 10, 11, 12, and 13 the court said, "All violent sex crimes, and because counts three and four were committed against one victim and the remaining counts as against another victim, pursuant to Penal Code section 667.6(d) of the Penal Code, the Court will impose full separate and consecutive terms with respect to the two groups of charges. [¶] And with respect to the counts against the same victim, on the same occasion within the two crime groups, since the defendant had the opportunity to reflect on his actions and then continued to gratify himself through a variety of the positions until he ejaculated in each

case, the Court is going to impose consecutive sentences within the two groups of charges."

The court said "[n]ow, with respect to the crimes that the Court just referenced, the violent sex crimes, the Court will impose a full separate and consecutive sentence under 667.6 (c) as to each crime and as they involve separate acts of violence within 667.6 (c)."

In sentencing appellant, the trial court faced a range of choices including imposition of the upper, middle, or lower term as to both the principal determinate term and the terms for offenses falling within Penal Code section 667.6, imposition of consecutive or concurrent sentences as to offenses not within section 667.6, and imposition of consecutive or concurrent sentences for offenses within section 667.6 but not covered by section 667.6, subdivision (d). Appellant contends that the application of *Blakely* to his sentencing impacts the trial court's decision to impose upper terms, the trial court's decision to impose consecutive terms, and the trial court's decision to impose a full, consecutive term under Penal Code section 667.6.

Imposition of the Upper Term

The trial court stated it was imposing the upper terms for certain counts because the victims were particularly vulnerable, appellant exhibited a degree of planning and sophistication, and because of appellant's "cruelty" and "overall general conduct with respect to each of the crimes." Appellant argues that, in so doing, the trial court was sentencing him beyond the statutory maximum by finding facts beyond those reflected in the jury verdict in violation of the Fifth, Sixth and Fourteenth Amendments.

We begin by acknowledging that the question of whether *Blakely* applies to upper-term sentencing may be the subject of future clarification by our Supreme Court.[11] With that prelude, we conclude that defendant's *Blakely* challenge has merit.

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[11] The Supreme Court has granted review in two cases involving *Blakely* issues. In *People v. Towne*, review granted July 14, 2004, S125677, the high court will consider, inter alia: "(2) Does [*Blakely*], preclude a trial court from making findings on

In our application of *Blakely* to the sentencing here, we must initially ascertain "the prescribed statutory maximum" sentence. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) This "prescribed statutory maximum" is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Blakely*, *supra*, __ U.S. at p. __ [124 S.Ct. at p. 2537].)

Under California's determinate sentencing law, "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." (§ 1170, subd. (b); see also Cal. Rules of Court, rule 4.420(a) ["middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation"].) The middle term is thus the "presumptive" sentence, absent aggravating or mitigating factors warranting imposition of an upper-term or lower-term sentence, respectively. (*People v. Arauz* (1992) 5 Cal.App.4th 663, 666.) Rule 4.421 of the California Rules of Court provide a nonexclusive list of 16 factors in aggravation that the sentencing judge may consider. Aggravating or mitigating circumstances need be proved to the sentencing judge only by a preponderance of the evidence. (Cal. Rules of Court, rule 4.420(b).)

We must determine whether the trial court could properly rely on any of the cited factors as the basis for its decision to impose the upper terms without violating *Blakely.* In accordance with *Blakely,* the Constitution requires a jury trial on any fact that "the law makes essential to the punishment," other than the fact of a defendant's prior conviction. (*Blakely, supra,* --- U.S. at p. ---- and fn. 5, 124 S.Ct. at p. 2537 and fn. 5, also p. 2540.)

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aggravating factors in support of an upper term sentence? (3) If so, what prejudicial error standard applies, and was the error in this case prejudicial?" The Supreme Court also granted review in *People v. Black*, review granted July 28, 2004, S126182, on these issues: "(1) What effect does [*Blakely*] have on the validity of defendant's upper term sentence? (2) What effect does *Blakely* have on the trial court's imposition of consecutive sentences?"

Applying this standard here, we conclude that the trial court could not rely only on the cited factors as a basis for imposing the upper term sentences. In accordance with the analysis of *Blakely,* the trial court was required to afford appellant the right to a jury trial before relying on the cited factors as aggravating factors supporting the imposition of the upper term. Remand for resentencing is the appropriate remedy.

Consecutive Sentencing

Applying *Blakely* to the court's decision to impose consecutive sentences here, appellant contends, "there is no basis to distinguish constitutionally between entitlement to a specific punishment for a single count, absent a jury's finding of a necessary fact, and entitlement to a specific punishment for multiple counts, absent a jury's finding of a necessary fact."

The question of *Blakely's* effect on the trial court's authority to impose consecutive sentences may also be the subject of future clarification by our Supreme Court. Neither *Blakely* nor *Apprendi* purports to create a jury trial right to the determination as to whether to impose consecutive sentences. Both *Blakely* and *Apprendi* involved convictions for a single count. The imposition of consecutive sentences was not at issue in *Blakely* and there is no indication that *Blakely* was intended to apply to consecutive sentences. (*Blakely, supra,* --- U.S. ---- [124 S.Ct. at pp. 2534-2536]; *Apprendi, supra,* 530 U.S. at pp. 476-483, 489, fn. 15, 490.) 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 the Fourteenth Amendment due process clause rights. We perceived no *Apprendi* problem in imposing the consecutive sentences here.

DISPOSITION

The matter is remanded for resentencing in accordance with the views expressed in this opinion. The judgment is otherwise affirmed.

ELIA, Acting P. J.

WE CONCUR:

BAMATTRE-MANOUKIAN, J.

McADAMS, J.