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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JUAN GONZALEZ ESPINAL, Defendant and Appellant.	D044029 (Super. Ct. No. SCS175068)

APPEAL from a judgment of the Superior Court of San Diego County, Jeffrey F. Fraser, Judge. Affirmed in part; reversed in part and remanded.

Juan Gonzalez Espinal appeals a judgment following his jury conviction of one count of forcible rape (Pen. Code, § 261, subd. (a)(2)),[1] one count of forcible sodomy (§ 286, subd. (c)(2)), and one count of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)). The jury also found true the allegation that in committing the forcible rape Espinal tied or bound his victim (Karla R.) (§ 667.61, subds.

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

(b), (c), & (e)).[2] The trial court sentenced Espinal to 15 years to life for the forcible rape conviction based on the true finding on the section 667.61 allegation, to be served consecutively to an upper, eight-year term for the forcible sodomy conviction.[3] On appeal he contends the trial court: (1) erred by excluding evidence Karla was a brothel prostitute when he met her approximately five years before the instant incident; and (2) committed *Blakely*[4] error in sentencing him to the upper term for his sodomy conviction based on aggravating factors not found true by a jury beyond a reasonable doubt.

FACTUAL AND PROCEDURAL BACKGROUND

Karla met Espinal when she was working as a cashier at a Tijuana bar and he was a customer. Her employment at the bar was interrupted twice by pregnancy leaves. After her most recent return to work in March 2003, Gustavo Rojas-Soto (Rojas), a fellow bar employee, told her Espinal was looking for her. After Karla gave her telephone number to Rojas, Espinal called her and offered her a job as a housekeeper at his home in the San Diego area. He offered to pay her $300 per week. Because Karla did not have the necessary papers to legally cross the United States border, Espinal arranged to have

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2 The jury found not true the allegations that: in committing the *sodomy* offense Espinal tied or bound Karla; the rape and sodomy offenses were committed during a residential burglary (§ 667.61, subds. (a), (c), & (d)); and Espinal personally inflicted great bodily injury on Karla in committing the sodomy and assault offenses (§ 12022.7, subd. (a)). The jury found Espinal not guilty on a second count of forcible rape (§ 261, subd. (a)(2)).

3 The trial court imposed a middle, three-year term for the assault conviction, but stayed its execution pursuant to section 654.

4 *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531] (*Blakely*).

someone to take her across the border at Tecate. On her arrival in the United States, she began working as Espinal's housekeeper at his two-bedroom apartment on Moss Street in Chula Vista. Two or three of Espinal's male coworkers lived in the master bedroom and Karla lived in the other bedroom. Although Espinal was at the apartment every day, he did not sleep there overnight. Karla cleaned the apartment, cooked for Espinal and his coworkers, and did Espinal's laundry. She considered Espinal to be her friend, but not her boyfriend. She never had a sexual or intimate relationship with Espinal.

On March 25, about one week after her arrival at the apartment, Karla went to bed at about 10:00 or 11:00 p.m. The men already had gone to bed and Espinal had left the apartment at about 8:00 p.m. Later that night, Karla was awakened by Espinal knocking on her bedroom door. Espinal asked her for some cigarettes, which Karla gave to him. She then closed her door and went back to sleep. She was awakened again when Espinal pushed open the door and climbed on top of her. She told him to let go of her and asked him what was wrong with him. Espinal stated he had paid $1,500 for her entry into the United States and could do whatever he wanted. He hit her face and pulled her hair. Punching and kicking, Karla was able to repulse Espinal and threw him onto the floor. When she tried to leave, he pulled her hair and hit her. She swung at him with pliers or a pair of scissors and ran into the living room. As she ran toward the front door, Espinal grabbed her and threw her onto the floor. She continued to struggle and screamed for help, and Espinal placed one hand on her neck and began choking her. Karla lost consciousness; when she regained consciousness, Espinal was pouring beer into her mouth. When he took off his shirt, she tried to run away as he pulled her by her pants, hit

her, and pulled her by her hair. Defending herself, she repeatedly hit him with a large candle that was in the hallway. Espinal then pushed her into her bedroom and threw her onto the floor while she kicked and screamed. He took off his shirt and used it to tie her wrists together. Although she continued to resist, he raped her. When she continued to scream, he squeezed her neck and she again lost consciousness. When she regained consciousness, Espinal was sodomizing her. She screamed and tried to escape. Espinal then got up and Karla heard him talking on the telephone, asking someone to bring a car to him. She freed her hands and ran out the front door. She ran to a public telephone and called 911, crying throughout the call.

On March 26, at about 3:35 a.m., Chula Vista Police Officer Scott Schneider arrived at the public telephone and found Karla, shaking, crying hysterically, and speaking to him in Spanish.[5] She had white strips of cloth on both of her wrists. Paramedics arrived within five minutes. Karla saw Espinal walking down the street and identified him to Schneider. Schneider approached Espinal and questioned him in English. He said that he was going for a walk and lived in El Cajon. Schneider detained him.

Karla was taken to a hospital and examined by a sexual assault nurse. The nurse identified Karla's injuries and concluded they were probably caused by nonconsensual sexual conduct. Her right cheek was swollen, her right ear was abraded, her neck and chest areas were scratched, and both wrists were bruised. She had bruising across her

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5 Schneider does not understand Spanish.

chest. She had one broken and one missing acrylic fingernail, bruises on both thighs, and abrasions on her left knee, right big toe, and left little toe. Karla told the nurse that her neck hurt and she had lost consciousness. Vaginal and rectal swabs taken from Karla showed the presence of Espinal's sperm.

At the Moss Street apartment, a police technician found drops of candle wax on the ceiling and wall of the hallway, which was consistent with someone throwing or swinging a lit candle. The door to Karla's bedroom was off its top hinge and its lock was broken, which was consistent with a forced entry. A candle jar was lying on the floor near the door. There was a pair of pliers in the bedroom. Two tank tops were found in the bedroom, one ripped and the other tied in a knot. There were bloodstains on the bedroom wall and candle wax throughout the bedroom.

At trial, Karla, Officer Schneider, the sexual assault nurse, and the police technician testified. The police technician testified her examination of Espinal showed he had scratches on his face, left ear, left shoulder, and stomach. He also had bruises on his chest and arm, and burn marks on his back. He had candle wax in his hair and on his back.

Kelley Necochea, a neighbor who lived in the apartment directly below the Moss Street apartment, testified that at about 2:30 a.m. she heard sounds "like a person hitting the floor" coming from the apartment above hers. She heard a female crying and saying, "no." During a period of 10 to 15 minutes, she heard the sounds of a scuffle.

In his defense, Espinal testified he met Karla at a Tijuana bar approximately five years earlier. He said Karla was not a cashier there. They regularly drank at the bar, got

a hotel room, and had sex. Although he lost contact with her after he was arrested in the United States, they later reestablished their relationship in 2002 and lived together in Mexico. However, Karla left him in November 2002 after he began seeing another woman. In March 2003, when he was living in the United States, he called her in Tijuana and they resolved their relationship problems. He arranged to have her smuggled across the border. They lived together at the Moss Street apartment and engaged in sexual relations most nights.

Espinal testified that on the night of the incident he and Karla engaged in consensual sex, including anal sex, in their bedroom. Afterward, when Espinal was in the bathroom, he heard a scream and found Karla talking on the telephone with a woman (apparently Elvia Azucena Alvarez) with whom she thought Espinal was having an affair. Espinal and Karla began arguing and she hit him with jar containing a lit candle. Espinal then tried to control her by grabbing her neck and tying her hands with pieces of his torn shirt. Karla left the apartment, threatening to call immigration authorities about him. Because he was concerned about her, he went after her and was arrested by police. Although he had not lived on Crystal Lane in El Cajon since 2000, he gave police that address because it was the only address he remembered.

Rojas testified for the defense that he worked as a bartender at the Tijuana bar at which Espinal met Karla. Karla was not a cashier there, but served drinks to customers. Karla became Espinal's girlfriend and went to live with him in Chula Vista.[6]

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6 The owner and an employee of a store also testified Espinal and Karla shopped at that store and they believed Karla was Espinal's girlfriend.

Elvia Azucena Alvarez testified for the defense that she was Espinal's friend and had dated him in the past. At about 1:00 or 2:00 a.m. on March 26, 2003, she received a telephone call from a woman who claimed to be Espinal's wife.[7] That woman accused her of being Espinal's girlfriend.

In rebuttal, Chula Vista Police Detective Robert Hinkledire testified that on the morning of March 26, 2003, he conducted a videotaped interview of Espinal in Spanish. The videotape was played for the jury and an English translation of the interview was admitted into evidence. During the interview, Espinal stated he lived on Crystal Lane in El Cajon. He rented the Moss Street apartment from a friend, but could only remember that friend's first name. He referred to Karla as his "wife" although they were not married. He said they had been together for four years. On the evening of the incident he had consumed about 12 beers. He initially said he and Karla had consensual sex before they began arguing.[8] He denied ever having anal sex with her. He said Karla then called Azucena Alvarez about midnight. Karla tried to hit him and threw things at him. He tried to control her by throwing her on the floor and holding her down.

Later during the videotaped interview, Espinal admitted he forced Karla to have sex with him. He explained that while they were arguing and fighting, he grabbed her from behind and, in anger, forced her to have sex with him. He stated he did not know he

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7 Telephone records were presented showing she received a call from Espinal's cell phone at about 1:20 a.m. on the 26th.

8 Espinal said he and Karla had consensual sex many times before that night.

had, by mistake, penetrated her anus until she screamed and asked him to stop.[9] He then turned her over onto her back and had vaginal sex with her. Karla said, "No[,] Juan," about three times. He then tied her up with his shirt, which Karla had ripped during the fight. He then asked Hinkledire how much jail time he would receive "for this."

DISCUSSION

I

Exclusion of Evidence

Espinal contends the trial court erred by excluding evidence Karla was working as a brothel prostitute when he met her approximately five years before the instant incident.

A

Before trial, the prosecutor moved to exclude defense evidence of Karla's prior sexual conduct pursuant to Evidence Code sections 1103 and 782, noting Espinal had not filed a written motion, as required by Evidence Code section 782. Espinal opposed the motion, arguing he did not have time to prepare that motion and nevertheless sought to present evidence at trial that Karla was working as a prostitute at a Tijuana brothel when he met her. He argued the evidence was relevant to impeach Karla's credibility should she testify she worked at the Tijuana bar as a cashier and to support his claim he had a sexual relationship with her before the instant incident. The prosecutor argued that evidence was not relevant and could not be used to impeach her credibility without timely filing a written motion, as required by Evidence Code section 782. The trial court gave

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9 He repeated his earlier statement that he and Karla never engaged in anal sex.

Espinal time to file a written motion and continued the matter until the following day. No Evidence Code section 782 motion was filed. The next day, the court tentatively excluded the evidence, finding it was irrelevant.

During the trial, Espinal sought to present evidence that Karla was a brothel prostitute when he met her. The court again excluded that evidence as irrelevant.

B

Evidence Code section 1103, subdivision (c)(1) provides that in any rape or sodomy prosecution "opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness' sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the complaining witness." That exclusionary provision does not apply to "evidence of the complaining witness' sexual conduct with the defendant." (Evid. Code, § 1103, subd. (c)(3).) "In adopting [Evidence Code section 1103] the Legislature recognized that evidence of the alleged victim's consensual sexual activities with others has little relevance to whether consent was given in a particular instance. [Citation.]" (*People v. Chandler* (1997) 56 Cal.App.4th 703, 707.) However, section 1103's exclusionary provisions do not apply "to make inadmissible any evidence to attack the credibility of the complaining witness as provided in [Evidence Code] section 782." (Evid. Code, § 1103, subd. (c)(5).)

Evidence Code section 782, subdivision (a) provides that in any rape or sodomy prosecution:

> "[I]f evidence of sexual conduct of the complaining witness is offered to attack the credibility of the complaining witness under Section 780, the following procedure shall be followed:

> "(1) A written motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness.
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> "(2) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated. . . .
>
> "(3) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant.
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> "(4) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant pursuant to Section 780, and is not inadmissible pursuant to Section 352 of this code, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court. . . ."[10]

"Because the victim's credibility is almost always at issue in sexual assault cases, Evidence Code section 782 specifies a procedure requiring an in camera review of the proffered evidence to diminish the potential abuse of [Evidence Code] section 1103, [subdivision (c)(5)]. The defense may offer evidence of the victim's sexual conduct to attack the victim's credibility if the trial judge concludes following the hearing that the prejudicial and other effects enumerated in Evidence Code section 352 are substantially outweighed by the probative value of the impeaching evidence. [¶] By narrowly

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10 Evidence Code section 780 generally allows impeachment of the credibility of a witness with evidence or other matter "that has any tendency in reason to prove or disprove the truthfulness of his [or her] testimony at the hearing . . . ."

exercising the discretion conferred upon the trial court in this screening process, California courts have not allowed the credibility exception in the rape shield statutes to result in an undermining of the legislative intent to limit public exposure of the victim's prior sexual history. [Citations.] Thus, the credibility exception has been utilized sparingly, most often in cases where the victim's prior sexual history is one of prostitution. [Citations.] Evidence the victim participated in a form of prostitution is conduct involving moral turpitude which is admissible for impeachment purposes. (See *People v. Wheeler* (1992) 4 Cal.4th 284, 297, fn. 7 [14 Cal.Rptr.2d 418, 841 P.2d 938] [allowing the admission of past criminal conduct involving moral turpitude amounting to a misdemeanor absent a conviction to impeach the credibility of witnesses and parties].) Prostitution is a crime of moral turpitude. [Citations.]" (*People v. Chandler*, *supra*, 56 Cal.App.4th at pp. 707-709, fn. omitted.)

"A trial court's ruling on the admissibility of prior sexual conduct will be overturned on appeal only if appellant can show an abuse of discretion. [Citation.]" (*People v. Chandler*, *supra*, 56 Cal.App.4th at p. 711.)

C

Although Espinal contends the trial court erred by excluding evidence that Karla was a brothel prostitute when he met her, we need not address the merits of that contention because the purported error was not prejudicial. Assuming arguendo the trial court erred by excluding that evidence, we nevertheless conclude the error was harmless.

Although Espinal argues we should apply the prejudice standard of *Chapman v. California* (1967) 386 U.S. 18, 24, we conclude the applicable standard in the

circumstances of this case is that of *People v. Watson* (1956) 46 Cal.2d 818, 836. In general, if a trial court erroneously excludes evidence, the defendant must show on appeal that it is reasonably probable he or she would have received a more favorable result had that evidence been admitted. (*Ibid*.; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1125; *People v. Chandler*, *supra*, 56 Cal.App.4th at pp. 711-712.) Espinal argues the more stringent *Chapman* standard requiring the People to show the error was harmless beyond a reasonable doubt should apply because evidence of *significant probative value* was excluded, depriving him of his due process rights under the United States Constitution. However, "the application of ordinary rules of evidence . . . does not implicate the federal Constitution, and thus we review allegations of error under the 'reasonable probability' standard of *Watson*, *supra*, 46 Cal.2d at page 836. [Citations.]" (*People v. Marks* (2003) 31 Cal.4th 197, 227.) *People v. Cunningham* (2001) 25 Cal.4th 926, 998-999 stated:

> "In general, the ' "[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense." [Citations.]' [Citations.] We have recognized, however, that Evidence Code section 352 [and other ordinary rules of evidence] must yield to a defendant's due process right to a fair trial and to the right to present all relevant evidence of *significant* probative value to his or her defense. (*People v. Babbitt* (1988) 45 Cal.3d 660, 684 [248 Cal.Rptr. 69, 755 P.2d 253].)
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> "Although the complete exclusion of evidence intended to establish an accused's defense may impair his or her right to due process of law, the exclusion of defense evidence on a minor or subsidiary point does not interfere with that constitutional right. [Citation.] Accordingly such a ruling, if erroneous, is 'an error of law merely,' which is governed by the standard of review announced in [*Watson*, *supra*, 46 Cal.2d at p. 836]. [Citation.]"

Therefore, the erroneous exclusion of evidence having only slight probative value or on a minor or subsidiary issue does not violate a defendant's federal constitutional rights. (*People v. Cunningham*, *supra*, at p. 999; *People v. Jennings* (1991) 53 Cal.3d 334, 372.)

Although Espinal argues his proffered evidence that Karla was a brothel prostitute when he met her was evidence of significant probative value, we conclude that evidence had only *slight* probative value and concerned a minor or subsidiary issue, requiring application of the less stringent *Watson* standard of harmless error. Espinal argued his proffered evidence would have helped to impeach Karla's credibility, because it would have contradicted her testimony that she worked as a cashier at a Tijuana bar. However, Espinal testified at trial that Karla did *not* work as a cashier at that Tijuana bar. He also testified that when he was a customer at the bar Karla sat at his table, drank with him, and later went to a hotel and had sex with him. Furthermore, Rojas also testified at trial he was a bartender at that Tijuana bar and Karla did *not* work as a cashier at that bar. Rojas described Karla's work there as "pushing and serving drinks and just talking to the customers." He further testified: "She always worked around there, well, dancing and stuff." Because both Espinal and Rojas testified at trial that Karla was *not* a cashier at that Tijuana bar, any excluded evidence that also would have shown Karla did not work as a cashier (e.g., that she instead worked there as a prostitute) would have been cumulative and provided only slight, if any, probative value in impeaching her credibility.

Espinal also argues his proffered evidence that Karla was a brothel prostitute when he met her was evidence of significant probative value because it would have supported

his claim of a prior sexual relationship with her. However, Espinal testified extensively at trial regarding the long-term sexual relationship he had with Karla before the instant incident, including descriptions of the type of sex they had. He testified they regularly had sex during the periods Karla worked at the Tijuana bar. He also testified that in 2002 they lived together in Mexico and before the incident they were living together at the Chula Vista apartment and had engaged in sexual relations, including anal sex, most nights. Rojas also testified Karla became Espinal's girlfriend and went to live with him in Chula Vista. The owner and an employee of a store also testified Espinal and Karla shopped at that store and they believed Karla was Espinal's girlfriend. Therefore, to the extent evidence Karla was a brothel prostitute would have supported Espinal's claim he had a sexual relationship with her, it had only slight probative value in supporting that claim. On the record in this case, any evidence Karla had been a brothel prostitute when Espinal met her five years earlier did *not* have *significant* probative value. Assuming arguendo the trial court erred by excluding evidence Karla was a brothel prostitute when Espinal met her, it is Espinal's burden on appeal to show it is reasonably probable he would have received a more favorable result had that evidence been admitted. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1125; *People v. Chandler*, *supra*, 56 Cal.App.4th at pp. 711-712.)

Applying the *Watson* standard, we conclude it is not reasonably probable Espinal would have received a more favorable result had the excluded evidence been admitted. Contrary to Espinal's assertion this case was merely a credibility contest between Karla's and his testimonies, there was strong evidence other than their conflicting testimonies to

support the jury's verdict. Officer Schneider testified Karla was shaking and crying hysterically when he arrived at the public telephone. The jury could reasonably infer it was unlikely she would have been so emotionally distraught had she engaged in consensual sex with Espinal. The sexual assault nurse also testified regarding the nature and extent of Karla's injuries. That nurse was of the opinion Karla's injuries were probably caused by nonconsensual sexual conduct. The neighbor below Karla's apartment testified she heard sounds "like a person hitting the floor" coming from the apartment above hers. She heard a female crying and saying, "no." During a period of 10 to 15 minutes, she heard the sounds of a scuffle.

In combination with the other evidence, that testimony supported a reasonable inference by the jury that Espinal assaulted Karla and engaged in nonconsensual sex with her. The police technician testified the door to Karla's bedroom was off its top hinge and the lock was broken, which was consistent with a forced entry. A candle jar was lying on the floor near the door. There were two tank tops in the room, one ripped and the other tied in a knot. There were bloodstains on the wall. There was candle wax throughout the bedroom. The police technician's examination of Espinal after the incident showed he had burn marks on his back and candle wax in his hair and on his back. In combination with the other evidence, the technician's testimony also would support a reasonable inference by the jury that Espinal assaulted Karla and engaged in nonconsensual sex with her. Finally, the videotaped interview of Espinal by Detective Hinkledire was admitted in evidence. During that interview, Espinal admitted he forced Karla to have sex with him. He explained that while they were arguing and fighting, he grabbed her from

behind and, in anger, forced her to have sex with him. He stated he did not know he had, by mistake, penetrated her anus until she screamed and asked him to stop. He then turned her over onto her back and had vaginal sex with her. Karla said, "No[,] Juan," about three times. He then tied her up with his shirt, which Karla had ripped during the fight. He then asked Hinkledire how much jail time he would receive "for this."

Considered with the other evidence, including Karla's own trial testimony regarding her relationship with Espinal and the incident, Espinal's statements during that interview provided strong evidence in support of the jury's findings he forcibly raped and sodomized Karla (and assaulted her by means of force likely to cause great bodily injury) and in raping her he tied or bound her.

Furthermore, even had evidence been admitted that Karla was a brothel prostitute when Espinal met her, it would have had, at most, only a *slight* or minimal effect in impeaching her credibility and in supporting Espinal's claim he had a prior sexual relationship with her. On this record, it is not reasonably probable the jury would have found Espinal's version of events more credible than Karla's had the excluded evidence been admitted. Accordingly, we conclude it is *not* reasonably probable Espinal would have received a more favorable result had the excluded evidence been admitted. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1125; *People v. Chandler*, *supra*, 56 Cal.App.4th at pp. 711-712.)

II

Blakely Error

Citing *Blakely v. Washington, supra,* ___ U.S. ___ [124 S.Ct. 2531], Espinal contends the trial court erred by imposing the upper, eight-year term for his sodomy conviction based on aggravating factors not found true by a jury beyond a reasonable doubt.

A

In sentencing Espinal on the forcible sodomy conviction, the trial court stated:

> "For the record, I don't see any mitigating factors at all. Obviously, the defendant has no remorse. . . . [¶] . . . [Karla] was brutally assaulted during it. She was very vulnerable at the time. The fact is that the defendant tried to prevent her from escaping. All of these factors in my opinion are aggravating factors, and I choose the upper term of eight years. [¶] Based on the fact that the aggravating factors, the callousness of what happened in the apartment that night, absolutely outweigh the [mitigating] factors -- again, there are no mitigating factors."

Therefore, the trial court found the following aggravating factors supported its imposition of the upper term for the sodomy conviction: (1) the victim was brutally assaulted; (2) the victim was very vulnerable; and (3) Espinal tried to prevent the victim from escaping. Based on those findings by the court, it imposed the upper, eight-year term for Espinal's forcible sodomy conviction.[11]

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11 Section 286, subdivision (c)(2) provides for punishment of either three, six, or eight years in prison.

B

The People argue Espinal forfeited any *Blakely* claims by not specifically raising them below in the trial court.

In *People v. Scott* (1994) 9 Cal.4th 331, the California Supreme Court held a defendant's failure to challenge in the trial court the imposition of an aggravated sentence based on erroneous or flawed information waived that issue for purposes of appeal. However, *Scott*'s reasons for its waiver rule--it was necessary to facilitate the prompt detection and correction of error in the trial court, thus reducing the number of appellate claims and preserving judicial resources (*id*. at pp. 351-353)--is a pragmatic rationale that does not support the application of the waiver rule here. Prior to *Blakely*, California courts and numerous federal courts consistently held there was no constitutional right to a jury trial in connection with a court's imposition of consecutive sentences. (*People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231; *U.S. v. Harrison* (8th Cir. 2003) 340 F.3d 497, 500; *U.S. v. Lafayette* (D.C. Cir. 2003) 337 F.3d 1043, 1049-1050; *U.S. v. Hernandez* (7th Cir. 2003) 330 F.3d 964, 982; *U.S. v. Davis* (11th Cir. 2003) 329 F.3d 1250, 1254; *U.S. v. Lott* (10th Cir. 2002) 310 F.3d 1231, 1242-1243; *U.S. v. White* (2d Cir. 2001) 240 F.3d 127, 136.) No published case in California had held a different rule applied in connection with the imposition of an upper term. Because of this state of the law, an assertion of a constitutional challenge to the imposition of an upper term would not have achieved the purpose of prompt detection and correction of error in the trial court. Further, because *Blakely* was decided after Espinal's sentencing, Espinal cannot be said to have knowingly and intelligently waived his right to a jury trial. (See *Blakely*,

supra, 124 S.Ct. at p. 2541 [noting that "[i]f appropriate waivers are procured," a state is free to utilize judicial fact-finding in its sentencing scheme].)

The People do not persuade us that Espinal forfeited his right to assert his sentence was error because he did not object below.[12] Espinal advocated in the trial court for a mitigated sentence by filing a statement in mitigation urging the court to impose a lesser aggregate sentence. Under the circumstances, it would be unreasonable to find Espinal forfeited a constitutional challenge of which he was unaware, and we find the forfeiture rule inapplicable.

C

In *Blakely*, the United States Supreme Court held " '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory

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12 The People argue *U.S. v. Cotton* (2002) 535 U.S. 625 held a defendant's failure to object at trial can forfeit his right to assert improper sentencing under *Apprendi v. New Jersey* (2002) 530 U.S. 466 (*Apprendi*) even though *Apprendi* had not been decided at the time of trial. The People argue, by extension, Espinal's failure to object at trial forfeited his right to assert improper sentencing under *Blakely* even though his trial pre-dated *Blakely*. However, the People do not articulate how the forfeiture doctrine is distinct from *Scott*'s waiver doctrine, or why such distinction should call for a different analysis. Moreover, *Cotton* evaluated a distinct claim--whether a grand jury indictment alleging conspiracy to possess and distribute drugs but omitting any quantity allegation deprived the court of the ability to sentence the defendant to the higher sentence based on the amount possessed when the defendant did not object *and it was " 'essentially uncontroverted' "* the amount possessed by the defendant qualified for the higher sentence. (*Cotton*, *supra*, at pp. 632-633.) *Cotton* effectively concluded the omission was harmless because, considering the evidence, "[s]urely the grand jury, having found that the conspiracy existed, would have also found that the conspiracy involved [the requisite amount]." (*Id*. at p. 633.) Thus, the forfeiture analysis in *Cotton* turned on its conclusion that the omission was harmless to the defendant's rights. Here, however, Espinal did contest the factual basis for the sentence and it was not " 'essentially uncontroverted' " the aggravating factors were present.

maximum [of the standard range] must be submitted to a jury, and proved beyond a reasonable doubt.' " (*Blakely*, *supra*, 124 S.Ct. at p. 2356.) The question of whether *Blakely* precludes a trial court from making findings on aggravating facts in support of an upper term is currently under review by the California Supreme Court. (*People v. Towne*, review granted July 14, 2004, S125677; *People v. Black*, review granted July 28, 2004, S126182.) Pending resolution of the issue by the Supreme Court, we must determine whether *Blakely* applies here.

Under California's determinate sentencing law, where a penal statute provides for three possible prison terms for a particular offense, the court is required to impose the middle term unless it finds, by a preponderance of the evidence, the circumstances in aggravation outweigh the circumstances in mitigation. (§ 1170, subd. (b); Cal. Rules of Court, rule 4.420(c), (d).)[13] The People argue imposition of the upper term under the California determinate sentencing scheme is not the same as "the imposition of a penalty beyond the standard range" and thus does not implicate *Blakely*. We conclude this distinction is one without a difference. Although an upper term is a "statutory maximum" penalty in the sense it is the highest sentence a court can impose for a particular crime, it is not necessarily the "maximum sentence a judge may impose *solely on the basis of facts reflected in the jury verdict or admitted by the defendant*," which is the relevant standard for purposes of applying *Blakely*. (*Blakely*, *supra*, 124 S.Ct. at p. 2357; see *Apprendi*, *supra*, 530 U.S. at pp. 491-497 [state hate crime statute authorizing the imposition of an

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13 All rule references are to the California Rules of Court.

enhanced sentence based on a judge's finding of certain facts by a preponderance of the evidence violated the due process clause]; *Ring v. Arizona* (2002) 536 U.S. 584, 592-593.)

As explained in *Blakely*, when the judge's authority to impose a higher sentence depends on the finding of one or more additional facts, "it remains the case that the jury's verdict alone does not authorize the sentence," as required to comply with constitutional principles. (*Blakely, supra*, 124 S.Ct. at p. 2358.) The same is true here. Because the maximum penalty the court can impose under California law without making additional factual findings is the middle term, *Blakely* applies. Thus, the question becomes whether the trial court could properly rely on any of the cited factors as the basis for its decision to impose the upper term without violating *Blakely*.

In this case the trial court relied on a number of aggravating factors as the basis for its decision to impose the upper term for the forcible sodomy conviction. The trial court found the following aggravating factors supported its imposition of the upper term: (1) the victim was brutally assaulted; (2) the victim was very vulnerable; and (3) Espinal tried to prevent the victim from escaping. None of those aggravating factors were found true by the jury. Under *Blakely*, the federal Constitution requires a *jury* to determine any fact " 'the law makes essential to the punishment' " other than the fact of the defendant's prior conviction. (*Blakely, supra*, 124 S.Ct. at pp. 2537, fn. 5, 2540 [any fact that pertains to whether the defendant has a legal right to a lesser sentence].) Applying those standards to the present case, there is no finding by the jury on which the trial court could rely for the selection of the upper term. Accordingly, we conclude on this record the trial

court's decision to select the upper, eight-year term for the forcible sodomy conviction violated Espinal's constitutional rights to a jury trial and proof beyond a reasonable doubt.[14]

DISPOSITION

The sentence, insofar as the court imposed the upper term for the forcible sodomy conviction, is vacated; in all other respects, the judgment is affirmed. The case is remanded to the superior court to conduct a new sentencing hearing consistent with the principles discussed in this opinion.

McDONALD, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McINTYRE, J.

[14] Although Espinal requests we remand the matter with directions that the trial court impose the middle, six-year term for his forcible sodomy conviction, he does not provide any substantive argument or analysis showing why the case should not be remanded for a new sentencing hearing. Accordingly, we decline to grant the specific relief he requests.