Filed 4/13/07 P. v. Johnson CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DAVID M. JOHNSON, Defendant and Appellant.	A113097 (Sonoma County Super. Ct. No. SCR472541)

David M. Johnson appeals following his conviction of kidnapping (Pen. Code, § 207, subd. (a)[1]), willful infliction of corporal injury on a spouse with a prior conviction (§ 273.5, subds. (a) & (e)(1)), assault with a deadly weapon (§ 245, subd. (a)(1)), and making criminal threats (§ 422).) With respect to the kidnapping and corporal injury on a spouse counts, the jury also found true allegations that defendant had inflicted great bodily injury (§ 12022.7, subd. (a).) The court sentenced defendant on the kidnapping count to the upper term of eight years, and three years for the enhancement. It also imposed the upper term on the remaining counts, but stayed the terms pursuant to section 654.

Defendant contends that his conviction for kidnapping must be reversed because the instructions on withdrawal of consent allowed the jury to convict him without finding the requisite intent. He also contends that in violation of *Cunningham v. California* (2007) 549 U.S. ____ [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*), the court

[1] Unless otherwise indicated, all subsequent statutory references are to the Penal Code.

imposed the aggravated term on each count based upon aggravating factors that must, absent defendant's waiver, be submitted to a jury.

FACTS

In a prior incident of domestic violence that occurred in October 2003, defendant, during an argument with his wife, Ms. Doe, head-butted her, hit her, wrapped his arm around her neck and dragged her down the hall. Her neck was particularly sensitive because she had degenerative disk disease, and had undergone two neck surgeries for it. Defendant repeatedly threatened to kill her. Defendant was convicted of misdemeanor willful infliction of corporal injury on a spouse for this incident, and served time in jail. He returned to live with Ms. Doe and her daughter after he was released, but moved out in June 2005.

In the late morning or early afternoon of August 19, 2005, defendant called Ms. Doe. It was the second anniversary of their rocky marriage. He asked her to meet him at a 7-Eleven store by the fairgrounds. He told her that he had divorce papers for her to sign.

She drove to the 7-Eleven to meet defendant. After she bought cigarettes and he bought beer, they returned to her car and she drove defendant to Spring Lake. She put out a blanket by a picnic table and they talked about their relationship, which Ms. Doe felt had come to an end. She asked defendant about the divorce papers, and he said he did not have any. He then became angry and started saying things in an angry and demeaning tone. He became more and more angry as he continued to drink his beer. He said he did not want to be there anymore, so they got in the car. She was driving and he was the passenger. She started to head home. Defendant yelled at her saying, "Where are you going?" She told him she was tired, and was going home. He said, "No, you're not, fucking bitch." He "made [her] turn around." She explained that she obeyed because she knew that when he gets angry "he'll hit." She drove for awhile until they stopped at a store behind the racetrack. They both went into the store, but she could not recall what she got, or who paid. She did not try to drive away while defendant was in the store because the last time she "went away or left [her] car" he damaged it. He began

to hit her as they drove around. He called her names and told her it was her fault that he had been fired from his job. She kept asking where he wanted to go, and he said, "Just keep driving, bitch." She also kept "explaining over and over it's not my fault." As she drove he hit her repeatedly with his fist on the right side of her face and ear. Some of the blows were so hard that they knocked her head against the driver's side window.

As they approached the jockey club parking lot defendant told her to go there. He continued to yell and scream at her. When she stopped in the parking lot, Ms. Doe saw a friend, but defendant told her, "[D]on't even think of trying to be contacting your friend . . . or I'll kill you." Defendant decided he wanted her to keep going, so she put the car in motion again. He hit her again twice, held a knife to her ribs, and told her that the friend could not help her.

Ms. Doe left the parking lot. As she drove he continued to yell at her, and then told her he was going to bury her in a remote construction area. She kept telling him she wanted to go home, and asking him to let her, but "he said no." She was afraid to pull over, or do anything because "[e]verything seemed to cause him to hit me." She also kept asking why he was doing this, and he responded he was going to kill her and bury her. When he told her to drive up a dirt road to the construction site she refused, and he became infuriated. She was sure he meant to kill her. All she wanted to do was go home and see her 16-year-old daughter. He kept striking her in the face repeatedly "like jack-hammering" and yelling that he was going to bury her. She became light-headed and her ears were ringing. She asked defendant to let her stop driving, but he refused and continued to hit her and threaten to kill her. She was afraid to stop driving because everything she did caused him to hit her. The blows were hard enough to cause the car to veer until she regained control. She wanted to go home, but knew he would not let her. Ms. Doe pleaded with him that if he was going to kill her, to let her talk to her daughter.

They stopped again at a 7-Eleven. Although Ms. Doe was not certain, she thought she may have gone inside with defendant. She then ran out to the phone to call her daughter. She told her daughter she was coming home. Defendant ran out and got to the phone immediately after her daughter answered. Ms. Doe urged him to talk to her

daughter, hoping that would calm him down. Instead, he hit Ms. Doe with the phone and hung it up.

Defendant ordered Ms. Doe back into the car. She had been crying since he started hitting her, and her eyes were blurry, and she had a headache. He continued to hit her in the head as she drove. At some point he ripped off the rear view mirror and used it to hit her over her right eye. The mirror shattered, and she began to bleed. She wanted to go home, and told him so, but he did not want her to. Eventually, Ms. Doe persuaded him to let her go back to the house by promising to have sex with him. She did not want to bring him home and have sex, but saw this as a way to get home and see her daughter. Once she made this promise, it took less than an hour to drive back to her home.

When they pulled into the carport, she "ran like hell." Her daughter met her on the way to her apartment, and called 911. After returning home from the hospital, where she was treated for her injuries, Ms. Doe saw that the windshield of her car was bashed in and the tire sidewalls had holes in them.

ANALYSIS

I.

Instructions on Consent

The defense to the kidnapping charge turned upon defendant's argument that he did not force Ms. Doe to go with him without her consent because Ms. Doe voluntarily got into the car with him. Defense counsel acknowledged Ms. Doe did not, of course, consent to being struck repeatedly in the head as she drove around with defendant, or to being held at knifepoint in the parking lot. Nonetheless he suggested that defendant was guilty only of the lesser offense of false imprisonment. In support of this theory, defense counsel noted that Ms. Doe voluntarily got in her car and drove with defendant to Spring Lake. He argued the jury could infer her continued consent to driving around throughout her ordeal from the fact that, after the argument began at the lake, she voluntarily got back into the car and drove with defendant. Moreover, he asserted the jurors could infer that she was not forced to drive anywhere because she was able to refuse defendant's demand that she drive to the construction site. Defense counsel further noted that

Ms. Doe eventually did end up driving home, which is where she had repeatedly said she wanted to go.

The instructions given informed the jury of the elements comprising the definition of kidnapping, and specified that the prosecution must prove that :

"1. The defendant took, held, or detained another person by using force or by instilling reasonable fear; [¶] 2. Using that force or fear the defendant moved the other person or made the other person move a substantial distance; [¶] 3. The other person did not consent to the movement; [¶] AND [¶] (4) The defendant did not actually and reasonably believe that the other person consented to the movement."

It further instructed :

"The defendant is not guilty of kidnapping if he reasonably and actually believed that the other person consented to the movement. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person consented to the movement. If the People have not met this burden, you must find the defendant not guilty of this crime.

"The defendant is not guilty of kidnapping if the other person consented to go with the defendant. The other person consented if she (1) freely and voluntarily agreed to go with or be moved by the defendant, (2) was aware of the movement, and (3) had sufficient maturity and understanding to choose to go with the defendant. The People have the burden of proving beyond a reasonable doubt that the other person did not consent to go with the defendant. If the People have not met this burden, you must find the defendant not guilty of this crime.

"Consent may be withdrawn. If, at first, a person agreed to go with the defendant, that consent ended if the person changed his or her mind and no longer freely and voluntarily agreed to go with or be moved by the defendant. The defendant is guilty of kidnapping if after the other person withdrew consent, the defendant committed the crime as I have defined it."

This instruction correctly informed the jury of all the elements of the offense the prosecution was required to prove. "Generally, to prove the crime of kidnapping, the

prosecution must prove three elements: (1) a person was unlawfully moved by the use of physical force or fear; (2) the movement was without the person's consent; and (3) the movement of the person was for a substantial distance." (*People v. Jones* (2003) 108 Cal.App.4th 455, 462.) It also informed the jury that it must find not only that the victim did not consent, but also that the defendant did not entertain a *reasonable* and *good faith* belief that the victim consented to accompany him. A defendant who has a good faith and reasonable belief that the victim consented lacks the requisite intent to move the victim by force or fear. (*People v. Mayberry* (1975) 15 Cal.3d 143, 155 (*Mayberry*); *People v. Felix* (2001) 92 Cal.App.4th 905, 910 (*Felix*).) Finally, it correctly informed the jury that even if a victim initially goes voluntarily with the defendant, if at any point her consent is withdrawn, defendant's use of force or fear to continue the asportation over a substantial distance constitutes kidnapping. (*People v. Davis* (1995) 10 Cal.4th 463, 517-518 [instruction correctly stated that "a kidnapping may occur where the victim *initially voluntarily went somewhere with the defendant or voluntarily permitted him to go somewhere with her, but thereafter she was transported after being forcibly restrained from leaving*"]; see also *People v. Galvan* (1986) 187 Cal.App.3d 1205, 1213 [defendant committed kidnapping when victim accepted ride home from defendant who then changed course and ignored her requests to be taken home].)

Defendant nonetheless contends that the portion of the instruction with respect to withdrawal of consent was erroneous for two related reasons. First, he argues the jury could construe the instruction to allow conviction if it found that Ms. Doe, after initially consenting, merely *subjectively* changed her mind, even if the defendant "never . . . understood that he was forcing Doe to go where she did not wish to go." A defendant who has no reason to believe that consent has been withdrawn at least entertains a *reasonable* and *good faith* belief that the victim voluntarily consented to accompany him. (See *Mayberry*, *supra*, 15 Cal.3d at p. 155; *Felix*, *supra*, 92 Cal.App.4th at p. 910.) Therefore, defendant argues the instruction on withdrawal of consent could result in a conviction without a determination that the defendant had the requisite intent to commit kidnapping. Second, based upon his premise that the instruction could be construed to

permit conviction even if the defendant was unaware that the victim had withdrawn her consent, he argues the court should, sua sponte, have modified or clarified it by stating that the victim must *communicate* to the defendant that she no longer consents. Otherwise, defendant asserts, the same problem exists: The jury could construe the instructions to require conviction if the jury found the victim subjectively changed her mind and no longer freely or voluntarily agreed to go with defendant, even if the evidence also supports the conclusion that the defendant had no reason to believe her consent had been withdrawn.

Defendant's premise fails because there is no reasonable likelihood that the instruction, if read as a whole, would be construed to permit conviction if the victim merely subjectively changed her mind, but the defendant had a good faith and reasonable belief that the victim continued to consent. " ' " '[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.' " [Citation.] If the charge as a whole is ambiguous, the question is whether there is a " 'reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." ' " (*People v. Huggins* (2006) 38 Cal.4th 175, 192; see also *Estelle v. McGuire* (1991) 502 U.S. 62, 72.) Defendant's construction is based upon a reading of the portion of the instruction on withdrawal of consent in isolation from the remainder of the instruction. Yet, read as a whole, there is no reasonable likelihood that a juror would construe the instruction to permit conviction if defendant reasonably and in good faith was unaware that the victim had withdrawn her consent. The instruction informed the jury that the prosecution must prove that the victim did not consent, *and* that defendant did not have a reasonable and good faith belief that the victim went with him voluntarily. Nothing in the portion of the instruction regarding withdrawal of consent suggested that a different rule applied when consent initially exists, and is later withdrawn. To the contrary, the instruction informs the jury that, if the victim's initial consent is withdrawn, the defendant is guilty of kidnapping only if the jury finds he thereafter "committed the crime *as I have defined it.*" The italicized language clearly refers the jury back to the initial definition of kidnapping, including the direction that the

jury must find not only that the victim did not consent, but *also* that the defendant *did not have a reasonable and good faith belief* that the victim went with defendant voluntarily. If the jury found the victim only subjectively changed her mind, but nothing she said or did objectively communicated that fact to the defendant, it could only conclude he had a reasonable and good faith belief in her continued consent.

Since the instruction is not reasonably susceptible to the interpretation that the defendant can be found guilty even if he has no reason to know that consent has been withdrawn, it correctly stated the law. The court therefore had no sua sponte duty to modify the instruction to specify that the victim must communicate the withdrawal of consent to the defendant. In any event, that requirement is implicit in the direction that to convict, the jury must not only find the victim did not consent, but also that the defendant did not have a good faith and reasonable belief that the victim consented. The case upon which defendant relies, *In re John Z.* (2003) 29 Cal.4th 756 (*John Z.*), in support of his assertion that a correct instruction must specifically inform the jury that the victim must communicate her withdrawal of consent to the defendant, does not so hold. In *John Z.*, the court overruled a line of authority that held the crime of rape requires lack of consent *at the moment of initial penetration*. (*Id*. at p. 760.) The court held that " 'forcible rape occurs when the act of sexual intercourse is accomplished against the will of the victim by force or threat of bodily injury and it is immaterial at what point the victim withdraws her consent, so long as that withdrawal is communicated to the male and he thereafter ignores it.' " (*Id*. at p. 762.) The court expressly declined to recommend "what pinpoint instructions, if any, might be appropriate in these withdrawn consent cases . . . or *recommend instructional language governing such matters as the defendant's knowledge of the victim's withdrawal of consent*, the possibly equivocal nature of that withdrawal, or the point in time at which defendant must cease intercourse once consent is withdrawn." (*Id*. at p. 763.)

Even if the claimed instructional error had occurred, we would find it to be harmless under any standard. (See *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*); *People v. Watson* (1956) 46 Cal.2d 818, 836) (*Watson*).) The evidence was

overwhelming that although Ms. Doe initially got into the car with defendant voluntarily, she communicated by words and acts that she did not consent to driving around aimlessly with defendant while he beat her and threatened to kill her, and no reasonable person could have entertained a good faith belief that she did continue to consent. (See *Felix, supra,* 92 Cal.App.4th at p. 910 [no error in failing to instruct on reasonable and good faith belief that victim consented to go with the defendant where defendant put victim's child in the car to induce her to go with him, repeatedly refused her requests to go home, and kept his eye on her when they stopped so that she did not attempt to run away].) Ms. Doe testified that she got back in the car with defendant after the argument began at Spring Lake. She told defendant she was heading home, but he ordered her not to. She testified that she turned the car around because she knew he would hit if angered. She also told the defendant many times during the drive that she just wanted to go home and he refused to let her. She did not attempt to run away or pull over because she was afraid he would damage her car or hit her. Defendant's subjective understanding that she did not voluntarily continue to drive around with him was manifest when he held a knife to her side to prevent her from seeking the aid of a friend and forced her to keep driving. (See *ibid*. [fact that defendant put victim's child in his car to induce her to go with him demonstrated he knew she would not go with him voluntarily].) Nor could defendant have held a reasonable and good faith belief that she continued to drive with him voluntarily based upon the fact that she refused his demand that she take a dirt road to the deserted construction area where he threatened to bury her, because, for this limited defiance she suffered his fury in the form of even more blows to the head. At their last stop at a store Ms. Doe returned to the car with defendant only after she ran out to call her daughter, and defendant struck her with the phone. Ms. Doe was able finally to get home only by employing the subterfuge of promising to have sex with him. At this point she had suffered many blows to the head, and was bleeding from her forehead, after defendant struck her with the rearview mirror, shattering it. In this state, her promise could not reasonably and in good faith be understood as free and voluntary consent to go with defendant. In any event, prior to making this promise in order to get home and gain

her freedom, Ms. Doe had already been forced to go with defendant involuntarily for a substantial distance. Ms. Doe's testimony was uncontradicted, and corroborated by evidence of her physical condition, her immediate flight from defendant as soon as she got home that was witnessed by her daughter, and her daughter's prompt call to 911.

II.

Cunningham Error

At the sentencing hearing held on February 9, 2006, the court found the following "significant factors in aggravation, the particular cruelty of the attack based on Mr. Johnson's knowledge of his wife's physical condition, that it was particularly painful because of her degenerative neck condition, and also the prior numerous convictions, the prior prison term, and the unsatisfactory prior grants of probation and parole." It further found "the successful completion of two grants of probation, and possibly the intoxication might be considered in mitigation." The court stated its conclusion that the aggravating factors outweighed the mitigating factors, and stressed that defendant's attack "was extremely damaging not just physically, but mentally and emotionally" that the death threat was real and immediate, and that his current offenses also caused serious emotional damage to the victim's daughter, who had testified at trial.

With this court's permission, defendant filed a supplemental brief contending that the judicial factfinding supporting the factors in aggravation violated his Sixth Amendment right to a jury trial. He relies upon the recent decision in *Cunningham, supra*, 127 S.Ct. 856. "*In* [*Cunningham*], the United States Supreme Court held that the imposition of an upper term sentence under California's determinate sentencing law (DSL), based on a judge's finding by a preponderance of the evidence that circumstances in aggravation outweighed circumstances in mitigation, violates a defendant's Sixth and Fourteenth Amendment right to a jury trial. The high court also held that the middle term sentence . . . is the maximum sentence a judge may impose under the DSL without the benefit of facts reflected in the jury's verdict—that is, facts found true by a jury beyond a reasonable doubt—or admitted by the defendant. [¶] The *Cunningham* court thus extended to the DSL the rule it originally announced in *Apprendi v. New Jersey* (2000)

530 U.S. 466, 476 (*Apprendi*). The *Apprendi* rule states that a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant, violates the federal constitutional guarantee of a right to a jury trial.

The People incorrectly contend that defendant's argument is waived by his failure to assert it below, or in his opening or reply briefs. At the time of the sentencing hearing, and the filing of the briefs on appeal, the controlling law in California was *People v. Black* (2005) 35 Cal. 4th 1238 (*Black*), which was filed on June 20, 2005. In *Black*, our Supreme Court analyzed California's sentencing scheme in light of *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) and held that "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*Black, supra*, at p. 1244.) In light of that holding, and before *Cunningham, supra*, 127 S.Ct. 856, it would have been futile for defendant to request a jury trial on the aggravating circumstances or to raise a *Blakely* objection at sentencing. "Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence. [Citations.]" (*People v. Welch* (1993) 5 Cal.4th 228, 237-238.)

Turning to the merits, one of the four aggravating factors found by the sentencing court, i.e., that the crime involved a high degree of cruelty, clearly falls within the category of sentencing facts that must be determined by a jury unless the defendant waives his right to a jury trial. The remaining three, i.e., the prior prison term, the numerous prior convictions, and unsatisfactory performance on probation, all were properly found by the court because they fall within the *Almendarez-Torres* exception that allows the court to impose a sentence in excess of the statutory maximum based on a judge's finding that a defendant had a prior conviction. (See *Almendarez-Torres v. United States* (1998) 523 U.S. 224.) *Cunningham* did not overrule *Almendarez-Torres*, and as interpreted by the California Supreme Court and courts in other jurisdictions, the

Almendarez-Torres exception extends beyond the mere fact of a prior conviction, and includes facts related to the defendant's "recidivism" (see *People v. McGee* (2006) 38 Cal.4th 682, 700-709 and cases cited), which includes a finding that defendant had a prior prison term, that his performance on probation was unsatisfactory, and that his prior convictions were numerous. (See *People v. Thomas* (2001) 91 Cal.App.4th 212, 221-222, cited with approval in *People v. McGee*, *supra*, at pp. 700-703.)

The People first contend that defendant's constitutional right to a jury trial is not violated under *Cunningham*, *supra*, 127 S.Ct. 856, where, as here, at least one aggravating factor is properly found by the court under the *Almendarez-Torres* exception. The People argue that because that single aggravating factor renders the defendant *eligible* for the upper term (see *People v. Osband* (1996) 13 Cal.4th 622, 728-729), the upper term, in a case such as this, becomes the statutory maximum. Therefore, the People argue, the court may proceed to make findings on other aggravating circumstances without violating defendant's right to a jury trial. The only authority the People cite in support of this argument is Justice Kennard's concurring and dissenting opinion in *Black*, *supra*, 35 Cal.4th 1238. Justice Kennard disagreed with the majority opinion that the DSL did not violate the defendant's constitutional right to a jury trial as defined in *Blakely*, *supra*, 542 U.S. 296, but agreed to affirm the judgment based upon the reasoning the People now advance in support of the judgment in this case. (*Black*, *supra*, at pp. 1270, 1273 (conc. & dis. opn. of Kennard, J.).) The *Cunningham* court, however, was unequivocal that the statutory maximum " 'is not the maximum sentence a judge may impose *after* finding additional facts, but the maximum he [or she] may impose *without* any additional findings" (*Cunningham*, *supra*, at p. 860, first italics added), and that under California law the statutory maximum is the *midterm*. (*Id*. at p. 871.) Given this holding, we cannot conclude that the United States Supreme Court would accept the rationale that, in some cases under the DSL, the statutory maximum is the *upper* term once the court properly makes findings of the one aggravating factor,

The People next argue that we may find the error harmless because the evidence that the offenses were committed with cruelty, based upon defendant's knowledge that

the victim had had two surgeries on her neck, was so overwhelming that if the fact had been submitted to the jury it could have reached no other conclusion but that this aggravating fact was proven beyond a reasonable doubt. (See *Washington v. Recuenco* (2006) ____ U.S. ____ [126 S.Ct. 2546] [court held failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error]; see also *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327.) We do not find beyond a reasonable doubt that the jury would have so found, nor do we deem it appropriate to reach such a conclusion based upon the evidence at trial where, as here, defendant's knowledge of the victim's neck condition was not an essential fact relevant to his guilt, and he therefore had no reason to present any opposing evidence on the issue.

The People finally contend that we may nonetheless affirm the sentence because the court would have been within its discretion to impose the upper term based upon any one of remaining factors the court properly could decide under the *Almendarez-Torres* exception. It has long been the law in California that when a court relies upon both improper and proper factors in imposing a sentence, its exercise of discretion may be upheld, and no resentencing is necessary if this court can determine from the record that the court would have exercised its discretion in the same way *without* the improper factor. (See *People v. Avalos* (1984) 37 Cal.3d 216, 233; *People v. Kelly* (1997) 52 Cal.App.4th 568, 581, fn. 18.[2]) "However, '[t]he statutory preference for imposition of the middle term, when coupled with the requirement that aggravating circumstances must outweigh mitigating circumstances before imposition of the aggravated term is proper, creates a presumption.' [Citation.] Thus, the reviewing court may not simply ask whether the imposed sentence would be 'wholly unsupported or arbitrary in the absence

[2] These decisions apply the state law standard for finding prejudice under *Watson*, *supra*, 46 Cal.2d 818. It is not clear whether it is necessary to apply *Chapman*, *supra*, 386 U.S. 18, since this analysis permits the sentence to be upheld only if *excluding* the aggravating factor found in violation of the defendant's jury trial rights it is not reasonable probable that the court would have imposed a more favorable sentence. Nonetheless, we shall assume that we cannot uphold the sentence unless we can find beyond a reasonable doubt that the court would have exercised its discretion to impose the upper term, even without the improper aggravating factor.

of error' but must also reverse where it cannot determine whether the improper factor was determinative for the sentencing court." (*People v. Avalos*, *supra*, at p. 233.)

The record in this case is too equivocal to permit us to determine whether the improper factor was determinative for the sentencing court in the selection of the upper term. In addition to the three aggravating factors based upon defendant's recidivism, the court found at least one, and possibly two, mitigating factors. Moreover, its comments following its pronouncement that the aggravating factors outweighed the mitigating factors emphasizing the physical and emotional damage defendant caused by the current offense could be construed to mean that the court placed great weight upon its finding of cruelty in selecting the upper term. Under these circumstances, rather than speculate as to whether the court would nonetheless impose the upper term, it is appropriate to vacate the sentence and remand to the trial court with directions that it may reinstate the sentence if, based upon its weighing of the aggravating factors it properly found under the *Almendarez-Torres* exception, and the factors in mitigation, it exercises its discretion to impose the upper terms with respect to each offense. If the court does not reinstate the sentence on these grounds, then it shall hold a resentencing hearing consistent with *Cunningham*, *supra*, 127 S.Ct. 856, and the views expressed in this opinion.

CONCLUSION

The sentence is vacated with directions that on remand the court may reinstate the sentence if based upon its weighing of the aggravating factors it properly found under the *Almendarez-Torres* exception (*Almendarez-Torres v. United States*, *supra*, 523 U.S. 224), and the factors in mitigation, it exercises its discretion to impose the upper terms. If the court does not reinstate the sentence on these grounds, then it shall hold a resentencing hearing consistent with *Cunningham*, *supra*, 127 S.Ct. 856, and the views expressed in this opinion. In all other respects the judgment is affirmed.

_____
STEIN, J.

We concur:

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MARCHIANO, P. J.

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MARGULIES, J.