Filed 2/23/07 P. v. Navarro CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RODOLFO ARAUJO NAVARRO, Defendant and Appellant.	F049537 (Super. Ct. No. VCF138135) **O P I N I O N**

APPEAL from a judgment of the Superior Court of Tulare County. William Silveira, Judge.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Senior Assistant Attorney General, J. Robert Jibson and Judy Kaida, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Rodolfo Araujo Navarro stands convicted, following a jury trial, of the forcible rape of M. (Pen. Code, § 261, subd. (a)(2)) and misdemeanor sexual battery of J.

(*id*., § 243.4, subd. (e)(1)). Sentenced to a total term of eight years in prison, he now appeals, raising various claims of trial and sentencing error. For the reasons that follow, we will vacate the sentence with directions.

FACTS

I

PROSECUTION EVIDENCE

In March 2004, M. left her husband and two of her children in Mexico, and came to the United States with one of her brothers and her daughter.[1] Using false documents to obtain employment, she regularly sent money to her family.

As of October 2004, M. worked at a nursery belonging to Jerry Moore. Appellant, the foreman, was her supervisor. M., who knew appellant was married, did not engage married men romantically. She was not physically attracted to appellant, and did not flirt with him or have any kind of interaction with him that was purely social. She specifically denied engaging him in oral copulation or other sexual activity two to three months before the events in question.

M. always worked with other persons. On October 28, 2004, however, appellant called her to "work alone." One of her brothers dropped her off that morning at the location where the tools were kept. A coworker, Susano Gamez, was there, but M. did not work with him that day because appellant told her to get into the pickup, and that he was going to take her to the nursery to count trees.[2] During the ride, appellant told M. not to

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[1] The record reflects M. had two brothers. She resided in Tulare County with her daughter, both brothers, and one brother's wife. The record frequently is unclear in referencing one particular brother or both brothers.

[2] Moore estimated that the location at which M. was counting trees was approximately 400 yards from where the tools were kept.

be afraid. M. had not expressed any fear, but she was not accustomed to being alone with anyone.

They arrived at the nursery, which, at this location, consisted of trees and empty areas. M. did not see anyone else around. Appellant asked M. if she preferred men or women. M., who had not initiated any conversation about sexual matters, responded that she did not like women. They continued to talk about sexual matters for a brief time, but she neither tried to touch appellant nor invited him to touch her. She told him that she wanted to work. She got out of the truck and asked him for the tools. He asked why she was in such a hurry to go to work, since he was the one who gave the orders. M., who understood that appellant had the authority to fire her, responded, "That's what I went for, to work."

Appellant, who was removing the blue overalls he was wearing over denim pants and a T-shirt, told M. to get the tools, so she approached the truck. The tools, a handheld counter and tablet, were in the front where appellant had sat, and she went to get them. Appellant then came up behind her. When she felt his body, she turned around and they began to struggle. She pushed him and he grabbed her wrists. She honked the horn with her shoulder, but there was no one to hear. As they struggled, M. felt appellant's mouth on her neck. She tried to pull loose. Appellant said she could leave, that he was not going to do anything. M. managed to take a step and tried to run, but felt appellant pull down her pants, which had an elastic waistband. She pulled her clothes up, but felt appellant pull them down again. He "locked [M.] up against the truck" and penetrated her from behind. She felt his penis inside her vagina. After he finished he said that, when she got through working there, she should go and pick up suckers, the branches of trees that have been pruned. He then left.

Feeling something draining from her intimate part, M. went to the restroom. She felt a lot of repugnance and threw up under the trees. She then began work counting the

trees. She was afraid to tell anybody what had happened, because she thought her brothers might seek out appellant and a tragedy might occur. Also, she had had no contact with American law enforcement authorities before this time and was concerned that, if she contacted the police, she would be deported.

Moore went to check on M. around 11:30 that morning. She tried to talk to him, but he did not understand Spanish and she did not speak English. Sometime later, she saw Gamez approaching. She thought he was appellant and tried to run away. When he asked where she was going, she said that something had happened to her. Because of embarrassment, she did not tell him the truth. Gamez said that when she was finished, she should go pick up the suckers. M. continued to work, then handed appellant the tablet on which she had counted the trees. She then distanced herself from him as quickly as she could.

By this time, appellant's two children were working. M. was going to start to work again, but she did not feel good. Appellant's sons asked her if their father had done something to her, but she told them to leave her alone. At some point, Gamez drove her home. During the drive, M. told Gamez that appellant had injured her and she began to cry.

Once M. arrived home, one of her brothers saw that she was upset and crying and asked her what was going on, but she would not talk about it. At some point, appellant telephoned the house. M.'s brother took the call, and then handed the telephone to M. after appellant asked to talk to her. When M. picked up the telephone, she became pale. Appellant told M. not to say anything and to remain quiet. She told him to leave her in peace.

A short time after M. got home, appellant's wife arrived. She encouraged M. to report what had happened in order to frighten appellant. M. replied that she did not want her brothers to become aware of events and she asked the woman to leave. M.'s brothers

had overheard them, however, and demanded that M. tell them what had gone on. As a result, M.'s sister-in-law contacted the police.

Tulare County Sheriff's Deputy Hermosillo responded to the call for service at 8:28 that evening. M. told him what had happened, including that she had only told Gamez that appellant was making advances toward her. While she was recounting events, she was very emotional. She cried continuously until Detective Huerta arrived, slightly more than an hour later, and had to take pauses in order to collect herself. M.'s clothing, which she had been wearing at the time of the events and was still wearing, was seized. She was then taken to have a physical examination, although by that time she had gone to the bathroom and wiped herself on two or three occasions.

Amanda Welker performed the sexual assault examination on M. With Detective Huerta translating, M. related that she had been forced to have sex with her foreman in a field, and that she had been "held up against a truck." M. related that during the assault, the man was both in front of and behind her. During the examination, M. complained of pain. The results of the examination revealed that M. had a linear posterior fourchette laceration and petechiae (bruising) on her cervix. Based on Welker's training and experience, M. suffered these injuries within 72 hours prior to the examination. The injuries were consistent with intercourse where the man is behind, and were consistent with the history M. provided. Although there was no way to tell whether the injuries happened during consensual sex, a woman who is consenting to sex and is aroused usually produces lubrication that lessens the probability of injury. Welker also swabbed for DNA, although the fact M. had urinated three times and wiped herself twice decreased the

chances of retrieving any biological samples.[3] During the interview and examination, M. was very timid and quiet. She began crying toward the end of the examination.

Detective Huerta arrested appellant early the next morning. Appellant, who was advised of, and waived, his rights, denied having had forced sex with M. He did not indicate he had had any sexual relationship with M. In fact, appellant responded affirmatively to Huerta's question whether appellant was saying that he never had any sexual relationship with her. When told that M. had undergone a sexual assault examination, however, appellant said he had had consensual sex with her because she had been flirting with him. Appellant said he "did it from behind" and ejaculated. He did not say he had never placed his penis inside M.'s vagina. When Huerta asked if this was the first time, appellant initially said yes, but later said M. previously had given him "a hand job" and oral sex. Although Huerta had not raised the subject of injuries, appellant said, "'If she doesn't have any kind of scratches or anything like that, it was … not forced. Everyone at work will tell you … what a flirt she was.'" When asked if he had threatened to have M. deported, appellant said he did not know whether she was here legally or not. At one point, Huerta asked where M. had been working in relation to other workers. Appellant said she was working next to them. He initially denied having taken her to count trees, although he later changed his story.

The day after he got out of jail, appellant telephoned Jerry Moore to see if he still had a job. When Moore said no, appellant replied that he would "get" Moore and would

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[3] Although the laboratory reports have not been presented to us, the parties stipulated that they could be received into evidence. They apparently showed that appellant's DNA was found on M.'s neck; discharge and staining, but none of appellant's DNA, were found on M.'s underwear; and no sperm were found on M.'s vaginal and vulvar swabs. Jurors were instructed that these exhibits could be considered only to the extent they impacted the credibility of any of the witnesses.

get people to talk about him. The next day, Moore observed a scuffle between appellant and his sons and M.'s brothers. As a result of the altercation and appellant's threat, Moore obtained a restraining order to keep appellant away from the ranch and Moore's employees. Appellant responded, asserting that he had consensual sex with an employee (M.) who had been pursuing him for three months, and also that Moore asked to be set up with the woman on several occasions, but appellant never complied. Appellant believed that Moore found out about appellant's and M.'s relationship and threatened her with termination and perhaps deportation because of her illegal residency if she did not say appellant had raped her. Appellant denied threatening Moore and stated he was only attempting to obtain his personal tools on the day he was attacked. Moore denied ever threatening M. or asking to be set up with her.

J. also worked at the nursery where appellant was the foreman. At some point, she let appellant know that she did not want anything to do with him because she respected his wife, who was good to J., and J.'s husband was violently jealous.

On or about October 25, 2004, appellant asked J. to repair some watering hoses. As a result, J. went to a small room where the tools and glue were kept. When she arrived, appellant was already inside. He asked her to come into the room. He asked whether she was afraid of him. She said "no" and he said "'Get close then.'" So she went inside the room. He then "got [her] from behind." He kissed her neck and embraced her with his arms crossed in front of her chest. She felt his hands on her breasts and began to cry. He let go of her and told her to clean her eyes so the other girls would not know.

J. reported her episode with appellant a day or two after the incident with M. She told Detective Huerta that appellant had hugged her and touched her shoulders, and that

she thought he touched her back and asked if she was okay.[4] She was crying. She said it was being rumored that M. had thrown herself at appellant. J. felt that this was unfair because M. was a good woman. J. also made the statement that appellant had never forced himself on her (J.).

II

DEFENSE EVIDENCE

Appellant's son, Freddy Navarro, was employed by Jerry Moore during October 2004. For most of October 28, he worked at a different ranch.[5] At some point during the day, however, he went to the nursery to talk to Moore. Gamez advised him of an unusual occurrence. As a result, Navarro spoke to Moore to find out what was going on. Moore said it might have been something he (Moore) had done. Moore seemed nervous. Navarro returned to where he had previously been working, and M. arrived. She seemed normal sometimes, but would wander off and return crying. Then she would seem normal again, laughing and talking with her coworkers as usual. Gamez took M. home at her request around 3:00 p.m. All M. would say was that she wanted to go home. When Navarro asked her what was going on, she told him to get away, that she did not want to talk about anything. She just wanted to go home.

Susano Gamez recalled taking M. home about 2:00 p.m. She seemed a bit nervous. As he took her home, she related that appellant had tried to grab her or touch her, but nothing happened.

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[4] J. admitted not telling everything to Huerta, as she was embarrassed. However, J. told the truth to a female detective about a month later.

[5] Moore apparently had several ranches.

Appellant testified on his own behalf that M. began working for the nursery in April or May 2004.[6] At first she seemed like a regular employee, but then she started flirting with him and with Moore. On June 12, 2004, appellant and M. began a romantic liaison. They started kissing and M. began to touch him with her hand. She then orally copulated him. This happened inside the nursery. The couple agreed that they would continue with their relationship as time permitted.

On October 28, one of M.'s brothers dropped her off at work shortly before 10:00 a.m. Moore was there and instructed appellant to take her to finish counting the trees. He gave appellant the counter and tablet, which appellant put in the tool box in the back of his truck. Appellant then took M. to the nursery where they took advantage of being alone. M. started kissing appellant, lowered his pants and began touching him. She then orally copulated him. He asked her if she wanted to have sex, but she said they were too close to a home. Also, appellant's sons were working about half a mile away, and she was afraid they would see something. So, the two agreed that they would have sex quickly. M. then lowered her pants a little bit, grabbed appellant's penis with her hand and put it in herself from behind. Appellant ejaculated before he actually penetrated her, however, and he never put his penis inside her vagina. He believed his semen went onto her buttocks. He did not know whether it was possible his semen could have been inside her vagina. At no time did M. resist him or tell him no, nor did he force or threaten her. After this encounter, appellant gave M. the counter and tablet and asked her to finish counting the trees.

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6 Appellant never received any information, one way or the other, concerning whether M. was legally in the United States. Before appellant could fire someone, he would have to confer with Moore.

Appellant denied telephoning M.'s home that night.[7] When he spoke to Huerta after his arrest, he denied raping M., but not having sexual relations with her. He also denied being alone with J. on October 25, 2004, or touching her breasts. He respected her because she was married.

Appellant lost his job after his arrest. When returning his truck keys to Moore and retrieving his personal tools, appellant had an altercation with one of M.'s brothers. He denied ever threatening Moore.

Appellant presented testimony from several women who had worked under his supervision at the nursery. These women stated they never had any type of problems with him of a sexual nature, nor had they ever heard of him disrespecting or sexually harassing a female employee. They opined that he was respectful with women in the employment setting.[8]

DISCUSSION

I

EXCLUSION OF EVIDENCE CONCERNING M.'S SEXUAL HISTORY

At the outset of trial, the People moved to exclude evidence of M.'s and J.'s prior sexual conduct. The trial court granted the motion, except to the extent such conduct involved appellant. On the second day of trial, prior to the presentation of any testimony,

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[7] According to Jerry Moore, when he learned on October 28 that M. was not at the work site and that she had gone home crying, he asked appellant to telephone her to see if she was all right and if she was going to be coming back to work the next day.

[8] In rebuttal, the prosecution presented the testimony of a woman who, in the summer of 1999, was working in her driveway when she saw appellant in the orchard across the street. He was urinating, so the woman turned away. When she turned back a few seconds later, she saw that he had started to approach her, and that he had his hand down by his exposed penis. The woman did not report the incident.

appellant submitted a confidential motion to introduce evidence of M.'s alleged prior sexual conduct for the purpose of impeaching M.'s credibility. The People objected on timeliness grounds, and also claimed the evidence was irrelevant because it had nothing to do with the issue of M.'s consent on the date of the charged offense. The court denied the motion, declaring that "having sex has nothing to do with credibility." The court further found that the motion was untimely and that defense counsel had failed to comply with discovery rules.

M. was the prosecutor's first witness. In pertinent part, he elicited that she did not engage married men romantically and that, prior to October 28, she knew appellant was married. During a break in cross-examination, the court clarified that it had denied the motion under Evidence Code[9] section 782, because such evidence is prohibited and there was no showing of relevancy. With respect to untimeliness, the court cited rule 4.111 of the California Rules of Court, which requires that pretrial motions in criminal cases be served and filed at least 10 calendar days before the hearing date. When defense counsel responded that, as a general rule, motions in limine can be filed as late as the date of trial, the court pointed out that motions in limine had been heard the previous day, while the motion was filed that morning.

After the prosecution rested, defense counsel renewed his motion. The court stated it would not allow the proffered testimony because it would constitute impeachment on a collateral issue, and it viewed the defense's request as a "back door way" to get into evidence that which the court had already ruled it would not allow. The court clarified that it had denied the written motion on the merits and also because it was untimely and

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9 Further statutory references are to the Evidence Code unless otherwise stated.

that the motion still would have been denied on the merits, even if timeliness were not an issue.

Appellant now contends the trial court erred by refusing to grant a hearing, pursuant to section 782, on admissibility of the proffered evidence. Alternatively, assuming no hearing was required in light of his offer of proof, he contends the trial court abused its discretion in excluding the evidence under section 352. We find no error.

Statutes enacted in 1974--specifically, sections 782 and 1103, subdivision (c) (formerly § 1103, subd. (2))--"specify when and under what circumstances evidence of a victim's prior sexual behavior can be admitted in a trial of sexual assault charges." (*People v. Chandler* (1997) 56 Cal.App.4th 703, 707.) In prosecutions for various sexual offenses, including rape, section 1103 prohibits a defendant from introducing opinion evidence, reputation evidence, or evidence of specific instances of the complaining witness's (alleged victim's) sexual conduct in order to prove consent, other than such conduct with the defendant. (§ 1103, subd. (c)(1), (3), (6).)[10] "In adopting this section

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10 Section 1103, subdivision (c) states, in its entirety: "(1) Notwithstanding any other provision of this code to the contrary, and except as provided in this subdivision, in any prosecution under Section 261, 262, or 264.1 of the Penal Code, or under Section 286, 288a, or 289 of the Penal Code, or for assault with intent to commit, attempt to commit, or conspiracy to commit a crime defined in any of those sections, except where the crime is alleged to have occurred in a local detention facility, as defined in Section 6031.4, or in a state prison, as defined in Section 4504, 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.

"(2) Notwithstanding paragraph (3), evidence of the manner in which the victim was dressed at the time of the commission of the offense shall not be admissible when offered by either party on the issue of consent in any prosecution for an offense specified in paragraph (1), unless the evidence is determined by the court to be relevant and admissible in the interests of justice. The proponent of the evidence shall make an offer of proof outside the hearing of the jury. The court shall then make its determination and

[Fn. continued.]

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*, *supra*, at p. 707.) The statute does not, however, render inadmissible any evidence offered to attack the credibility of the complaining witness as provided in section 782. If the prosecutor introduces evidence, or the complaining witness testifies, concerning his or her sexual conduct, the defendant may cross-examine that witness on the subject and may offer relevant rebuttal evidence (§ 1103, subd. (c)(4), (5)). In other words, "[w]hile strictly precluding admission of the victim's past sexual conduct for purposes of proving consent, Evidence Code section 1103, subdivision (c)(4), allows the admission of evidence of prior sexual history relevant to the credibility of the victim." (*People v. Chandler*, *supra*, at p. 707.) "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," however; thus, "the credibility exception has been utilized sparingly,

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at that time, state the reasons for its ruling on the record. For the purposes of this paragraph, 'manner of dress' does not include the condition of the victim's clothing before, during, or after the commission of the offense.

"(3) Paragraph (1) shall not be applicable to evidence of the complaining witness' sexual conduct with the defendant.

"(4) If the prosecutor introduces evidence, including testimony of a witness, or the complaining witness as a witness gives testimony, and that evidence or testimony relates to the complaining witness' sexual conduct, the defendant may cross-examine the witness who gives the testimony and offer relevant evidence limited specifically to the rebuttal of the evidence introduced by the prosecutor or given by the complaining witness.

"(5) Nothing in this subdivision shall be construed to make inadmissible any evidence offered to attack the credibility of the complaining witness as provided in Section 782.

"(6) As used in this section, 'complaining witness' means the alleged victim of the crime charged, the prosecution of which is subject to this subdivision."

most often in cases where the victim's prior sexual history is one of prostitution. [Citations.]" (*Id*. at p. 708.)

As this court has recognized:

> "There is necessarily a certain amount of overlap between the issues of the victim's consent in a rape or other sex offense case and the victim's credibility. Presumably, any complaining witness in a rape case will deny consent to the sexual acts complained of; to avoid the harassment which had traditionally plagued complaining witnesses in cases of this type, the Legislature excluded evidence of prior sexual activity by the complaining witness with persons other than the defendant in order to prove consent. Thus, it seems clear under Evidence Code section 1103, subdivision [(c)](1), that a defendant in a rape case cannot, based solely upon the victim's testimony and her presumed denial of consent, introduce evidence that she engaged in sexual activity with 1 other man, 10 other men, or 100 other men, nor that she engaged in such activity freely or for monetary compensation. This rule properly prevents the victim of sexual assault from being herself placed on trial. However, once the defendant, in accordance with the procedural requirements of Evidence Code section 782, makes a sworn offer of proof concerning the relevance of the sexual conduct of the complaining witness to attack her credibility, even though it is the underlying issue of consent which is being challenged, then the absolute protection afforded by Evidence Code section 1103, subdivision [(c)](1), gives way to the detailed procedural safeguards inherent in Evidence Code section 782." (*People v. Rioz* (1984) 161 Cal.App.3d 905, 916, italics omitted.)

> "Under Evidence Code section 782 the admission of evidence of sexual conduct of the alleged victim of a rape offered to attack her credibility is procedurally limited. Section 782 requires that the testimony be preceded by a written motion by the defendant accompanied by an affidavit containing an offer of proof. If the trial court finds that the offer of proof is 'sufficient,' it must conduct a hearing out of the presence of the jury and allow the alleged victim to be questioned '"regarding the offer of proof …. 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 … and is not inadmissible pursuant to Section 352 …, the court may make an order stating what evidence may be introduced by the defendant, and the nature of questions to be permitted.

The defendant may then offer evidence pursuant to the order of the court."' [Citation.]" (*People v. Sims* (1976) 64 Cal.App.3d 544, 553-554.)[11]

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[11] At all times pertinent herein, section 782 provided: "(a) In any prosecution under Section 261, 262, 264.1, 286, 288, 288a, 288.5, or 289 of the Penal Code, or for assault with intent to commit, attempt to commit, or conspiracy to commit any crime defined in any of those sections, except where the crime is alleged to have occurred in a local detention facility, as defined in Section 6031.4, or in a state prison, as defined in Section 4504, if 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.

"(2) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated. The affidavit shall be filed under seal and only unsealed by the court to determine if the offer of proof is sufficient to order a hearing pursuant to paragraph (3). After that determination, the affidavit shall be resealed by the court.

"(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.

"(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.

"(5) An affidavit resealed by the court pursuant to paragraph (2) shall remain sealed, unless the defendant raises an issue on appeal or collateral review relating to the offer of proof contained in the sealed document. If the defendant raises that issue on appeal, the court shall allow the Attorney General and appellate counsel for the defendant access to the sealed affidavit. If the issue is raised on collateral review, the court shall allow the district attorney and defendant's counsel access to the sealed affidavit. The use of the information contained in the affidavit shall be limited solely to the pending proceeding.

[Fn. continued.]

> "Read as a whole, [section 782] empowers the trial judge first to accept the offer of proof as true. He then determines whether, if the evidence is as the defendant claims, it is relevant[12] and if relevant whether its probative value is outweighed by the probability of undue prejudice or the undue consumption of trial time. (Evid. Code, § 352.)[13] Only if the judge determines both questions in favor of admissibility is the offer of proof 'sufficient.' Only if it is 'sufficient' is the trial court required to conduct the hearing to determine if the offer truly recites what the evidence will be." (*People v. Blackburn* (1976) 56 Cal.App.3d 685, 691-692.)

Assuming the evidence was as appellant claimed in his offer of proof, it was not relevant at the time the motion was initially made. The record does not show anything before the trial court at that time suggesting M.'s credibility about sexual conduct with someone other than appellant would be in issue. Instead, the proffered evidence was more akin to the predisposition or character evidence held inadmissible in *People v. Steele*

"(b) As used in this section, 'complaining witness' means the alleged victim of the crime charged, the prosecution of which is subject to this section."

12 Pursuant to section 780, "[e]xcept as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: [¶] (a) His demeanor while testifying and the manner in which he testifies. [¶] (b) The character of his testimony. [¶] (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies. [¶] (d) The extent of his opportunity to perceive any matter about which he testifies. [¶] (e) His character for honesty or veracity or their opposites. [¶] (f) The existence or nonexistence of a bias, interest, or other motive. [¶] (g) A statement previously made by him that is consistent with his testimony at the hearing. [¶] (h) A statement made by him that is inconsistent with any part of his testimony at the hearing. [¶] (i) The existence or nonexistence of any fact testified to by him. [¶] (j) His attitude toward the action in which he testifies or toward the giving of testimony. [¶] (k) His admission of untruthfulness."

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

(1989) 210 Cal.App.3d 67, 75-76 [by tending to show complaining witness's pattern of promiscuous behavior, proffered evidence permitted inference that she consented to sexual activity on occasion of alleged offense; predisposition to engage in certain sexual conduct related to her character, and one prior occasion was insufficient to render evidence admissible on noncharacter theory of modus operandi with respect to sexual conduct].) Accordingly, the trial court properly denied the motion without a hearing. (See *People v. Rioz, supra*, 161 Cal.App.3d at p. 916.)[14]

By the time appellant renewed his motion, M. had testified that she did not engage married men romantically. Defense counsel then slightly altered his offer of proof, although not under oath or in writing. (See *People v. Rioz, supra,* 161 Cal.App.3d at p. 917 & fn. 5 [trial court should insist upon strict compliance with requirements of § 782; statute requires that defendant tender sworn offer of proof of relevancy of complaining witness's sexual conduct to attack her credibility].) Assuming these omissions were not fatal to appellant's renewed motion, we conclude the trial court did not err in rejecting the proffered testimony without holding a hearing.

Section 782 permits the trial court to make a section 352 determination in order to gauge whether the defendant's offer of proof is sufficient to require a hearing. (*People v. Blackburn*, *supra*, 56 Cal.App.3d at pp. 691-692.) Section 352, in turn, "empowers the trial judge to bar impeachment of a witness by reference to collateral matter [citation]." (*Id*. at p. 693.)

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14 In light of this conclusion, we need not determine whether the motion was timely. (See Pen. Code, § 1054.7 [disclosures required under Pen. Code, § 1054 et seq. must be made at least 30 days prior to trial unless good cause shown]; Cal. Rules of Court, rule 4.111 [unless otherwise ordered or specifically provided by law, all pretrial motions in criminal cases must be served and filed at least 10 calendar days prior to hearing; failure to do so without good cause may be considered as admission motion is without merit].)

> "A collateral matter has been defined as 'one that has no relevancy to prove or disprove any issue in the action.' [Citation.] A matter collateral to an issue in the action may nevertheless be relevant to the credibility of a witness who presents evidence on an issue; always relevant for impeachment purposes are the witness's capacity to observe and the existence or nonexistence of any fact testified to by the witness. [Citations.] As with all relevant evidence, however, the trial court retains discretion to admit or exclude evidence offered for impeachment. [Citations.] A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation]." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

The issue here was if M. consented to have sexual intercourse with appellant on October 28, 2004. Whether she had a blanket policy of not engaging married men romantically[15] was only marginally probative. Moreover, admission of the proffered testimony almost certainly would have resulted in a mini-trial with respect to the alleged incident described therein. Under the circumstances, the trial court did not abuse its discretion by excluding the evidence without first holding a section 782 hearing.

Were we to find error, either in the trial court's failure to hold a hearing or in its exclusion of the proffered evidence itself, we would conclude there was no miscarriage of justice, "because, viewing the entire record, it is not reasonably probable the error affected the verdict. [Citation.]" (*People v. Chandler*, *supra*, 56 Cal.App.4th at p. 711; accord, § 354; *People v. Cudjo* (1993) 6 Cal.4th 585, 611; cf. *People v. Mickle* (1991) 54 Cal.3d 140, 168-169; *People v. Franklin* (1994) 25 Cal.App.4th 328, 336-337.) Every witness who testified to seeing M. after her encounter with appellant--even those who testified on appellant's behalf--said that her demeanor was unusual. According to one of M.'s

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15 The phrase first was used when the prosecutor asked M. if she ever flirted with appellant when she was at work. When M. asked what "flirt" meant, the prosecutor clarified by asking whether she ever tried to engage appellant romantically.

brothers, she was crying "a lot." Deputy Hermosillo testified that he observed M. to be crying for approximately one hour to an hour and 10 minutes. Appellant fails to suggest why M. would have been so upset if she had engaged in a *consensual* encounter with him, especially if this was the mutually-agreed-upon continuation of a sexual relationship. There was no evidence anyone else knew of the encounter and could have reported her conduct to her family. Appellant's alleged belief that Moore threatened to deport M. if she did not accuse appellant of rape was unsupported. Additionally, appellant fails to explain how M. received her injuries if events occurred as he testified. No evidence was introduced showing that M. had sex with anyone other than appellant within 72 hours prior to the rape examination, and the testimony contained in appellant's offer of proof would not have changed this fact.[16] Moreover, although it was possible the injuries could have been caused by consensual sex, appellant clearly testified that he was unable to place his penis inside M.'s vagina because he ejaculated when she grabbed him with her hand. Under these circumstances, M.'s version of events was supported by the physical evidence, and appellant's story of consensual sex was patently unconvincing. (See *People v. Chandler, supra,* 56 Cal.App.4th at p. 712.)[17]

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16 On direct examination by the prosecutor, M. testified that she had not had any kind of sexual contact with anyone else the week before she was raped. If evidence existed that contradicted her testimony on this point it would have been admissible to attack her credibility, and also for the noncharacter purpose of offering an alternative explanation for her injuries, despite the fact it involved M.'s sexual conduct. (§ 1103, subd. (c)(4); *People v. Steele, supra,* 210 Cal.App.3d at pp. 75-76; *People v. Rioz, supra,* 161 Cal.App.3d at p. 916.)

17 Appellant likewise was not harmed by the prosecutor, in his argument to the jury, (1) rhetorically asking where the witnesses were to M.'s supposed pursuit of appellant and (2) stating jurors could consider the fact no such witnesses had been called. Defense counsel objected to the prosecutor's statements as being impermissible under section 782 in light of the trial court's prior rulings. The court immediately sustained the objection and directed the prosecutor to move on, which he did. Assuming the prosecutor was

[Fn. continued.]

II

ADMISSION OF MOORE'S REBUTTAL TESTIMONY

At the outset of his testimony, appellant stated: "Before all this I wish to tell the jury, and first of all my wife, for everything that I am going to say, I know is going to hurt her." During the prosecution's rebuttal case, the court and counsel discussed the prosecutor's desire to recall Jerry Moore for his testimony that appellant's wife was aware appellant was having an affair with another woman. The court summarized the prosecutor's argument by stating the evidence was offered to rebut appellant's testimony that he initially lied to the police about a sexual involvement with M. to spare his family. Defense counsel objected under section 1101 and argued the evidence was prejudicial. He offered to stipulate that he would not argue that particular theory to the jury. The court ruled the evidence was admissible, finding it minimally prejudicial. As a result, Moore testified that he spoke to appellant's wife at work on the day after the rape. When the prosecutor asked what she told Moore at that time, defense counsel objected on hearsay, section 352, and section 1101 grounds. Those objections were overruled. Moore then testified that appellant's wife told him that appellant had been taken to jail. She also talked about his girlfriend and how he had "gone a little bit crazy" the past few months. The prosecutor clarified that appellant's wife was referring to another woman, not M.

Appellant now contends the trial court committed prejudicial error by admitting this testimony. He says it constituted double hearsay, violated his right to confront the

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asking jurors to draw an inference they might not have drawn had they heard the excluded evidence, and thus unfairly took advantage of the court's ruling (see *People v. Daggett* (1990) 225 Cal.App.3d 751, 758), the trial court's response was sufficient to prevent any prejudice.

witness against him (i.e., his wife) and was irrelevant and unduly prejudicial.[18] We conclude that any error was harmless.

"The decision to admit rebuttal evidence rests largely within the discretion of the trial court and will not be disturbed on appeal in the absence of demonstrated abuse of that discretion. [Citations.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1199; Pen. Code, § 1093, subd. (d).) Here, there was no actual testimony, either by appellant or through Detective Huerta's recitation of appellant's statements to him, that appellant initially lied to police about a sexual involvement with M. in order to spare his family. Nevertheless, it is within a trial court's broad scope of discretion to admit rebuttal testimony in order to allow the prosecutor to offset the impression given by defense witnesses, or to rebut inferences created by the defense. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1164; *People v. Jordan* (2003) 108 Cal.App.4th 349, 366.) As the initial discussion between the court and counsel was not reported, we surmise this was the basis for the preliminary decision the trial court was required to make, i.e., the proffered testimony constituted proper rebuttal, notwithstanding the defense's specific evidentiary objections.

There appears to be merit to appellant's argument that his hearsay objection should have been sustained. "'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (§ 1200, subd. (a).) Except as provided by law, such evidence is inadmissible. (*Id.*, subd. (b).) Although we fail to see the multiple levels of hearsay appellant now says exist (e.g., Moore did not testify that appellant's wife related to him

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18 Appellant says the testimony showed he committed the "crime" of adultery. The statutes criminalizing adultery in this state were repealed in 1975. (See former Pen. Code, §§ 269a, 269b, repealed by Stats. 1975, ch. 71, §§ 5-6, p. 133.) Accordingly, we view appellant's argument as being founded on the generally-accepted principle that adultery is a wrongful act.

something appellant said to her), the statement of appellant's wife arguably was offered to prove the truth of the matter stated, i.e., that appellant had a girlfriend. The prosecutor certainly argued the evidence to the jury as if it was established that appellant had committed adultery.[19]

Respondent argues that the statements of appellant's wife were not hearsay: They were not offered to prove the truth of her assertions, but instead for the nonhearsay purpose of showing her state of mind. (§ 1250, subd. (a)(1);[20] *People v. Smithey* (1999) 20 Cal.4th 936, 971-972; see *People v. Bolden* (1996) 44 Cal.App.4th 707, 714-715.) If

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19 During his closing argument, the prosecutor explained that he had presented Moore's testimony to rebut appellant's suggestion while testifying that he did not want his wife to hear about this and knew it would hurt her. The prosecutor contended that appellant's statement was designed to get jurors to infer that the reason he did not initially admit having sex with M. was because he did not want his family to learn about it and wanted to protect his wife. The prosecutor argued that appellant's wife already knew appellant was "messing around" with women. Therefore, appellant did not lie to protect his wife, but so he would not get in trouble.

20 Section 1250 provides: "(a) Subject to Section 1252 [which renders statements inadmissible if they are made under circumstances such as to indicate lack of trustworthiness], evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant. [¶] (b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed."

This section codifies an exception to the hearsay rule. (*People v. Jablonski* (2006) 37 Cal.4th 774, 819.) Statements that do not directly declare a mental or emotional state, but merely constitute circumstantial evidence of it, are outside the hearsay rule. Declarations of mental condition, which directly assert it, constitute hearsay and are admissible only under this hearsay exception. (1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, § 198, p. 915.)

appellant's wife believed appellant had a girlfriend and, presumably, a sexual relationship with his girlfriend, it would be less probable that appellant would lie to police about having sex with M. in order to spare his wife's feelings.

It is not enough simply to identify a nonhearsay purpose for a statement. The nonhearsay purpose must also be relevant to an issue in dispute.[21] (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1204.) Here, we believe it was *appellant's* state of mind, not his wife's, which was relevant: Did *he* lie about a sexual encounter with M. to protect his wife? As appellant points out, this is especially true because there was no evidence he was aware his wife knew (or at least believed) he had a girlfriend. Respondent's (and the prosecutor's) argument succeeds only if appellant had such knowledge.

Assuming Moore's rebuttal testimony should have been excluded upon any ground raised by defense counsel, however, the error was harmless because no reasonable probability exists that the jury would have reached a different result had the evidence been excluded. (*People v. Whitson* (1998) 17 Cal.4th 229, 251; *People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Marks* (2003) 31 Cal.4th 197, 226-227 [applying standard to error under § 352]; *People v. Daniels* (1991) 52 Cal.3d 815, 860 [applying standard to erroneous admission of evidence as rebuttal testimony]; *People v. Alcala* (1984) 36 Cal.3d 604, 636, overruled on other grounds in *People v. Falsetta* (1999) 21 Cal.4th 903, 911 [applying standard to error under § 1101]; *People v. Brooks* (1979) 88 Cal.App.3d 180, 188 [applying standard to erroneous admission of state-of-mind evidence].)[22] Despite

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[21] Section 1250 similarly requires that the declarant's mental state be factually relevant. (*People v. Noguera* (1992) 4 Cal.4th 599, 621.)

[22] Appellant argues the admission of multiple hearsay violated his constitutional right to confront the witness against him. Appellant did not object on this ground in the trial court and so has not preserved this point for review. (*People v. Waidla* (2000) 22 Cal.4th 690, 726, fn. 8.) Moreover, violations of state evidentiary rules generally do not rise to

[Fn. continued.]

appellant's argument to the contrary, we fail to discern much, if any, prejudice. That appellant may have engaged in acts of infidelity and thereby wronged his wife did not in any way suggest he was a rapist. If anything, the evidence portrayed him as someone who partook of consensual relationships, and to whom such relationships were readily available at the time he allegedly engaged in forcible sex. As defense counsel argued to the jury, the fact appellant had an extramarital affair was a "bad thing[]," "but does that mean that he raped [M.] on that date? That doesn't mean he raped her. That just means he exercised poor judgment." Moreover, as stated in part I, *ante*, appellant's version of events was patently unconvincing, even aside from this evidence.

III

CALJIC NO. 2.62

The conference on jury instructions was not reported. Appellant did not object, on the record, to the giving of CALJIC No. 2.62 (defendant testifying--when adverse inference may be drawn), pursuant to which jurors subsequently were instructed:

> "In this case the defendant has testified to certain matters. If you find the defendant failed to explain or deny any evidence against him introduced by the prosecution which he reasonably he [*sic*] can be expected to deny or explain because of facts within his knowledge, you may take that failure into consideration as tending to indicate the truth of this evidence and indicate that among the inferences it [*sic*] may reasonably be drawn therefrom those in favor of [*sic*] the defendant are more probable.[23]
>
> "The failure of the defendant to deny or explain evidence against him does not by itself warrant an inference of guilt, nor does it relieve the

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the level of federal constitutional error. (*People v. Benavides* (2005) 35 Cal.4th 69, 91.) In any event, we would reach the same conclusion of no prejudice were we to apply the harmless-beyond-a-reasonable-doubt test applicable to federal constitutional error.

23 We assume this is an error in transcription. The instruction actually states, "… those unfavorable to the defendant are the more probable."

> prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt.
>
> "If the defendant does not have knowledge that he would need to deny or explain the evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain this evidence."

Appellant now contends he either explained or denied all of the evidence; hence, CALJIC No. 2.62 should not have been given. He further contends the error was prejudicial, since the linchpin of his case was his credibility and the instruction effectively caused the jury to conclude he lied, while concomitantly enhancing the credibility of the prosecution witnesses. We summarily reject respondent's claim that appellant waived the issue by failing to object to the instruction (see Pen. Code, § 1259). On the merits we find no error and manifestly no prejudice.

It is settled that jurors properly may consider logical gaps in the defense case, and CALJIC No. 2.62 reminds them of this power. (*People v. Redmond* (1981) 29 Cal.3d 904, 911.) However, "'before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference [citation].' [Citation.]" (*People v. Saddler* (1979) 24 Cal.3d 671, 681.) The applicability of CALJIC No. 2.62 "is peculiarly dependent on the particular facts of the case." (*People v. Roehler* (1985) 167 Cal.App.3d 353, 393.) Whether the instruction may be given turns on an assessment of evidence adduced during "'the scope of relevant cross-examination'" of the defendant. (*Id*. at p. 392.) The instruction is proper only if the trial court preliminarily determines, as a matter of law, that the evidence supports a conclusion the defendant failed to bridge a gap in his or her case. It is then up to the jurors to decide whether such a gap in fact exists and whether the instruction will be applied. (*Ibid*.; cf. *People v. Hannon* (1977) 19 Cal.3d 588, 597-598.)

As a reviewing court, we must ascertain whether the record evidence supports a conclusion appellant failed to explain or deny any evidence within the scope of relevant

cross-examination. (*People v. Saddler, supra*, 24 Cal.3d at p. 682.) The contradiction of prosecution evidence does not constitute a failure to explain or deny. (*Ibid*.) Similarly, the test is not whether appellant's testimony was believable. (*People v. Kondor* (1988) 200 Cal.App.3d 52, 57.) However, "'[i]f the defendant tenders an explanation which, while superficially accounting for his activities, nevertheless seems bizarre or implausible, the inquiry whether he reasonably should have known about circumstances claimed to be outside his knowledge is a credibility question for resolution by the jury [citations].'" (*People v. Belmontes* (1988) 45 Cal.3d 744, 784, quoting *People v. Mask* (1986) 188 Cal.App.3d 450, 455.) The relevant question is whether the evidence supports a jury conclusion appellant failed to satisfactorily explain a matter about which he was cross-examined. (See *People v. Roehler, supra*, 167 Cal.App.3d at p. 392.) If such evidence exists, the instruction was proper. (See *People v. Saddler, supra*, 24 Cal.3d at p. 681.)

Here, appellant failed to explain, at the very least, why he never told Detective Huerta that there was no penetration. Additionally, when his trial testimony was considered in conjunction with his statement to Huerta, his explanation for how his semen might have gotten inside M. arguably was bizarre or implausible. Accordingly, CALJIC No. 2.62 was properly given.

Even assuming the instruction should not have been given, however, reversal is not required. (*People v. Watson, supra*, 46 Cal.2d at p. 836; see *People v. Saddler, supra,* 24 Cal.3d at p. 683.) Pursuant to CALJIC No. 17.31, the jury was told to disregard any instruction that applied to facts determined by it not to exist. While this instruction "does not render an otherwise improper instruction proper, it may be considered in assessing the prejudicial effect of an improper instruction." (*Saddler, supra,* at p. 684.) As stated in *People v. Ballard* (1991) 1 Cal.App.4th 752, 756-757, "CALJIC No. 2.62 does not direct the jury to draw an adverse inference. It applies only if the jury finds that the defendant failed to explain or deny evidence. It contains other portions favorable to the defense

(suggesting when it would be unreasonable to draw the inference; and cautioning that the failure to deny or explain evidence does not create a presumption of guilt, or by itself warrant an inference of guilt, nor relieve the prosecution of the burden of proving every essential element of the crime beyond a reasonable doubt). It is not reasonably probable a more favorable verdict would have resulted if the instruction had not been given. [Citations.]"

We reach the same result. The record here does not support a finding of prejudice. (See *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1472.)

IV

IMPOSITION OF THE UPPER TERM

In imposing sentence on the rape count, the trial court rejected appellant's assertion that circumstances in mitigation existed because M. consented and was a willing participant, and because appellant exercised caution to avoid harm to her. The court also rejected the notion that appellant's prior record of criminal conduct was insignificant, in light of the amount of time that had passed since his last conviction and the fact he had successfully completed parole.[24] The court expressly found that appellant had "a serious record of criminal conduct," and "was convicted of serious felonies involving drugs." The court noted that, while appellant did successfully complete parole, "the fact still is the Court can consider such prior felony behavior in setting a sentence." The court further found, as "the greatest factor in aggravation," that appellant took advantage of a position of trust and confidence, and it also relied on the fact that, while the rape itself did not

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[24] The probation officer's report (RPO) revealed that appellant suffered four misdemeanor convictions between 1974 and 1985. In a single incident in 1986, he was convicted of four felonies, two violations of Health and Safety Code section 11351 (possession for sale of a controlled substance), and two violations of Health and Safety Code section 11352 (transportation or sale of a controlled substance).

involve any unusual violence or cruelty, it subjected M. to a great deal of humiliation. Accordingly, it imposed the upper eight-year term for that offense.

Relying on *United States v. Booker* (2005) 543 U.S. 220, *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), appellant contends the trial court violated his Sixth Amendment right to trial by jury by imposing the upper term based on factors not admitted by appellant or found to be true by the jury beyond a reasonable doubt.

Prior to appellant's sentencing, the California Supreme Court undertook an extensive analysis of these cases and concluded that the imposition of an upper term sentence, as provided under California law, was constitutional. (*People v. Black* (2005) 35 Cal.4th 1238, 1244, 1254, 1261 (*Black*).) Recently, however, the United States Supreme Court overruled *Black* in part and held that California's determinate sentencing law "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Cunningham v. California* (2007) ___ U.S. ___, ___ [127 S.Ct. 856, 868] (*Cunningham*).) The middle term prescribed under California law, not the upper term, is the relevant statutory maximum. (*Ibid*.)

As noted, the RPO revealed that appellant had a prior criminal record consisting of both misdemeanor and felony convictions. The trial court expressly found appellant was convicted of serious felonies involving drugs and stated it could consider appellant's prior felony behavior. In so doing, it necessarily relied on the fact of appellant's prior convictions. This means the upper term was supported by factors that, under *Blakely* and *Apprendi*, need not be found by a jury beyond a reasonable doubt. (See *Blakely*, *supra*, 542 U.S. at p. 301; *Apprendi*, *supra*, 530 U.S. at p. 490.) It follows that reliance on those factors was not error under *Cunningham* (see *Cunningham*, *supra*, ___ U.S. at p. ___ [127

S.Ct. at p. 868]) and, hence, that imposition of the upper term was constitutionally permissible.

This is not, however, the end of our analysis, since, regardless of whether the sentence was constitutional, the trial court nevertheless relied on aggravating factors that were inappropriate under *Cunningham*. A single valid factor in aggravation suffices to support imposition of the upper term (*People v. Osband* (1996) 13 Cal.4th 622, 730), and the trial court here found no circumstances in mitigation. Thus, we cannot say for certain on this record that the same term may not be imposed anew, consistent with *Cunningham*. Because of the trial court's statements and emphasis on nonrecidivist factors, however, we likewise cannot say with any confidence that the court would have imposed the upper term had it been aware it could not rely on those factors.

"'An appellate court is not restricted to the remedies of affirming or reversing a judgment. Where the prejudicial error goes only to the degree of the offense for which the defendant was convicted, the appellate court may reduce the conviction to a lesser degree and affirm the judgment as modified, thereby obviating the necessity for a retrial. [Citations.]' [Citation.]" (*People v. Edwards* (1985) 39 Cal.3d 107, 118.)

An analogous situation exists here. Accordingly, the judgment of sentence is vacated with directions as follows: If the People do not bring the matter before the trial court for a contested resentencing hearing within 60 days after the filing of the remittitur in the trial court, the trial court shall proceed as if the remittitur constituted a modification of the judgment to reflect a sentence of the middle term and shall so modify the abstract of judgment. The People shall in writing notify the trial court and appellant's trial counsel of their intentions in this regard within 30 days after the filing of the remittitur. Should the People state an intention to not contest the modification to the middle term or fail to timely notify the trial court, and unless the trial court on its own decides to set a

resentencing hearing, the trial court shall promptly modify the abstract of judgment as provided herein, and shall transmit a certified copy of same to the appropriate authorities.

DISPOSITION

The judgment of conviction is affirmed. The judgment of sentence is vacated with directions to the trial court and parties to proceed as ordered in this opinion.

_____
Levy, J.

WE CONCUR:

_____
Vartabedian, Acting P.J.

_____
Gomes, J.