Filed 5/31/07 P. v. Owen CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CHESTER WILLIAM OWEN, Defendant and Appellant.	D048090 (Super. Ct. No. SCE240755)

APPEAL from a judgment of the Superior Court of San Diego County, Louis R. Hanoian, Judge. Affirmed in part; reversed in part, with instructions.

A jury convicted Chester William Owen, Jr. of three counts of forcible oral copulation (Pen. Code,[1] § 288a, subd. (c)(2), counts 2, 3 and 4); inflicting corporal injury on a spouse (§ 273.5(a), count 11); and battery (§ 242, count 12). He was acquitted of two counts of lewd acts on a child (§ 288, subd. (a), counts 9 and 10); and the court

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

declared a mistrial regarding five counts of forcible oral copulation on which the jury did not attain unanimous verdicts (§ 288a, subd. (c)(2), counts 1 and 5 through 8).[2]

The trial court sentenced Owen to a total of 26 years in prison as follows: the upper term of eight years — to be served consecutively — for counts 2, 3, and 4; a consecutive two-year term for count 11; and, 180 days for count 12.

Owen contends: (1) a juror committed misconduct by consulting the website of defense counsel during jury deliberations; (2) the trial court erred in denying him access to confidential identifying information regarding eleven jurors, which he needed to support his motion for a new trial; (3) the prosecutor committed prejudicial error under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*); (4) the prosecutor committed misconduct during closing argument; and (5) the trial court erred under *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*) by imposing upper term sentences. We affirm in part and reverse in part with instructions.

FACTUAL AND PROCEDURAL BACKGROUND

Oral Copulation Charges

Owen's daughter, L., was born in 1981. When she was 12 years old, she moved to La Mesa, California to live with Owen and his wife, S. L. testified that in her early teens, Owen would punish her by making her stand completely naked approximately 12 inches in front of him while he lectured her and required her to watch his exposed penis; he

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2 The People subsequently dismissed counts 1, 5, 6, 7 and 8 in the interest of justice. (§ 1385.)

would get an erection and ejaculate. Subsequently, he started making her masturbate him. Eventually, he began requiring her to perform oral sex on him while he wore a condom, which he would take off to ejaculate on her.

L. was approximately 16 years old when Owen sometimes gave her a choice of punishments: get spanked or perform oral sex on him. L. testified, "the beatings hurt so bad;" therefore, she sometimes performed oral sex on him because she "could take 5 minutes, get it over with and go about what was the rest of the day." Owen told her that, "if [she] was going to be . . . failing in school and be a failure, that the only way that [she] was going to make it in life was on [her] back. . . . then, [she] need[ed] to learn how." Owen required L. to orally copulate him at least twice a year after she turned 14 and before her 18th birthday. L.'s cries and protests did not deter Owen. S. normally was not at home when Owen required L. to orally copulate him. When L. was approximately 16 years old, Owen once made her lie next to him on his bed and watch a pornographic videotape of women performing oral sex on men. When L. turned 18 years old, Owen stopped the beatings and sexual punishments.

Angela V., a friend of Owen's, testified that during a visit to his house, she witnessed an argument between Owen and L. He wanted L. to do a chore, but she wanted to go out with a friend. Owen finally asked L., "[D]o you want the punishment?" L. immediately stopped arguing and did the chore. Angela V. was shocked at L.'s response, and asked Owen what the "punishment" was. Owen replied that he taught L. "how to give a good blow job," and added, "Well, she's going to have to do that some day when she gets married." At that time, Angela V. was not sure how to interpret Owen's

comments, and assumed that he was joking. However, after his arrest for the charged crimes, she mentioned to someone that he was guilty, based on his earlier comments.

Corporal Injury to a Spouse Charge

S. testified that in October, 2003, Owen got into an argument with her at home because he wanted to go watch the Cedar fire, but she refused because she was tired from working long hours, and wanted to sleep. Owen pushed her hard into a bedroom, and she fell into a plastic storage box. She experienced pain, and a large bruise on her left shin. After one week, she got inflammation of the skin, and went to urgent care; she required antibiotic treatment. It took a month for the inflammation to go down.

Battery Charge

L. testified that in October 2003, Owen pushed L. on her bed; L. kicked him; he hit her leg, grabbed her ankle, and dragged her toward her bedroom door; but the family dog "went to bite him," and he let her go.

L.'s Controlled Telephone Call to Owen

On April 19th, 2004, L. moved out of her father's house; she was 23 years old. Owen was upset by L.'s abrupt move, and contacted her at work. He asked Dr. Noll Evans, a psychologist who had treated L. as a child, to speak to her. L. informed Evans regarding Owen's sexual abuse of her. Subsequently, L. contacted the police, who obtained her consent to place a monitored telephone call to Owen, which was recorded. The tape recording of the conversation was played during the testimonies of both L. and Owen, and the jurors were given copies of the transcript to read along.

During the phone call, the following exchange took place:

"[L.] Why weren't you worried about me when you were making me give you blow jobs, Dad?

"[Owen] Oh [inaudible].

"[L.] [Crying] Like you don't think that was fucking with my mind?

"[Owen] Well.

"[L.] Honestly? You're my father and you don't believe that was messing with me?

"[Owen] That was . . . that was . . .

"[L.] [Crying]

"[Owen] . . . messing. That, well . . .

"[L.] You don't understand the harm that caused to me. I'm 23 years old now and . . .

"[Owen] Okay.

"[L.] . . . That's the only thing I can remember is you making me get on my knees in front of you and . . .

"[Owen] Okay, [L.]? *I apologize. I was 100 percent wrong in anything I ever did.*

"[L.] [Crying]

"[Owen] Okay? I can understand that and I can understand you hating me for it. But I'm your father and I'm asking you to give me one more chance."

At another point in the telephone conversation, the following exchange took place:

"[L.] I just don't understand, Dad. Like, you're not supposed to treat your daughter that way.

"[Owen] *You're not. No, you're not. And I am 100 percent wrong.* What would you want me to do about it? How can I back up time and undo it? I can't. *All I can do is say, "I was an asshole*." *And I did wrong*.

"[L.] But how could you go so wrong with your daughter to make her do those . . .

"[Owen] Beca- beca- because, [L.], I was so depressed in my life because . . .

"[L.] [Crying] So you were depressed, so you made me give you blow jobs . . .

"[Owen] [L.], no, I didn't. I was so depressed in my life that I . . . I've contemplated suicide. I did a lot of things and . . .

"[L] *But what were the blow jobs supposed to accomplish with you?*

"[Owen] *They were supposed to show you that that's the way you would make your living for love, for your whole life. Actually it was because I had a warped idea and I was wrong. I don't know what else I can say to you except I was wrong."* (Emphasis added.)

Owen's Defense

Owen denied L. ever orally copulated him or that he stood naked in front of her. He testified that from approximately October 2003 until January 2004, when L. was in her twenties, there were occasions when she was on her knees before him, once because she was cleaning and the other times because he ordered her to kneel as a form of punishment.

Owen testified regarding the spousal abuse charge that he was trying to pass S. and brushed against her causing her to fall on the box. He admitted concerning an uncharged prior act of spousal abuse that in 1992 he punched or slapped S., and "she ended up with a gigantic black eye."

Owen testified about the battery incident that he was arguing with L. and started yelling at her; she kicked him, and he "hit her on the thigh right above her leg."

Claim of Juror Misconduct

Owen brought a motion for a new trial under section 1181 based in part on juror misconduct. Defense counsel spoke to several jurors following the verdict regarding their thoughts and impressions of the case, and juror 12 disclosed he had accessed the defense counsel's website during trial. The court subsequently provided defense counsel with contact information for juror 12, who cooperated with counsel's investigations. Defense counsel submitted a declaration stating that at 9:34 p.m. on November 6, 2005, during the jury deliberation phase of trial, juror 12 accessed the website from his home computer for a total of 4 minutes and 58 seconds.[3]

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3 Defense counsel's declaration states juror 12 typed the name of defense counsel, "william nimmo," in the search engine located at www.google.com and thereby accessed the website www.nimmolawgroup.com. The approximately five minutes that juror 12 consulted the website, he accessed its directory and pages is accounted for as follows: "Child Molestation and Child Sexual Assault" (1 minute) "Trial Lawyer of the Year" (52 seconds); "Case Histories and Results" (8 seconds); "Child Molest/Forcible Rape" (26 seconds); "Child Molest" (29 seconds); "Assault with Intent to Commit Great Bodily Injury-Hate Crime" (26 seconds); "William F. Nimmo, Attorney at Law" (6 seconds); "Criminal Law Information Guide" (16 seconds); "Sexual Assault Cases" and "Child Molestation/Child Sexual Assault" (13 seconds; the links to both these topics were inoperable); "Newsroom" (33 seconds).

Defense counsel requested from the court the contact information for the other eleven jurors arguing, "It seems incredibly unlikely that [juror 12] sat through deliberations without offering his views on the case. Considering his views were undoubtedly affected by his misconduct, it is likely his participation in deliberations would have impermissibly affected the impartiality of other jurors. This effect may have been subtle, so defense counsel is simply seeking information on what was said and done by [juror 12] during deliberations in order to ascertain whether his misconduct was aggravated by biasing additional jurors."

The court denied the request, reasoning that despite the defense attorney's post-verdict contact with the jury, he had not met his burden of proving that juror 12 read and understood all the pages he accessed for the brief moments spent on each page. The court stated, "While looking at Penal Code section 1122, basically, the jurors were told they're not to converse with anyone about any subject connected with the case. They're not to form or express an opinion on it, not to read or listen to accounts on the news, not to visit the scene or otherwise investigate the facts of the case, not investigate the law in the case, not communicate with defense counsel or with any witnesses or anyone outside the court process, and none of those things happened. I mean, there's no showing that the juror conversed with anyone on anything that he discovered on the visit to the website."

The court denied the motion for a new trial on all grounds, and stated: "And finally, the just kind of the catch-all, the lack of due process. We had about a four-week trial in connection with this case where the parties had an opportunity to present a complete picture of what was going on. I know Mr. Owen doesn't agree with that, but

there was a lot of stuff that was presented in connection with this case. There were exhibits upon exhibits, experts upon experts, and all the witnesses had an opportunity to testify completely under the rules, and I find that there was no due process violation in the conduct of the trial."

Juror Misconduct

Owen contends he was deprived of a fair trial in violation of his rights guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, section 16 of the California Constitution because of juror 12's misconduct.

"Juror misconduct involving the receipt of extraneous information about a party or the case that was not part of the evidence received at trial creates a presumption that the defendant was prejudiced by the evidence and may establish juror bias. [Citation.] This is because 'due process means a jury capable and willing to decide the case solely on the evidence before it.' [Citation.] When, as here, the jury receives the evidence from an outside source, the verdict is set aside if there is a "substantial likelihood" of juror bias. [Citation.] Defendant may establish bias if (1) the extraneous material, judged objectively, 'is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror' [citation] or (2) from the nature of the misconduct and surrounding circumstances, it is substantially likely a juror 'was actually biased' against the defendant. [Citation.] Because it is impossible to shield jurors from every contact that may influence their vote, courts tolerate some imperfection short of actual bias." (*People v. Ramos* (2004) 34 Cal.4th 494, 519.) "An appellate court will accept the trial court's determinations and findings on questions of historical fact if they are supported by

substantial evidence . . . The question whether the misconduct was prejudicial is a mixed one of law and fact, and is subject to an appellate court's independent determination." (*Id.*, at p. 520.)

The trial court ruled that juror 12 did not commit misconduct because, "The website does not contain evidence about the case. The website does not purport to be jury instructions or anything akin to that about the law. It refers to some things on the legal topics or the topics that apply in the case, but those were dead-ends as [defense counsel] has stated. So no investigation on the law that applies in this case. It's not an investigation of the law. The site doesn't purport to be a . . . primer on the law, and it was not a primer on the law. There was no actual communication with defense counsel." The court continued, "And so I think when you view the material objectively, [it] would not have influenced the jury contrary to the defendant's interest. There simply was not enough time for someone to read, digest and compare the strategies of other cases with someone to determine whether or not this one falls within that. And even if it does, it would be pure speculation to suggest that it was to affect someone otherwise adversely."

The court also found that juror 12 voted to acquit the defendant of two counts of lewd acts on a child, thus indicating he was not prejudiced against the defendant. Finally, the court found "[the jurors] were convinced beyond a reasonable doubt, notwithstanding the defense view of those items of evidence that the defendant was guilty of the offense. In my independent weighing of the evidence, I don't disagree with the jury's finding on that."

We agree with the trial court there was no juror misconduct. The information juror 12 found on the website was not inherently prejudicial. It was not evidence about a party or the case; but rather included promotional information about Owen's attorney; descriptions of some challenging cases he defended that produced favorable results for his clients; the difficulties an attorney encounters in defending child molestation and sexual assault cases, and suggestions regarding types of expert evidence needed to defend against charges of child molestation. Owen's speculation that juror 12 communicated with other jurors regarding the information he found on the website was not evidence. (*In re Hamilton* (1999) 20 Cal.4th 273, 301, fn. 21.) Juror 12's votes to acquit Owen of two charges also indicate he was not actually biased against Owen. In short, juror 12's conduct fell within the range of "imperfections short of actual bias" that courts are permitted to tolerate as part of our jury system. (*People v. Ramos, supra*, 34 Cal.4th at p. 519.)

In determining whether the court erred in refusing to provide the defense access to the eleven juror's identifying information, the standard of review is abuse of discretion. (*People v. Jones* (1998) 17 Cal.4th 279, 317.) "Upon the recording of a jury's verdict in a criminal jury proceeding, the court's record of personal juror identifying information of trial jurors . . . consisting of names, addresses and telephone numbers, shall be sealed until further order of the court." (Code Civ. Proc., § 237, subd. (a)(2).) Under Code Civil Procedure, section 237, a defendant or defendant's counsel may, following the recording of a jury's verdict in a criminal proceeding, petition the court for access to personal juror identifying information within the court's records necessary for the

defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose. (Code Civ. Proc., § 206, subd. (g).) However, a petition for access to sealed juror information post verdict "shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information." (*Ibid.*)

We agree with the trial court that Owen did not present sufficient facts to establish a proper basis for obtaining the identifying information of the eleven jurors because there was no showing juror 12 shared with the other jurors any information he obtained from the website. Owen did not show good cause for disclosure, and the trial court was not obligated to allow him to engage in a fishing expedition. (*People v. Wilson* (1996) 43 Cal.App.4th 839, 852.) Also, as the trial court pointed out, the jury was instructed with CALJIC No. 1.03 regarding the duty not to conduct its own investigations of the case, and there is no evidence the other eleven jurors disobeyed this order. Under these circumstances, we conclude the trial court did not abuse its discretion in denying Owen's request for the juror identifying information.

Brady Error

Owen contended in his motion for a new trial that the prosecutor committed *Brady* (*Brady v. Maryland* (1963) 373 U.S. 83) error by concealing relevant information from the defense. Specifically, the prosecutor did not inform the defense regarding S.'s statement that the carpet in L.'s bedroom had not been cleaned between the time of the alleged instances of oral copulation and the time defense counsel tested the carpet for semen in connection with trial.

"Under [*Brady*], the prosecution must disclose to the defense any evidence that is 'favorable to the accused' and is 'material' on the issue of either guilt or punishment. Failure to do so violates the accused's constitutional right to due process. [Citation.] Evidence is material under the *Brady* standard 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " (*City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 7-8.) "Evidence is 'material' under Brady 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result . . . would have been different.' " (*In re. Sassounian* (1995) 9 Cal.4th 535, 544.) A " 'reasonable probability' is a probability sufficient to 'undermine confidence in the outcome.' " (*Ibid.*) The probability of a different result is "assessed by considering the evidence in question under the totality of the relevant circumstances and not in isolation or in the abstract." (*Ibid.*)

The trial court ruled the prosecutor committed error under *Brady* by not disclosing to the defense S.'s statement the carpet had not been cleaned; however, the court found no prejudice, and ruled: "The state of the evidence was — and then as I understand the statement from [S.], that would have been that the carpet wasn't cleaned, not that somebody didn't wipe it up, but the carpet wasn't cleaned. Stanley Steamer didn't come in and clean the carpet. Mr. Owen testified the carpet was never cleaned. And that evidence really was uncontroverted in the course of a trial. I can't — I couldn't find that to be prejudicial. I would find, beyond a reasonable doubt, that that had no effect on anything in the case and that the *Brady* violation was not prejudicial beyond a reasonable doubt."

We conclude the prosecutor erred in not disclosing S.'s statement to the defense, but the error was not prejudicial in light of Owen's unrebutted testimony that the carpet was not cleaned. Accordingly, the defense presented the jury with the same evidence the prosecutor withheld. The defense also presented forensic evidence regarding tests done on the carpet, which produced negative results for semen.[4] On this record it is not reasonably probable the jury would have reached a different outcome if the prosecutor had timely disclosed S.'s statement.

Prosecutorial Misconduct

Owen contends the prosecutor committed misconduct when she argued a fact she knew to be untrue. Specifically, in rebuttal argument, the prosecutor stated, "And just as a side note, you look at People's exhibit 12, pictures of the baby powder, you will see carpet cleaner, a red bottle on the shelf underneath it. More importantly, I wouldn't expect to find [semen] there because it never got there." Owen's counsel made no objection to this statement during trial.

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4 Although we recognize arguments by counsel is not testimony, we note the defense attorney relied on the fact the carpet was not cleaned to vigorously argue to the jury: "We know [semen] is not [on the floor] because we went out and tested it. Our test was competent. Our tests were thorough and you could find semen after that period of time. How could [there] not be semen present? Now you notice the D.A. didn't go out and test it. We went out and tested it. The law enforcement didn't go out and test it. We went out and tested it and if we were wrong, you don't think that they would jump on it there with a team and say, 'Hey, we better check this out . . . If they'd have found semen they would have told us. There is no semen on this floor. There should have been semen on that floor."

The trial court ruled that the prosecutor's comment "was an inference that was drawn from a photograph that was admitted into evidence." In any event, any error was not prejudicial because Owen testified the carpet had not been cleaned.

"A defendant's conviction will not be reversed for prosecutorial misconduct, however, unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct. [Citation.] Also, a claim of prosecutorial misconduct is not preserved for appeal if defendant fails to object and seek an admonition if an objection and jury admonition would have cured the injury." (*People v. Crew* (2003) 31 Cal.4th 822, 839.)

" ' " 'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " ' " (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

Here, "[D]efense counsel did not object when the [comment was] made. Further, the record before us fails to disclose a basis for applying any exception to the general rule requiring both an objection and a request for a curative instruction. [Citation.] Accordingly, insofar as defendant's claim of prosecutorial misconduct relates to a [comment that was] not objected to, the claim is barred." (*People v. Carter* (2005) 36 Cal.4th 1114, 1204.)

At any rate, Owen's claim fails on the merits because the prosecutor's single comment did not constitute a pattern that rendered the trial fundamentally unfair, and the prosecutor did not use deceptive or reprehensible methods to attempt to persuade the court or the jury. Furthermore, the different convictions were supported by overwhelming evidence, including the testimonies of L., Angela V. and S., and Owen's monitored phone conversation with L.

The law has long recognized the human inclination to speak out with a denial when someone is accused of a crime or wrongdoing, and has adopted an exception to the rule against hearsay. "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." (Evid. Code, § 1221.) One who fails to deny an accusation or to offer an exculpatory explanation under circumstances where denial is reasonably appropriate is considered to have admitted the truth of the accusation. During the telephone call, Owen adoptively admitted L.'s statements regarding the "blowjobs" he required her to perform on him, and accepted he had a "warped idea," and was "100 percent wrong," but justified his conduct by stating the blowjobs "were supposed to show [L.] that that's the way [she] would make [her] living for love, for [her] whole life." Therefore, it is not reasonably probable Owen would have received a more favorable verdict absent the claimed instance of misconduct. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Cunningham Error

In supplemental briefing filed after the United States Supreme Court decision in *Cunningham, supra*, 549 U.S. ___ [127 S.Ct. 856], Owen argues that the trial court violated his right to a jury trial guaranteed by the Sixth and Fourteenth Amendments of the federal Constitution by imposing the upper term sentences on counts 2 through 4 based upon multiple factors that were not determined to be true by a jury, and were not admitted to by Owen. We agree.

The court explained its decision to impose the upper terms as follows:

"The lower term is not something that I think is justified in the case. The prior insignificant record applies here as well as a circumstance in mitigation. Mr. Owen is a man in his 50's, and he has one misdemeanor conviction in his past and that applies here as a mitigating factor as well.

"I think the other mitigating factor here is the defendant's O.C.P.D. It's not justification, but it is a condition that I'm absolutely 100 percent convinced he was not faking. It was there. . . He has obsessive/compulsive personality disorder, that as I mentioned, I think is a circumstance that mitigation, but it does not justify or constitute a defense to the charges, but that's something that he can't help. . . .

"Looking at the circumstances in aggravation, the offenses against [L.] that do disclose a high degree of callousness, just the very relationship themselves — this is not charged as incest. It's charged as, basically, a forcible oral copulation, and the familial relationship places this in a more serious mode, in my view. The defendant was in a position of trust and confidence as the father of the victim. The crimes were highly

callous and cruel, just the very nature of the abuse that took place. And right now I can even just talk about the abuse that was admitted by Mr. Owen on the stand. Obviously he didn't admit the sexual abuse and still is denying that, but the way he would address his daughter verbally, the way he would smack her, I think there were three different times when he talked about hitting her in the face with his backhand or otherwise is extremely cruel and callous to do that. And that is a strong circumstance in aggravation pursuant to Rule [4.421, subd. (a)(1)]. The manner which the offenses were carried out indicate planning and sophistication as [defense attorney's] timeline would suggest, and the argument with presenting the time, as best he could to try to present an alibi or to try to show that there wasn't any time in which to commit the offenses, but the jury found that they were committed, and in order to do that with the time filled up required a certain amount of sophistication in the case to make sure that nobody else was at home at the time and that they were — that the scene was cleaned up, the condoms were thrown away, the wrappers were thrown away, and all of that demonstrates planning and sophistication."

In *Cunningham*, the United States Supreme Court held that California's determinate sentencing law (DSL), by placing sentence-elevating fact finding within the trial judge's province, violates a criminal defendant's right to a jury trial safeguarded by the Sixth and Fourteenth Amendments to the federal Constitution. (*Cunningham*, *supra*, 549 U.S. ___ [127 S.Ct. at p. 860].) *Cunningham* explained that because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence rather than by proof beyond a reasonable doubt, the DSL

violates the bright-line rule in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, that any fact, other than the fact of a prior conviction, 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, supra*, 549 U.S. ___ [127 S.Ct. at p. 868].) Quoting *Blakely v. Washington* (2004) 542 U.S. 296, 303-304 for the proposition that " 'the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant,' " the *Cunningham* court concluded that "[i]n accord with *Blakely*, therefore, the middle term prescribed in California statutes, not the upper term, is the relevant statutory maximum." (*Cunningham, supra*, 549 U.S. ___ [127 S.Ct. at p. 868].)

The Attorney General concedes in a supplemental brief that *Cunningham* generally precludes a trial court from finding facts to impose an upper term sentence and that the middle term is the statutory maximum for a valid sentence in California in the absence of aggravating facts found by the jury. Nevertheless, the Attorney General argues that in this case we need not reverse the court's upper term sentences on counts 2 through 4 because: (1) at sentencing Owen failed to object to the sentence on the basis his right to a jury trial was denied; (2) under *People v. Calhoun* (2007) 40 Cal.4th 398, 404-405 (*Calhoun*), the trial court's reasoning for the upper terms were inherent in the jury's verdict; and (3) any error was harmless under *Chapman v. California* (1967) 386 U.S. 18, 24.

We reject the Attorney General's assertion that the claim is waived because of Owen's failure to object. (*People v. Hill* (2005) 131 Cal.App.4th 1089, 1103.) Owen was

sentenced on January 26, 2006, in the interregnum between *People v. Black* (2005) 35 Cal.4th 1238 (*Black*) and *Cunningham*. The controlling law was *Black*, which concluded the imposition of an upper term under the DSL based on facts not found by a jury or admitted by a defendant did *not* violate *Blakely*.

In *People v. Scott* (1994) 9 Cal.4th 331, the California Supreme Court held a defendant's failure to challenge in the trial court the imposition of an aggravated sentence based on erroneous or flawed information waived that issue for purposes of appeal. However, *Scott's* reason for its waiver rule — it was necessary to facilitate the prompt detection and correction of error in the trial court, thus reducing the number of appellate claims and preserving judicial resources (*id*. at pp. 351-353) — is a pragmatic rationale that does not support the application of the waiver rule here. Prior to *Cunningham*, the controlling law in California was that there was no constitutional right to a jury trial in connection with a court's imposition of the upper term. Because of the state of the law, an assertion of a constitutional challenge to the imposition would not have achieved the purpose of prompt detection and correction in the trial court. To the contrary, an objection would have been futile in light of *Black* and we will not require interposition of futile objections at trial to preserve issues for appeal. (Cf. *People v. Chavez* (1980) 26 Cal.3d 334, 350, fn 5.)

Moreover, the essence of an allegation of *Blakely* error is that the defendant was deprived of his or her constitutional right to a jury trial on the factors on which the trial court relied in imposing an upper term. A defendant is not precluded from asserting on appeal that he was denied this constitutional right despite a failure to raise it in the trial

court. (*People v. Saunders* (1993) 5 Cal.4th 580, 589, fn. 5.) Because a claim of *Blakely* error involves a deprivation of the right to a jury trial — a trial on aggravating factors — Owen's challenge to his upper term is cognizable on appeal, although he did not raise the issue in the trial court.

We conclude the judge's fact finding resulted in the upper terms on counts 2 through 4 in violation of Owen's right to a jury trial safeguarded by the Sixth and Fourteenth Amendments to the federal Constitution. (*Cunningham, supra*, 549 U.S. ___ [127 S.Ct. at p. 860].) The trial court relied on some aggravating factors that were proper, and others that were impermissible for the imposition of the upper terms. For example, we agree the jury implicitly found based on the charges and evidence in this case that Owen was in a position of trust over L. (*Calhoun, supra*, 40 Cal.4th 398; Cal. Rules of Court, rule 4.421, (a)(11).) However, the court also relied on Owen's admission he used strong language with L. and hit her in the face with the back of his hand. But as the court recognized, Owen did not admit such conduct as part of the sexual crimes for which he was convicted; to the contrary, he repeatedly denied the sexual offenses. Therefore, it was improper for the trial court to use these admissions for findings of aggravation.

We decline to engage in a harmless error analysis of the sentencing error here under *Chapman, supra,* because we cannot tell beyond a reasonable doubt what balance the court would have struck between the mitigating and aggravating factors if it relied solely on the permissible aggravating factors. Accordingly, we reverse the court's imposition of upper term sentences on counts 2 through 4, and remand the matter for the

trial court to resentence Owen based on permissible criteria, consistent with *Cunningham* and this opinion.

DISPOSITION

The court's imposition of upper term sentences on counts 2 through 4 is reversed, and the matter remanded for resentencing. In all other respects the judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

McDONALD, Acting P. J.

IRION, J.