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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. BERKLEY L. RODRIQUEZ, Defendant and Appellant.	B169227 (Los Angeles County Super. Ct. No. BA238426)

APPEAL from a judgment of the Superior Court of Los Angeles County. Larry Paul Fidler, Judge. Remanded for resentencing, otherwise affirmed.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, David F. Glassman and Lawrence M. Daniels, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, appellant Berkley L. Rodriquez was convicted of one count of forcible sodomy (Pen. Code, § 286, subd. (c)(2)) and one count of unlawful possession of cocaine (Health & Saf. Code, § 11350, subd. (a).)[1] In a bifurcated proceeding, the trial court found true the allegation appellant had previously suffered a felony conviction which resulted in the service of a prison term within the meaning of Penal Code section 667.5, subdivision (b). The trial court denied appellant's motion for new trial and sentenced appellant to the upper term of eight years on the sodomy count and a concurrent high term of three years for possession of a controlled substance, adding a consecutive one-year prior prison term for a total of nine years. Appellant appeals the judgment of conviction.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The trial

Lorena C. briefly dated defendant in mid-June 2002 and once had consensual sex with him.[2] When they were dating, she considered him her boyfriend.

On the night of August 2 or 3, 2002, she was dancing at a nightclub and saw defendant again. They spoke to each other, and she told him about the difficult times she was going through.[3] They both were drinking and dancing together. Her four male friends left her there and, when the club closed, she agreed to accompany defendant from the nightclub. She left with him because he had offered her help.

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[1] The jury acquitted him a five additional counts of forcible sodomy, alleged to have been committed with the same victim.

[2] She testified she stopped seeing him because "I wanted to get away from that environment what I was in. He was very jealous, and I had a lot of friends elsewhere – strike that. I had a lot of things to do elsewhere." She was not mad at him when she saw him at the nightclub. They had not had anal sex; she did not want to have that with him or anyone else.

[3] At the preliminary hearing, she testified she was homeless. At trial, she testified she meant she did have a house but "needed to get out of where I was at."

Defendant and Lorena C. left the nightclub when it closed, about 4 a.m., and took a cab that was waiting outside. She thought they were going to his home, but he gave directions to a motel. Her other friends always respected her, and "when I've said no, it's been no." When they got to the motel, she called him a liar but went with him to the motel office. She filled out the paperwork for the motel, giving a false name as directed by defendant;[4] and defendant paid for the room. Defendant told her he wanted to order more beer; she said it was too late and that he should rest. He said he did not care but then abandoned that conversation. Both were drunk.

The conversation then turned to matters of a sexual nature. She did not remember how it started, but he ordered her to take off her clothes. She did not like him bossing her around and ordering her to do it and told him she was not going to do anything with him. He responded with "a real bad attitude about the whole thing." Defendant raised his voice and told her she was going to have sex with him. She "went along with him" and asked him to let her go to the bathroom, which he permitted. She went into the bathroom but did not shut the bathroom door as she was urinating and was wondering what she was doing there. She felt a kick to her face and, as she tried to get away, defendant started hitting her on the face and pulling her by the hair back into the motel room as she screamed for help.[5] He threw her onto the bed and he told her not to scream, that he was going to kill her; suddenly he put his hand on her neck and was pulling her hair with one hand and strangling her with the other. She told him that if he killed her he would be doing her a favor.

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[4] About two years before, she had used a false name when talking to police officers. At that time, she was afraid because she was getting her immigration papers in order.

[5] Her hair was found on the left side of defendant's face and on his left shoulder leading to his upper arm.

As he choked her, she could not breathe and started to think about her two children.[6] She told him to let her go and not to worry, that she was not going to call the police. She promised that on the lives of her children, who she loved very much. Nevertheless, he kept threatening her and said he would find her and kill her. He then said exactly what he wanted sexually, which was "sex from behind;" she refused. As he kept threatening to kill her, she thought it was "just better" if she did what he said.

According to the victim, defendant turned her over on the bed and then sodomized her seven to ten times for between fifteen and thirty minutes. All she could do was bite the bed and cry. It was painful and hideous to her; she had never had anal sex before.

Defendant then went to use drugs and told her to take them as well; she took the cocaine with the room key because she was afraid he was going to be abusive again and thought she should do exactly as he said.[7] He then said "let's go;" she cooperated only because she was doing everything he told her to. He again sodomized her, more than ten times, for what seemed like hours. It was still hurting and he was telling her to tell him she liked it; she told him that and he told her "I love you" in English and Spanish. He did not use a condom, but she did not know if he ejaculated. They had no vaginal intercourse that night. None of the sex with defendant that night was consensual.

She decided to pretend she was sleeping in hopes he would go it sleep. Eventually, he stopped the anal sex and fell asleep on top of her. When she was sure he was asleep, she went into the bathroom to use the toilet, cleaned her rear, and dressed herself. She was reluctant to call the police but felt so filthy that she ran out and kept running until she got to the motel office. She thought he might have a gun "because he

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[6] She had not called the babysitter to say she was staying at a friend's place. The sitter knew she was coming back to pick up the children the next day about 7.

[7] She admitted using cocaine in the four days before she went to the motel.

usually carries a gun." Very scared, she called 911 from under the desk in the manager's office. The 911 tape was played for the jury and admitted in evidence.[8]

The police came; she told them what had happened, "he fucked me in the ass"; and they got defendant out of the room. The victim, who had scratches and bruises as well as a bite on her ear and a swollen lip and face, was taken to the hospital and examined.[9] Crying and looking down, she described the assault by defendant and told the nurse she had had consensual sex with someone besides defendant within 24 hours; she was still wearing the same clothes; that had been in the afternoon of August 2 without a condom.[10] The nurse observed bruising on the victim's face and body; redness and swelling, abrasions on the ear, and anal and rectal pain and fresh bleeding. There were no vaginal injuries, but there were several lacerations to the anal area. Her injuries were consistent with blunt force trauma.[11] There was no indication of involuntary drug use, and she told the nurse she had not been bitten and had not urinated after the assault.[12]

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[8] She did not mention to the 911 operator that she had been forced to have sex. But she testified that the reason she called the police was the defendant had "had his way" with her and she did not "wish this on anybody."

[9] The supervisor of the nurse who examined her testified.

[10] The parties stipulated that a single sperm cell fragment was found on the rectal swab; there was insufficient male DNA to detect a profile, which does not prove or disprove that anal sex occurred. Moreover, DNA from more than one person was obtained from the panties, with both the victim and defendant excluded as the source of that DNA, but consistent with another male. The results are consistent with the victim having had vaginal intercourse on August 2, 2002, with a male other than defendant.

[11] The testifying supervisor opined that the injuries could be caused by 20 penetrations, or if the person is not ready, by one or two penetrations. The injuries indicate the anal sex was painful. They do not necessarily indicate the anal sex was not consensual.

[12] Furthermore, the report indicates the victim told the nurse her assailant said he had a gun and that he threatened to kill her. No interpreter was used by the nurse, though Spanish translators were available.

The episode had been "something very hard" for her to deal with. She has been seeing a counselor since the attack.

Regarding the drug count, the parties stipulated that the substance found in the hotel room was 2.7 grams of cocaine.

The defense was that defendant injured the victim but did not force her to have anal sex. The defense tried to paint Lorena C. as a liar.

According to defendant, who testified in his own behalf,[13] he met Lorena at a burger stand in June; they had sex a few days later, hung out for a day, but were not in a boyfriend/girlfriend relationship. He characterized it as sort of like a one-night stand sort of thing, on the morning after a party when they woke up laying next to each other. He next saw her by chance at the nightclub a little after 9 p.m. on August 2. She told him the problems she was having, including that she did not want to go back to the place she was staying, but he did not offer to help her find a place to live. He was drinking hard liquor, more than usual, and she was also drinking a lot; they danced together. He denied offering her a place to stay but did tell her she could hang out with him, that "we could just kick it for the night . . . ."

Furthermore, he denied initially offering her a ride. Rather, he testified that as he waved down an approaching cab, she "came out of nowhere" and after asking what he was going to do, asked if she could go with him; there was no discussion about where they were going. The cab driver asked where to go and defendant told him to take them to a particular motel.[14] He thought they might have sex, but they never discussed that.

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[13] The court allowed him to be impeached with two felony convictions. However, the court would not allow the prosecutor to introduce misdemeanor moral turpitude conduct, that he used false names with police, or that he had juvenile petitions sustained for residential burglary and assault with a deadly weapon. Neither would the court allow evidence of his gang affiliation.

[14] Defendant had a place to live, but his girlfriend lived there with him.

Lorena got out of the cab with him, and she went to talk to the clerk at the motel and arranged to get a room.

When they got to the room, he suggested more beer. She replied, "Um, no, we don't need no beer. Let's just kick it" and started taking off all her clothes. She then came towards defendant and took off all his clothes, after which they started making out and had vaginal intercourse. Then he motioned to her to get in a doggie-style position; he lubricated her anus with her vaginal fluids and penetrated her only once from the rear. She did not refuse sex, either vaginal or anal.

According to defendant, she then asked him to stop and suggested doing some coke "so we could both feel better."[15] He made two lines and she did both lines with a dollar bill. Defendant admitted snorting at the club, but testified he did not snort cocaine at the motel. Both drunk, they then got into another argument about beer. He thought he should be able to get beer after she had done coke, got very angry, and snapped. He punched her, grabbed her from the back of her neck, and pulled her hair. He contends that all the non-anal injuries occurred after the "stupid argument" about beer, following the sex, which he characterized as consensual.

He had her in a chokehold and, upset and crying, she told him to calm down and that she would not call the police. Defendant denied having a gun, telling her he had a gun, or threatening to kill her. He loosened the choke hold eventually; they laid in bed naked, and he fell asleep. Defendant never went to get beer.

Police officers woke him up and took him into custody. None of his cash was then in his pant's pocket.

Jury deliberations

The jury commenced deliberating at 3:25 on Wednesday, April 3, 2003, and adjourned at 4 p.m. The jury resumed the next day at 10:50 a.m. and recessed from noon

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[15] According to defendant, he had told her at the club that he had cocaine and was going to do it in the club rest room. Thus, he admitted count 7, possession of cocaine.

to 1:38. The judge reported at 2:38 that he had a note from the jury "which, frankly, I don't understand." The note read: "What is the legal difference between 'rape' and 'forced sodomy.'" The court commented: "I have no idea what the relevance is to this case. There is no evidence of a rape. There is no testimony concerning a rape. The defendant testified to vaginal intercourse. According to him, that was consensual. So there is absolutely no issue. I mean, the only testimony to believe that even deals with sodomy was just – unless they are just misunderstanding something, are off the wrong track."

The court called out the jury and explained the parties and the court were "at a loss because this case has nothing to do with rape. So why does anyone want to know what rape is since it's not alleged or has been no allegations or testimony that would have anything to do with rape. The only testimony – it's up to you to believe, you know, whatever the witness had to say or not, then apply the instructions. But the instructions and the testimony concern forced sodomy. [¶] So does that answer, hopefully that answers, rape is just not an issue in this case. Does that take care of it? [¶] Tell me what your concerns are."

The juror who asked the question replied "I was wondering if there is a difference." The court answered "Well, the difference would be rape, as we normally use it within the legal community, would be a forced act of vaginal intercourse; and sodomy is anal intercourse. So that if you want to know what the difference is, I guess that that is the difference. There is no testimony concerning forced vaginal intercourse in this case. So it's not – it's just a nonissue." The court asked if that answered the question, and the jury replied affirmatively. There was no defense objection to the court's explanation.

At 3:55, the jury returned its verdicts.

Hearing on motion for new trial

Defendant filed a motion for new trial on June 30, 2003, on the grounds of newly discovered evidence, raised again on appeal, and that there was insufficient evidence to sustain the verdict. The supporting declaration of Deputy Public Defender Cynthia Yuen

stated she received a faxed copy of the qualitative toxicology results for Lorena C. on or about March 13, 2003, with the case set to return on March 20 as day 12 of 15; according to defense counsel, Hon. Alice Altoon had indicated on the previous court date that the case would be subject to no further continuances.[16] On March 20, defense counsel requested the quantitative analysis results and was advised the next day that such testing would take at least two weeks to perform. She detailed her unsuccessful efforts to get an expedited order as trial was progressing and before defendant's April 3 conviction. The report, dated April 9, 2003 was sent to the misdemeanor division of the Public Defender's Office indicated that cocaine metabolite was present in the urine sample at a concentration of about 740,334 nanograms per milliliter. At an unspecified date, she consulted with Dr. Plotkin, who advised her this was a "significant" amount of cocaine and "consistent with someone intending to use cocaine to get high." Moreover, Dr. Plotkin told her the person ingesting that amount of cocaine "would have been in a state of cocaine intoxication. In this state a person would be exhibiting symptoms such as heightened anxiety, fearfulness, and paranoia. Additionally, these symptoms would be aggravated if alcohol had been consumed, and if the person is a chronic user of cocaine."

A hearing was held July 31, 2003, in which Dr. Gordon Plotkin testified regarding the laboratory report of Lorena C.'s urine.[17] The report on the urine specimen indicated approximately 740,000 nanograms of cocaine. Although a blood specimen is more accurate, .74 milligrams per cc of urine of cocaine metabolite in the urine "is an extremely high amount." He assumed the person did not void prior to the examination,

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[16] The minute order of March 4, 2003, does not so indicate. Rather, over defendant's objection a defense oral motion of continuance was heard and granted to March 20 as day 12 of 15. We have no reporter's transcript for March 4.

[17] Dr. Plotkin has both a Ph.D. in biochemistry from UCLA and a medical degree from the University of Miami with a four year residency in psychiatry from UCI and a forensic psychiatry fellowship from USF; he is a specialist in medications and substances with psychiatric patients. He has been on the Los Angeles Superior Court panel since about 1994-1996.

as indicated in the nurse's report, and concluded that the person "was intoxicated" with a "significant amount of cocaine." According to Dr. Plotkin, cocaine in this amount "would have a lot of [irritabilities], could have suspiciousness going all the way up into the range of having true psychotic symptoms like hallucination, delusion" and which can cause, violence, impulsivity, [jitteriness], and anxiety. Cocaine amplifies fearfulness, impulsivity and reactiveness, possibly poor judgment or insight, and poor read of the situation. Alcohol combined with cocaine magnifies the action with a synergistic effect. At the time of the incident six hours before collection, the cocaine would be even higher than reflected in the report. This was not consistent with someone attempting to ingest as little cocaine as possible; if one dose, it was an extremely substantial dose. However, had the person voided her bladder, ingested the cocaine, and the urine was collected two hours later, "then maybe you could say this was a one time – not necessarily incidental, still intoxication amount but a one time amount."[18]

On cross-examination, Dr. Plotkin was vague about when he received the data and talked to defense counsel, but he thought it "was within the last couple of months." He was not saying that someone under the influence of cocaine cannot accurately state what happened to them as the victim of a crime. Rather he testified "I think it would be nearly impossible to hallucinate you were sodomized especially with the physical evidence."

The court proposed recalling Dr. Plotkin after the court reporter prepared the transcript regarding the witness's testimony on her cocaine use. That was done on August 7, 2003. At the court's request, Dr. Plotkin reviewed the victim's testimony. Acknowledging that the cocaine would not prevent her from testifying truthfully, Dr. Plotkin opined "it would have some impact in her ability to interpret the events that are happening at that time. [¶] If she was intoxicated with cocaine in a fairly high level, she

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[18] His assumption was that the "person's urine was collected six hours after the reported last possible ingestion of the cocaine and that she hadn't voided during that period of time . . . ."

would have a difficult time reading people. She would take it as more paranoid. She would be more suspicious, she will be more irritable and the interpretations will be out of whack than if she wasn't intoxicated. But that's also true with the alcohol intoxication . . . ." The greater the concentration of cocaine, the more magnified the fear. Moreover, even at the level of intoxication, "she would recall" forced and very painful sodomy if that occurred. In fact, the memory for an episode is "actually quite acute" given a stimulant like cocaine.

He opined that the level of cocaine had to be more than just the tip of the key amount[19] and/or she had a very high level of cocaine in her bloodstream before she urinated.

The prosecutor argued this was not "newly discovered evidence." She noted the victim early on admitted using cocaine during the incident and that when the prosecutor received the urine results on March 13, she immediately faxed them to the defense, which a week later asked for a quantitative analysis. The prosecutor informed the defense that would take two weeks and asked if the defense would be requesting a continuance; the defense replied that defendant did not want to waive time so they would not be requesting a continuance.[20] Moreover, the victim's intoxication was argued at trial by the defense.

The court concluded this was not newly discovered evidence within the meaning of the statute, citing *People v. Clauson* (1969) 275 Cal.App.2d 699. Moreover, the court reasoned that Dr. Plotkin's testimony would "not render a different result on a retrial of

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[19] Dr. Plotkin testified that the result would be "impossible" based on using a small amount from the tip of a key only once. But he acknowledged she may have made lines with the cocaine taken from the key.

[20] Defense counsel recalled that they were not going to be able to continue the case and thought they would get the quantitative results while the trial was pending so went ahead with the trial. She argued that this was new evidence that would have made a difference.

the cause." Finally, in denying the motion, the court stated its believe that "the evidence shows this event took place as the victim testified it did."

CONTENTIONS ON APPEAL

Appellant contends: 1. The judgment must be reversed because a better result was likely had the trial court not erroneously refused appellant's request for an instruction on battery as a lesser included offense to the six counts of forcible sodomy. 2. The judgment must be reversed due to prejudice caused by instructional error in a) instructing with CALJIC No. 2.70 when the prosecution had not introduced extrajudicial statements; b) misinstructing in response to the jury's question regarding the difference between rape and sodomy; and c) cumulative instructional error. 3. The judgment must be reversed because the trial court erred in denying appellant's motion for new trial on grounds of newly discovered evidence. 4. Appellant was deprived of constitutional rights when the trial court made findings of fact used to impose the upper terms.[21]

DISCUSSION

1. The trial court properly refused appellant's request for an instruction on battery as a lesser included offense to the six counts of forcible sodomy.

The defense requested an instruction on battery "as a lesser of rape" and claims error in the trial court's denial of that request. The court noted defendant was not charged with the battery defendant testified to, smacking the victim purportedly after consensual sex. Moreover, "It's not like there is an unlawful touching that doesn't amount to rape. Under the facts it may be a lesser in the abstract, but the evidence doesn't support it in this case." Defense counsel then asked for the instruction "to be given based on [defendant's] testimony that he did hit her as a separate action from any section."

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[21] *Blakely v. Washington* (2004) 542 U.S. ___ 124 S.Ct. 2531, 159 L.3d.2d 403, was decided following the initial briefing in this case. Supplemental briefs were filed on the *Blakely* issue.

The trial court correctly declined the instruction. Battery "is a necessarily included offense of forcible sodomy," but that does not necessitate the giving of a battery instruction in every case charging forcible sodomy. (*People v. Hughes* (2002) 27 Cal.4th 287, 366-367.) Rather, as the court decided in *Hughes*, *ibid*., "'the existence of "*any* evidence, no matter how weak" will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is "substantial enough to merit consideration" by the jury. [Citations.] "Substantial evidence" in this context is "'evidence from which a jury composed of reasonable [persons] could . . . conclude[]'" that *the lesser offense*, *but not the greater*, was committed. [Citations.]' (*People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094], second italics added (Breverman).)"

In the case at bench, if the jury believed defendant, the sexual incidents were consensual and not criminal. If the jury believed Lorena C., the sexual incidents constituted forcible sodomy, not merely battery. Thus there is no evidence from which a jury could decide that the lesser offense, but not the greater, was committed.[22] The trial court properly rejected the battery instruction.

2. There was no prejudicial error in a) instructing with CALJIC No. 2.70 when the prosecution had not introduced extrajudicial statements or b) instructing in response to the jury's question regarding the difference between rape and sodomy; nor was there cumulative instructional error.

a. CALJIC No. 2.70

Appellant contends that the trial court committed prejudicial error in instructing with CALJIC No. 2.70 when the prosecution had not introduced any extrajudicial statements that would have constituted admissions or confessions. In discussing the instructions offered by the People, the court asked regarding 2.70, "where is the

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[22] The unrelated battery defendant testified he committed after consensual sex was not a lesser included offense of the sexual activity.

confession or admission?" The prosecutor relied on appellant's admission to possessing cocaine. The court stated it would doublecheck to see if the instruction applied if a defendant made a statement admitting guilt on the witness stand, as opposed from the usual scenario of an out-of-court statement. Defense counsel objected and the court stated "if you don't want me to give it, maybe I won't give it. I think you are making a mistake, but I will leave it up to you." Defense counsel added: "I don't see any reason to give it, your honor. I am going to concede." The court added: "I'm going to refuse it per objection of defendant."

The court later gave further consideration to CALJIC No. 2.70 and decided that despite defense objection it had a sua sponte responsibility and, in any event "There is no harm to the defendant. If anything, it helps him." Defense counsel argued "the harm comes in the language that comes at the end when talks about viewing these statements with caution," the court agreed that that language applied to out-of-court statements and agreed to take the paragraph out.

The court instructed the jury with a modified version of CALJIC 2.70, omitting only the final paragraph from the form instruction: "A confession is a statement made by a defendant in which he has acknowledged his guilt of the crimes for which he is on trial. In order to constitute a confession, the statement must acknowledge participation in the crimes as well as the required criminal intent. [¶] An admission is a statement made by the defendant which does not by itself acknowledge his guilt of the crimes for which the defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence. [¶] You are the exclusive judges as to whether the defendant made a confession or admission, and if so, whether that statement is true in whole or in part. . . . ."

Whether or not the instruction should have been given, we see no possible harm to defendant. His trial counsel conceded guilt on count 7, possession of cocaine, the crime about which the admission/confession was made.

b. The court correctly answered the jury's question regarding the difference between rape and forced sodomy.

Appellant contends that the jury was misdirected regarding forcible sodomy in response to the jury's question "What is the legal difference between 'rape' and 'forced sodomy.'" Read in the context of its entire explanation, the court accurately told the jury the difference between rape and forced sodomy. The court stated "the instructions and the testimony concern forced sodomy," not rape.[23]

The juror who asked the question replied "I was wondering if there is a difference." The court answered "Well, the difference would be rape, as we normally use it within the legal community, would be a forced act of vaginal intercourse; and sodomy is anal intercourse." There was no defense objection to the court's explanation, probably because everyone present understood the court was stating that either rape or forcible sodomy was intercourse that was forced and the difference was anatomical.

c. There was no cumulative instructional error.

Finally, appellant contends that the combination of an inapplicable instruction about confessions and admissions and an incomplete response regarding the difference between rape and forced sodomy constitutes prejudice necessitating reversal of count 1. We disagree. For the reasons stated above, the explanation of the difference between rape and forced sodomy, read in context, was correct. Any error in giving CALJIC 2.70 was not harmful to defendant. There was no prejudice.

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[23] The jury was instructed with a modified version of CALJIC No. 10.20 regarding the elements of the crime of unlawful sodomy in violation of section 286, subdivision (c)(2), which clearly include force, violence, fear or threats. In arguing to the jury, the prosecutor explained that the case came down to whether the jury believed Lorena that the anal penetration was accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the victim. Defendant admitted one event of anal intercourse; a "conservative number six" were charged.

3. The trial court did not err in denying appellant's motion for new trial on grounds of newly discovered evidence.

Appellant argues that the "newly discovered evidence," Dr. Plotkin's testimony, compels a new trial. As our Supreme Court observed in *People v. Delgado* (1993) 5 Cal.4th 312, 328, "'"The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."' [Citations.] '"[I]n determining whether there has been a proper exercise of discretion on such motion, each case must be judged from its own factual background."' [Citation.] [¶] In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: '"1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits."' [Citations.]"

We find no abuse of discretion in the trial court's decision. (*People v. Dyer* (1988) 45 Cal.3d 26, 52.) First, the evidence could have been discovered earlier. Cocaine was found in the bathroom of the motel room when the police arrested defendant.[24] At the preliminary hearing, on November 14, 2002, months before trial, there was evidence defendant forced Lorena C. to snort cocaine. A urine sample had been taken from the victim within hours of the assault and could have been analyzed at any time. Even once the urine sample was qualitatively analyzed, the defense could have but did not request a continuance for the further quantitative analysis that was later the basis of Dr. Plotkin's testimony.

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[24] Indeed, appellant's possession of that cocaine was uncontested at trial or on appeal.

In addition, the trial court concluded Dr. Plotkin's testimony would not have produced a different result. Given the evidence the jury already had about Lorena C.'s intoxication and cocaine use, we cannot find this conclusion to be an abuse of discretion.

4. Appellant was deprived of constitutional rights when the trial court made certain findings of fact used to impose the upper terms.

The trial court sentenced appellant to consecutive terms, imposing the high term on both count 1 and count 7. In explaining its decision to impose the high term, the court found no circumstances in mitigation and found the following circumstances in aggravation: the victim was particularly vulnerable because of her condition; appellant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are going to be imposed; they had a past relationship; appellant took advantage of a position of trust or confidence to commit the offense; his prior convictions as an adult are of increasing seriousness; and he has served a prior prison term. In his reply to respondent's supplemental brief, relying on *Blakely v. Washington* (2004) 542 U.S.__, 124 S.Ct. 2531, appellant contends that, other than the fact of a prior conviction, any fact used to impose the upper term, must be submitted to a jury and proved beyond a reasonable doubt.[25] He contends that the matter should be remanded for resentencing in that l) the trial court's reliance of his serving a prior prison

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[25] We agree that where his briefs were filed before *Blakely* was decided, appellant's failure to raise the issue earlier is not a waiver. (*People v. Scott* (1994) 9 Cal.4th 331, 353-354; *People v. Saunders* (1993) 5 Cal.4th 580, 590.) The People note courts previously have applied waiver principles to *Apprendi* claims and similar principles should apply to *Blakely* claims. (*United States v. Cotton* (2002) 535 U.S. 625 [152 L.Ed.2d 860].) We do not find the People's waiver argument persuasive. *Blakely* extended the *Apprendi* rationale into a new area. Thus, appellant cannot be said to have waived the contention.

The issue of the application of *Blakely* to the upper term is currently pending before our state Supreme Court. (*People v. Towne*, review granted July 14, 2004, S125677; *People v. Black,* review granted July 28, 2004, S126182.) The Supreme Court also has additional cases presenting various *Blakely* issue pending before it.

term was invalid as a factor in aggravation;[26] 2) reliance on the victim's being particularly vulnerable and appellant's taking advantage of a position of trust should have been decided by a jury; and 3) it cannot be determined whether elimination of three of the five cited factors would not have made a difference in the trial court's sentencing decision. We agree

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court held that any fact, other than a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be charged, submitted to a jury, and proved beyond a reasonable doubt. *Blakely v. Washington supra*, 542 U.S. ___ [124 S.Ct. 2531] extended *Apprendi's* holding to cases where a judge found aggravating factors that were then used to justify the imposition of an increase prison term. In such cases, the court stated 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*." (*Id*. at p. 2537, emphasis in original.) In the recent case of *United States v. Booker* (January 12, 2005) 2005 WL 50108, ___ U.S. ___ [125 S.Ct 738, 756], the United States Supreme Court reaffirmed the analysis contained in *Blakely*. The majority of the *Booker* court, 125 S.Ct. 738, 756, held "we reaffirm our holding in *Apprendi:* Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or

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[26] Respondent acknowledges that dual use of the prior prison term is improper under *People v. Coleman* (1989) 48 Cal.3d 112, 163-164 [cannot impose enhancement for prior prison term and use that factor to impose upper term], but argues that claim was not raised in appellant's openly brief, was a state law-based claim based on pre-*Blakely* authority, and was therefore waived. Even if there was no waiver regarding *Blakely* and/or *Coleman*, respondent maintains that California and Washington's sentencing schemes differ in fundamental respects; that error if any was not prejudicial; and that, in any event, the appropriate remedy is to remand for resentencing for the prosecutor to decide whether to try aggravating circumstances before a jury. The *Coleman* issue can be raised on resentencing in the trial court.

proved to a jury beyond a reasonable doubt." The majority in *Booker* , *supra*, 125 S.Ct. 738, 749, specifically indicated that an increased sentence based on a finding of "racial malice" as in *Apprendi* as well as "deliberate cruelty" in *Blakely* determined by a judge using a preponderance of the evidence standard would be in violation of *Blakely*.

We hold that appellant's sentence is in violation of *Blakely* and *Booker* in that the trial court relied on the factors of victim's being particularly vulnerable and appellant's taking advantage of a position of trust. These factors should have been presented to the jury for their determination.

DISPOSITION

We remand for resentencing in accordance with *Blakely*, but otherwise affirm the judgment.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COOPER, P.J.

We concur:

BOLAND, J.

FLIER, J.