Filed 4/12/07 P. v. Sutton CA4/2
Opinion following rehearing

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MARTEL ANTWONE SUTTON, Defendant and Appellant.	E038982 (Super.Ct.No. FSB 037526) OPINION

APPEAL from the Superior Court of San Bernardino County. Arthur Harrison, Judge. Affirmed with directions.

Stephen M. Lathrop, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Ronald A. Jakob and Jennifer A. Jadovitz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Martel Antwone Sutton broke into Jane Doe's home (the victim) and hit her repeatedly with a frying pan when she discovered him in her home in the middle of the night. Defendant then robbed and raped the victim in her home. When done raping the victim, defendant noticed a shed in the victim's backyard, locked her in the shed, and drove off in the victim's car.

Defendant appeals from judgment entered following jury convictions for first degree burglary (count 1; Pen. Code, § 459)[1]; assault with a deadly weapon (count 2; § 245, subd. (a)(1)); forcible oral copulation (count 3; § 288A, subd. (c)(2)); forcible rape (count 4; § 261, subd. (a)(2)); false imprisonment (count 6; § 236); kidnapping (count 7; § 207, subd. (a)); robbery (count 8; § 211); and unlawful taking of a vehicle (count 9; Veh. Code, § 10851, subd. (a)). The jury acquitted defendant of count 5, attempted forcible sodomy (§§ 286, subd. (c)(2), 664). As to counts 1, 2, 3, 4, 6, 8, and 9, the jury found true that defendant used a deadly weapon (i.e., a frying pan) and found true as to all convicted offenses that defendant personally inflicted great bodily injury (GBI). (§§ 12022, subd. (b)(1), 12022.7, subd. (a), and 12022.8.) The court sentenced defendant to an aggregate indeterminate prison term of 22 years 4 months plus a consecutive term of 25 years to life.

Defendant contends his conviction for false imprisonment should be reversed because false imprisonment is a lesser included offense of kidnapping, and his conviction for assault with a deadly weapon (count 2) should be reversed because it is a lesser

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

included offense of robbery. Defendant also contends the trial court erred in imposing the weapon use enhancement as to count 2 because weapon use is an element of count 2; imposing the GBI enhancement on the rape offense because the GBI factor was used in imposing the one-strike law; failing to stay the GBI enhancement imposed on count 3 (forcible oral copulation) because the GBI enhancement was imposed on count 4 (rape); sentencing defendant for kidnapping and robbery in violation of section 654, the multiple punishment bar; and imposing upper terms and consecutive sentences in violation of *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*).

We agree, as do the People, that the trial court erred in imposing the weapon use enhancement as to count 2 (assault with a deadly weapon) and the GBI enhancement as to count 4 (rape), and accordingly, direct the trial court to strike these enhancements. The trial court also erred in imposing upper terms on counts 1, 3 and 7, based on factors requiring a jury trial under *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*). Defendant's sentence is thus reversed and the matter is remanded for resentencing as to counts 1, 3 and 7. In all other regards, we reject defendant's contentions and affirm the judgment.

1. Factual Background

On December 27, 2002, at 2:00 a.m., defendant turned off the victim's electrical power at her residence and entered her home through a window. According to defendant's recorded statement given to the police, he intended to take the victim's money and car. The victim was awakened by a noise and walked to the kitchen to get a flashlight because her bedroom light was not working. While in the kitchen, she saw

defendant and screamed. Defendant hit her on the head with a frying pan two or three times, causing her to become dizzy. Defendant said he wanted her keys and money. The victim gave defendant her keys and went to the dining room to look for her money. Defendant told her, "Get your money, or I'll hit you again." The victim gave defendant her wallet. Defendant took the money out of the victim's wallet. According to defendant's recorded statement, he had dumped everything out of the victim's purse before the victim woke up.

Also, according to defendant's recorded statement, defendant decided to rape the victim after he hit her with the pan and took her to the back bedroom. After taking the victim's money, he said, "What about the room in the back?" Defendant and the victim walked to the back room. On the way, defendant ripped the phone off the wall and told the victim to take off her clothes and lay down. She did what defendant told her to because she was afraid. The victim lay on the bed in the back bedroom. Defendant hit her several times in the head and face with the pan.

As defendant began pulling off the victim's nightgown and panties, she felt as if she would pass out. She resisted defendant's attempts to pull her legs apart and asked why defendant kept hitting her. Defendant replied, "You won't hold still." The victim then passed out. Defendant admitted during his statement to the police that he raped the victim.

When the victim regained consciousness, she was lying on the floor and defendant was behind her. He told her to sit up and forced her up. He put his penis in her mouth and said, "Is that the best you can do?," and threw the victim's nightgown to her. After

she put it on, defendant and the victim walked down the hall. As they walked, defendant asked the victim, "What is that little house in the back?" She said it was her shed. Defendant said he was going to put her in it and he walked her out to the shed. He then locked her inside the shed and left.

According to defendant's recorded statement, defendant began to drive away and then realized he had dropped his wallet and went back to the victim's house to retrieve it. After he returned, he brought the victim a glass of water. In response to the victim asking when she could call for help, he said at "2:00" and locked her in the shed again. About 10 minutes later the victim heard defendant drive away in her car.

The victim called out for assistance and pounded on the shed. Finally, the police arrived around 7:00 a.m. and released the victim from the shed. She told the police someone had raped her and had stolen her keys and money.

The victim sustained injuries to her face, including bruising, loose teeth, and facial fractures requiring her jaw to be wired closed for about two months. She also sustained trauma to her vagina, including extensive bleeding.

The next day defendant was arrested while in possession of the victim's car. After waiving his *Miranda* rights, defendant admitted to the charged offenses, with the exception of sodomy.

2. Convictions for Kidnapping and False Imprisonment

Defendant argues that defendant's conviction for false imprisonment, count 6, must be reversed because it is a lesser-included offense to kidnapping charged in count 7. The two offenses were charged as separate offenses.

The People assert that defendant was properly convicted of both kidnapping and false imprisonment because the offenses involved separate and distinct acts. During the trial, the prosecutor confirmed, upon the court's inquiry, that the prosecution was electing to base its false imprisonment charge on the victim's confinement in the back bedroom and the kidnapping charge on defendant's subsequent act of taking the victim out to the shed. The prosecutor also argued this during closing argument.

False imprisonment is a lesser included offense to kidnapping. (*People v. Magana* (1991) 230 Cal.App.3d 1117, 1120-1121.) "Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person . . . into another part of the same county, is guilty of kidnapping." (§ 207.) In contrast, false imprisonment is "the unlawful violation of the personal liberty of another." (§ 236.) (*People v. Ross* (1988) 205 Cal.App.3d 1548, 1553-1554.) Unlike kidnapping, false imprisonment does not include the element of asportation. But both offenses require a nonconsensual detention or confinement of the victim.

Even though false imprisonment is a lesser included offense to kidnapping, a defendant may be convicted of both offenses if they are committed as separate and independent acts; that is, if the intent to commit false imprisonment manifested itself in conduct which was materially different from the kidnapping. In *People v. Ratcliffe* (1981) 124 Cal.App.3d 808, 820, in which a false imprisonment conviction was reversed as a lesser included offense of the kidnapping offense, the court concluded there was no question that the primary criminal objective of the defendant in committing the

kidnapping was to commit false imprisonment. The court explained that "If both the false imprisonment count and kidnapping count relate to the same act, double conviction as well as double punishment is prohibited. [Citations.]" (*People v. Ratcliffe, supra,* 124 Cal.App.3d at p. 820.) In *Ratcliffe,* unlike the case at bench, the false imprisonment was related to the same act as the kidnapping.

Defendant's reliance on *People v. Magana, supra,* 230 Cal.App.3d 1117, for the proposition false imprisonment in the instant case was a lesser included offense of kidnapping is misplaced. In *Magana* the false imprisonment and kidnap charges arose from the same acts. The defendant forced the victim to walk with him through a park, tied her to a tree, raped her, and then forced her to walk with him for another 15 minutes in the park until she escaped upon encountering police officers. The same continuous course of conduct served as a basis for the kidnap and the false imprisonment. (*Magana, supra,* at pp. 1120-1121.) Furthermore, in *Magana,* the court did not consider whether the kidnapping and false imprisonment (tying the victim to a tree) were separate offenses since the respondent on appeal conceded that the false imprisonment conviction must be stricken as a lesser included offense to the kidnapping.

Here, the false imprisonment and kidnapping were discrete acts. Defendant first falsely imprisoned the victim in the back bedroom for the purpose of raping her. When he was done and he and the victim were walking down the hallway, defendant noticed the shed outside and asked the victim, "What is that little house out in back?" When she told him it was her shed, he formed the new intent of taking her outside to the shed and locking her inside it. These unrefuted facts provide substantial evidence that the false

imprisonment offense and subsequent kidnapping were separate offenses, in which defendant formed a new intent to kidnap the victim, after completing the false imprisonment offense.

Because sufficient evidence in the record supports the trial court's finding the two offenses were separate, defendant's convictions for both offenses should not be disturbed on appeal. (*People v. Ratcliffe, supra,* 124 Cal.App.3d at pp. 815-816.)

3. Convictions for Assault with a Deadly Weapon and Robbery

Defendant contends his conviction for assault with a deadly weapon (count 2) must be reversed because it is a lesser included offense of robbery. He argues that since multiple convictions may not be based on necessarily included offenses (*People v. Pearson* (1986) 42 Cal.3d 351, 355), his conviction for assault with a deadly weapon must be reversed because the jury found true the robbery enhancements that defendant committed robbery while using a deadly weapon and caused great bodily injury (§§ 12022, subd. (b)(1) and 12022.7, subd. (a)).

We reject defendant's argument because assault with a deadly weapon is not a lesser included offense of robbery. The California Supreme Court held in *People v. Wolcott* (1983) 34 Cal.3d 92, 99, that, "because a defendant can commit robbery without attempting to inflict violent injury, and without the present ability to do so, robbery does not include assault as a lesser offense. The addition of an allegation that defendant used a firearm within the meaning of Penal Code section 12022.5 does not alter this conclusion." (*Wolcott, supra,* at p. 100.)

The *Wolcott* court reasoned in part that California courts have consistently stated that such firearm enhancements do not prescribe a new offense but are merely additional punishment for an offense in which a firearm is used. (*People v. Wolcott, supra*, 34 Cal.3d at p. 100.) The *Wolcott* court added, "But even if California could constitutionally consider enhancement allegations as part of the accusatory pleading for the purpose of defining lesser included offenses, we see no reason to adopt that course. . . . [¶] . . . [¶] We conclude that under the statutory definitions of robbery, assault, and use of a firearm, the offense of assault with a deadly weapon is not a lesser included offense in a charge of robbery with a 'use' enhancement." (*People v. Wolcott, supra*, 34 Cal.3d at pp. 101-102.)

Defendant argues that the United States Supreme Court in *Apprendi v. New Jersey* (2000) 530 U.S. 466, implicitly overruled *Wolcott's* holding that enhancements are not to be considered in determining a lesser included offense. Defendant acknowledges this issue is currently before the California Supreme Court in *People v. Sloan* (2005) 126 Cal.App.4th 1148 (review granted June 8, 2005) and urges this court to disregard *Wolcott*. But until our high court overrules *Wolcott*, this court will follow *Wolcott*. Thus defendant's conviction for assault with a deadly weapon will stand. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456.)

4. Deadly Weapon Enhancement Imposed and Stayed on Count 2

Defendant argues, and the People agree, that the weapon use enhancement (§ 12022, subd. (b)(1)) found true as to count 2 (assault with a deadly weapon) must be stricken. We agree. Personal use of a deadly weapon is an element of the offense of

assault with a deadly weapon and therefore the trial court erred in staying the enhancement. It must be stricken from count 2.

5. GBI Enhancement Imposed and Stayed on Count 4

Defendant asserts, and the People agree, the court erred in imposing and staying a GBI enhancement (§ 12022.8) on count 4 (forcible rape). Both parties agree the enhancement should be stricken from count 4, but for different reasons. Defendant argues that since the GBI factor was used in sentencing defendant under the one-strike law, section 667.61, subdivision (a), the GBI enhancement cannot also be imposed under section 12022.8.

The People correctly note that the GBI factor was not considered in sentencing defendant under the one-strike law. However, since the section 12022.8 enhancement was imposed as to count 3 (forcible oral copulation), it cannot also be imposed as to count 4. We agree. The section 12022.8 GBI enhancement must be stricken from count 4.

6. GBI Enhancement Imposed on Count 3

Defendant contends the GBI enhancement (§ 12022.8) as to count 3 (forcible oral copulation) must be stayed because the trial court used GBI to impose a one-strike sentence in connection with count 4. Defendant argues that under section 654, he cannot be punished more than once for GBI. We disagree. There was no dual use of the GBI enhancement.

As noted in the preceding section, GBI implicitly was not used as a factor in imposing a one-strike sentence as to count 4. Section 667.61, subdivision (a), mandates a

25-year-to-life sentence for a defendant who commits forcible rape, among other specified sexual crimes (§ 667.61, subd. (c)), under at least two circumstances enumerated in subdivision (e). Such circumstances include committing the offense during a burglary, personally inflicting GBI, and personally using a deadly weapon. (§ 667.61, subd. (e)(2), (3), and (4)) In the instant case, defendant committed forcible rape while committing a burglary and using a dangerous or deadly weapon (i.e., a frying pan).

Since the one-strike sentence imposed on count 4 could be imposed based on the burglary and dangerous weapon factors, the GBI enhancement can be imposed on count 3 without invoking the multiple punishment prohibition under section 654,[2] and need not be stayed. The trial court's oversight in not stating that it did not rely on GBI in imposing the one-strike sentence on count 4, if error, is harmless.

7. Sentencing on Count 7 (Kidnapping)

Defendant contends his sentence for kidnapping must be stayed under section 654 because his kidnapping and robbery convictions arose out of a continuous course of conduct and therefore he cannot be punished both for offenses.

In discussing section 654, the court in *People v. Alvarado* (2001) 87 Cal.App.4th 178, explained that "Section 654 is intended to ensure that punishment is commensurate with a defendant's criminal culpability. [Citations.] It expressly prohibits multiple sentences where a single act violates more than one statute. . . . (See, e.g., *Neal v. State*

[2] We note the issue of whether the multiple punishment bar of section 654 applies to sentence enhancements is currently pending before the California Supreme Court in *People v. Palacios*, S132144, review granted May 11, 2005, 28 Cal.Rptr.3d 645.

of California (1960) 55 Cal.2d 11, 19.) [¶] Section 654 also prohibits multiple sentences where the defendant commits different acts that violate different statutes but the acts comprise an indivisible course of conduct engaged in with a single intent and objective. (*Neal v. State of California, supra,* 55 Cal.2d at p. 19.) 'If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' (*Ibid.*) Thus, in legal effect, different acts that violate different statutes merge under the perpetrator's single intent and objective and are treated as if they were a single act that violates more than one statute. [¶] If, on the other hand, in committing various criminal acts, the perpetrator acted with multiple criminal objectives that were independent of and not merely incidental to each other, then he may be punished for the independent violations committed in pursuit of each objective even though the violations were parts of an otherwise indivisible course of conduct. [Citation.]" (*Alvarado, supra,* at p. 196.)

Whether defendant maintained multiple criminal objectives is a question of fact for the trial court. We must uphold such a finding if there is substantial evidence to support it. (*People v. Porter* (1987) 194 Cal.App.3d 34, 37-38.) The trial court is given broad latitude in determining whether section 654 is applicable. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.) When considering whether there has been an abuse of discretion in imposing multiple punishment, this court "'must "view the evidence in a light most favorable to the respondent and presume in support of the [sentencing] order the existence of every fact the trier could reasonably deduce from the evidence."'" (*Hutchins, supra,* at pp. 1312-1313.)

The People rely on *People v. Foster* (1988) 201 Cal.App.3d 20, *People v. Nichols* (1994) 29 Cal.App.4th 1651, *People v. Porter, supra,* 194 Cal.App.3d 34, and *People v. Sandoval* (1994) 30 Cal.App.4th 1288, for the proposition defendant was properly convicted of both robbery and kidnapping because defendant entertained multiple criminal objectives when he committed the two crimes.

In *Foster,* the court held section 654 did not bar the court from sentencing defendant consecutively for false imprisonment and robbery because the robbery was complete when the defendant committed the false imprisonment offense. After the defendant and her codefendant robbed two mini market employees, the defendant and codefendant locked the two employees in the store's cooler and left. The defendant argued the false imprisonment offense was incidental to the robbery and therefore under section 654, the false imprisonment sentence must be stayed.

The *Foster* court rejected this argument, stating, "There is no merit to this contention. The imprisonment of the victims occurred *after* the robbers had obtained all of the money, and therefore was not necessary or incidental to committing the robbery. Locking the victims in the store cooler was potentially dangerous to their safety and health. It is analogous to a needless or vicious assault committed after a robbery, which has long been held separately punishable and distinguishable from an assault which is merely incidental to robbery. [Citations.]" (*People v. Foster, supra,* 201 Cal.App.3d at pp. 27-28.)

In *People v. Nichols, supra,* 29 Cal.App.4th 1651, the court also upheld multiple punishment. The court sentenced the defendant separately and consecutively to

kidnapping for robbery and attempting to dissuade a witness. In *Nichols*, the defendant kidnapped a truck driver and hijacked his truck. During the hijacking, the defendant told the victim he would kill him if he told anyone about the crime. The *Nichols* court rejected the defendant's contention he could not be punished for both offenses because they were part of an indivisible course of conduct with one intent and objective. The *Nichols* court noted multiple punishment was proper where there was evidence of consecutive objectives or separate, simultaneous objectives. (*Id.* at p. 1657.)

Similarly, in *Porter*, the court rejected the defendant's contention that the trial court violated section 654 by sentencing him to concurrent terms for robbery and kidnapping for robbery. In *Porter*, the defendant and his codefendant robbed the victim at knife-point while the victim was sitting in his car. The defendant then told the victim at knife-point to drive to the victim's bank so the defendant could withdraw money from the victim's bank account. The victim did so but escaped upon arriving at the bank.

The court in *Porter* concluded the record supported "the trial court's implied finding that the two crimes for which appellant was sentenced involved multiple objectives, were not merely incidental to each other, and were not part of an indivisible course of conduct." (*People v. Porter, supra,* 194 Cal.App.3d at p. 38.) The *Porter* court explained: "A reasonable inference from the record is that appellant and his companion initially planned only to rob the victim of the contents of his wallet, but thereafter came up with a new idea: kidnapping the victim to his bank to compel him to withdraw money from his account by means of what they thought was an automated teller card. . . . This is not, therefore, a case of punishing appellant for kidnapping for the purpose of robbery

and for committing 'that very robbery.' [Citation.] . . . What began as an ordinary robbery turned into something new and qualitatively very different. . . . The trial court could reasonably treat this as a new and independent criminal objective, not merely incidental to the original objective and not a continuation of an indivisible course of conduct. In the unusual circumstances of this case, appellant could be punished both for the robbery he committed and the kidnapping for the purpose of a distinctly different type of robbery." (*Porter, supra,* at pp. 38-39.)

Likewise, here, the record supports the trial court's finding the robbery and kidnapping crimes involved multiple objectives, were not merely incidental to each other, and were not part of an indivisible course of conduct. The robbery occurred when defendant hit the victim over the head with a frying pan and then demanded her money and keys. After the victim gave defendant her money and keys, defendant formed a new intent and committed the separate offense of confining the victim in a back bedroom and raping her. Defendant thereafter noticed a shed outside and formed another new intent and objective of taking the victim out to the shed and locking her inside. Although the robbery and kidnapping were committed within a single period of aberrant behavior, the offenses arose from separately formed objectives predominately independent of each other. (*People v. Alvarado, supra,* 87 Cal.App.4th at p. 194.)

While taking the victim out to the shed and locking her inside aided defendant in escaping, it was committed as an afterthought and was not necessary to completing the other offenses. After robbing and raping the victim, the defendant could have left the victim in her home. The victim had been compliant and was in a fragile physical state

due to defendant inflicting severe physical injuries. Defendant had also turned off the electrical power and disconnected all of the victim's phones. Defendant could have escaped and delayed the victim's attempt to seek help by simply tying her up in her home or by some other means without taking her out to the shed.

The court in *People v. Sandoval, supra,* 30 Cal.App.4th 1288 noted that "'[A] separate act of violence against an unresisting victim or witness, whether gratuitous or to facilitated escape or to avoid prosecution, may be found *not* incidental to robbery for purposes of section 654.'" (*Sandoval* at p. 1300, quoting *People v. Nguyen* (1988) 204 Cal.App.3d 181, 193.)

In *People v. Sandoval, supra,* 30 Cal.App.4th 1288, the court upheld consecutive sentencing for attempted robbery and attempted murder of a convenience store clerk during a single incident. When the clerk refused to give the defendant money, the defendant shot the clerk in the chest. The *Sandoval* court rejected the defendant's section 654 challenge in which he argued that both offenses emanated from one indivisible course of conduct. The *Sandoval* court reasoned that the attempted robbery was complete when the clerk refused to hand over the money. The defendant then, without provocation, decided to take a different course of action and shoot the victim. Likewise, in the instant case, defendant decided to take a different course of action, including raping the victim and then locking her in the shed. The act of taking the victim out to the shed and locking her inside was not incidental to the initial robbery even though it arguably facilitated defendant's escape.

Defendant argues that in the instant case, when defendant took the victim out to the shed, i.e., kidnapped the victim, the robbery was ongoing because after defendant locked the victim in the shed, he went back to the victim's house and continued looking for property to steal. But there is little if any evidence that defendant searched for more property after locking the victim in the shed. To the contrary, defendant stated in his recorded statement that, after he locked the victim in the shed, he drove away in the victim's car but returned to retrieve his wallet. He claimed that after returning, he looked for his wallet in the victim's house, took the victim some water, and then drove off again in the victim's car.

Defendant did not state that, after he took the victim to the shed, he continued robbing the victim or went back in the house looking for more property to steal. Rather, defendant said in his recorded statement that, after he locked the victim in the shed, he counted the money from the victim's purse and dumped the rest of the contents out by the side of the house. He then left in the victim's car.

Later in defendant's recorded statement he said that after he put the victim in the shed, he looked through her purse ("pouch"), throwing out what he did not want and keeping the rest. He then went back into the house to put the phones, which were in his pocket, back in the house. When asked during his statement how much of the mess in the house defendant caused, defendant said the victim had caused some of it when she was searching for her purse. He dumped a "bag" in the front room when he came in the house the "first time," "at the beginning," before the victim discovered defendant in her house.

There is no evidence that defendant continued robbing the victim after he initially took her money and keys.

Even if defendant's version of the incident is not entirely truthful, there is substantial evidence that defendant's initial objective of robbing the victim of her money and keys ended before defendant decided to rape the victim and put her in the shed. As in *Sandoval*, defendant's act of taking the victim to the shed was a different course of action, which was not incidental to the robbery for purposes of section 654 even though it may have facilitated defendant's escape. We thus conclude the trial court did not abuse its discretion in sentencing defendant separately for robbery and kidnapping.

8. Consecutive and Aggravated Terms

On February 2, 2007, we granted defendant's petition for rehearing of this court's unpublished opinion filed on January 3, 2007, in light of *Cunningham*, *supra*, 127 S.Ct. at p. 860. Rehearing was limited to the issues of consecutive and aggravated sentencing under *Cunningham*. This court deemed defendant's petition for rehearing a supplemental brief addressing the effect of *Cunningham*. The People filed a responsive supplemental brief, and defendant filed a supplemental reply.

Defendant contends the trial court erred in imposing consecutive and aggravated terms because the court based its sentencing decision on facts not found by the jury. (*Blakely*, *supra*, 542 U.S. at pp. 303-304.) Upper terms were imposed on counts 1 (stayed), 3, and 7. Consecutive sentencing was imposed on counts 3 and 8.

A. Factual Background

At the sentencing hearing, the trial court found the following aggravated factors: "[T]he crime involved great bodily harm, cruelty, viciousness, and callousness; that the defendant was armed with or used a weapon at the time of the offense; that the victim was particularly vulnerable; and that the offense involved a degree of sophistication and planning. [¶] The evidence was that the defendant selected the victim and her residence, not just the residence to break into, but also an indication that he figured he could take the victim over. 'Overcome her' is the interpretation the Court puts to that." The court later noted the jury did not find the use of a dangerous or deadly weapon as to count 7, kidnapping.

The court found a single mitigating factor, of defendant not having a prior criminal history.

Based on these factors, the trial court sentenced defendant to an aggravated eight-year term for count 7.

As to count 3 (forcible oral copulation, § 288a, subd. (c)(2)), the trial court imposed an eight-year aggravated term, consecutive to count 7 (kidnapping, § 667.6, subd. (c)). The court added a five-year GBI enhancement for a total term on count 7 of 13 years.

As to count 8 (robbery, § 211), the court imposed a consecutive one-year four-month term, consisting of one-third the middle term.

The trial court also imposed a six-year upper term for count 1 (burglary, § 459), but stayed the sentence (§ 654).

At a subsequent sentence modification and restitution hearing on September 30, 2005, the court left defendant's sentence intact. The court reiterated the aggravating factors previously relied on for the aggravated terms as follows: "The Court did adopt those factors in aggravation appearing on page 4 of the probation report. Specifically, rule 4.414 subsection (b), the defendant engaged in violent conduct which indicates a serious danger to society. In addition to those articulated by the probation report, the crime involved great bodily harm, indicating a high degree of cruelty, viciousness and callousness. The defendant was armed, used a weapon. [¶] At the time the victim was particularly vulnerable in that she lived alone and the Court noted from the trial testimony that there was a significant degree of planning that went into the selection of this victim, the exercise and execution of the crime itself. The planning disclosed some degree of criminal sophistication by this defendant."[3]

The record reflects the trial court found that the factors in aggravation outweighed the sole mitigating factor. Defendant did not raise a *Blakely* objection to the factors in aggravation.

B. Forfeiture

The People contend that because defendant failed to object in the trial court on the basis now urged on appeal, he has forfeited any challenge based on *Blakely, supra,* 542 U.S. 296. (See *Hill, supra,* 131 Cal.App.4th at p. 1103 [holding that a *Blakely* challenge was forfeited by the defendant's failure to raise it in the trial court].)

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[3] All further references to rules are to the California Rules of Court.

We reject this forfeiture argument. Unlike the defendant in *Hill, supra*, 131 Cal.App.4th at page 1103, who waived a *Blakely* challenge by failing to raise it at his sentencing which occurred *after Blakely* but *before People v. Black, supra,* 35 Cal.4th 1238, vacated in *Black v. California* (Feb. 20, 2007) ___ U.S. ___ [127 S.Ct. 1210, ___ L.Ed.2d ___, 2007 WL 505809] (*Black*), defendant was sentenced on August 5, 2005, *after Black* was decided on June 20, 2005. Therefore a *Blakely* objection would have been futile under controlling law which the court was compelled to follow. Under such circumstances, defendant did not forfeit the issue. (*People v. Chavez* (1980) 26 Cal.3d 334, 350, fn. 5; *City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780, 784-785.)

Even if defendant forfeited the issue, to forestall any claim of ineffective assistance of counsel based on failure to raise a timely objection, we will address the issue on the merits. (*People v. Norman* (2003) 109 Cal.App.4th 221, 229-230.)

C. Analysis

As stated in *Cunningham*, California's determinate sentencing law (DSL) and "the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts - whether related to the offense or the offender - beyond the elements of the charged offense." (*Cunningham, supra,* 127 S.Ct. at p. 862); § 1170, subd. (b); rule 4.420(a).) *Cunningham* rejected this procedure, holding that "under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a

judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." (*Cunningham, supra*, 127 S.Ct. at pp. 863-864.)

(1) Consecutive Sentencing

Defendant asserts that under *Cunningham, supra,* 127 S.Ct. at pages 863-864, imposition of consecutive terms for counts 3 and 8 violated the Sixth and Fourteenth Amendments to the United States Constitution, as interpreted in *Blakely, supra*, 542 U.S. at pages 303-304. But, as explained in *People v. Hernandez* (2007) 147 Cal.App.4th 1266, 1270 (*Hernandez*), "*Cunningham* did not address the constitutionality of the DSL pertaining to a trial court's decision to impose concurrent or consecutive sentences. It did not mention, let alone expressly overrule, the California Supreme Court's decision that '*Blakely's* underlying rationale is inapplicable to a trial court's decision whether to require that sentences on two or more offenses be served consecutively or concurrently.' (*People v. Black, supra*, 35 Cal.4th at p. 1262, vacated in *Black v. California* (Feb. 20, 2007) ___ U.S. ___, [2007 U.S. Lexis 1856].)"

In rejecting the defendant's contention that he was entitled to a jury determination of the facts upon which the trial court relied to impose consecutive sentences, the *Hernandez* court explained that "'While there is a statutory presumption in favor of the middle term as the sentence for an offense [citation], there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing.' [Citation.]" (*Hernandez, supra*,

147 Cal.App.4th at p. 1270, quoting *People v. Reeder* (1984) 152 Cal.App.3d 900, 923.) Defendant therefore "does not have a legal right to concurrent sentencing, and as the Supreme Court said in *Blakely,* 'that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.'" (*Hernandez, supra,* at p. 1271, quoting *Blakely, supra,* 542 U.S. at p. 309.)

Accordingly, a jury trial was not required as to the factors the trial court relied on in imposing consecutive terms on counts 3 and 8.

(2) Aggravated Terms

Citing *Cunningham, supra,* 127 S.Ct. at pp. 860, 864-871, defendant contends his aggravated sentences for forcible oral copulation (count 3) and kidnapping (count 7) should be reduced to the middle terms or, alternatively, this court should remand the case for resentencing because the trial court imposed aggravated terms based on facts not found by the jury.

When imposing aggravated terms on counts 1, 3, and 7, the trial court relied on factors which, under *Blakely, supra,* 542 U.S. at pp. 303-304, and *Cunningham, supra,* 127 S.Ct. at pp. 863-864, required true findings by the jury. Those factors included findings that (1) the crime involved great bodily harm, indicating a high degree of cruelty, viciousness and callousness; (2) the victim was particularly vulnerable in that she lived alone and was 60 years old; (3) there was a significant degree of planning that went into the selection of the victim; (4) the crime involved a degree of criminal sophistication and planning; (5) defendant engaged in violent conduct indicating he was a serious danger to society; and (6) defendant used a weapon.

These are factual findings, most of which the court, rather than the jury, made. Such findings by the court were improper, as stated in *Cunningham*: "[T]he Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." (*Cunningham, supra*, 127 S.Ct. at p. 860; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *Blakely, supra,* 542 U.S. at pp. 303-304.)

Here, the facts relied on by the trial court were not admitted by defendant or found true by the jury, with the exception of the GBI and weapon use factors. This court cannot rely on the jury findings of GBI or use of a weapon since those findings were either elements of defendant's crimes or used to impose enhancements and thus were not available for use as aggravating factors. (*People v. Hill* (1994) 23 Cal.App.4th 1566, 1575.) Therefore, under *Cunningham, supra,* 127 S.Ct. 856, the trial court erred in imposing the aggravated terms based on factors which should have been decided by the jury.

We reject the People's argument that the factors the trial court relied on in imposing the upper terms were reflected in defendant's statement given to the police. In his statement, defendant admitted he broke into the victim's home and shut off her electricity; when the victim saw defendant, he pushed her down and hit her with a pan; defendant took her purse and car keys, and later put her in the shed; and he forced the victim into her bedroom, hit her, and raped her. Even though defendant admitted these

facts in his police statement, he did not expressly admit the factors relied on by the trial court, which must be tried by a jury.

(3) Harmless error

In the alternative, the People argue that any error in imposing an aggravated sentence was harmless error because there was overwhelming or uncontradicted evidence of the aggravated factors relied on by the court. The People argue that since the jury would have found at least one of the aggravating circumstances true beyond a reasonable doubt, there was no prejudice. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Washington v. Recuenco* (2006) ___ U.S. ___ [126 S.Ct. 2546, 2553] (*Recuenco*).)

The United States Supreme Court in *Recuenco* concluded that failure to submit a sentencing factor to the jury does not constitute structural error requiring reversal per se. (*Recuenco, supra,* 126 S.Ct. at p. 2553.) In *Recuenco*, the defendant was convicted of assault with a deadly weapon. The trial court imposed a sentence enhancement based on the defendant being armed with a firearm. The jury verdict did not contain a finding as to this factor. The United States Supreme Court in *Recuenco* held the error was subject to a harmless error analysis, rather than reversible per se. (*Ibid.*)

Likewise, in the instant case the harmless error analysis applies to the trial court's error in imposing aggravated terms based on findings which should have been made by the jury rather than the court. (*Recuenco, supra,* 126 S.Ct. at p. 2553.) The record in this case reflects that, absent the unconstitutional fact findings made by the court, the trial court could not have imposed aggravated terms. There were also no recidivism factors which the trial court could have relied on in imposing the aggravated sentences.

The People argue that we need not reverse the court's upper-term sentences because any *Cunningham* error was harmless beyond a reasonable doubt under *Chapman v. California, supra,* 386 U.S. at p. 24. The People claim the jury would have found some or all of the aggravating factors true had they been presented to the jury for determination. These contentions are unavailing.

The court imposed the upper-term sentences in this case because it found six aggravating factors and only one mitigating factor - that defendant had no criminal record. We recognize that a single aggravating factor is sufficient to impose an aggravated upper prison term where the aggravating factor outweighs the cumulative effect of all mitigating factors. (*People v. Nevill* (1985) 167 Cal.App.3d 198, 202; *People v. Osband* (1996) 13 Cal.4th 622, 728-729.) But, because we can only speculate which, if any, of the aggravating factors relied on by the court the jury would have found true, and what effect those findings would have had on the court at sentencing when weighed against the single mitigating factor, we cannot find the *Blakely* error to have been harmless beyond a reasonable doubt.

Thus, pending further guidance from our Supreme Court, we choose to utilize the remedy of a remand for resentencing, as that is the usual remedy for erroneous imposition of the upper term. (See, e.g., *People v. Quinones* (1988) 202 Cal.App.3d 1154, 1159-1160; *People v. Young* (1983) 146 Cal.App.3d 729, 737.) We therefore reverse as to sentencing alone, for reconsideration of the appropriate base term on counts 1, 3, and 7, consistent with the requirements of *Cunningham, supra,* 127 S.Ct. 856.

9. Disposition

We affirm the judgment of conviction but remand this case to the superior court to correct the sentence enhancements on counts 2 and 4 and for resentencing as to counts 1, 3 and 7. The trial court is accordingly directed to modify defendant's sentence as follows: (1) the weapon use enhancement (§ 12022, subd. (b)(1)) imposed on count 2 (assault with a deadly weapon) shall be stricken; (2) the great bodily injury enhancement (§ 12022.8) imposed on count 4 shall be stricken; (3) the aggravated sentences imposed on counts 1 (stayed), 3 and 7 shall be vacated and the trial court shall resentence defendant on these counts in accordance with this opinion.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

s/Hollenhorst
Acting P. J.

We concur:

s/King
J.

s/Miller
J.