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CERTIFIED FOR PARTIAL PUBLICATION[1]

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. WENDY LEA WAGENER, Defendant and Appellant.	D042896 (Super. Ct. No. SCD170770)

APPEAL from a judgment of the Superior Court of San Diego County, Melinda J. Lasater, Judge. Affirmed.

Lewis A. Wenzell for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., and Hector M. Jimenez, Deputy Attorneys General, for Defendant and Appellant.

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1 Pursuant to California Rules of Court, rule 976.1, the majority opinion is certified for publication with the exception of DISCUSSION parts I and II; the concurring and dissenting opinion is certified for publication with the exception of part A.

A jury convicted Wendy Lea Wagener of robbery (Pen. Code,[2] § 211), assault with a deadly weapon (§ 245, subd. (a)(1)), possession of methamphetamine for purposes of sale (Health & Saf. Code, § 11378), possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and unlawful possession of a hypodermic syringe (Bus. & Prof. Code, § 4140). Two enhancement allegations were found to be true. The court found the priors to be true. (§§ 12022, subd. (b)(1); 1192.7, subd. (c)(23).) The court sentenced Wagener to a total of 17 years, 4 months. Wagener appeals, contending her robbery and assault with a deadly weapon convictions should be reversed because (1) the court erroneously admitted prejudicial hearsay statements and (2) the court failed to properly instruct the jury. We affirm.

FACTS

On October 24, 2002, Sandra Dillin was collecting aluminum cans in an alley. Richard Montgomery, owner of the home where appellant was residing, drove his pick-up truck into the alley and blocked the exit. Appellant got out of the truck and approached Dillin, called her a liar and began to punch her. Appellant told Dillin she was hitting her because Dillin told a mutual friend that appellant was a racist. Appellant grabbed Dillin's hair, pulled her to the ground, put Dillin in a headlock, scraped her forehead and arm against the pavement, kicked her in the ribs and cut off several clumps of her hair with a pocketknife. Because appellant threatened to cut Dillin's clothes off, Dillin took off her shirt for appellant, leaving herself kneeling on the ground in her bra.

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2 All further statutory references are to the Penal Code unless otherwise specified.

Appellant grabbed Dillin's bike, put it in the back of Montgomery's pick-up truck and drove away. Dillin immediately reported the incident to police.

San Diego Police Officer Kevin McNamara responded to Dillin's call but was unable to locate appellant. During a follow-up interview, Dillin provided McNamara with Montgomery's address in Spring Valley where she suspected appellant might be located. McNamara went to the address and found Montgomery's truck. With assistance from Detective Edward Verduzco, McNamara arrested appellant and discovered hypodermic needles and methamphetamine appellant admitted belonged to her.

Dillin did not appear in court on January 14, 2003, to testify as directed, causing a bench warrant to issue for her arrest for her failure to appear for trial. The prosecutor informed the court that Dillin, who was under subpoena and had been cooperative, was receiving threats not to testify from appellant's boyfriend Michael Reed, but she did not feel the need for protection. Further, the prosecutor told the court he suspected appellant was involved with Dillin's absence and requested a court order for the sheriff to withdraw appellant's telephone privileges. The court granted the prosecution's motion with the exception that appellant could call her attorney. Dillin turned herself in the next day. She testified that on January 13 she was prepared to testify against appellant but after being in the company of Patricia Alotta, appellant and Dillin's mutual friend, she decided not to appear on January 14.

DISCUSSION

I. *Co-conspirator Exception to the Hearsay Rule*

A. *Background*

During trial, the court admitted three different sets of hearsay statements from two people. The statements against appellant were admitted over her objection on the ground the declarations were co-conspirator statements in furtherance of a conspiracy to dissuade a witness. The hearsay statements included statements made by Reed to Dillin, Alotta to Dillin and Alotta to Rodney Tucker, the district attorney investigator. The prosecution alleged that during the trial appellant made telephonic contact with Alotta in order to enter into an agreement to dissuade and intimidate Dillin, in violation of section 136.1.

Dillin testified Reed told her that he and appellant "came up with a nice little package for [Dillin] and [her] boyfriend to get away the weekend of the hearing." According to Dillin, Reed offered her a credit card and all she had to do was "get out of town so the D.A. couldn't find [Dillin and her boyfriend]" to testify at trial.

Dillin further testified Alotta came to the home where Dillin was staying the morning of January 14 and said she needed to talk to Dillin. When they got in Alotta's car, Dillin stated Alotta expressed concern about what Dillin's testimony would do to appellant and asked Dillin if she really thought what appellant did to her was worth 13 years in jail. According to Dillin, Alotta said she and appellant had come up with a plan to get Dillin to testify that she had exaggerated appellant's role in the assault and "wanted to drop the whole thing." Dillin also testified Alotta was startled and "hit the accelerator" when they were spotted by the district attorney investigator.

Tucker testified he spoke with Alotta on the telephone on January 14, when Dillin did not appear in court. He stated Alotta told him she just drove around a bit with Dillin and then dropped her off back at the house in which she was staying. According to Tucker, Alotta said Dillin "had said she had to go to court that day, and someone from the D.A.'s office is going to pick her up."

The court instructed the jury that if it found appellant attempted to dissuade a witness from testifying or attempted to persuade a witness to testify falsely, such conduct may be considered as circumstances tending to show consciousness of guilt. Appellant argues the court erroneously admitted the three sets of hearsay statements under the co-conspirator statement exception to the hearsay rule because there was no independent proof of the conspiracy.

B. *Analysis*

Though hearsay statements are generally inadmissible, hearsay statements by co-conspirators may be admitted if the offering party presents " 'independent evidence to establish prima facie the existence of . . . [a] conspiracy.' [Citations.]" (*People v. Hardy* (1992) 2 Cal.4th 86, 139.) In order to establish prima facie the existence of a conspiracy, the proponent "must offer evidence sufficient for the trier of fact to determine that the preliminary fact, the conspiracy, is more likely than not to have existed." (*People v. Herrera* (2000) 83 Cal.App.4th 46, 61.) "The decision whether the foundational evidence is sufficiently substantial is a matter within the court's discretion." (*People v. Lucas* (1995) 12 Cal.4th 415, 466, citing *Alvarado v. Anderson* (1959) 175 Cal.App.2d 166, 178.)

Proof of the underlying conspiracy may be established by circumstantial evidence. (*People v. Towery* (1985) 174 Cal.App.3d 1114, 1131; *People v. Longines* (1995) 34 Cal.App.4th 621, 626.) Additionally, proof may "'be inferred from the conduct, relationship, interests, and activities of the alleged conspirators. [Citations.]'" (*People v Rodrigues* (1994) 8 Cal.4th 1060, 1135, quoting *People v. Cooks* (1983) 141 Cal.App.3d 224, 311.) The prosecution need not formally charge a conspiracy in order to introduce co-conspirator hearsay statements. (*People v. Jourdain* (1980) 111 Cal.App.3d 396, 404.) "The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified . . . or, in the court's discretion as to the order of proof, subject to the admission of such evidence." (Evid. Code, § 1223, subd. (c).)

Viewed in this light, the court properly admitted the three sets of hearsay statements under the co-conspirator exception to the hearsay rule. Dillin testified she contacted police immediately after the assault. She testified she was in court on January 13 prepared to testify against appellant. She further testified because of her interaction with Alotta, she was too far away from court and too tired to testify on January 14. Dillin also testified that while she was under subpoena, Reed approached her more than three times prior to January 14. Despite her attempts to avoid him, Reed would find Dillin in the middle of the night. Moreover, Tucker testified that when he went to pick up Dillin on the morning of January 14, he saw a car drive away with a woman who looked like Dillin in the passenger seat. Tucker testified the owner of the house where he was to pick up Dillin identified the car as Alotta's and gave him Alotta's telephone number. Tucker further testified that when he called Alotta, she admitted the car belonged to her and that

Dillin had been in her car. As such, sufficient independent evidence existed to establish prima facie the existence of a conspiracy between appellant, Reed and Allota to dissuade Dillin from testifying such that a reasonable jury could find it more likely than not that the conspiracy existed at the time the co-conspirator statements were made.

Appellant also urges that Tucker's testimony was inadmissible under *Crawford v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 1354]. Even if appellant is correct, our decision here leads us to conclude the error is harmless.

II. *Jury Instructions*

Appellant next argues the court failed to instruct the jury as to the meaning of the term "preponderance of the evidence" as it pertains to admission of co-conspirator statements. During jury selection, and before any of the conspiracy issues arose, Juror No. 5 asked what the difference was between "preponderance of the evidence" and "beyond a reasonable doubt" because he had previous experience on a licensing board. The court's inclination was just to "read the instruction on reasonable doubt and not to even get into the preponderance issue" so as to avoid confusing the jury and to make sure the jury reached its verdict by holding the prosecution to the correct burden of persuasion. The prosecution agreed with the court but the defense objected. The court decided to describe the difference between the two standards to Juror No. 5 outside the presence of the jury for his general edification but admonished him just to apply the beyond a reasonable doubt standard to the instant case.

The court discussed a definition for "preponderance of the evidence" again with counsel during discussion of jury instructions. Again, the court expressed concern about

confusing the jury with fine legal distinctions. And again, the prosecution did not object but defense counsel did. The court decided, after informing defense counsel how the decision to define only "beyond a reasonable doubt" actually helps the defense, to proceed over defense counsel's objection.[3] Before closing argument, the court gave jury instructions and read CALJIC No. 6.24 without defining the term "preponderance of the evidence" contained in the instruction.[4]

Courts have a *sua sponte* duty to give clarifying instructions where terms used have a "technical meaning peculiar to the law which is not commonly understood by the average person." (*People v. Brucker* (1983) 148 Cal.App.3d 230, 239, fn. omitted.) Assuming, *arguendo*, that "preponderance of the evidence" is such a technical term not commonly understood by the average person, we find the court erred in not instructing

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3 The court said to defense counsel: "I'm amazed that you'd ask to have preponderance in there. It has actually helped your side by not having it in there, because then the People have a higher burden on whether they can – the jury can even consider whether someone is a coconspirator."

4 CALJIC No. 6.24 provides: "Evidence of a statement made by one alleged conspirator other than at this trial, shall not be considered by you as against another alleged conspirator unless you determine *by a preponderance of the evidence* (italics added):

"One, that from other independent evidence that at the time the statement was made, conspiracy to commit a crime existed;

"Two, that the statement was made while the person making the statement was participating in the conspiracy, and that the person against whom it was offered was participating in the conspiracy before or during that time;

"And, three, that the statement was made in furtherance of the objective of the conspiracy.

"The word 'statement' as used in this instruction includes any oral, or written verbal communication or the nonverbal conduct of a person intended by that person as a substitute for oral or written verbal expression."

the jury on the proper definition of the standard. However, that error was not prejudicial. Even though the court did not define "preponderance of the evidence" for the jury, the court was very clear in its jury instructions that "each fact which is essential to complete a set of circumstances necessary to establish [appellant's] guilt must be proved beyond a reasonable doubt." (CALJIC No. 2.01.) Thus, the failure to define "preponderance of the evidence" could not have been prejudicial because the jury was instructed to apply a higher standard to its determination than called for in CALJIC No. 6.24. As such, we find the appellant's argument without merit.

III. *Imposition of the Upper Term*

Relying upon *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*), appellant argues the imposition of the upper term was unlawful because the aggravating factors, including appellant's recidivism, which were used to reach those upper terms, were not found by a jury.[5] At the outset we note recent opinions, two of which come from this court, agree with appellant's analysis. (*People v. George* (Sept. 15, 2004, D042980) ___ Cal.App.4th ___ [D.A.R. 11568]; *People v. Barnes* (Sept. 24, 2004, H026137) ___ Cal.App.4th ___ [D.A.R. 12010]; *People v. Lemus* (Sept. 20, 2004, D042549) ___ Cal.App.4th ___ [D.A.R. 11763].)

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[5] Appellant also urges the use of recidivism as a factor to aggravate a sentence has been called into question and thus *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [118 S.Ct. 1219] (*Almendarez-Torres*) is no longer sound authority. *Blakely*, however, cites *Almendarez-Torres* with approval. (*Blakely, supra*, 542 U.S. ___ [124 S.Ct. at p. 2536].)

A

In *Blakely* Justice Scalia, writing for the court, notes: " 'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " (*Blakely, supra,*542 U.S. ____ [124 S.Ct. at p. 2536].)

In *Blakely* what constitutes the prescribed "statutory maximum" is described as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation] and the judge exceeds his proper authority." (*Blakely, supra,*542 U.S. ____ [124 S.Ct. at p. 2537].)

Our colleagues conclude a verdict or plea in California's tripartite sentencing structure permits imposition of only the middle term because that is the only sentence which may be imposed without a finding of additional facts. They therefore conclude *Blakely* requires a jury must find true any fact used to impose the aggravated term. (*People v. George, supra,* ___ Cal.App.4th ___ [D.A.R. at pp. 11572-11573]*; People v. Lemus, supra,* ___ Cal.App.4th ___ [D.A.R. at pp. 11766-11767]*; People v. Barnes, supra,* ___ Cal.App.4th ___ [D.A.R. at p. 12019].) We recognize the difficulty in discerning the meaning of the passage relied upon for this argument, but we respectfully

suggest the passage in *Blakely* cannot be read in a vacuum or analyzed literally, on the basis of one of its sentences. Rather, it must be considered as a whole, and in light of *Apprendi v. New Jersey* (2000) 530 U.S. 466, 483 [120 S.Ct. 2348] (*Apprendi*), *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428] (*Ring*) and especially *Harris v. United States* (2002) 536 U.S. 545 [122 S.Ct. 2406] (*Harris*), the authority upon which the passage rests, as well as the historical context of *Blakely* itself.

In the end, we are compelled to part company with our colleagues. We conclude California's sentencing scheme is consistent with and does not offend the constitutional concerns addressed in *Apprendi* and its progeny, *Blakely.*[6]

In concluding the "statutory maximum" is the maximum a judge may impose if punished solely on the basis of facts reflected in the jury verdict alone, the majority in *Blakely* (*Blakely, supra,* 542 U.S. ____ [124 S.Ct. at p. 2537]) refers us to *Harris, supra,* 536 U.S. 545. The court in *Harris* explained that once the elements of a crime, i.e., the facts authorized by the jury's verdict have been found true, the Fifth and Sixth Amendments have been satisfied. (*Harris, supra,* 536 U.S. at p. 565.) Thereafter factors relating to the defendant or crime may be used to impose a sentence, including a mandatory minimum sentence, without implicating those constitutional rights. Stated another way, the facts "reflected in the jury verdict" or plea are the elements of the crime.

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6 The question of whether *Blakely* precludes a trial court from making findings on aggravating facts supporting an upper term is currently on review by the California Supreme Court. (*People v. Towne,* review granted July 14, 2004, S125677; *People v. Black,* review granted July 28, 2004, S126182.)

This does not mean any fact used to sentence the defendant becomes an element. As the court explains in *Harris* at pages 564-566: "Absent authorization from the trial jury–in the form of a finding, by proof beyond a reasonable doubt, of the facts warranting the extended sentence under the New Jersey statute–the State had no power to sentence the defendant to more than 10 years, the maximum 'authorized by the jury's guilty verdict.' [Citation.] '*[T]hose facts that determine the maximum sentence the law allows,' then, are necessarily elements of the crime*. (Italics added.) [Citation.]

"*Yet once the jury finds all those facts, Apprendi says that the defendant has been convicted of the crime; the Fifth and Sixth Amendments have been observed; and the Government has been authorized to impose any sentence below the maximum*. (Italics added.) That is why, as *Apprendi* noted, 'nothing in this history suggests that it is impermissible for judges to exercise discretion–taking into consideration various factors relating both to offense and offender–in imposing a judgment *within the range.* [Citation.] That is also why . . . nothing in this history suggests that it is impermissible for judges to find facts that give rise to a mandatory minimum sentence below 'the maximum penalty for the crime committed.' [Citation.] In both instances the judicial factfinding does not 'expose a defendant to a punishment greater than that otherwise legally prescribed.' [Citation.] Whether chosen by the judge or the legislature, the facts guiding judicial discretion below the statutory maximum need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt. When a judge sentences the defendant to a mandatory minimum, no less than when the judge chooses a

sentence within the range, the grand and petit juries already have found all the facts necessary to authorize the Government to impose the sentence. *The judge may impose the minimum, the maximum, or any other sentence within the range without seeking further authorization from those juries – and without contradicting Apprendi.* (Italics added.)

"Petitioner argues, however, that the concerns underlying *Apprendi* apply with equal or more force to facts increasing the defendant's minimum sentence. Those factual findings, he contends, often have a greater impact on the defendant than the findings at issue in *Apprendi.* This is so because when a fact increasing the statutory maximum is found, the judge may still impose a sentence far below that maximum; but when a fact increasing the minimum is found, the judge has no choice but to impose that minimum, even if he or she otherwise would have chosen a lower sentence. [Citation.] Why, petitioner asks, would fairness not also require the latter sort of fact to be alleged in the indictment and found by the jury under a reasonable-doubt standard? The answer is that because it is beyond dispute that the judge's choice of sentences within the authorized range may be influenced by facts not considered by the jury, a factual finding's practical effect cannot by itself control the constitutional analysis. *The Fifth and Sixth Amendments ensure that the defendant 'will never get* more *punishment than he bargained for when he did the crime,' but they do not promise that he will receive 'anything less' than that.* [Citation.] *If the grand jury has alleged, and the trial jury has found, all the facts necessary to impose the maximum, the barriers between government and defendant fall. The judge may select any sentence within the range, based on facts*

not alleged in the indictment or proved to the jury – even if those facts are specified by the legislature, and even if they persuade the judge to choose a much higher sentence than he or she otherwise would have imposed. That a fact affects the defendant's sentence, even dramatically so, does not by itself make it an element." (*Harris, supra,* 536 U.S. at pp. 565-566, italics added.)

The caveat to this conclusion is that neither a judicial choice nor legislative structuring of statutes allows for using a traditional sentencing factor to impose on the defendant a sentence beyond the maximum authorized by the substantive statute for which the defendant was charged and found guilty. If a fact is used to achieve such a result, it constitutes an element of a new crime, a crime for which the defendant has been denied access to a jury and has been denied his right to due process, in particular the right to notice of the crime alleged against him. (*Harris, supra,* 536 U.S. at p. 558, fn. 9, 567-568; *Apprendi, supra,* at pp. 491, 494 and fn. 19, 495; *Jones v. United States* (1999) 526 U.S. 227, 232 [122 S.Ct. 2406]; *McMillan v. Pennsylvania* (1986) 477 U.S. 79, 93 [106 S.Ct. 2411]; *Blakely*, *supra*, 542 U.S. ___ [124 S.Ct. at p. 2543]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 325-326.)

In *Blakely* the defendant entered a plea to an offense which carried a range of punishment. The maximum sentence for the range was 53 months. Following his plea, an additional fact, i.e., "deliberate cruelty," was used to impose an additional sentence. The effect of using the fact was to add a term of imprisonment beyond the 53 months. It thus functioned as the element of a new crime, a crime for which the defendant was entitled to his full right to a jury and his due process right to notice of the offense charged

and penalty sought. Stated another way, while the court had jurisdiction to go beyond the range to which Blakely pleaded guilty, in doing so it deprived the defendant of his right to jury trial on the fact that took his sentence beyond the range.

In concluding the midterm is the authorized statutory maximum to which the defendant is "entitled" and any fact used to increase a sentence over that entitlement must be determined by a jury, our colleagues in effect set forth a very expansive view of what constitutes an "element" of an offense. In doing so they echo a position previously expressed by Justice Thomas, namely that "a 'crime' includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact–of whatever sort, including the fact of a prior conviction–the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime. Similarly, if the legislature, rather than creating grades of crimes, has provided for setting the punishment of a crime based on some fact–such as a fine that is proportional to the value of stolen goods–that fact is also an element. No multifactor parsing of statutes, of the sort that we have attempted since *McMillan,* is necessary. One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element."

(*Apprendi, supra,* 530 U.S. at p. 501, J. Thomas concurring; also see *Harris, supra,* 536 U.S. at p. 575, J. Thomas dissenting.)

Justice Thomas's view does not appear to have been adopted by the court in *Blakely.* Indeed, it is inconsistent with *Harris,* the case upon which *Blakely* rests.[7]

B

The question remains whether California's sentencing structure requiring the judge select from three prison terms violates the principles set forth in *Apprendi, Harris* and *Blakely*. We conclude it does not. We first note that if the line between sentencing factors and elements of a crime is drawn at the maximum *statutory* term allowed, which we believe *Harris* requires (or if it is drawn at the sentence allowed by a plea), it is of no moment whether one characterizes the middle term in our tripartite sentencing structure as "fixed" or "discretionary" (or any other term one wishes to attach to it). In any instance, the *effect* of using facts to increase the terms of imprisonment still keeps the sentence imposed under the maximum allowed for committing the crime. Thus under either scenario, the "aggravating" facts must be characterized as "sentencing factors" that operate within a range and thus do not implicate the right to jury determination. As the

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[7] In *Blakely* Justice Scalia, writing for the majority of Justices Stevens, Souter, Thomas and Ginsberg, applied the rationale of part III of *Harris* and *Apprendi.* Thus it appears the broad view expressed by Justice Thomas and adopted by this court in *People v. George, supra,* ___ Cal.App.4th ___ [D.A.R. 11568] and *People v. Lemus, supra,* ___ Cal.App.4th ___ [D.A.R. 11763] has been, at least for the moment, abandoned. For sentencing purposes, the dissenters in *Harris* are now willing to draw the *Apprendi* line at the statutory maximum rather than at each discretionary fact used to increase a sentence within the range authorized by law.

court notes in *Apprendi*, "nothing . . . suggests that it is impermissible for judges to exercise discretion–taking into consideration various factors relating both to offense and offender–in imposing a judgment *within the range* prescribed by statute." (*Apprendi*, *supra*, 530 U.S. at p. 481.) Such factors are "sentencing factors," a term which "appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense." (*Apprendi, supra,* 530 U.S. at p. 494, fn. 19; see also *Harris, supra,* 536 U.S. at p. 565.)

Our tripartite statutes meet the classic definition of ranges. A "range" is a "rank, class, or order;" a "row, line or series" or a "[variation] within limits." (Random House Unabridged Dict. (2d ed. 1993) p. 1599.)

Moreover, the Legislature, through establishment of our rules of court, accepts our tripartite statutes as offering ranges of punishment. Thus, rule 4.405(b) of the California Rules of Court notes a " 'Base term' is the determinate prison term selected from among the three possible terms prescribed by statute or the determinate prison term prescribed by law *if a range of three possible terms is not prescribed*." (Italics added.)

It is true that the imposition of a middle term is different than an indeterminate sentencing structure. This does not however change the character of our statutes or our analysis. Our statutes still offer a range of sentence choices. Indeed, California's sentencing ranges are consistent with the accepted historical development of sentencing statutes. As noted in *Harris, supra,* 536 U.S. at page 558: "In the latter part of the 20th century many legislatures, dissatisfied with sentencing disparities among like offenders,

implemented measures regulating judicial discretion. These systems maintained the statutory ranges and the judge's factfinding role but assigned a uniform weight to factors judges often relied upon when choosing a sentence. [Citation.] One example of reform, the kind addressed in *McMillan*, was mandatory minimum sentencing. This ' "operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it . . . .' [Citation.]" California's tripartite application of lower, middle and upper term is also an example of a modern system that regulates discretion in that it establishes a range within which a judge's discretion in selecting a sentence is controlled and guided. Section 1170, subdivision (a), describes this as *specified discretion*.

It is also true that the Penal Code and California Rules of Court use the term "shall" in describing the selection of the middle term. (§ 1170, subd. (b); rule 4.410 (c), (d).) As the California Supreme Court has noted, while the "shall"/"may" dichotomy is a familiar interpretive device, it is not a fixed rule of statutory construction. (*People v. Ledesma* (1997) 16 Cal.4th 90, 95.) "[U]nlike some codes [in California] that expressly define 'shall' as mandatory and 'may' as permissive, . . . the Penal Code provides only that '[w]ords and phrases must be construed according to the context and the approved usage of the language.' " Because of definitional diversity, "it is impossible to conclude with sufficient certainty what the Legislature intended by its use of 'may' if we consider the word in isolation. We must therefore focus more broadly on the language, context, and history of the statute." (*Ibid*.)

The language of the various rules and code sections applicable to selection of the base term work together to provide a system where *after considering the entire record,* the sentencing court may select any of three possible sentencing choices. (§ 1170, subd. (a).) This choice is discretionary and designed to tailor the sentence to the particular case. (*People v. Scott* (1994) 9 Cal.4th 331, 349.) If after a full consideration of the entire record the court finds there are no aggravating or mitigating circumstances, it must then apply the middle term. (*People v. Thornton* (1985) 167 Cal.App.3d 72, 76-77; *People v. Myers* (1983) 148 Cal.App.3d 699, 703.) The statutory scheme of section 1170, subdivision (b) " 'does not mandate a selection by the court of either the upper or lower term under any particular ciumstances; it mandates only selection of the middle term in the absence of aggravating or mitigating circumstances.' " (*People v. Thornton, supra,* 167 Cal.App.3d at pp. 76-77; see § 1170, subd. (a)(1).) Application of the middle term is not the beginning of a judge's sentencing analysis, it is a *conclusion* to which the defendant is entitled upon a finding of no aggravating or mitigating circumstances. It is in the absence of aggravation or mitigation that the word "shall" becomes mandatory. (*People v. Thornton, supra,*167 Cal.App.3d at pp. 76-77*; People v. Meyers, supra,*148 Cal.App.3d at p. 703.)

We believe the legislative history of the determinate sentencing laws supports this conclusion. As originally drafted, section 1170, subdivision (b), provided that the sentencing judge had no authority to impose the upper or lower term of imprisonment unless a formal motion was brought by either the defendant or the People. (Sen. Bill No. 42 (1975-1976 Reg. Sess.) as introduced.) The evidence allowed to increase or decrease

a sentence was dependent solely on evidence introduced at a trial on the motion. Thus while the sentencing court had the jurisdiction to impose the upper or lower terms, it did not have the discretion to do so unless it was conferred on the court by the parties. In 1977 the requirement of a formal motion was eliminated. Although section 1170, subdivision (b), retained the requirement that the midterm be selected unless there are circumstances in aggravation or mitigation, the sentencing judge was given the *independent authority* to impose the upper or lower sentence on his or her own initiative. This change we believe is significant. With this change, the sentencing judge now has the jurisdiction *and* discretion at the outset of the sentencing procedures to select *any* of the three possible sentences in the statute and the judge may do so without a request by anyone. Even after weighing aggravating and mitigating factors, if the judge believes the aggravating factors outweigh the mitigating, he or she can still impose the middle term. The midterm is no longer a fixed term *from which* the sentence adjusted up or down; it is either a deliberate sentencing choice which may be motivated by a judge's mercy or a default sentence to which the defendant is entitled in the absence of imposition of the upper or lower sentence. (Assem. Com. on Crim . J., Analysis of Assem. Bill No. 476 (1977-1978 Reg. Sess.) as amended Mar. 17, 1977, p. 4; Assem. Com. on Crim. J., Analysis of Assem. Bill No. 476 (1977-1978 Reg. Sess.) as amended Apr. 19, 1977, p. 2; Assem. Office of Research, 3d reading analysis of Assem. Bill No. 476 (1977-1978 Reg. Sess.) as amended May 2, 1977, p. 3.) At the same time the formal motion requirement was lifted, the sentence ranges were increased specifically for the purpose of increasing the scope of judicial discretion. (Sen. Com. on Judiciary, Analysis of Assem. Bill No.

476 (1977-1978 Reg. Sess.) as amended June 6, 1977, p. 13.) The broader, completely discretionary aspect of our sentencing laws can be readily distinguished from structures that *require an increase* in sentences based on findings of particular facts. Such *required* aggravation would run contrary to *Blakely.*

Given our position that tripartite statutes reflect a true range, selection of the upper term is not a question of jurisdiction but an exercise of discretion and sentence choices.

C

In summary, analogous to the statute upheld in *Harris,* any defendant charged in California with a substantive crime for which there is a tripartite sentence understands the maximum sentence he is exposed to at the outset of the charge filed against him. If the defendant is charged with a crime and a jury convicts the defendant or he pleads guilty to the offense, the maximum sentence that can be imposed is that established by the facts authorized by the verdict, i.e., the maximum authorized by the substantive crime with which he was charged or the plea. Once a crime is found true, the principles of the Fifth and Sixth Amendments have been met. Thereafter, facts relevant to the defendant or the offense may be used in sentencing without implicating the defendant's right to a jury because they do not result in a sentence beyond the statutory maximum or the maximum established by the plea, i.e., they do not become elements of a new offense. If a fact is to be used to carry the defendant beyond the statutory maximum and outside the statutory range or it carries the defendant beyond the sentence allowed for the guilty plea, it is an enhancement which in California must be pleaded and proved beyond a reasonable doubt. (§ 1170.l, subd. (e).)

The Supreme Court cases dealing with the enhancement-sentencing factor dichotomy teach that a defendant can be deprived of the rights to due process and jury trial in a variety of ways. The deprivation can occur due to insufficient charging of crimes, a sentence beyond a negotiated plea or statutory maximum, or a defectively drawn statute. Here, however, none of those defects exists.

We conclude the statutory structure established in California meets the requirements of *Apprendi*, *Harris* and *Blakely*. While others may read these cases in such a manner as to invalidate the sentencing structure in California, we are compelled to uphold that structure if there is a constitutional argument supporting such a result. (*Myers v. Philip Morris Companies, Inc*. (2002) 28 Cal.4th 828, 846-847; *People v. Price* (2004) 120 Cal.App.4th 224, 238-239.) We believe there is. We therefore uphold the sentences here.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

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BENKE, Acting P. J.

I CONCUR

____

IRION, J.

McDONALD, J., Concurring and Dissenting.

I concur with the majority opinion in the affirmation of the convictions. However, I am of the opinion the hearsay statements should not have been admitted into evidence under the coconspirator exception to the hearsay rule, although I also think the error was not legally prejudicial. I dissent from the majority opinion's analysis of the sentencing scheme.

A

COCONSPIRATOR EXCEPTION TO HEARSAY RULE

The trial court over defendant Wagener's objection admitted into evidence three hearsay statements: 1) Dillin testified Wagener's boyfriend Reed told Dillin he and Wagener had arranged to compensate her for not testifying against Wagener; 2) Dillin testified Wagener's friend Alotta told Dillin she and Wagener had a plan to get Dillin to modify her testimony against Wagener; and 3) Tucker, a prosecution investigator, testified Alotta told him she drove Dillin from the location Dillin was to be picked up by the prosecution for transportation to court to testify in Wagener's criminal trial.

These hearsay statements were admitted under the Evidence Code section 1223 coconspirator exception to the hearsay rule. The coconspirator exception to the hearsay rule applies here only if Wagener was participating in the conspiracy (Evid. Code, § 1223, subd. (b)) and the conspiracy is established by evidence independent of the hearsay statements (*People v. Hardy* (1992) 2 Cal.4th 86, 139.)

Here, the only evidence of a conspiracy to which Wagener was a party was contained in the hearsay statements and the fact Reed was a boyfriend and Alotta a friend of Wagener. Disregarding the hearsay statements as proof of a conspiracy to which Wagener was a party, the remaining evidence is the relationship between Wagener and Reed and Wagener and Alotta.

It cannot be concluded from the mere fact of the relationships that Wagener was a party to a conspiracy to dissuade a witness from testifying or testifying truthfully; it is at least as likely that the friends would act to dissuade Dillin from testifying without as with participation by Wagener. The hearsay statements should therefore have been excluded.

However, reviewing the record as a whole, it is not reasonably probable Wagener would have received a more favorable result at trial had the hearsay statements been excluded. (*People v. Hardy, supra,* 2 Cal.4th at p. 147.) The evidentiary error was therefore not legally prejudicial and does not require reversal on appeal.

B

IMPOSITION OF UPPER TERMS

Defendant Wagener was sentenced to the upper term of five years for robbery (Pen. Code, §§ 211, 212.5, 213),[1] the upper term of four years for assault with a deadly weapon (§ 245, subd. (a)(1)) and the upper term of three years for possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)). These upper terms were doubled under the Three Strikes law because the trial court found true the allegation

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

Wagener had previously been convicted of a serious or violent felony (§ 667, subds. (b)-(i)). Although the record is not entirely clear, it appears the trial court imposed the upper terms based on its finding by a preponderance of the evidence that the following aggravating factors described in the California Rules of Court, rule 4.421[2] were present:

> "[(a)](1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness. [¶] . . . [¶]
>
> "[(b)](1) The defendant has engaged in violent conduct which indicates a serious danger to society.
>
> "(2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness. [¶] . . . [¶]
>
> "(5) The defendant's prior performance on probation or parole was unsatisfactory."

None of these aggravating factors were alleged by the prosecution in the information, admitted by Wagener, or found true by the jury.

Wagener contends that under *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*), imposition of these upper terms violated her federal constitutional rights to a jury trial and proof beyond a reasonable doubt in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The majority opinion rejects Wagener's contention, concluding the California determinate sentencing scheme satisfies the requirement of *Blakely* and the earlier decisions of the United States

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2 All rule references are to the California Rules of Court.

Supreme Court in *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Harris v. United States* (2002) 536 U.S. 545. (Maj. opn., *ante,* at p. 22.)

Apparently not enamored with *Blakely,* the majority opinion relies on the principle it gleans from *Harris*: If the statutory sentencing scheme provides a range of sentences for conviction of a particular criminal offense, the Fifth and Sixth Amendments are satisfied if the court imposes a sentence within the limits of the range of sentences (maj. opn., *ante,* at p. 13); the right to a jury trial is satisfied by the jury verdict of guilty of the charged offense. In *Harris,* the court held that the jury-convicted defendant did not have a right to the minimum sentence within the prescribed range, which the defendant argued could be increased within the range only by further jury consideration; the jury finding of guilt is all of the jury factfinding necessary to impose any sentence, including the maximum, within the statutorily prescribed range of sentences for that offense. (*Harris v. United States, supra,* 536 U.S. at pp. 466-568.)

The majority opinion then transposes its concept of range of sentences to the *Blakely* facts and states: "In *Blakely* the defendant entered a plea to an offense [that] carried a range of punishment. The maximum sentence for the range was 53 months." (Maj. opn., *ante,* at p. 14.) However, the maximum sentence for the offense in *Blakely* was not 53 months but rather 10 years, and the imposed sentence in *Blakely* was 90 months, less than the 10-year maximum. (*Blakely, supra,* 124 S.Ct. at p. 2535.) Were the majority opinion to acknowledge 10 years as the maximum sentence, then under its analysis of *Harris* the 90-month sentence in *Blakely* was authorized by the jury verdict of

guilt because the sentence was less than the maximum, an argument made by the prosecution and expressly rejected in *Blakely.*

Blakely considered a defendant's guilty plea in the State of Washington "to second-degree kidnapping involving domestic violence and use of a firearm." (*Blakely, supra,* 124 S.Ct. at p. 2531.) In Washington second-degree burglary is a Class B felony, for which the standard range of sentence is 49 to 53 months, but the maximum sentence for which is 10 years. (*Id.* at p. 2535.) The judge is authorized to impose a sentence above the standard range "if he [or she] finds 'substantial and compelling reasons justifying an exceptional sentence.' " (*Ibid.*) The Washington statute lists aggravating factors that justify an increase sentence, which are illustrative rather than exhaustive. (*Ibid.*) If a court finds aggravating factors and imposes a sentence above the standard range it must make findings of fact and conclusions of law. (*Ibid.*)

In *Blakely,* the trial court accepted the defendant's guilty plea to second degree kidnapping, which admitted all of the elements of that offense. The court then made findings of aggravating factors not admitted by the defendant or found by a jury, including a finding the defendant acted with "deliberate cruelty." The defendant was then sentenced to a term of 90 months, more than the "standard range" but below the maximum. The crux of the *Blakely* decision by the Supreme Court is a definitive explanation of the term "standard range maximum sentence" in the context of the Sixth Amendment right to a jury trial. Justice Scalia wrote: "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he [or she] may impose *without* any additional findings." (*Blakely, supra,* 124

S.Ct. at p. 2537.) Under this definition, the trial court in *Blakely* could not impose a sentence above 53 months because to do so it had to find facts not admitted by the defendant or found by the jury. The *Blakely* court therefore vacated the 90-month sentence. The majority opinion acknowledges the standard sentence range in *Blakely* is from 49 to 53 months, although the maximum sentence in Washington for a Class B felony is 10 years. In contrast, it treats the standard sentencing range under the California determinate sentencing law as the lower term at a minimum to the upper term at the maximum. However, the upper term in California can be imposed only if the court makes findings of aggravating facts not found by the jury or admitted by the defendant, the consideration that by *Blakely's* definition limited the standard range for a Washington Class B felony to 49 to 53 months; applied to California's determinate sentencing scheme the standard range is the midterm.

The majority opinion considers the aggravating factors found by the judge in this case to be sentencing factors permitting a sentence to be imposed at the maximum statutory term (the upper term) although those same factors must be found by a jury to impose the maximum statutory term of 10 years in *Blakely*. In this respect, the majority opinion is in direct conflict with *Blakely*.

California's determinate sentencing law is contained in section 1170 et seq. Section 1170, subdivision (b) provides: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime . . . . The court shall set forth on the record the facts and reasons for imposing the

upper or lower term." Section 1170.3 provides that, "The Judicial Council shall seek to promote uniformity in sentencing under Section 1170 by: [¶] (a) The adoption of rules providing criteria for the consideration of the trial judge at the time of sentencing regarding the court's decision to: [¶] . . . [¶] (2) Impose the lower or upper prison term." In response to Section 1170.3, the Judicial Council adopted Rules 4.420, 4.421 and 4.423, which reiterate the statute's mandate to select the middle term unless circumstances in aggravation or mitigation found by a preponderance of the evidence outweigh the other and delineate aggravating and mitigation circumstances regarding the crime and the defendant.

The similarities between the California determinate sentencing scheme and the Washington sentencing scheme described in *Blakely* are striking. The maximum sentence in California is the upper term and in Washington for a Class B felony is 10 years. The sentence standard range using only facts found by the jury or admitted by the defendant is the midterm in California and 49 to 53 months in Washington. Each scheme describes aggravating factors that must be found by the trial court to increase the sentence above the standard range maximum and each requires specific findings of the aggravating factors. The majority opinion seeks to avoid the similarities by suggesting that the direction *shall* in section 1170, subdivision (b), in context, means *may* and the court therefore has discretion to impose the upper term, and by stating the upper term is within the standard range of sentences, permitting the court to consider aggravating factors as *sentencing factors* that do not need to be admitted or found true by the jury. It is difficult to conceive that *shall* means *may* when section 1170, subdivision (b) provides the

midterm shall be imposed *unless* the court finds aggravating or mitigating factors. Furthermore, *People v. Thornton* (1985) 167 Cal.App.3d 72, 76-77 held that in the absence of aggravating or mitigating factors, the court must impose the middle term.

The second distinction asserted by the majority opinion (the standard range under the California determinate sentencing scheme extends from the low term to the statutorily maximum upper term) conflicts directly with *Blakely,* which specifically provides in this context that the "relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he [or she] may impose *without* any additional findings." (*Blakely, supra,* 124 S.Ct. at p. 2537.) In the California determinate sentencing scheme that relevant statutory maximum is, by *Blakely's* definition, the middle term.

The imposition of upper terms in this case was not permissible under *Blakely* because it was based on facts not admitted by the defendant or found true by the jury. Wagener's sentence should be vacated and the matter remanded for resentencing.

McDONALD, J.