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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. KEITH L. WHITE, Defendant and Appellant.	B166502 (Los Angeles County Super. Ct. No. VA072175)

APPEAL from a judgment of the Superior Court of Los Angeles County, James M. Sutton, Jr., Judge. Affirmed in part, reversed in part and remanded.

Patricia A. Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Keith White appeals from his conviction on charges of forcible rape, forcible oral copulation by future threats, and robbery. In his original appeal, he contended that the evidence was insufficient to support the charge of oral copulation through threat of future injury. We sent a letter to counsel asking them to address whether the 1998 changes in Penal Code[1] section 288a, which separated the various methods of committing forcible oral copulation into different subdivisions, were intended by the Legislature to be technical and not substantive. While the appeal was pending, the United States Supreme Court issued its decision in *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*), which casts doubt on certain aspects of California's sentencing scheme, particularly the manner in which judges impose upper prison terms. Accordingly, we granted leave to file supplemental briefing on sentencing issues raised by *Blakely*. Finally, in August of this year, appellant sought, and we granted permission, to file a second supplemental brief seeking review of purported nunc pro tunc orders issued by the trial court after notice of appeal was filed. The effect of the orders was to substantially increase appellant's sentence on the robbery charge by increasing the enhancement.

We conclude that substantial evidence supports appellant's conviction of forcible oral copulation, but agree with appellant that *Blakely* requires reversal of the sentence imposed. Additionally, as respondent concedes, the trial court compounded its sentencing error by improperly increasing the enhancement on the robbery in its nunc pro tunc orders. Accordingly, we remand for resentencing only.

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

FACTUAL AND PROCEDURAL BACKGROUND

On March 10, 2003, a four-count amended information was filed, charging appellant with: forcible rape by means of force, violence, duress, menace, or fear of immediate and unlawful injury in violation of Penal Code section 261, subdivision (a)(2), in counts 1 and 3; forcible oral copulation by future threats in violation of section 288, subdivision (c)(3), in count 2; and second degree robbery in violation of section 211 in count 4. It was alleged as to counts 1, 2, and 3 that appellant was ineligible for probation or suspension of sentence pursuant to section 1203.065, subdivision (a), and that he used a firearm or deadly and dangerous weapon within the meaning of section 667.61, subdivisions (a), (b), and (e). It was alleged as to all four counts that appellant personally used a firearm within the meaning of section 12022.53, subdivision (b).

Appellant pled not guilty to all charges. He was found guilty by a jury of one count of forcible rape; forcible oral copulation through future threats as alleged in count 2; and robbery as alleged in count 4. He was found not guilty on count 3. The jury found the weapons allegations to be true.

Sentencing

For count 2, the court imposed the upper term of eight years. Reviewing the aggravating factors, the court stated at the sentencing hearing that appellant's crime "involved unspeakable violence, great bodily harm, [and] the threat of bodily harm," in addition to being "vicious" and "callous." The victim was said to be "particularly vulnerable" due to her "slight physiognomy." The court further noted that appellant was on probation or parole at the time of the crime for robbery, and that appellant "personally used a firearm in the commission of the crime." The court believed that the crime involved "planning" but chose to "disregard that as an aggravating factor."

Appellant was sentenced to 37 years and 4 months to life, consisting of: 15 years to life for count 1; the upper base term of 8 years enhanced by 10 years for count 2; and one-third the base term or 1 year enhanced by a term of one-third the prescribed term or 3 years and 4 months for count 4, all to run consecutively.[2] He was given 288 days of custody credit, and restitution and parole revocation fines were imposed pursuant to section 1202.4, subdivision (b) and section 1202.45.[3]

Trial

The victim, Rita B., testified that on July 27, 2002, between 1:00 and 2:00 p.m., she went out for a walk on the bicycle trail that ran along the San Gabriel River. She first spotted appellant wearing a blue shirt and dark pants, climbing over the fence that separated the path from a nearby back yard. He appeared to be walking away from her. A short time later, she heard angry shouting behind her. The words she heard were initially incomprehensible, but she came to understand that someone was saying "Turn around, bitch. Stop. Turn around, bitch. Look at me." She turned around and saw appellant pointing a gun at her. The gun was only about a foot from her face. He said he was going to shoot her and told her not to turn around. He forced her to walk backwards toward a freeway underpass. He kept telling her to keep walking and threatening to shoot her, and also kept telling her to look at him.

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[2] As is discussed below, the minute order and abstract of judgment conflict with the reporter's transcript, and shows a sentence of 16 months plus 3 years for the enhancement on count 4.

[3] Appellant was under 18 at the time, and was therefore remanded to juvenile authorities until age 21.

Once they were in a somewhat more secluded area, appellant told Rita to empty her pockets. She had a radio, and offered it to him. He told her to remove her clothing. She initially refused, but he put the gun to her head. He told her to get down on her knees and open her mouth or he would shoot her. He placed his penis in her mouth. She tried to pull away. Putting both his hands on her neck, he pulled her back towards him, propping the gun briefly against a nearby wall. He next told her to stand, and tried to put his penis inside her anally. He then led her further down toward the riverbed. He made her lie down and put his penis inside her vaginally. At that point, she was not looking at him and did not know whether the gun was in his hands or on the ground.

While the attack was going on, a man riding a bicycle on the path came within view. Appellant lay down and told Rita to sit on him, facing towards him. He smiled at the bicyclist and gave him a "thumbs up" sign. He told Rita he would shoot her if she said anything. She waived her hands behind her back, trying to signal to the bicyclist that something was wrong. When the bicyclist moved away, appellant got up and told Rita to stand up and get her clothes. She started to run one way down the path, and he ran the other way.

Rita immediately encountered a young couple on bicycles and told them she had been raped. She indicated appellant who could still be seen running away. The young man chased after appellant. The young woman called 911, and sheriff's deputies soon arrived. A few hours later, the deputies took Rita to view appellant, who had been placed in custody. She positively identified him as the attacker.

Steven Hernandez testified that he was riding his bicycle on the path on the day in question when he saw Rita sitting naked on top of an African-American man Hernandez could not identify. Rita waved her hand behind her back. Hernandez loudly said that what they were doing "wasn't right." A few moments later he saw the man running away. He appeared to have a long stick in his hand.

Brianne Gomez confirmed seeing Rita on the path in a frantic state on the day in question and calling 911 on her behalf. Her boyfriend, Oscar Castillo, testified that he chased after the person pointed out by Rita, and saw the man, whom he was able to identify as appellant, jump a fence.

Deputy John Steele took the information concerning where the assailant was last seen and set up a containment area. He observed fresh footprints going toward a particular residence's yard. Appellant was located at the residence, along with a rifle. He was wearing clothing that did not match the description given to the police, but clothing matching that description and Rita's radio were found inside the house. The footprints observed leading to the residence matched appellant's shoe size.

A nurse examined Rita and found injuries consistent with her description of the assault.

The defense presented no witnesses or evidence.

With respect to count 3, the jury was instructed that appellant was accused of having committed the crime of "unlawful oral copulation in violation of section 288a subdivision (c)(3) of the Penal Code," which was defined, in pertinent part, as follows: "Every person who participates in an act of oral copulation against the will of the victim by threatening to retaliate in the future against the victim or any other person and there is a reasonable possibility that the perpetrator will execute the threat, is guilty of the crime of unlawful oral copulation in violation of Penal Code section 288a subsection (c) subdivision (3). . . . Threatening to retaliate means a threat to kidnap or falsely imprison or inflict extreme pain, serious bodily injury, or death. In order to prove this crime each of the following elements must be proved: (1) a person participated in an act of oral copulation with an alleged victim; and (2) the act was accomplished against the alleged victim's will by threatening to retaliate in the future against the alleged victim or any other person;

and there was a reasonable possibility that the perpetrator would execute the threat."

In closing argument to the jury, the prosecutor stated in reference to count 2: "Count 2 . . . is a charge of oral copulation. . . . The elements are that a person participated in an act of oral copulation with an alleged victim . . . and this act was accomplished against her will by threatening to retaliate in the future against her, and there was reasonable possibility that the perpetrator would execute the threat." Concerning the latter element, the prosecutor stated: "[T]he second element has to do with the defendant making threats, a threat to retaliate in the future, with the reasonable probability that the perpetrator would execute the threat. With regard to the oral copulation, the threat in this case was [appellant] threatening to shoot [the victim]. You'll remember Rita said: ['']I don't want to do this. I can't do this. I can't do it. No. Please, no.['] But the defendant pointed the gun at her and said: ['']I'll shoot you. I'll shoot you. You do it now. Do it now, bitch. Do it now.['] This was the threat, the threat to retaliate, the threat to inflict bodily injury on her."

DISCUSSION

I

The sole original issue raised on appeal was whether the evidence was sufficient to support appellant's conviction for oral copulation accomplished by threat of future retaliation under section 288a, subdivision (c)(3). Appellant argued that his threat to shoot Rita could not be construed a threat to retaliate *in the future*. Instead, it was an *immediate* threat that should have been charged under subdivision (c)(2). A review of the history of section 288a and the similar provisions of section 261, and their interpretation by the courts, establishes that the variance between the information and the facts proved at trial was, at most, harmless error.

Section 288a, subdivision (c) is divided into three subparagraphs. Subdivision (c)(3) provides: "Any person who commits an act of oral copulation where the act is accomplished against the victim's will by threatening to retaliate[4] in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat, shall be punished by imprisonment in the state prison . . . ." The other two subparts of subdivision (c) make it a felony to participate in oral copulation with a person "under 14 years of age and more than 10 years younger than [the assailant]" (§ 288a, subd. (c)(1)) or to commit "an act of oral copulation when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison . . . ." (§ 288a, subd. (c)(2).)

The first modern version of section 288a, subdivision (c) derived from former section 288b enacted in 1967, contained no subparagraphs and simply provided that "[a]ny person who participates in an act of oral copulation with another person who is under 14 years of age and more than 10 years younger than he, or who has compelled the participation of another person in an act of oral copulation by force, violence, duress, menace, or *threat of great bodily harm*, shall be punished by imprisonment in the state prison for a period not less than three years." (Stats. 1975, ch. 877, § 2, p. 1958; see Stats. 1967, ch. 1551, § 3, p. 3722, italics added.)

A provision regarding threats of future injury was added in 1985. After the amendment, subdivision (c) still contained no subparagraphs and stated: "Any

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4 "'[T]hreatening to retaliate'" is defined in the statute to mean "a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death." (§ 288a, subd. (*l*).)

person who participates in an act of oral copulation with another person who is under 14 years of age and more than 10 years younger than he or she, or when the act is accomplished against the victim's will by means of force, violence, duress, menace, or *fear of immediate and unlawful bodily injury* on the victim or another person or where the act is accomplished against the victim's will by *threatening to retaliate in the future* against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat shall be punished by imprisonment in the state prison for three, six, or eight years." (Stats. 1985, ch. 1085, § 3, pp. 3633-3634, italics added.) There was no imperative need for the amendment. Prior to 1985, the courts had already interpreted the term "threat of great bodily harm" expansively to include threats against third parties, and threats of future harm. (See, e.g., *People v. La Salle* (1980) 103 Cal.App.3d 139, 147, disapproved in part on other grounds in *People v. Kimble* (1988) 44 Cal.3d 480, [victim testified that because of defendant's "tone of voice, the way he spoke to her, and the way he treated her daughter" that he would harm the daughter if she did not accede to his demands]; *People v. St. Andrew* (1980) 101 Cal.App.3d 450, 454 [victim, a mental patient, feared her assailant, a hospital attendant, would have her restrained in her bed or placed in a locked room]; *People v. Cassandras* (1948) 83 Cal.App.2d 272, 276, disapproved in part on another ground in *People v. Collins* (1960) 54 Cal.2d 57 [defendant told victim that, unless she submitted, he would have her arrested as a prostitute and that the police would take her children away].)

In 1998, section 288a was put in its present form, with three separately numbered subparagraphs. In enacting this amendment, the Legislature stated: "The amendments to Sections 286, 288a, and 289 of the Penal Code, which number certain subdivisions with paragraphs, are intended to be technical

amendments only and are not intended to make any substantive changes to those sections." (Stats. 1998, ch. 936, §§ 5, 25.)

The problem of imprecision in pleading under the various clauses of the forcible oral copulation statute and the similarly worded forcible rape statute, long predated this change, and have been repeatedly addressed by the courts. In *People v. Craig* (1941) 17 Cal.2d 453, for example, the defendant was charged with forcible rape in one count and rape based on the age of the victim in another, although only a single act of intercourse had occurred. He was found guilty and sentenced on both counts. In modifying the judgment to reflect one conviction and punishment, the court stated: "Under [section 261], but one punishable offense of rape results from a single act of intercourse, although the act may be accomplished under more than one of the conditions or circumstances specified in [the statute's] subdivisions. These subdivisions merely define the circumstances under which an act of intercourse may be deemed an act of rape; they are not to be construed as creating several offenses of rape based upon that single act. . . . The victim was not doubly outraged, once because she was forcibly attacked and once because she was under 18 years of age." (*Id*. at p. 455.)

From this holding derived a rule that "regardless of the subsection alleged, if the proof brings the case within any of the subsections of section 261, the offense of rape has been successfully proved by the prosecution" and "[t]he fact that the information was framed under the wrong subdivision of the section is immaterial." (*People v. Cassandras*, *supra*, 83 Cal.App.2d at p. 276; accord, *People v. Tollack* (1951) 105 Cal.App.2d 169, 172 ["Regardless of the subdivision alleged in the information, if the evidence brings the case within any one of the subdivisions of section 261 the offense of rape has been established"].)

The Supreme Court abrogated that rule in *People v. Collins*, *supra*, 54 Cal.2d 57, substituting a less formulistic one based on more familiar concepts of

notice and prejudice. Defendant there was charged with rape by force and violence, but was ultimately convicted of rape based on the age of the victim. The Supreme Court stated: "An accused should be advised of the charge against him in order that he may have a reasonable opportunity to prepare and present his defense. When the information charges rape committed under the circumstances stated in a particular subdivision of section 261 and the prosecution offers proof of different circumstances which bring the act under another subdivision, the accused may be taken by surprise unless before the trial he has received notice of the possibility of such a variance by other means than the information." (*Id*. at p. 59.) In other words, "[t]he decisive question . . . is whether the variance was of such a substantial character as to have misled defendants in preparing their defense." (*Id*. at p. 60.) In the case before it, there was no prejudice and the variance was deemed "immaterial" because "[n]ot only was it proved at the preliminary hearing that the prosecuting witness was 15 years of age, but the attorney for one of the defendants then expressed the view that the evidence tended to show statutory rape only. Moreover, it is not claimed that if [statutory rape] had been expressly alleged defendants would or could have disputed the age of the prosecuting witness." (*Ibid*.)

Collins was limited in *People v. Lohbauer* (1981) 29 Cal.3d 364. There, the court was asked to affirm a conviction for the misdemeanor offense of entering a noncommercial dwelling without the consent of the owner, when the defendant had been charged with burglary. Citing the "fundamental" rule that "[w]hen a defendant pleads not guilty, the court lacks jurisdiction to convict him of an offense that is neither charged nor necessarily included in the alleged crime," the court held that "[b]ecause [the misdemeanor violation] was neither charged nor necessarily included within the burglary charge, defendant's conviction of the lesser offense may not be sustained 'whether or not there was evidence at his trial

to show that he had committed that offense.'" (*Id*. at pp. 368-369, quoting *In re Hess* (1955) 45 Cal.2d 171, 175.)

The respondent in *Lohbauer* claimed that *Collins* permitted the conviction to be upheld because it stood for a rule that *any* variance between the charged offense and the offense for which the defendant was convicted was immaterial unless the defendant was "'misled to his prejudice and prevented from preparing an effective defense.'" (*People v. Lohbauer, supra*, 29 Cal.3d at pp. 369-370.) The Supreme Court explained that *Collins* should not be read so broadly: "In that case multiple defendants were charged with rape in violation of former section 261, *subdivision 3*, prohibiting sexual intercourse accomplished with force or violence. They were found guilty of rape in violation of former section 261, *subdivision 1*, prohibiting sexual intercourse with a female under the age of 18. We affirmed the convictions, concluding that these subdivisions of the former statute 'do not state different offenses but merely define the different circumstances under which an act of intercourse constitutes the crime of rape.'" (*Id*. at p. 371, quoting *People v. Collins*, *supra*, 54 Cal.2d at p. 59.) Because the *Collins* holding was based on the conclusion that "rape was one crime" it did not undermine the requirement that the defendant either be convicted of the offense charged or a lesser included offense. (*Id.* at p. 372.) The court did not, however, overrule *Collins*, despite the Chief Justice's plea that it do so. (*People v. Lohbauer, supra*, 29 Cal.3d at p. 373 (conc. opn. of Bird, C.J.).)

The continued viability of *Collins* was recently reaffirmed in *People v. Maury* (2003) 30 Cal.4th 342, where the defendant was convicted of multiple rapes and murders. With respect to one of the rapes, the defendant was charged with having committed it "'by means of force and fear of immediate and unlawful bodily injury.'" (*Id*. at p. 427.) The jury was instructed that it could find the defendant guilty of this charge if it determined that he had accomplished an act of

sexual intercourse "'by means of force, *violence*, or fear of immediate and unlawful bodily injury.'" (*Ibid*., italics added.) This led the defendant to complain of violation of "his Sixth Amendment right to notice and his right to due process" because "the jury might have convicted him of an uncharged offense, rape by means of violence." (*Ibid*.) The court disagreed with this analysis, citing *Collins* for the proposition that "contrary to defendant's assertion, rape by means of violence is *not* a different offense from rape by means of force or fear; these terms merely describe different circumstances under which an act of intercourse may constitute the crime of rape." (*Ibid.*) The court further noted that defendant had failed to show or assert prejudice and that "the variance was not of such a substantial character as to have misled defendant in preparing his defense," again citing *Collins*. (*Ibid.*) With regard to prejudice, the court specifically noted: "[I]n finding defendant guilty of rape, the jury found [the victim's] testimony credible. That evidence equally supported findings of rape by means of force, violence, or fear. It is inconceivable that the jury would have found defendant guilty of rape by means of violence, but not by means of force or fear." (*Id*. at p. 428.)

It follows from the Supreme Court's holdings in *Collins* and *Maury*, and the Legislature's statement that it meant no substantive change in the law when it added subparagraphs to section 288a in 1998, that an error in specifying the correct subparagraph of section 288a, subdivision (c), in the information is not necessarily fatal. Because forcible oral copulation is one offense whether committed by immediate force or by threat of future retaliation, imprecision of the type alleged here is not equivalent to the situation where the defendant is convicted of a crime not charged in the accusatory pleading. Instead, where the prosecution fails to assert the correct subparagraph of section 288a, the issue is whether the defendant was misled or can show prejudice. We do not see any reason to believe that appellant was misled or prejudiced here. The prosecutor informed the jury,

without objection from defense counsel, that the "threat to retaliate" element of the charge was established by appellant pointing the gun at the victim and saying: "[']I'll shoot you. I'll shoot you. You do it now. Do it now, bitch. Do it now.[']" The defense argument was based entirely on the possibility of mistaken identity due to appellant being captured away from the scene of the assault, wearing different clothing, and the lack of a formal lineup. In finding appellant guilty on count 2, the jury clearly believed that appellant was the assailant and that Rita was forced to orally copulate him under threat of being shot. The possibility that the jury may have been misled concerning whether the crime required the threatened shooting to occur immediately or sometime in the future does not establish that appellant was convicted of the wrong crime or otherwise prejudiced by possible error in the charging allegations.

Moreover, it is not entirely clear that there was error. One court has held that the dividing line between threat of future harm and fear of immediate injury may be difficult to distinguish and some types of threats may qualify as either. In *People v. Ward* (1986) 188 Cal.App.3d 459, 468, the court was faced with the converse of the issue presented here. There, the defendant was convicted of ongoing lewd conduct with a minor accomplished through fear of immediate harm in violation of section 261, subdivision (2). The evidence indicated that the threats had been to "'take [the girl's] mother out'" if the girl did not comply. (*Id.* at p. 463.) On appeal, defendant contended that, because the mother was not present in the room when the illicit activities occurred, the threatened harm would have had to take place in the future, and thus fell under section 261, subdivision (a)(6), proscribing sexual acts accomplished by "threatening to retaliate in the future against the victim or any other person."

The court viewed the "critical issue" as being "whether the victim's submission was a reasonable reaction to the defendant's threat, express or

implied." (*People v. Ward, supra*, 188 Cal.App.3d at p. 466.) By adding a specific provision covering threats to retaliate in the future, "the Legislature recognized that under the usual circumstances surrounding sexual assaults, the victim is unable to use [discrete] mental processes to distinguish between 'immediate' action and future retribution." (*Ibid.*) The law does not protect against unfounded charges by insisting that the victim predict whether the threat is of immediate or future harm, but by "its requirement that the victim act upon an objectively reasonable basis in concluding there is a possibility the perpetrator will execute the threat if the victim does not submit." (*Id*. at pp. 466-467.) In the case before it involving a young girl, "[a] jury could conclude that, in the girl's mind, as a reasonable person of that age, only her submission to these ongoing sexual attacks would prevent her mother's immediate death. At the minimum, the temporal aspect of the fear was at that point in the spectrum of time where 'immediate' and 'in the future' arguably become merged and indistinguishable." (*Id*. at p. 468.)

Here, the facts indicate that the victim's perceived immediacy of the threat may have been disrupted by appellant's actions in putting down the gun and grabbing the victim with both hands or by the presence of the bicyclist/witness. But whether the victim understood the threat to "shoot" her unless she "d[id] it now" to be a threat of immediate action or future violence, there is no question that it was objectively reasonable for her to believe appellant intended to do her harm unless she went along with his demands.

In reviewing a challenge based on sufficiency of the evidence, the appellate court is to view the record in the light most favorable to the judgment to determine whether it discloses evidence which is reasonable, credible, and of solid value to support the trier of fact's decision. (*People v. Morales* (1992) 5 Cal.App.4th 917, 925.) We must presume in support of the judgment the existence of every fact the trier could reasonable deduce from the evidence. (*People v. Kraft* (2000) 23

Cal.4th 978, 1053.) Unless it is clearly shown that "on no hypothesis whatever is there sufficient substantial evidence to support" the jury's verdict, the reviewing court will not reverse. (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.) For the reasons discussed, we conclude the jury's verdict on the forcible oral copulation count was supported by evidence and reasonable inferences.

II

In a supplemental brief, appellant contends that the trial court committed sentencing error under *Blakely, supra*, 542 U.S. ___ [124 S.Ct. 2531], and *Apprendi v. New Jersey* (2000) 530 U.S. 466, because it imposed the upper term after making its own factual findings, separate from the jury's, concerning aggravating and mitigating factors. We begin by reviewing the holdings in *Blakely* and *Apprendi*, and then turn to their application to California laws.

A

In *Apprendi*, *supra*, 530 U.S. 466, the defendant pled guilty to possession of a firearm for unlawful purposes, an offense that was punishable under New Jersey state law for a period of between five and ten years. The trial court held a hearing and found the crime to have been motivated by racial animus. A separate statute provided for an extended term of imprisonment if the judge made such a finding. Defendant was sentenced to 12 years on that single firearm count. Although defendant had pled guilty to other counts that, combined with the firearm count, would have justified a total sentence of more than 12 years, the Supreme Court rejected the state's argument that the sentence was proper because it was "within the range authorized by statute for the three offenses to which he pleaded guilty." (*Id*. at p. 474.) The Supreme Court described the issue as whether "the 12-year sentence imposed on count 18 [alone] was permissible, given that it was above the

10-year maximum for the offense charged in that count," noting that the trial court's factfinding "increased--indeed, it doubled--the maximum range within which the judge could exercise his discretion, converting what otherwise was a maximum 10-year sentence on that count into a minimum sentence." (*Ibid*.)

Concluding that criminal practice and procedure must "adhere to the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable doubt," the court held that "[o]ther 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." (*Apprendi v. New Jersey*, *supra,* 530 U.S. at pp. 483, 490.)

Because the statute invalidated in *Apprendi* required judicial factfinding in the area of "a core criminal offense 'element'"--the defendant's purpose or state of mind (530 U.S. at p. 493)--and not aggravating or mitigating factors, it appeared that other, more common sentencing factors would escape constitutional scrutiny. (See *People v. Juarez* (Nov. 16, 2004, B165580) __ Cal.App.4th __ [21 Cal.Rptr.3d 75, 81] [noting that after *Apprendi*, "the California statutory scheme appeared to dodge the constitutional bullet that brought down the New Jersey arrangement" and that "our courts felt secure *Apprendi* did not require a jury finding as to the factors in aggravation even when a judge's affirmative finding on those factors would lead to a sentence substantially higher than the court could otherwise impose for the offense of which the jury had convicted the defendant"].)

In *Blakely*, however, the Supreme Court expanded the scope of *Apprendi*, making its rule potentially applicable to a wide range of sentencing laws. Defendant there, a resident of the State of Washington, had been charged with first degree kidnapping, and pled to second degree. Under Washington law, second degree kidnapping was a class B felony, and state law provided that "'no person

convicted of a [class B] felony shall be punished by confinement . . . exceeding . . . a term of ten years.'" (*Blakely, supra*, 542 U.S. __ [124 S.Ct. at p. 2535], quoting Wash. Rev. Code Ann. § 9A.20.021(1)(b).) Under another statute, however, the "'standard range'" for a sentence for second degree kidnapping with a firearm was said to be 49 to 53 months. (*Ibid.*, quoting § 9.94A.320.) Yet another statutory provision permitted judges to impose a sentence above the standard range if they found "'substantial and compelling reasons justifying an exceptional sentence.'" (*Ibid.*, quoting § 9.94A.120(2).) Under Washington decisional authority, reasons used to justify an exceptional sentence had to "'take[] into account factors other than those which are used in computing the standard range sentence for the offense.'" (*Ibid*., quoting *State v. Gore* (2001) 143 Wn.2d 288, 315-316 [21 P.3d 262].) Utilizing the exceptional sentence provision, the *Blakely* trial court imposed a sentence beyond the standard range after holding a factual hearing and finding that defendant had acted with "deliberate cruelty." (*Blakely, supra*, 124 S.Ct. at p. 2536.)

The Supreme Court explained in *Blakely* why *Apprendi* applied to the 90-month sentence imposed despite the 10-year maximum sentence for class B felonies set forth in the statutes: "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [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. [¶] The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea.

Those facts alone were insufficient because, as the Washington Supreme Court has explained, '[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense,' [(]*Gore*, 143 Wash.2d, at 315-316 . . . [)], which in the case included the elements of second-degree kidnapping and the use of a firearm, [citations]. Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed. [Citation.] The 'maximum sentence' is no more 10 years here than it was 20 years in *Apprendi* . . . ." (*Blakely, supra*, 124 S.Ct. at p. 2537.)

The Supreme Court compared the situation before it in *Blakely* to that in *Ring v. Arizona* (2002) 536 U.S. 584, where it had "applied *Apprendi* to an Arizona law that authorized the death penalty if the judge found one of ten aggravating factors" and held that "the defendant's constitutional rights had been violated because the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding. [Citations.]" (*Blakely, supra*, 124 S.Ct. at p. 2537.) Under the court's analysis, "Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact." (*Id*. at p. 2538, fn. omitted.)

The Supreme Court described its decisions in *Blakely* and *Apprendi* as necessary to give "intelligible content to the right of jury trial." (*Blakely, supra*, 124 S.Ct. at p. 2538.) As the court explained, "[t]hose who would reject *Apprendi* are resigned to one of two alternatives. The first is that the jury need only find whatever facts the legislature chooses to label elements of the crime, and that those it labels sentencing factors--no matter how much they may increase the

punishment--may be found by the judge. This would mean, for example, that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it--or of making an illegal lane change while fleeing the death scene. . . . The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." (*Id*. at p. 2539, fn. omitted.)

B

With that background in mind we turn to a review of California courts' current understanding of the requirements of *Blakely*.

1. Waiver

Respondent contends, as a preliminary matter, that appellant waived or forfeited this contention by failing to object to the sentencing at the time of trial, citing *People v. Sample* (2004) 122 Cal.App.4th 206, 220-221. In *People v. Vaughn* (2004) 122 Cal.App.4th 1363, we announced our disagreement with *Sample's* holding that failure to raise *Apprendi* in the trial court resulted in forfeiture of the right to argue *Blakely* on appeal. Instead, in accord with the courts in *People v. George* (2004) 122 Cal.App.4th 419, 424, and *People v. Barnes* (2004) 122 Cal.App.4th 858, 879, we held: "The Supreme Court's decision in *Blakely* extended the *Apprendi* rationale into a new area, and created an opportunity for reviving the debate over *Apprendi's* ultimate meaning and impact . . . . Appellant cannot have forfeited or waived a legal argument that was not recognized at the time of his trial." (*People v. Vaughn, supra*, 122 Cal.App.4th at p. 1369.) We see no reason to diverge from *Vaughn*, particularly in view of the

increasing number of courts that take the same approach. (See, e.g., *People v. Ackerman* (Nov. 18, 2004, H026899) __ Cal.App.4th __ [21 Cal.Rptr.3d 142]; *People v. Juarez, supra*, __ Cal.App.4th __ [21 Cal.Rptr.3d 75]; *People v. Picado* (2004) 123 Cal.App.4th 1216 [20 Cal.Rptr.3d 647]; *People v. Fernandez* (2004) 123 Cal.App.4th 137; *People v. Jaffe* (2004) 122 Cal.App.4th 1559, 1583.)

2. Upper Term Sentencing

With regard to upper term sentencing, some courts have concluded that California's sentencing scheme is sufficiently distinguishable from Washington's to render *Blakely* inapplicable even where the trial court engages in additional factfinding. In *People v. Wagener* (2004) 123 Cal.App.4th 424, the court focused on the term "statutory maximum," which is defined in *Blakely* as being the "'maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.'" (*Id.* at pp. 429-430, quoting *Blakely*, *supra*, 124 S.Ct. at p. 2537.) In a two-to-one decision, the court expressed the belief that the three potential terms listed in California penal statutes--upper, mid, and lower--are the equivalent of the "standard range" in Washington. Thus, the majority construed the upper term in California's tripartite structure, rather than the middle term, as being the statutory maximum a judge could impose on the basis of the facts reflected in the jury verdict. (*People v. Wagener, supra*, 123 Cal.App.4th at pp. 433-436.) The majority believed that "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" will be the upper term set forth in the statute. (*Id*. at p. 436.) It followed from the majority's analysis that "[o]nce 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." (*Id*. at p. 437.)

The dissent in *Wagener* disagreed with the basic premise, concluding that the upper term should not be seen as part of the standard range or defined as the statutory maximum. As the dissent saw it, "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. [Citation.] 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.'" [Citation.] The Washington statute lists aggravating factors that justify an increase sentence, which are illustrative rather than exhaustive. [Citation.] If a court finds aggravating factors and imposes a sentence above the standard range it must make findings of fact and conclusions of law. [Citation.]" (*People v. Wagener, supra*, 123 Cal.App.4th at pp. 439-440 (dis. opn. of McDonald, J.), quoting *Blakely*, *supra*, 124 S.Ct. at p. 2535.) Put another way, "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." (*Id* at p. 441.)

The dissent explained that the trial court had justified the upper term by making findings described in rule 4.421 of the California Rules of Court to the effect that the crime involved "'violence"'; that the defendant engaged in "'violent conduct'"; that "'[t]he defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing

seriousness"'; and that "'[t]he defendant's prior performance on probation or parole was unsatisfactory.'" (*People v. Wagener, supra*, 123 Cal.App.4th at p. 438 (dis. opn. of McDonald, J.).) But "[n]one of these aggravating factors were alleged by the prosecution in the information, admitted by [the defendant], or found true by the jury." (*Ibid*.) The dissent described the majority's essential misstep as follows: "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*." (*Id*. at p. 440.)

The First District relied on similar reasoning to reach the same conclusion in *People v. Picado, supra,* 123 Cal.App.4th 1216 [20 Cal.Rptr.3d 647], another two-to-one opinion. Defendant there was found guilty of four gang-related assaults. The trial court selected a principal term and imposed the upper sentence. The majority in *Picado*, like the majority in *Wagener*, concluded that the upper term rather than the mid-term was the statutory maximum sentence that could be imposed based on the jury's verdict. The fact that "[Penal Code] section 1170, subdivision (b),[[5]] requires some additional fact for imposition of the upper term" was "not enough to trigger *Blakely*," in the majority's view. (*Id.* at [p. 663].) "Section 1170, subdivision (b), does not permit the trial court to exceed the maximum sentence prescribed for the crime in the charging statute. Nor does it

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5 Section 1170, subdivision (b) provides in pertinent part: "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." Under the statute, the court is permitted to consider "the record in the case, the probation officer's report, other reports including reports received pursuant to Section 1203.03, and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing." (*Ibid.*)

require the finding of a particular fact in order to divert from the statutory maximum. Rather, it merely guides the trial court's discretionary selection of the proper term *from within the statutory range* for the subject offense." (*Id*. at [p. 666].)

The dissent in *Picado*, like the dissent in *Wagener*, disagreed with the majority's basic premise that California sentencing law was dissimilar to the Washington law invalidated in *Blakely*: "[A] comparison of the Washington and California sentencing schemes shows that Washington's 'standard sentence range' for a specific offense is more analogous to the midterm of California's tripartite sentencing provisions than to the full range of our tripartite scheme." (*People v. Picado, supra*, 123 Cal.App.4th at p. __ [20 Cal.Rptr.3d at p. 670].) "Although not identical, the California and Washington (as described in *Blakely*) sentencing schemes are far more alike than different. The default sentence, using facts found only by the jury or admitted by defendant, is the midterm in California and the de minimis 'standard sentence range' in Washington. To impose a longer term, the sentencing courts of both states must find and identify specific factors or circumstances in aggravation, which are facts additional to those found by the jury in its verdict or admitted by the defendant in a plea. . . . Contrary to the majority's characterization of Washington's 'exceptional sentence' as an enhancement statute [citation]--which under California law would have to be pled and proved [citation]--an 'exceptional sentence' in Washington is analogous to an upper term in California, given the procedure by which, until *Blakely*, both states imposed them." (*Id*. at [p. 672].)

Other courts have concluded that *Blakely* does apply to upper term sentencing under California law. In *People v. George*, *supra*, the court found *Blakely* error where the trial judge had specified five bases for its decision to impose the upper term: "that (1) the crime was serious and involved threats of

great bodily injury to the victims; (2) the crime involved planning, sophistication, and professionalism; (3) the current offense was more serious than the offense underlying [the defendant's] prior conviction, which was itself serious; (4) at the time [the defendant] committed the current offenses, he was on felony probation; and (5) [the defendant's] prior performance on probation was poor." (122 Cal.App.4th at pp. 425-426.) The court concluded, however, that "the trial court was constitutionally entitled to rely only on the fact that [the defendant] was on probation at the time of the charged offense as a basis for imposing an upper term," noting that, like a prior conviction, "a probationer's status can be established by a review of the court records relating to the prior offense." (*Id*. at p. 426.) Although it recognized that a single factor could justify an upper term sentence, the court could not "conclude that the elimination of four of the cited factors would not have made a difference in the court's sentencing decision," and remanded the matter for resentencing. (*Id.* at p. 427.)

In *People v. Juarez, supra*, __ Cal.App.4th __ [21 Cal.Rptr.3d 75] the court stated it was "clear beyond dispute" that "the 'statutory maximum sentence' is that term of imprisonment which a trial judge can impose based *solely* on the findings the jury *necessarily* made in reaching its verdict and without the judge making any further findings of fact." (*Id.* at [p. 83].) In the court's view, it was impossible to distinguish the California sentencing scheme from the Washington system "without elevating form over substance, something the Supreme Court has cautioned it will not tolerate." (*Ibid.*) Under both California's and Washington's systems, "unless and until a judge makes a factual finding, e.g., one or more 'circumstances in aggravation' exist, the highest term a defendant can receive is the 'middle term.' The fact we label the enhanced sentence the trial judge's factual finding justifies an 'upper term' while Washington calls it an 'exceptional sentence' is in the nature of a difference in form not substance. Nor is it more than

a difference in form that Washington calls the presumptive sentence the jury verdict alone will justify a 'standard sentence' while California law labels it the 'middle term' sentence. [¶] These differences in terminology and some differences in overall structure do not alter the fundamental vice the Supreme Court identified in *Blakely*. In both Washington and California, the 'judge inflicts punishment that the jury's verdict alone does not allow' based on factual findings the judge not the jury makes." (*Ibid.*, fn. omitted.)

The court in *Juarez* rejected defendant's contention that *Blakely* error required per se reversal. Utilizing harmless error analysis, it concluded that the error was not harmless under the circumstances before it. The upper term was imposed based on the trial court's findings that the crime involved planning and sophistication and the victim was especially vulnerable. "The evidence here may well have been sufficient to support a jury finding even beyond a reasonable doubt that one or both these factors in aggravation were present. But the evidence is by no means so overwhelming we can say beyond a reasonable doubt the outcome would have been the same had these factors been submitted to the jury as required by *Apprendi-Blakely*." (*People v. Juarez, supra*, __ Cal.App.4th at p. __ [21 Cal.Rptr.3d at p. 92].)

In *People v. Butler* (2004) 122 Cal.App.4th 910, the court recognized that California's sentencing scheme is subject to *Blakely*, but concluded that any error was harmless.[6] There, the trial court imposed an upper term based on findings that the crime involved a threat of great bodily harm and a large quantity of contraband;

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[6] In *Juarez*, the court held that that *Blakely* error was subject to harmless error analysis. (*People v. Juarez, supra*, __ Cal.App.4th at p. __ [21 Cal.Rptr.3d at pp. 89-91].) In *George*, the court "assum[ed] without deciding," that resentencing is only required if it was not reasonably probable that a more favorable sentence would have been imposed in the absence of error. (*People v. George, supra*, 122 Cal.App.4th at p. 426.)

that defendant took advantage of a position of trust or confidence and engaged in violent conduct; and that defendant's prior convictions were both numerous and of increasing seriousness. The court held that under *Blakely*, only the factor pertaining to prior convictions was validly considered. (*Id.* at p. 920.) Nevertheless, the court affirmed the sentence, concluding that "one proper aggravating factor articulated by the trial court . . . was sufficient to support the upper term sentence," particularly because the trial court had specifically stated on the record that any one of the aggravating factors outweighed the lack of mitigating factors. (*Id*. at pp. 920-921.)

Other courts have taken a divergent approach. In *People v. Jaffe, supra*, 122 Cal.App.4th 1559, the defendant was convicted of possession of various narcotic substances, as well as two handguns. The court sentenced him to an upper term for the main offense due to the following aggravating factors: he was on parole at the time of the offense, he had served a prior prison term, his prior convictions were numerous and of increasing seriousness, and he was convicted of multiple crimes for which he was receiving concurrent sentences. The Court of Appeal focused on the fact that, at the sentencing hearing, the defendant admitted that he had gone to prison for bank robbery and that he was on probation or parole at the time of his current offense, and that either of these factors would have justified the upper term. Although certain of the aggravating factors on which the trial court relied were the result of judicial factfinding, defendant's admission of two such facts transformed the upper term into the statutory maximum that could be imposed under *Blakely*, under the court's analysis: "To be sure, defendant here did not admit the existence of every aggravating factor on which the trial court ultimately relied in its discretion, but the maximum term under *Blakely* is dependent on what facts the defendant admits, not on any fact the defendant does not admit. Since the four year upper term was the statutory maximum for *Blakely* purposes based on facts

admitted by defendant, defendant cannot complain about the sentencing court also relying on other facts as additional justification for this upper term." (*Jaffe*, at pp. 1587-1588.)

The same conclusion was reached in *People v. Barnes*, *supra*, 122 Cal.App.4th 858, in which defendant was convicted of possession of cocaine base for sale and admitted two prior possession convictions and a prior prison term. The sentence range for the possession count was three, four, or five years. (See Health & Saf. Code, § 11351.5.) The admitted facts could have resulted in an additional seven years. The trial court imposed the upper term because appellant had just been released from prison when he committed the crime and a one-year enhancement for the prior prison term, but struck the two three-year enhancements for the prior convictions, resulting in a total sentence of six years. The appellate court held that because, under the facts found by the jury and the facts admitted, the defendant could have received a maximum sentence of 11 years (the four-year midterm plus seven years for the three enhancements), the sentence did not violate *Blakely*. "So long as the resulting sentence is within the maximum penalty authorized by the facts found by the jury and admitted by defendant, *Blakely* and *Apprendi* do not prohibit a sentencing court from relying on aggravating or mitigating facts not found by the jury or admitted by the defendant." (*Barnes*, at p. 881.)

C

As can be seen from the above, California courts have expressed a range of views concerning whether or how our state's sentencing system is impacted by *Blakely*. The conclusion espoused by the courts in *Wagener* and *Picado*, that *Blakely* has no impact on how our state conducts criminal sentencing, is not one that we find tenable. The Washington sentencing scheme struck down by *Blakely*

is similar in all essential respects to California's, as the courts in *George* and *Juarez* discussed. The fact that Washington calls its basic sentence a "standard range" while California calls it the "mid-term" is not significant. In both states, variance from the basic sentence is permitted only after the trial court examines a number of aggravating and mitigating factors, most of which are neither presented to the jury nor admitted by the defendant.

It is tempting to go along with those courts that have held that a single true aggravating factor will transform the maximum sentence permissible from the midterm to the upper term and salvage sentences based in large part on judicial factfinding. We believe this outcome is foreclosed, however, by the Supreme Court's rejection of a similar argument raised in *Apprendi*. Respondent in that case, the State of New Jersey, pointed there out that even without the trial court's improper finding of racial animus, the court could have produced the 12-year term of imprisonment received by defendant by imposing a lesser sentence on the principal assault count and consecutive sentences for other counts. The Supreme Court rejected that attempt to justify the punishment, stating that the "constitutional question" was whether the 12-year sentence imposed on the principal count was permissible. (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 474.) The fact that there were other ways for the judge to have arrived at the same or a higher sentence, the court deemed of "no . . . relevance." (*Ibid*.)

In view of the Supreme Court's assertion that hypothetical alternate scenarios should not be used as after-the-fact rationalizations for impermissible sentencing choices, we must respectfully disagree with the courts in *Jaffe* and *Barnes* to the degree that they support a conclusion that the existence of a single aggravating factor found by the jury or admitted by the defendant avoids *Blakely* and automatically justifies an upper term sentence. The relevant question is not whether we can conceive of a legitimate way for the trial court to have arrived at

the 13-year sentence imposed on appellant. The question is whether the trial court would have exercised its discretion to impose the upper term for the section 288a, subdivision (c) violation if it knew that one or more of the factors relied on were invalid. This is a question that can only be answered on a case-by-case basis. (Compare *People v. Osband* (1996) 13 Cal.4th 622, 729 ["In this case, the court could have selected disparate facts from among those it recited to justify the imposition of both a consecutive sentence and the upper term, and on this record we discern no reasonable probability that it would not have done so"], with *People v. George*, *supra*, 122 Cal.App.4th at p. 427 [court remanded matter for resentencing where it could not conclude that elimination of four invalid factors would not have made a difference in the trial court's sentencing decision] and *People v. Robinson* (1992) 11 Cal.App.4th 609, 615-616, disapproved in part on another ground in *People v. Scott* (1994) 9 Cal.4th 331 ["[T]his is not a case in which the factors in aggravation so powerfully outweigh any possible excuse that we can say with confidence that no more favorable result is likely on resentencing"].)[7]

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[7] Appellant contends the court engaged in structural error requiring reversal per se because it was tantamount to denial of a jury trial. That position is supported by the decision in *People v. Lemus* (2004) 122 Cal.App.4th 614, review granted December 10, 2004, where the court indicated that harmless error analysis was inappropriate: "[W]e have concluded [the defendant] had a constitutional right to a jury trial on any fact that would justify the trial court increasing the sentence beyond the presumptive middle term for either the enhancement or for count 6. Accordingly, we believe that the loss of a jury trial right cannot be found harmless on the theory that if a jury trial had been held the defendant would have lost on the issue [of the truth of the facts that justified increasing the sentence]. The point of *Blakely* is that the jury trial must be held." (*Id.* at p. 622.) Review of the *Lemus* opinion has been granted by the Supreme Court. Since we believe the sentence must be reversed under either harmless error or per se analysis, we do not resolve this issue here.

Analyzing the issue here, we see that section 288a, subdivision (c) provides for a sentence of three, six, or eight years. In imposing the upper term, the court relied almost entirely on aggravating factors that did not involve recidivism and were neither presented to the jury nor admitted by appellant, such as: that the crime "involved unspeakable violence, great bodily harm, [and] the threat of bodily harm"; that the crime was "vicious" and "callous"; and that the victim was "particularly vulnerable" due to her "slight physiognomy." It is true that the court further noted that appellant was on probation or parole at the time of the crime for robbery,[8] but, since we cannot say on this record that the court would have imposed the upper term in the absence of the inappropriate factual findings concerning the crime and the victim, we must reverse the sentence and remand for resentencing.

Appellant further contends that consecutive sentencing was invalid under *Blakely*. For the reasons discussed in *People v. Vaughn*, *supra*, 122 Cal.App.4th at page 1372, we disagree. As we stated there: "[A] trial court's imposition of consecutive sentences does not result in a usurpation of the jury's factfinding powers or appellant's due process rights as long as each sentence imposed is within each offense's prescribed statutory maximum. . . . Although our laws permit the trial judge to order the separate sentences imposed for each crime to run concurrently, its decision in this regard is similar to the discretion afforded under section 654, and results in a lessening of the prescribed sentence--not an enhancement."

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[8] As we have seen, the court also noted that appellant "personally used a firearm in the commission of the crime," a finding the jury made. Since a factor cannot be used both as an enhancement and as a justification for an upper term, this factor was not material.

III

There is one final issue to be addressed. While this appeal was pending, the trial court entered two nunc pro tunc orders altering appellant's sentence by (1) correcting an error in the minute order and abstract of judgment that incorrectly stated that the term imposed by the trial judge for count 4 (the robbery) was one year and four months instead of one year and (2) increasing the count 4 enhancement from three years and four months (or one-third the prescribed term) to 10 years. The result was to increase appellant's prison term from 37 years and 4 months to life to 44 years to life.

In his second supplemental brief, appellant contends that the change in the base term was a proper correction of a clerical error to reflect the true sentence for the robbery imposed by the judge at the sentencing hearing. With respect to the increase in the enhancement, however, appellant contends that the increase was erroneous because the robbery sentence was the subordinate term, and the court's original decision to impose one-third the prescribed term for the enhancement to the robbery was the correct one. In its second supplemental letter brief, respondent does not dispute either of these contentions. Respondent concedes that the court intended to sentence appellant to the base term of one year on count 4. Respondent points out, however, that the overall sentence on count 4 was correct because, although the minute order and abstract of judgment mistakenly added four months to the base term, these documents described the enhancement as three years rather than three years and four months the judge imposed as reflected in the reporter's transcript.

Respondent further concedes that "any section 12022.53, subdivision (b) enhancement imposed on count IV is subject to the one-third requirement of section 1170.1" and that "the firearm enhancement imposed [for count 4] should be 3 years and 4 months." Accordingly, respondent admits the nunc pro tunc increase

in the enhancement on count 4 was in error. These matters should be taken into account by the court at the resentencing hearing.

DISPOSITION

The judgment is reversed as to the sentence only, and the matter remanded to the court to conduct a new sentence determination. In all other respects, the judgment is affirmed.

CERTIFIED FOR PUBLICATION

CURRY, J.

We concur:

EPSTEIN, P.J.

HASTINGS, J.