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Opinion following rehearing

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DARRYEAL WOODROW WILSON, Defendant and Appellant.	A102205 (Napa County Super. Ct. No. CR109693)

A jury convicted defendant Darryeal Woodrow Wilson of four counts of committing lewd acts with his six-year-old niece. The sole issue raised on appeal was whether the trial court abused its discretion in admitting a videotaped police interview of the niece. We found that the evidence was properly admitted, and affirmed the judgment. We subsequently granted defendant's petition for rehearing to consider the impact of the decision in *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*), upon defendant's sentence. We conclude that the principal, upper term sentence of eight years imposed upon defendant for his conviction in count one must be vacated, and the matter returned to the trial court for resentencing. In all other respects, we affirm the judgment.

BACKGROUND

Pretrial Proceedings

Defendant was charged by information with four counts of committing lewd acts upon a child under the age of 14. (Pen. Code, § 288, subd. (a).)[1] Count one alleged that defendant touched six-year-old S.'s vaginal area over her clothing while she was in his car. Count two alleged that defendant had S. touch his penis. Count three alleged that defendant rubbed his penis on S.'s body. Count four alleged that defendant penetrated S.'s vagina. The information further alleged as to count four that defendant had substantial sexual conduct with the victim. (§ 1203.066, subd. (a)(8).) Defendant pleaded not guilty to all counts and denied the enhancement allegation.

On February 14, 2003, the prosecution filed a motion in limine to admit the videotape of a March 14, 2002 interview of S. by Katharine Prim Knutsen of the Napa Police Department. The prosecution advised that it intended to call S. as a witness at trial and that it had provided written notice to defendant in December 2002 of its intention to introduce the videotape at trial. Defendant conceded the admissibility of the statement, "as long as the child is going to testify." Jury trial commenced on February 18, 2003.

Prosecution Case

In May 2001, defendant visited his sister, D., at her house in Napa. They had not seen each other for about 20 years. Defendant came to her house about eight times between November 2001 and February 2002, including visits for Thanksgiving and Christmas. Each visit lasted two or three days. The last visit occurred on February 25, 2002. During this period, D.'s daughters, six-year-old S. and 16-year-old T., lived with her. Defendant picked S. up from school a few times while he was in Napa visiting D. Defendant and S. went to the laundromat alone in defendant's car, a red Mustang. One evening, D., her boyfriend, defendant, and S. went to the movies in defendant's car. D. and her boyfriend went to one movie, while defendant and S. saw Cinderella II. When D.

[1] Unless otherwise indicated all further statutory references are to the Penal Code.

and her boyfriend came out of their movie, defendant and S. were already in defendant's car.

S. testified that defendant had touched her on her "peepee." She described defendant touching her "peepee" with his hand at home while he was sitting in the living room and she was standing. It hurt when he touched her. She could not remember whether defendant touched her over or under her clothing. S. recalled an incident in defendant's car when he told her to come to the front seat with him and touched her "private spot" with his hand. She thought he touched her under her clothes. She could not remember if defendant ever touched her "peepee" over her clothes in his car. S. also testified that defendant had her put her hand on his private part over his clothing at her house. She could not remember if she ever saw defendant's penis, or if he ever touched her with his penis. She denied that defendant had touched her stomach with his penis.

After S. testified, defense counsel withdrew his concession to the admissibility of the videotaped interview and sought to exclude it. In an evidentiary hearing conducted outside the presence of the jury, the trial court viewed the videotape and heard testimony establishing the circumstances in which the tape was made and recounting out-of-court statements S. made to others about the alleged molestations. Following the hearing, the court ruled that the videotape was admissible, and it was played for the jury.

The taped interview occurred on March 14, 2002. Detective Knutsen asked S. if anyone ever touched her private parts and S. nodded her head. When asked who touched her private parts, S. responded, "My uncle." When asked her uncle's name, she replied, "Uncle . . . Darryeal." She said he touched her private parts at her house and in his car. She described an incident in which defendant picked her up from school after Christmas and put her hand on his penis over his clothes. S. said defendant sometimes went under her clothes, but only at the house. S. demonstrated how defendant moved his pelvis up and down during one incident in which he placed her hand on his penis in the car. S. also said defendant touched her vaginal area another time when she was in his car. S. also described an incident at her house when defendant put his hand down the waistband of her shorts and penetrated her vagina. S. said defendant touched her "peepee" at her

house more than 10 times and touched it in his car once. When asked if she ever saw defendant's penis, S. responded that defendant pulled up her shirt and rubbed his penis on her stomach in his car. As to that incident, she stated, "I was almost gonna throw up."

D.'s oldest daughter, M.G., who was 30 years old at the time of the trial, testified that defendant exposed himself and masturbated in front of her several times when she was around eight years old and defendant was staying in her house. M.G. did not recall defendant ever touching her in a sexual manner. Defendant's 19-year-old daughter, A.W., testified that defendant molested her from the time she was 11 or 12 years old until she was about 17. She testified that he would sometimes touch her breasts and buttocks both over and under her clothing. A.W.'s mother testified that she immediately separated from defendant in 2001 and filed for divorce when she found him looking into A.W.'s bedroom window at night. A.W. did not tell her mother about the molestations until 2002, shortly before the police contacted her concerning S.'s allegations.

Defense Case

Defense counsel elicited testimony from D.'s former boyfriend that he had told police investigators that D. had not left defendant alone with S., and that defendant had not been left to baby-sit for S. The boyfriend testified that the only times S. and defendant were alone was once when she rode in the car with him to do some laundry, and once when they went to a movie together.

D. testified that she was not aware of defendant ever being home alone with S., or of defendant picking S. up from school without someone else being present. She further testified that S. never told her defendant had done anything bad to her.

Defendant called a social worker who testified that S. told her in August 2002 that she had seen defendant molesting her niece, M. Officer Knutsen testified that during the videotaped interview, S. volunteered that defendant had "never, ever, ever, ever, ever" molested M. Knutsen further testified that she conducted a thorough investigation, including an interview of M., and found no evidence that defendant had molested her.

Verdict and Sentence

The jury found defendant guilty on all counts and found the special allegation true. In its sentencing memorandum, the prosecution pointed out that defendant was ineligible for probation due to the jury's finding that he had engaged in substantial sexual conduct. (§ 1203.066, subd. (a)(8).) The prosecution recommended the full aggravated term of eight years on count one and consecutive terms of one-third the middle term (two years) on counts two, three, and four. The defendant's sentencing memorandum requested a mitigated term of three years in state prison with sentences on the three remaining counts to be stayed pursuant to section 654. The probation report noted five circumstances in aggravation and none in mitigation. The report recommended that probation be denied but offered no sentencing recommendation.

At the sentencing hearing on March 28, 2003, the trial court stated that it was relying solely on two circumstances in aggravation to impose the upper term of eight years on count one: (1) defendant "took advantage of a position of trust and confidence to commit each of these offenses" (Cal. Rules of Court, rule 4.421(a)(11)); and (2) each of the crimes "was carried out in a fashion that would indicate planning, sophistication or professionalism." (Cal. Rules of Court, rule 4.421(a)(8).)

The court also imposed consecutive sentences of two years on each of the three remaining counts. In choosing consecutive over concurrent sentences, the court relied on the following independent, separate reasons: (1) the crimes and their objectives were predominantly independent of one another (Cal. Rules of Court, rule 4.422(a)(1)); (2) the crimes were committed at different times and separate places rather than being committed so closely in time and place as to indicate a single period of aberrant behavior (Cal. Rules of Court, rule 4.425(a)(3)); (3) defendant has engaged in increasing criminal behavior dangerous to society (Cal. Rules of Court, rules 4.425(b), 4.421(b)(1)); and (4) during an interim period when defendant was ostensibly not involved in criminal activity he was in fact molesting his daughter. (Cal. Rules of Court, rules 4.425(b), 4.421(c), 4.408(a).)

The court accordingly sentenced defendant to a total of 14 years in state prison. This timely appeal followed.

DISCUSSION

Admission of Videotape

Defendant contends the trial court erred in finding that the time, content, and circumstances of the videotaped interview of S. provided sufficient indicia of reliability to support introduction of the videotape as substantive evidence that he committed the charged offenses.

Evidence Code section 1360 provides in relevant part as follows: "(a) In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse . . . performed with or on the child by another . . . is not made inadmissible by the hearsay rule if [among other prerequisites] [¶] . . . [¶] [t]he court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability." (Evid. Code, § 1360, subd. (a).)

A trial court's decision to admit a statement under Evidence Code section 1360 will not be reversed on appeal absent an abuse of discretion. (*People v. Brodit* (1998) 61 Cal.App.4th 1312, 1329–1330 (*Brodit*).) Since defendant makes no claim that admission of S.'s interview violated his rights under the federal confrontation clause, we need not render an independent determination of whether "sufficient indicia of reliability" supported its admission. (See *Lilly v. Virginia* (1999) 527 U.S. 116, 136 ["when deciding whether the admission of a declarant's out-of-court statements violates the Confrontation Clause, courts should independently review whether the government's proffered guarantees of trustworthiness satisfy the demands of the Clause"]; *People v. Eccleston* (2001) 89 Cal.App.4th 436, 445; *People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1373–1374.)

In reviewing trial court determinations under Evidence Code section 1360, appellate courts have looked to the following nonexclusive factors: (1) spontaneity and consistent repetition; (2) mental state of the declarant; (3) use of terminology unexpected of a child of similar age; and (4) lack of motive to fabricate. (*Brodit*, *supra*, 61 Cal.App.4th at pp. 1329–1330, relying on *In re Cindy L.* (1997) 17 Cal.4th 15, 29–30;

see also, *Idaho v. Wright* (1990) 497 U.S. 805, 821–822 [distilling these four factors from review of state and federal cases].)

In this case, after viewing the videotape, the trial court explained at length its reasons for concluding that the statement bore sufficient indicia of reliability. First, the court noted that the interview was conducted on March 14, 2002, which was close in time to the period when the molestations were alleged to have occurred. Second, the trial court considered the circumstances of the interview. It took place at Child Protective Services' office with only the interviewer and the child present. The interviewer took plenty of time to have the child relax and talk about subjects other than the molestations. S. played with crayons throughout the interview. The court noted that the interview room presented a nonthreatening environment, and that the interviewer's questions and demeanor did not appear to place pressure on S. to provide particular answers.

The court considered the four factors specified in *Brodit* and *Idaho v. Wright*. It found no evidence that S. felt hostility toward the defendant or harbored some other motive to fabricate. There was also no indication that the child's answers had been prompted either by the interviewer or anyone else. As to S.'s mental state, the court observed that she exhibited signs of discomfort and embarrassment in speaking about what had happened with her uncle, and did not appear to be eager to discuss this subject. However, she never refused to answer questions or tried to stop the interview.[2] In general, the court found that S.'s mental state, as reflected in the tape, was consistent with what one would expect from a child victim in these circumstances.

The court noted for the most part, the terminology S. used during the interview was age-appropriate and did not display any unusual level of sexual knowledge for a six year old. The court, however, pointed out that such knowledge was demonstrated by S. in the course of describing the incident in which defendant took her hand and held it on

[2] After several minutes of answering questions about the details of what had happened during each molestation incident, S. asked Knutsen, "Can I go now?" Knutsen replied that she was "almost done," and went on with the interview.

top of his penis. The tape showed her making a pelvic thrusting motion to explain what the defendant was doing during this incident. The court found the motion to be "absolutely remarkable" and unexpected coming from a six year old.

Finally, the court considered the consistency between the statements S. made to the interviewer and other reports she made of the molestations around the same time. At the evidentiary hearing, S.'s sister, M.G., testified that on March 9, 2002, S. disclosed to her for the first time that defendant had been touching her. M.G. called another sister, D.C., and later that day took S. to D.C.'s house. When D.C. asked if defendant took her clothes off, S. responded, "[N]o, . . . he puts his hands down my pants." S. told her that when she would sit on defendant's lap, he would put his hands down her pants and sometimes he would make her touch him. Later, S. told M.G. that defendant had put his fingers in her "peepee." Neither M.G. nor D.C. asked S. many questions about what happened for fear of making her more uncomfortable than she already was.

The trial court found that S.'s answers on the interview tape were consistent with her earlier statements with regard to the essential facts. She consistently stated that defendant touched her with his hand in her genital area, and she told both the interviewer and D.C. that he also made her touch him. While S. gave the interviewer more details about where the incidents occurred and what happened, that was presumably because the interviewer asked for those details and her sisters did not. Thus, with regard to spontaneity and consistency, the trial court found no grounds to question the reliability of the tape.

Defendant argues the trial court abused its discretion by failing to give sufficient weight to the following indicia of unreliability: (1) the tape did not establish that S. understood it was morally wrong to tell a lie; (2) S.'s statements on the tape were not spontaneous because she did not initiate the subject of sexual abuse with the interviewer; (3) S. was inconsistent because she told the interviewer defendant had placed his penis on her stomach, but she did not tell her sisters and she denied such conduct occurred when she testified at trial; (4) S. made inconsistent statements on the tape as to when, where, and how many times certain acts occurred; and (5) S. volunteered to the interviewer that

defendant had never molested her niece M., and then told a social worker several months later that she had seen defendant molesting M. even though a police investigation failed to show any such molestation had occurred.

In our view, Detective Knutsen adequately established on the tape that S. knew the difference between the truth and a lie, and knew that lying was bad and would get her into trouble.[3] That S. did not bring up the subject of sexual abuse on her own does not show lack of spontaneity. If anything, it merely confirms these experiences were foreign and unpleasant to her and that she had no agenda to get her uncle in trouble.

Regarding asserted inconsistencies between the videotape and S.'s trial testimony, we find that S.'s in-court testimony was remarkably consistent with her statements on the videotape, especially considering her age and the fact she was testifying nearly a year after the interview. Defendant concedes that S. was consistent in mentioning vaginal touching to her sisters and the interviewer. The only significant difference between her in-court testimony and out-of-court statements is that by the time of trial she could no longer recall the incident in which defendant placed his penis on her stomach. However, S.'s account of this event on the tape bears, if anything, *more* indicia of reliability than her trial testimony.[4]

The other inconsistencies defendant points to have no bearing on the reliability of the taped statement. The fact that S. told a social worker several months after the taped interview that her niece had been molested is irrelevant to whether the tape should have been admitted. Evidence Code section 1360 instructs the court to focus on the "time, content, and circumstances" of the recorded statement. (Evid. Code, § 1360,

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[3] S. responded negatively when Knutsen asked her if it was good to tell a lie, and told Knutsen she had never told a big lie and her nose would grow long and her mother would spank her if she did.

[4] Most obviously, the tape was made one year closer in time to when defendant had contact with S. In addition, on the tape S. demonstrated on herself what defendant did with his penis and then volunteered that she felt like she "was almost gonna throw up" when it happened. These events would be much easier for a six year old to forget than to fabricate.

subd. (a)(2).) Asserted inconsistent statements made *after* the interview may be fodder for cross-examination of the complaining witness, but the trial court was not required to weigh them heavily on the issue of the tape's reliability.[5] The inconsistencies defendant points to within the videotaped interview are minor and inconsequential in comparison to the compelling consistencies in S.'s statements. Considering the difficulty in keeping a six year old's attention and memory focused on one event at a time, and the inherent ambiguity in the number of times certain acts of molestation actually occurred, the asserted inconsistencies in no way undermined the reliability of the interview.

The trial court carefully reviewed the videotape in light of all of the factors identified in the statute and relevant case law, and provided an admirably thorough and detailed analysis of its reasons for finding the tape reliable. It did not abuse its discretion in allowing the tape to be played for the jury.

Blakely Issue

We granted rehearing to allow defendant to present argument under *Blakely, supra*, 124 S.Ct. 2531, that the trial court erred by imposing upper and consecutive terms not based upon facts found to be true by the jury beyond a reasonable doubt. Defendant asserts that without a jury determination of the necessary predicate facts, imposition of upper and consecutive terms was unauthorized under *Blakely* and violates his Sixth Amendment rights.[6]

The Blakely Opinion

[5] We do not mean to imply that a trial court *must* ignore later-occurring events that bear directly on the reliability of a recorded statement. For example, if the complaining witness later recants her videotaped statement, or conclusive proof of its untruthfulness emerges, Evidence Code section 1360 would not preclude the court from taking these developments into account. In this case, the subsequently developed evidence tended to confirm rather than undermine the statement S. made in her interview.

[6] The effect of *Blakely* on California sentencing law is now before the California Supreme Court in *People v. Black*, review granted July 28, 2004, S126182, and *People v. Towne*, review granted July 14, 2004, S125677.

In *Blakely*, the United States Supreme Court extended the rule articulated in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, (*Apprendi*), 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." (*Blakely*, *supra*, 124 S.Ct. at p. 2536.) *Apprendi* involved factual findings used to support statutory sentence enhancements under a New Jersey hate-crimes statute. (*Apprendi*, at pp. 468–469.) At issue in *Blakely* was the determinate sentencing procedure followed by courts in the State of Washington.

The petitioner in *Blakely* entered a guilty plea to second degree kidnapping of his estranged wife in which he admitted domestic violence and use of a firearm, but "no other relevant facts." (*Blakely, supra*, 124 S.Ct. at pp. 2534–2535.) Under the Washington Criminal Code, second degree kidnapping was classified as a class B felony that carried a maximum statutory sentence of 10 years. (*Id.* at p. 2535.) The Washington sentencing guidelines further limited the presumptive " 'standard range' " to 49 to 53 months, but authorized the judge to impose a sentence above the specified range (subject to the 10-year maximum) upon a finding by a preponderance of the evidence of " 'substantial and compelling reasons justifying an exceptional sentence.' " (*Ibid.*) At the sentencing hearing, an "exceptional sentence" of 90 months was imposed, based upon the trial judge's finding that the petitioner used " 'deliberate cruelty' " in the commission of the offense. (*Ibid*.)

The court in *Blakely* expanded upon its prior determination in *Apprendi, supra,* 530 U.S. 466, and *Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*),[7] that the right to a jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure" that must be given "intelligible content." (*Blakely, supra*, 124 S.Ct. at pp. 2538–2539.) The Sixth Amendment, declared the court, "is not a limitation

[7] The petitioner in *Ring* challenged an Arizona statute authorizing imposition of a death sentence if the judge found one of ten specified aggravating factors. (*Ring*, *supra*, 536 U.S. at pp. 592–593.)

on judicial power, but a reservation of jury power." (*Id.* at p. 2540.) The court observed that "*Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict." (*Id.* at p. 2539.)

The court in *Blakely* extended its *Apprendi* and *Ring* decisions to hold that a defendant's constitutional rights have been violated when a judge "imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding. *Apprendi, supra*, [530 U.S.] at [pp.] 491–497; *Ring, supra*, [536 U.S.] at [pp.] 603–609." (*Blakely, supra*, 124 S.Ct. at p. 2537.) It rejected as contrary to *Apprendi* the State of Washington's position that "there was no *Apprendi* violation because the relevant 'statutory maximum' is not 53 months, but the 10-year maximum for class B felonies." (*Ibid.*) The court defined "the 'statutory maximum' for *Apprendi* purposes" 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." (*Ibid*.)

Waiver

The People contend that defendant waived any claim of *Blakely* error by failing to raise any objection in the trial court to imposition of the upper term and consecutive sentences under *Apprendi*. The *Apprendi* decision predated defendant's sentencing in this case by three years.

"Claims of error relating to sentences 'which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner' are waived on appeal if not first raised in the trial court. [Citation.]" (*People v. Brach* (2002) 95 Cal.App.4th 571, 577.) "[W]ith certain exceptions, an appellate court will not consider claims of error that could have been—but were not—raised in the trial court." (*People v. Vera* (1997) 15

Cal.4th 269, 275.) Even constitutional objections must be interposed in the trial court in order to preserve them for appeal. (See *People v. Williams* (1997) 16 Cal.4th 153, 250.)

However, not all claims of error are prohibited in the absence of a timely objection in the trial court. Claims asserting the deprivation of certain fundamental, constitutional rights may be raised for the first time on appeal. (*People v. Vera, supra,* 15 Cal.4th at p. 276.) The failure to object to an "unauthorized sentence" also is not subject to the waiver rule. (*In re Birdwell* (1996) 50 Cal.App.4th 926, 931.) "[A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case. Appellate courts are willing to intervene in the first instance because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing." (*People v. Scott* (1994) 9 Cal.4th 331, 354.) A related exception to the waiver rule is that it "is generally not applied when the alleged error involves a pure question of law, which can be resolved on appeal without reference to a record developed below." (*People v. Williams* (1999) 77 Cal.App.4th 436, 460.)

In the present case, defendant claims deprivation of his fundamental constitutional rights to jury trial and proof beyond a reasonable doubt. He raises an issue of constitutional law that we may decide without reference to the particular sentencing record developed in the trial court. Further, if defendant's position is found to have merit, the sentence was not lawfully imposed and may be corrected on appeal despite the lack of an objection in the trial court. Finally, although *Apprendi* had been decided at the time of defendant's sentencing, *Blakely* had not. At the time of defendant's sentencing, no relevant judicial tribunal had construed *Apprendi* to require jury determination of facts used to impose an upper term of imprisonment under a determinate sentencing law comparable to California's. On all of these grounds, defendant cannot be held to have waived the *Blakely* claims he now raises.

Imposition of Aggravated Term

The relevant elements of California's determinate sentencing law (DSL) are set forth in section 1170. Subdivision (b) of section 1170 states 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. . . . In determining whether there are circumstances that justify imposition of the upper or lower term, the court may 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 . . . and any further evidence introduced at the sentencing hearing." (Italics added.) California Rules of Court, rules 4.421 and 4.423, respectively, articulate the "circumstances in aggravation and mitigation of an offense. (Judicial Council of Cal., Annual Rep. (1978) p. 3.) [¶] 'Facts relating to the crime' are set forth in subdivision (a), and 'facts relating to the defendant' in subdivision (b), of each rule." (*People v. Cheatham* (1979) 23 Cal.3d 829, 832–833.) Under rule 4.420(b), "[t]he circumstances utilized by the trial court to support its sentencing choice need only be established by a preponderance of the evidence." (*People v. Leung* (1992) 5 Cal.App.4th 482, 506.)

"[S]ection 1170, subdivision (b) . . . leaves to the lower court a choice . . . as to whether, even after weighing the aggravating circumstances against the mitigating circumstances and determining the aggravating circumstances preponderate, it will impose the upper or middle term as the base term. The statute does not mandate a selection by the court of either of those terms under any particular circumstances, but mandates only selection of the middle term in the absence of aggravating or mitigating circumstances." (*People v. Myers* (1983) 148 Cal.App.3d 699, 704.)

The specification of a presumptive middle term brings the California DSL into conflict with *Blakely*, and invalidates the imposition of an upper term upon defendant. Under section 1170, subdivision (b), three possible terms of imprisonment for each offense are specified, but the sentencing court may not impose the upper term without a finding by a preponderance of the evidence—rather than beyond a reasonable doubt—that circumstances in aggravation are established by a preponderance of evidence and outweigh circumstances in mitigation. (*People v. Wright* (1982) 30 Cal.3d 705, 709–710.)

Thus, while the upper term is the most severe sentence the court may select for the commission of a particular offense, the maximum penalty the court has authority to impose under the California DSL without finding additional facts is the middle term. (*People v. Butler* (2004) 122 Cal.App.4th 910, 918; *People v. Lemus* (2004) 122 Cal.App.4th 614, 621; *People v. George* (2004) 122 Cal.App.4th 419, 425.) To select an upper term, the sentencing court does not merely *consider* sentencing factors before exercising discretion, as occurs with the choice of a consecutive or concurrent term, but rather *must find* circumstances in aggravation that outweigh circumstances in mitigation. (*People v. Wright, supra,* 30 Cal.3d at pp. 709–710.)

Under the DSL a sentencing judge cannot make the discretionary decision to increase a sentence above the middle term without first finding "facts to support it beyond the bare elements of the offense"; the verdict alone does not authorize the sentence. (*Blakely, supra*, 124 S.Ct. at p. 2538, fn. 8.) With the requirement of a predicate finding before an upper term may be imposed, the sentencing scheme thus violates the directive in *Blakely* that the " '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." (*Blakely,* at p. 2537; *People v. Butler, supra*, 122 Cal.App.4th at pp. 917–918.)

In this case, the eight-year upper term sentence imposed on defendant on count one was based on facts found by the trial court based on a preponderance of the evidence—that defendant took advantage of a position of trust and confidence to commit the crimes and that he carried them out in a fashion that would indicate planning, sophistication or professionalism. Under *Blakely*, defendant was entitled to a midterm sentence absent findings beyond a reasonable doubt by the jury of these or other facts supporting judicial imposition of an upper term sentence under the DSL.

Consecutive Sentences

The trial court's selection of consecutive subordinate terms of imprisonment presents issues that are entirely distinct under *Blakely* from those raised by imposition of an aggravated, upper term sentence.

A concurrent term is not a specified presumptive or standard maximum sentence. Section 669 provides that when a defendant "is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts," the sentencing court "shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively." (See also *People v. Downey* (2000) 82 Cal.App.4th 899, 912–913.) Section 669 thus imposes a mandatory duty upon the trial court to determine whether the terms of imprisonment for multiple offenses are to be served concurrently or consecutively, but the choice of a consecutive or concurrent term is entirely discretionary with the trial court based upon consideration of the sentencing criteria set forth as guidelines in rule 4.425 of the California Rules of Court. (*People v. Jenkins* (1995) 10 Cal.4th 234, 255–256; *In re Calhoun* (1976) 17 Cal.3d 75, 80–81.) "[T]he provisions of rule [4.425] are merely . . . . guidelines, not rigid rules courts are bound to apply in every case . . . ." (*People v. Calderon* (1993) 20 Cal.App.4th 82, 86–87.) "While there is a statutory presumption in favor of the middle term as the sentence for an offense (§ 1170, subd. (b)), there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required." (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.)

Therefore, either a consecutive or concurrent term is within the trial court's discretion if the defendant has been found guilty of multiple crimes by the jury. The sentencing court need not make any additional finding of fact to impose a consecutive sentence. The jury verdict, not any additional finding of fact by the trial court, justifies the imposition of a consecutive term. (*People v. Shaw* (2004) 122 Cal.App.4th 453, 459.) A consecutive term imposed under California law is a discretionary sentence choice that does not increase the penalty beyond the prescribed statutory maximum, and is not tantamount to an *Apprendi* enhancement or a *Blakely* exceptional sentence. (See *People v. Sample* (2004) 122 Cal.App.4th 206, 227; *People v. McPherson* (2001) 86 Cal.App.4th 527, 532; *People v. Farr* (1997) 54 Cal.App.4th 835, 843.)

We therefore conclude that defendant was not denied his due process rights to a jury trial and finding of guilt beyond a reasonable doubt under *Blakely* by the trial court's selection of a consecutive subordinate term. (*People v. Shaw, supra*, 122 Cal.App.4th at p. 459; *People v. Sample, supra*, 122 Cal.App.4th at p. 227.)

Prejudice

We follow the federal standard of review of constitutional errors (*Chapman v. California* (1967) 386 U.S. 18, 24), and must reverse the sentence unless it appears beyond a reasonable doubt that the assumed error did not contribute to it. (*People v. Neal* (2003) 31 Cal.4th 63, 86.)

Here, each of the sentencing factors relied upon by the trial court to impose the upper term related to the current offenses. Factors having to do with recidivism—a recognized exception from the right to a jury trial articulated in *Apprendi*—played no role in the trial court's imposition of an aggravated term. Although defendant admitted to four misdemeanor convictions occurring 32 years before his current convictions, we cannot say that this factor alone would have supported an upper term sentence.

We also cannot say with confidence that had the jury been asked to find beyond a reasonable doubt that the defendant took advantage of a position of trust and confidence, or that he acted in a fashion showing planning or sophistication, that it would have done so. It is not possible to say beyond a reasonable doubt that the jury would have made these or other findings sufficient to support an aggravated term had the existence of these factors been reserved for the jury's determination.

Thus, under *Blakely* the denial of the right to a jury trial and findings on the aggravating circumstances that resulted in the imposition of the upper term on count one must be considered prejudicial to defendant. (*People v. Lemus*, *supra*, 122 Cal.App.4th at p. 622.) Accordingly, we vacate that portion of the judgment and remand the matter for resentencing.

DISPOSITION

The upper term sentence of eight years imposed upon count one is vacated and the case is remanded to the trial court for the limited purpose of conducting sentencing

proceedings in accordance with the requirements of *Blakely*.[8] In all other respects the judgment is affirmed.

_____
Margulies, J.

We concur:

_____
Marchiano, P.J.

_____
Swager, J.

[8] We note that the People, no less than the defendant, have the right to a jury trial in criminal proceedings. (*People v. Willis* (2002) 27 Cal.4th 811, 814; *People v. Wheeler* (1978) 22 Cal.3d 258, 282, fn. 29.)