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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DARRIN LEVAR ARMSTRONG et al.,

Defendants and Appellants.

B169138

(Los Angeles County
Super. Ct. No. BA231058)

APPEALS from judgments of the Superior Court of Los Angeles County, Michael M. Johnson, Judge. Affirmed in part and reversed in part with directions.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant Darrin Levar Armstrong.

Cynthia L. Barnes, under appointment by the Court of Appeal, for Defendant and Appellant Jaimie Monique Evans.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Ana R. Duarte and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendants Darrin Levar Armstrong and Jaimie Monique Evans appeal from judgments of conviction entered after a jury trial. Defendant Armstrong was convicted of torture (Pen. Code, § 206) and second degree robbery (*id.*, § 211), during which a principal was armed with a firearm (*id.*, § 12022, subd. (a)(1)) and he personally used a firearm (*id.*, § 12022.53, subd. (b)); first degree burglary (*id.*, § 459) and assault with a firearm (*id.*, § 245, subd. (b)) during which he personally inflicted great bodily injury on the victim (*id.*, § 12022.7, subd. (a)), and two counts of false imprisonment by violence (*id.*, § 236), during all of which a principal was armed with a firearm (*id.*, § 12022, subd. (a)(1)) and he personally used a firearm (*id.*, § 12022.5, subd. (a)(1)). He was sentenced to state prison for an indeterminate term of life with the possibility of parole plus 19 years.

Defendant Evans was convicted of torture (Pen. Code, § 206), second degree robbery (*id.*, § 211), and first degree burglary (*id.*, § 459) during the commission of which a principal was armed with a firearm (*id.*, § 12022, subd. (a)(1)). She also was convicted of assault by means likely to produce great bodily injury (*id.*, § 245, subd. (a)(1)), during which she personally inflicted great bodily injury on the victim (*id.*, § 12022.7, subd. (a)) and a principal was armed with a firearm (*id.*, § 12022, subd. (a)(1)). She was sentenced to state prison for an indeterminate term of life with the possibility of parole plus six years.

On appeal, defendants claimed evidentiary, instructional and sentencing error. We rejected all claims of error except defendant Armstrong's contention that one of his firearm use enhancements is not supported by sufficient evidence.

Following full briefing and a waiver of oral argument in the case, we permitted defendant Armstrong to file a supplemental brief addressing the sentencing issue raised by *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531].) Defendant Evans joined in raising this issue. We vacated submission of the case to allow the People an

opportunity to respond. We conclude that *Blakely* requires reversal of defendants' upper term sentences and resentencing on those counts.

FACTS

In August and September 2001, Tyiska Webster (Webster), dated Craigen Armstrong (Craigen), defendant Armstrong's brother. During this time, he told her about two or three killings in which he had been involved. He first told her he had killed a man driving the wrong way on a one-way street in Inglewood. A few days later, he told her he was a passenger in a car that pulled alongside another car in Inglewood. After words were exchanged, he shot and killed one or two men in the other car. Craigen took Webster to the scene of this crime, where she saw the police conducting their investigation.

Webster never told the police about Craigen's involvement in the killings; she did not want to get involved. Craigen was arrested for the crimes in October 2001. While he was in jail, Webster spoke to him by telephone, sent him several letters and put money in his account.

Webster knew defendant Evans through their brothers, who were friends. In October 2001, Webster stayed with Evans at Evans's mother's home for about a month. After a fight during which Evans hit her, Webster moved out.

On April 11, 2002, Webster was with her girlfriend, Vonya Mason (Mason). Mason shot and killed a woman in a dispute over narcotics. She and Webster fled to Webster's grandmother's house. Two days later, Webster telephoned the police and said she had information about the shooting. She requested protection from Mason's brothers, who were gang members.

On April 19, Detective Frank Bolan placed Webster into protective custody and relocated her and her daughter, Camry, to the Beverly Garland Hotel in North Hollywood. This was in connection with the Mason case; Detective Bolan knew nothing about the Craigen case. Although Detective Bolan instructed Webster not to contact

Mason, Webster wrote to her in jail. In addition, Webster's grandmothers, father, brother and sister knew where she was staying.

On the evening of May 1, 2002, Webster heard a knock on the hotel room door. She asked who it was, and a female voice answered, "housekeeping." When she opened the door, defendants and a man and woman whom Webster did not recognize rushed in. The man later was identified as Kevion Clark (Clark). The others called the woman Ebony.

Defendant Armstrong threw Webster, who was seven months pregnant, face down on the bed, holding her down by putting his knee in her back. He asked her why she was not taking care of Craigen by visiting him or putting money in his account. He wanted the money she had and asked her where her money was. As he did this, Clark closed and locked the door and turned out the lights. Defendant Evans put Camry in the bathroom and closed the door.

Evans used a bed sheet to tie Webster's feet together. She put a pillowcase over Webster's head, and someone pulled a scarf off Webster's head and stuffed it in her mouth. Webster was thrown to the floor and kicked in her head and back.

Someone then sat Webster up and pulled the pillowcase off of her head. Defendant Armstrong asked her if she was ready to talk. He kept asking her why she was in the witness protection program and who she was "snitching" on. Webster kept telling him that it had nothing to do with Craigen, but he accused her of lying. He pulled out a gun, inserted a clip and pointed it at her. He said, "I should kill you right now." As this was going on, Clark was searching the dresser drawers and Webster's purse. He also put Camry back in the bathroom when she attempted to get out.

The pillowcase was again placed on Webster's head. Her face was pushed to the floor. She was hit in the head with the gun a number of times. She saw blood pouring from her head into the pillowcase, and then she lost consciousness.

Defendant Evans found some suckers in the room. She ate the candy off the plastic sticks and gave some of the sticks to defendant Armstrong and Ebony. Webster was placed on the bed. Armstrong, Evans and Ebony lit the plastic sticks on fire and

dripped the melting plastic onto Webster's face, hands and legs. They kept asking her why she was in the witness protection program and who she was "snitching" on.

Ebony pulled the telephone cord from the wall. Defendant Armstrong grabbed it and tried to strangle Webster with it. Ebony then took it and tried to strangle Webster with it. When it broke, Ebony and defendant Evans took the pieces and whipped Webster on her back and legs.

Defendant Armstrong's cell phone rang. He answered and said, "Yeah, we found her. She's right here." He handed the phone to Webster. It was Craigen. He asked her why she hadn't visited or deposited money for him, and why she was playing with his feelings. Webster said she would do whatever he wanted if he would make the others leave. He told her to put Armstrong back on the phone. She gave the phone back to Armstrong. She heard him ask whether they should kill her.

Clark said that Webster knew where defendants lived, so they should do what they had to do. Defendant Armstrong said the gun was too loud. Defendant Evans made Webster hold three pillows in front of her face while Armstrong pointed the gun at her. She did this for several minutes, but Armstrong did not shoot.

Defendant Evans then made Webster change her shirt, which was covered with blood. Ebony sprinkled soap powder on the carpet, so that Webster could clean the blood from it. Defendants, Clark and Ebony gathered up Webster's clothes and the bloody sheets and placed them in a bag. They took Webster's wallet, identification card, and check cashing card, Detective Bolan's business card, papers with her social worker's telephone number and address on them, and Webster's money. They told Webster that if she told anyone what they did, they would go after her family. If asked, she should say it was her baby's father.

After the four left, Webster waited about five minutes, then took Camry and went to the front desk. Hotel employees called the police. Webster was taken to the hospital by ambulance and remained there for about a week. She suffered a fractured cheek bone, a subdural hematoma, 187 burns from the melted plastic and other injuries.

Detective Bolan was notified. He went to the Beverly Garland Hotel, where he supervised a search of Webster's room. He found bloody bedding, the cut telephone cord and burned plastic sticks.

Detective Jeffrey Sandefur obtained a search warrant and supervised a search of defendant Armstrong's home, vehicle and cell phone records. Police found Webster's identification card, check cashing card, papers and Detective Bolan's card in Armstrong's bedroom. His cell phone records showed several calls to the Beverly Garland Hotel and a call to Evans on May 1. Clark's fingerprint was found inside Armstrong's vehicle. A subsequent search of Evans's bedroom produced a piece of paper with Clark's name on it. A search of Craigen's jail cell produced a piece of paper with Webster's name and an address.

After defendants were arrested, defendant Evans spoke to Detective Sandefur. She said that Webster invited her to the Beverly Garland Hotel so that Evans could braid her hair. While Evans was there, she got into a fight with Webster, punching and kicking her. She denied burning Webster. During a break in the interview, she told an officer that she was being accused of burning Webster with sucker sticks on her face, arms and legs. Detective Sandefur had not mentioned anything about sucker sticks.

Defense

Defendant Armstrong was with his girlfriend, Jennifer Reyes (Reyes), at the home of her friend, Marina Armijo (Armijo), from 3:00 p.m. to 10:30 p.m. on May 1, 2002. Reyes and Armijo saw him use his cell phone while he was there. After Armstrong was arrested, Reyes and Armijo did not tell the police he had been with them because they were afraid the police would not believe them.

Reyes had met Webster when defendant Armstrong drove Webster various places, including to the jail to put money on Craigen's account. After they drove Webster back to her hotel, Reyes noticed some identification cards and other papers in the back seat of Armstrong's vehicle. She gathered them together and gave them to Armstrong when they got back to his room.

Linda West (West), defendant Evans's mother, allowed Webster and Camry to stay in her home in late 2001 and early 2002. On several occasions, she observed Evans and Webster in bed together, engaging in sexual activity. West also knew defendant Armstrong and Craigen and friends of Evans's.

Dr. Lawrence Wells treated Webster in the emergency room on May 1, 2002. When he asked her who inflicted her injuries, she said she did not know.

CONTENTIONS

Defendant Armstrong contends the personal firearm use enhancement on his torture conviction under Penal Code section 12022.53, subdivision (b), must be stricken, in that it was not pled in the information. We disagree, in that the failure to plead the enhancement in the information did not prejudice defendant.

Defendant Armstrong further contends the evidence is insufficient to support the personal gun use enhancement on his conviction of the false imprisonment of Camry. We agree the evidence is insufficient.

Defendant Armstrong asserts the trial court erred in allowing the prosecutor to bring in too much information about Craigen's triple murder case, in that the evidence was extremely prejudicial and inflammatory and violated defendant's due process right to a fair trial. We disagree that defendant was prejudiced by the admission of the evidence.

Defendant Evans contends the trial court erred prejudicially by giving the group beating instruction, CALJIC No. 17.20, to the jury. We disagree, in that the instruction has been upheld as a correct statement of the law.

Both defendants contend the trial court erred in failing to stay their sentences on the robbery charge under Penal Code section 654. The contention lacks merit.

Finally, defendants assert that under *Blakely v. Washington, supra*, ___ U.S. ___ [124 S.Ct. 2531], imposition of the upper term sentence for their robbery convictions and defendant Armstrong’s enhancement for personal use of a firearm in connection with his false imprisonment of Camry violated their Sixth Amendment right to a jury trial. We agree.

DISCUSSION

Personal Firearm Use Enhancement under Penal Code Section 12022.53, Subdivision (b) on Torture Conviction—Defendant Armstrong

In the information, a personal firearm use allegation under Penal Code section 12022.53, subdivision (b), was included with the robbery charge only, not the torture charge. The summary contains an allegation that a principal was armed with a firearm during the commission of the crime. (*Id.*, § 12022, subd. (a)(1).) Personal use allegations under Penal Code section 12022.5, subdivision (a)(1), were included with the burglary, assault and false imprisonment charges.

The jury was instructed as to personal use of a firearm (CALJIC No. 17.19). It was given the option of finding, and did find to be true, an allegation of personal firearm use under Penal Code section 12022.53, subdivision (b), as to the torture charge.

Due process requires that a defendant be given notice of the charges against him and the opportunity to defend against them. (*People v. Jones* (1990) 51 Cal.3d 294, 317.) He must have a reasonable opportunity to prepare and present his defense and cannot be taken by surprise by evidence offered at trial. (*Ibid.*) This requirement applies to enhancements as well as substantive charges. (*People v. Hernandez* (1988) 46 Cal.3d 194, 208.)

The Penal Code does not require any specific language to be used in the information. Neither does it require enumeration of the specific code section under which the defendant is charged. (Pen. Code, §§ 952, 958; *People v. Thomas* (1987) 43 Cal.3d 818, 826.) For the most part, it is the transcript of the preliminary hearing, rather

than the information, which provides defendant with notice of the criminal acts against which he must defend. (*People v. Jones, supra*, 51 Cal.3d at p. 317; see, e.g., *People v. Holt* (1997) 15 Cal.4th 619, 672-673.)

Only where a statute requires that an enhancement be pled and proved must it be pled specifically in the information for the enhancement to be imposed. (*People v. Mancebo* (2002) 27 Cal.4th 735, 743.) Penal Code section 12022.53 contains a pleading and proof requirement in subdivision (e) only, which is inapplicable here.¹ Subdivision (b) does not include a pleading and proof requirement.

There is nothing in the information which gave defendant notice that he was being charged with a firearm use enhancement under Penal Code section 12022.53, subdivision (b), on the torture charge. The information as a whole, however, gave defendant notice that he was being charged with firearm use. The preliminary hearing provided notice that Webster was claiming defendant drew the gun during his initial beating of her and before he began burning her.

Penal Code section 960 provides: “No accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits.” Defendant points to nothing he would have done differently with respect to his defense had the information contained a firearm use enhancement on the torture charge. His defense was one of alibi. In closing argument, his attorney focused on Webster’s lack of credibility and her motivation for lying about defendant. His attorney specifically stated, “I’m not going to go into the charges,” and he did not address the individual charges and enhancements.

Any deficiencies in the information simply did “not prejudice a substantial right of the defendant upon the merits.” (Pen. Code, § 960.) He had the requisite notice and opportunity to defend. (*People v. Holt, supra*, 15 Cal.4th at pp. 672-673.)

¹ Subdivision (e) of Penal Code section 12022.53 applies to a principal in a crime committed for the benefit of a criminal street gang.

Sufficiency of the Evidence to Support the Gun Use Enhancement as to the False Imprisonment of Camry—Defendant Armstrong

When the sufficiency of the evidence is challenged, the question on appeal is whether the conviction is supported by substantial evidence, i.e., evidence from which a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt. (*People v. Hill* (1998) 17 Cal.4th 800, 848-849.) “In making this determination, we ““must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.”” [Citation.]” (*People v. Rayford* (1994) 9 Cal.4th 1, 23; accord, *People v. Cuevas* (1995) 12 Cal.4th 252, 260-261.)

In order to find defendant Armstrong personally used a firearm in the false imprisonment of Camry, the jury was required to find that defendant “intentionally displayed a firearm in a menacing manner, intentionally fired it, or intentionally struck or hit a human being with it.” (CALJIC No. 17.19.) Defendant did not fire the gun or strike Camry with it. The question thus is whether defendant intentionally displayed his gun in the commission of the false imprisonment of Camry. (Pen. Code, § 12022.5, subd. (a)(1).)

The People acknowledge that the evidence established that defendant Evans placed Camry in the bathroom before defendant Armstrong drew his gun. There additionally was evidence that Camry attempted to leave the bathroom a number of times thereafter, but Clark put her back in the bathroom when she did so. There is no evidence that defendant displayed the gun to her in order to get her to return to the bathroom.

The People argue that the jury reasonably could infer that Camry’s observation of defendant Armstrong holding the gun “caused the child to surrender to demands that she return to the bathroom after each attempt to flee.” This is not a reasonable inference; it is pure speculation. The People point to no evidence that Camry observed the gun.

We agree with defendant that the evidence is insufficient to support the gun use enhancement to his conviction of the false imprisonment of Camry. Accordingly, it must be stricken.

Evidence of Craigen’s Triple Murder Case—Defendant Armstrong

Defendant Armstrong contends the trial court erred in admitting evidence concerning his brother’s triple murder case, in that the evidence was more prejudicial than probative. Specifically, he contends he was “highly damaged by the prosecution’s juxtaposing his case to his brother’s. The numerous references and vivid details about Craigen’s case could have done nothing less than inflame the jury against defendant.”

Evidence Code section 352 provides the trial court with the discretion to exclude evidence if the probability of undue prejudice resulting from its admission substantially outweighs its probative value. Unduly prejudicial evidence is that which “uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues.” (*People v. Yu* (1983) 143 Cal.App.3d 358, 377.)

Defendant Armstrong tacitly acknowledges that evidence concerning Craigen’s case was relevant. It explained the reason for defendant’s actions—protection of his brother’s interests. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1118.) He claims, however, that evidence of the details of the case were more prejudicial than probative, and their admission therefore constituted an abuse of discretion.

Whether or not all the details of Craigen’s case were necessary for the jury’s understanding of the reasons for defendant’s actions, we fail to see how defendant was prejudiced by their admission. Evidence as to *Craigen’s* misdeeds would not tend to “evoke an emotional bias against *defendant* as an individual.” (*People v. Yu, supra*, 143 Cal.App.3d at p. 377, italics added.) There was no evidence of any involvement by defendant in Craigen’s crimes, no evidence that would lead the jury to hold Craigen’s crimes against defendant.

It is clear the jury believed Webster and the evidence tying defendant to the crimes against her, and it disbelieved defendant’s alibi witnesses and explanations for that

evidence. Under the circumstances, it is not reasonably probable defendant would have been acquitted had the jury not been exposed to detailed evidence concerning Craigen's crimes. Defendant was not deprived of a fair trial by the admission of the evidence, and so reversal is not required. (*People v. Marks* (2003) 31 Cal.4th 197, 226-227; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

CALJIC 17.20—Defendant Evans

The trial court instructed the jury pursuant to CALJIC No.17.20: “It is alleged as to both defendants that in the commission of the crimes charged the defendants personally inflicted great bodily injury on Tyiska Webster, within the meaning of Penal Code Section 12022.7. [¶] If you find a defendant guilty of the crimes charged, you must determine whether the defendants personally inflicted great bodily injury on Tyiska Webster in the commission or attempted commission of the crimes. [¶] . . . [¶]

“When a person participates in a group beating and it is not possible to determine which assailant inflicted a particular injury, he or she may be found to have personally inflicted great bodily injury upon the victim if 1) the application of unlawful physical force upon the victim was of such a nature that, by itself, it could have caused the great bodily injury suffered by the victim; or 2) that at the time the defendant personally applied unlawful physical force to the victim, the defendant knew that other persons, as part of the same incident, had applied, were applying, or would apply unlawful physical force upon the victim and the defendant then knew, or reasonably should have known, that the cumulative effect of all the unlawful physical force would result in great bodily injury to the victim. . . .”

Defendant contends that CALJIC No. 17.20 is contrary to the law. We disagree. It has been upheld as a correct statement of the law. (*People v. Banuelos* (2003) 106 Cal.App.4th 1332, 1337-1338, review den. June 11, 2003.)² Inasmuch as defendant does

² The question whether CALJIC No. 17.20 is a correct statement of the law currently is before the Supreme Court in *People v. Modiri* (2003) 112 Cal.App.4th 123,

not otherwise challenge the application of CALJIC No. 17.20 to this case, we decline to reverse based upon use of this instruction.

Penal Code Section 654

Penal Code section 654 provides: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . .” (Subd. (a).) The section protects against multiple punishment for “multiple statutory violations produced by the ‘same act or omission.’ [Citation.] However, because the statute is intended to ensure that defendant is punished ‘commensurate with his culpability’ [citation], its protection has been extended to cases in which there are several offenses committed during ‘a course of conduct deemed to be indivisible in time.’ [Citation.]” (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

In order to determine whether a course of conduct is indivisible, the court looks to “defendant’s intent and objective, not the temporal proximity of his offenses.” (*People v. Harrison, supra*, 48 Cal.3d at p. 335.) Thus, “if all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.] [¶] If, on the other hand, defendant harbored ‘multiple criminal objectives,’ which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, ‘even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.’ [Citation.]” (*Ibid.*)

Whether a course of conduct is indivisible for the purpose of section 654 is primarily a factual determination for the trial court. (*People v. Harrison, supra*, 48

review granted December 23, 2003, S120238. *Modiri* held that CALJIC No. 17.20 was, in part, an incorrect statement of the law. (*Modiri, supra*, at p. 137.)

Cal.3d at p. 335; *People v. Nelson* (1989) 211 Cal.App.3d 634, 638.) The trial court's finding must be upheld on appeal if supported by substantial evidence. (*Nelson, supra*, at p. 638; *People v. Green* (1988) 200 Cal.App.3d 538, 543-544.)

Here, the trial court applied Penal Code section 654 to stay the sentences on defendant Armstrong's convictions of burglary, assault and false imprisonment of Webster and defendant Evans's convictions of burglary and assault. It did not stay the sentences on defendants' robbery convictions. It found that defendants harbored a separate intent in the commission of the robbery than they had in the commission of the other crimes. It found "that the robbery was almost an afterthought, it was done incidental to the torture. It was done when the defendants were leaving the hotel room. There was money taken, as well as the identification, and in all events, it is a separate crime."³

Webster testified that when defendants first entered her room, defendant Armstrong asked her why she was not taking care of Craigen by visiting him or putting money in his account. He wanted the money she had and asked her where her money was. While defendants were beating and interrogating her, Clark was looking through her drawers and her purse. He took her identification and money out of her purse. Her identification and other papers were taken at some point, as were her wallet and some of her clothes. In addition, defendant Evans took money from Webster's wallet, about \$180. No one told Evans to do this; she did it on her own.

The People acknowledge that the foregoing evidence does not support the trial court's finding "that the robbery was almost an afterthought, it was done incidental to the torture. It was done when the defendants were leaving the hotel room." They argue, however, that the evidence clearly establishes that defendants' objective in taking Webster's money was separate from their objective in beating Webster. Their intent in taking the money was to obtain money to put in Craigen's account. Their intent in

³ Defendants had argued that they took Webster's identification as part of their plan to intimidate her so that she would not testify against Craigen.

beating Webster was to convince her not to testify against Craigen. Thus, the People contend, substantial evidence supports the trial court's finding that the robbery was divisible from the other crimes and could be punished separately.

Defendants counter that the robbery was committed with the same intent as the other crimes. That intent was to intimidate, hurt and humiliate Webster so that she would not testify against Craigen. The robbery therefore "was an integral part of the whole picture, and not a separate crime with a different intent."

We agree with the People. The evidence supports the conclusion that defendants both wanted her money to put in Craigen's account and wanted to find out why she was in protective custody and ensure that she not testify against Craigen. In other words, they intended both to rob and to intimidate. Accordingly, the robbery may be punished separately. (Pen. Code, § 654; *People v. Harrison, supra*, 48 Cal.3d at p. 335.)

Blakely v. Washington

Blakely v. Washington, supra, ___ U.S. ___ [124 S.Ct 2531] was based on the Supreme Court's holding in *Apprendi v. New Jersey* (2000) 530 U.S. 466 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." (At p. 490.) In *Blakely*, the court explained "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation] and the judge exceeds his proper authority." (*Blakely, supra*, at p. ___ [124 S.Ct. at p. 2537].)

Under California's determinate sentencing law, the maximum sentence a trial court may impose without any additional findings is the middle term. (Pen. Code,

§ 1170, subd. (b); Cal. Rules of Court, rule 4.420(a).) The court may impose the upper term only if it makes additional findings of circumstances in aggravation. (*Ibid.*) Under *Blakely*, unless those circumstances are based on facts reflected in the jury verdict, imposition of the upper term violates the defendant's Sixth Amendment right to a jury trial, and the sentence is invalid. (*Blakely v. Washington, supra*, ___ U.S. at p. ___ [124 S.Ct at p. 2538].)

Here, the trial court imposed the high term sentences on defendants' robbery convictions and defendant Armstrong's firearm use enhancement on his sentence for the false imprisonment of Camry, finding the circumstances in aggravation greatly outweighed any mitigating circumstances. Specifically, it found defendants' intent to deter a witness was "especially evil" (Cal. Rules of Court, rule 4.421(a)(6)) and their torture of Webster was "extraordinarily gruesome." It found Webster was particularly vulnerable, in that she was pregnant and had her three-year-old child with her (*id.*, rule 4.421(a)(3)), and she was seriously injured (*id.*, rule 4.421(a)(1)). In addition, the crimes probably scarred Camry emotionally.

As to defendant Armstrong, the trial court additionally found that he was in a position of leadership (Cal. Rules of Court, rule 4.421(a)(4)), his criminal record was increasing (*id.*, rule 4.421(b)(2)) and he was on felony probation at the time he committed the crimes (*id.*, rule 4.421(b)(4)).

Inasmuch as we are reversing the finding that defendant Armstrong used a gun in the false imprisonment of Camry, we need not concern ourselves with the imposition of the upper term on that enhancement. As to the imposition of the upper term on defendants' robbery convictions, only one of the circumstances in aggravation recited by the trial court was based upon a factual finding by the jury, but that finding was made in connection with the torture count. In finding defendants guilty of torture, the jury necessarily found that defendants inflicted serious bodily injury on Webster. (Pen. Code, § 206; CALJIC No. 9.90.)

With respect to the robbery charge, the only factual findings the jury made related to being armed with or using a firearm, and enhancements were imposed based on these

findings. If an enhancement is imposed based on a fact found by the jury, that fact may not be used to aggravate a sentence. (Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rule 4.420(c).)

Pursuant to *Blakely*, defendants' upper term sentences for robbery, unsupported by factual findings by the jury, are invalid. Defendants must be resentenced in accordance with the principles set forth in *Blakely*.

The finding that defendant Armstrong used a gun in the false imprisonment of Camry (Pen. Code, § 12022.5, subd. (a)(1)) is reversed. Defendants' 5-year upper term sentences for robbery are reversed and the case is remanded for resentencing on the robbery convictions in accordance with the principles expressed herein. In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED

SPENCER, P.J.

We concur:

VOGEL, J.

MALLANO, J.