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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. RALPH CAMPA, Defendant and Appellant.	D042811 (Super. Ct. No. SCN155737)

APPEAL from a judgment of the Superior Court of San Diego County, Marguerite L. Wagner, Judge. Affirmed in part; reversed in part.

Ralph Campa appeals from his convictions of unlawful sexual intercourse with a minor under age 16 by a perpetrator age 21 or older (Pen. Code,[1] § 261.5, subd. (d)) and lewd or lascivious act with a minor age 14 or 15 by a perpetrator at least 10 years older (§ 288, subd. (c)(1)). He contends his convictions should be reversed because: (1) there was no proof he knew the victim was under age 16 and the jury was not instructed on this

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

issue; (2) the trial court did not give a sua sponte instruction on a mistake of fact defense based on evidence that he believed the victim was at least 18 years old; (3) he was improperly convicted of a necessarily included offense; and (4) hearsay statements in letters written by the victim were improperly admitted into evidence. We reject these arguments.

As to sentencing, we find the court's imposition of upper term sentences violated the principles in the United States Supreme Court's recent decision in *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531]. We reverse the sentence and remand for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

In 2001, S., age 14 or 15, developed a friendship with 42-year-old Campa. S. and Campa frequently used methamphetamine together. S. was addicted to the drug and would try to obtain it whenever she could; she used it on an almost daily basis, both with and without Campa. Because S. lacked money, Campa was usually the one who provided the drugs when they got together.

Sometime in 2001, S. commenced a sexual relationship with Campa. They engaged in sexual intercourse in a shed in the backyard of the home Campa shared with his parents, wife, and son. During the time period between 2001 when they commenced the sexual relationship until April 2002 (when the police were notified), they had sexual intercourse about 15 times.

On April 9, 2002, S. went to Campa's house around 1:00 a.m. Campa and S. had an argument and Campa called her parents. When S. returned home around 4:30 a.m.,

her step-father noticed that she appeared to be high on drugs. He told her she was in violation of her probation for using drugs, and if she did not tell him what was going on he would call her probation officer. According to S., she then disclosed her sexual relationship with Campa to her parents and the police because she was angry at Campa for calling her parents.

S. told the police that the last time she had sex with Campa was on April 7, 2002. At the officer's request, S. gave the police the underpants she had been wearing on April 7. A few weeks after the police were called, Campa and S. again engaged in sexual intercourse, with S. promising she would never testify against Campa.

Forensic testing revealed a semen stain on the underwear provided by S. to the police. DNA from the stain matched S.'s and Campa's DNA. The DNA expert testified that although a DNA match does not absolutely identify a person, it is based on the statistical probability of a match in 1 out of every 36 to 860 billion unrelated persons.[2]

Campa defended the charges against him on the theory that he never had a sexual relationship with S. To support this defense, S.'s aunt testified that in March 2002 she (the aunt) began a sexual relationship with Campa. The aunt claimed that the underwear S. provided to the police belonged to her (the aunt). The aunt stated that in April 2002, she wore the underwear after having sexual intercourse with Campa, and then discovered the underwear was missing from her dirty laundry basket after S. visited her home the next day. To refute this testimony, the prosecution's DNA expert testified that the DNA

stain on the underwear contained no indications that it included DNA from a third individual apart from S. and Campa.

Campa was convicted of unlawful sexual intercourse with a minor under 16 years of age by a perpetrator 21 years or older (§ 261.5, subd. (d)) and lewd or lascivious act on a child 14 or 15 years of age by a perpetrator at least 10 years older (§ 288, subd. (c)(1)). The jury deadlocked on a charge of furnishing methamphetamine to a minor, and this charge was dismissed. Campa was sentenced to the upper term of four years for the unlawful sexual intercourse conviction. An upper term sentence of three years was stayed on the lewd act conviction under section 654. Before trial, Campa pleaded guilty to methamphetamine possession; he received a consecutive, eight-month (one-third the middle term) sentence for this conviction. (Health & Saf. Code, § 11377, subd. (a); § 18.)

DISCUSSION

CONVICTIONS

I. *Alleged Lack of Evidence and Improper Instruction Regarding Knowledge of Age of Victim for Unlawful Sexual Intercourse*

Campa argues his conviction under section 261.5, subdivision (d) must be reversed because (1) there was no proof that he knew the victim was under age 16, and (2) the trial court's instruction regarding the elements of the crime created a conclusive presumption that he knew the victim was under age 16. The premise of his argument is

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2 The expert did not perform a calculation of the statistical probability for related

that *knowledge* of the victim's age is an element of the offense of unlawful sexual intercourse, and thus there must be evidence and instruction on this issue. The argument is unavailing.

Section 261.5, subdivision (a) defines the crime of unlawful sexual intercourse as "an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor," and defines a minor as a person under the age of 18. Section 261.5 sets three levels of punishment for unlawful sexual intercourse depending on various age considerations—(1) if the age difference between the minor and the perpetrator is three years or less, the crime is a misdemeanor (§ 261.5, subd. (b)); (2) if the minor is more than three years younger than the perpetrator, the crime may be a felony subject to a prison term of 16 months, two years, or three years (§§ 261.5, subd. (c), 18); and (3) if the minor is under 16 years of age and the perpetrator is 21 years or older, the crime may be a felony subject to a prison term of two, three, or four years (§ 261.5, subd. (d)).[3]

To sustain a conviction under section 261.5, the victim's *age* is an element of the crime which must be proven by the prosecution. However, there is nothing in section 261.5 which requires the prosecution to prove that that the defendant *knew* the victim's age as an element of the offense. Although under *People v. Hernandez* (1964) 61 Cal.2d 529, 534, a good faith reasonable belief that the victim is at least 18 years old is a *defense*

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persons.

to a section 261.5 charge, the courts have long recognized that the prosecution's burden of proof is satisfied upon a showing that an act of sexual intercourse with a minor has occurred. (See *In re Jennings* (2004) 34 Cal.4th 254, 276, 279.) As stated in *People v. Zeihm* (1974) 40 Cal.App.3d 1085, 1089, disapproved on other grounds in *People v. Freeman* (1988) 46 Cal.3d 419, 428, fn. 6: "belief as to age is a matter of defense and is not part of the prosecution's burden of proof." Thus, the availability of the mistake of age defense set forth in *Hernandez* does *not* interpose a knowledge of age element on unlawful sexual intercourse. (Cf. *In re Jennings, supra,* 34 Cal.4th at pp. 260, 276, 279-280 [although mistake of fact defense may be raised by defendant, prosecution need not prove knowledge of age to establish offense of purchasing alcohol for person under age 21].)

Campa argues that the long-established definition of unlawful sexual intercourse must now be changed given the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Blakely v. Washington, supra,* 124 S.Ct. 2531 (*Blakely*). The argument is misplaced. *Apprendi* and *Blakely* require that a jury, not a judge, find all the facts necessary for conviction and punishment for an offense, and proscribe sentencing schemes which in effect reclassify elements of an offense as sentencing factors to allow a judge to impose a sentence beyond the statutory maximum without a jury finding that the factors exist. (See *Blakely, supra*, 124 S.Ct. at pp. 2536, 2537, fn. 6, 2538-2540, & fn. 11.) Although *Apprendi* and *Blakely* limit a state

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3 Section 261.5, subdivisions (c) and (d) may also be charged as a misdemeanor and

legislature's right to define sentencing factors to be found by a judge, the decisions do *not* limit a state legislature's right to define the elements of an offense. Here, the California Legislature has defined unlawful sexual intercourse without including a knowledge element in the offense. Thus, the fact of a defendant's knowledge is not necessary for a conviction. The punishment imposed under section 261.5, subdivision (d) is based on a jury finding of the statutorily-defined elements of the offense, thus fully comporting with *Apprendi* and *Blakely*.

In sum, because knowledge of the victim's age is not an element of unlawful sexual intercourse, we need not further consider Campa's argument that the evidence did not show he knew the victim was under age 16. Further, the instruction setting forth the elements of the offense was properly confined to the statutory definition of the crime.[4]

II. *Failure to Instruct on Mistake of Age*

Campa argues the trial court had a sua sponte duty to instruct the jury on the mistake of age defense based on a good faith, reasonable belief that the victim was 18 years old or older. (CALJIC No. 10.67.)

A trial court has a sua sponte duty to instruct on a defense if it appears the defendant is relying on the defense, or if there is substantial evidence to support the defense and the defense is not inconsistent with the defendant's theory of the case.

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punished by a maximum of one year in jail.

4 The complained-of instruction simply delineates the statutory definition of the crime, i.e., the perpetrator is 21 years or older, the victim is under age 16, and the two persons are not married to each other. (See CALJIC No. 10.40.2.)

(*People v. Breverman* (1998) 19 Cal.4th 142, 157.) Even assuming arguendo there was substantial evidence to support a finding of mistake of age,[5] Campa's defense was that he never had sexual intercourse with S. Campa fails to explain how a defense that he had intercourse with a person he believed was at least 18 years old can be consistent with a defense that he never had intercourse with the person. Given the inconsistency between the two defenses, the court did not have a sua sponte duty to give the mistake of age instruction.

III. *Conviction of Both Unlawful Sexual Intercourse and Lewd Conduct and Failure to Instruct on Lesser Included Offenses*

Campa asserts that unlawful sexual intercourse and lewd conduct are necessarily included offenses of each other. Based on this argument, he asserts (1) he was improperly convicted of both offenses, and (2) the failure to instruct the jury that it had to select one of the two offenses requires reversal of the two convictions.

A defendant may be subjected to multiple convictions on counts arising from a single act or course of conduct, but to avoid multiple punishment the sentences must be stayed on all but one of the convictions. (§§ 954, 654; *People v. Ortega* (1998) 19 Cal.4th 686, 692.) However, an exception to the rule allowing multiple convictions for a single act or course of conduct arises when the convictions involve necessarily included offenses. "'Although the reason for the rule is unclear, [the California Supreme Court]

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[5] It is doubtful that the evidence was sufficient to require a sua sponte mistake of age instruction because it was apparently undisputed that S. communicated with Campa

has long held that multiple convictions may *not* be based on necessarily included offenses.'" (*People v. Ortega, supra,* 19 Cal.4th at p. 692, italics in original.) The test of a necessarily included offense """is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense."" (*Ibid*.) Under the "elements test" for necessarily included offenses, the language of the statutes is examined to ascertain whether "the crimes are defined in such a way as to make it impossible to commit the greater offense without also committing the lesser." (*People v. Miranda* (1994) 21 Cal.App.4th 1464, 1467.)

To support his argument that the offenses here are necessarily included, Campa points to the statutory definition of lewd conduct which includes a reference to unlawful sexual intercourse. Section 288, subdivision (a) defines the proscribed lewd conduct as "any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof . . . with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child . . . ." Because unlawful sexual intercourse is among the offenses defined in Part 1, he asserts that if he committed the lewd conduct offense he necessarily committed the unlawful sexual intercourse offense.

The argument fails because it does not fully consider the elements of the offenses. Section 261.5 requires the act of sexual intercourse. A defendant can perform a lewd act

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from juvenile hall during the course of their sexual relationship. Thus, Campa would have known she was a minor.

on a minor short of intercourse, thereby being guilty of lewd conduct without being guilty of unlawful sexual intercourse.

To the extent Campa also suggests that lewd conduct is an offense necessarily included in unlawful sexual intercourse, this argument also fails. In *People v. Pearson* (1986) 42 Cal.3d 351, 355-356, the court held that section 288 lewd conduct was not a lesser included offense of statutory sodomy because the former requires specific intent to sexually arouse whereas the latter merely requires general intent. To illustrate how statutory sodomy could be committed without the intent specified in section 288, *Pearson* explained: "For example, an act of sodomy can be committed for wholly sadistic purposes, or by an individual who lacks the capacity to form the required specific intent" for the lewd conduct offense. (*Id*. at p. 356.) This conclusion applies equally to the crime of unlawful sexual intercourse vis-à-vis lewd conduct.

If the two offenses do not satisfy the "elements" test, Campa alternatively argues that they satisfy the "accusatory pleading" test for necessarily included offenses. The accusatory pleading test examines the language of the information to ascertain whether the greater offense is described "'in such a way that if committed as specified the lesser offense is necessarily committed.'" (*People v. Miranda, supra,* 21 Cal.App.4th at p. 1467.)[6] Here, the information charges lewd conduct based on sexual intercourse. Thus, if the defendant committed the offense of lewd conduct by sexual intercourse, he necessarily committed the offense of unlawful sexual intercourse. However, as we shall

explain, we conclude the accusatory pleading test is inapplicable to the issue of multiple convictions based on charged offenses.

As recently noted by the California Supreme Court, the accusatory pleading test is generally used to evaluate whether a defendant has been given notice of an *uncharged* lesser offense for purposes of deciding whether to instruct on the uncharged lesser offense. (*People v. Montoya* (2004) 33 Cal.4th 1031, 1035; see also *People v. Miranda, supra*, 21 Cal.App.4th at p. 1467.) The uncharged lesser offense instruction is properly given if the defendant has received notice of the need to defend against the uncharged offense either (1) from the statutory definition of the charged offense (the "elements" test), or (2) from the language of the accusatory pleading (the "accusatory pleading" test). (*People v. Lohbauer* (1981) 29 Cal.3d 364, 368-369.) Because the notice/due process rationale underlying the accusatory pleading test has no applicability to the issue of whether the defendant may be convicted of multiple *charged* offenses, several courts have concluded there is no reason to apply the accusatory pleading test to the issue of multiple charged convictions. (*People v. Miranda, supra,* 21 Cal.App.4th at p. 1467; *People v. Scheidt* (1991) 231 Cal.App.3d 162, 168-170; *People v. Watterson* (1991) 234 Cal.App.3d 942, 947, fn. 15.) In *Montoya*, the California Supreme Court noted the Court of Appeal decisions holding that the accusatory pleading test did not apply to the multiple convictions issue, but did not decide if these holdings were correct because it was not necessary to do so in the case before it. (*People v. Montoya, supra*, 33 Cal.4th at

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6 Although under this test the court examines the pleadings, it does not examine the

pp. 1035-1036.) However, a concurring opinion in *Montoya* "emphasize[s] the force of the argument against applying the accusatory pleading test in deciding whether conviction of two *charged* offenses is proper." (*Id*., concur. op. Chin, J., pp. 1038-1039; see also *People v. Pearson, supra*, 42 Cal.3d at p. 356, fn. 2.)

Although dicta in several California Supreme Court decisions has assumed the accusatory pleading test applies to the issue of multiple convictions for charged offenses (see *People v. Ortega, supra,* 19 Cal.4th at p. 698; *People v. Sanchez* (2001) 24 Cal.4th 983, 988), it is clear from *Montoya* that this assumption is subject to question. Pending resolution of this issue by the Supreme Court, we agree with the analysis in *Scheidt* and *Miranda*, and apply it here. Accordingly, the fact that the information charged lewd conduct by sexual intercourse did not trigger the rule precluding multiple convictions for necessarily included offenses.

Finally, to support his argument against multiple convictions, Campa cites *People v. Greer* (1947) 30 Cal.2d 589, 601-603, overruled on other grounds in *People v. Fields* (1996) 13 Cal.4th 289, 308, fn. 6, and *People v. Nicholson* (1979) 98 Cal.App.3d 617, 624-626, which hold that even though statutory rape (or attempted statutory rape) and lewd conduct technically are not necessarily included offenses, only one conviction is permissible when the two counts are premised on the same sexual act. This "specifically included" rule was expressly rejected in *People v. Pearson*, *supra*, 42 Cal.3d at pages

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evidence presented at trial. (*People v. Ortega, supra*, 19 Cal.4th at p. 698.)

356-358, where the court clarified that multiple convictions were permissible for the offenses as long as multiple punishment was not imposed.

In sum, because under the elements test the offenses are not necessarily included in each other, there was no error in the dual convictions, one of which was stayed under section 654 to prevent double punishment. Further, there was no need to instruct the jury that it could find guilt of only one of the two offenses.[7] Given our holding, we need not evaluate various other arguments raised by the People, including the contention that even if the offenses were necessarily included under the accusatory pleading test, multiple convictions were proper because each conviction was premised on a distinct act of sexual intercourse. (See *People v. Ortega, supra*, 19 Cal.4th at pp. 692, 699.)

IV. *Admission of Letters*

Campa argues the court erred in admitting hearsay letters written in November and December 2001 by S. to Campa. The letters were found by the police in Campa's bedroom dresser drawer, and included a statement by S. that she loved Campa most for his personality, not just his penis. The prosecutor contended the letters were not offered for the truth of the matter that S. loved Campa's personality more than his body part, but to corroborate that S.'s relationship with Campa was sexual. The prosecutor also argued for admission because Campa retained the letters in his dresser drawer, thus supporting

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[7] Without citation to authority or developed argument, Campa also argues that the court confused the jury by improperly instructing that battery and assault were lesser included offenses of the charged offenses. Because of his cursory presentation of this issue, we decline to address it. (*People v. Dougherty* (1982) 138 Cal.App.3d 278, 282-283.)

an inference about the nature of the connection between S. and Campa. Although stating its discomfort with its ruling, the court concluded the letters were admissible to corroborate the sexual relationship. Based on this ruling, the prosecutor's closing argument to the jury referred to S.'s letters to support the charge that S. and Campa had a sexual relationship.

Inadmissible hearsay evidence is evidence of a statement that was made other than by a witness while testifying that is offered to prove the truth of the matter stated. (Evid. Code, § 1200, subds. (a), (b).) We agree with Campa that the references in the letters to the sexual relationship were offered for the truth of the matter. The primary disputed issue at trial was whether S. and Campa had a sexual relationship. The hearsay statements in the letters referred to a sexual relationship with Campa, and they were offered to prove that there was a sexual relationship. The mere fact that the precise details of the statements were not offered for the truth does not detract from the prosecutor's clear purpose of offering the statements for the truth of the sexual relationship. (See *People v. Baeske* (1976) 58 Cal.App.3d 775, 780.) Although the letters may have also been admissible for some nonhearsay purpose such as the fact that Campa kept love letters from S. in his dresser drawer, the court's ruling broadly allowed the statements in the letters to be used as corroborative evidence of the sexual relationship and the prosecution used them for this purpose in closing argument to the jury.

Notwithstanding the error in the court's reasoning, the statements were admissible under the prior consistent statement exception to the hearsay rule. A witness's prior

consistent statements are admissible to rebut a charge that the witness had a motive to fabricate if the prior statements were made before the alleged motive to fabricate arose. (Evid. Code, §§ 791, subd. (b), 1236; *People v. Noguera* (1992) 4 Cal.4th 599, 628-629; *People v. Fair* (1988) 203 Cal.App.3d 1303, 1309, overruled on other grounds in *People v. Brown* (1994) 8 Cal.4th 746, 756, 759.) Defense counsel's cross-examination suggested that S. falsely reported a sexual relationship with Campa on April 9, 2002, because she was angry at Campa for calling her parents and thought she would go to juvenile hall for her drug usage if she did not tell her parents what was occurring with Campa. The letters referring to the sexual relationship, written before April 9, could have been admitted as prior consistent statements to rebut this charge of motive to lie.

Alternatively, even if there was no basis to admit the statements in the letters for the truth of the matter, the strength of the evidence that there was a sexual relationship supports a finding of no prejudice. The DNA match on the underwear provided compelling evidence that sexual intercourse occurred between S. and Campa. Given the strong corroboration provided by the DNA evidence, we are satisfied the jury would have credited S.'s testimony on this issue even if it had not been presented with the corroborating information in the letters.

SENTENCE

The court imposed a four-year upper term on the unlawful sexual intercourse count, and stayed a three-year upper term on the lewd act count under section 654. Our court recently considered the impact of *Blakely v. Washington, supra,* 124 S.Ct. 2531 on California's sentencing scheme. In *People v. George* (2004) 122 Cal.App.4th 419, 424-

425, we concluded that *Blakely* is applicable to upper terms and the sentencing error required reversal. We adhere to this holding here.[8]

The Blakely Decision

In *Blakely,* the United States Supreme Court held the defendant's Sixth Amendment right to trial by jury was violated when a Washington sentencing court imposed an "exceptional" sentence that was three years beyond the state's "standard range" maximum for the crime. (*Blakely, supra,* 124 S.Ct. at pp. 2535-2538.) The exceptional sentence was based on the sentencing court's factual finding of an aggravated circumstance of deliberate cruelty. (*Ibid*.) *Blakely* applied the rule of *Apprendi v. New Jersey, supra,* 530 U.S. at p. 490, which provides: "'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Blakely, supra*, 124 S.Ct. at p. 2536.) The *Blakely* court defined the "'statutory maximum'" 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*." (*Id.* at p. 2537.) That is, the test to determine the unconstitutionality of a sentence derived from factual findings

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8 A split exists in this court on the applicability of *Blakely*. In *People v. Wagener* (2004) 123 Cal.App.4th 424, this court held *Blakely* was inapplicable to California's middle/upper term sentencing scheme. We decline to follow *Wagener*. The issue of *Blakely*'s application to California's sentencing scheme is currently pending before the California Supreme Court. (*People v. Towne*, review granted July 14, 2004, S125677; *People v. Black*, review granted July 28, 2004, S126182.)

We note that Campa does not contend *Blakely* applies to his consecutive sentence for drug possession. In any event, such an argument would be unavailing. (*People v.*

by a court rather than a jury is whether the sentence is "*greater than what state law authorize[s] on the basis of the verdict alone*." (*Id*. at p. 2538, italics added.) The *Blakely* court did not, however, limit all fact-finding by a sentencing judge—rather, distinguishing determinate from indeterminate sentencing schemes, the court explained that a judge may impose a sentence based on additional facts as long as the sentence does not exceed the sentence to which the defendant has a *legal right* under the state's statutory scheme. (*Id*. at p. 2540 [facts ruled upon by court under indeterminate scheme do not violate jury trial right because the facts "do not pertain to whether the defendant has a legal *right* to a lesser sentence"].)

Applicability of Blakely to Upper Term Sentences

Under California's determinate sentencing law, where a penal statute provides for three possible terms for a particular offense, the sentencing court is required to impose the middle term unless it finds, by a preponderance of the evidence, that the circumstances in aggravation outweigh the circumstances in mitigation. (§ 1170, subd. (b); Cal. Rules of Court,[9] rule 4.420.) Because this sentencing scheme *requires* selection of the middle term unless the court finds aggravating or mitigating circumstances, the middle term is viewed as the sentence to which the defendant is presumptively entitled. (*People v. Avalos* (1984) 37 Cal.3d 216, 233; *People v. Reeder* (1984) 152 Cal.App.3d 900, 925; *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582-1583 ["midterm is

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Jaffe (2004) 122 Cal.App.4th 1559, 1589; *People v. Vaughn* (2004) 122 Cal.App.4th 1363, 1372.)

statutorily presumed to be the appropriate term"].) Further, in order to avoid punishing the defendant twice based on the same fact, a fact that is an element of the crime or the basis of an imposed enhancement may not be used to impose the upper term. (§ 1170, subd. (b); Rule 4.420(c) & (d); *People v. Scott* (1994) 9 Cal.4th 331, 350.)[10] Thus, the upper term cannot be based on matters included in the jury verdict—that is, the elements of the crime and imposed enhancements.

Although there are some differences between the Washington and California sentencing schemes, we conclude that for purposes of the core concerns set forth in *Blakely*, California's upper term sentencing scheme is comparable to the scheme evaluated in *Blakely*. The Washington sentencing court was authorized to impose an exceptional sentence based on a court finding of aggravating factors, which factors must be distinct from the elements of the crime used to compute the standard range sentence, and thus distinct from the matters encompassed within the jury verdict or guilty plea. (*Blakely, supra*, 124 S.Ct. at pp. 2535, 2537-2538.) Similarly, California courts are authorized to impose an upper term sentence based on a court finding of aggravating factors, which factors must be distinct from the elements of the crime and imposed enhancements encompassed within the jury verdict. In *Blakely*, the United States Supreme Court rejected the contention that the maximum term set forth in the exceptional sentence statute should be viewed as the statutory maximum, and instead concluded that

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9 Subsequent references to rules are to the California Rules of Court.

the statutory maximum was the term set forth in the standard range statute, because the latter is the only sentence which may be imposed "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Id.* at p. 2537, italics omitted.)

Absent direction from the California Supreme Court or Legislature, we are compelled to apply *Blakely's* holding here—i.e., the statutory maximum for an offense is not the upper term but rather is the middle term, because the latter is the presumptively correct term and is the only term that does not require findings beyond the jury verdict to justify its imposition. Accordingly, because the upper term increases the penalty beyond the statutory maximum, it cannot be imposed unless it is based on the fact of a prior conviction or facts found by the jury beyond a reasonable doubt. (*People v. George, supra,* 122 Cal.App.4th at p. 425.)

Analysis of Campa's Sentence

Having concluded that *Blakely* is applicable to California's upper term, we consider the upper terms selected here.

Preliminarily, we reject the People's argument that Campa has waived the issue by failing to raise an *Apprendi* objection to the trial court. As a federal court aptly stated, *Blakely* "worked a sea change in the body of sentencing law." (*U.S. v. Ameline* (9th Cir. 2004) 376 F.3d 967, 973, & fn. 2.) Prior to *Blakely*, it was widely assumed that the upper term was the statutory maximum within the meaning of *Apprendi.* (See, e.g., *In re*

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10 A court may utilize an enhancement to impose the upper term if it can, and does,

Varnell (2003) 30 Cal.4th 1132, 1142 [stating, without discussion, that upper term of three years was statutory maximum under *Apprendi*]; see § 18.) Campa was not required to anticipate an extension of *Apprendi* to California's middle/upper term sentencing scheme. The pragmatic waiver rule of *People v. Scott, supra,* 9 Cal.4th at page 353, which applies to sentencing issues that could have been corrected by the trial court, does not apply here. (*People v. George, supra,* 122 Cal.App.4th at p. 424.)

We now turn to the merits of Campa's sentence. Under *Blakely*, the Constitution requires a jury trial on facts (other than the fact of a prior conviction) which determine whether the defendant will be given a sentence greater than the statutory maximum. Based on our conclusion that the statutory maximum is the middle term, the trial court can only impose the upper term if it utilizes the fact of a prior conviction or matters included in the jury verdict.[11] Here, the court imposed upper terms based on findings that the victim was particularly vulnerable; the crime involved significant planning; the defendant's prior convictions were numerous; the defendant was on probation when he committed the offense; and the defendant's prior performance on probation was poor. Because at least some of the court's reasons for selecting upper terms included aggravating factors not encompassed within the jury verdict, Campa's jury trial rights were violated.

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strike the enhancement. (Rule 4.420(c).)

[11] For example, if a court strikes an enhancement found by the jury and then uses the enhancement to impose the upper term (rule 4.420(c)), this procedure would comply with *Blakely*'s jury-determination requirement.

We next consider whether the error requires reversal. The court relied on several factors which were not determined by a jury beyond a reasonable doubt, and we cannot conclude a jury would have found these facts to be true. Further, even though one aggravating factor is sufficient to justify an upper term (*People v. Osband* (1996) 13 Cal.4th 622, 730) and the sentencing court here referred to such permissible aggravating factors as numerous prior convictions and probation status (see *People v. George, supra*, 122 Cal.App.4th at p. 426), the court was unaware that it could not consider the wide array of aggravating factors formerly available. We are unable to confidently conclude that the court would have selected the upper terms had it been apprised that the only permissible aggravating factors were matters within the prior conviction exception and matters included within the jury verdict. We are not persuaded by the People's argument that because here the court relied on two permissible aggravating factors (rather than merely one permissible factor as in *People v. George*), the error was harmless. Selection of the upper term may be both a qualitative and quantitative process (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401), and we decline to speculate what terms the court would have selected had it been mindful of the *Blakely* constraints.

Regardless of whether we apply the harmless beyond a reasonable doubt standard (see *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326 [*Apprendi* error]) or reasonable probability of a different outcome standard typically applied when the court states both proper and improper reasons (see *People v. Price* (1991) 1 Cal.4th 324, 492), we conclude reversal of the sentence is required and the matter must be remanded for resentencing. (*People v. George, supra*, 122 Cal.App.4th at pp. 426-427.)

DISPOSITION

The judgment is affirmed as to the convictions. The judgment is reversed as to the sentence and remanded for resentencing in a manner consistent with the views expressed in this opinion.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

McDONALD, J.