Filed 4/22/05 P. v. Castro CA2/8
Opinion following rehearing

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. RONAL ANTONIO CASTRO, Defendant and Appellant.	B168064 (Los Angeles County Super. Ct. No. BA232610)

APPEAL from a judgment of the Superior Court of Los Angeles County. Terry A. Green, Judge. Reversed as to sentence only and otherwise affirmed.

Doris S. Browning, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jeffrey B. Kahan and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Ronal Antonio Castro appeals from the judgment entered following a jury trial that resulted in his conviction of two counts of lewd act upon a child under the age of 14 years. He contends: (1) he was denied due process as a result of the prosecutor's comments on defendant's exercise of the right to remain silent; (2) the trial court erred by allowing the victim's mother to sit with the victim while the victim testified; (3) the prosecutor committed various acts of prejudicial misconduct; and (4) to the extent defense counsel failed to object to the alleged misconduct, such failure constitutes ineffective assistance of counsel. In an opinion filed July 15, 2004, we affirmed the judgment. We subsequently granted defendant's petition for rehearing in light of the recent United States Supreme Court decision in *Blakely v. Washington* (2004) 542 U.S. ___, 124 S.Ct. 2531. 159 L.Ed.2d 403 (*Blakely*), and asked the parties to brief the issue. After considering the parties' supplemental letter briefs, we conclude that the trial court's selection of the high term violated the principles set forth in *Blakely*. Accordingly, we reverse the judgment as to sentence only and remand to the trial court for resentencing in accordance with *Blakely*.

FACTUAL AND PROCEDURAL BACKGROUND

Viewed in accordance with the usual rules on appeal (*People v. Kraft* (2000) 23 Cal.4th 978, 1053), the evidence established that the victim, Daisy, also known by the name "Daniela," was 10 years old and in the fourth and fifth grades when she lived with her mother, brother and grandparents in the same apartment complex, on the same floor, as defendant, his wife and children.[1] Sometime before Daisy's 11th birthday in December 2000, defendant sexually molested and then raped Daisy. Daisy did not report the crime until almost two years later.

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[1] Defendant's mother-in-law, Graciella, also lived in the apartment building with her son (defendant's brother-in-law), Noe. Defendant's wife, Lucila, and Daisy's mother were from the same town in Mexico and had known each other since childhood.

Daisy testified that, on a Friday when she was 10 years old, she was in the hallway talking to defendant's sister-in-law, Olivia, who was sitting on the stairs leading to the first floor. Defendant came up, grabbed Daisy by the arm, then started to touch her. Defendant touched Daisy's "private parts," including her breasts, buttocks and vagina. Defendant told Daisy not to tell her parents because, if she did, something bad would happen to her family. Daisy believed him and was afraid. When she went home after this encounter with defendant, Daisy felt sick to her stomach because defendant had touched her. Daisy's mother was not home, and in response to her grandmother's inquiry as to why she was crying, Daisy said she had fallen down. Daisy did not want her grandmother to know what had happened. When Daisy's mother returned home that night, Daisy did not tell her what had happened.

It was either the next day or the following week, but definitely a Saturday, that Daisy recalled returning from throwing away some trash and encountering defendant standing at the screen door of his apartment. Defendant pulled Daisy into the apartment, closed the door behind them, threw her onto the bed, took off all her clothes and his own, then raped her. Daisy tried to scream, but defendant covered her mouth with his hand. When it was over, defendant repeated his warning not to say anything; this time he added a threat that he would kill her family if she told.

Back in her own apartment, Daisy's grandmother asked why she had been crying. Daisy denied crying and went into the bathroom where she took a bath before going to bed. Daisy did not want to report the attack because she was afraid her mother would blame Daisy for what defendant did.

After the incidents with defendant, Daisy tried to kill herself by taking 18 Benadryl pills. When she told the school psychologist that she tried to kill herself, she was admitted to a hospital for "crazy people." Although the doctors asked her why she had tried to kill herself, Daisy did not tell them about defendant. It was not until May 27,

2002, that Daisy told her grandmother what had happened.[2] Defendant was arrested on June 10, 2002.

Defendant was charged by information with commission of a lewd act upon Daisy, a person under 14 years of age and commission of a lewd act by use of force, violence or duress (Pen. Code, § 288, subds. (a), (b)(1)).[3] Defendant was convicted as charged and sentenced to a total of eight years in prison.

Defendant filed a timely notice of appeal.

DISCUSSION

There Was No *Griffin*[4] Error

Defendant contends he was denied due process as a result of evidence that constituted improper comment on his election to invoke his Fifth Amendment right to silence. Specifically, he contends the trial court erred in admitting the arresting officer's testimony that, during a pre-arrest interview, defendant denied knowing Daisy even after the officers described to defendant Daisy and the allegations she was making against him. As we understand defendant's argument on appeal, it is that evidence of the specific questions and accusations which were directed at defendant during his pre-arrest interview, before defendant invoked his right to silence, was intended to imply to the jury that defendant invoked that right. We disagree.

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[2] This was occasioned by an incident, described by Daisy as follows: Daisy was alone with Noe in Noe's apartment when Daisy heard her mother calling her name. Daisy was afraid her mother would think she had been having sex with Noe, although she had not been. Daisy jumped out of the window to avoid her mother, but her mother found her and began hitting her. The police were called and Daisy was taken to the hospital for a check up. Because she did not want Noe punished for something that defendant had done, Daisy told her grandmother the truth: that she had been raped by defendant.

[3] A kidnapping charge was subsequently dismissed. All further undesignated statutory references are to the Penal Code.

[4] *Griffin v. California* (1965) 380 U.S. 609, 615 (*Griffin*).

"Under the Fifth Amendment of the federal Constitution, a prosecutor is prohibited from commenting directly or indirectly on an accused's invocation of the constitutional right to silence. Directing a jury's attention to a defendant's failure to testify at trial runs the risk of inviting the jury to consider the defendant's silence as evidence of guilt. (*Griffin v. California, supra*, 380 U.S. at pp. 614-615 [citation].) The prosecutor is permitted, however, to comment on the state of the evidence, 'including the failure of the defense to introduce material evidence or to call witnesses.' [Citation.]" (*People v. Lewis* (2001) 25 Cal.4th 610 (*Lewis*).)

Here, outside the presence of the jury, the prosecutor informed the trial court that he anticipated Detective Sunny Romero would testify that, when first contacted by the police at his apartment, defendant voluntarily agreed to go to the police station to be questioned. During that voluntary questioning, defendant denied knowing Daisy. After doing so, defendant stated he no longer wanted to talk to the police and wanted an attorney. The prosecutor also anticipated Romero would testify that, while in the police car on the way to the station, defendant asked Romero "whether . . . the girl's mother was accusing him of this crime." The trial court ruled: "All he can say is they were down there talking voluntarily and he said that 'I don't know the girl' or something like that. He cannot say that they advised him of his rights and he invoked his rights. He cannot say that. [¶] . . . [¶] And in the car, if he volunteers, did the mother accuse him of this, they can testify to that."

Whereupon, Romero testified that, when he and his partner, Detective Ryder, went to defendant's apartment on June 10th, they told his wife they were there to discuss with defendant a crime report as to which defendant was a witness. When defendant came out, Romero asked if he would mind coming to the station to talk about a report as to which he was a witness.[5] Defendant agreed to do so. Defendant was not under arrest at

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[5] The conversation was in Spanish and English. Romero spoke Spanish and translated for Ryder, who did not speak Spanish.

that time. In a tape recorded conversation at the police station, Romero explained to defendant that he was there as a witness, was not under arrest and was free to go at any time. In pertinent part, Romero testified as follows: "[THE PROSECUTOR]: Did Detective Ryder ask the defendant whether he knew Daisy? [¶] [THE WITNESS]: Yes. [¶] [THE PROSECUTOR]: And was that question translated in Spanish for [defendant] to understand it? [¶] [THE WITNESS]: Yes, it was. [¶] [THE PROSECUTOR]: Now, as you were watching this interview, Detective Romero, did [defendant] indicate whether he knew Daisy or not? [¶] [THE WITNESS]: He said no. [¶] [THE PROSECUTOR]: Now, [did] Detective Ryder specify about Daisy? Did he give the defendant a location where this Daisy lived? [¶] [THE WITNESS]: I believe Detective Ryder said Daisy lived in the same building he did. [¶] [THE PROSECUTOR]: And when this was translated for [defendant] to understand it, did he give a response? [¶] [THE WITNESS]: Yes. He still said he didn't know. [¶] *[THE PROSECUTOR]: Now, after you told – after he was told about Daisy living in the building with him, did Detective Ryder continue to ask [defendant] about this allegation?* [¶] *[THE WITNESS]: Yes.* [¶] *[THE PROSECUTOR]: What was asked?* [¶] *[THE WITNESS]: Detective Ryder informed him of the nature of the investigation, and [defendant] stopped talking.*" (Italics added.) Before any objection from defense counsel, the trial court immediately instructed the jury not to consider anything other than the testimony that defendant denied knowing Daisy. "Anything after that is taken off your plate." Thus, the trial court instructed the jury to not consider the italicized portion of Romero's testimony.

The prosecutor next asked Romero: "When you advised [defendant] of the nature of the investigation, what did that entail?" There was no objection and Romero testified that they advised defendant of Daisy's accusation of rape against defendant and when and where that rape was alleged to have occurred. After speaking with defendant for about 10 minutes, they arrested him and transported him to the main jail. In the car on the way to the main jail, defendant asked "who was accusing him, the mother or her, or her or the mother. He was asking who was making the allegations basically."

Preliminarily, we note that defendant never objected to this testimony. Failure to object on the basis argued on appeal, or to request an admonition to cure any perceived harm, will result in the claim not being preserved for appeal. (*Lewis, supra,* 25 Cal.4th at p. 670.) Although an objection is not required where it would have been futile (*People v. Chavez* (1980) 26 Cal.3d 334, 350, fn. 5; *People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1365, fn. 8), such is not the case here. The trial court had already limited the scope of Romero's testimony in the side bar conference and on its own motion had struck testimony that it believed exceeded that scope. Thus, there would have been no reason to think an objection would have been futile. Accordingly, the issue has been waived.

Even if the issue were preserved for appeal, we would find the claim lacks merit. Romero's description of what the officers told defendant about the investigation did not constitute comment on defendant's invocation of the right to remain silent, and thus does not fall within the *Griffin* and *Lewis* rubric. The challenged evidence concerned what the officers said to defendant before he was arrested, not what defendant did or did not say after he was arrested.

Finally, even assuming error, there was no prejudice. This is because there was independent and overwhelming evidence of defendant's guilt: the victim identified defendant, a neighbor and friend of the family, as her rapist. Under these circumstances, it is not reasonably likely that the challenged evidence affected the outcome of the trial. (See *United States v. Whitehead* (9th Cir. 2000) 200 F.3d 634, 639 (*Whitehead*) [" 'When deciding whether a prosecutor's reference to a defendant's post-arrest silence was prejudicial, this court will consider the extent of comments made by the witness, whether an inference of guilt from silence was stressed to the jury, and the extent of other evidence suggesting defendant's guilt.' [Citation.]"].)

Defendant's reliance on other portions of *Whitehead, supra,* 200 F.3d at page 638, for a contrary result is misplaced. While Ninth Circuit opinions are not binding authority in California State courts, we are free to adopt their analysis if it is sound. But we need not decide whether we agree with *Whitehead* because that case is distinguishable. In

Whitehead, the trial court admitted evidence that, after the defendant was arrested but before he was given his *Miranda*[6] rights, he did not ask the arresting officers what was found in his car or why he was being arrested. (*Id.* at p. 637.) During closing, the prosecutor argued that the defendant remained silent because he knew there were drugs in his car. (*Id.* at p. 638.) The Ninth Circuit found evidence of the defendant's silence in the face of arrest acted as an impermissible penalty on the exercise of the right to remain silent. However, it found no cause for reversal because the defendant failed to demonstrate that the error affected the outcome of the proceedings. (*Id.* at p. 639.) Thus, in *Whitehead*, the challenged evidence concerned the defendant's post-arrest silence. By contrast, the challenged evidence here is what the detectives said to defendant before he was arrested. Defendant's response to the detectives' statements was not admitted into evidence. Accordingly, *Whitehead* is inapposite.

Penal Code Section 868.5

Defendant contends the trial court erred by allowing Daisy's mother to sit next to Daisy while Daisy testified. He argues that doing so violated section 868.5 because the mother subsequently testified in the prosecution's case-in-chief. We agree that allowing the mother to sit with Daisy before the mother testified was contrary to the procedure mandated by section 868.5. However, the error was waived by defendant's failure to make an objection on this specific ground. Moreover, the error was harmless.

In pertinent part, section 868.5 provides: "(a) Notwithstanding any other law, a prosecuting witness in a case involving a violation of Section . . . 288 . . . , shall be entitled, for support, to the attendance of up to two persons of his or her own choosing, one of whom may be a witness . . . at the trial . . . , during the testimony of the prosecuting witness. Only one of those support persons may accompany the witness to the witness stand . . . . [¶] (b) If the person or persons so chosen are also prosecuting

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6 *Miranda v. Arizona* (1966) 384 U.S. 436.

witnesses, the prosecution shall present evidence that the person's attendance is both desired by the prosecuting witness for support and will be helpful to the prosecuting witness. Upon that showing, the court shall grant the request unless information presented by the defendant or noticed by the court establishes that the support person's attendance during the testimony of the prosecuting witness would pose a substantial risk of influencing or affecting the content of that testimony. . . . In all cases, the judge shall admonish the support person or persons to not prompt, sway, or influence the witness in any way. . . . [¶] (c) *The testimony of the person or persons so chosen who are also prosecuting witnesses shall be presented before the testimony of the prosecuting witness. The prosecuting witness shall be excluded from the courtroom during that testimony.* Whenever the evidence given by that person or those persons would be subject to exclusion because it has been given before the corpus delicti has been established, the evidence shall be admitted subject to the court's or the defendant's motion to strike that evidence from the record if the corpus delicti is not later established by the testimony of the prosecuting witness." (Italics added.)

In *People v. Kabonic* (1986) 177 Cal.App.3d 487, 495 (*Kabonic*), the court observed that section 868.5 has a dual purpose: minimizing the trauma to the complaining witness and "guarding against the possibility that the support person would tailor his or her testimony to match that of the complaining witness." A failure to comply with the procedural requirements of section 868.5 is not an error of constitutional dimension, and a judgment will be reversed on this ground only upon a showing that it was reasonably probable that a result more favorable to the defendant would have occurred in the absence of the complained of error. (*Id*. at p. 498, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, failure to object to any deviation from the procedural requirements of the statute constitutes a waiver of the issue on appeal because it deprives the trial court of the opportunity to correct the error. For example, in *People v. Lord* (1994) 30 Cal.App.4th 1718 (*Lord*), the court held that, although section 868.5 requires a case-

specific showing of necessity for support via an evidentiary hearing, the defendant "waived any claim of error by failing to request a hearing and determination of necessity, or otherwise object to the presence of a support person. [Citations.]" (*Id.* at p. 1722.)[7]

Here, prior to trial, the prosecutor requested, pursuant to section 868.5, that Daisy's mother be allowed to stand by Daisy during Daisy's trial testimony. This colloquy followed: "[DEFENSE COUNSEL]: I don't really want to have an objection to it. The problem is she's going to be a major witness. [¶] THE COURT: How old is the child? [¶] [THE PROSECUTOR]: The child is 13 years old. She's suffering. She's shaking outside, and I want to make sure she testifies. [¶] THE COURT: I'll grant the testimony. [¶] [THE PROSECUTOR]: I've already spoken with [the mother] not to speak with the child. [¶] [DEFENSE COUNSEL]: We had a problem. I didn't do the prelim, but there was a problem at the prelim I read at the transcript where the mother is talking to the child. [¶] THE COURT: Well, that can't happen. [¶] [THE PROSECUTOR]: I already talked to her about that already twice." After opening statements, the prosecution called Daisy as its first witness: "[THE PROSECUTOR]: I'd like to have Daisy's mother perhaps sit behind her, if the court permits it? [¶] THE COURT: That's fine, but there must not be communication. [¶] [THE PROSECUTOR]: There will not be, and I've already advised her of that." Defendant made no objection.

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[7] But see *Kabonic, supra*, 177 Cal.App.3d at page 496, in which the court held that the defendant's failure to object to the support person's presence on the specific grounds argued on appeal did not constitute waiver of those grounds where the defendant objected on the grounds that support person "was going to be a witness in [the] case"]. (*Ibid.*) In so concluding, the court relied on section 1259, which provides: "Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which *affected the substantial rights of the defendant*. . . . ." (Italics added.) We find the opinion in *Lord, supra*, better reasoned on this point than that in *Kabonic*, and adopt *Lord's* reasoning here.

When mother testified subsequently, defendant also did not object on the grounds that mother had been present during Daisy's testimony.[8]

Defendant's failure to object to any violation of section 868.5, subdivision (c), constitutes a waiver of the issue on appeal. (*Lord*, *supra*, 30 Cal.App.4th at p. 1722.) In any case, to the extent defense counsel's ambiguous statement, "I don't really want to have an objection to it. The problem is she's going to be a major witness[,]" can be construed as an objection, it can only be reasonably understood as an objection to the mother sitting with Daisy, and not to the fact that Daisy was going to testify first, contrary to the requirements of section 868.5, subdivision (c). This is because, at the time defense counsel made this objection, nothing in the record indicates he necessarily knew Daisy was going to be the first witness. When he learned that Daisy would be the first witness, he failed to make the requisite objection to allow the trial court an opportunity to correct potential error and thus preserve it for appeal. (*Ibid*.)

Finally, even assuming the objection was preserved for appeal, we would find the failure to comply with section 868.5 was harmless under the circumstances. Although under section 868.5, subdivision (c), mother should have testified before Daisy, mother's evidence did not concern the actual rape, only the collateral issue of Daisy's behavior in the months following the rape.[9] Under these circumstance, we conclude that the result of

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[8] We do not here address the question whether, where no immediate objection is made to a support person accompanying a prosecution witness to the stand, the support person's testimony can later be excluded by an objection at the beginning of the support person's testimony on the grounds the latter did not testify first.

[9] Here, Daisy's mother testified that, before she learned of the abuse, she did not know Daisy had any problems with defendant. When Daisy was about 10 years old, her mother noticed a personality change. Daisy always seemed angry with her mother and had a better relationship with her maternal grandmother. In 2001, Daisy took some pills and was hospitalized for almost a week. Daisy's mother was angry with Daisy for doing this, but did not talk to Daisy about why she did it. When Daisy got out of the hospital, her mother continued to be angry. One day, when Daisy was not at home, her mother went looking for her. When she learned that Daisy was in an apartment alone with Noe, she thought the worst. When she found Daisy, Daisy's mother grabbed her by the hair

the trial would not have been more favorable to defendant if mother testified first, or even if she was precluded from testifying because Daisy had already done so. (*Kabonic, supra,* 177 Cal.App.3d at p. 498; *People v. Watson, supra,* 46 Cal.2d 818 at p. 836.)

There Was No Prosecutorial Misconduct

Defendant contends the prosecutor committed various acts of misconduct during closing argument. We conclude that none of the challenged comments amount to misconduct.

". . . A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. . . . It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature. . . . As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*People v. Hill* (1998) 17 Cal.4th 800, 819-820, citations and internal quotation marks omitted.) This is only the general rule however, and a defendant will be excused from the necessity of a timely objection and/or a request for admonition if either would be futile or if an admonition would not have cured the harm caused by the misconduct. (*Ibid.*)

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and dragged her back to their apartment. She put Daisy in the bathroom and started hitting her, while demanding to know if something had happened. Finally, the maternal grandmother convinced Daisy's mother to leave the grandmother alone with Daisy. After a few minutes in the bathroom with Daisy, the grandmother came out and called the police. The grandmother said she was calling the police because appellant had raped Daisy.

With this standard in mind, we address defendant's various charges of misconduct. First, defendant complains that, without support in the evidence, the prosecutor told the jury that "everyone in the complex was acquainted with the events and problems in Daisy's life."[10] Preliminarily, we observe the prosecutor did not state that everyone was aware that Daisy had been raped. Rather, the reasonable inference to be taken from the challenged statement is that Daisy's recent erratic behavior, including her suicide attempt, the visit to a local church arranged by neighbors (including defendant's mother-in-law) so the pastor could pray for Daisy and her mother, the incident where defendant's brother-in-law, Noe, was asked to hold Daisy to keep her from running away, and finally, the scene created when her mother dragged Daisy by the hair into the apartment followed

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10 Defendant did not object to this statement at the time it was made. But, after the jury had begun deliberations, defense counsel charged the prosecutor with misconduct on the grounds that: "There is nothing in the evidence I have heard or seen where the cops told [defendant] about all the details of somebody being molested in the building. . . . [C]ounsel implied in his argument that [defendant] knows her and she knows him because all this information was given about the girl being molested in the building by him. I don't find that." The trial court disagreed: "I think what he was saying, he was constructing a hypothetical situation that in this building the problems with Daisy or Daniela were not a secret and his own family was involved and apparently his brother-in-law was involved in trying to restrain the child, and that a reasonable inference is, among life-long friends, a child who is this disturbed is not going to be a secret. Okay? [¶] [DEFENSE COUNSEL]: In other words, he is saying he should have known. [¶] THE COURT: Should have known, that this is something which is very visible on the radar screen. [¶] [DEFENSE COUNSEL]: That isn't the way I took it, though." The trial court continued: "And he made it very clear that he was not talking about things that [defendant] – he was very clear to point out that he was not talking about things which [defendant] should have said here in court, which would have been error, but talking to the police about, 'Who is Daisy or Daniela?' " The trial court concluded: "To the extent counsel misstated the evidence, the jury heard the evidence. And I have instructed in as many ways as I can with my limited knowledge of the English language not to consider statements of counsel. [¶] Now, I think where he was going is that this is a highly visible event that there's this very troubled girl, that it's not reasonable for [defendant] to say, 'Who is Daisy' when Daisy was visible on everyone's radar screen, including his family's. [¶] [DEFENSE COUNSEL]: To make the record, I see it as misconduct and make a motion for mistrial on that basis. [¶] THE COURT: Motion denied."

by the arrival of the police, would likely have made Daisy well known to residents of the complex.[11] Additionally, Daisy's mother testified that, after the police took Daisy away, defendant's wife and mother-in-law came to the apartment to ask why the police had been to Noe's apartment. A reasonable inference from this testimony is that, by the time defendant was questioned by the police more than 10 days later, his wife, mother-in-law or brother-in-law had told him about the situation with Daisy. Taken as a whole, the prosecutor's argument was a fair comment on the evidence: Defendant told the police he did not know Daisy; his counsel argued that this was truthful because defendant knew her as "Daniela." Given that the two families lived in close proximity to each other, defendant's wife had known Daisy's mother for many years, and Daisy's behavioral problems were apparent, the prosecutor did not commit misconduct by exhorting the jury to disregard the defense's "Daisy/Daniela" argument.

Defendant complains that the prosecutor improperly vouched for Daisy's credibility when he argued to the jury: "Children don't lie about things like this. They don't. . . . And children don't come to court and talk about facts like this and embarrass themselves and talk about sexual things like this unless it happened." Again, we find no misconduct that the prosecutor's statement did not occur in a vacuum. Daisy testified that she did not want to be in court and did not want to answer the prosecutor's questions, but, "I came, I came for something." When asked why she should be believed, Daisy

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11 As we have already set forth in detail, *ante*, defense counsel argued during closing that the reason defendant denied knowing "Daisy" when interviewed by the police was that defendant knew her by the name "Daniela." In rebuttal, the prosecutor countered that people called Daisy by both names: "They know her as Daisy and Daniela. [¶] The whole apartment complex knows that something happened. . . . Everybody knows Daisy or Daniela or at least the circumstances. . . . There's only one Daisy, only one Daniela. The defendant knows that, he lives there. [¶] . . . [¶] Then they say, 'Okay. Well, Daisy lives in your apartment complex. She's this age, and these things have happened to her at the complex.' That's what she said. Everybody knows that. It's not some big secret here in the apartment complex. The police have been there. Everybody knows what's happened to Daisy or Daniela, however you want to call her."

testified: "I wouldn't waste my time being here. I wouldn't put a person—have a person put in jail just because I want to." Defense counsel made the following closing argument: "Now, a charge of sexual assault against a male, a man, is one that is easily made and usually hard to disprove." He argued that Daisy "tells stories that aren't true. [¶] . . . But she also invents stories. Why else would that neighbor take the mother and daughter down to that pastor to talk about her beating her up and so forth? To try to stop the beating, I think. [¶] Now during that interview with the pastor at the church, [Daisy] is supposed to have said she had sex with a lot of guys. Well, I didn't put that in evidence in order to convince you that she had sex with other people. I put that evidence in to show you that this girl will say anything that comes to her mind to hurt her mother. With her mother there she says, 'Oh, I've had sex with lots of guys.' My investigator testified to that when the pastor either didn't remember or denied it. [¶] Why would she do that? To get back at her mother. And what about a girl that's accused of having sex with people, a 14-year-old girl, that's not true? Why not invent something? 'Yeah, okay, ma, I had sex with this guy, [defendant], where we did this and we did that.' " Under these circumstances, we find the prosecutor's rebuttal to defense counsel's theory of the case to be both fair comment on the evidence and a statement of matters drawn from common experience—namely, the reluctance of a child to make an untrue accusation of this nature.

Finally, we are less comfortable with the prosecutor's statement: "Where there's smoke, there's fire." Assuming that statement constitutes an improper attempt to absolve the prosecution of its obligation to prove its case beyond a reasonable doubt, and apart from whether the failure to object to it constitutes a waiver of the issue on appeal, we find the error harmless. The jury was instructed that they "must not be biased against the defendant because he has been arrested for this offense, charged with a crime, or brought to trial. None of these circumstances is evidence of guilt, and you must not infer or assume from any or all of them that a defendant is more likely to be guilty than not

guilty." We assume they understood and followed this instruction. (*People v. Holt* (1997) 15 Cal.4th 619, 662; *People v. Delgado* (1993) 5 Cal.4th 312, 331.)

There Was No Ineffective Assistance of Counsel

Defendant contends his trial attorney gave ineffective assistance of counsel by his failure to object to (1) the prosecutor's statement that "Children don't lie about things like this," and (2) the prosecutor's suggestion that one can infer guilt from accusation. We disagree.

To require reversal on a claim of ineffective assistance of counsel, the defendant must show both that counsel's representation " '. . . fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.][,]" and that he was prejudiced thereby. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216; *People v. Walker* (1993) 14 Cal.App.4th 1615, 1623-1624.) Here, inasmuch as we have found the prosecutor's statements to have not constituted misconduct, and/or to have not been prejudicial, defendant has failed to establish ineffective assistance of counsel.

Section 290.3

For the first time on appeal, the People contend the trial court erred in not imposing a fine pursuant to section 290.3 [persons required to register as sex offenders under section 290 are subject to $200 fine "unless the court determines that the defendant does not have the ability to pay the fine"]. We agree with defendant that the issue has been waived. (*People v. Tillman* (2000) 22 Cal.4th 300, 302; *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1518.)

Blakely

In his petition for rehearing, defendant contends the trial court committed sentencing error under *Blakely* because it imposed the upper term based upon aggravating factors not found true by the jury.[12] We agree.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), the United States Supreme Court determined 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." In *Blakely*, the high court clarified that the statutory maximum 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*." (*Blakely*, *supra*, 124 S.Ct. at p. 2537, italics in original.) Whether *Blakely* applies to the California sentencing scheme is currently before our Supreme Court in a number of cases, including *People v. Butler* (2004) 122 Cal.App.4th 910, review granted Dec. 15, 2004, S129000; *People v. George* (2004) 122 Cal.App.4th 419, review granted Dec. 15, 2004, S128582; *People v. Black*, review granted July 28, 2004, S126182; and *People v. Towne*, review granted July 14, 2004, S125677. We agree with those courts that have concluded *Blakely* applies because the maximum penalty a court can impose under California law without making additional factual findings is the middle of three terms. (See Pen. Code, § 1170, subd. (b), and Cal. Rules of Court, rule 4.420(a) and (b).)

Here, defendant's eight-year sentence was comprised of the eight-year high term on count two (§ 288, subd. (b)(1)), plus a concurrent eight-year high term on count three (§ 288, subd. (a)). The trial court articulated the following reasons for selecting the high term: "I pick the high term for any one of the rules in aggravation as set forth in the

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12 The People's argument that defendant forfeited his *Blakely* claim by failing to object at the sentencing hearing is not well taken. The Supreme Court's decision in *Blakely* extended the *Apprendi* rationale into a new area, and created an opportunity for reviving debate over *Apprendi's* ultimate meaning and impact. Defendant cannot have forfeited or waived a legal argument that was not recognized at the time of his trial.

People's sentencing memorandum.[13] The crime involved great violence, and it was done with a level of cruelty, especially for a child. The victim was horribly – the defendant threatened the victim. Any one of those is ample in and of itself, by itself, to justify high term. So this is a high term of years in state prison. [¶] For the count 3 I'll sentence him to a concurrent term of eight years in state prison. I run it concurrent[ly] because he has no prior significant record." In response to the prosecutor's urging that consecutive sentences be imposed, the trial court stated: "I can't get around the fact that he has no priors or record."

From this record, it is clear that the trial court selected the high term based entirely upon facts other than that of a prior conviction. This violated defendant's rights under *Blakely*. Accordingly, we reverse and remand for a new sentencing determination. Because of the obvious relationship between the sentences on the two counts, the court should conduct a new sentencing hearing at which time the court may reconsider all of its sentencing options within the limits set forth in our opinion and other applicable law.

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13 The sentencing memorandum listed the following aggravating circumstances: (1) the crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness (Cal. Rules of Court, rule 4.421(a)(1) (rule 4.421); (2) the victim was particularly vulnerable (rule 4.421(a)(3); (3) the defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or any other way illegally interfered with the judicial process (rule 4.421(a)(6); (4) the manner in which the crime was carried out indicates planning, sophistication, or professionalism (rule 4.421(a)(8); and (5) the defendant took advantage of a position of trust or confidence to commit the offense (rule 4.421(a)(11)). The only mitigating circumstance identified was the defendant's lack of a prior record.

DISPOSITION

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

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RUBIN, ACTING P.J.

We concur:

BOLAND, J.

FLIER, J.