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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. MARK DIAZ, Defendant and Appellant.	B185735 (Los Angeles County Super. Ct. No. GA053302)

APPEAL from a judgment of the Superior Court of Los Angeles County. Fred J. Fujioka, Judge. Affirmed as modified.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves and Dane R. Gillette, Chief Assistant Attorneys General, Pamela C. Hamanaka, Senior Assistant Attorney General, Donald E. De Nicola, Deputy Solicitor General, Marc E. Turchin, Joseph P. Lee, Alene M. Games, Kristofer Jorstad, Lawrence M. Daniels, and Michael R. Johnsen, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts I through V.

Mark Diaz was convicted of sexual penetration of a victim who was unable to resist due to intoxication, anesthesia, or controlled substance (Pen.[1] Code, § 289, subd. (e)), two counts of oral copulation by means of intoxication, anesthesia or controlled substance (§ 288a, subd. (i)), and two counts of rape by intoxication, anesthesia or controlled substance (§ 261, subd. (a)(3)). He appeals his conviction and sentence on six grounds, alleging that: (1) the primary evidence against him, a videotape, was improperly seized and should have been suppressed; (2) the videotape was inadmissible hearsay and its admission violated his rights under the Confrontation Clause of the United States Constitution; (3) there was insufficient evidence of the victim's inability to give consent; (4) the instructions on the subject of rape improperly created a mandatory presumption and shifted the burden of proof to him; (5) the trial court improperly denied his motion for a new trial; and (6) the imposition of upper term and consecutive sentences violated his Sixth Amendment right to a jury trial as set forth in *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*). We affirm the convictions but impose midterm sentences on three counts.

FACTUAL AND PROCEDURAL BACKGROUND

Monica T. reported to the Pasadena Police Department that Diaz had sexually assaulted her while she was unconscious. After her report, the police sought and received a warrant to search Diaz's home for evidence relating to the sexual assault. The police seized various items from Diaz's apartment, including a videotape. The videotape did not depict Monica T.; instead, it was a recording of Diaz engaging in sexual intercourse and other sexual acts with an unknown woman who appeared to be semi-conscious.

Diaz was charged with 14 sexual offenses against Monica T. and the unknown woman, known as Jane Doe. At trial, Monica T. testified, but Jane Doe did not. The jury viewed the videotape depicting Diaz engaged in sexual acts with Jane Doe. The jury

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

acquitted Diaz of all counts pertaining to Monica T., but convicted him on the five counts alleged against him in which Jane Doe was the victim. The trial court denied Diaz's motion for a new trial based on error in admitting the videotape and the discovery of new evidence.

The trial court sentenced Diaz to the upper term of eight years on count 10, sexual penetration of a person prevented from resisting due to intoxication, anesthesia or controlled substance (§ 289, subd. (e)). The court imposed one-third the midterm sentence on the two counts of oral copulation by means of anesthesia or controlled substance (§ 288a, subd. (i)), to be served consecutively. On counts 13 and 14, rape by intoxication, anesthesia or controlled substance (§ 261, subd. (a)(3)), the trial court sentenced Diaz to consecutive upper terms under section 667.6, subdivision (d). Diaz appeals.

DISCUSSION

I. Search Warrant

The trial court denied Diaz's motion to suppress the videotape of his sexual assaults on Jane Doe. Diaz appeals this ruling, claiming that the videotape should have been suppressed by the trial court because the search warrant was overly broad and unsupported by probable cause with respect to the seizure of videotapes. In determining whether an affidavit is supported by probable cause, the magistrate must make a "practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." (*Illinois v. Gates* (1983) 462 U.S. 213, 238.) A magistrate's determination of probable cause is entitled to deferential review, and is to be sustained by a reviewing court as long as there was a substantial basis for the magistrate's conclusion that the legitimate objects of the search were probably present on the specified premises. (*People v. Kraft* (2000) 23 Cal.4th 978, 1040-1041.) The determination will not be

overturned unless the supporting affidavit fails as a matter of law to support the finding of probable cause, and doubtful or marginal cases are resolved in favor of upholding the warrant. (*Fenwick & West v. Superior Court* (1996) 43 Cal.App.4th 1272, 1278.) Diaz bears the burden to establish invalidity of the search warrant. (*Ibid.*)

While the affidavit was sufficient to establish probable cause to search Diaz's home, it did not demonstrate probable cause to search for videotapes in the course of that search. Nothing in the affidavit tends to suggest that videotaped evidence would exist or that there would be a reason to examine videotapes. The affidavit does not set forth anything said by Monica T. regarding cameras, film, electronics, or any subject that would suggest that videotapes would exist that are related to the crime. Nothing about the offenses described suggests that videotaped evidence would exist or be related to the acts Monica T. alleged. We therefore cannot say that the magistrate had "'a substantial basis for. . . conclud[ing]' that probable cause existed" (*Illinois v. Gates*, *supra*, 462 U.S. at pp. 238-239) with respect to videotapes.

Even though the warrant was deficient, we agree with the trial court that it was not so facially defective as to prevent officers from reasonably relying on it. Under *United States v. Leon* (1984) 468 U.S. 897, 923, the exclusionary rule does not bar the use of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate unless (1) the issuing magistrate was misled by information that the officer knew or should have known was false; (2) the issuing magistrate abandoned his or her judicial role; (3) the affidavit was so lacking in indicia of probable cause that it would be entirely unreasonable for an officer to believe such cause existed; or (4) the warrant was so facially deficient that the executing officer could not reasonably presume it to be valid. Here, there is no indication that the magistrate abandoned her role or was misled by any false information. The affidavit demonstrated abundant probable cause for a search even if the scope of the search to cover videotapes may be questioned, so it cannot be said that the affidavit was so lacking in indicia of probable cause that it would be entirely unreasonable for an officer to believe that probable cause existed. Diaz asserts that "neither the officers conducting the search nor

the officer who sought its authorization acted as 'reasonable officer[s] would and could act in similar circumstances' relative to the videotape,"but offers no argument to support this contention. Contrary to Diaz's claim, nothing in the record that suggests that the officers who carried out the warrant acted unreasonably. Moreover, the application for the search warrant demonstrates that the officer who sought the warrant acted reasonably: he interviewed the complaining witness, who described the events, location, and perpetrator in detail and he performed a computer check that confirmed Diaz's description and address, then prepared the statement of probable cause and declaration, specifically requesting that the warrant cover a variety of specific items related to the alleged offenses. Certainly the affidavit was not lacking in indicia of probable cause to search the apartment; and to the extent that the videotapes were not identified with sufficient particularity or the probable cause for their seizure appropriately delineated, the search warrant was not so facially defective that executing officers could not reasonably believe it to be valid. The exclusionary rule does not prevent the use of the videotape here.

II. Admission of the Videotape

Diaz argues that the videotape of his sexual conduct with Jane Doe should not have been admitted because it violates his Sixth Amendment rights (*Crawford v. Washington* (2004) 541 U.S. 36) and because it is hearsay that is not admissible under any exception to the hearsay rule. Both of Diaz's arguments are premised on the view that the evidentiary value of the videotape was to show consent or lack thereof. Diaz argues that consent is not necessarily verbal, at least in this sexual context, for in the course of sexual fantasy and role-playing, a woman could be saying "no" but meaning "yes." Diaz argues that because Jane Doe's state of mind is relevant to determining whether her repeated use of the words "No," "Stop," and similar negative responses to the sexual conduct Diaz was engaging in were actually intended to deny or withdraw consent, the statements on the tape were inadmissible hearsay and testimonial statements.

The problem with Diaz's argument is its starting point. The evidentiary value of the videotape was not to demonstrate that Jane Doe gave or did not give consent to the sexual acts Diaz engaged in. In fact, whether she consented is entirely irrelevant to the charges against Diaz. Diaz was not charged with committing oral copulation, copulation with a foreign object, and rape because he lacked Jane Doe's consent—he was charged with the specific versions of those offenses that depend not on an unwilling victim but on an incapacitated one. (See § 289, subd. (e) ["Any person who commits an act of sexual penetration when the victim is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance . . . " commits a crime]; 288a, subd. (i) ["Any person who commits an act of oral copulation, where the victim is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance . . . ." commits a crime]; 261, subd. (a)(3) [rape is the act of sexual intercourse "[w]here a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance . . ."].) The value of the videotape for purposes of the charges against Diaz relating to Jane Doe was that the videotape permitted the jury to evaluate Jane Doe's *condition* while Diaz was performing sexual acts upon her: her mostly motionless body, her grogginess and lack of alertness, her slurred speech and frequent incoherence, her failure to rouse unless slapped (and sometimes even when slapped), and other indicia of her level of impairment. While Jane Doe did speak on the tape, her statements were not offered for the truth of the matter asserted with respect to any of the charges on appeal. The videotape therefore was not hearsay in this context (Evid. Code, § 1200 [hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated"]), nor was it a testimonial statement offered for the truth of the matters asserted. (*Crawford v. Washington*, *supra*, 541 U.S. at pp. 51-53, 59, fn. 9 [describing testimonial statements and observing that the Confrontation Clause does "not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted"].)

Diaz does point out three instances in closing argument in which the prosecutor referred to the videotape arguably as much for the meaning of Jane Doe's statements as

for her capacity. While the primary use of the videotape was to argue that the victim was in fact incapacitated, the prosecutor did, in addition, assert that Jane Doe's statements corroborated the account of specific conduct given by complaining witness Monica T. and cast doubt upon the defendant's attestations to his own good character. To the extent that these brief arguments constituted an erroneous hearsay use of the videotape, we think that any error was harmless for two reasons. First, these uses of the videotape pertained to issues collateral to Diaz's conviction on the charges involving Jane Doe—namely, the charges involving Monica T. (of which defendant was acquitted) and to Diaz's self-proffered character evidence. Because of the unusual circumstance here that Diaz's conduct with Jane Doe was filmed and subsequently viewed by the jury, Diaz's character was irrelevant to the central question of Jane Doe's capacity to consent to the sexual acts Diaz unquestionably performed. In light of the evidence of Diaz's conduct, erroneous admission of passing arguments based on a hearsay use of this otherwise admissible evidence was harmless.

Second, the prosecutor clearly, consistently and frequently reiterated that consent was not relevant to the charges involving Jane Doe: "When we're talking about intoxication . . . the elements are different than rape using force. And how they are different is in the following regard: when it is alleged that someone has been raped or committed a rape crime by the use of force, then the aspect of consent comes into play because part of the elements of rape by force is that it was against the victim's will. In other words, she didn't want this to happen. [¶] Okay. The difference with intoxication and—the Legislature is very smart in this regard—is actual consent. That's what I've been talking about. Actual consent is irrelevant. You're going to go, why have I been talking about it so much? I'm talking about it because the defense is going to go into it. Actual consent is irrelevant to any sexual charge that involves intoxication."

The prosecutor continued, "Your job is not to determine whether or not she agreed to this . . . it's just irrelevant. [¶] What the law says, the person has to be prevented from resisting by the intoxication. What 'prevented from resisting' means is she doesn't even have the reasonable judgment possible to give that consent. So what that means is that

the emphasis is not on the effect of the intoxication on her powers of resistance. The emphasis is on the effect o[n] her powers of judgment. It's a very different thing. [¶] If you look at that video, again just using your reasonable common sense, you will see that this woman didn't have any capacity at that point in time to have any kind of reasonable judgment or any kind of reasonable discussion as to what he was doing to her." The jury instructions (CALJIC Nos. 1.23.2, 10.02, 10.13, 10.33) on the charges concerning Jane Doe further cemented that the issue was not consent but capacity to consent. Given the clarity with which the elements of the crimes against Jane Doe were presented to the jury by the prosecutor and by the jury instructions, any incidental hearsay reference to the videotape as evidencing a lack of consent was harmless.

III. Sufficiency of the Evidence of Incapacity to Consent

Diaz contends that his convictions must be overturned because there was insufficient evidence, largely ignoring the issue of capacity to consent in favor of insisting that "the rapes here are rapes solely by virtue of the *State's* post-coital characterization" and that the victim was damaged not by being sexually assaulted while semi-conscious but by "the State's decision to play and play a videotape of an intimate encounter between her and appellant . . . ." We could not disagree more strongly, and observe that Diaz's blame-shifting argument borders on the frivolous, as the evidence was plainly sufficient to permit a jury to convict him and this court may not usurp the function of the jury on appeal. (*People v. Brown* (1984) 150 Cal.App.3d 968, 970 ["When a jury's verdict is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, which will support it, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the jury"].)

We have reviewed the evidence and conclude that it is sufficient to permit a reasonable jury to conclude that Jane Doe lacked the capacity to consent to commit to sexual acts. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 [appellate court reviews the record in the light most favorable to the judgment and determines whether it discloses substantial evidence such that a rational trier of fact could find the defendant guilty beyond a reasonable doubt].) The defendant captured the sex acts he performed on videotape. For much of the video, Jane Doe lies limp and motionless, with her eyes closed. She periodically attempts to roll to her side, to cover her vaginal area with her hands, or to close her legs as Diaz positions himself to assault her. She moans and mumbles, often incoherently, slurring the few words and phrases she does say. Diaz drags her across the bed to arrange her limbs and position her body for the camera, but he is hampered by her limpness and her tendency to roll onto her side as soon as he lets go of her legs. He slaps her repeatedly and appears to attempt to rouse her from her stupor to cause her to perform sex acts on him. From watching Diaz's videotape, a reasonable jury could infer, as it did here, that the largely insensible Jane Doe was too intoxicated to give legal consent and that Diaz knew or should have known that fact. (See *People v. Giardino* (2000) 82 Cal.App.4th 454, 462.)[2]

IV. Jury Instructions

A. CALJIC No. 1.23.1

CALJIC No. 1.23.1 defines "consent" as "positive cooperation in an act or attitude as an exercise of free will." Diaz alleges that his convictions must be overturned because

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[2] Although Diaz's counsel devotes several pages of her briefing to descriptions of decisions in which a court has concluded that a witness's testimony was so inherently improbable, unbelievable, or impossible that it could not stand as the basis for a conviction, the evidence here is not incredible, contradicted by other conduct of the victim, or otherwise undermined in any way.

this definition of consent creates a rebuttable mandatory presumption of lack of consent where there is not positive proof of assent, thereby improperly shifting the burden from the prosecution to prove lack of consent to the defense to prove consent.

As has already been discussed above, consent is not the question with respect to the charges on which Diaz was convicted—all of those counts depended on a victim who was legally incapable of consenting. The relevant jury instructions on the counts on which Diaz was convicted are CALJIC Nos. 1.23.2, 10.02, 10.13, and 10.33, which establish that the prosecution must prove that the alleged victim was prevented from resisting the act by an intoxicating substance or a controlled substance. The existence or absence of consent, and therefore CALJIC No. 1.23.1, was only a question in the charges involving Monica T., and Diaz was acquitted of all those counts.

B. CALJIC No. 1.23.2

Diaz then turns his attention to CALJIC No. 1.23.2, which defines the term "prevented from resisting" for the purposes of the sexual offense charges based on intoxication. He claims that the instruction "asks the defendant [to] prove too much which cannot be proven, and allows too much by way of presumption." According to Diaz, that which must be but cannot be proven is "what is in the mind of the victim," and the instruction, he claims, "creates a bubble around the intoxicated victim which cannot be pierced other than by showing she was not intoxicated . . . ."

Diaz's reading of CALJIC No. 1.23.2 strains credulity. It does not create "an irrebuttable presumption that an intoxicated woman is a woman who has been prevented from resisting . . . ." In fact, the instruction as given advised the jury not to equate intoxication and being prevented from resisting: "It is not enough that the alleged victim was intoxicated or impaired by the controlled substance to some degree . . . . Impaired mentality may exist and yet the individual may be able to exercise reasonable judgment with respect to the particular matter presented to his or her mind. Instead the level of

intoxication and the resulting mental impairment must have been so great that the alleged victim could no longer exercise reasonable judgment concerning that issue."

The instruction also does not require the defendant to "show[] the conduct assented to by the intoxicated victim was not the product of a lack of rationality, meaning either that the conduct assented to was objectively reasonable or that the conduct was the sort of conduct this victim would consider subjectively reasonable even if she were not intoxicated." The standard is an objective one: considering all of the surrounding circumstances, did the victim possess the ability to exercise reasonable judgment? The jury is capable of making this determination. (*People v. Linwood* (2003) 105 Cal.App.4th 59, 68 ["Can a jury determine whether a defendant reasonably should have known that a person's level of intoxication was such as to prevent him or her from resisting an act of sexual intercourse?" Yes"].) The instruction does not, as Diaz claims, require a defendant to prove reasonableness either by establishing community standards of morality or delving into prohibited evidence of the victim's moral standards. The instruction raises only the question of the victim's capacity to exercise reasonable judgment, not whether her judgments are reasonable based on her personal moral beliefs or community moral standards.

Diaz has not demonstrated any error in giving CALJIC No. 1.23.2.

V. Denial of Motion for New Trial

Diaz claims that the trial court erred in denying his motion for new trial because he presented sufficient new evidence to warrant a new trial. A new trial may be ordered "[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial." (§ 1181, subd. 8.) "In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: '"1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with

reasonable diligence have discovered and produced it at the trial; and 5. That these be shown by the best evidence of which the case admits."' [Citations.]" (*People v. Delgado* (1993) 5 Cal.4th 312, 328.)

Diaz submitted five declarations in support of his new trial motion, all concerning Jane Doe. Diaz's girlfriend declared that she had spoken with Jane Doe in March 2005. She asserted that in that conversation Jane Doe said that she did have a prior sexual relationship with Diaz and that she had gone out drinking with Diaz on occasion. She also claimed that she told Jane Doe about the videotape and that Jane Doe "became very concerned about whether somebody saw the video and wanted to know the whereabouts of the tape. At no time did [Jane Doe] ever indicate that her contact with Mark [Diaz] at any time during their sexual relationship was against her will and without her consent." According to the girlfriend, Jane Doe was reluctant to come forward because of "her own personal problems" and her need to "'protect herself.'"

The declarations of Laura Eldridge and Angie Rodriguez were identical in all pertinent respects. Both women declared that in March 2005 they had a telephone call with a woman who identified herself as the victim in this case. They said that Jane Doe acknowledged having a sexual relationship with Diaz and recounted the same response when they mentioned the videotape: "Although [Jane Doe] never indicated that she did not know of the video, her main concern was where it was and who would see it, seeming to be embarrassed about the video." Their declarations stated that Jane Doe said she would only talk about her relationship with Diaz with Diaz's girlfriend, the first declarant, and that she would not come forward because of "personal problems and it was extremely uncomfortable to talk about the subject matter because of her very strict mother."

A private investigator stated that he had contacted Jane Doe's family members, and that he then during trial found her roommate, who said that Jane Doe was taking final exams at that time. "Since March I have been making constant efforts to talk to the people at the apartment who I later learned were [Jane Doe's] sister (the alleged roommate) and mother who constantly were trying to protect [Jane Doe]." He learned

about an arrest warrant for Jane Doe. In June 2005 he subpoenaed Jane Doe's sister to come to court to give information on Jane Doe's whereabouts. All he notes is that the sister was reluctant to come to court and that she came with an attorney, who indicated that he would attempt to get Jane Doe to cooperate.

Diaz's trial attorney declared that the "defense has been making efforts prior to, during, and even after trial to locate [Jane Doe] . . . ." He did not detail any of his efforts made before or during trial, or explain why if the three declarants were talking with Jane Doe in March 2005 (voir dire began March 2, 2005) Jane Doe could not have been located and subpoenaed for the trial. Instead, counsel discussed a post-trial, pre-sentencing meeting on July 20, 2005, between Jane Doe, defense counsel, and the prosecutor. According to counsel, at this meeting Jane Doe stated that she had socialized with Diaz over a period of a month after she met him at a Pasadena bar. Jane Doe "confirmed that she did drink with defendant on multiple occasions and never drank to the point where she would not appreciate her surroundings and was always in control of her actions." She denied having any sexual relationship with Diaz and said that she did sleep over at Diaz's home but stayed on the couch in the living room. She was unable to explain why she would be seen naked except for high-heeled boots on the videotape. Jane Doe also had no explanation for why she would have referred to Diaz as "baby" on the tape if they had no sexual relationship.

At the hearing on the motion for a new trial, the prosecutor offered testimony as an officer of the court as to what Jane Doe said at the joint interview described by Diaz's trial attorney. The prosecutor said, "What was left out of counsel's declaration is she indicated she had been indeed contacted by those three individuals, that they attempted to have her change her story or tell a story that was favorable to Mark [Diaz]. She refused to do so. What is also left out is she indicated that she was indeed there on this particular evening, that she had been with him socially, not romantically, not sexually at any time before this, and that she remembers being inside of his apartment or condo, that she remembers meeting [Diaz's girlfriend], and that the next thing she remembers is waking

up the next day in the neighbor's apartment and stating, quote, I felt like I had been drugged."

The trial court denied the motion, observing that "it is important to note that, although this case took two years to get to trial, within months Ms. [Doe] was contacted. As an experienced trial counsel, I could see reasons why Mr. Kessel [defendant's trial counsel] did not subpoena her in for the trial. And I think that was a legitimate trial tactic, but now they can't take advantage of it and ask that the case—the charges which Mr. Diaz was tried and convicted be retried. Especially now since this is a one-victim case. And as I indicated, the statements made by [Jane Doe] that are in Mr. Kessel's motion are not inconsistent with the prosecutor's theory. Especially the part where she says that she did not have a sexual relationship, does not know how she ended up naked in bed with the defendant. I'm paraphrasing that last statement. But given that that's completely consistent with the offenses charged." Defense counsel asserted that he had tried to find this alleged victim. The court responded, "You are a very, very good trial attorney, and I'm not trying to use this to hoist you, but you are, and the case was well tried. Given the state of what we have in these declarations and given what Mr. Martin [the prosecutor] . . . said that she would have testified to, I think that a careful, diligent, intelligent[] trial attorney would not call her as a witness. She was a loose can[n]on for you. [¶] . . . I'm not faulting you for not . . . locating her or putting her on during the course of the trial, but I do believe that you could have. I think that you made a reasonable tactical decision."

We review the trial court's decision for an abuse of discretion (*People v. Delgado*, *supra*, 5 Cal.4th at p. 328), and find none whatsoever. While there is no question that if Jane Doe had appeared at trial, her testimony would have been material and very important on the issue of whether she was prevented by intoxication from resisting the sexual acts depicted in the videotape, that alone does not entitle Diaz to a new trial. Diaz insists that the statements in the declarations he submitted with his motion for new trial "directly contradicted the Government's fundamental thesis that appellant had sex with [Jane Doe] against her will, whether because [she] did not consent to sex with appellant,

withdrew her consent, or was so intoxicated her consent was invalid," but we do not see any contradiction. None of the declarants testified that Jane Doe said that she was not so intoxicated that she could not exercise reasonable judgment at the time of the events depicted. None of the declarants asserted that Jane Doe knew of the tape or that she even knew at the time she was engaging in sexual activity. The declarants' observation that Jane Doe did not claim to be unaware of the tape is not equivalent to a statement that she was contemporaneously aware of and able to consent to what happened that night. Diaz's "evidence," even when considered without reference to the additional information about Jane Doe's statements provided by the prosecutor, does not, as he asserts, create reasonable doubt or make a different result probable if a new trial were to be held. (*Delgado*, at p. 328.)

Moreover, this is not a case in which Jane Doe was unknown before and during trial. It appears from Diaz's own evidence that individuals aligned with the defense had located her by the time of trial in March 2005. There is no reason offered for why the final steps could not have been taken to secure Jane Doe's presence in court at that time, and indeed, there is no sign in the record that defense counsel, close on the heels of his witness, ever requested a continuance of the trial to bring Jane Doe into court. Instead, the defense strategy was to attack the use of the videotape as violating Diaz's Confrontation Clause rights because he could not confront and cross-examine Jane Doe. Diaz has not established that he could not, with reasonable diligence, have discovered and produced this witness at trial. (*People v. Delgado*, *supra*, 5 Cal.4th at p. 328.) The trial court did not abuse its discretion when it denied the motion for a new trial.

VI. Sentencing Issues

The trial court sentenced Diaz to the upper term of eight years on count 10, sexual penetration of a victim who is prevented from resisting by intoxication, anesthesia, or a controlled substance (§ 289, subd. (e)). The court stated that it found four factors in aggravation and one in mitigation, and that the aggravators clearly outweighed that

mitigator, leading to an upper term sentence. The court next imposed one-third the midterm sentence on counts 11 and 12, both for oral copulation by means of anesthesia or controlled substance (§ 288a, subd. (i)), and designated them to run consecutively pursuant to section 1170.1, subdivision (a). On each of the two counts of rape by drugs (§ 261, subd. (a)(3)), the trial court sentenced Diaz to the upper term of eight years and concluded that it was required by section 667.6, subdivision (d) to order that the sentences be served consecutively because the crimes were committed on separate occasions. The trial court stated that in the event that its determination that section 667.6, subdivision (d) mandated consecutive sentences on counts 13 and 14 was incorrect, the court would nonetheless have elected to impose consecutive sentences on those counts under section 667.6, subdivision (c)[3] because the factors in aggravation outweighed the factors in mitigation.

While this case was pending on appeal, the United States Supreme Court issued its opinion in *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*). We requested that the parties submit letter briefs on the impact of *Cunningham* on this case. Diaz contends that the three upper term sentences are improper under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), *Blakely*, *supra*, 542 U.S. 296, and *Cunningham*, and that the imposition of consecutive sentences on counts 13 and 14 is unconstitutional. The Attorney General argues that any *Apprendi/Blakely/Cunningham* objections have been waived and that the sentence is constitutionally valid.

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[3] At sentencing, the court misspoke and repeated section 667.6, subdivision "(d)" as its alternate authority, but it is clear from the context that the court meant to refer to section 667.6, *subdivision (c)*.

A. Waiver/Forfeiture

The Attorney General contends Diaz waived or forfeited any *Apprendi/Blakely/Cunningham* error when he did not object on *Apprendi* or *Blakely* grounds in the trial court, even though his sentencing hearing occurred over a year after the *Blakely* opinion had been issued by the U.S. Supreme Court. We reject this contention. Even if the forfeiture doctrine may reasonably be applied in this constitutional context (see *People v. Vera* (1997) 15 Cal.4th 269, 276-277 [claims of deprivation of certain fundamental constitutional rights are not forfeited by the failure to object in the trial court]), there is a general exception to the forfeiture rule for instances when an objection would have been futile. (*People v. Boyette* (2002) 29 Cal.4th 381, 432; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648.) At the time of the sentencing hearing in this case, August 31, 2005, the California Supreme Court had already decided *People v. Black* (2005) 35 Cal.4th 1238 (*Black*). In light of *Black*, it would have been futile for Diaz to object on the grounds that the jury rather than the trial court must find aggravating facts and that those facts must be found beyond a reasonable doubt. (§ 1170, subd. (b); Cal. Rules of Court, rules 4.409 & 4.420-4.421.) Diaz has neither waived nor forfeited his claim that the procedure by which he was sentenced violates the Sixth Amendment.

B. Upper Terms

1. Sixth Amendment Violation

The fundamental principle at issue here was announced in *Apprendi*, *supra*, 530 U.S. at page 490: "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." The Supreme Court clarified the meaning of the term "statutory maximum" in *Blakely*, *supra*, 542 U.S. at pages 303 and 304, 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* . . . 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."

In California, pursuant to the Determinate Sentencing Law, most crimes, including those in counts 10, 13, and 14, have a statutory upper term, a middle term, and a low term sentence from which the judge selects. "Penal Code § 1170(b) . . . controls the trial judge's choice [among the three sentences]; it provides that 'the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.' '[C]ircumstances in aggravation or mitigation' are to be determined by the court after consideration of several items: the trial record; the probation officer's report; statements in aggravation or mitigation submitted by the parties, the victim, or the victim's family; 'and any further evidence introduced at the sentencing hearing.'" (*Cunningham*, *supra*, 127 S.Ct. 856, 861-862.)

The United States Supreme Court has found California's determinate sentencing scheme constitutionally defective in two respects: first, in finding circumstances in aggravation, judges—not juries—make factual findings that have the effect of increasing the statutory maximum sentence for the crime by allowing the court to impose the upper term sentence; and second, these aggravating factors are found by a preponderance of the evidence and not by proof beyond a reasonable doubt.[4] (*Cunningham*, *supra*, 127 S.Ct. at

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[4] The California Supreme Court had concluded otherwise in *Black*, *supra*, 35 Cal.4th 1238. The United States Supreme Court disapproved *Black* in *Cunningham* and later vacated the judgment and remanded the matter to the California Supreme Court, where it is now pending. (*Black*, *supra*, 35 Cal.4th 1238, cert. granted, judg. vacated and cause remanded for further consideration in light of *Cunningham*, *supra*, 127 S.Ct. 856 *sub nom*. *Black v. California* (Feb. 20, 2007) 549 U.S. ___ [127 S.Ct. 1210].)

p. 868.) The Supreme Court explained that under California's Determinate Sentencing Law, "an upper term sentence may be imposed only when the trial judge finds an aggravating circumstance. [Citation.] An element of the charged offense, essential to a jury's determination of guilt, or admitted in a defendant's guilty plea, does not qualify as such a circumstance. [Citation.] Instead, aggravating circumstances depend on facts found discretely and solely by the judge. In accord with *Blakely,* therefore, the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum. [Citation.] Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt . . . , the [Determinate Sentencing Law] violates *Apprendi's* bright-line rule: Except for 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.' [Citation.]" (*Ibid*.)

In light of the Supreme Court's ruling in *Cunningham*, *supra*, 127 S.Ct. 856, we conclude that in the absence of jury findings on the aggravating factors made beyond a reasonable doubt, the imposition of high term sentences on counts 10, 13, and 14 violated the Sixth Amendment. In selecting the high term, the trial court stated that it found four factors in aggravation and one in mitigation, and that the aggravators clearly outweighed that mitigator. The court described its analysis as follows:

"The court is going to find the following factors in aggravation: One, the crime involved great violence, great bodily harm, threat of great bodily harm, high degree of cruelty, viciousness, and callousness. Specifically I'm finding it involved a high degree of cruelty, viciousness and callousness. As I said, she was treated in a manner which completely denied her humanity, and any act, I believe, of rape involves a great violence. [¶] Second, the victim was particularly vulnerable. Third, the manner in which the crime was carried out indicates planning and sophistication. There's a camera by the bed that was used. Last, the defendant engaged in violent conduct which indicates a serious danger to society. Having sex against someone's will, whether it's used [*sic*] by violence or restraint or through the use of an intoxicant so the person is unconscious or not

conscious, what occurs is what I consider to be violent conduct which indicates a serious danger to society. [¶] As a factor in mitigation, I find the defendant has either no prior record or insignificant record of criminal conduct considering the recency [*sic*] and frequency of prior crimes."[5] The court refused to consider Diaz's intoxication as a mitigating factor, and stated, "I have taken into consideration some of the other factors [defense counsel] mentioned, indicating that otherwise he's led a law-abiding life and that otherwise, outside of this event, he could be a good person. But I don't find that to be enough mitigation to outweigh the aggravation. I clearly find the aggravation outweighs the mitigation. [¶] On count 10, because the factors in aggravation outweigh the factors in mitigation, I'm sentencing him to [the] high term of eight years." The court imposed the upper term on counts 13 and 14 without any further comments to explain its selection of the upper term on those counts.

In order for the trial court to find each of the four aggravating factors it believed to be present, the court necessarily engaged in additional factfinding beyond the facts found true by the jury. This is exactly the factfinding that failed constitutional scrutiny in *Cunningham*: "If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied." (*Cunningham*, *supra*, 127 S.Ct. at p. 869.) In the absence of pertinent admissions by Diaz, the four aggravating factors on which the trial court relied to impose the upper term sentences on counts 10, 13, and 14 could only have been relied on had they been submitted to a jury for determination under the beyond a reasonable doubt standard of proof. As these factors were neither admitted nor found true by a jury beyond a reasonable doubt, they cannot, consistent with the Sixth Amendment, increase the statutory maximum punishment available for Diaz's crimes beyond the presumptive midterm sentence.

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[5] According to the probation report, Diaz has no prior criminal convictions or juvenile adjudications.

2. Particularly Vulnerable Victim Finding

In support of the high term sentences, the Attorney General argues that the finding that the victim was particularly vulnerable does not violate *Blakely*, *supra*, 542 U.S. 296, because "the jury here necessarily found, in convicting appellant of the charged offenses, that appellant engaged in sexual acts with a woman incapable of consent. The trial court's aggravating circumstance finding that the victim was particularly vulnerable merely reflected this jury determination." If, as the Attorney General posits, vulnerability and incapacity to resist the sexual offenses are equivalent, then the victim's vulnerability is not a proper aggravating factor in light of the sexual offenses of which Diaz was convicted because, by definition, any victim of these offenses would be a particularly vulnerable victim, as he or she was "prevented from resisting" by an intoxicant, anesthetic substance, or controlled substance. (§§ 289, subd. (e); 288a, subd. (i); 261, subd. (a)(3).) Using elements as aggravators collapses the sentencing scheme by making every occurrence of a crime aggravated, undermining the purpose of an aggravating factor: "A fact is aggravating if it makes defendant's conduct distinctively worse than it would otherwise have been." (*People v. Zamarron* (1994) 30 Cal.App.4th 865, 872.)

As a general rule, a fact that is an element of a crime may not be used to impose the upper term. (Cal. Rules of Court, rule 4.420(d).) Moreover, it has been held an analogous contexts that it is improper to base a finding of particular vulnerability on a fact that is an element of the crime. In *People v. Flores* (1981) 115 Cal.App.3d 924, at page 927, the court held that a victim's minority is not a proper basis for a particular vulnerability finding when the victim's minority is an element of the offense. The Court of Appeal wrote that by defining certain sexual acts on minor victims as distinct crimes with heightened punishments, "it seems clear that the Legislature already has determined that all persons of specified ages are 'particularly vulnerable' by reason of their age alone . . . ." (*Ibid.*) Here, it is clear that the Legislature considered individuals who were rendered incapable of resisting sexual penetration with a foreign object, oral copulation,

and rape due to the influence of a controlled substance, intoxicant, or anesthetic substance to be particularly vulnerable, and accordingly, defined those acts as distinct crimes with their own statutory punishments. (§§ 289, subd. (e); 288a, subd. (i); 261, subd. (a)(3).) The element of prevention from resisting due to intoxication, controlled substance, or anesthetic cannot do double duty as an aggravating factor. (See *Flores*, at p. 927; *People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [victim cannot be vulnerable simply because she was a child where the defendant was convicted of lewd and lascivious conduct upon a child under the age of 14]; *People v. Ginese* (1981) 121 Cal.App.3d 468, 476-477 [while a victim of an age range crime may be particularly vulnerable for reasons other than his or her age, the mere fact of minority cannot support a finding of particular vulnerability; it is "merely referring to punishable elements of the crime already incorporated into the child molesting statute"]; *People v. Alvarado* (2001) 87 Cal.App.4th 178, 195 [vulnerability finding may not be based exclusively on victim being 81 years old when a sentence enhancement was imposed because the victim was over 65 years old; finding may, however, properly be based on victim's age in combination with other factors].)

Therefore, to the extent that the court's finding that the victim was particularly vulnerable "reflected" the jury's determination that she was incapable of resisting due to intoxication or controlled substance, then relying on the existence of a vulnerable victim as an aggravator constitutes an illegal dual use of facts. The problem of a dual use of facts distinguishes the instant case from *People v. Calhoun* (2007) 40 Cal.4th 398, 404-408, on which the Attorney General relies to justify the vulnerable victim aggravator. *Calhoun* is inapposite because the aggravating factor found in that case—the fact that there were multiple victims—was necessarily encompassed by the jury's verdict *but was not an element of the crime*. In *Calhoun*, it was evident that the jury had necessarily concluded there were multiple manslaughter and reckless driving victims because the victims' names were included on the various verdict forms. (*Id*. at p. 406.) The fact that there were multiple victims, however, was not part of any offense charged in *Calhoun*, so using the fact that there were multiple victims as an aggravating factor in *Calhoun* did not

contravene the principle that an element of a crime may not be used to impose the high term sentence—unlike here, where being incapable of resistance (and thus, the Attorney General argues, necessarily particularly vulnerable) was an element of the offenses on which Diaz was sentenced to the upper term.

For purposes of a finding that a victim was particularly vulnerable, "'Particularly . . . means in a special or unusual degree, to an extent greater than in other cases. Vulnerability means defenseless, unguarded, unprotected, accessible, assailable, one who is susceptible to the defendant's criminal act.' [Citation.]" (*People v. Loudermilk* (1987) 195 Cal.App.3d 996, 1007.) If the trial court believed that Diaz's conviction of sexual offenses based on victim incapacity necessarily meant that the victim was particularly vulnerable, the court erred. If, instead, the trial court concluded that apart from the fact of her incapacitation by intoxication or controlled substance, Jane Doe was "defenseless, unguarded, unprotected, accessible, assailable, [or] susceptible to the defendant's criminal act" to "a special or unusual degree, to an extent greater than in other cases" (*ibid.*), the trial court engaged in precisely the type of judicial factfinding that is prohibited by *Apprendi*, *supra*, 530 U.S. 466, *Blakely*, *supra*, 542 U.S. 296, and *Cunningham*, *supra*, 127 S.Ct. 856. In either event, the vulnerable victim finding cannot serve as a basis for imposing the upper term.

3. Additional Errors in Imposing the Upper Terms

We also note that the trial court appears to have used the fact of the commission of the offense itself as an aggravating factor in at least two instances in violation of California sentencing law. First, in concluding that the offense involved great bodily injury, the trial court said, "[A]ny act, I believe, of rape involves a great violence." Second, to explain its finding that there was violent conduct indicating a great danger to society, the court observed, "Having sex against someone's will, whether it's used [*sic*] by violence or restraint or through the use of an intoxicant so the person is unconscious or not conscious, what occurs is what I consider to be violent conduct which indicates a

serious danger to society." The trial court's use of the fact of the offense itself as an aggravator is impermissible. A factor in aggravation must have the effect of making a crime "'"distinctively worse than the ordinary"'" (*People v. Webber* (1991) 228 Cal.App.3d 1146, 1169), and a fact that is an element of a crime or that is essential to a jury's determination of guilt may not be used to impose the upper term. (*Cunningham, supra*, 127 S.Ct. at p. 868; see also Cal. Rules of Court, rule 4.420(d).)

4. Harmless Error Analysis

The failure to submit a sentencing factor to the jury is subject to harmless error analysis (*Washington v. Recuenco* (2006) 548 U.S. ___, 126 S.Ct. 2546, 2551-2553) under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 327 [*Apprendi* error evaluated under *Chapman* standard]). We reject the Attorney General's position that the *Apprendi/Blakely/Cunningham* error was harmless beyond a reasonable doubt because if the aggravating factors had been submitted to the jury, it unquestionably would have found each of them true beyond a reasonable doubt. While a jury reasonably could have found aggravating factors true beyond a reasonable doubt on the evidence presented to the trial court, we cannot conclude beyond a reasonable doubt that a jury would have done so. Accordingly, we cannot say that the constitutional error was harmless, and the upper term sentences on counts 10, 13, and 14 must be modified. (See Section VI.D., *post*.)

C. Consecutive Sentencing under Penal Code Section 667.6, Subdivision (d)

On counts 13 and 14, the two counts of rape by intoxication, anesthesia, or controlled substance (§ 261, subd. (a)(3)), the trial court imposed consecutive sentences based on section 667.6, subdivision (d). The court stated that if a reviewing court were to conclude that the trial court was not required by section 667.6, subdivision (d) to impose

consecutive sentences on counts 13 and 14, it would have chosen to impose consecutive sentences nonetheless under section 667.6, subdivision (c) because the aggravating factors outweighed the mitigating factors. Diaz claims that the analysis set forth in *Apprendi*, *supra*, 530 U.S. 466, *Blakely*, *supra*, 542 U.S. 296, and *Cunningham*, *supra*, 127 S.Ct. 856 applies with equal force to consecutive sentencing and precludes the trial court from imposing consecutive sentences on counts 13 and 14 in the absence of his admission or a factual finding by a jury beyond a reasonable doubt that the crimes were committed on separate occasions. We cannot agree.

Section 667.6, subdivision (d) mandates full consecutive sentences for certain sexual crimes committed against a single victim on separate occasions. "In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions." (§ 667.6, subd. (d).)

The trial court made the requisite finding of separate occasions under section 667.6, subdivision (d): "In regards to the issue of consecutive sentences, I've looked at that tape more times than I want to, and I agree that there are numerous acts. In fact, I believe this case was undercharged, probably for good tactical reasons. But given the number of offenses that occurred and events that occurred in between, it's hard to describe how many times there was a break in the events which would have given the defendant time to reflect on what he was doing and perhaps stop. [¶] There were points where the victim said 'Ow' or 'You're hurting me,' 'Stop,' or moved his hand away from her private parts or pushed him away, and things sort of stopped at that moment. I remember thinking, when I watched the tape, that, well, it's over now. But then he continued. There were clearly points in time where she indicated that she was not participating in this behavior and—in this activity, and he continued. [¶] He also took

the time to focus the camera and reposition the camera as if he was a director in a movie. And at some point as I indicated he grabbed her and moved—dragged her across the bed. To me that was particularly striking, the way she was moved, as if she was a piece of meat, and at that time there's evidence there's a total lack of recognition of humanity. [¶] As such, I'm finding that these two crimes consisted of separate occasions, and, therefore, I'm going to impose full, separate, and consecutive term[s] of eight years for counts 13 and 14."

In the turbulent wake of *Apprendi*, *supra*, 530 U.S. 466, *Blakely*, *supra*, 542 U.S. 296, and *Cunningham*, *supra*, 127 S.Ct. 856, section 667.6, subdivision (d) immediately raises a Sixth Amendment red flag: Clearly this provision requires the trial court to make factual findings, and just as clearly, the question of whether the crimes were committed on separate occasions was not submitted to the jury here for a determination beyond a reasonable doubt. Although section 667.6, subdivision (d) does require judicial factfinding, because that fact-finding did not increase Diaz's statutory maximum sentence we do not find *Apprendi/Blakely/Cunningham* error in the imposition of full consecutive sentences on counts 13 and 14.[6]

As discussed above, the *Apprendi/Blakely/Cunningham* touchstone is that "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Apprendi*, *supra*, 530 U.S. at p. 490.) The starting point for all *Apprendi/Blakely/Cunningham* cases is the statutory maximum sentence, the maximum sentence to which the defendant may be sentenced based on the facts reflected in jury's verdict or admitted by the defendant. (*Blakely*, *supra*, 542 U.S. at pp. 303-304 [statutory maximum sentence is the as "the maximum [t]he [trial judge] may impose *without* any additional findings"].)

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[6] The error in imposing upper term sentences on these counts has already been discussed *ante*, in Section VI.B.

Based on the facts in the verdict alone, without the additional judicial determination that the acts occurred on separate occasions, Diaz could have been sentenced on counts 13 and 14 under one of two statutory schemes: section 1170.1 (California's Determinate Sentencing Law) or section 667.6, subdivision (c), which is a discretionary alternative sentencing scheme for certain sexual offenses. Under section 667.6, subdivision (c), the trial court had the discretion to impose full consecutive sentences "whether or not the crimes were committed during a single transaction." (Former § 667.6, subd. (c)[7].) If the trial court elected to proceed under section 667.6, subdivision (c), it was required to state the reason for its discretionary sentencing choice (Cal. Rules of Court, rule 4.406(b)(6)), but this did not create a presumption of or legal entitlement to sentencing under section 1170.1. (See *People v. Reeder* (1984) 152 Cal.App.3d 900, 923; *People v. Hernandez* (2007) 147 Cal.App.4th 1266, 1271.)

A comparison of the Rules of Court governing the selection of full consecutive sentences under section 667.6, subdivision (c) with the rules for imposing upper term sentences immediately demonstrates the vast difference between the procedures governing the decision to impose an upper term and the decision to impose sentence under section 667.6, subdivision (c). As the court in *Cunningham*, *supra*, 127 S.Ct. at page 862 observed, California's Rules of Court specify that the determination of aggravating factors is entirely about finding facts: "'Circumstances in aggravation,' as crisply defined by the Judicial Council, means '*facts* which justify the imposition of the upper prison term.' Rule 4.405(d) (emphasis added). Facts aggravating an offense, the Rules instruct, 'shall be established by a preponderance of the evidence,' Rule 4.420(b) [footnote], and must be 'stated orally on the record.' Rule 4.420(e)." Because of this

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[7] Section 667.6, subdivision (c) has since been amended on two occasions but remains similar in effect. The statute now provides, "In lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of an offense specified in subdivision (e) if the crimes involve the same victim on the same occasion. A term may be imposed consecutively pursuant to this subdivision if a person is convicted of at least one offense specified in subdivision (e)." (§ 667.6, subd. (c).

emphasis on facts in the context of aggravators, a majority of the Supreme Court rejected Justice Alito's argument in dissent that policy judgments or subjective beliefs of the trial judge could be aggravating circumstances: "California's Rules . . . constantly refer to 'facts.' As just noted, the Rules define 'circumstances in aggravation' as '*facts* which justify the imposition of the upper prison term.' Rule 4.405(d)(emphasis added). [Footnote]. And 'circumstances in aggravation,' the Rules unambiguously declare, 'shall be established by a preponderance of the evidence,' Rule 4.420(b), a clear factfinding directive to which there is no exception." (*Id*. at pp. 862-863.)

In sharp contrast are the rules governing the trial court's choice of proceeding under section 667.6, subdivision (c) or section 1170.1 for qualifying offenses. The decision to sentence to full consecutive sentences under section 667.6, subdivision (c) is one that "generally require[s] a statement of a reason." (Cal. Rules of Court, rule 4.406(b) & 4.406(b)(6).) The responsibility to state a reason means that the trial court shall or must[8] "state in simple language the primary factor or factors that support the exercise of discretion." (Cal. Rules of Court, rule 4.406(a).) Rule 4.406, governing the statement of reasons for sentence choices, never uses the words "fact" or "finding," and does not impose a standard of proof. Unlike the series of rules governing the determination of aggravating facts, there are no other rules in the Rules of Court setting forth standards by which to determine facts or factors for the purposes of the decision whether to impose a full consecutive sentence under section 667.6, subdivision (c). The decision to impose full consecutive sentences under section 667.6, subdivision (c), therefore, is wholly discretionary and requires no judicial factfinding beyond the facts contained in the verdict itself, which here established that the trial court could sentence Diaz under section 667.6, subdivision (c) or section 1170.1.

Because the trial court had the discretion under section 667.6, subdivision (c) to sentence Diaz to full consecutive sentences based on the facts encompassed by the

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[8] At all times relevant to this case, the rule used the term "shall." Rule 4.406 was subsequently amended and now uses the word "must" instead."

verdict alone—without making any additional findings of fact—the statutory maximum Diaz faced for purposes of *Apprendi*, *supra*, 530 U.S. 466, *Blakely*, *supra*, 542 U.S. 296, and *Cunningham*, *supra*, 127 S.Ct. 856, was a full consecutive term on counts 13 and 14. (*People v. Groves* (2003) 107 Cal.App.4th 1227, 1231.) Therefore, when the trial court made a finding of separate occasions finding under section 667.6, subdivision (d), it did not "increase[] the penalty for [the] crime[s] beyond the prescribed statutory maximum." (*Apprendi*, *supra*, 530 U.S. at p. 490.) As the court's factual finding did not raise Diaz's potential punishment beyond that to which he was already subject based on the verdict alone, the court's failure to submit the question of separate occasions to the jury did not violate the Sixth Amendment. (*Ibid*.)

D. Proceedings in Light of Sentencing Error

We asked the parties to submit additional briefing on the question of what remedial orders this court should make in the event that we concluded that Diaz's sentence violated the Sixth Amendment. Diaz argues that because the upper term sentences here were imposed based on factors that were impermissible under *Cunningham*, *supra*, 127 S.Ct. 856, our options are limited to imposing midterm sentences ourselves or remanding for the imposition of midterm or low term sentences. The Attorney General contends that if we conclude that none of the aggravating factors were constitutionally valid, we may remand the matter for a new sentencing hearing at which the trial court could empanel a new jury to make aggravating factor findings in compliance with *Cunningham*, *supra*, 127 S.Ct. 856.

The Attorney General acknowledges that there is "no explicit statutory authorization for a procedure in which a jury would find aggravating circumstances in support of an upper term," but argues that "this certainly does not render such a procedure unlawful." He argues that "[i]n the absence of specific statutory guidance, the court retains the inherent power and duty to effect an appropriate procedure to carry out the mandate of the law and to preserve the orderly administration of justice."

Although we are well aware that there exist "inherent powers of the courts [that] are derived from the Constitution (art. VI, § 1 [reserving judicial power to courts]; [citations omitted]), and are not confined by or dependent on statute" (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 267), we are not convinced that those inherent authorities extend or should be conscripted into supporting the judicial creation of an entirely unprecedented second-chance sentencing trial/rehearing system for defendants whose sentences have been invalidated on appeal due to *Apprendi/Blakely/Cunningham* error.[9] The magnitude of such a judicial concoction would be immense; it would involve co-opting a wide variety of criminal procedures already prescribed by statute and shoehorning them into a new sentencing system unique to one particular set of criminal defendants. To exercise judicial authority in this manner would require devising, inter alia, systems for charging and pleading aggravating factors—after a trial on the information has already occurred—in such a manner as to give adequate notice of the alleged aggravating factors so as to satisfy due process requirements for criminal defendants. "Indeed, because a fact 'other than a prior conviction' used to impose the upper term must first be submitted to a jury and proved beyond a reasonable doubt, unless the accused waives the right to jury trial (*Cunningham, supra,* ___ U.S. at p. ___

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[9] We do not question that in the absence of a constitutionally legitimate sentencing procedure the courts may and, indeed, must employ their inherent powers to ensure that properly convicted criminal defendants are sentenced to terms of imprisonment. "Courts have the inherent power to create new forms of procedure in particular pending cases. 'The . . . power arises from necessity where, in the absence of any previously established procedural rule, rights would be lost or the court would be unable to function.' [Citation.]" (*James H. v. Superior Court* (1978) 77 Cal.App.3d 169, 175.) This is not, however, an instance in which the court would be unable to function, rights would be lost, or convicted defendants would go without prison sentences if we do not invent new procedures. The Supreme Court did not strike down California's entire sentencing scheme, only the procedure for imposing high term sentences based on aggravating facts, other than prior convictions, found by a judge rather than a jury and by a preponderance of the evidence standard. What is at stake here is not the continued operation of our trial courts, it is the question of whether one specific group of criminal defendants—those sentenced to upper term sentences in violation of the Sixth Amendment where the constitutional error is not harmless—will receive high term or midterm sentences.

[166 L.Ed.2d at p. 873], it now appears that to satisfy procedural due process, an aggravating fact must be charged in the accusatory pleading. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 476, 494, fn. 19 [147 L.Ed.2d 435, 446, 457, fn. 19]; *Jones v. United States* (1999) 526 U.S. 227, 243, fn. 6 [143 L.Ed.2d 311, 326, fn. 6] ['any fact (other than prior conviction) that increases the maximum penalty for a crime *must be charged in an indictment*, submitted to a jury, and prove[d] beyond a reasonable doubt' (italics added)].)" (*Barragan v. Superior Court* (2007) ___ Cal.App.4th ___ [2007 WL 914768, *2] [permitting, in a just-begun criminal trial, the amendment of the information to allege aggravating factors].) This task would be made all the more complicated by the fact that the California Rules of Court explicitly provide that the list of aggravating factors in California Rules of Court, rule 4.420 is non-exhaustive. (Cal. Rules of Court, rule 4.408 ["The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made"].)

After resolving the constitutional and practical issues presented by charging an already-convicted and already-sentenced criminal defendant with aggravating factors, we would have to judicially extend the laws concerning discovery in criminal cases to press that statutory creation into one that would offer and permit appropriate post-trial discovery with respect to the charged aggravating factors. As there presently exists no statutory authority for selecting noncapital sentencing juries, we would have to create a system for selecting a jury panel for a post-appeal sentencing trial on aggravating facts. We would need a new system of evidentiary rules to address what evidence from the trial could be admitted at this subsequent sentencing proceeding—a system that would have to take into account the fact that the defendant was forced to elect whether to testify at his or her first trial without any knowledge that a second jury would later be empaneled to consider that testimony for the purposes of evaluating aggravating factors. New jury instructions and new verdict forms would have to be developed. We are doubtful that the quasi-legislative creation of procedures for a wholly new sentencing "trial" on aggravating factors for this single group of criminal defendants who have already been

charged, tried, convicted and sentenced, but whose sentences are vacated on *Apprendi/Blakely/Cunningham* grounds, would adequately protect their constitutional rights, preserve due process, and avoid issues of double jeopardy.

Similarly militating against such a judicial invention is the fact that California courts have long declined to formulate new sentencing schemes as long as a valid sentencing option survives the declaration that a criminal punishment prescribed by statute is unconstitutional. In *Rockwell v. Superior Court* (1976) 18 Cal.3d 420, 445, the California Supreme Court held unconstitutional the procedure by which California imposed the death penalty on the grounds that the procedure failed to authorize the consideration of mitigating factors and in effect made the death penalty mandatory if enumerated special circumstances were present. The People argued that the Supreme Court could salvage the death penalty system by construing some statutory language as permissive rather than mandatory and by "prescrib[ing] procedures that will satisfy the requirements of the Eighth and Fourteenth Amendments." (*Ibid*.) The Supreme Court refused, observing that its conclusion that the statutes governing the imposition of the death penalty were unconstitutional left intact a valid punishment for those convicted of first degree murder: life imprisonment. (*Ibid.*; see also *Leaming v. Municipal Court* (1974) 12 Cal.3d 813 [declaring unconstitutional penal provisions for a second conviction for indecent exposure and leaving the statute to be read in conjunction with section 18, which sets forth the term of imprisonment for felonies where no term is elsewhere specified].) As the Supreme Court explained in *Rockwell*, this approach is preferable to a wholesale rewriting of Penal Code provisions because "[w]ere this court to attempt to devise the necessary procedures and criteria we would not only invade the legislative province, but would also be in the position of having to pass objectively on the constitutionality of procedures of our own design." (*Rockwell*, at p. 445.) Concurring separately, Justice Clark emphasized that the Supreme Court properly refused to "save the law by rewriting it," because "the courts must not, in this case or any other, act as a super-legislature." (*Id*. at p. 449.)

Finally, we are all the more reluctant to impose a new judicially-created sentencing trial scheme for previously-convicted and already-sentenced defendants whose sentences are voided on *Apprendi/Blakely/Cunningham* grounds in light of the Legislature's response to *Cunningham*, *supra*, 127 S.Ct. 856. In urgency legislation signed by the Governor on March 30, 2007, the Legislature amended section 1170, subdivision (b) to eliminate the statutory presumption for the middle term. Previous section 1170, subdivision (b), as it was in effect at the time of Diaz's trial, provided that when an offense is punishable by one of three statutory terms, "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." Rather than invent a system for charging and trying aggravating factors by jury under the reasonable doubt standard, the Legislature simply removed the statutory presumption to the middle term so that the section now reads, "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court." (§ 1170, subd. (b), as amended by Stats. 2007, ch. 3, § 2 (effective Mar. 30, 2007).)

The amendments made by the Legislature to the Determinate Sentencing Law in response to *Cunningham*, *supra*, 127 S.Ct. 856, demonstrate its view that the appropriate immediate method to remedy the constitutional defects in the Determinate Sentencing Law is *not* the creation of new procedures to submit aggravating factors to juries for findings beyond a reasonable doubt within the current sentencing scheme. Given the Legislature's determination, we think it singularly inappropriate for this court to impose on the trial courts the burden of implementing a judicially-designed aggravating factor trial system that would be unique to those defendants whose sentences were vacated on appeal due to *Apprendi/Blakely/Cunningham* error.

We conclude that there is no need to remand the matter to the trial court. If we were to remand the matter for a new sentencing hearing the trial court would lack the discretion to impose an upper term sentence, as no aggravating factors were admitted by Diaz or found true by the jury beyond a reasonable doubt, nor did Diaz have any prior convictions. The trial court, therefore, could only consider whether to impose midterm

sentences or lower term sentences on counts 10, 13, and 14. Having reviewed the evidence and considered the trial court's comments at sentencing, we are convinced beyond a reasonable doubt that even if the trial court had not considered constitutionally improper aggravating factors, under no circumstances would the trial court have exercised its sentencing discretion to impose low term sentences on counts 10, 13, and 14. Accordingly, we modify the judgment to impose the middle term of six years on counts 10, 13, and 14, for a decrease of six years in Diaz's aggregate prison term.

DISPOSITION

The convictions are affirmed. The judgment is modified to impose the middle term of six years on counts 10, 13, 14. The clerk of the superior court is ordered to prepare a new abstract of judgment reflecting the imposition of six-year terms on counts 10, 13, and 14. In preparing the abstract of judgment, the clerk should ensure that the sentences for counts 13 and 14 reflect that the six-year midterm sentences are full terms to be served consecutively, not consecutive sentences of 1/3 the middle term as they were previously and incorrectly designated. The clerk of the superior court shall forward a copy of the new abstract of judgment to the Department of Corrections.

CERTIFIED FOR PARTIAL PUBLICATION.

ZELON, J.

I concur:

JOHNSON, J.

PERLUSS, P. J., Concurring and Dissenting.

I fully agree with parts 1 through 5 of the majority opinion. With respect to part 6, dealing with sentencing issues under *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] (*Apprendi*), *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*) and *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*), I also agree (1) Mark Diaz did not forfeit his argument the trial court's imposition of a sentence based in part on its own factual findings concerning aggravating circumstances violated his right to a jury trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution by failing to object on constitutional grounds in the trial court; (2) the trial court's imposition of upper term sentences on counts 10, 13 and 14 based on its own factual findings of aggravating circumstances, none of which involved a prior conviction (see *Cunningham, supra,* 127 S.Ct. at p. 868; *Almendarez-Torres v. United States* (1998) 523 U.S. 224 [118 S.Ct. 1219, 140 L.Ed.2d 350])[1] or even more broadly the defendant's recidivism (see *People v. Thomas* (2001) 91 Cal.App.4th 212, 221-222 ["courts have held that no jury trial right exists on matters involving the more broadly framed issue of 'recidivism'"]; see also *People v. McGee* (2006) 38 Cal.4th 682, 706-707),[2] violated Mark Diaz's

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[1] The question whether there is a violation of the defendant's rights under *Cunningham* if the defendant is eligible for the upper term based on a single aggravating factor established by means that satisfy the governing Sixth Amendment authorities even if the trial judge relies on other aggravating factors not established by such means in exercising his or her discretion to impose an upper term sentence is currently pending before the California Supreme Court. (E.g., *People v. Towne*, review granted July 14, 2004, S125677, supp. briefing ordered, Feb. 7, 2007.)

[2] Whether the prior conviction exception of *Almendarez-Torres v. United States*, *supra*, 523 U.S. 224, as set forth in *Cunningham*, is properly interpreted to apply not only to the fact of a prior conviction but also to other issues relating to the defendant's recidivism, including the defendant's status as a probationer or parolee at the time the current offense was committed and the existence of "numerous" or increasingly serious prior convictions is also currently pending before the California Supreme Court. (*People v. Towne, supra,* S125677, supp. briefing ordered, Feb. 7, 2007 [parties to address the following issue, among others, "Do *Cunningham v. California, supra,* and *Almendarez-*

constitutional right to a jury trial; and (3) imposition of consecutive sentences under Penal Code section 667.6, subdivisions (c) and (d), does not constitute *Blakely/Cunningham* error. I respectfully disagree, however, with the majority's conclusion the error in imposing upper term sentences was not harmless.[3]

As the majority explains, the trial court's error in making the factual findings upon which it based its decision to impose the upper term sentences, rather than submitting those issues to the jury, is subject to harmless error analysis. (*Washington v. Recuenco* (2006) 548 U.S. __ [126 S.Ct. 2546, 165 L.Ed.2d 466] [*Apprendi/Blakely* error not "structural error" requiring automatic reversal]; see *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327 [*Apprendi* error reviewable under the harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] (*Chapman*)]; *People v. Davis* (2005) 36 Cal.4th 510, 564 [same].) An error may be found harmless under *Chapman* only if, on appeal, the Attorney General demonstrates beyond a reasonable doubt the result would have been the same notwithstanding the error. (E.g., *Sengpadychith*, at p. 320.)

I am persuaded on this record the *Blakely/Cunningham* error was harmless. Although the trial court identified four circumstances or factors in aggravation, it expressly stated any one of those factors standing alone would outweigh the mitigating factors (primarily Diaz's lack of prior criminal record) and justify the upper-term,

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Torres v. United States (1998) 523 U.S. 224, 239-247 [118 S.Ct. 1219, 140 L.Ed.2d 350], permit the trial judge to sentence defendant to the upper term based on any or all of the following aggravating factors, without submitting them to a jury: the defendant's prior convictions as an adult are numerous and of increasing seriousness; the defendant has served a prior prison term; the defendant was on parole when the crime was committed; the defendant's prior performance on probation or parole was unsatisfactory (California Rules of Court, Rule 4.421, subds. (b)(2) - (b)(5))?"]; *People v. Hernandez*, review granted Feb. 7, 2007, S148974; *People v. Pardo*, review granted Feb. 7, 2007, S148914.)

[3] Because I would affirm the judgment in its entirety, I express no view on the majority's analysis whether a remand for resentencing is appropriate and, if so, what procedures may be used by the trial court on remand.

consecutive sentences imposed.[4] Accordingly, although I agree with the majority that several of the circumstances discussed by the court appear to duplicate elements of Diaz's crimes and, therefore, were not properly considered as aggravating factors independent of any *Blakely/Cunningham* issue (see Cal. Rules of Court, rule 4.420(d)), the proper focus of the required harmless error analysis is whether we are persuaded the jury would have found true beyond a reasonable doubt any one of the factors upon which the court based its aggravated sentence. (See *People v. Cleveland* (2001) 87 Cal.App.4th 263, 271 [finding any *Apprendi* error harmless because "[w]e have no doubt a jury would have reached the same conclusion under the reasonable doubt standard"].)

The first aggravating circumstance identified by the court was that Diaz's repeated sexual assaults on his semi-conscious victim disclosed a high degree of cruelty, viciousness or callousness. (See Cal. Rules of Court, rule 4.421(a)(1) ["[t]he crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness"].)[5] Diaz's conduct toward his incapacitated victim upon which this assessment was based was essentially undisputed: It was captured on the videotape Diaz made of his own assault; Diaz himself did not deny the tape accurately reflected what had occurred, asserting only that the victim had consented to his conduct -- an interpretation of the visual record the jury

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[4] The court stated, "I want to make the record clear that, as for the factors that I found in aggravation, each factor alone is so strong that I would find that each factor alone would separately -- is strong enough to out -- as a single factor or the factors in mitigation, let alone those facts in aggravation in their entirety. Looking at the four different factors in aggravation that I found, I found each one is strong enough by themselves to outweigh the factors in mitigation, let alone the four factors in aggravation when viewed together."

[5] As the majority correctly notes, the trial court expressed its view that "any act, I believe, of rape involves a great violence," but it specifically found as an aggravating circumstance not that Diaz's crimes involved great violence or great bodily harm, but that his acts disclosed a high degree of cruelty, viciousness or callousness: "Specifically, I'm finding it involved a high degree of cruelty, viciousness and [*sic*] callousness. As I said, she was treated in a manner which completely denied her humanity . . . ."

implicitly rejected in finding that the victim was prevented from resisting Diaz by intoxication and that Diaz, in turn, was guilty of two counts of rape by use of drugs, two counts of oral copulation by anesthesia or controlled substance and unlawful sexual penetration by a foreign object.

Accepting the jury's conclusion the victim lacked the capacity to consent to Diaz's assaultive behavior, I have no doubt that the same jury would have also concluded Diaz's actions, including his decision to record them on videotape, disclosed a high degree of cruelty or callousness. In addition to the five separate sex crimes for which he was convicted, as well as a number of further uncharged offenses,[6] the tape shows Diaz repeatedly slapping the victim, who largely lies limp, motionless and moaning on the bed, but who occasionally rouses herself to cry out "ow," "you're hurting me," "no," "don't do it" and "stop." It also depicts Diaz dragging the victim across the bed and positioning and repositioning her body for the camera -- "as if he was a director in a movie," in the words of the trial judge.[7] Applying *Chapman*'s heightened beyond-a-reasonable-doubt standard for assessing harmless error in cases involving violation of a defendant's federal constitutional rights, from this record I am confident the jury would necessarily have found, beyond a reasonable doubt, the existence of this aggravating factor if the issue had been submitted to it. (See *People v. Cleveland*, *supra*, 87 Cal.App.4th at p. 271.) Any sentencing error, therefore, was harmless.

CERTIFIED FOR PUBLICATION

PERLUSS, P. J.

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[6] The trial court observed during the sentencing hearing, "I've looked at that tape more times than I want to, and I agree that there are numerous acts. In fact, I believe this case was undercharged, probably for good tactical reasons."

[7] In its findings the viciousness or callousness of Diaz's conduct while committing the crimes was an aggravating factor, the trial court stated, "He also took the time to focus the camera and reposition the camera as if he was a director in a movie. And at some points as I indicated he grabbed her and moved -- dragged her across the bed. To me that was particularly striking, the way she was moved, as if she was a piece of meat, and at that time there's evidence there's a total lack of recognition of humanity."