Filed 11/23/04 P. v. Hughes CA1/1
Opinion following rehearing

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT S. HUGHES, Defendant and Appellant.	A105756 (Sonoma County Super. Ct. No. MCR429522)

Defendant appeals from a judgment following pleas of guilty. His counsel raised no issues and asked this court for an independent review of the record to determine whether there are any issues that would, if resolved favorably to appellant, result in reversal or modification of the judgment. (*People v. Wende* (1979) 25 Cal.3d 436; see *Smith v. Robbins* (2000) 528 U.S. 259.) Upon review of the record we found no arguable issues, although we ordered an amendment of the abstract of judgment to require AIDS testing. We subsequently granted defendant's petition for rehearing to consider the impact of the decision in *Blakely v. Washington* (2004) 542 U.S. ___ [159 L.Ed.2d 403, 124 S.Ct. 2531] (*Blakely*), upon defendant's sentence. We conclude that the upper term imposed upon defendant must be vacated, but otherwise affirm the judgment as amended.

BACKGROUND

On October 22, 2003, a felony complaint was filed charging defendant with five counts of lewd and lascivious acts on a minor under the age of 14. (Pen. Code, §288, subd. (a).) It was further alleged as to each count that the defendant had substantial sexual contact with the minor. (Pen. Code § 1203.066, subd. (a)(8).)

The defendant waived a preliminary hearing on December 5, 2003, and pleaded guilty to counts one and two pursuant to a negotiated disposition. The People moved to dismiss the remaining counts and requested that the motion "be taken under advisement by the Court and ruled on at the time of sentencing." The allegations under Penal Code[1] section 1203.066, subdivision (a)(8) were stricken. The matter was referred to the probation department for a report and a doctor was appointed pursuant to section 288.1.

A sentencing hearing was held on February 19, 2004. After a brief hearing which included comments from the doctor and Christina W., the court sentenced defendant to the aggravated term of 8 years on count one and 2 years on count two to run consecutively for a total term of 10 years. Defendant was ordered to pay restitution of $4,000 pursuant to section 1202.4, subdivisions (a)(3) and (b), and section 1202.45, to register pursuant to section 290, to provide blood and salvia samples pursuant to section 296, to submit to AIDS testing pursuant to section 1202.1, and to have no contact with the minor victim pursuant to section 1202.05. The defendant was awarded 139 days of credit.

This appeal followed.

FACTS

We only state the facts briefly which are taken from the probation report since there was no preliminary hearing.

The victim Kelly[2] is the daughter of Christina W. and was nine years old at the time of the offenses. Christina W. filed a sexual abuse report with the police on October 19, 2003. She had been involved in a relationship with the defendant for six years. She had three children from a prior relationship and the children referred to the defendant as "dad." Kelly was interviewed on October 20, 2003. She stated that at the start of the school year about two months prior, the defendant asked her to give him a massage. She

---

[1] All further references are to the Penal Code, unless otherwise indicated.

[2] The minor is referred to in the probation report as Jane Doe and in the complaint as Kelly. We will refer to her by the name used in the complaint.

declined but after he yelled at her, they went into his bedroom, he locked the door and removed his clothing. He laid down on the bed and she started to massage him. He told her that she was doing it wrong and had her remove her clothing so he could show her proper massage techniques. Kelly stated that he then attempted to place his penis in her "privates." She went on to detail other incidents during which the defendant attempted to place his penis inside her vagina and had her massage his penis. She related that these incidents happened every day of the week while her mother was at work. She reported that the defendant had a drinking problem which was consistent with statements from the defendant's daughter. Kelly's brother was interviewed and reported that he had heard the defendant ask his sister for massages and had observed her and the defendant taking showers together.

A pretext telephone call was placed to the defendant by Christina W. during which he stated that "I touched her like I wasn't supposed to."

The probation report recommended that the defendant be sentenced to state prison for 10 years.

DISCUSSION

The Plea.

We have reviewed the entire record before us. Defendant has admitted the sufficiency of the evidence establishing the charged crimes by his pleas of guilty and is therefore not entitled to review of any issue that merely goes to the question of his guilt or innocence. (*People v. Hunter* (2002) 100 Cal.App.4th 37, 42.) The record shows that defendant was represented by counsel throughout the proceedings. Before he entered his pleas, he was advised of the constitutional rights he would be waiving and the possible consequences of his plea. He expressly waived his constitutional rights and knowingly and voluntarily entered his pleas.

The Blakely Issue.

We have granted rehearing to give defendant the opportunity to present the argument that under the recent United States Supreme Court decision in *Blakely, supra,* 542 U.S. ___ [124 S.Ct. 2531], the trial court erred by imposing upper and consecutive

terms which were not based upon either admissions by him or a finding made by the jury beyond a reasonable doubt. Defendant asserts that without "a jury determination" of the necessary predicate facts, imposition of upper and consecutive terms "was unauthorized under *Blakely* and in violation of the Sixth Amendment." He maintains that for the purposes of the *Blakely* opinion the "statutory maximum" sentence which cannot be exceeded without a finding by the jury and proof beyond a reasonable doubt is limited to middle and concurrent terms of imprisonment. Therefore, he complains that the upper and consecutive terms imposed upon him based upon findings by the *trial court* violated his constitutional rights as defined in *Blakely*. This contention requires a thorough examination of the *Blakely* opinion and its impact upon the California Determinate Sentencing Law.[3]

I. Waiver.

We first dispose of respondent's contention that defendant waived any claim of *Blakely* error by failing to request a jury determination or otherwise object to the reasons the court gave for the sentence. "Claims of error relating to sentences 'which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner' are waived on appeal if not first raised in the trial court." (*People v. Brach* (2002) 95 Cal.App.4th 571, 577; see also *People v. Breazell* (2002) 104 Cal.App.4th 298, 304-305.) According to a fundamental principle of appellate procedure, "with certain exceptions, an appellate court will not consider claims of error that could have been—but were not—raised in the trial court." (*People v. Vera* (1997) 15 Cal.4th 269, 275.) " '[A]n appellate court should not take notice of matters not first presented to and considered by the trial court, where to do so would unfairly permit "one side to press an issue or theory on appeal that was not raised below." [Citation.]' [Citation.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 171.) " 'Generally speaking, the rationale underlying the rule requiring objection below as a prerequisite to complaint on appeal regarding some error by the trial

---

3 We are of course aware that the effect of *Blakely, supra,* 124 S.Ct. 2531, on California sentencing law is already before the California Supreme Court in *People v. Black*, S126182, and

court is predicated on the premise that, in its absence, the People would be deprived of the opportunity to cure the defect in the trial court and the defendant would be allowed to gamble on a favorable result—secure in the knowledge that if he did not prevail there, he would be able to prevail on appeal. . . .' [Citation.]" (*People v. Zamarron* (1994) 30 Cal.App.4th 865, 870; see also *People v. McClellan* (1993) 6 Cal.4th 367, 377.) The waiver doctrine also seeks to " ' "encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided . . . ." ' [Citation.]" (*People v. Peel* (1993) 17 Cal.App.4th 594, 600.)

"The California Supreme Court has repeatedly held" that even "constitutional objections must be interposed before the trial judge in order to preserve such contentions for appeal." (*People v. Rudd* (1998) 63 Cal.App.4th 620, 628, citing *People v. Williams* (1997) 16 Cal.4th 153, 250; *People v. Padilla* (1995) 11 Cal.4th 891, 971; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20; *People v. Garceau* (1993) 6 Cal.4th 140, 173-174; *People v. McPeters* (1992) 2 Cal.4th 1148, 1174; *People v. Ashmus* (1991) 54 Cal.3d 932, 972-973, fn. 10.) " ' "No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." [Citation.]' [Citation.]" (*People v. Saunders* (1993) 5 Cal.4th 580, 590; see also *People v. Rudd, supra,* at p. 629.)

However, "Not all claims of error are prohibited in the absence of a timely objection in the trial court. A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." (*People v. Vera, supra,* 15 Cal.4th 269, 276.) Further, failure to object does not prevent correction or vacation of an "unauthorized sentence" on appeal. (*In re Birdwell* (1996) 50 Cal.App.4th 926, 931.) "An unauthorized sentence is a narrow exception to the requirement that the parties raise their claims in the trial court to preserve the issue for appeal." (*People v. Breazell, supra,* 104 Cal.App.4th 298, 304.) "[A] sentence is

---

People v. Towne, S125677.

generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case. Appellate courts are willing to intervene in the first instance because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing." (*People v. Scott* (1994) 9 Cal.4th 331, 354; see also *People v. Breazell, supra,* at p. 304; *People v. McGee* (1993) 15 Cal.App.4th 107, 117.) "Claims involving unauthorized sentences or sentences entered in excess of jurisdiction can be raised at any time." (*People v. Andrade* (2002) 100 Cal.App.4th 351, 354; see also *People v. Turner* (2002) 96 Cal.App.4th 1409, 1415.) A related exception to the waiver rule is that it "is generally not applied when the alleged error involves a pure question of law, which can be resolved on appeal without reference to a record developed below." (*People v. Williams* (1999) 77 Cal.App.4th 436, 460.)

In the present case defendant has presented a claim of deprivation of his fundamental constitutional rights to jury trial and proof beyond a reasonable doubt. (*People v. Holmes* (1960) 54 Cal.2d 442, 443-444.) The constitutional challenge raised by defendant is an issue of law that we may decide without reference to the particular sentencing record developed in the trial court. (*In re Justin S.* (2001) 93 Cal.App.4th 811, 815.) And if his position is found to have merit, the sentence may not lawfully be imposed under any circumstances without a jury trial, and as an unauthorized component of his disposition may be corrected on appeal despite the lack of an objection in the trial court. (*Ibid.*; *People v. Cleveland* (2001) 87 Cal.App.4th 263, 268, fn. 2; *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1534; *People v. Chambers* (1998) 65 Cal.App.4th 819, 823; *In re Paul R.* (1996) 42 Cal.App.4th 1582, 1590; *People v. Sexton* (1995) 33 Cal.App.4th 64, 69.) Finally, *Blakely* was decided after defendant was sentenced, and therefore he had no reason to object in the face of previously established law that consistently denied a criminal defendant the constitutional right to a jury trial in connection with the imposition of an upper term of imprisonment. (See *People v. Butler* (2004) 122 Cal.App.4th 910, 918-919; *People v. Lemus* (2004) 122 Cal.App.4th 614, 620; *People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231; *People v. Ramos* (1980) 106 Cal.App.3d 591, 605-606; *People v. Williams* (1980) 103 Cal.App.3d 507, 510;

People v. Betterton (1979) 93 Cal.App.3d 406, 410-411; *People v. Nelson* (1978) 85 Cal.App.3d 99, 102-103; *U.S. v. Harrison* (8th Cir. 2003) 340 F.3d 497, 500.) We cannot find that defendant voluntarily and intelligently waived a known right or forfeited his right to object on appeal by failing specifically to raise an objection in a timely fashion. We therefore conclude that defendant has not waived his right to complain of denial of the right to a jury trial under *Blakely*, and despite the lack of an objection below elect to address his constitutional claims on their merits. (*People v. Peck* (1996) 52 Cal.App.4th 351, 362, fn. 5; see also *People v. Marshall* (1996) 13 Cal.4th 799, 831-832; *People v. Ashmus, supra,* 54 Cal.3d 932, 976; *In re Khonsavanh S.* (1998) 67 Cal.App.4th 532, 537; *People v. Williams* (1998) 61 Cal.App.4th 649, 657.)

II. The Blakely Opinion.

In *Blakely*, the United States Supreme Court revisited the rule articulated in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, (*Apprendi*), that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed *statutory maximum* must be submitted to a jury and proved beyond a reasonable doubt." (*Blakely*, *supra*, 124 S.Ct. 2531, 2536, italics added.) At issue in *Blakely* was whether the determinate sentencing procedure followed by courts in the State of Washington deprived the petitioner of his "federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence." (*Ibid*.) The petitioner entered a guilty plea to second-degree kidnapping of his estranged wife in which he admitted domestic violence and use of a firearm, but "no other relevant facts." (*Id*., at pp. 2534-2535.) Under the Washington Criminal Code (§§ 9A.40.030(3); 9A.20.021(1)(b)), second-degree kidnapping was designated a class B felony that carried a maximum statutory sentence of 10 years. (*Blakely*, *supra*, at p. 2535.) The governing Washington sentencing guidelines further limited the presumptive "standard range" to 49-53 months, but authorized the judge to impose a sentence above the specified range, although below the 10-year maximum, upon a finding by a preponderance of the evidence of "substantial and compelling reasons justifying an exceptional sentence." (*Ibid.,* citing Wash. Rev. Code § 9.94A.120(2).) At the sentencing hearing, an "exceptional sentence" of 90 months

was imposed, based upon the trial judge's finding that the petitioner used "deliberate cruelty" in the commission of the offense, which was one of the statutorily enumerated grounds for departure from the standard sentencing range. (*Blakely*, *supra*, at p. 2535.)[4]

The court in *Blakely* reaffirmed the commitment articulated in its prior decisions in *Apprendi, supra,* 530 U.S. 466, and *Ring v. Arizona* (2002) 536 U.S. 584, "to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." (*Blakely, supra*, 124 S.Ct. 2531, 2538-2539.) The Sixth Amendment, declared the court, "is not a limitation on judicial power, but a reservation of jury power." (*Blakely, supra*, at p. 2540.) The court further observed that "*Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict." (*Blakely, supra*, at p. 2539.)[5]

---

4 Under the Washington Sentencing Reform Act, the factors that may be relied upon to justify a finding of an exceptional sentence are listed, but the list is illustrative not exhaustive. A factor may be taken into consideration to impose an exceptional sentence only if it is not already taken into a account in the calculation of the standard range sentence for the offense. (*Blakely, supra*, 124 S.Ct. 2531, 2535.)

5 In *Apprendi, supra*, 530 U.S. 466, 468-469, the court had earlier invalidated a New Jersey hate-crime statute that authorized a 20-year enhanced sentence, despite the standard 10-year statutory maximum, if the judge found the crime had been committed " 'with a purpose to intimidate . . . because of race, color, gender, handicap, religion, sexual orientation or ethnicity.' " (Quoting N. J. Stat. Ann. § 2C:44-3(e) (West Supp. 1999-2000).) The court reasoned in *Apprendi* that the due process clause and the Sixth Amendment right to a jury trial "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt,' " despite the label of "sentencing factor" rather than "element" of the crime placed upon the finding by the Legislature. (*Apprendi, supra*, at p. 477, citations omitted.) The court in *Apprendi* determined that, "[W]hen the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict," and therefore must be submitted to the jury. (*Id*., at p. 494, fn. 19.) The essential holding of *Apprendi* was: "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. . . . '[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.' [Citations.]" (*Apprendi, supra*, at p. 490; see also *People v. Scott* (2001) 91 Cal.App.4th 1197, 1209.)

Then in *Ring v. Arizona, supra,* 536 U.S. 584, 592-593, a Sixth Amendment violation was found in an Arizona law that authorized the death penalty if the judge found one of ten specified aggravating factors. The court declared that, "[i]f a State makes an increase in a defendant's

The court in *Blakely* operated from the conclusion reached in both its *Apprendi* and *Ring* decisions that a defendant's constitutional rights have been violated when a judge "imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding. *Apprendi, supra*, at 491-497, [ ]; *Ring, supra*, at 603-609, [ ]." (*Blakely, supra*, 124 S.Ct. 2531, 2537.) The notion advocated by the State in *Blakely* "that there was no *Apprendi* violation because the relevant 'statutory maximum' is not 53 months, but the 10-year maximum for class B felonies in § 9A.20.021(1)(b)," and "no exceptional sentence may exceed that limit," was rejected as contrary to those "clear" precedents. (*Blakely, supra*, at p. 2537.) Instead, the court defined "the 'statutory maximum' for *Apprendi* purposes" as "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority." (*Ibid.*)

The court then concluded: "The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea. Those facts alone were insufficient because, as the Washington Supreme Court has explained, '[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard

---

authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt. . . . A defendant may not be 'expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.' " (*Ring v. Arizona, supra,* at p. 602.) As in *Apprendi*, the Arizona aggravating death penalty factors were considered to "operate as 'the functional equivalent of an element of a greater offense,' " and thus the Sixth Amendment required "that they be found by a jury." (*Ring v. Arizona, supra,* at p. 609.) The court expressed the fundamental principle that a jury trial is required "o[n] any fact on which the legislature conditions an increase in . . . maximum punishment." (*Id*., at p. 589.)

range sentence for the offense,' [citation], which in this case included the elements of second-degree kidnapping and the use of a firearm, see §§ 9.94A.320, 9.94A.310(3)(b). Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed. See § 9.94A.210(4). The 'maximum sentence' is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator)." (*Blakely, supra*, 124 S.Ct. 2531, 2537-2538, fn. omitted.) "Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact." (*Blakely, supra*, at p. 2538.) "Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence." (*Ibid.*, fn. 8.)

In the *Blakely* opinion, the court nevertheless took care to point out that reversal of the "exceptional sentence" imposed under the Washington sentencing law on the basis of a disputed determination that the petitioner acted with deliberate cruelty, was not the equivalent of " 'find[ing] determinate sentencing schemes unconstitutional.' " (*Blakely, supra*, 124 S.Ct. 2531, 2540.) Thus, our task, in accordance with the *Blakely* decision, is to examine the nature of the California Determinate Sentencing Law – and in particular the imposition of an upper term – to determine whether it is "implemented in a way that respects the Sixth Amendment." (*Ibid*.)

III. The Upper Term.

Under the California Determinate Sentencing Law (DSL), "The statutory basis for the selection of punishment for offenses or enhancements which contain three potential terms is section 1170, subdivision (b) which states in pertinent part: 'When a judgment of

imprisonment is to be imposed and the statute specifies three possible terms, the court *shall order imposition of the middle term*, unless there are circumstances in aggravation or mitigation of the crime. . . . In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing.' " (*People v. Brown* (2000) 83 Cal.App.4th 1037, 1045, italics added.) California Rules of Court, rules 4.421 and 4.423,[6] respectively, articulate the "circumstances in aggravation and mitigation of an offense. (Judicial Council of Cal., Annual Rep. (1978) p. 3.) [¶] 'Facts relating to the crime' are set forth in subdivision (a), and 'facts relating to the defendant' in subdivision (b), of each rule." (*People v. Cheatham* (1979) 23 Cal.3d 829, 832-833.) Under rule 4.420(b), "The circumstances utilized by the trial court to support its sentencing choice need only be established by a preponderance of the evidence."[7] (*People v. Leung* (1992) 5 Cal.App.4th 482, 506.)

"A trial court weighs aggravating and mitigating factors when it faces the discretionary decision of which of three possible terms to impose under the determinate sentencing law." (*People v. Bishop* (1997) 56 Cal.App.4th 1245, 1250.) " 'Selection of the upper term is justified only if, considering the *entire record* of the case, including the

---

[6] All further references to rules are to the California Rules of Court.

[7] Rule 4.420 reads: "(a) When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is ordered suspended, the sentencing judge shall select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules. The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.

"(b) Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence. Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation. The relevant facts are included in the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any further evidence introduced at the sentencing hearing. Selection of the lower term is justified only if, considering the same facts, the circumstances in mitigation outweigh the circumstances in aggravation."

probation officer's report, other reports properly filed in the case and other competent evidence, circumstances in aggravation are established by a preponderance of the evidence and outweigh circumstances in mitigation.' [Italics added.] (Cal. Rules of Court, rule 439(b).)." (*People v. Laws* (1981) 120 Cal.App.3d 1022, 1037.) "[S]ection 1170, subdivision (b), as implemented by rule [4.420], leaves to the lower court a choice to be made in the exercise of its discretion as to whether, even after weighing the aggravating circumstances against the mitigating circumstances and determining the aggravating circumstances preponderate, it will impose the upper or middle term as the base term. The statute does not mandate a selection by the court of either of those terms under any particular circumstances, but mandates only selection of the middle term in the absence of aggravating or mitigating circumstances." (*People v. Myers* (1983) 148 Cal.App.3d 699, 704.)

While the consideration of sentencing factors and discretionary selection of an appropriate punishment are traditional sentencing functions, the specification of a presumptive middle term brings the California DSL into conflict with the rather confounding standards articulated in *Blakely*, and invalidates the imposition of an upper term upon defendant. Under section 1170, subdivision (b), three possible terms of imprisonment for each offense are specified, but the sentencing court may not impose the upper term without a finding by a preponderance of the evidence – rather than beyond a reasonable doubt – that circumstances in aggravation are established by a preponderance of evidence and outweigh circumstances in mitigation. (*People v. Wright* (1982) 30 Cal.3d 705, 709-710.) "In determining which term to impose, 'the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.' (Pen. Code, § 1170, subd. (b).)" (*Id.,* at p. 709.) "[A] special finding of aggravation must be made before the upper term for an offense can be imposed . . . ." (*In re Manzy W*. (1997) 14 Cal.4th 1199, 1202, fn. 1.) " '[T]he statutory preference for imposition of the middle term, when coupled with the requirement that aggravating circumstances must outweigh mitigating circumstances before imposition of

the aggravated term is proper, creates a presumption.' [Citation.]" (*People v. Edwards* (1993) 13 Cal.App.4th 75, 79, quoting from *People v. Avalos* (1984) 37 Cal.3d 216, 233.)

Thus, while the upper term is the most severe sentence the court may select for the commission of a particular offense, the maximum penalty the court has authority to impose under the California DSL without finding additional facts is the middle term. (*People v. Butler, supra,* 122 Cal.App.4th 910, 918; *People v. Lemus, supra,* 122 Cal.App.4th 614, 621; *People v. George* (2004) 122 Cal.App.4th 419, 425.) To select an upper term the sentencing court does not merely consider sentencing factors before exercising discretion, as occurs with the choice of a consecutive or concurrent term, but rather must find circumstances in aggravation that outweigh circumstances in mitigation. (*People v. Wright, supra,* 30 Cal.3d 705, 709-710.) Under the DSL a sentencing judge cannot make the discretionary decision to increase a sentence above the middle term without first finding "facts to support it beyond the bare elements of the offense;" the verdict alone does not authorize the sentence. (*Blakely, supra*, 124 S.Ct. 2531, 2538, fn. 8.) With the requirement of a predicate finding before an upper term may be imposed, the sentencing scheme violates the directive in *Blakely* that the " 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without *any additional findings*." (*Blakely, supra*, at p. 2537, italics added; *People v. Butler, supra*, at pp. 917-918.)

IV. The Consecutive Term.

We find nothing in the trial court's exercise of sentencing discretion to select a consecutive subordinate term of imprisonment, however, that violates the precepts of *Blakely*. (*People v. Sample* (2004) 122 Cal.App.4th 206, 225.) A concurrent term is not a specified presumptive or standard maximum sentence. Section 669 provides that when a defendant "is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts," the sentencing court "shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively." (See also *People v. Downey* (2000) 82 Cal.App.4th 899, 912-913.)

Section 669 thus imposes a mandatory duty upon the trial court to determine whether the terms of imprisonment for multiple offenses are to be served concurrently or consecutively, but the choice of a consecutive or concurrent term is entirely discretionary with the trial court based upon consideration of the sentencing criteria set forth as guidelines in rule 4.425. (*People v. Jenkins* (1995) 10 Cal.4th 234, 255-256; *In re Calhoun* (1976) 17 Cal.3d 75, 80-81; *People v. Shaw* (2004) 122 Cal.App.4th 453, 458; *People v. Sample, supra,* 122 Cal.App.4th 206, 225-226; *People v. Coelho* (2001) 89 Cal.App.4th 861, 886; *People v. Alvarado* (2001) 87 Cal.App.4th 178, 194; *People v. Lepe* (1987) 195 Cal.App.3d 1347, 1350.) "[T]he provisions of rule [4.425] are merely '[c]riteria affecting the decision to impose consecutive rather than concurrent sentences . . . .' They are guidelines, not rigid rules courts are bound to apply in every case . . . ." (*People v. Calderon* (1993) 20 Cal.App.4th 82, 86-87.) "While there is a statutory presumption in favor of the middle term as the sentence for an offense (§ 1170, subd. (b)), there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing. (§§ 669, 1170.1, subd. (a); rule [4.]433(c)(3).)" (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.) "The sentencing rules do not create a presumption in favor of concurrent sentencing." (*People v. Sample, supra*, at p. 226.)

Therefore, a consecutive term does not represent a departure from any standard or presumptive sentencing range. Either a consecutive or concurrent term is within the trial court's discretion and the permissible statutory range of punishment if the defendant has been found guilty of multiple crimes by the jury. Nor is the sentencing court required to make an additional finding of fact as a prerequisite to imposing the more severe punishment of a consecutive sentence. The jury verdict, not any additional necessary finding of fact by the trial court, justifies the imposition of a consecutive term. (*People v. Shaw, supra*, 122 Cal.App.4th 453, 459.) The decision to select a consecutive sentence is only made once the accused has been found beyond a reasonable doubt by the jury to

have committed two or more offenses in compliance with the Sixth Amendment right to a jury trial under *Blakely*. A consecutive term imposed under California law is a discretionary sentence choice that does not increase the penalty beyond the prescribed statutory maximum, and is not tantamount to an *Apprendi* enhancement or a *Blakely* exceptional sentence. (See *People v. Sample, supra,* 122 Cal.App.4th 206, 227; *People v. McPherson* (2001) 86 Cal.App.4th 527, 532; *People v. Farr* (1997) 54 Cal.App.4th 835, 843.) We therefore conclude that defendant was not denied his due process rights to a jury trial and finding of guilt beyond a reasonable doubt under *Blakely* by the trial court's selection of a consecutive subordinate term. (*People v. Shaw, supra*, 122 Cal.App.4th 453, 459; *People v. Sample, supra*, at p. 227.)

V. Prejudice.

We turn to the issue of prejudice. We conclude that any sentencing error under *Blakely* is not a structural defect that demands automatic reversal. (See *People v. Epps* (2001) 25 Cal.4th 19, 29; *People v. Vera, supra,* 15 Cal.4th 269, 278; *People v. Marshall, supra,* 13 Cal.4th 799, 851-852.) Rather, we follow the federal standard of review of constitutional errors (*Chapman v. California* (1967) 386 U.S. 18, 24), and must reverse the sentence unless it appears beyond a reasonable doubt that the assumed error did not contribute to the judgment. (*People v. Neal* (2003) 31 Cal.4th 63, 86; *People v. Carter* (2003) 30 Cal.4th 1166, 1221-1222; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.)

Here, all of the sentencing factors relied upon by the trial court to impose the upper term relate to the current offenses: a threat of great bodily harm, actions indicative of sophisticated planning, isolation of the victim, escalating seriousness of the sexual abuse over time, and a high degree of callousness. The upper term was not based upon any aggravating circumstances that fall within the recognized exception from the right to a jury trial articulated in *Apprendi* for an increase in penalty due to the defendant's prior convictions or other associated recidivist conduct. (*Apprendi, supra*, 530 U.S. 466, 490; *People v. Kelii* (1999) 21 Cal.4th 452, 455; *People v. Taylor* (2004) 118 Cal.App.4th 11, 28; *People v. Superior Court (Andrades)* (2003) 113 Cal.App.4th 817, 831; *People v. Lee*

(2003) 111 Cal.App.4th 1310, 1314; *People v. Belmares* (2003) 106 Cal.App.4th 19, 27; *People v. Thomas* (2001) 91 Cal.App.4th 212, 222-223; *Thompson v. Superior Court* (2001) 91 Cal.App.4th 144, 154.) Thus, we cannot find that the *Blakely* error did not contribute to the judgment. The denial of the right to a jury trial and findings on the aggravating circumstances which resulted in the imposition of the upper term on count 1 must be considered prejudicial to defendant. (*People v. Lemus, supra*, 122 Cal.App.4th 614, 622.)

DISPOSITION

Accordingly, the upper term sentence of eight years imposed upon count 1 is vacated and the case is remanded to the trial court for the limited purpose of conducting sentencing proceedings in accordance with the requirements of *Blakely*.[8] Our review of the record reveals that the abstract of judgment does not reflect the order requiring AIDS testing. The trial court is directed to amend the abstract of judgment to include the testing required by section 1202.1, and to then forward a copy of the amended abstract of judgment to the California Department of Corrections. In all other respects the judgment is affirmed.

_____
Swager, J.

We concur:

_____
Marchiano, P. J.

_____
Margulies, J.

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