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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL EDWARD MAYZES, Defendant and Appellant.	A106553 (Marin County Super. Ct. No. SC132695)

Appellant pleaded guilty to inflicting corporal injury on his spouse. Although the probation department recommended probation, the trial court sentenced him to the upper term of four years in state prison. Appellant contends that, in so doing, the trial court violated *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*), and also improperly relied on uncharged offenses and elements of the underlying offense. We agree with appellant's *Blakely* argument, and accordingly remand for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

On November 28, 2003, appellant's wife went to a hospital emergency room with severe bruises, swelling, and abrasions on her face and neck.[1] When law enforcement personnel were called to investigate, she reported to them that she had awakened that morning in extreme pain, but did not recall how she had been injured. The victim told

[1] Appellant and his wife separated after the incident that led to his conviction, and the record suggests that she had instituted divorce proceedings by the time appellant was sentenced. We will therefore refer to her from now on as the victim rather than as appellant's wife. Because appellant pleaded guilty, the facts are taken from the probation officer's presentence report.

the officers that her seven-year-old daughter had told her that "Daddy did that to you." The victim explained that appellant was a martial arts expert and had assaulted her many times in the past, though she had never reported it.[2] The daughter told the officers that her father hit her mother frequently. She said the couple had been fighting the day her mother was injured, and that she had seen her father punch and kick her mother and call her names.

The investigating officers found appellant and arrested him. He told them that he had suffered a work-related back injury, and was in constant pain. He said he had "whited out," and that when he regained consciousness, he had his hands on the victim's neck. He indicated that he had had similar experiences in the past. In later discussions with the probation officer, appellant attributed his loss of consciousness to a stress reaction from pain, and requested counseling.

On December 1, 2003, appellant was charged with assault by means likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(1)[3]) and inflicting corporal injury upon a spouse or cohabitant (§ 273.5, subd. (a)), with an allegation, as to both counts, of personal infliction of great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)). After a psychological evaluation, appellant was found competent to stand trial.

On March 12, 2004, in accordance with a negotiated disposition, appellant pleaded guilty to the felony of inflicting corporal injury on a spouse resulting in a traumatic condition. (§ 273.5, subd. (a).) No specific sentence was promised in exchange for the guilty plea, but the assault charge and the great bodily injury allegation were dismissed. Appellant did not waive his right to have the dismissed offenses excluded from consideration in connection with his sentencing. (See *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*).)

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[2] Appellant has no prior criminal record.

[3] All further unspecified references to statutes are to the Penal Code.

The probation report, which was dated April 16, 2004, listed two aggravating factors: (1) appellant's behavior caused the victim not only significant physical harm, but also emotional harm, and she was extremely fearful of him (Cal. Rules of Ct., rule 4.421(a)(1)[4]); and (2) appellant had engaged in violent conduct indicating a serious danger to society, particularly in that he claimed not to remember the event and his violent behavior toward the victim had occurred with on a number of prior occasions. The report identified as mitigating factors appellant's assertion that he was in a "white out" state and not aware of his behavior; his lack of a prior criminal record; and his acknowledgment at the time of his arrest that he was aware that he had hurt the victim. The report noted that appellant had successfully completed college and had a history of steady employment prior to his significant back injury. The report recommended that appellant be placed on probation with a one-year jail term and treatment conditions. However, it suggested that if appellant were sentenced to prison, he be given the middle term.

On April 22, 2004, the probation department submitted an additional statement from the victim for consideration in connection with the sentencing. The victim asserted that appellant had abused her severely and frequently throughout their marriage, using his martial arts skills to do so. She also asserted that he had sent her a letter from jail addressing her by a name he had told her he would use if he intended to kill her, and expressed fear that he would kill her if he were released from custody.

Appellant submitted a psychological evaluation, dated April 27, 2004, which had been conducted at the request of his defense counsel. The evaluator diagnosed appellant as suffering from schizotypal personality disorder, which is similar to schizophrenia but of lesser severity, and possibly also from depression. She opined that appellant's reported "white outs" could have been caused by the schizotypal personality disorder, and recommended that he undergo treatment in the form of long-term psychotherapy, low-dose antipsychotic medications, and possibly anti-depressants. She also

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

recommended that appellant reside with his mother[5] and that he be barred from contact with the victim and their children until his psychiatric disorder was under better control.

At the initial sentencing hearing on April 30, 2004, the judge recognized that appellant had "some form of mental health problem," and stated that "[w]hether [appellant] can be kept safely away from the victim is my biggest concern." Appellant said he did not know where the victim and their children currently resided, and his counsel assured the court that appellant had made no efforts to locate them and was willing to abide by a recently issued family court order barring him from contact with his wife and allowing him to see his children only under professional supervision. The judge continued the sentencing for a week to allow appellant's counsel to complete the details of a proposed mental health treatment plan and monitoring system for appellant, but cautioned that he was "skeptical" about the idea of probation and "quite concerned that [appellant] is very dangerous . . . for whatever reason, probably including some form of mental health problem, to his spouse and children."

After the initial sentencing hearing, appellant's counsel submitted documentation regarding a private electronic monitoring firm that was available to monitor appellant if he were placed on probation. At the hearing, counsel gave the court the names and qualifications of two psychotherapists who could treat appellant, and a list of family and community members who were willing to oversee him when neither his mother nor his grandmother were available, so that he would be under 24-hour supervision. The court also received numerous character reference letters from members of his family and community urging that he be granted probation.

In the meantime, however, the court had also received, through the prosecutor, two letters from the victim. In her letters, the victim reiterated that appellant had repeatedly used his martial arts skills to abuse her. She asserted that he had practiced ways of killing her and had moved the family to Marin in order to isolate her so that he could abuse or

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[5] Appellant's mother offered to have him reside with her in Alameda County if he were granted probation, and averred that she could and would supervise him closely, with the help of her extended family. Appellant concurred in this proposal.

even kill her with impunity. She also reported that appellant had told her he would be put on probation rather than sent to prison because of his educational background; that he was knowledgeable about psychology; and that "he would gladly run circles around a psychologist for a few days a week to keep his freedom and teach me the final lesson." The prosecutor acknowledged that appellant must have made this statement before the date of the offense to which he pleaded guilty, because he had had no contact with the victim since then.

At the continued sentencing hearing on May 7, 2004, the victim appeared and made a brief unsworn statement in open court confirming the contents of her letters and again imparting her fear that appellant would kill her. She expressed concern that having appellant's mother supervise him on probation would be ineffective, because his mother had known of the past abuse, had done nothing to stop it, and could not be trusted to do so. Appellant's mother responded by contending that the victim "seems very troubled," and reiterated that she and her support network would ensure that appellant had no contact with the victim, would supervise him, and would make sure he got treatment for his mental illness. Appellant's counsel pointed out that although appellant did not deny his physical abuse of the victim, he did deny the psychological abuse she alleged, which had not been part of the charges and had not been independently verified.

At the conclusion of the continued sentencing hearing, the trial court denied probation and imposed the upper term of four years in state prison, as urged by the prosecutor. The judge explained his choice of the upper term by stating that "in view of all of the circumstances of this incident, it appears that its aggravated nature, both in terms of the substantial and continuing injury to the principal victim, and the perpetration of the activity in the presence of children of tender years, make it clearly an aggravated event." Appellant's notice of appeal was timely filed on May 17, 2004.

DISCUSSION

Although appellant's trial counsel vigorously urged that he be given probation, on appeal he does not challenge the trial court's decision to impose a prison term. He argues, however, that the trial court erred in imposing the upper term, contending both

that this decision violated *Blakely, supra*, 542 U.S. ___ [124 S.Ct. 2531], and that it reflected other errors independent of *Blakely*.

A. *Blakely* Error

In *Blakely*, the Supreme Court held that a Washington State court denied a criminal defendant his constitutional right to a jury trial by increasing the defendant's sentence for second-degree kidnapping from the "standard range" of 53 months to 90 months based on the trial court's finding that the defendant acted with "deliberate cruelty." (*Blakely*, *supra*, 124 S.Ct. at p. 2537.) The *Blakely* court found that the state court violated the rule previously announced in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*) 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." (*Blakely, supra*, at p. 2536.) In reaching this conclusion, the court clarified that, for *Apprendi* purposes, 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 in original.)

In response to appellant's argument that *Blakely* invalidates his upper term sentence, the People contend that California's "triad" sentencing system does not implicate *Blakely* at all, and that any one of the three legislatively authorized terms for an offense, including the upper term, can be imposed by a trial court without violating a defendant's Sixth Amendment rights. Under the People's view of the California system, although there is a "presumptive mid-term sentence," the upper term is the statutory maximum sentence that the trial court has discretion to impose.

The People's argument may have been persuasive before *Blakely* was decided. Now, however, it is flatly contradicted by the Supreme Court's holding that the statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but rather the sentence it may impose without making *any additional findings*. (*Blakely*, *supra*, 124 S.Ct. at p. 2538.) Under California's determinate sentencing law, the maximum sentence a judge may impose for a conviction without making any

additional findings is the middle term. Section 1170, subdivision (b), states that "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." Furthermore, California Rules of Court, rule 4.420, subdivision (b), states that "[s]election 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." In our view, therefore, *Blakely* precludes the imposition of upper term sentences under California's determinate sentencing law on the basis of aggravating factors that have not been found by a jury to exist beyond a reasonable doubt.[6]

The People also argue that even if *Blakely* applies, appellant cannot rely on it, because his guilty plea precludes him from raising any constitutional challenge to his sentence without first obtaining a certificate of probable cause as required by section 1237.5. We agree with appellant that the controlling authority on that question is *People v. Buttram* (2003) 30 Cal.4th 773 (*Buttram*). *Buttram* held that no certificate of probable cause is required when a defendant pleads guilty under an arrangement that provides for a range of possible sentences, and then seeks to argue on appeal that the trial judge erred in imposing a sentence at the top of that range. (30 Cal.4th at p. 777.) This is precisely the fact pattern here. Appellant's plea bargain involved an agreement to dismiss another charge and an enhancement allegation, but did not address sentencing at all.

The People attempt to distinguish *Buttram* on the basis that appellant's challenge is a constitutional one rather than an attack on the trial judge's exercise of sentencing discretion, citing *People v. Young* (2000) 77 Cal.App.4th 827 and *People v. Cole* (2001)

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[6] The question whether *Blakely* applies to California's determinate sentencing scheme is pending before the California Supreme Court in *People v. Towne*, review granted July 14, 2004, S125677, and *People v. Black*, review granted July 28, 2004, S126182. Our analysis of the issue is drawn from the first opinion filed by our division in the wake of *Blakely*. We have restated that opinion here, rather than merely citing it, because it has now been depublished by virtue of the Supreme Court's grant of review. (*People v. Butler* (2004) 122 Cal.App.4th 910, review granted Dec. 15, 2004, S129000.) Briefing on the merits in *Butler* has been stayed pending the decision in *Black* and *Towne*.

88 Cal.App.4th 850.[7] This argument is without merit. In *Buttram*, the Supreme Court stated that in determining whether a certificate of probable cause is necessary for an appeal following a guilty plea, " 'the critical inquiry is whether a challenge to the sentence is *in substance* a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5. [Citation.]' [Citation.]" (*Buttram, supra*, 30 Cal.4th at p. 782, italics in original.) A challenge to a sentence is deemed to challenge the validity of the plea " 'if the sentence was part of a plea bargain. [Citation.] It does not if it was not . . . .' " (*Id*. at p. 785.) Thus, the test under *Buttram* does not focus on the *grounds* of the challenge to the sentence, but only whether or not the sentence was a specified term of the plea bargain.

Unlike the defendants who sought to appeal in *People v. Young*, *supra*, and *People v. Cole*, *supra*, appellant's challenge to the imposition of the upper term in no way implicates the validity of the plea bargain itself, which did not include an agreement to a four-year sentence, or indeed to any prison sentence at all. Instead, defendant is arguing

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[7] In *People v. Cole*, *supra*, 88 Cal.App.4th 850, the plea bargain provided that the defendant would plead no contest with the assurance that his maximum sentence would be 25 years to life instead of more than 75 years to life, as it would have been without the bargain. (*Id*. at pp. 858-859, 873.) The court imposed the 25-year sentence, and the defendant sought to argue on appeal that the sentence was cruel and unusual punishment. The Court of Appeal held the defendant could not make that argument without a certificate of probable cause. The court noted that although the argument was styled as a challenge to the sentence, it really was a challenge to the validity of the plea, because the plea bargain expressly authorized a sentence of up to 25 years to life, the sentence the defendant received. That term was a negotiated term of the bargain, given in consideration for the reduction in exposure. Having agreed to the bargain, the defendant could not challenge the sentence given pursuant to it. (*Id*. at p. 873.)

In *People v. Young*, *supra*, 77 Cal.App.4th 827, the defendant agreed to a maximum sentence of 25 years to life in return for the prosecution's agreement not to seek consecutive sentences, which would have increased the maximum punishment to 52 years to life. (*Id*. at p. 830.) As in *Cole*, the defendant sought to argue on appeal that the sentence was cruel and unusual punishment. Holding that the defendant could not do so without a certificate of probable cause, the court stated: "The prosecution agreed to a maximum sentence of 25 years to life in return for defendant's plea. Yet, defendant now attacks that maximum sentence on the ground that it is cruel and unusual punishment. By arguing that the maximum sentence is unconstitutional, he is arguing that part of his plea bargain is illegal and is thus attacking the validity of the plea." (*Id*. at p. 832.)

that the sentence imposed by the court, *independently* of the plea bargain, is illegal under *Blakely*. This is a challenge to the sentence, not the plea. Under the rationale of *Buttram*, such an appeal does not require a certificate of probable cause, even if the appellant raises constitutional arguments.

We also reject the People's contention that defendant forfeited his right to claim *Blakely* error by failing to raise this issue in the trial court. Because of the constitutional implications of the error at issue, we question whether the forfeiture doctrine applies at all. (See *People v. Vera* (1997) 15 Cal.4th 269, 276-277 [claims asserting deprivation of certain fundamental, constitutional rights not forfeited by failure to object].) Furthermore, there is a general exception to this rule where an objection would have been futile. (*People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648, and authority discussed therein.) We have no doubt that, at the time of the sentencing hearing in this case, an objection that the jury rather than the trial court must find aggravating facts would have been futile. (See § 1170, subd. (b); Cal. Rules of Court, rules 4.409 & 4.420-4.421.) In any event, we have discretion to consider issues that have not been formally preserved for review. (See 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 36, p. 497.) Since the purpose of the forfeiture doctrine is to "encourage a defendant to bring any errors to the trial court's attention so the court may correct or avoid the errors" (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060), we find it particularly inappropriate to invoke that doctrine here in light of the fact that *Blakely* was decided after defendant was sentenced.[8]

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[8] We are not persuaded otherwise by the People's references to two federal cases, which, they contend, characterize *Apprendi* claims that were not raised in the trial court as forfeited notwithstanding the fact that *Apprendi* was decided while the cases were on appeal. (See *United States v. Cotton* (2002) 535 U.S. 625; *U.S. v. Ameline* (9th Cir. 2004) 376 F.3d 967.) As these cases illustrate, under federal appellate procedure, characterizing a claim as "forfeited" does not mean that the claim may not be reviewed on appeal. Rather, such a claim is reviewed for "plain error." (*Ibid.*) In addition, we note that after the close of briefing in this case, the Ninth Circuit withdrew its original opinion in *U.S. v. Ameline, supra*, 376 F.3d 967; issued a new opinion (*U.S. v. Ameline* (9th Cir. 2005) 400 F.3d 646); and subsequently granted rehearing en banc (*U.S. v. Ameline* (9th Cir. March 11, 2005) ___ F.3d ___ [2005 WL 612710]).

Accordingly, we turn to the merits of appellant's *Blakely* argument. As already noted, the sentencing judge explained that his choice of the upper term was based on "the substantial and continuing injury to the principal victim, and the perpetration of the activity in the presence of children of tender years, make it clearly an aggravated event." These factors clearly fall within the ambit of *Blakely*, and were neither proven beyond a reasonable doubt nor admitted by appellant. No other aggravating factors were cited, and because appellant has no prior criminal record, no recidivism-related factors could have played a part in the judge's decision.[9] Thus, the imposition of the upper term was based solely on factors which, in our view, the trial court could not properly consider under *Blakely*.

Moreover, we cannot find that this error was harmless beyond a reasonable doubt.[10] In finding the aggravating factors on which the upper term was based, the trial judge relied in large part on the victim's unsworn and uncorroborated statements regarding appellant's past behavior. Our review of the record does not convince us beyond a reasonable doubt that a jury would have necessarily drawn the same conclusions for this proffer as did the sentencing judge. Accordingly, we concur with appellant that *Blakely* requires that appellant be resentenced.

B. Other Sentencing Errors

Independent of his contentions based on *Blakely*, appellant argues that the trial court erred in treating as aggravating factors conduct by appellant that either was inherent in the charge to which he pleaded guilty, or constituted uncharged criminal conduct that the court was barred from considering under *Harvey*, *supra*, 25 Cal.3d 754. Because the issue whether *Blakely* applies to California determinate sentences is pending before the

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[9] At least some recidivism-related aggravating factors are valid, even under a *Blakely* analysis, in light of *Apprendi*, *supra*, 530 U.S. 466.

[10] Because the *Blakely* court rested its holding on *Apprendi*, *supra*, 530 U.S. 466, we apply the standard of prejudice applicable to *Apprendi* errors, which is the "*Chapman* test." (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.) Applying that test, we must determine whether the failure to obtain jury determinations as to the aggravating factors discussed above was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

California Supreme Court, we consider ourselves obligated to address these issues even though they would otherwise be moot given our resolution of the *Blakely* issue.

Before addressing the merits of appellant's contentions of non-*Blakely* sentencing error, we must first address respondent's argument that appellant waived any challenge to the judge's consideration of these factors by failing to object at the time of sentencing. (See *People v. Scott* (1994) 9 Cal.4th 331, 351-352.) This contention has merit. Most of trial counsel's efforts at the sentencing hearing were devoted to advocating that appellant receive probation. She did expressly request that the minimum term be imposed if the court rejected probation. She also objected to the trial court's consideration of the victim's statements as factors in its sentencing decision, pointing out that the victim's allegations of threats and past abuse had not been part of the charges and had not been independently verified. She did not, however, raise the contentions that appellant now urges on appeal with sufficient specificity to have permitted the trial judge to reconsider and correct the asserted errors. Accordingly, we agree that the issues were not adequately preserved. (See *People v. de Soto* (1997) 54 Cal.App.4th 1, 8-10.)

In any event, with one exception, appellant's contentions in this regard are without merit. We address the exception first. "It is established that a circumstance that is an element of the substantive offense cannot be used as a factor in aggravation. [Citations.] A sentencing factor is . . . an element of the offense . . . if the crime as defined by statute cannot be accomplished without performance of the acts which constitute such factor. [Citation.]" (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1261-1262.) Here, appellant pleaded guilty to inflicting corporal injury on a spouse resulting in a traumatic condition. At the change of plea hearing, the prosecutor summarized the factual basis for this plea as follows: "the victim in this matter . . . reported . . .that [appellant] struck her several times. [¶] The victim had numerous bruises on her face, chest, legs, and stomach. . . . [Appellant] admitted hitting the victim, his wife, and causing injury."

It is not clear whether the "substantial . . . injury" to the victim upon which trial judge relied as an aggravating circumstance was considered by the judge to have occurred during the specific incident leading to appellant's guilty plea. To the extent that

it was, we concur with appellant that this was error. We do not in the least condone or minimize appellant's behavior or the injury he inflicted on the victim, but the fact remains that there is nothing in the record to indicate that the injuries she incurred as a result of the crime itself went beyond what was necessarily encompassed in the charge and the stated factual basis for the plea.

Moreover, the terms of appellant's plea bargain included *dismissal* of the great bodily injury allegation, and appellant did not waive his rights under *Harvey*, *supra*, 25 Cal.3d 754. Thus, to the extent that the judge considered as an aggravating circumstance the proposition that appellant had inflicted serious injury on the victim during the crime itself, this was error. (See *In re Knight* (1982) 130 Cal.App.3d 602 [where prior conviction allegations were dismissed as part of plea bargain, prior convictions could not be relied upon as aggravating factors in sentencing].)

Alternatively, however, in referring to the "substantial and continuing injury to the . . . victim" the trial judge could have had in mind the injuries the victim asserted appellant had inflicted upon her at times *other* than the incident giving rise to the conviction. Appellant argues that these injuries also should not have been considered, contending that under *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, it was a violation of due process for the judge to consider as aggravating factors incidents of domestic violence between appellant and the victim that had not resulted in prior charges or convictions.

We disagree. *McKinney* involved the admission of evidence of prior uncharged misconduct against a defendant in a jury trial to show propensity.[11] Appellant cites no authority holding that prior criminal conduct not resulting in a conviction, if shown by a preponderance of the evidence (see rule 4.420(b)) and reasonably related to the

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[11] We note that under Evidence Code section 1109, evidence of prior incidents of domestic violence between appellant and the victim would have been admissible had this matter gone to trial, as an exception to the general rule against propensity evidence codified in Evidence Code section 1101 and discussed in *McKinney v. Rees*, *supra*, 993 F.2d 1378. The admission of such evidence has been held not to violate due process. (See, e.g., *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1094-1096.)

sentencing decision, cannot be considered as an aggravating factor in sentencing. In fact, the cases are to the contrary. (See generally *People v. Gonzales* (1989) 208 Cal.App.3d 1170, 1172 [conviction subsequent to current offense, together with arrest record, properly considered as part of pattern of violent behavior]; *People v. Taylor* (1979) 92 Cal.App.3d 831, 833 [arrest record]; *People v. Fulton* (1979) 92 Cal.App.3d 972, 976 [count on which jury was unable to reach verdict].) Thus, but for *Blakely*, we find no error in the trial court's considering appellant's history of domestic violence as an aggravating factor. (See rule 4.421(b)(1) [aggravating factors include fact that defendant has engaged in violent conduct indicating serious danger to society].)

The final aggravating factor articulated by the judge was "the perpetration of the [domestic violence] in the presence of children of tender years." The presence of at least one of the couple's children during the crime was not inherent in the charged offense, nor did its consideration violate either due process or appellant's rights under *People v. Harvey*, *supra*, 25 Cal.3d 754. Moreover, the fact that the victim's child was present when a defendant inflicted corporal injury on a spouse or cohabitant is reasonably considered as an aggravating factor under rule 4.421(a)(1), as a circumstance disclosing a high degree of cruelty and callousness. Accordingly, aside from *Blakely* error, we reject appellant's argument that this factor was improperly considered in aggravation.

Under California law, "[w]hen a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper. [Citation.]" (*People v. Price* (1991) 1 Cal.4th 324, 492, superseded by statute on other grounds as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161-1165; see also *People v. Osband* (1996) 13 Cal.4th 622, 728.) Further, a single factor in aggravation is sufficient to support imposition of an upper term. (*People v. Osband*, *supra*, 13 Cal.4th at p. 728; *People v. Cruz* (1995) 38 Cal.App.4th 427, 433; see also *People v. Kelley* (1997) 52 Cal.App.4th 568, 581; *People v. Piceno* (1987) 195 Cal.App.3d 1353, 1360; *People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) In light of the trial judge's remarks at the sentencing hearing, the record in the present case

leaves us with little or no doubt that he would have imposed the upper term even if he had excluded from consideration the one aggravating factor we have found invalid.

This brings us to appellant's final argument, which is that the trial court abused its discretion in determining that the aggravating factors outweighed those in mitigation. On this issue, our standard of review is highly deferential. A trial court has broad discretion to make essential sentencing determinations, including the selection of a term other than the middle statutory term, by weighing and balancing aggravating and mitigating factors. (§ 669; rule 4.406(b)(2), (4), (5); *People v. Giminez* (1975) 14 Cal.3d 68, 71-72; *People v. Roe* (1983) 148 Cal.App.3d 112, 119.) In making any claim of sentencing error, the burden is on the party attacking the sentence to show that the trial court's sentencing decision was irrational, arbitrary or capricious, or in excess of the "bounds of reason, all of the circumstances being considered." (*People v. Giminez, supra,* 14 Cal.3d at p. 72.) In the absence of such a showing, an appellate court will respect the trial court's discretionary sentencing determination and presume that the trial court acted as it did in order to achieve legitimate sentencing objectives. (*People v. Welch* (1993) 5 Cal.4th 228, 233-234; *People v. Warner* (1978) 20 Cal.3d 678, 683; *People v. Giminez, supra,* 14 Cal.3d at p. 72; *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831-832.)

In the present case, we have reduced the number of aggravating factors from three to two in our disposition of appellant's non-*Blakely* arguments. Nonetheless, we are not persuaded that the mitigating factors outweigh the remaining aggravating ones. Overall, the trial court's decision to impose the upper term appears to have been prompted primarily by concern for the safety of the victim. It can hardly be deemed an abuse of discretion to give this concern greater weight than appellant's psychiatric problems, good employment history, and lack of a criminal record.

Appellant's trial counsel presented a strong case that appellant's violent behavior was aberrant and was caused by a treatable mental illness, and that the victim's security could be assured, even if appellant were placed on probation, through electronic monitoring and constant supervision. The record makes clear that the trial judge carefully considered this option, but ultimately decided to err on the side of safeguarding

the victim to the greatest possible extent by confining defendant to prison for the upper term. Reasonable people might disagree with this choice, but we cannot characterize it as an abuse of discretion.

DISPOSITION

The cause is remanded to the trial court with directions to reconsider appellant's sentence in accordance with the views expressed herein. The judgment is otherwise affirmed.

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Ruvolo, J.

We concur:

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Kline, P.J.

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Haerle, J.