Filed 2/24/05 P. v. Wilson CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RAY LEROY WILSON, Defendant and Appellant.	B169748 (Los Angeles County Super. Ct. No. BA194735)

APPEAL from a judgment of the Superior Court of Los Angeles County, David Mintz, Judge. Affirmed in part, Reversed in part.

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

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lawrence M. Daniels, Shawn McGahey Webb and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

BACKGROUND

Appellant Ray Leroy Wilson was convicted by jury of the following crimes: one count each of forcible and attempted forcible sodomy (Pen. Code, § 286, subd. (c)(2));[1] one count of felony spousal abuse (§ 273.5, subd. (a)); one count of criminal threats (§ 422); one count of sexual penetration by a foreign object (§ 289, subd. (a)(1)); one count of assault with a deadly weapon by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)); and two counts of spousal rape (§ 262, subd. (a)(1)).

The jury also found that in the course of committing the spousal abuse, criminal threats, forcible sodomy, sexual penetration by a foreign object, and both counts of spousal rape, that appellant had personally used a knife. Appellant waived a jury trial on the allegation that he had suffered a prior serious or violent felony conviction and admitted a 1989 conviction for assault with intent to commit rape (§ 220).

The victim, Zarema T., testified more fully at the preliminary hearing than at trial. The court disbelieved her many claims at trial that she did not remember much of the conduct leading to the charges against appellant. The court therefore allowed the reading of her preliminary hearing testimony. We summarize from both sources.

Zarema testified that she married appellant on May 1, 1999, and they lived together in her apartment on Fuller Avenue in Hollywood for a short while, until appellant went to prison (apparently on a parole violation) two weeks after Zarema

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[1] All statutory references in this section are to the Penal Code, unless otherwise stated.

called the police and reported that appellant had slapped her. When she sought him out after he was released from prison, he told her that he was not allowed to contact her, and to wait until he called, which he did three days later, on October 29, 1999. She went to a motel with him and voluntarily engaged in sex, after which they spent a nice time at the beach. Zarema believed appellant had changed and everything would be alright. They then went to her apartment on Fuller Avenue. For the first two days they were at the apartment, October 29 and 30, 1999, they engaged in voluntary sex.

On October 31, appellant's mood changed. Upon returning to the apartment, appellant saw the light blinking on the telephone answering machine. Appellant tried to check the messages, but there were none. He then threatened Zarema with a knife and said: "You have a boyfriend. . . . I'm going to kill you." At that time, Zarema did not take him seriously.

Later that day they went to a nearby grocery store and a security guard greeted Zarema with something like, "Hello, take care." Appellant became furious, asked Zarema why the guard had spoken to her, and said he thought the guard was her lover. Zarema had never seen the guard before. Telling her to wait, appellant returned to the guard and yelled at him in a threatening manner.

Upon returning from the grocery store, appellant barricaded the door with a heavy coffee table and compelled Zarema to remain there, topless, for three days. Most of this time he possessed a kitchen knife with what appeared to be an 8-inch blade. He told Zarema he would kill her by twisting her neck. He also put on boxing gloves and repeatedly punched Zarema. He also struck her in the stomach with his knee, knocking the breath out of her, and burned her nipples with a cigarette. He yelled at her, "I want you to scream from the pain as I did . . . when I

was in prison." He became more and more angry as the days passed, and seemed to lose control completely, in spite of Zarema's efforts to calm him down.

Once she tried to call a Russian girlfriend for help, but appellant prevented her, saying, "You are not going to leave this apartment ever. You are not going to talk with somebody ever. You are dead already," and, "I've been dreaming six months doing my time in a prison that I will kill you on Halloween night." He told her that he would break her neck if she screamed or called for help.

Appellant demanded sex four to six times a day, and if she refused, he would pick her up, slap her and threaten her. He attempted anal sex either twice or three times -- she was not sure. She obeyed because she was frightened, and felt like she was his slave. She had told him many times before that she would not agree to have anal sex because she had hemorrhoids and it caused her great pain. On November 1, 1999, he attempted to penetrate her anus with his penis, causing her "such a horrible pain." He also tried to put his finger into her anus, but was unable to insert more than the tip of it.

Finally, on November 2, 1999, while appellant was taking a shower, Zarema was able to move the table far enough away from the door to escape. He saw what she was doing from the bathroom and attempted to run after her, but his nakedness prevented him from leaving the apartment. She went to the nearby grocery store and called the police.

Los Angeles Police Officer Bryan Millner was dispatched to the store and found Zarema in a back room near the bakery. She was crying hysterically, appeared very fearful, and was barely able to get out a sentence. It was obvious from the red marks on her skin, chest, neck and face, that she had been beaten. He asked her about the marks and why she had called the police. She replied that her

husband had raped or sodomized her, Millner could not remember which, and that he had also burned her nipples. She described appellant's threats to kill her, and told Millner how she had been struck on the top of her head with a knife handle as it protruded through the bottom of appellant's fist. When they arrived at the apartment, appellant was gone.

Forensic nurse Cari Caruso was working as a sexual assault nurse at County U.S.C. Hospital where she conducted a medical exam of Zarema T. on the evening of her escape. She also prepared a sexual assault evidence kit. Caruso observed a greenish purple bruise on Zarema's right temple, swelling on the left temple, a small bruise on either side of the neck, lacerations on the forehead, a cut lip, bruising on the right shoulder and chest, and redness on the nipples. There were no vaginal injuries, but Caruso testified that that did not rule out rape. She also observed redness and a skin tag in the anal cavity, but no tearing, which in her opinion did not preclude forcible anal intercourse; it probably ruled out full penetration. Caruso testified that Zarema told her that anal intercourse had been attempted, but the individual had stopped, either because he caused her pain, or because of her refusal.

On August 26, 2003, appellant was sentenced to 94 years to life in prison, and he filed his notice of appeal the same day.

DISCUSSION

Appellant contends that evidence of other sex offenses amounted to improper character and propensity evidence that should not have been admitted, and that Zarema's preliminary hearing testimony should not have been admitted. He also contends that the trial court erred in failing to instruct with CALJIC No.

1.23.1, CALJIC No. 10.65, and CALJIC No. 10.61.1. He contends that the forcible sodomy, attempted sodomy, spousal rape, and penetration with a foreign object convictions were not supported by substantial evidence. Appellant also seeks reversal due to the cumulative effect of the asserted errors. In a supplemental brief, appellant contends that resentencing is required under the reasoning of the recent United States Supreme Court opinion in *Blakely v. Washington* (2004) 542 U.S. ____, 124 S.Ct. 2531 (*Blakely*).

We shall discuss each of appellant's assignments of error, although not necessarily in the order presented. We shall reject the claims of error occurring during trial, and therefore reject appellant's assertion of cumulative error. But we agree with appellant's *Blakely* contention, at least in part, and shall remand for resentencing.

1. *Evidence of Other Sex Offenses*

Appellant contends that the trial court abused its discretion in admitting the testimony of Becky C. and Frida C.

Becky C. testified that in January 1989, she was jogging near her home in Ventura, when a red Toyota pickup truck pulled up behind her, and after allowing other cars to go by, passed her and disappeared over the hill. As she jogged to the top of the hill, she saw that the truck had stopped in a turn-out, and appellant was standing near it. As she jogged past, they made eye contact, and she became frightened by his wild and scary eyes. She "freaked out," and ran to the middle of the road, looking for a car to see her.

Appellant ran toward her with his pants undone and his penis erect. She told him to go away, but he put his hands over her mouth and tried to pull her back

toward the truck. They fought in the middle of the road, and when she ran to the other side, he tackled her into the ditch at the side of the road. She tried to run away, but he pulled her down and sat on her legs while he tried to pull down her running shorts, saying, "I just want to look."

When Becky continued to struggle, he choked her with one hand while trying to pull down her shorts, but switched to both hands after she scratched his eyes, threw rocks at him, and scratched his penis, "trying to make him bleed." Unable to breathe, she could not continue to fight, and he penetrated her vagina with his penis and ejaculated. She then fought some more, and he hit her, putting his hand over her mouth several times until she passed out.

Becky regained consciousness and realized appellant had released her neck and seemed distracted, so she attempted to lift herself out of the ditch. Appellant was pulling her back down when a car stopped, so he pretended they were together by helping her out of the ditch. Several cars had stopped by that time, and Becky ran to one of them for help. She testified that she had never before met appellant and did not consent to sex with him. He was convicted of assault with intent to commit rape.

Frida C. testified that she was a resident of Guatemala, where she met appellant towards the end of 1999 while he was living in Guatemala under the name of Louis Jaime Deleon. She had an intimate relationship with him, beginning in January or February 2000, and they lived together until she terminated the relationship on May 17, 2000.

Her sexual intercourse with appellant was vaginal, with two exceptions, once when she consented to anal intercourse, and once when she did not. Having never had anal intercourse before, Frida consented the first time but she found it

unpleasant. When she told appellant that she did not like it, he agreed that he would not do it again.

The second time was in April 2000, and it was not consensual. Frida was awakened by what she thought was appellant initiating vaginal intercourse, and when she realized he intended to have anal intercourse, she said no and moved away. But appellant had slapped her in the face once when she failed to obey him, so she did not protest when he persisted because she was afraid he would become angry and wake her three-year-old daughter.

When Frida decided to end their relationship, she found appellant at the restaurant, told him that it was over, she did not want to live with him, did not love him, and that she hated him. He asked her not to go, saying that he loved her and her daughter, and that he would kill her, her daughter, and her mother if she left. She tried to leave, but he grabbed her arm and pulled her back. She hit him in the chest, called for her mother who was upstairs, and tried to leave again, but appellant grabbed her again. She managed to free herself by grabbing onto the door with both hands, but this caused her to fall to the floor, where appellant repeatedly kicked her in the head, causing injuries that required sutures.

Appellant points out that under Evidence Code section 1101, subdivision (a), character evidence is inadmissible when offered to prove the defendant's conduct on a specified occasion, with some exceptions.[2] As appellant acknowledges, one such exception is section 1108, which provides in subdivision (a): "In a criminal action in which the defendant is accused of a sexual offense, evidence of the

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[2] All further statutory references will be to the Evidence Code, unless otherwise stated.

defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." Under section 352, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Thus, in a sex offense case, "propensity" evidence may not be deemed unduly prejudicial per se. (*People v. Falsetta* (1999) 21 Cal.4th 903, 916-917 (*Falsetta*).) Rather, evidence of the defendant's other sex crimes is admissible for the purpose of showing a propensity to commit such crimes, subject to the trial court's discretion to exclude the evidence if its prejudicial effect outweighs its probative value. (*Id*. at p. 907.) In evaluating such evidence, "trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense. [Citations.]" (*Id*. at p. 917.)

Here, the trial court engaged in a careful weighing process on the record. The court found both incidents to be unrelated. It found the incident involving Frida to be highly probative, because the victim was involved in an ongoing

relationship with appellant, as in this case, and the incident was similar to the facts alleged in this case, and it was very recent.

The court found the 1989 rape of a stranger to be similar enough to be highly probative, that ten years did not make the incident not remote, particularly since there has been intervening criminal conduct on appellant's part. The court found that because there had been a conviction and punishment in that case, the jury would be less likely to convict solely to impose punishment for the past event. The court considered the inflammatory nature of the evidence, but found its probative value to outweigh that factor, as well as the consumption of time.

Appellant sets forth facts that would justify a contrary ruling by the trial court. For example, he contends that the court should have found the 1989 incident remote, without considering intervening conduct, and that it was inflammatory and too dissimilar to be probative, because the victim was a stranger and there was no question of consent. Further, appellant contends, the 1989 incident was more prejudicial than probative, because he was convicted only of a sexual assault, rather than the rape that it was, and the jury might convict on the ground that he was not punished sufficiently.

"The trial court's exercise of discretion in admitting evidence under Evidence Code section 352 will not be disturbed unless the court acted in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" (*People v. Yovanov* (1999) 69 Cal.App.4th 392, 406.)

"When the question on appeal is whether the trial court has abused its discretion, the showing is insufficient if it presents facts which merely afford an opportunity for a difference of opinion. An appellate tribunal is not authorized to

substitute its judgment for that of the trial judge. [Citation.]" (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.) Appellant's showing consists of setting forth facts upon which the trial court might have relied to rule differently. The trial court considered those facts, and since we do not find that its conclusions "exceed[] the bounds of reason, all of the circumstances being considered," we find no abuse of discretion. (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

2. *Constitutionality of Section 1108*

Appellant contends that section 1108 violates his rights to due process and equal protection under the United States Constitution. He acknowledges that the identical due process issue was resolved in favor of the constitutionality of 1108 by the California Supreme Court in *Falsetta, supra*, 21 Cal.4th 903. The Court also found that the statute did not violate equal protection. (*Id*. at p. 919; see *People v. Medina* (2003) 114 Cal.App.4th 897, 904.)

Appellant invites us to reject *Falsetta*, in favor of the reasoning of the Ninth Circuit Court of Appeals in *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 770, overruled on other grounds in *Woodford v. Garceau* (2003) 538 U.S. 202. We are not bound by decisions of the federal circuit courts of appeal, even with regard to federal constitutional questions. (*People v. Cleveland* (2001) 25 Cal.4th 466, 480.) On the other hand, we are bound to follow the majority opinions of the Supreme Court, and do not have discretion to reject them. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) We therefore decline appellant's invitation.

3. *Subsequent Domestic Violence*

Appellant contends that the testimony of Frida C. should not have been admitted under section 1109, because it was conduct that occurred *subsequent* to the charged offenses. Section 1109 provides that, with two exceptions not at issue here, "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352."

Appellant did not object to the evidence on this ground. "[A] defendant may not complain on appeal that evidence was inadmissible on a certain ground if he did not rely on that ground in a timely and specific fashion in the trial court." (*People v. Mickey* (1991) 54 Cal.3d 612, 689; Evid. Code, § 353.)

In any event, the language of the statute expressly allows evidence of *other* acts of domestic violence, without limiting such evidence to *prior* conduct. Nevertheless, appellant contends that the statute limits the evidence to prior conduct, in order to show what his disposition was *before* the charged offense, suggesting that purpose of section 1109 is to allow evidence relevant to show a *pre*disposition to commit the charged crime, not simply a disposition to commit the crime. We disagree.

Appellant points out that there appears to be no published authority involving the admission of subsequent domestic violence under section 1109. There is, however, compelling analogous authority. Rejecting a similar contention with regard to section 1108, the court in *People v. Medina*, *supra,* 114 Cal.App.4th 897 (*Medina*), noted that the statute describes *other* conduct, not *prior* conduct. (*Id*. at pp. 902-903.) The court quoted from an analogous opinion arising under

section 1103, which allows character evidence under specified circumstances: "'As Wigmore astutely observed, . . . a man's trait or disposition a month or a year after a certain date is as evidential of his trait on that date as his nature a month or a year before that date; because character is a more or less permanent quality and we may make inferences from it either forward or backward.' [Citation.]" (*Id*. at p. 903, quoting *People v. Shoemaker* (1982) 135 Cal.App.3d 442, 447 (*Shoemaker*).)

The *Medina* and *Shoemaker* courts both found Wigmore' s views "compelling": *Medina* held that with regard to section 1108, "both prior and subsequent acts may constitute relevant evidence of a person's character"; *Shoemaker* held evidence of the victim's subsequent violent acts to be relevant and admissible under section 1103 to prove his violent character at the time of the earlier charged offense. (*Medina, supra*, 114 Cal.App.4th at p. 903; *Shoemaker, supra*, 135 Cal.App.3d at p. 448.)

Similarly, in *People v. Griffin* (1967) 66 Cal.2d 459, the California Supreme Court considered the admissibility of a subsequent similar crime to prove intent: "The evidence tended to prove that in both instances defendant became acquainted with a man living with a common law wife, used that acquaintance to be invited to the man's home for the night or longer, and then attacked the woman in the man's absence. Under these circumstances, the evidence of the other crime is relevant even though it occurred after instead of before the crime charged, and the chronology of the crimes does not therefore affect the admissibility of the evidence of the subsequent crime. [Citations.]" (*Id*. at p. 465.)

We find the reasoning of these authorities equally applicable here. An interval of just four months, in *either* direction, between appellant's false imprisonment and repeated physical and sexual assaults upon his wife and the

physical and sexual assaults upon Frida, did not detract from the highly probative nature of this evidence to show his disposition to assault his domestic partners. It would not have been error, therefore, for the trial court to overrule an objection, if one had been made on this ground.

4. *Admission of Preliminary Hearing Testimony*

Appellant contends that Zarema's preliminary hearing testimony should not have been admitted as a prior inconsistent statement *to the extent* that it was, because much of the testimony was not inconsistent with her trial testimony.

"Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." (Evid. Code, § 1235.)[3] Appellant objected to the portions of the preliminary hearing transcript that the prosecution proposed to have read as prior inconsistent statements. The trial court found that Zarema's many claims not to remember events during the three days of her ordeal were not believable, but instead, were intended to evade answering the questions put to her. The court ruled that it would allow, as prior inconsistent statements, her preliminary hearing testimony only with regard to the *specific questions* to which she answered that she did not remember.

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[3] Section 770 provides: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action."

"In normal circumstances, the testimony of a witness that he does not remember an event is not 'inconsistent' with a prior statement by him describing that event. [Citation.] But justice will not be promoted by a ritualistic invocation of this rule of evidence. Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement [citation], and the same principle governs the case of the forgetful witness." (*People v. Green* (1971) 3 Cal.3d 981, 988 (*Green*).) Thus, the trial court's finding of deliberate evasion by claiming lack of recall at trial testimony justified its intent to admit preliminary hearing testimony with regard to the same questions. (See *id*. at p. 989.)

Defense counsel did not wish to have just certain portions of the transcript read to the jury. For tactical reasons, defense counsel took the position that if any of this testimony was to be read, all of it should be. The trial court summarized the defense position as follows: "In light of my ruling, counsel conferred and . . . without waiving your objection to my finding under [*Green, supra*, 3 Cal.3d 981], it's your feeling for tactical reasons that rather than pick out those portions of the preliminary hearing testimony that are specifically inconsistent with what she claims not to have remembered, you felt it would be in your client's interest to simply read her testimony in its entirety to the jury and not ask the court to rule on an individual basis which statements in the prelim transcript were specifically inconsistent with either her testimony or her claimed lack of memory." Defense counsel agreed that the court's description of his position was accurate.

On appeal, appellant acknowledges that Zarema was "unquestionably evasive at trial," that her "evasiveness was pervasive," and that her testimony regarding sodomy and penetration with a foreign object were admissible as inconsistent statements under the reasoning of *Green*, *supra*, 3 Cal.3d at pages

988-989. Thus, appellant's assignment of error is not based upon the trial court's finding under *Green* that Zarema's lack of recall was disingenuous, which was the very ground expressly preserved by appellant. Instead, appellant seeks reversal because the trial court went too far by reading all of her testimony.

The trial court agreed to the reading of all Zarema's preliminary hearing testimony, only because defense counsel asked the court to do so for tactical reasons. Thus, appellant has waived the issue under the doctrine of invited error. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1138-1139.)

Appellant contends that he did not invite error, because defense counsel's tactical reason for requesting all the testimony was an attempt to mitigate the damage of the court's original error in admitting any of the testimony. Appellant points to authority where the doctrine of invited error was not imposed *without* a clear tactical reason for defense counsel's action. (See e.g., *People v. Coleman* (1988) 46 Cal.3d 749, 781, fn. 26, citing *People v. Graham* (1969) 71 Cal.2d 303, 319-320.) Since defense counsel expressed a tactical purpose, the doctrine applies, and appellant may not complain on appeal of testimony he asked to be placed into evidence. (See *People v. Barraza* (1979) 23 Cal.3d 675, 683-684.)

5. *Failure to Give CALJIC No. 10.65*

Appellant contends that the trial court erred by failing to instruct the jury, sua sponte, with CALJIC No. 10.65.

CALJIC No. 10.65 instructs, in relevant part: "There is no criminal intent if the defendant had a reasonable and good faith belief that the other person voluntarily consented to engage in [the sexual conduct]. Therefore, a reasonable and good faith belief that there was voluntary consent is a defense to such a charge

. . . , unless the defendant thereafter became aware or reasonably should have been aware that the other person no longer consented to the sexual activity."

This instruction sets forth the defense of reasonable and good faith mistake of fact with regard to consent, or the "*Mayberry* defense." (*People v. Maury* (2003) 30 Cal.4th 342, 423-424; see *People v. Mayberry* (1975) 15 Cal.3d 143, 153-158.)

"'The *Mayberry* defense has two components, one subjective, and one objective. The subjective component asks whether the defendant honestly and in good faith, albeit mistakenly, believed that the victim consented to sexual intercourse. In order to satisfy this component, a defendant must adduce evidence of the victim's equivocal conduct on the basis of which he erroneously believed there was consent. [¶] In addition, the defendant must satisfy the objective component, which asks whether the defendant's mistake regarding consent was reasonable under the circumstances. Thus, regardless of how strongly a defendant may subjectively believe a person has consented to sexual intercourse, that belief must be formed under circumstances society will tolerate as reasonable in order for the defendant to have adduced substantial evidence giving rise to a *Mayberry* instruction.' [Citation.]" (*People v. Maury*, *supra*, 30 Cal.4th at p. 424, quoting *People v. Williams* (1992) 4 Cal.4th 354, 360-361.)

Usually, the defendant satisfies the subjective component by testifying with regard to his belief, but the instruction may be warranted by circumstantial evidence of the defendant's good faith and reasonable belief, which may be supplied entirely by the victim's testimony. (*People v. Castillo* (1987) 193 Cal.App.3d 119, 125.) But a *Mayberry* instruction "should not be given absent substantial evidence of equivocal conduct that would have led a defendant to

reasonably and in good faith believe consent existed where it did not." (*People v. Williams*, *supra*, 4 Cal.4th at p. 362.)

"A trial court's duty to instruct, sua sponte, on particular defenses arises '"only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case."' [Citations.]" (*People v. Maury*, *supra*, 30 Cal.4th at p. 424.)

Appellant concedes that he did not rely on the *Mayberry* defense, or any defense. The thrust of defense counsel's argument was that Zarema fabricated the entire incident, perhaps to avoid deportation and to be able to remain married in order to regulate her immigration status.[4] Thus, the defense is inconsistent with appellant's theory at the time of trial.

Nor is there sufficient evidence in the record of appellant's belief regarding consent to support the trial court's sua sponte duty to instruct on the theory. Appellant did not testify. The evidence of his state of mind came from Zarema's descriptions of his actions and his words to her. His words and actions were not of the sort to inspire consent. He told her, "I was planning to die on Halloween. And I'm going [to] kill you and take you straight to hell with me." As he started to burn her nipples, he yelled, "I want you to scream from the pain as I did, as I did when I was in prison." He said he would kill her by "swishing" her neck, demonstrating a twisting motion. He barricaded the door, and insisted she remain topless for three days, almost all the while holding a kitchen knife with an 8-inch blade. He choked her many times, almost causing her to vomit, and told her: "You are not going to

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[4] Zarema is a Russian immigrant.

leave this apartment ever. You are not going to talk with somebody ever. You are dead already"; and, "I've been dreaming six months doing my time in a prison that I will kill you on Halloween night." He told her that he would break her neck if she screamed or called for help. When Zarema escaped, appellant left the country and lived under an assumed name.

Appellant contends that Zarema's "initial and intermittent consent," and her failure to specify precisely "any one act constituting a sex offense," was sufficient to warrant a *Mayberry* instruction. Appellant refers to no evidence of "intermittent" consent. Our review of the record reveals a definite break, the return from the grocery store, between the period of consensual sex acts and the period of nonconsensual acts, when Zarema agreed to sex because she was afraid that appellant would beat her up if she refused. Equivocal conduct of the victim may be found to have been sufficient to create a good faith belief in a reasonable person that she was consenting to the acts, but not where the "equivocal conduct occurred only after the defendant's exercise or threat of 'force, violence, duress, menace, or fear of immediate and unlawful bodily injury. . . .' [Citations.]" (*People v. Williams*, *supra*, 4 Cal.4th at p. 364.)

We find no evidence from which it might be inferred that appellant harbored a good faith and reasonable belief that Zarema consented to any sex acts after the return from the grocery store on October 31, 1999, when appellant threatened her with death and barricaded the door.[5] Where, as here, there is no evidence of the

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[5] In a footnote, appellant refers to defense counsel's interpretation of Zarema's testimony that later in the three-day period, when sex was no longer consensual, she "was using sex . . . to calm him down." Counsel interpreted this as using sex "as a weapon so he wouldn't get mad," and argued, "I'm sorry, if that's the truth, that's not rape." Reviewing the actual testimony reveals that she did this during the time that she

defendant's mistaken state of mind, defendant does not testify and does not rely a *Mayberry* defense, and where his entire defense is to attack the credibility of the victim, there is no error in failing to give CALJIC No. 10.65. (See *People v. Maury*, *supra*, 30 Cal.4th at p. 425.)

6. *Failure to Give CALJIC Nos. 10.61.1 and 1.23.1*

Appellant contends that the trial court should have given CALJIC No. 10.61.1, apparently sua sponte, since he does not claim to have requested it.

CALJIC No. 10.61.1 instructs: "Evidence has been introduced for the purpose of showing that the defendant and (alleged victim) engaged consensually in sexual intercourse on one [or more] occasions prior to the charge against the defendant in this case. [¶] If you believe this evidence, you should consider it only for the limited purpose of tending to show that [(alleged victim) consented to the act[s] of intercourse charged in this case] [, or] [the defendant had a good faith reasonable belief that (alleged victim) consented to the act of sexual intercourse]. [¶] You must not consider that evidence for any other purpose."

As we have noted in the previous section, there is insufficient evidence to support a theory of consent and it is undisputed that appellant's trial counsel presented a defense inconsistent with such a theory. Thus, the trial court had no duty to instruct sua sponte with CALJIC No. 10.61.1. (See *People v. Maury*, *supra*, 30 Cal.4th at p. 424.)

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considered sex consensual. But Zarema also explained that "using sex . . . to calm him" meant not refusing him sex, because she was afraid that he would beat her up if she did. Submission in the face of threats of violence is not consent. (See *People v. Guldbrandsen* (1950) 35 Cal.2d 514, 520.)

Appellant also contends that the trial court erred in failing to instruct with that portion of CALJIC No. 1.23.1 that sets forth the definition of "consent" found in Penal Code section 261.6, as follows: "'[C]onsent' means positive cooperation in an act or attitude as an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved."

We agree that appellant may have been entitled to CALJIC No. 1.23.1, if he had requested it, and if he had relied upon a consent defense, or if there had been substantial evidence of actual consent. (See *People v. Maury*, *supra*, 30 Cal.4th at p. 424.) But he did not request it, did not rely on actual consent as a defense, and there was no substantial evidence of actual consent to the acts charged.

We conclude that the trial court had no duty to give CALJIC Nos. 10.61.1 or 1.23.1 without a request from appellant, and since appellant did not request them, there was no error.

7. *Sufficiency of the Evidence*

First, appellant contends that the evidence was insufficient to convict him of forcible sodomy and attempted forcible sodomy.

Evidence is sufficient to support a conviction only if a review of the whole record in the light most favorable to the judgment discloses substantial evidence; that is, evidence which is reasonable, credible, and of solid value, such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) To determine whether substantial evidence supports the conviction, "we must view the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence

of every fact the jury could reasonably deduce from the evidence. [Citation.]" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1019.)

Zarema testified that during the time she was held in her apartment, appellant attempted anal sex twice or three times, adding that she thought it was twice. One attempt was on November 1, 1999, but Zarema could not remember whether the other attempt was on the same day or another day. She answered "yes" when asked whether he had penetrated her anus with his penis. She then called it an attempt, but said, "He violated me. And I , I don't really know how far he penetrated. But it was such a horrible pain. I was just yelling, jumping out. I was shocked. It was pain shock."

Pain is circumstantial evidence of penetration. (See *People v. Gonzalez* (1983) 141 Cal.App.3d 786, 790, disapproved on another ground in *People v. Kurtzman* (1988) 46 Cal.3d 322, 330.) "The uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable. The rule is applicable to sex cases. [Citations.]" (*People v. Scott* (1978) 21 Cal.3d 284, 296; Evid. Code, § 411.)

Appellant contends that Zarema's statement that he attempted to have anal intercourse with her on two or three other occasions, but that she did not remember which or whether it was the same day or another of the three days, is insufficient to support a conviction for attempted forcible sodomy. We disagree.

"[A]n attempt to commit sodomy . . . consists of acts falling short of actual penetration so long as the perpetrator has done more than mere preparation. [Citations.]" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 89.) An attempt goes beyond preparation where there is an intent to commit the crime and a direct ineffectual act done toward its commission. (*People v. Memro* (1985) 38

Cal.3d 658, 698.) The defendant's intent to commit the crime may be shown by his entire course of conduct during the incident in question, as well as his prior history. (*Id*. at p. 699.) And the commission of a sex crime may be ineffectual due to the victim's refusal. (See *People v. Herman* (2002) 97 Cal.App.4th 1369, 1390.)

Here, Zarema had told appellant many times before October 31, 1999, that she could not have anal sex because of her hemorrhoids. She testified, "He knew that I have a really bad [*sic*], that I am bleeding, that I'm dying from the pain." On October 31, appellant barricaded the door and held Zarema captive for two days while he threatened her life, demanded sex, beat her if she refused, and brandished a knife during the entire two days. Asked if appellant had attempted anal sex on November 1, Zarema testified, "I remember that he attempted to do that . . . twice or three times. But I don't remember was it on Monday or another date."

After she described the "attempt" during which the penetration of her anus caused her "horrible pain," Zarema was asked, "And how many times did he do this to you, separate times during that period when you were locked in the room?" She replied, "I think he tried to do it twice." After this response, the court asked, "But during that three day period, do you have a specific knowledge as to how many times specifically this happened, the attempted anal intercourse?" She replied, "As I said, I believe it was, it happened twice . . . I'm not sure. I think it happened twice. Maybe three times."

The prosecution then asked, "Now when we are saying attempted, did his penis actually penetrate even the slightest amount, but did it penetrate your anus?" The court clarified: "Other than the one time you've already explained the

excruciating pain." Zarema replied, "I think this horrible pain explains everything."[6]

Although the prosecution and the court were apparently unable to elicit the exact clarification their questions sought, it is reasonably clear from the quoted testimony that Zarema used "attempt" to describe slight penetration. This is particularly apparent after she described the penetration that caused "horrible pain," and was asked, "how many times did he do *this* to you?" (Italics added.) She replied, "I think he tried to do it twice."

Thus, the "attempts" consisted of slight penetration causing pain. *Completing* sodomy requires only *contact* between the penis of one person and the anus of another person, and even *slight* penetration is sufficient to complete. (Pen. Code, § 286, subd. (a).) The jury could reasonably infer from Zarema's testimony that each attempt caused her pain, and there was, therefore, at least slight penetration, but apparently the jury entertained a reasonable doubt, and found defendant guilty of the lesser offense of attempted forcible sodomy. (See *People v. Dewberry* (1959) 51 Cal.2d 548, 555.) We conclude that the evidence was sufficient to support the jury's finding.

8. *Generic Testimony*

Appellant contends that Zarema's testimony was so "generic" with regard to specific times and dates of nonconsensual intercourse, as to deprive him a

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[6] It is apparent from her testimony that Zarema spoke heavily accented English, and that she may have had occasional difficulty understanding a question. Appellant does not assign the absence of an interpreter as error. (See Evid. Code, § 752, subd. (a); *People v. Holtzclaw* (1926) 76 Cal.App. 168, 173.)

reasonable opportunity to prepare and present his defense, violating his constitutional rights to due process and a fair trial.

"Generic" testimony usually refers to "repeated acts of molestation occurring over a *substantial* period of time but, lacking any meaningful point of reference, [about which the victim] is unable to furnish many specific details, dates or distinguishing characteristics as to individual acts or assaults." (*People v. Jones* (1990) 51 Cal.3d 294, 299 (*Jones*), italics added.) A substantial period of time in such cases usually consists of *years*, not two or three days. (Cf., *id*. at p. 314 ["e.g., an act of intercourse 'once a month for three years'"]; *People v. Butte* (2004) 117 Cal.App.4th 956, 958-959.)

Zarema testified that on October 29 and 30, 1999, she engaged in sex with appellant voluntarily. Beginning October 31, after returning from the grocery store, appellant barricaded the door, threatened to kill her, demanded vaginal sex four to six times a day, hit her if she refused sex, and brandished a large knife for the next two days. Zarema could not remember how many times she acceded to the demands for sex. She testified: "All I remember that it was sex, sex, and sex all the time. Threaten and then sex. Threaten and then sex. I don't remember exactly dates and hours."

When testimony regarding repeated sex offenses over a long period of time is generic, the defendant is afforded the due process right to notice of the charges and the right to present a defense to those charges, by the accusatory pleading and the preliminary hearing. (*Jones*, *supra*, 51 Cal.3d at p. 317.) If the information and preliminary hearing are inadequate for that purpose, "the defendant has a variety of procedural due process remedies available to obtain relief from unwarranted prosecution or punishment, including demurrers (Pen. Code, § 1002 et

seq.), pretrial motions to set aside the information or indictment (Pen. Code, § 995), and motions for judgment of acquittal (Pen. Code, § 1118), modification of verdict (Pen. Code, § 1181) or new trial (*ibid.*)." (*Jones*, *supra*, 51 Cal.3d at p. 320.)

Assuming only for discussion that testimony regarding repeated sexual assaults over just two or three days in the same location is generic, we turn to appellant's contention that the enumerated remedies did not protect him. His reasoning appears to be as follows: because *Jones* was a child molestation case, and the issue of generic testimony usually arises either in cases of sex crimes against children or "course of conduct" offenses,[7] and because the victim was not a child and this was not charged as a "course of conduct" offense, the Information and preliminary hearing were insufficient to provide him with adequate notice of the charges with which to prepare his defense.

The remedies set forth in *Jones* are not restricted to defendants accused of crimes against children or defendants accused of course of conduct crimes. (E.g., Pen. Code, § 1002 et seq.; Pen. Code, § 995; Pen. Code, § 1118; Pen. Code, § 1181.) Indeed, a defendant *must* avail himself of one or more of these remedies, if he believes that the information and the evidence adduced at preliminary hearing provide insufficient notice to permit the preparation of a defense, or he may not raise the issue on appeal. (*People v. Holt* (1997) 15 Cal.4th 619, 672.) And long before *Jones* considered the question of adequate notice imparted by generic testimony in child molestation cases, a defendant and been required to bring a

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[7] See e.g., *People v. Gear* (1993) 19 Cal.App.4th 86, 91-92.

demurrer to avoid waiving any objection to the sufficiency of the information. (See e.g., *People v. Ellenwood* (1897) 119 Cal. 166, 168.)

Appellant does not claim that he was not afforded notice of the charges in the form of an information and preliminary hearing. And he provides no authority even suggesting that he had no right to demur to the information or bring appropriate pretrial and post-trial motions, or that such remedies would have been insufficient to provide him with adequate notice of the charges with which to prepare his defense.

Two informations were filed in this case, one on December 26, 2002, after appellant was afforded a preliminary hearing in which the victim was examined and cross-examined, and another on May 5, 2003, after the first was dismissed by the prosecution. Appellant demurred to *neither* information, but pleaded not guilty to the charges each time. After pleading to the second information, appellant waived any further preliminary hearing. By doing so, he forfeited any due process claim of inadequate notice of the charges in the pleadings. (*People v. Butte*, *supra*, 117 Cal.App.4th at pp. 958-959.)

On February 27, 2003, appellant brought a motion to set aside the first information, pursuant to Penal Code section 995, on the ground that he had been committed without probable cause, but not because the victim's testimony had been too generic. After trial, appellant brought a motion to set aside his conviction with regard to forcible sodomy, as charged in count 5, on the ground that it was inconsistent with the jury's finding that he was guilty of attempted forcible sodomy, as a lesser included offense, as charged in count 1.

Nowhere in either motion is there a suggestion that appellant had been denied any constitutional right due to the vagueness or the generic nature of the

victim's testimony at preliminary hearing or the allegations of the information. Appellant was required to raise any constitutional claims of due process violations in the trial court, and by failing to do so, he has forfeited them. (See *People v. Davis* (1995) 10 Cal.4th 463, 501-502, fn. 1.)

Appellant also contends that the testimony was so vague that it did not amount to substantial evidence sufficient to sustain a conviction for rape. He asserts that Zarema's testimony was simply, "Threaten and then sex, threaten and then sex," and claims that she "did not testify to *any* distinct acts of . . . nonconsensual intercourse where the lack of consent was somehow made manifest to appellant." (Italics in the original.)

We disagree. After the prosecution stated, "I want to talk about the 31st after you came back from Ralph's [grocery store]," the following exchange took place:

"Q Did you have vaginal sex with the defendant?

"A I believe, yes.

"Q Okay. Why did you have sex with him *at that time*, vaginal sex? (Italics added.)

"A He's kind of a sexaholic, and he need sex all the time. We got sex four or five, six times in a day, I mean 24 hours. And I didn't want already have sex, but he didn't leave me a choice. If I would refuse, he pick me up. He slap me.

"Q Okay. And on the 31st, did you have sex, vaginal sex with the defendant?

"A Yeah.

"Q How about on the 1st? That would be the Monday.

"A All I remember that it was sex, sex, and sex all the time. Threaten and then sex. Threaten and then sex. I don't remember exactly dates and hours. [¶] If you would have sex 20 times during three days, would you remember exactly when it happened?"

Still asking about the period from October 31 to November 2, the prosecution asked whether appellant put anything else into her anus, and she responded that he had inserted the tip of his finger.

Thus, Zarema testified that she had sex with appellant *many* times during the time she was held in her apartment, because he would hit her when she refused. The jury could reasonably conclude from such testimony that there were at least two acts of vaginal intercourse and one digital penetration of her anus that occurred after the door was barricaded and appellant had threatened her with a knife. We reject appellant's theory of this case, which would bar conviction of any sex offense where the defendant has violated his victim too many times for her to count, unless she can pinpoint the exact time of day of each violation.

And appellant has not suggested what more Zarema should have done to make her lack of consent "manifest" to him. Resistance by the victim is not an element of rape. (*People v. Barnes* (1986) 42 Cal.3d 284, 302-303.) "It is primarily for the woman who is attacked to decide to what extent, if at all, she can safely resist" in the face of threats of immediate bodily harm with apparent power to inflict it, and her submission under such circumstances is not a manifestation of consent. (*People v. Lay* (1944) 66 Cal.App.2d 889, 893; see *People v. Guldbrandsen, supra,* 35 Cal.2d at p. 520.)

We conclude, as we did with regard to forcible sodomy and attempted forcible sodomy, that the evidence was sufficient to support the convictions for spousal rape and sexual penetration with a foreign object.

9. *Sentencing Under Blakely*

In his supplemental brief, appellant contends that the trial court committed sentencing error under *Blakely v. Washington, supra*, 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*), and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), when it imposed the upper term after making its own factual findings with regard to aggravating factors. In particular, appellant contends that the trial court should not have considered "the number and nature of appellant's prior convictions and prior prison term, his performance on parole/probation, the vicious and callous nature of the charged offenses, the violent/vicious/callous nature of the charged offenses, the victim's particular vulnerability, the planning/premeditation involved in the offenses, the separate occurrence of the offenses and appellant's opportunity to reflect between them."

Apprendi held: "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." (*Apprendi*, *supra*, 530 U.S. at p. 490.) In *Blakely*, the United States Supreme Court explained that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* [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] [so that] the judge exceeds his proper authority." (*Blakely, supra,* 542 U.S. ___ [124 S.Ct. at p. 2537], italics in original.)

Under the California determinate sentencing law, a sentencing court must impose the middle term unless it finds there are factors in mitigation or aggravation. (*People v. Avalos* (1984) 37 Cal.3d 216, 233.) Only where factors in aggravation are found to exist may the court impose the upper term. (*Id*. at p. 233, Pen. Code, § 1170, subd. (b).) We have recently compared the California statute with the Washington statute reviewed in *Blakely*, and found the two analogous, and concluded that the middle term is the "'statutory maximum' for *Apprendi* purposes," and imposition of the upper term, therefore, may be based only upon aggravating factors found by a jury beyond a reasonable doubt. (*People v. White* (2004) 124 Cal.App.4th 1417, 1434, 1439.)

Blakely invalidated a sentence beyond the statutory maximum, imposed after the trial judge found that defendant had acted with "deliberate cruelty." (*Blakely*, *supra*, 542 U.S. ___ [124 S.Ct. at pp. 2536-2537].) Similarly here, the trial court chose upper terms on counts 2, 5, 6, and 8, based upon its own findings with regard to the cruel, violent, vicious and callous nature of the charged offenses and the victim's particular vulnerability. Since these findings were made by the trial judge, not the jury, and appellant did not waive a jury determination, appellant must be resentenced. (See *People v. White*, *supra*, 124 Cal.App.4th at p. 1439.)

Appellant also contends that the trial court's imposition of full consecutive terms with regard to counts 5, 6, and 8, fall within *Blakely.*

The trial court sentenced appellant on those counts under Penal Code section 667.6, subdivision (d), which requires full consecutive terms for sex offenses, if the crimes involve separate victims or involve the same victim on separate occasions. In order to find that multiple attacks upon the same victim occurred on separate occasions, the trial court must determine whether the defendant had a reasonable opportunity to reflect upon his actions and nevertheless resumed sexually assaultive behavior. (*People v. Irvin* (1996) 43 Cal.App.4th 1063, 1071-1072.) While this sentencing choice may fall within *Blakely*, we need not reach that issue.

The trial court also noted that full consecutive terms were appropriate under Penal Code section 667.6, subdivision (c), and made the findings necessary for application of that subdivision. (See *People v. Belmontes* (1983) 34 Cal.3d 335, 347-349.) The court cited the violence of the conduct, which involved planning, indicating that appellant posed a serious danger to society, finding that appellant's prior convictions as an adult were numerous and of increasing seriousness, and that appellant was on parole at the time of the offense.

Neither *Blakely* nor *Apprendi* involved sentencing for multiple offenses, and did not reach the issue of consecutive sentencing. A defendant is presumptively entitled to the middle term unless the court finds aggravating circumstances. (*People v. Avalos, supra*, 37 Cal.3d at p. 233.) It is for that reason that the middle term is the "statutory maximum," beyond which, under *Blakely*, a defendant may not be sentenced due to facts not found by a jury beyond a reasonable doubt. (*Blakely, supra*, 542 U.S. ___ , 124 S.Ct. at pp. 2536-2537; see *People v. White, supra*, 124 Cal.App.4th at p. 1439.)

A defendant is not entitled to a concurrent term. (*People v. Reeder* (1984) 152 Cal.App.3d 900, 925.) When a the court imposes a consecutive sentence, it is not increasing the statutory maximum sentence, but merely deciding that the sentences for two separate offenses, of which the defendant was found guilty by a jury, should not be served at the same time. So long as each sentence is properly determined, the court is not required to allow the defendant to serve them concurrently. (See *People v. Groves* (2003) 107 Cal.App.4th 1227, 1231-1232.)

DISPOSITION

The judgment is reversed with regard to the sentence only, and the matter is remanded for the court to conduct a new sentencing determination pursuant to *Blakely v. Washington, supra,* 542 U.S. ___. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED

HASTINGS, J.

I concur:

EPSTEIN, P.J.

GRIMES, J., Concurring and Dissenting.

I concur with the majority opinion except the discussion of sentencing under *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*). Respectfully, I dissent with respect to the disposition and the conclusion in part 9 of the discussion that *Blakely* mandates reversal of the upper term sentences imposed for the offenses in counts 2, 5, 6 and 8 and remands for resentencing on those counts.

My colleagues conclude that "the middle term is the 'statutory maximum' for *Apprendi* purposes, and imposition of the upper term, therefore, may be based only upon aggravating factors found by a jury beyond a reasonable doubt." (Maj. opn. at p. 31.) I disagree.

Until our Supreme Court concludes otherwise,[1] I am of the opinion that *Blakely* does not apply to the tripartite prison scheme (upper, middle, and low term) of the California determinate sentencing law (Pen. Code, § 1170, subds. (a)(3) & (b); see also, Cal. Rules of Court, rules 4.420(a)-(c), 4.421 & 4.423). It is my view that our California sentencing scheme is the type of discretionary sentencing within a range authorized by law to which *Blakely* does not apply.

In view of the foregoing, I would affirm the trial court's imposition of upper term sentences on counts 2, 5, 6 and 8.

GRIMES, J.*

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[1] The issue of whether *Blakely* applies to the upper term choice is pending before our Supreme Court in *People v. Black*, S126182 and *People v. Towne*, S125677.

***** Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.