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CERTIFIED FOR PARTIAL PUBLICATION*

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JUAN CARLOS LEMUS, Defendant and Appellant.	D042549 (Super. Ct. No. SCS170426)

APPEAL from a judgment of the Superior Court of San Diego County, Margie G. Woods, Judge. Affirmed in part, reversed in part and remanded.

Koryn & Koryn and Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry J.T. Carlton and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts I, II and III.

A jury convicted Juan Carlos Lemus of torture (Pen. Code,[1] § 206; count 4), corporal injury to a cohabitant (§ 273.5, subd. (a); count 5), making a criminal threat (§ 422; count 6), assault (§ 240; count 7), assault by means likely to produce great bodily injury (§ 245, subd. (a)(1); count 8), and false imprisonment (§§ 236/237, subd. (a); count 9.) The jury also found true the allegations Lemus personally inflicted great bodily injury in the commission of counts 4, 5, and 8. (§ 12022.7, subd. (e).)[2]

The trial court sentenced Lemus to a total prison term of life plus eight years for his crimes. Specifically, for the count 4 crime of torture and its attendant enhancement, the court imposed a life term (§ 206.1) and a five-year upper term for the infliction of great bodily injury enhancement. The court imposed an upper term of three years for the count 6 criminal threat conviction to run consecutive to the count 4 term.

Lemus appeals his torture conviction contending 1) there was insufficient evidence to establish that crime, 2) the court prejudicially erred in failing to give a jury instruction on battery with serious bodily injury as a lesser included offense of torture, and 3) the sentence imposed for the conviction constitutes cruel and/or unusual punishment.

During the pendency of this appeal, we asked the parties for supplemental briefing on the applicability of the recent United States Supreme Court case of *Blakely v.*

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1 All further statutory references are to the Penal Code.

2 The jury also found true that Lemus did personally inflict great bodily injury when he committed the assault by means likely to produce great bodily injury within the meaning of section 1192.7, subdivision (c)(8).

Washington (2004) ___ U.S. ___ [124 S.Ct. 2531] (*Blakely*) on the determinate portion of the sentence imposed in this case.

In the unpublished portion of this opinion, we conclude there was sufficient evidence to convict Lemus of torture, that battery is not a necessarily lesser included offense of torture, and that the sentence imposed for the torture conviction and its enhancement does not constitute cruel and/or unusual punishment. In the published portion of the opinion, we conclude resentencing in light of *Blakely* is required.

FACTUAL BACKGROUND[3]

Maria L. (Maria) and Lemus lived together for about a year and a half and had a baby together. During the course of their relationship, Lemus was physically and emotionally abusive toward Maria. He was domineering and controlling to the point of even following Maria to the bathroom to ensure she was not cheating on him. Eventually, Maria, fearful of Lemus's controlling and intensely jealous behavior, moved out with the baby and went to stay with a cousin. However, a week later, on August 12, 2002, Lemus convinced Maria to return to his apartment.

At about 11:00 p.m. that night, as Lemus and Maria talked in the living room about how things were going to improve in their relationship, the conversation degenerated into an argument with Lemus accusing Maria of cheating on him. Lemus slapped Maria across her face twice and instructed her to lay their baby in the bedroom.

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3 Because Lemus challenges the sufficiency of the evidence, we review the record in the light most favorable to the judgment.

Lemus followed Maria into the bedroom and began kissing her. Maria reciprocated because she did not want to get hit. At some point, Lemus became upset and ordered Maria to take a shower, saying she smelled like men's cologne.

Maria obediently went to the bathroom, turned the water on, and sat on the toilet. Lemus followed her, ripped her bra off, and ordered her to perform various sexual acts both in and out of the bathroom. Maria complied with Lemus's sexual demands because she was fearful he would hit her again. At one point, Lemus inserted his penis into Maria's vagina with great force.

After Lemus finished having sex in its various forms, he went to the living room window and saw some men outside. Lemus became enraged and accused Maria of cheating on him with those men. When Maria denied the accusation, Lemus punched her in the face. He kept accusing Maria of cheating on him, punching her face and head, telling her that if she admitted cheating on him, he would stop beating her.

Maria cried throughout the attack and tried escaping several times to no avail. During the ordeal Lemus grabbed her by the hair, threw her to the ground, and covered her mouth to stop her screaming. He also pulled her cheeks to try to silence her as he continued hitting her.

Lemus then ordered Maria to get into the shower and turn the water on so people would not hear her screaming. Instead, Maria went to the bedroom to get the baby, hoping that if she were holding their son, Lemus would spare her. Lemus however, demanded Maria hand over the baby. She complied because she was fearful he would hurt the child. After placing the baby on the floor, Lemus punched Maria in the head and

face, and again ordered her into the shower. Lemus continued to punch and beat her in the shower and when she sat in the tub, he kicked her in the head several times.

As the beating, punching, and kicking continued, Lemus repeatedly asked Maria who she was cheating with and who her lovers were. Although Lemus would leave the bathroom periodically, he would shortly return and continue beating Maria. At one point, Lemus ordered Maria to kneel down in the water and he dunked her head under for several seconds. He unsuccessfully tried to dunk her a second time. Lemus then got into the tub with Maria, grabbed her head, shook it, pulled her hair, and hit her head some more, until she finally "confessed" to cheating on him. Lemus hit her again before he stopped his onslaught. The physical abuse, which lasted about four hours, ended around 4:00 a.m.

The two then bathed together. Lemus explained to Maria he had not wanted to beat her, but he had been disappointed in her infidelity. After bathing, they went to the bedroom where Lemus laid down and Maria sat next to their baby. When Lemus saw a light flash from the window, he accused Maria of using the light as a signal from her lovers, telling her to return the signal. When Maria placed a clock in the window, Lemus told her she was playing dumb and then went to sleep. Maria forced herself to stay awake because she was afraid she might die from her injuries if she fell asleep.

Two hours later as Lemus was leaving for work, he instructed Maria to clean up the apartment, arrange his clothes, and not to leave or go anywhere. Lemus also told Maria not to tell anyone what had happened or he would take it out on her family. Maria waited some time after Lemus left to ensure he was not lurking outside before she opened

the door to get help. The police arrived at about 6:40 a.m. When the police later arrested Lemus he told them he had hit Maria because she had cheated on him.

As a result of Lemus's attacks on Maria, she incurred several large lacerations in her vaginal area consistent with blunt force trauma, a severely swollen and bruised face, swollen and ripped upper and lower lips, scratches on her face, missing chunks of hair, tender large red lumps all over her head, large bruises all over her chest and additional bruising over the rest of her body.

DISCUSSION

I

SUFFICIENCY OF EVIDENCE - TORTURE

Lemus contends there was insufficient evidence to convict him of torture, arguing evidence of Maria's injuries and of his intent were insufficient to rise to the level contemplated by the torture statute. He specifically urges that because Maria did not suffer any broken bones, scarring, or other permanent injury to her body or vital organs, her injuries were not sufficient to establish she was tortured and that there was inadequate evidence to show his conduct was "inspired by pure evil."

When the sufficiency of the evidence is challenged, "'we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence--that is, evidence that is reasonable, credible, and of solid value--from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Hale* (1999) 75 Cal.App.4th 94, 105 (*Hale*), quoting *People v. Thomas* (1992) 2 Cal.4th 489, 514.) "'[I]t is the *jury*, not the appellate court, which must

be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] Therefore, an appellate court may not substitute its judgment for that of the jury.'" (*People v. Sanchez* (1998) 62 Cal.App.4th 460, 468, quoting *People v. Ceja* (1993) 4 Cal.4th 1134, 1139.) We will not reverse a conviction on the ground of insufficient evidence unless it clearly is shown that "on no hypothesis whatever is there sufficient substantial evidence to support the verdict . . . ." (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.)

Torture is defined in section 206 which provides: "Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury as defined in Section 12022.7 upon the person of another, is guilty of torture. [¶] The crime of torture does not require any proof that the victim suffered pain." Section 12022.7, subdivision (f), defines great bodily injury as "a significant or substantial physical injury." Therefore, torture consists of two elements: (1) a person inflicted significant or substantial physical injury upon another, and (2) that person did so with the specific intent of causing cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or any sadistic reason. (*People v. Pre* (2004) 117 Cal.App.4th 413, 419 (*Pre*).)

Lemus argues the substantial physical injury element of torture requires permanent injuries or greatly disfiguring or scarring injuries. In support of his position, Lemus marshals a host of torture cases where the victims suffered such serious injuries. However, we recently concluded, "[s]ection 206 does not require permanent, disabling, or disfiguring injuries; '[s]ection 206 only requires "great bodily injury as defined in Section 12022.7" . . . . "Abrasions, lacerations and bruising can constitute great bodily injury."'"

(*Pre*, *supra*, 117 Cal.App.4th at p. 420, quoting from *Hale*, *supra*, 75 Cal.App.4th at p. 108.) Therefore, contrary to Lemus's position, the only injury required under section 206 is great bodily injury as defined in section 12022.7, or significant or substantial physical injury. In reviewing the entire record here, we find that Maria received such substantial physical injury. Maria had significant bruises all over her face and body; her lips were ripped, swollen, and tender; she had large red lumps on her head; she was missing chunks of hair; and she had significant lacerations in her vaginal area. This evidence was sufficient to constitute great bodily injury. (See *Hale*, supra, 75 Cal.App.4th at p. 108.)

Lemus further contends there was insufficient evidence to conclusively establish he had the requisite intent for torture. He argues the intent required for torture is something on par with motives "inspired by pure evil." However, the statutory language lends little support for this position. We have previously noted that "[p]roposition 115, adopted by the voters in 1990, created the relatively new crime of torture. 'Torture is a new crime, different from others.' [Citation.] It is a major crime and 'fills a gap in existing law dealing with extremely violent and callous criminal conduct . . . . Section 206 is the electorate's response to a particular type of violence *animated by a discrete and especially reprehensible intent*.' [Citation.]" (*Hale*, *supra*, 75 Cal.App.4th at p. 107, emphasis added.) The intent required for section 206 torture differs from the intent required for murder by torture because section 206 torture "does not require that the defendant act with premeditation or deliberation or that the defendant have an intent to inflict prolonged pain." (*Pre*, *supra*, 117 Cal.App.4th at p. 420.) Instead, section 206

torture simply requires an intent to cause cruel or extreme pain for revenge, extortion, persuasion, or sadism. Such intent can be established by the circumstances of the offense. (*Hale*, *supra*, 75 Cal.App.4th at p. 106.)

The circumstances here demonstrate that Lemus had the specific intent to cause Maria cruel or extreme pain for the purpose of revenge or extortion. Extortion is defined as "[t]he action or practice of extorting or wresting anything . . . from a person by force or by undue exercise of authority or power . . . ." (Oxford English Dictionary (2d ed. 1989) http://www.oed.com.) The evidence established that Lemus's attacks were calculated to either punish Maria for infidelity or to wrest a confession from her that she was cheating on him. Throughout the continuous physical and emotional abuse, Lemus repeatedly demanded that Maria tell him who her lovers were. Each time she denied his accusations he served her with a new volley of punches, hits, or kicks. The evidence also indicated his actions were inspired by an intent to seek revenge against Maria. After the several hours of abuse ended and Lemus and Maria were showering together, he told her that he had not wanted to abuse her, but did so because he was disappointed with her unfaithfulness. When the police eventually arrested Lemus, he told them he hit Maria because she had cheated on him.

The evidence further shows Lemus intended to inflict cruel or extreme pain on Maria. He did not simply slap her. He subjected her to prolonged physical and emotional abuse. When Maria tried to escape, Lemus yanked her by the hair and threw her to the ground. He repeatedly punched her in the face, pulled her hair, hit her, kicked

her in the head, and dunked her head under water. Lemus continued these attacks on Maria for almost four hours.

Moreover, Lemus coupled his physical abuse of Maria with emotional abuse. He took advantage of a position of trust by convincing Maria to return to him and talking about how things would change in their relationship. After Lemus had sex with her he flew into a rage, accusing her of infidelity. He repeatedly asserted Maria was unfaithful until she finally "confessed." Even then he struck her again. Later, when they were in bed, Lemus launched a new set of bizarre accusations against Maria about the lights from the windows being signals from her lovers, causing Maria renewed fears for her life. The jury could reasonably determine from the totality of the evidence that Lemus intended to inflict cruel or extreme pain on Maria. Accordingly, we conclude there was sufficient evidence for the jury to find Lemus guilty beyond a reasonable doubt of committing torture in violation of section 206.

II

FAILURE TO INSTRUCT ON BATTERY WITH SERIOUS BODILY INJURY AS A NECESSARILY LESSER-INCLUDED OFFENSE OF TORTURE

Lemus contends the court prejudicially erred in failing to give the jury an instruction on battery with serious bodily injury as a lesser-included offense of torture. It is well established that the trial court has a duty to instruct on the principles of law applicable to the case, including any recognized defenses and lesser-included offenses. (*People v. Breverman* (1998) 19 Cal.4th 142, 154. (*Breverman*).) This sua sponte instructional rule "prevents the 'strategy, ignorance, or mistakes' of *either* party from

presenting the jury with an 'unwarranted all-or-nothing choice,' encourages 'a verdict . . . no harsher *or more lenient* than the evidence merits' [citation], and thus protects the jury's 'truth-ascertainment function' [citation]." (*Id.* at p. 155.)

Whether the duty to provide a sua sponte instruction on a lesser included offense arises depends on whether such offense is necessarily included within the charged offense. If the charged offense does not necessarily contain the lesser included offense, the court is under no obligation to instruct thereon. A lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading charging the greater offense, include all the elements of the lesser offense such that the greater cannot be committed without also committing the lesser. (*Breverman*, *supra*, 19 Cal.4th at p. 154.) Thus, there are two tests to determine whether an offense contains a lesser included offense: (1) the elemental test in which all the elements of the lesser offense are wholly included within the elements of the greater; and (2) the accusatory pleadings test in which the facts as alleged in a count are sufficient to allege a lesser crime. (*Ibid.* at fn. 5.)

Battery is "any willful and unlawful use of force or violence upon the person of another." (§ 242.) An aggravated form of battery occurs when the battery results in serious bodily injury. (§ 243, subd. (d).) To establish battery resulting in serious bodily injury, the People must prove: (1) a person used physical force or violence against another; (2) the use of force or violence was willful and unlawful; and (3) the use of force or violence inflicted serious bodily injury on the other person. (CALJIC No. 9.12.)

By contrast, torture, as already noted, consists of two elements: (1) the infliction of great bodily injury on another; and (2) the specific intent to cause cruel or extreme pain and suffering for revenge, extortion or persuasion or any sadistic purpose. (*People v. Baker* (2002) 98 Cal.App.4th 1217, 1223.) Count 4 of the information alleged Lemus "did unlawfully and with the intent to cause cruel and extreme pain and suffering for the purpose of revenge, extortion, persuasion, and for a sadistic purpose, inflict great bodily injury as defined in . . .12022.7, upon Maria . . . ."

Although the specific intent element of torture can include the general intent element of battery, and both crimes involve serious physical injury, the statutory definition of torture does not explicitly include the battery element of physical force or violence. In other words, torture does not require the direct use of touching, physical force or violence. Thus it is possible to commit torture without necessarily committing a battery. Such a situation, though perhaps uncommon, may exist when a person with the intent to inflict cruel or extreme pain withholds food or water to starve a person. Likewise, one can imagine a torture scenario where a person is subjected to deafening noise that ultimately damages or destroys hearing. In neither of these situations has the torturer touched or battered the victim, yet intent to inflict cruel or extreme pain for revenge, extortion, persuasion, etc. and serious physical injury remain. Battery is a different crime altogether from torture. Hence our earlier pronouncement, "'[t]orture is a new crime, different from others.' [Citation.] It is a major crime and 'fills a gap in existing law . . . .'" (*Hale*, *supra*, 75 Cal.App.4th at p. 107.)

Further, under the statutory pleading test, nothing in the count 4 allegations in the information for torture shows that Lemus used force or violence against Maria. That the information also alleged an enhancement allegation under section 12022.7, subdivision (e), which requires personal infliction of injury, does not change this fact. Enhancement allegations are not considered as part of the accusations for purposes of defining lesser included offenses. (*People v. Wolcott* (1983) 34 Cal.3d 92, 101.)

We therefore conclude battery is not a lesser included offense of torture under either the elements or statutory pleading tests and thus the court was not required to instruct the jury on battery as a lesser-included offense of torture.[4]

III

CRUEL AND/OR UNUSUAL PUNISHMENT

Lemus challenges his sentence of life plus five years for his torture conviction as cruel and/or unusual punishment. He specifically argues the punishment he received was grossly disproportionate to the crimes for which he was convicted. We disagree.

A punishment violates the constitution "not only if it is inflicted by a cruel or unusual method, but also if it is grossly disproportionate to the offense for which it is imposed." (*People v. Dillon* (1983) 34 Cal.3d 441, 478 (*Dillon*).) In testing whether a punishment is disproportional we look to "(1) the nature of the offense and/or offender; (2) comparison of the penalty in question with prescribed penalties for more serious

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4 Division Two of our district has recently made the same determination in *People v. Lewis* (2004) 120 Cal.App.4th 882.

offenses in the same jurisdiction; and (3) comparison of the penalty in question with penalties prescribed for the same offense in other jurisdictions." (*People v. Barrera* (1993) 14 Cal.App.4th 1555, 1567 (*Barrera*).)

In looking to the nature of the offense we consider factors such as, "(1) the degree of danger the offense presents to society; (2) whether the offense is minor in nature; (3) the defendant's gain; (4) the extent of injury to others; and (5) the nonviolent versus violent nature of the offense." (*Barrera*, *supra*, 14 Cal.App.4th at p. 1567.) Torture is an offense that is highly repugnant to civilized society. It is a crime that arises out of callous disregard for the sanctity of human life. As such, it cannot be considered a minor crime. Here, Lemus committed the crime for the depraved purposes of vengeance and coercing a confession from Maria that she was unfaithful. To get what he wanted, Lemus pummeled Maria so severely and for so long that she suffered severe injuries to her head, face, and body. Accordingly, the nature of Lemus's offense warrants severe punishment.

In looking to the nature of the offender, we consider "age, prior criminality, personal characteristics, and state of mind." (*Dillon*, *supra*, 34 Cal.3d at p. 479.) At the time of the offense, Lemus was 28 years old—hardly a youthful offender. While it may be true that Lemus had not been the subject of prior criminal prosecutions, ample evidence produced at trial revealed he had been physically abusive toward Maria throughout their two-year relationship. Evidence also showed he was domineering and controlling of Maria to the point of following her to the bathroom to ensure her fidelity. Lemus's state of mind at the time of the crime demonstrated that his furor was fueled by spiteful vengeance. Even after the attack, Lemus continued to accuse Maria with the odd

references to light signals from her lovers. Lemus demonstrated a callous disregard of Maria's serious injuries and a total lack of remorse. Accordingly, Lemus's character does not convince us that his punishment is cruel and/or unusual.

Lemus attempts to show that torture is punished more severely than other equal or more serious crimes. He compares torture with aggravated battery, assault with a deadly weapon, second degree murder, and mayhem. These crimes, except for second degree murder, are punished by determinate sentences whereas torture is punished by an indeterminate sentence. Second degree murder carries a more severe sentence than does torture. Lemus fails to recognize, however, that torture has a specific intent element that is particularly odious to civil society. As stated, torture requires an intent to cause cruel or extreme pain and suffering for revenge, extortion, persuasion, or any sadistic purpose. It is this intent that makes torture such a serious crime. As the court in *Barrera* noted, "[a] review of the statutes of California shows no crimes more serious than torture that are punished less severely." (*Barrera*, *supra*, 14 Cal.App.4th at p. 1570.) Accordingly, Lemus's comparison of punishments for other crimes fails.

Finally, we recognize that no other state has criminalized torture separately the way California has done. Thus, it is impossible to compare punishments for torture from other jurisdictions. In sum, Lemus's argument that the punishment for what he did to Maria constitutes cruel and/or unusual punishment is untenable.

IV

BLAKELY V. WASHINGTON

As this court has recently stated in *People v. George* (2004) ___ Cal.App.4th ___ [2004 D.A.R. 11568] (*George*), "[d]uring the pendency of this appeal, the United States Supreme Court issued its decision in *Blakely, supra,* 124 S.Ct. 2531, which held that a state trial court's imposition of a sentence that exceeded the statutory maximum of the standard range for the charged offense on the basis of additional factual findings made by the court violated the defendant's Sixth Amendment right to trial by jury. Based on the trial court's imposition of upper terms [for Lemus on the great bodily injury enhancement for count 4 and for the offense in count 6] we requested further briefing from the parties on the effect of *Blakely* in this case.

"In his brief, [Lemus] contends that pursuant to the analysis of *Blakely*, the court's finding of facts to justify its imposition of upper term sentences violated his right to jury trial. The attorney general responds that [Lemus] has waived the issue by failing to raise a challenge to the sentences in the proceedings below, that there is no constitutional violation pursuant to the analysis of *Blakely*, and that, even if a *Blakely* error existed, it was harmless beyond a reasonable doubt.

"1. Waiver. [¶] In *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*), the California Supreme Court held that a defendant's failure to challenge in the trial court the imposition of an aggravated sentence based on erroneous or flawed information waived that issue for purposes of appeal. The attorney general argues that the holding of *Scott* is equally applicable here. However, the court in *Scott* reasoned that its waiver rule was necessary

to facilitate the prompt detection and correction of error in the trial court thus reducing the number of appellate claims and preserving judicial resources [citation], a pragmatic rationale that does not support the application of the waiver rule here. Prior to *Blakely*, California courts and numerous federal courts consistently held that there was no constitutional right to a jury trial in connection with a court's imposition of consecutive sentences. [Citations.] No published case in California held that a different rule applied in connection with the imposition of an upper term sentence. [Citation.] In light of this state of the law, [an assertion of a constitutional challenge to] the imposition of an upper term sentence would not have achieved the purpose of prompt detection and correction of error in the trial court. Further, because *Blakely* was decided after [Lemus's] sentencing, [Lemus] cannot be said to have knowingly and intelligently waived his right to a jury trial. [Citation.]" (*George, supra,* ___ Cal.App.4th ___ [2004 D.A.R. at p. 11572].)

Additionally, Lemus vigorously advocated in the trial court for a mitigated sentence. He filed a statement in mitigation and urged the court to impose a lesser sentence. The trial court stated extensive reasons for the sentence imposed. Under the circumstances, it would be unreasonable to find that Lemus abandoned a constitutional challenge of which he was unaware. For these reasons, we find, as we did in *George,* that the waiver rule of *Scott, supra,* 9 Cal.4th 331, is inapplicable under these circumstances. (*George, supra,* ___ Cal.App.4th ___ [2004 D.A.R. at p. 11572].)

In *George*, *supra,* ___ Cal.App.4th ___ [2004 D.A.R. 11568], we further stated: "2. Application of *Blakely* to an Upper Term Determination. [¶] In *Blakely*, the United States Supreme Court held 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.'" [Citation.] The question of whether *Blakely* precludes a trial court from making findings on aggravating facts in support of an upper term sentence is currently under review by the California Supreme Court. [Citations.] Pending resolution of the issue by the high court, we must undertake a determination of whether *Blakely* applies under the circumstances presented.

"Under California's determinate sentencing law, where a penal statute provides for three possible prison terms for a particular offense, the court is required to impose the middle term unless it finds, by a preponderance of the evidence, that the circumstances in aggravation outweigh the circumstances in mitigation. [Citations.] The Attorney General argues that the imposition of an upper term sentence under the California determinate sentencing scheme is not the same as 'the imposition of a penalty beyond the standard range' and thus does not implicate *Blakely*. The attempted distinction, however, is one without a difference. Although an upper term is a 'statutory maximum' penalty in the sense that it is the highest sentence a court can impose for a particular crime, it is not necessarily the 'maximum [sentence] a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant,*' which is the relevant standard for purposes of applying *Blakely.* [Citations.]

"As explained in *Blakely,* when the judge's authority to impose a higher sentence depends on the finding of one or more additional facts, 'it remains the case that the jury's verdict alone does not authorize the sentence,' as required to comply with constitutional principles. [Citation.] The same is true here. Because the maximum penalty the court

can impose under California law without making additional factual findings is the middle term, *Blakely* applies. Thus, the question becomes whether the trial court could properly rely on any of the cited factors as the basis for its decision to impose the upper term without violating *Blakely*." (*George, supra,* ___ Cal.App.4th ___ [2004 D.A.R. at pp. 11572-11573].)

In the present case, the trial court relied on a number of aggravating factors as the basis for its decision to impose the upper term as to the enhancement and as to count 6. The court noted that the crime involved great violence, great bodily harm, and involved a high degree of cruelty, viciousness or callousness. The court also found that the victim was vulnerable and the defendant took advantage of a position of trust, that the defendant threatened the victim if she reported the crime and engaged in violent conduct indicating he was a serious danger to society. "In accordance with *Blakely,* the Constitution requires a jury trial on any fact that 'the law makes essential to the punishment' other than the fact of the defendant's prior conviction. [Citation.]" (*George, supra,* ___ Cal.App.4th ___ [2004 D.A.R. at p. 11573].) Applying those standards to the present case, it is clear that there is no finding by the jury on which the trial court could rely for the selection of the upper term sentence. Accordingly, we find on this record the court's decision to select the upper term for the enhancement to count 4 and for the offense in count 6 violated the defendant's Sixth Amendment right to a jury trial as defined in *Blakely.*

3. Prejudice

The attorney general argues that if *Blakely* applies to the selection of the upper term sentences in this case, any error in that regard is harmless. Essentially, the attorney

general argues that since a single factor in aggravation would support an upper term (*People v. Cruse* (1995) 38 Cal.App.4th 427, 433), the error is harmless because the jury, had it been presented with such issues of aggravation, would have found any of the factors to be true. As we understand the attorney general's argument, it appears to be that even if Lemus had a right to a jury trial, the evidence is overwhelming as to the aggravated nature of his offense and therefore any jury would have found the factors in aggravation to be true. We believe the argument misses the point of *Blakely*.

The decision in *Blakely* is premised on the notion that the defendant has a constitutional right under the Sixth Amendment to a jury trial as to any factual determination which increases the sentence which could be imposed based upon the finding of guilt on the offense alone. In this case, we have concluded Lemus had a constitutional right to a jury trial on any fact that would justify the trial court increasing the sentence beyond the presumptive middle term for either the enhancement or for count 6. Accordingly, we believe that the loss of the jury trial right cannot be found harmless on the theory that if a jury trial had been held the defendant would have lost on the issue. The point of *Blakely* is that the jury trial must be held.

In any event, whether we apply the traditional harmless error standard or the constitutional harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24, we are compelled to conclude that the error in this case is not harmless. While the conduct in which Lemus engaged is egregious and the record demonstrates his lack of remorse for that egregious conduct, Lemus has no prior criminal convictions and the trial court's decision to impose the upper term sentences was based on fact finding on matters

not contained within the jury verdicts. Accordingly, the sentence as to the great bodily injury enhancement for count 4 and the sentence for count 6 must be vacated and the case remanded to the superior court to conduct a new sentencing hearing consistent with the principles discussed in this opinion.

DISPOSITION

The sentence as to the enhancement to count 4 and the sentence for count 6 are vacated and the case remanded to the superior court to conduct a new sentencing hearing. In all other respects, the judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

HUFFMAN, J.

I CONCUR:

AARON, J.

Benke, J., concurring and dissenting.

I concur in parts I, II and III of the majority opinion. I part company with my colleagues on the question of whether *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*) compels reversal of the upper terms imposed for violation of Penal Code[1] sections 422 (count 6, making a criminal threat) and 12022.7, subdivision (e) (great bodily injury enhancement for count 4, torture).

Appellant was found guilty of section 422, making a criminal threat. That statute authorized three possible sentences of sixteen months, two or three years. He was sentenced to the upper term of three years. A great bodily injury enhancement was found true pursuant to section 12022.7, subdivision (e). That statute provides for a prison term of three, four or five years. He was sentenced to the upper term of five years. My colleagues find the selection of the upper term sentences violates the teachings of *Blakely*. I disagree. I conclude California's sentencing scheme is entirely consistent with the principles discussed in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348] (*Apprendi*) and its progeny, *Blakely*.

The holdings of *Apprendi* and *Blakely* do not, I respectfully suggest, extend to the application of judicial discretion when that discretion is kept within a sentence range authorized by the statute for the crime of which the defendant was convicted. As the court notes in *Apprendi*, "nothing . . . suggests that it is impermissible for judges to

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1 All further statutory references are to the Penal Code unless otherwise specified.

exercise discretion–taking into consideration various factors relating both to offense and offender–in imposing a judgment *within the range* [italics in orig.] *prescribed by statute* [italics added]." (*Apprendi, supra*, 530 U.S. at p. 481.) Such factors are "sentencing factors," a term which "appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense." (*Id*. at p. 494, fn. 19.)

The defect the Supreme Court found in Blakely's sentencing was not that the trial judge in setting the sentence utilized discretion based on facts not found by the jury in returning its verdict but rather that the sentence imposed was for a term outside the range set by statute for the offense and the decision to go outside that range was based on facts not found by the jury. The court in *Blakely* had no complaint with sentencing ranges for offenses, and it readily accepted the constitutional propriety of indeterminate sentencing schemes. If a constitutionally proper sentence for a crime can be a range, then necessarily some institution other than the jury must determine the sentence within that range. The salutary purpose for prescribing a range of punishment for an offense is to allow for varying sentences based on gradations of culpability within the broad sweep of the sentence statutorily authorized for the crime committed. The determination of culpability within a statutory range is a task for which juries generally are not well suited and is traditionally given to the court. The task is one that necessarily requires the judge weigh a host of factors, some involving the crime, some the defendant and most involving facts not found by the jury.

As I read *Blakely* and *Apprendi*, such a system is perfectly constitutional. A sentence at the upper range of that allowed in Washington for the crime to which Blakely pled guilty, even if imposed for reasons based on facts not determined by the jury, was lawful. What the Constitution does not allow is the imposition of a term outside the range of punishment for the core offense when based on facts not found by the jury.

Once this is understood, the constitutionality of California's determinate sentence system becomes apparent. Our determinate sentencing system is based on the declaration in the Penal Code of a range of sentences for each offense, i.e., the Legislature has decided that an appropriate sentence for the conviction of a crime is within that range. My colleagues find it significant that in our system the middle of the three terms is considered "presumptively" the appropriate term. I find no significance in that presumption at all.[2] The fact remains the Legislature has set a range of punishment for

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[2] In any event, I make the following observations: The significance my colleagues find rests on two erroneous assumptions. The first is that we can simply superimpose Washington's statutory structure on California. We cannot. As noted, *ante*, California's sentences are drawn from single statutes, each of which contains a range of discretionary choices. Washington authorized sentences drawn from multiple statutes. The majority errs by applying California's sentencing *terminology* on Washington. The second erroneous assumption is that our statutory midterm is the point at which the sentencing function must *always* begin. Although the Penal Code and California Rules of Court indicate the midterm shall be imposed, the word "shall" must be interpreted in conjunction with statutory language, context and history. (*People v. Ledesma* (1997) 16 Cal.4th 90, 95.) I conclude the application of the middle term is not the beginning of the sentencing choice to be made; rather, it is the conclusion to which the defendant is entitled if the court finds no aggravating or mitigating factors. Thus it is in the absence of such factors that the court "shall" then impose the middle term. (*People v. Thornton* (1985) 167 Cal.App.3d 72, 76-77; *People v. Meyers* (1983) 148 Cal.App.3d 699, 703.)

the offense. In any noncapricious sentencing system based on an authorized range, the middle of the range is for average culpability, the lower for the less culpable and the upper for the most culpable. Our determinate system is merely more formal than many in that it requires a finding and stating particular reasons for imposing the upper or lower term.

The constitutional defect found by *Blakely* in Washington's sentence scheme was that it allowed for the imposition of a term greater than the range authorized by law for the offense to which Blakely pled guilty based on a fact not found by a jury or admitted by the defendant. California's law suffers no such defect and the sentencing in this case was proper.

CERTIFIED FOR PUBLICATION

BENKE, Acting P. J.