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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN CUNNINGHAM,

Defendant and Appellant.

A103501

**(Contra Costa County
Super. Ct. No. 010396-0)**

John Cunningham (appellant) appeals his conviction by jury trial of continuous sexual abuse of a child under age 14. (Pen. Code, § 288.5.)¹ On appeal he contends the trial court erroneously admitted the victim's hearsay statements, imposed the upper term, and based the upper term on aggravating factors not found by the jury in violation of his right to jury trial under *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531]. We reject these contentions and affirm.

BACKGROUND

Victim's Testimony

The victim, referred to at trial and herein as John Doe, is appellant's son. Doe, born in August 1989, testified that he lived with his mother, Wanda, for the first 10 years of his life. In December 1999, when Doe was 10 years old, he went to live with

¹ Appellant was sentenced to 16 years in state prison.

appellant, appellant's girlfriend, Latasha, appellant's and Latasha's baby, and Latasha's young nephew.

Doe admitted that prior to moving in with appellant, Doe falsely accused his stepfather of beating him, resulting in scars on his back, because he wanted to live with appellant and did not like his new stepfather. After appellant took Doe to the hospital Doe admitted he had lied. Doe also admitted that when he was eight years old he called the telephone number for Boys' Town and falsely reported that there was no food in his mother's house and she did not provide him with enough attention. The police and child protective services investigated the call and found Doe was healthy and had ample food at his house.

Doe testified that in January 2000, shortly after he moved in with appellant, appellant began forcibly sodomizing him and forcing him to orally copulate appellant. Sometimes while being sodomized by appellant, Doe screamed for help because it hurt "very bad" and appellant put his hand over Doe's mouth to stop Doe from screaming. The acts occurred in appellant's bedroom, the living room, the bathroom and the shower. Sometimes appellant molested Doe when he was angry with Doe. Because appellant threatened to kill Doe if he told anyone about the abuse, Doe was afraid of appellant and did not tell anyone while living with him. In December 2000, Doe first told his younger cousin, Brittany, about appellant's abuse in a note while visiting her when appellant was out of town. Before giving her the note Doe said "I have to tell you," but did not want to say it aloud. The note said, "my dad is hu[m]ping me." Thereafter Brittany showed the note to her mother, Karla, who then questioned Doe as to what it meant. Doe told Karla about appellant's repeated incidents of sodomy and forcing Doe to orally copulate him. After Karla told her husband, Gerrell, about Doe's allegations, Gerrell talked to Doe, then took him to appellant's house for a family meeting. While there, as Doe was packing his clothes, appellant confronted him while they were alone and said, "In a week you better say you are lying or else I am going to fuck you up."

After Doe reported appellant's abuse to Wanda and his stepfather, Wanda took him to the hospital. The pediatrician who performed a sexual assault examination on Doe

testified that the examination revealed no trauma to Doe's anus, consistent with most postsodomy examinations. However, the doctor said that Doe's accounts of how he felt physically during and after being sodomized and orally copulating appellant were consistent with how children report such incidents.

On January 4, 2001, Doe was interviewed by San Pablo Police Officer Jeff Palmieri. Doe told Palmieri that appellant sexually abused him numerous times beginning shortly after he moved in with appellant. On January 8, Kerry O'Malley of the Children's Interview Center (CIC) conducted a videotaped sexual assault interview of Doe.² Doe's statements during the CIC interview were consistent with his earlier statements to Palmieri.

On January 5, 2001, appellant agreed to a videotaped interview by Officer Palmieri and Contra Costa District Attorney's Office Inspector Ted Todd.³ At the beginning of the interview appellant adamantly denied any type of sexual touching of Doe. As the questioning ensued, appellant became more forthcoming in his responses. After two or three hours, appellant admitted that Doe's mouth did make contact with appellant's penis for five seconds while in the shower on one occasion. Appellant also said that Doe was a liar and was manipulative and later said Doe was a homosexual and "can't quit the homosexual behavior."

Defense

Testifying in his own defense, appellant denied ever molesting Doe or any child. He also denied ever threatening to kill Doe or "fuck [him] up." Appellant testified that prior to coming to live with him, Doe had been expelled from school due to behavior problems and was not doing his homework. Other defense witnesses testified that Doe had a history of lying and his allegations against appellant were fabricated because he was unhappy about appellant's requirements regarding chores and homework.

² A videotape of the CIC interview was played for the jury and admitted into evidence.

³ The videotaped interview was played for the jury.

DISCUSSION

I. *Doe's Hearsay Statements Were Properly Admitted*

Appellant contends the court erred in admitting, pursuant to Evidence Code section 1360 (hereafter section 1360), the portions of the videotaped CIC interview which contained Doe's hearsay statements to Brittany and Karla. He contends the error violated his right to due process. Appellant does not argue that the admission of Doe's hearsay statements violated the Sixth Amendment right of confrontation under the rule recently announced in *Crawford v. Washington* (2004) 541 U.S. 36. Since Doe testified at trial, no Confrontation Clause violation occurred. (*Crawford*, pp. 68-69.)

Section 1360⁴ creates a limited exception to the hearsay rule in criminal prosecutions regarding a child's statements describing acts of child abuse or neglect, including sexual abuse. (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1367.) In determining whether child hearsay statements possess the requisite indicia of reliability

⁴ Section 1360 provides, in relevant part:

“(a) In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another, or describing any attempted act of child abuse or neglect with or on the child by another, is not made inadmissible by the hearsay rule if all of the following apply:

“(1) The statement is not otherwise admissible by statute or court rule.

“(2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability.

“(3) The child either:

“(A) Testifies at the proceedings.

“(B) Is unavailable as a witness, in which case the statement may be admitted only if there is evidence of the child abuse or neglect that corroborates the statement made by the child.

“(b) A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement.

“(c) For purposes of this section ‘child abuse’ means an act proscribed by Section . . . 288.5 of the Penal Code”

pursuant to section 1360, subdivision (a)(2), the trial court may consider such nonexclusive factors as: “(1) spontaneity and consistent repetition; (2) the mental state of the declarant; (3) use of terminology unexpected from a child of [similar] age; and (4) lack of motive to fabricate. [Citation.]” (*People v. Eccleston* (2001) 89 Cal.App.4th 436, 445; *People v. Brodit* (1998) 61 Cal.App.4th 1312, 1330, citing *In re Cindy L.* (1997) 17 Cal.4th 15, 29-30.) Although courts have considerable leeway in their consideration of appropriate factors, the “ ‘unifying principle is that these factors relate to whether the child declarant was particularly likely to be telling the truth when the statement was made.’ [Citation.]” (*Roberto V.*, at p. 1374.)

Appellant relies on *Lilly v. Virginia* (1999) 527 U.S. 116 and *People v. Eccleston*, *supra*, 89 Cal.App.4th 436 to argue we are to exercise de novo review over the trial court’s reliability determination. This argument rests on a misunderstanding of the cited authorities. At the time section 1360 was enacted (1995), the leading case on the interpretation of the Confrontation Clause was *Ohio v. Roberts* (1980) 448 U.S. 56.⁵ *Roberts* had held that the prosecution could only introduce hearsay against a criminal defendant if the statement was admitted under a firmly rooted hearsay exception or had sufficient indicia of reliability. (*Id.* at p. 66.) Since section 1360 is not a firmly rooted hearsay exception, an accused could argue under *Roberts* that a statement admitted under this section lacked the reliability required by the statute and by the Constitution. While the deferential abuse of discretion standard of review is applied to the statutory finding (*People v. Roberto V.*, *supra*, 93 Cal.App.4th at p. 1367; *People v. Brodit*, *supra*, 61 Cal.App.4th at pp. 1329-1330), the stricter de novo standard of review is applied to the reliability finding under the Confrontation Clause (*Lilly*, at pp. 136-137; *Eccleston*, at pp. 445-446). Since only the statutory finding of reliability is at issue here, we apply the abuse of discretion standard. In doing so we review the trial court’s ruling based on the evidence before the court at the time of the ruling. (See, e.g., *People v. Box* (2000) 23 Cal.4th 1153, 1195; *People v. Cervantes* (2004) 118 Cal.App.4th 162, 176.)

⁵ During the pendency of this appeal, the United States Supreme Court rejected the *Roberts* analysis in *Crawford v. Washington*, *supra*, 541 U.S. 36.

In this case, prior to trial, appellant filed a written motion in limine seeking to exclude portions of Doe's videotaped CIC interview on the basis that they did not qualify under section 1360. At the initial hearing appellant also objected to admission of Doe's incriminating statements to Brittany and other adult relatives prior to the videotaped interview.⁶ The parties stipulated that the court would review the CIC interview video and sections of the police reports submitted by the prosecutor, which describe the subject statements by Doe to determine whether the statements provided sufficient indicia of reliability to be admitted under section 1360. Thereafter the court reviewed the CIC interview videotape, a transcript thereof, a police report, and a supplemental police report,⁷ after which it ruled Doe's hearsay statements admissible.

A. The Police Reports

1. Initial Report

Officer Palmieri's initial report states that in his January 4, 2001 interview, Doe said that during the first molestation incident appellant made Doe touch appellant's penis and then "whipped" Doe on the buttocks with his hand for not doing his homework. Throughout the year 2000, appellant made Doe orally copulate him in the living room of the residence and appellant sodomized Doe several times while in the bathroom. Doe referred to appellant's penis as his "dingling" or "dick," and said appellant used Vaseline or oil before sodomizing him. Doe said that in December 2000 he "got in trouble by [appellant]" regarding a book report after which appellant whipped him on his buttock and had him orally copulate appellant. Two weeks before Christmas appellant sodomized him in the shower causing him great pain. Doe described having to use the bathroom after being sodomized and seeing a white film in the toilet water. He said the oral copulation and sodomy happened almost every day that he was alone with appellant.

⁶ We note that appellant's objection failed to specify which adult relatives were referred to. However, the relatives were identified in the police reports and the CIC videotape the court considered in ruling on the motion.

⁷ The police reports and transcript of the CIC interview were introduced solely for purposes of the section 1360 motion, and were not admitted into evidence.

He admitted lying several times to his parents, but was adamant that his accusations regarding appellant were not lies, and he was visibly upset. When Palmieri asked why Doe was crying, he said he did not want to get anyone in trouble, loved appellant and wanted appellant to stop molesting him. Doe told Palmieri that on January 2, 2001, he looked Brittany in the eyes and told her appellant was molesting him. After Brittany told Karla, Karla confronted Doe and he told her about appellant's abuse over the last year. Doe also told Palmieri that when Karla took him back to appellant's house to confront appellant with Doe's allegations, appellant, while alone with Doe told Doe that if he did not say the allegations were a joke, he would "fuck him up." Doe also told Palmieri he did not tell anyone about the abuse for a long time because appellant threatened to kill him if he told anyone.

2. Supplemental Report

Officer Palmieri's supplemental report states that on January 9, 2001, he telephoned Karla and Brittany. Brittany told him that on the afternoon of January 2 while she and Doe were drawing, Doe told her he had something important to tell her but did not want to say it out loud. Doe wrote down that appellant had been "humping" him. When Brittany asked Doe if he was telling the truth, he looked her in the eyes and responded affirmatively. Brittany believed Doe was telling the truth because before he wrote the note he was "happy," and when he told her about appellant he started crying. Karla told Palmieri that after Brittany gave her Doe's note she confronted Doe and told him she wanted him to tell the truth. Doe told Karla that appellant had been "putting his dingling in [Doe's] butt," and Doe was also made to put his mouth on appellant's penis. Doe told her the incidents had been occurring for a year, often in the shower, and that appellant put Vaseline or grease "on his butt" before each act of sodomy. Doe told her the last act happened a couple of weeks before because he had not completed a book report.

B. The CIC Videotape

When interviewer O'Malley asked Doe if he knew why he was at CIC, Doe responded "so [he] could talk to [her]" "about something that happened to [him]." In

response to O'Malley's saying, "Well if you feel comfortable right now, [Doe], could you tell me what happened," Doe gave a detailed description of the molestation he suffered for a year by a "person" or "him." Doe described appellant's use of Vaseline and the pain he experienced while being sodomized. His description of the first incident of molestation was consistent with Palmieri's police report. Subsequently, when O'Malley asked who "him" referred to, Doe identified appellant. Doe said appellant "humped" him, which Doe said meant "molested." The conduct Doe described as appellant "humping" him constituted sodomy. Doe often referred to appellant's penis as his "private part," but also referred it as his "ding-a-ling" and his "dick." He referred to having to go to the bathroom after being sodomized as "when I boo-boo." He also said after being sodomized something "white with bubbles" would come out in his stool. Doe described the December book report incident as the last incident of molestation. He said appellant first "whooped him" in the bedroom with a belt, then took him to the living room and had Doe orally copulate him, then took Doe into the bathroom and sodomized him. Doe said he told Brittany because he knew she would tell her mother.

When O'Malley asked Doe how he felt about what happened with appellant, Doe said he felt "shock." Doe said appellant threatened to kill him if he told anyone. Doe said he was afraid to tell anyone because they might not believe him. However, he said he "got tired of him doing it" and "it was disgusting" and told his cousin Brittany to tell her mother. He said he was glad he "brought it out" because he "got sick of it." He said the molestation happened almost every day.

Doe admitted to O'Malley that in the past he had "said some stuff" about his mother that was not true. When O'Malley asked how she would know if he was telling her the truth, Doe said people know when he is telling the truth. He said Brittany knew he was telling the truth because he looked in her eyes in response to her request to do so and she knew he was telling the truth. He also said he was not laughing when he told Brittany, and that kids laugh when they are not telling the truth. Doe said he cried when talking to Officer Palmieri because he was afraid that Palmieri would not believe him. He was afraid no one would believe him because of his prior lies about his mother and

stepfather. He said he previously lied about his mother because he was left alone with no one to talk to and play with. He said he lied about his stepfather because his stepfather would play with his sisters but not with him.

C. Court's Reasoning Regarding Reliability

At the subsequent hearing on the in limine motion the court ruled Doe's out-of-court statements admissible, stating the following reasons for concluding that they bore sufficient indicia of reliability: "In terms of reliability, the court finds that the spontaneity of the statements by the minor to his cousin Brittany in the note, knowing his cousin would tell his aunt, and consistent repetition of the manner in which the acts were committed shows the reliability of such statements. [¶] The mental state of the minor is demonstrated by the fact that he came forward because he said he was tired of the abuse. The use of the terminology . . . in which he described the acts is unexpected in a child of similar age. [¶] And to further explain the court's finding . . . the court has read his description of the sexual acts which showed a knowledge of such matters far beyond the ordinary familiarity of a child of his age. [¶] And fourth, the lack of motive to fabricate is demonstrated by the fact that he was very sorry that he had to tell about these acts because they involved his father and he did not want to have to describe them. [¶] So, based upon those factors the court finds under *Brodit* and *Eccleston* and [section] 1360 that the requirements have been met."

For the following reasons, appellant contends the court erroneously concluded that Doe's hearsay statements were sufficiently reliable to be admissible under section 1360: First, the statements, particularly the note to Brittany, were not spontaneous, but were instead planned. In addition, the statements were not consistent, but were "embellished" and "refined" with each retelling. Second, Doe's mental state at the time of his statements was "unstable" given his prior false accusations against Wanda and Latasha; his animosity toward appellant, Wanda and Latasha; and his behavioral problems at school. Third, Doe's statements did not indicate a level of knowledge that was unexpected for an 11 and one-half year old, and he spent time with older siblings and had access to numerous TV channels with no parental controls. Fourth, Doe had a motive to

lie—he wanted to move back to Wanda’s house due to his perceived mistreatment by appellant and Latasha. Finally, there was little, if any, evidence corroborating Doe’s accusations.

We conclude the court did not abuse its discretion in finding Doe’s hearsay statements reliable. Regarding the spontaneity of the statements to both Brittany and O’Malley, Doe’s statements were spontaneous in the sense that Doe initiated them. (See *People v. Eccleston*, *supra*, 89 Cal.App.4th at p. 446.) In addition, his statements to O’Malley regarding appellant’s abuse were in response to her neutral question, “could you tell me what happened?” We reject appellant’s assertion that Doe’s hearsay statements were not consistently repeated, but were “embellished” and “refined” with each retelling. Doe’s initial and very brief statement to Brittany that appellant had been sodomizing him was not inconsistent with his much longer statements to Karla and O’Malley. Doe’s statements to Karla and O’Malley were remarkably consistent as to the “general outline of abuse” (*id.* at p. 446), and it is understandable that he imparted extra details of the abuse to the interviewer because of the interview format.

Regarding Doe’s mental state, the record is mixed. Although he conceded to O’Malley that he had previously fabricated claims against his mother and stepfather, O’Malley conducted a lengthy colloquy with him regarding truth and falsity and questioned him as to how she would know that he was telling the truth. He also stated that in light of his prior lies he was worried that his allegation of appellant’s abuse would not be believed. The court could reasonably conclude that this degree of candor enhanced, rather than detracted from Doe’s reliability.

We also reject appellant’s assertion that Doe’s statements did not indicate a level of knowledge unexpected of an 11 and one-half year old. Doe’s extremely detailed descriptions of the unpleasant physical sensations he experienced during and after being sodomized would be unusual even for an adult unless experienced firsthand. Nothing in the record before the court at the in limine hearing suggested that Doe’s level of knowledge came from a source other than his personal experience.

Based on the record before the court at the in limine hearing, it could properly determine that Doe lacked a motive to fabricate based on his stated love for appellant, reluctance to report the abuse and the possibility of appellant's resulting incarceration. Appellant had the opportunity to cross-examine Doe at trial about his perceived mistreatment by appellant and appellant's girlfriend as a motive for fabricating the abuse allegations.

Finally, we reject appellant's assertion that the lack of corroborating evidence suggested that Doe's hearsay statements were unreliable. Corroboration is not necessary where the child victim testifies at trial. (See § 1360, subd. (a)(3)(A).)

After reviewing the police reports and CIC videotape, the court provided a thorough statement of its reasons for finding Doe's hearsay statements reliable. Appellant has failed to demonstrate that the court abused its discretion.

II. *The Court Properly Imposed the Upper Term*

A. *Aggravating Factors*

Appellant next contends the court erroneously relied on five of six aggravating factors in sentencing him to the upper term.⁸

Prior to sentencing, the court appointed psychologist Richard Lundeen, pursuant to Penal Code section 288.1, to examine appellant and submit to the court a written report and recommendation.⁹ Dr. Lundeen opined that appellant would not be a danger to Doe or other children in the community if released. Regarding treatment, Dr. Lundeen stated “ ‘either [appellant] did not engage in inappropriate sexual behavior as charged, or else he has repressed those behaviors to a depth where he cannot deal with them at a conscious level at this time. In either case, he would be a poor candidate for

⁸ The People assert that appellant has waived this claim because he only objected below to the aggravating factors that the victim was particularly vulnerable and that appellant took advantage of a position of trust. (See *People v. Scott* (1994) 9 Cal.4th 331, 356.) Even assuming the claim is waived, we review it on the merits in the interests of justice and to prevent an ineffective assistance of counsel claim.

⁹ Dr. Lundeen's report is not included within the appellate record but is summarized in the probation report.

rehabilitative therapy if he does not have a condition from which he is trying to rehabilitate.” Appellant retained psychologist John Kincaid to conduct a psychological evaluation. Dr. Kincaid’s report stated that if granted probation appellant would be unlikely to pose a risk to Doe, but it would be prudent to restrict him from direct contact with minors without the immediate presence of a responsible adult. Dr. Kincaid also stated that he saw “little likelihood that [appellant’s] incarceration would be a detriment to [Doe], who had lived with him only a relatively brief time.” Dr. Kincaid recommended that appellant obtain treatment which would decrease the likelihood that he would reoffend. He also stated that, if incarcerated, appellant should be referred for a mental health evaluation although “offense-specific treatments are almost nonexistent in custody.”

Although the probation report did not recommend a particular sentence, it noted the following circumstances in aggravation (Cal. Rules of Court,¹⁰ rule 4.421): (1) “The crime involved great sexual violence and callousness toward a 10-year-old child.” In particular, the report noted that the victim was “brutally whipped and sodomized over 100 times in a one year period.” (2) The victim was particularly vulnerable as he relied on his father, as his custodial parent, for support. (3) Appellant took advantage of his position of parental trust and trust as a police officer to commit the offense. (4) Appellant engaged in violent conduct which indicated a serious danger to children in society. The probation report noted the single mitigating factor that appellant had no prior criminal record. (Rule 4.423)

At sentencing, the court acknowledged that it had considered the probation report, psychological evaluations, sentencing memoranda, letters from the community in mitigation and letters from Doe and his mother. After denying probation, it found the sole mitigating factor was appellant’s lack of prior criminal conduct. (Rule 4.423(b).) The court found the following aggravating factors: (1) The crime involved great violence and the threat of great bodily harm disclosing a high degree of viciousness and

¹⁰ All rule references are to the California Rules of Court.

callousness. (2) The victim was particularly vulnerable due to his age and dependence on appellant as his father and primary caretaker. (3) Appellant threatened to commit bodily injury upon the victim in an attempt to coerce the victim to recant his statements about the crime. (4) Appellant took advantage of a position of trust to commit the crime in that he is the victim's father and sole caregiver for a substantial period of time. (5) Appellant engaged in violent conduct which indicates a serious danger to the community. (6) Appellant was a peace officer at the time he committed the criminal acts, violating his duty to serve the community of which the victim was a member. After finding that the aggravating circumstances outweighed the sole mitigating factor, the court imposed the upper 16-year term.

1. *The Relationship Between Appellant and the Victim*

Appellant contends the court erred in finding the victim was vulnerable due to his age because age was an element of the charged offense. (Rule 4.420(d).) Although the victim's minority cannot be used as an aggravating factor where minority is an element of the offense (*People v. Robinson* (1992) 11 Cal.App.4th 609, 615, disapproved on other grounds in *People v. Scott, supra*, 9 Cal.4th at p. 353, fn. 16), victim vulnerability in this case was also based on the victim's dependence on appellant as his primary caretaker. Thus, the court properly based its vulnerable victim finding on a factor other than the victim's age. (*People v. Garcia* (1985) 166 Cal.App.3d 1056, 1070.)

Appellant next contends the court erred in using the victim's dependence on appellant, and appellant's taking advantage of a position of trust as the victim's father/sole caregiver as two separate aggravating factors. He relies on *Garcia*, which held that the victim's relationship to the defendant could not be used both to support a finding of vulnerability and to find that the defendant took advantage of a position of trust or confidence to commit the offense. "It does appear that these factors are two sides of the same coin. The significant circumstance is the relationship between the defendant and the victim. The circumstances that placed the defendant in a position of trust and confidence were identical to the circumstances which placed the victim in a position of vulnerability." (*People v. Garcia, supra*, 166 Cal.App.3d at p. 1070.) We agree with this

analysis and conclude that having used the relationship between appellant and the victim in support of the vulnerable victim factor (rule 4.421(a)(3)), the court could not use that fact in support of a separate aggravating factor (rule 4.421(a)(11)).

2. *Danger to Society*

Appellant next contends the court's finding that he engaged in violent conduct, which indicated he posed a serious danger to the community (rule 4.421(b)(1)), is not supported by the evidence. We disagree. The fact that appellant repeatedly forcibly sodomized Doe and forced Doe to orally copulate him suggests that the charged offense was a crime of violence. In addition, appellant's retained psychologist, Dr. Kincaid, opined that while a grant of probation would not pose a risk to Doe, it would be prudent to restrict appellant from unsupervised direct contact with minors. In addition, Dr. Kincaid recommended that appellant receive treatment to reduce the likelihood of reoffending. Dr. Kincaid's testimony provides sufficient support for the finding that appellant posed a serious danger to the community.

3. *Great Violence and Great Bodily Harm*

Appellant argues the court erred in using the fact that he threatened the victim both to find that the crime involved great violence and the threat of great bodily harm (rule 4.421(a)(1)) and to find that he threatened the victim in an attempt to coerce the victim to recant the victim's statement about the crime (rule 4.421(a)(6)). Appellant asserts the record is devoid of any violence separate from that deemed to be inherent in the acts of sodomy and oral copulation.

Even assuming the court's reliance on this factor was misplaced, the court properly found multiple aggravating factors. Sentencing courts have wide discretion in weighing aggravating and mitigating factors, and may balance them qualitatively as well as quantitatively. (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) In addition, one aggravating factor alone may warrant imposition of the upper term and the court need not state reasons for minimizing or disregarding mitigating circumstances. (*Ibid.*; accord, *People v. Brown* (2000) 83 Cal.App.4th 1037, 1043-1044.)

4. *Status As Peace Officer*

Finally, appellant contends his status as a police officer was not reasonably related to his sentencing and therefore the court erroneously relied upon it as an aggravating circumstance under rule 4.408(a).¹¹ In particular, he argues that the abuse he inflicted on the victim was in no way related to his employment as a police officer. Moreover, he argues that his status as a police officer did not make the offense against the victim “distinctively worse than it would ordinarily have been.” (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 682.)

Appellant also notes that this case is factually distinguishable from *Brown*, where the defendant’s status as a police officer was relied on as an aggravating factor in imposing the upper term on a firearm enhancement. In that case, the defendant shot a fellow officer with whom she was having an affair, and thereafter destroyed evidence. *Brown* stated that the trial court could properly have considered the unusual facts relating to the defendant—that the defendant was a police officer who used deadly force to solve a personal problem, caused serious injury, and thereafter destroyed evidence as an aggravating factor because peace officers are seen as having a duty to protect people, not unlawfully shoot an unarmed estranged lover. (*People v. Brown, supra*, 83 Cal.App.4th at pp. 1043-1044.) We agree with appellant that *Brown* is distinguishable from the instant case.

Again, assuming the court improperly relied on appellant’s police officer status as an aggravating factor, the court properly found two aggravating factors and exercised its discretion in balancing them against a single mitigating factor. Appellant has failed to demonstrate that imposition of the upper term was an abuse of the court’s discretion.

¹¹ Rule 4.408(a) provides: “The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. Any such additional criteria shall be stated on the record by the sentencing judge.”

B. *Blakely v. Washington*

In a supplemental brief filed pursuant to *Blakely v. Washington, supra*, 124 S.Ct. 2531, appellant contends his sentence must be reversed because in imposing the upper term the trial court, and not the jury, made the findings on aggravating factors in violation of his rights to jury trial and due process.¹² The People rejoin, in part, that appellant waived his challenge.¹³

Under the California sentencing scheme the lower, middle and upper terms constitute a range of authorized punishments for a given crime; the exercise of judicial discretion in selecting the upper term based on aggravating sentencing factors does not implicate the right to a jury determination because the upper term is within the authorized range of punishment. A defendant, such as appellant, who is convicted of continuous sexual abuse of a child under age 14, faces a maximum prison term of 16 years in prison that may be imposed “*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” (*Blakely v. Washington, supra*, 124 S.Ct. at p. 2537.) As *Blakely* explained, “In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment,’ [citation], and the judge exceeds his proper authority.” (*Ibid.*) It is instructive that, in distinguishing between permissible and impermissible schemes, the court in *Blakely* explained: “In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-

¹² The issue of whether *Blakely* precludes a trial court from making findings on aggravating factors in support of imposing an upper term sentence is currently pending in our Supreme Court. (*People v. Towne*, review granted July 14, 2004, S125677.)

¹³ The California Supreme Court is currently considering the issue in *People v. Black*, review granted July 28, 2004, S126182.

year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.” (*Blakely*, at p. 2540.) Here, the 16-year upper term was the maximum statutorily authorized sentence for violating Penal Code section 288.5. The court’s imposition of that maximum did not violate appellant’s rights to jury trial or due process.¹⁴

DISPOSITION

The judgment is affirmed.

¹⁴ After submission of this case, the United Supreme Court decided *United States v. Booker* (2005) __U.S.__ [125 S.Ct. 738] (maj. opn. of Stevens, J.) *Booker*, in our view, clarifies that *Blakely*’s Sixth Amendment concerns are inapplicable to statutory provisions that merely *permit*, but do not compel, the imposition of a particular sentence upon a particular finding of fact. In California, Penal Code section 1170 permits, but does not compel, the imposition of an upper term upon the finding of one or more aggravating factors. (See *People v. Scott*, *supra*, 9 Cal.4th at pp. 349-350.)

SIMONS, J.

We concur.

STEVENS, J.

(A103501)

Jones, P.J., Concurring and Dissenting

I concur with the majority opinion in all respects, except its conclusion that imposition of the 16-year upper term was not unconstitutional. I conclude the case must be remanded for resentencing under compulsion of *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531] (*Blakely*), for the reasons expressed in my dissent in *People v. Picado*, review granted January 19, 2005, S129826, California Rules of Court, rule 28.2(d)(2).

In short, *Blakely* held that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.” (*Blakely, supra*, 124 S.Ct. at p. 2538.) It explained that the relevant “statutory maximum” is not the maximum sentence a court may impose after finding additional facts, but the maximum it may impose based solely on the facts reflected in the jury verdict or admitted by the defendant. (*Id.* at pp. 2537-2538.) Under California’s determinate sentencing scheme, the maximum sentence a court can impose without making additional factual findings is the middle term. (Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rule 4.420(a).)

In this case, the trial court relied on a number of aggravating factors as the basis for imposing the upper term. Even if the vulnerable victim factor was based on evidence other than the victim’s age, I believe that *Blakely* requires a jury finding of this factor. Similarly, the factors that appellant engaged in violent conduct indicating a serious danger to the community, and the crime involved great violence and the threat of bodily harm require a jury finding under *Blakely*. Finally, even assuming the evidence shows that appellant admitted his status as a police officer, I need not reach the question whether this is unrelated to the offense, as appellant contends, because I would remand the case to the trial court to weigh whether this factor alone is sufficient to support the upper term.

United States v. Booker (2005) ___ U.S. ___ [125 S.Ct. 738] (*Booker*), addressing the applicability of *Blakely* to the federal sentencing guidelines, does not alter my conclusion. Justice Breyer’s majority opinion severed from the Federal Sentencing Act

its provision (18 U.S.C.A. § 3553(b)(1)) that makes the guidelines mandatory. As a result, the guidelines are now effectively advisory; their use will not implicate the Sixth Amendment, leaving a federal court broad discretion to impose a sentence within the statutory range assigned to a particular offense. (*Booker, supra*, 125 S.Ct. at pp. 750, 757, 764.) By the mandatory language of Penal Code section 1170, subdivision (b), a California court is required to impose the middle term, unless it makes factual findings different from, or in addition to, those inherent in the jury verdict.¹⁵

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¹⁵ Penal Code section 1170, subdivision (b), states: “When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court *shall order imposition of the middle term*, unless there are circumstances in aggravation or mitigation of the crime.” (Italics added.)