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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,
Plaintiff and Respondent,
v.
JOSE FRANCISCO MACIAS,
Defendant and Appellant.

A107282
(Sonoma County
Super. Ct. Nos. MCR-425707 & SCR-33648)

Appellant entered negotiated guilty pleas in two separate cases to inflicting corporal injury upon a cohabitant (Pen. Code, § 273.5, subd. (a)) and assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)). He also admitted an enhancement for commission of a felony while released from custody on bail (Pen. Code, § 12022.1), and a prior misdemeanor conviction for inflicting corporal injury (Pen. Code, § 273.5, subd. (a)).¹ In a single sentencing proceeding defendant received an aggregate sentence in both cases of eight years in state prison: a five-year upper term for inflicting corporal injury, a consecutive one-year term for assault with a deadly weapon, and a two-year term for the on-bail enhancement.

¹ As part of the negotiated dispositions in both cases other offenses were dismissed, but defendant entered waivers pursuant to *People v. Harvey* (1979) 25 Cal.3d 754. All further statutory references are to the Penal Code, unless otherwise indicated.

Defendant claims in this appeal that imposition of an upper term violated his rights to a jury trial and proof beyond a reasonable doubt under *Blakely v. Washington* (2004) 542 U.S. ___ [159 L.Ed.2d 403, 124 S.Ct. 2531] (*Blakely*), he received ineffective assistance of counsel at the sentencing hearing, and the restitution fines stated in the abstract of judgment must be corrected. We find no inadequate assistance of counsel or prejudicial sentencing error, but conclude that the abstract of judgment must be modified to reflect one restitution fine each under sections 1202.4, subdivision (b) and 1202.45.

STATEMENT OF FACTS²

The conviction for inflicting corporal injury resulted from an incident on August 8, 2003. The police arrived at the residence of defendant and his wife in response to a report of domestic violence received from the victim's parents. When questioned by the officers, defendant admitted that he and his wife argued, but claimed no physical violence occurred. He stated: "I didn't hit her, I've been through that before. If I was going to hit her, I'd make it count." The defendant's wife was crying, appeared fearful, and suffered from numerous obvious, recent scratches and bruises to her arms and right breast. She stated that during an argument defendant struck her repeatedly with a kitchen chair while she was speaking on the telephone with her parents. In her written statement the victim added that defendant "threatened to 'kill her in front of their son.'" When contacted, the victim's three-year-old son indicated that his father hit the victim with a chair. The victim's father heard the argument over the telephone, and a sound "like the defendant 'popping her one'" A broken chair was found concealed under blankets in a bedroom closet. An emergency protective order was issued at the scene, and the victim stated she "would be seeking a permanent restraining order" against defendant.

The assault offense occurred on the evening of January 10, 2004. When police officers, fire and ambulance personnel responded to a residence following a domestic violence report, a witness stated that defendant and his wife were "physically fighting"

² In light of appellant's guilty pleas, we concisely recite the facts of the offenses taken from the probation reports as necessary to the sentencing issues raised in the appeal.

outside. A police officer observed defendant standing over the victim, again his wife, who was lying in glass on the ground near a parked car, screaming and bleeding from her face. The driver's side window of the car was smashed. To one of the responding police officers the victim appeared to "have suffered from a major facial trauma." The victim stated that during an argument inside the residence defendant struck her in the head, smothered her with a blanket, and bit her on the arms before she managed to escape and run from the house with their son to the car parked in the driveway. As she attempted to drive away, defendant approached the vehicle, pulled the molding from around the driver's door, and broke the window by throwing a brick that hit the victim in the face. Defendant then pulled the victim from the car by her hair and slammed her to the ground. As defendant stomped her face and stomach he yelled, "I'm going to kill you and [our son]." Defendant hit and kicked the victim several more times before the police officers arrived.³ The victim was taken to the hospital where she was treated for a serious laceration on her face, bumps and bruises to her face and arms, and bite marks to her wrist and arm. She indicated that defendant had "physically assaulted her" many other times, which she did not report due to her fear of defendant and his parents. Defendant did not appear injured, but had blood on his hands and was very irate. He was immediately arrested.

DISCUSSION

I. The Imposition of an Upper Term.

Defendant argues that under the United States Supreme Court decision in *Blakely*, *supra*, 124 S.Ct. 2531, the trial court erred by imposing an upper term on the basis of neither admissions by him nor findings made by the jury beyond a reasonable doubt. He maintains that for purposes of the *Blakely* opinion the "statutory maximum" sentence which cannot be exceeded without a finding by the jury and proof beyond a reasonable doubt is limited to the middle term of imprisonment. Therefore, he complains that

³ Other witnesses, one of them defendant's son, corroborated the victim's account of the assault.

imposition of an upper term without his admission of the necessary underlying facts violated his constitutional rights as defined in *Blakely*.⁴

A. Waiver of *Blakely* Error.

We first dispose of respondent's contention that defendant forfeited any claim of *Blakely* error by failing to request a jury determination of aggravating circumstances or otherwise "raise an objection pursuant to *Blakely*, *Apprendi*, or the Sixth Amendment." "Claims of error relating to sentences 'which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner' are waived on appeal if not first raised in the trial court. [Citation.]" (*People v. Brach* (2002) 95 Cal.App.4th 571, 577, italics omitted; see also *People v. Breazell* (2002) 104 Cal.App.4th 298, 304-305.) Our high court has observed that even constitutional rights can be waived. (*People v. Saunders* (1993) 5 Cal.4th 580, 590.)

However, "[c]laims involving unauthorized sentences or sentences entered in excess of jurisdiction can be raised at any time." (*People v. Andrade* (2002) 100 Cal.App.4th 351, 354; see also *People v. Turner* (2002) 96 Cal.App.4th 1409, 1415.) A related exception to the waiver rule is that it "is generally not applied when the alleged error involves a pure question of law, which can be resolved on appeal without reference to a record developed below." (*People v. Williams* (1999) 77 Cal.App.4th 436, 460.)

Defendant has presented a claim of deprivation of his fundamental constitutional rights to jury trial and proof beyond a reasonable doubt. (*People v. Holmes* (1960) 54 Cal.2d 442, 443-444.) This constitutional challenge is an issue of law that we may decide without reference to the particular sentencing record developed in the trial court. (*In re Justin S.* (2001) 93 Cal.App.4th 811, 815.) If his position is found to have merit, the sentence may not lawfully be imposed under any circumstances without a jury trial, and as an unauthorized component of his disposition may be corrected on appeal despite the lack of an objection in the trial court. (*People v. Cleveland* (2001) 87 Cal.App.4th 263,

⁴ We are of course aware that the effect of *Blakely*, *supra*, 124 S.Ct. 2531, on California sentencing law is already before the California Supreme Court in *People v. Black* (review granted July 28, 2004, S126182), and *People v. Towne* (review granted July 14, 2004, S125677).

268, fn. 2; *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1534; *People v. Chambers* (1998) 65 Cal.App.4th 819, 823; *In re Paul R.* (1996) 42 Cal.App.4th 1582, 1590; *People v. Sexton* (1995) 33 Cal.App.4th 64, 69.)

Finally, *Blakely* was decided after defendant was sentenced, and therefore he had no reason to object in the face of well-established law that consistently denied a criminal defendant the constitutional right to a jury trial in connection with the imposition of an upper term of imprisonment. (See *People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231; *People v. Ramos* (1980) 106 Cal.App.3d 591, 605-606; *People v. Williams* (1980) 103 Cal.App.3d 507, 510; *People v. Betterton* (1979) 93 Cal.App.3d 406, 410-411; *People v. Nelson* (1978) 85 Cal.App.3d 99, 102-103; *United States v. Harrison* (8th Cir. 2003) 340 F.3d 497, 500.) We therefore conclude that defendant has not waived his right to complain of *Blakely* error, and elect to address his constitutional claims on their merits. (*People v. Peck* (1996) 52 Cal.App.4th 351, 362, fn. 5; see also *People v. Marshall* (1996) 13 Cal.4th 799, 831-832; *People v. Ashmus* (1991) 54 Cal.3d 932, 976; *In re Khonsavanh S.* (1998) 67 Cal.App.4th 532, 537; *People v. Williams* (1998) 61 Cal.App.4th 649, 657.)

B. The Validity of Imposition of an Upper Term under Blakely.

In *Blakely*, the United States Supreme Court revisited the rule articulated in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed *statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt.” (*Blakely, supra*, 124 S.Ct. 2531, 2536, italics added; see also *People v. Seel* (2004) 34 Cal.4th 535, 541.) At issue in *Blakely* was whether the determinate sentencing procedure followed by courts in the State of Washington deprived the petitioner of his “federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence.” (*Blakely, supra*, at p. 2536.) The petitioner entered a guilty plea to second-degree kidnapping of his estranged wife in which he admitted domestic violence and use of a firearm, but “no other relevant facts.” (*Id.*, at pp. 2534-2535.) Under the Washington Criminal Code (§§ 9A.40.030(3); 9A.20.021(1)(b)), second-

degree kidnapping was designated a class B felony that carried a maximum statutory sentence of 10 years. (*Blakely, supra*, at p. 2535.) The governing Washington sentencing guidelines further limited the presumptive “standard range” to 49-53 months, but authorized the judge to impose a sentence above the specified range, although below the 10-year maximum, upon a finding by a preponderance of the evidence of “substantial and compelling reasons justifying an exceptional sentence.” (*Ibid.*, citing Wash. Rev. Code § 9.94A.120(2).) At the sentencing hearing, an “exceptional sentence” of 90 months was imposed, based upon the trial judge’s finding that the petitioner used “deliberate cruelty” in the commission of the offense, which was one of the statutorily enumerated grounds for departure from the standard sentencing range. (*Blakely, supra*, at p. 2535.)⁵

The court in *Blakely* reaffirmed the commitment articulated in its prior decisions in *Apprendi, supra*, 530 U.S. 466, and *Ring v. Arizona* (2002) 536 U.S. 584, “to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure.” (*Blakely, supra*, 124 S.Ct. 2531, 2538-2539.) The court in *Blakely* operated from the conclusion reached in both its *Apprendi* and *Ring* decisions that a defendant’s constitutional rights have been violated when a judge imposes “a sentence greater than the maximum he could have imposed under state law without the challenged factual finding. *Apprendi, supra*, at 491-497, 120 S.Ct. 2348; *Ring, supra*, at 603-609, 122 S.Ct. 2428.” (*Blakely, supra*, at p. 2537.) The notion advocated by the State in *Blakely* “that there was no *Apprendi* violation because the relevant ‘statutory maximum’ is not 53 months, but the 10-year maximum for class B felonies in § 9A.20.021(1)(b),” and “no exceptional sentence may exceed that limit,” was rejected as contrary to those “clear” precedents. (*Blakely, supra*, at p. 2537.) Instead, the court defined “the ‘statutory maximum’ for *Apprendi* purposes”

⁵ Under the Washington Sentencing Reform Act, the factors that may be relied upon to justify a finding of an exceptional sentence are listed, but the list is illustrative not exhaustive. A factor may be taken into consideration to impose an exceptional sentence only if it is not already taken into account in the calculation of the standard range sentence for the offense. (*Blakely, supra*, 124 S.Ct. 2531, 2535.)

as “the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations.] In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment,’ [citation], and the judge exceeds his proper authority.” (*Ibid.*)

In a very recent successor case to *Blakely*, the United States Supreme Court once again confirmed the *Apprendi* rule that, “Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.” (*United States v. Booker* (2005) 543 U.S. ___, 05 C.D.O.S. 315, 319, (*Booker*).)⁶ Finding “no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue” in *Blakely*, the court concluded that its “holding in *Blakely* applies to the Sentencing Guidelines.” (*Booker, supra*, at pp. 317, 319.) The court observed that although the Federal Sentencing Guidelines are listed in title 18 United States Code in subsection (a) of section 3553 “as one factor to be considered in imposing a sentence, subsection (b) directs that the court ‘shall impose a sentence of the kind, and within the range’ established by the Guidelines, subject to departures in specific, limited cases.” (*Booker, supra*, at p. 317.) Thus, in “most cases” the Guidelines furnish “all relevant factors” to be taken into account, without departures permissible, and “the judge is bound to impose a sentence within the Guidelines range.” (*Booker, supra*, at p. 317.) The court pointed out, however: “If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the *Sixth*

⁶ The *Booker* opinion was decided after the briefs were filed in the present case, but is binding upon any case, such as this one, still pending on appeal.

Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.” (*Booker, supra*, at p. 317.) As written, however, the Guidelines were found “mandatory and binding on all judges,” and to that extent constitutionally invalid. (*Booker, supra*, at p. 317.)

In a separate companion opinion the court turned to the “second question presented, a question that concerns the remedy.” (*United States v. Booker, supra*, 543 U.S. ___, slip opn. at p. 2.) Rather than declaring “total invalidation” of the Federal Sentencing Guidelines or engrafting onto them the “ ‘jury trial’ requirement” articulated in *Blakely* and *Booker*, by “looking to legislative intent” the court decided that “Congress would have preferred” the remedy of partial invalidation, severance, and excision of two provisions of the statutory scheme to “make the Guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender’s real conduct – a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve.” (*United States v. Booker, supra*, at pp. 2, 3, 6.)

The “two specific statutory provisions” the court severed and excised are: “the provision that requires sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure), see 18 U.S.C. § 3553(b)(1) (Supp. 2004), and the provision that sets forth standards for review on appeal, including *de novo* review of departures from the applicable Guidelines range, see § 3742(e) (main ed. and Supp. 2004) [citation]. With these two sections excised (and statutory cross-references to the two sections consequently invalidated), the remainder of the Act satisfies the Court’s constitutional requirements.” (*United States v. Booker, supra*, 543 U.S. ___, slip opn. at p. 16.) Without the provision “that makes ‘the relevant sentencing rules . . . mandatory and impose[s] binding requirements on all sentencing judges,’ ” the court found that the statute “falls outside the scope of *Apprendi*’s requirement.” (*United States v. Booker, supra*, 543 U.S. ___, slip opn. at p. 16.) Under the court’s remedial ruling, section 3553(a) of the Sentencing Reform Act of 1984, which “sets forth numerous factors that guide sentencing” and review by appellate courts,

“remains in effect.” (*United States v. Booker, supra*, at p. 19.) Finally, the court declared that, “the Act without its ‘mandatory’ provision and related language remains consistent with Congress’ initial and basic sentencing intent” to “ ‘provide certainty and fairness in meeting the purposes of sentencing, [while] avoiding unwarranted sentencing disparities . . . [and] maintaining sufficient flexibility to permit individualized sentences when warranted.’ [Citations.]” (*United States v. Booker, supra*, at p. 21.)

While the consideration of sentencing factors and discretionary selection of an appropriate punishment are traditional sentencing functions that were confirmed in *Booker* as within the authority of the trial court, the specification of a mandatory or presumptive middle term brings the California determinate sentencing law (California DSL) into conflict with the principles announced in *Blakely* and *Booker*. Under section 1170, subdivision (b), three possible terms of imprisonment for each offense are specified, but the sentencing court may not impose the upper term without a finding by a preponderance of the evidence—rather than beyond a reasonable doubt—that circumstances in aggravation outweigh circumstances in mitigation. (*People v. Wright* (1982) 30 Cal.3d 705, 709-710.) “In determining which term to impose, ‘the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.’ (Pen. Code, § 1170, subd. (b).)” (*People v. Wright, supra*, at p. 709.) “[A] special finding of aggravation must be made before the upper term for an offense can be imposed” (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1202, fn. 1.) “ “[T]he statutory preference for imposition of the middle term, when coupled with the requirement that aggravating circumstances must outweigh mitigating circumstances before imposition of the aggravated term is proper, creates a presumption.” [Citation.]” (*People v. Edwards* (1993) 13 Cal.App.4th 75, 79, quoting from *People v. Avalos* (1984) 37 Cal.3d 216, 233.)

Thus, the maximum penalty the court has authority to impose under the California DSL without finding additional facts is the middle term. To select an upper term the sentencing court does not merely consider sentencing factors before exercising discretion, as occurs with the choice of a consecutive or concurrent term, but rather must find

circumstances in aggravation that outweigh circumstances in mitigation. (*People v. Wiley* (1995) 9 Cal.4th 580, 587; *People v. Wright, supra*, 30 Cal.3d 705, 709-710.) Under the DSL a sentencing judge cannot make the discretionary decision to increase a sentence above the middle term without first finding “facts to support it beyond the bare elements of the offense;” the verdict or plea alone does not authorize the sentence. (*Blakely, supra*, 124 S.Ct. 2531, 2538, fn. 8.)

In the present case, the trial court based the upper term sentencing on a finding that aggravating circumstances under California Rules of Court, rule 4.421 outweighed mitigating circumstances under rule 4.423. These factors, the court further found, outweighed the lack of any mitigating circumstances. Since the aggravating circumstances involved the current offense, the sentencing does not come within the exception in *Apprendi* for enhanced penalties based on a defendant’s prior convictions or other recidivist conduct. (*Apprendi, supra*, 530 U.S. 466, 490; *People v. Epps* (2001) 25 Cal.4th 19, 25; *People v. Kelii* (1999) 21 Cal.4th 452, 455; *People v. Taylor* (2004) 118 Cal.App.4th 11, 28.) Under the mandates announced in *Blakely* we are required to conclude that the imposition of the upper term on the basis of judicial findings by a preponderance of the evidence entails constitutional error under *Blakely*.

C. Prejudice.

We turn to the issue of prejudice. We conclude that any sentencing error under *Blakely* is not a structural defect that demands automatic reversal. (See *People v. Epps, supra*, 25 Cal.4th 19, 29; *People v. Vera* (1997) 15 Cal.4th 269, 278; *People v. Marshall, supra*, 13 Cal.4th 799, 851-852.) Rather, we follow the federal standard of review of constitutional errors (*Chapman v. California* (1967) 386 U.S. 18, 24), and must reverse the sentence unless it appears beyond a reasonable doubt that the assumed error did not contribute to the judgment. (*People v. Neal* (2003) 31 Cal.4th 63, 86; *People v. Carter* (2003) 30 Cal.4th 1166, 1221-1222; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.)

The explication in *Booker* of the constitutional flaws in the Federal Sentencing Guidelines and the appropriate remedy to be enforced not only assists in our

determination of the nature and scope of the error committed in the imposition of an upper term under the California DSL, but also significantly impacts and alters our prejudicial error analysis in the present case.⁷ Although the Federal Guidelines differ greatly in structure from the California DSL, the constitutional invalidity of both sentencing schemes is based upon the “mandatory nature” of the sentencing decisions required to exceed a stated maximum term. (*Booker, supra*, 05 C.D.O.S. 315, 317.)

We think the appropriate remedy for the California DSL, after consideration of the legislative intent upon which the sentencing scheme is predicated, is the same one the United States Supreme Court devised in *Booker* for the Federal Guidelines. We perceive in the California DSL identical objectives and policy considerations that underlie the Federal Guidelines: to promote increased uniformity and diminish disparity in sentencing, while maintaining sufficient flexibility to permit individualized sentences imposed by the trial court with specified discretion that are proportionate to the seriousness of the offense based upon “real conduct.” (*United States v. Booker, supra*, 543 U.S. ___, slip opn. at pp. 7, 10, 21; see also § 1170, subd. (a);⁸ *People v. Martin* (1986) 42 Cal.3d 437, 442-443; *In re Jeanice D.* (1980) 28 Cal.3d 210, 224; *In re Morrall* (2002) 102 Cal.App.4th 280, 288; *People v. West* (1999) 70 Cal.App.4th 248, 255-256.)

Without the “mandatory” middle term provision in section 1170, subdivision (b), the California DSL, again like the Federal Guidelines, remains faithful to the legislative intent to avoid sentencing disparities and promote certainty, while maintaining flexibility to permit imposition of individualized punishment appropriate to the crime and the

⁷ The court in *Booker* indicated: “[W]e must apply today’s holdings – both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act – to all cases on direct review.” (*United States v. Booker, supra*, 543 U.S. ___, slip opn. at p. 25.)

⁸ Section 1170, subdivision (a)(1), reads: The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances. The Legislature further finds and declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion.”

offender. (*United States v. Booker, supra*, 543 U.S. ___, slip opn. at p. 21.) Even if the initial instruction to the trial court to impose the middle term is deleted, the sentencing scheme retains the elements of uniformity and proportionality with the discretionary selection of one of three potential terms within the legislatively established range. A sentence choice must still be based upon consideration of specified aggravating and mitigating circumstances, rather than determined according to the caprice of the court.

We are also convinced that, as with elimination of section 3553(b) from the Federal Guidelines, the remainder of the California DSL properly functions independently of the directive in section 1170, subdivision (b), to impose the middle term unless additional predicate findings are made by the trial court. The sentencing court may continue to consider relevant aggravating and mitigating circumstances, make factual determinations, and exercise discretion to choose a specific lower, middle or upper term.⁹

With the deletion of the presumptive middle term the California DSL does not otherwise contravene Sixth Amendment rights as defined in *Blakely*. Absent the specification of a middle term as the statutory maximum, and the command to impose that term absent findings of facts beyond those made by the jury, the sentencing court merely selects one of three specified terms that are all within the prescribed range, and none of which exceeds the statutory maximum. The Sixth Amendment is not implicated by advisory provisions that recommend rather than require selection of particular sentences in response to differing sets of facts. (*Booker, supra*, 543 U.S. ___, 05 C.D.O.S. 315, 317.) Discretionary selection of a lower, middle or upper term based upon consideration of appropriate mitigating or aggravating circumstances conforms to the precepts of *Blakely* “For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the

⁹ We do not, in the present case, need to implement any remedy for the California DSL, nor do we do so. We only state our conclusion that under *Booker* the appropriate remedy appears to be severance and deletion of the mandatory middle term provision. We leave the final determination of the judicial remedy, if any, for the constitutional defects in California DSL to another case or to our high court.

facts that the judge deems relevant.” (*Booker, supra*, at p. 317.) As we read *Booker*, the only constitutional flaw in the California DSL is that a binding middle term is set as the statutory maximum, which may be exceeded only upon additional findings made by the trial court.

If the only constitutional defect in the sentencing scheme is the mandatory middle term provision, and the only remedy necessary to cure the defect is elimination of the offending provision, the only error committed by the trial court in the present case was adhering to the statutory dictate to exceed the statutory maximum middle term only upon findings of fact not made by the jury. Rather than considering the relevant factors and exercising discretion to select an appropriate term within the defined range, as endorsed in *Booker*, the court erred by making the findings necessary to exceed the middle term, as commanded by section 1170, subdivision (b). Consequently, the focus of our prejudicial error analysis is upon whether the trial court would have selected a lesser sentence if it had exercised discretion to choose any of the three terms within the authorized sentencing range unfettered by the threshold directive to impose the middle term. (See *In re Manzy W.*, *supra*, 14 Cal.4th 1199, 1209-1211; *People v. Price* (1991) 1 Cal.4th 324, 492; *People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1435.) To find the federal constitutional error harmless we must be able to conclude that “beyond a reasonable doubt” the error in following the mandatory middle term provision of the statute did not contribute to the result of an upper term sentence. (See *Chapman v. California, supra*, 386 U.S. 18, 24; *People v. Simon* (1995) 9 Cal.4th 493, 506, fn. 11; *People v. Spark* (2004) 121 Cal.App.4th 259, 269; *People v. Sanchez* (1994) 23 Cal.App.4th 1680, 1686-1687.)

We conclude that the trial court would certainly have imposed the upper term for the 2003 offense of inflicting corporal injury if presented with discretion to choose one of the three specified sentences upon consideration of the relevant sentencing factors. The brutal beating of the victim by repeated blows with a chair as she spoke on the telephone, accompanied by threats to kill her, provided abundant justification for an upper term sentence. As we read the record, the multitude of aggravating circumstances associated

with the offense – extreme callousness, the threat to kill the victim, and the commission of the offense in the presence of the victim’s young son – are established by persuasive and in our view largely indisputable evidence in the probation report.¹⁰ No circumstances in mitigation are found in the record, and only a single aggravating factor is necessary to justify selection of an upper term. (*People v. Brown* (2000) 83 Cal.App.4th 1037, 1043.) Beyond any reasonable doubt we find that the same sentence would have been imposed upon defendant without any *Blakely* error. Thus, even if the trial court erred in finding some aggravating factors, the decision to impose an upper term was not prejudicial to defendant. (See *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1263-1264; *People v. Williams* (1996) 46 Cal.App.4th 1767, 1782-1783.)

II. Defense Counsel’s Failure to Object to Circumstances in Aggravation.

Defendant also claims that his counsel provided “ineffective assistance” by failing to object to the trial court’s improper consideration of “facts relating to the 2004 offenses” to impose an upper term for “the 2003 offense.” He further claims that defense counsel was remiss for allowing the trial court to use “facts related to the dismissed 2004 offenses to aggravate” the upper term sentence “for the 2003 offense” without a valid “*Harvey* waiver in the 2004 case.”

Defendant’s argument is not supported by the record. His guilty plea to the 2003 infliction of corporal injury offense resulted in the dismissal of counts 1 and 3, but was expressly accompanied by a *Harvey* waiver. The plea to the assault offense also indicates the defendant agreed “that the court can consider the dismissed charges in determining the appropriate sentence in my case.” Thus, the trial court was entitled to consider facts related to the dismissed charges to impose the upper term for infliction of corporal injury. In any event, the trial court did not rely on any facts associated with the assault offense or

¹⁰ Upon review of the record we find that the trial court did not improperly rely upon factors associated with the 2004 assault offense to impose the upper term for the earlier infliction of corporal injury offense. We also observe that additional aggravating factors existed: the defendant was armed with or used a weapon – a chair – at the time of the commission of the crime, and the victim was particularly vulnerable, as she was in the house talking on the telephone when the crime occurred. (Cal. Rules of Court, rule 4.421(a)(2)(3).)

the accompanying dismissed charges to select the upper term for the infliction of corporal injury offense. Defense counsel was not incompetent for failing to object, and no prejudice to defendant resulted.

III. Correction of the Abstract of Judgment.

Defendant's final contention is that the "abstract of judgment must be corrected" to delete multiple fines of \$3,200 improperly imposed pursuant to sections 1202.4, subdivision (b) and 1202.45 "for both cases." He maintains that in the oral pronouncement of sentence the trial court "clearly imposed only one fine under each statutory provision." He also claims that imposition of "multiple restitution fines" in a "single sentencing proceeding" violated the court's statutory authority. Defendant therefore asks us to correct the abstract of judgment "to reflect only one \$3200 fine under each statute" as the statutes authorize and the trial court intended.

We agree with defendant that the duplicate restitution fines specified in the minute order are not authorized by the governing statutes where, as here, separate criminal cases were filed but sentencing has occurred in a single, combined proceeding. "As pertinent here, subdivision (b) of section 1202.4 provides: 'In *every case* where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record.' Section 1202.45 provides: 'In *every case* where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4. This additional restitution fine shall be suspended unless the person's parole is revoked.' " (*People v. Tillman* (2000) 22 Cal.4th 300, 301, fn. 1, italics added; *People v. Smith* (2001) 24 Cal.4th 849, 851.) These two provisions "require trial courts to impose a restitution fine as part of the judgment of conviction entered against a criminal defendant and, in cases where parole is granted, an additional fine in the same amount suspended unless parole is later revoked. The restitution fine under section 1202.4 is mandatory unless the sentencing court, in the words of the statute,

‘finds compelling and extraordinary reasons for not doing so, and states those reasons on the record.’ (§ 1202.4, subd. (b).) In cases in which the court imposes a restitution fine, imposition of a parole revocation fine is also mandatory. (§ 1202.45.)” (*People v. Tillman*, *supra*, at pp. 301-302.)

In *People v. McNeely* (1994) 28 Cal.App.4th 739, 742-743, the court was presented with the same procedural history: the defendant entered guilty pleas to various charged offenses in two cases with separate case numbers, and at a “single sentencing hearing for both cases” was sentenced and ordered to pay a restitution fine (under former Gov. Code § 13967, subd. (c)) that exceeded the \$10,000 statutory limit for a single case.¹¹ The court declared: “While a trial court can separately sentence a defendant on different cases at a single hearing [citation], here the court combined the charges in both cases in imposing the prison term and ordering restitution. We do not believe this creates separate sentencing proceedings on the two cases. When a penal statute is ambiguous, it must be construed in the light most favorable to the defendant.” (*People v. McNeely*, *supra*, at pp. 743-744.) Accordingly, the restitution order was modified to reflect a \$10,000 limitation. (*Id.*, at p. 744.)

In *People v. Ferris* (2000) 82 Cal.App.4th 1272, 1277, the court adopted the reasoning of the decision in *McNeely* to conclude that, “The provisions of both section 1202.4, subdivision (b) and section 1202.45 apply ‘[i]n every case where a person is convicted of a crime.’ (Italics added.) Those statutes do not specify whether the phrase ‘every case’ means every separately charged and numbered case or every jointly tried case. When a penal statute is ambiguous, we adopt the construction that is more favorable to the defendant.” The court accordingly adopted the “statutory construction that is favorable to” the defendant to find that “the phrase ‘every case’ in sections 1202.4, subdivision (b) and 1202.45 includes a jointly tried case although it involves charges in

¹¹ At the time *McNeely* committed his crimes, Government Code section 13967, subdivision (c), limited victim restitution to a maximum of \$10,000, and at issue in the case was whether the court could order up to \$10,000 in restitution for the eight victims in the first case with eight burglaries and up to \$10,000 in restitution for the two victims in the second case. If not, the court was limited to an order of \$10,000 for restitution to all victims.

separately filed informations.” (*People v. Ferris, supra*, at p. 1277.) Despite “any technical retention of separate case numbers,” the cases were “effectively joined in one case” for purposes of sections 1202.4, subdivision (b) and 1202.45, and “the trial court erred by imposing restitution fines in ‘both cases.’ To allow separate restitution fines in a case involving separate informations but joint trials and sentencing could lead to prosecutorial abuse.” (*People v. Ferris, supra*, at pp. 1277-1278. fn. omitted.)

Although in the present case the two criminal proceedings were not technically consolidated, the sentencing of defendant in a single proceeding limited the trial court’s authority to impose upon him one restitution fine each under sections 1202.4, subdivision (b) and 1202.45. (*People v. McNeely, supra*, 28 Cal.App.4th 739, 743-744.) As we read the oral pronouncement of judgment the trial court did just that. The court declared: “Further, you’re to pay a restitution fine of three thousand, two hundred dollars, to be paid in an amount and manner as determined by the Department of Corrections; . . . and you’re ordered to pay an additional restitution fine pursuant to 1202.45 of the Penal Code in the same amount as that imposed pursuant to 1202.4(b) of the Penal Code.” As interpreted to conform to the statutory authority of sections 1202.4, subdivision (b) and 1202.45, the trial court’s oral pronouncement of judgment controls over the clerk’s minute order, which erroneously refers to duplicative restitution fines (See *People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2; *People v. Mesa* (1975) 14 Cal.3d 466, 471; *People v. Hong* (1998) 64 Cal.App.4th 1071, 1075.)

DISPOSITION

Accordingly, the judgment is modified to impose one section 1202.4, subdivision (b) restitution fine of \$3,200, and one section 1202.45 parole revocation restitution fine of \$3,200, which is suspended unless parole is revoked. The judgment is affirmed as so modified. The superior court is directed to prepare an amended abstract of judgment to reflect the modification and notify the Department of Corrections of the modification.

Swager, J.

We concur:

Marchiano, P. J.

Margulies, J.