



People v. Estrada

2005 | Cited 0 times | California Court of Appeal | June 22, 2005

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Gabriel J. Estrada appeals from the judgment entered following his conviction by a jury of spousal rape (Pen. Code, § 262, subd. (a)(1)),¹ forcible oral copulation (§ 288a, subd. (c)(2)), false imprisonment by violence or menace (§§ 236, 237), and forcible sexual penetration. (§ 289, subd. (a)(1).) Appellant admitted that he had been previously convicted of a serious or violent felony within the meaning of California's "Three Strikes Law." (§§ 667, subds.(b)-(i), 1170.12.)

The trial court sentenced appellant to prison for 49 years, 4 months. As to each of the offenses of spousal rape, forcible oral copulation, and forcible sexual penetration, the trial court selected the upper term of 8 years and doubled it to 16 years because of the "strike." It then ran the three 16-year terms consecutively for a total of 48 years. As to the offense of false imprisonment by violence or menace, the trial court imposed a consecutive term of 16 months (one-third the midterm of 24 months doubled because of the strike).

Appellant contends that the trial court erroneously denied his Wheeler motions. (People v. Wheeler (1978) 22 Cal.3d 258.) The motions were based on the prosecutor's alleged use of peremptory challenges to eliminate male jurors solely because of their gender. In addition, appellant contends that the evidence is insufficient to support the conviction of false imprisonment by violence or menace. Finally, appellant argues that the imposition of upper and consecutive terms violated his right to a jury trial under *Blakely v. Washington* (2004) 542 U.S. __ [124 S.Ct. 2531, 159 L.Ed.2d 403] (hereafter *Blakely*). We affirm.

Facts

M.E. was married to appellant. They had three children. At the time of trial in March 2004, M.E. was 25 years old and the children were seven, six, and four years old.

In April 2002 appellant hit M.E. with his fists, kicked her, and choked her. After the beating, M.E. filed for divorce and separated from appellant.



People v. Estrada

2005 | Cited 0 times | California Court of Appeal | June 22, 2005

In May 2003 M.E. drove to a parking lot, where she met appellant. Appellant was in the front seat of a parked Ford Expedition. The three children were in the back seat. M.E. entered the front seat of the Expedition, and an argument ensued between her and appellant.

Appellant drove forward through the parking lot. M.E. told him to stop, but he refused. When the Expedition slowed down to make a turn, M.E. opened the door and started to exit the vehicle. Appellant grabbed her in the left breast area, "pulled [her] in with his right hand," and "pushed [her] back against the seat." M.E. was crying and said she "just wanted to get out." She pleaded with appellant to take her back to her car. Appellant locked the doors.

Appellant drove to a Sizzler's restaurant and parked in the parking lot. Appellant, M.E., and the children entered the restaurant, ordered a meal, and sat down at a table. Appellant told M.E. that he would not divorce her and that "there [were] going to be problems" if she did not drop the divorce proceedings.

After the meal, appellant, M.E., and the children walked back to the Expedition. M.E. again asked appellant to take her back to her car. Appellant refused and drove to a remote location. "He said he wanted a piece of ass." M.E. replied that "he wouldn't get it."

Appellant stopped the Expedition on the shoulder of the road and told the children to go to the trunk space in the back of the vehicle. The children complied. Appellant forced M.E. to lower her pants and to orally copulate his penis. Appellant inserted his finger into M.E.'s vagina. M.E. "was begging him to stop." Appellant inserted his penis into M.E.'s vagina and ejaculated. He then drove M.E. and the children back to the parking lot where her car was located.

Wheeler Motions

Appellant contends that the trial court erroneously denied his Wheeler motions. In *Wheeler*, our Supreme Court held that a prosecutor's exercise "of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution." (*People v. Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.) The United States Supreme Court subsequently held that such a practice violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. (*Batson v. Kentucky* (1986) 476 U.S. 79, 84-89.)

A prosecutor is presumed to have exercised his peremptory challenges in a constitutional manner. (*People v. Alvarez* (1996) 14 Cal.4th 155, 193.) The defendant has the burden of making a *prima facie* showing of purposeful discrimination. (*Ibid.*) "[T]o state a *prima facie* case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias." (*People v. Johnson* (2003) 30 Cal.4th 1302, 1306.)



People v. Estrada

2005 | Cited 0 times | California Court of Appeal | June 22, 2005

If the defendant establishes a prima facie case, the burden shifts to the prosecutor to show the absence of purposeful discrimination. (People v. Alvarez, supra, 14 Cal.4th at p. 193.) The trial court must assess whether the prosecutor stated adequate neutral reasons for the peremptory challenges. "Even seemingly 'highly speculative' or 'trivial' grounds may support the exercise of a peremptory challenge. [Citations.] . . . 'What is required are reasonably specific and neutral explanations that are related to the particular case being tried.' [Citation.]" (People v. Ervin (2000) 22 Cal.4th 48, 77.) If the prosecutor states adequate neutral reasons, the trial court must assess whether the peremptory challenges were actually exercised for those reasons -- "in other words, whether the reasons . . . were 'genuine.' [Citation.]" (People v. Alvarez, supra, 14 Cal.4th at p. 197.)

Appellant made three separate Wheeler motions. As to each motion, appellant alleged that the prosecutor had purposefully discriminated against male jurors. "Peremptory challenges may not be used to exclude male jurors solely because of a presumed group bias. [Citation.]" (People v. Williams (2000) 78 Cal.App.4th 1118, 1124.)

The initial Wheeler motion was made after the People had used their first five peremptory challenges to excuse five male jurors. In support of the motion, appellant's counsel stated: "The five peremptories exercised by the People have all been consistently males."

The trial court asked the prosecutor if she wished to respond to the Wheeler motion. The prosecutor replied, "I can't recall if I am supposed to, your honor, until the court finds a prima facie case." The court stated: "Well the reality is the court can allow you the opportunity to respond, if you would like, prior to making a prima facie case." The prosecutor replied: "Then I will, your honor." The prosecutor explained her reasons for excusing each of the five jurors. The trial court denied the Wheeler motion because appellant had "failed to make a prima facie showing" of purposeful discrimination.

The second Wheeler motion was made after the People had used an additional five peremptory challenges to excuse five male jurors. Appellant's counsel stated: "We are now to ten peremptories having been exercised by the People. All of them have been males only. . . . I] would renew my objection under Wheeler that the People are intending to excuse a single . . . cognizable class, and that being of males."

The trial court asked the prosecutor if she wanted "to go ahead and make a record" The prosecutor explained her reasons for excusing each of the five additional jurors. The trial court denied the second Wheeler motion because appellant had failed to establish "a prima facie case" of purposeful discrimination.

Appellant contends that, as to the first and second Wheeler motions, "the court's invitation to the prosecution to explain its peremptories before ruling on the issue of whether there was a prima facie case constituted an implicit finding of a prima facie case[.]" Appellant argues, "Given a prima facie



People v. Estrada

2005 | Cited 0 times | California Court of Appeal | June 22, 2005

case was implicitly found in both motions, appellant's convictions must be reversed for the court's wholesale failure to particularly assess the legitimacy/credibility of the proffered explanations." Appellant presents no argument on whether he actually made a prima facie showing.

The trial court did not implicitly find that appellant had established a prima facie case of purposeful discrimination. The trial court made clear that, before determining whether a prima facie case had been established, it would allow the People an opportunity to respond to each Wheeler motion. After hearing the People's response, the trial court expressly ruled that a prima facie case had not been established. Under these circumstances, the prima facie case issue was not mooted by the trial court's invitation to the People to explain their peremptories. (See *People v. Boyette* (2002) 29 Cal.4th 381, 422 [question whether defendant made a prima facie showing not moot where "trial court did not immediately rule on whether a prima facie showing had been made . . . [and] asked the prosecutor for her reasons"].)

People v. Fuentes (1991) 54 Cal.3d 707, is distinguishable. In response to the defendant's Wheeler motion, the Fuentes trial court asked the prosecutor for an explanation. When the prosecutor indicated that he was unprepared to give one, the trial court stated: " 'Before we commence the trial, I will have the reasons set forth by the People.' " (Id., at p. 715.) The trial court said to defense counsel: " ' [I]f I rule in your favor, I'd start over with a whole new panel.' " (Id., at p. 716.) Our Supreme Court concluded that the trial court's statements "clearly indicate that the court had implicitly found a prima facie case of improper exclusion on the basis of race." (Ibid.) Here, in contrast, the trial court's statements clearly indicate that it was allowing the prosecutor to respond to the Wheeler motion before determining the prima facie case issue.

Thus, as to the first and second Wheeler motions, the question is whether appellant actually made a prima facie showing of purposeful discrimination. Since appellant presents no argument on this issue, the issue is waived. (*People v. Hardy* (1992) 2 Cal.4th 86, 150.) In any event, appellant failed to establish a prima facie case. The only stated ground for the first and second Wheeler motions was that all of the People's peremptories had been exercised against men. As a matter of law, the stated ground was insufficient. "[D]efense counsel may not establish a prima facie case of Wheeler error simply by stating that all members of a cognizable class have been excluded. [Citations]." (*People v. Gray* (2001) 87 Cal.App.4th 781, 788; see also *People v. Box* (2000) 23 Cal.4th 1153, 1188-1189.)

Even if appellant had made a prima facie showing, a reversal would not be required merely because the trial court did not "particularly assess the legitimacy/credibility of the proffered explanations." "When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (*People v. Silva* (2001) 25 Cal.4th 345, 386.) Appellant does not contend that the prosecutor's stated reasons for excusing any of the 10 jurors were unsupported by the record or inherently implausible.



People v. Estrada

2005 | Cited 0 times | California Court of Appeal | June 22, 2005

The third Wheeler motion was made after the prosecutor had exhausted her 20 peremptory challenges. Of the last ten jurors excused by the prosecutor, nine had been men and one had been a woman. Although 19 of the prosecutor's 20 peremptory challenges had been exercised against men, only 3 women were seated in the jury box.

The trial court found that appellant had established a prima facie case of purposeful gender-based discrimination as to the last nine male jurors excused by the prosecutor. The court asked the prosecutor to explain her reasons for excusing these jurors. After hearing the prosecutor's reasons, the trial court denied the third Wheeler motion. It found the reasons "credible" and "gender[-] neutral in basis."

Appellant contends that, as to two of the male jurors (hereafter Juror No. 1 and Juror No. 2), the People failed to carry their burden of showing that the peremptory challenges had not been predicated on group bias. The prosecutor exercised her final peremptory challenge against Juror No. 1. Before he was excused, the jury consisted of 10 men and 2 women. A woman (hereafter Juror W) was next in line to be seated in the jury box, and she was called to replace Juror No. 1. During earlier questioning, Juror W had stated that she was married and had two "school[-]aged" children.

The prosecutor explained that she had excused Juror No. 1 for the following reasons: "One is strategy. There are hardly any females on the panel at this time, and the People don't feel it is balanced at this time. . . . It seemed like the next juror was a very good juror for the People based on her age, similar to the victim's age, and the fact that she has small children. Also, [Juror No. 1] has no kids. . . . [He] has never been married, has no children and his ties are puppies that he raised. I don't feel that that would be an appropriate person to serve on this type of jury."

Appellant contends that the true reason for excusing Juror No. 1 was that "the State wanted the venire 'more balanced' in terms of gender." This reason, appellant maintains, was not an adequate neutral explanation. Appellant argues that the prosecutor's other stated reasons for excusing Juror No. 1 were "pure pretext."

"[A]n appellate court independently reviews a trial court's conclusion on whether the prosecutor stated adequate neutral reasons for the peremptory challenges in question: It amounts to the resolution of a pure question of law [citation]." (People v. Alvarez, supra, 14 Cal.4th at p. 198, fn. 9.) On the other hand, we review for substantial evidence a finding that the prosecutor's stated reasons were genuine: "It is plainly the resolution of a pure question of fact." (Id., at p. 198.)

We agree with appellant that, if the true reason for excusing Juror No. 1 was that the prosecutor wanted a jury "'more balanced' in terms of gender," this would not have been an adequate gender-neutral explanation. But the prosecutor's other stated reasons were adequately gender-neutral, and substantial evidence supports the trial court's finding that these other reasons were genuine.



People v. Estrada

2005 | Cited 0 times | California Court of Appeal | June 22, 2005

The prosecutor pointed out that Juror W was approximately the same age as the victim and had children. Moreover, like the victim's children, Juror W's children were "school aged." In view of these similarities between the victim and Juror W, it was reasonable for the prosecutor to believe that Juror W would be better able to empathize with the victim than Juror No. 1.

Furthermore, it was reasonable for the prosecutor to believe that a parent, regardless of his or her gender, would be less inclined to sympathize with the defendant than a juror without children, such as Juror No. 1. The victim had been raped in the presence of her three children, and one of the charged offenses was child abuse. (§ 273a, subd. (a).)² Juror No. 1 was the least desirable of the seated jurors because he had never been married, had no children, and "his ties" had been with "puppies that he [had] raised."

In these circumstances, the prosecutor's strategic decision to excuse undesirable Juror No. 1 in order to select desirable Juror W was legitimate: "Near the end of the voir dire process a lawyer will naturally be more cautious about 'spending' his increasingly precious peremptory challenges. . . . [A]s the number of challenges decreases, a lawyer necessarily evaluates whether the prospective jurors remaining in the courtroom appear to be better or worse than those who are seated. If they appear better, he may elect to excuse a previously passed juror hoping to draw an even better juror from the remaining panel." (People v. Reynoso (2003) 31 Cal.4th 903, 918-919.)

As to Juror No. 2, the prosecutor explained that he had no children and that she found it "rather odd" he had claimed to be married but was not wearing a wedding band. The prosecutor also expressed concern that Juror No. 2 had said he had "two very close friends" who were deputy sheriffs, "yet he has no idea what they do. They don't talk about the subject." The prosecutor noted that Juror No. 2 "seem[ed] very hesitant . . . when asked the question about whether they discuss their work." Unlike Juror No. 1, appellant does not contend that the prosecutor failed to state adequate neutral reasons for excusing Juror No. 2. He contends that the reasons were not genuine because the record fails to support the prosecutor's statement that Juror No. 2 did "not talk to his sheriff friends about their work" We disagree. Based on the following colloquy between the court and Juror No. 2, the court could have reasonably found that the prosecutor did not fabricate a sham explanation for the peremptory challenge:

"The Court: Do you know what assignment your friends are working at?"

"[Juror No. 2]: As of right now, no. I don't really get into that.

"The Court: So work is not something that you all talk about?"

"[Juror No. 2]: No, not too much."

Appellant argues that the trial court "failed to properly and precisely pass on the prosecutor's



People v. Estrada

2005 | Cited 0 times | California Court of Appeal | June 22, 2005

explanations: in other words, rather than going through each dismissed juror and indicating whether the State's rationale was adequate in itself . . . , or corroborated by the court's own observations . . . , the court improperly relied upon blanket approval of the State's justification." But, as discussed above, the trial court may make "a global finding that the reasons appear sufficient" unless "the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both" (People v. Silva, supra, 25 Cal.4th at p. 386.) Appellant has not shown that the prosecutor's reasons for the peremptory challenges were unsupported by the record or inherently implausible. (See also People v. Reynoso, supra, 31 Cal.4th at p. 919 ["in fulfilling [obligation to make a sincere and reasoned attempt to evaluate prosecutor's explanation], the trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine"].)

Finally, appellant asks us to engage in a comparative analysis in evaluating the prosecutor's reasons for her peremptory challenges. However, as appellant recognizes, our Supreme Court has concluded that it is improper for an appellate court to engage in comparative juror analysis for the first time on appeal. (People v. Johnson, supra, 30 Cal.4th at pp. 1324-1325.) Our Supreme Court explained: "[P]ermitting appellate courts to overturn trial court decisions based on their own comparative analysis of a cold record, divorced from the nuances of trial not apparent from the record, is inconsistent with the deference reviewing courts necessarily give trial courts." (Id., at p. 1324.) Thus, we decline to engage in comparative analysis. Substantial Evidence Supports the False Imprisonment Conviction

Appellant contends that the evidence is insufficient to support the conviction of false imprisonment by violence or menace. (§§ 236, 237.) "In reviewing a criminal conviction challenged as lacking evidentiary support, 'the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" [Citation.] [Citation.] (People v. Combs (2004) 34 Cal.4th 821, 849.)

"False imprisonment is the unlawful violation of the personal liberty of another." [Citations.] In this context, "[p]ersonal liberty" is violated when "the victim is "compelled to remain where he does not wish to remain, or to go where he does not wish to go." [Citations.] . . . [¶] The offense becomes felonious when it is 'effected by violence, menace, fraud, or deceit' [Citations.] "Violence" . . . means the "the exercise of physical force used to restrain over and above the force reasonably necessary to effect such restraint." [Citations.] 'Menace' is defined as "'a threat of harm express or implied by word or act.'" [Citation.] (People v. Reed (2000) 78 Cal.App.4th 274, 280-281.)

Substantial evidence supports the false imprisonment conviction. A reasonable trier of fact could find beyond a reasonable doubt that M.E. was subjected to false imprisonment by violence or menace when she opened the door and tried to exit the Expedition. Appellant grabbed her in the left breast



People v. Estrada

2005 | Cited 0 times | California Court of Appeal | June 22, 2005

area, "pulled [her] in with his right hand," "pushed [her] back against the seat," and locked the doors.

The Imposition of Upper and Consecutive Terms Did Not Violate Appellant's Right to a Jury Trial under Blakely

A. Upper Terms

On each of the convictions of spousal rape, forcible oral copulation, and forcible sexual penetration, appellant was sentenced to the upper term of eight years, which was doubled because of the "strike." Appellant argues that the trial court's imposition of upper terms violated his constitutional right to a jury trial because the circumstances in aggravation were neither admitted by him nor found true by the jury.

Appellant's argument is based on *Blakely*, supra, 542 U.S. __ [124 S.Ct. 2531, 159 L.Ed.2d 403]. The defendant in *Blakely* pleaded guilty to second-degree kidnapping with a firearm. The victim was his wife. The Washington State sentencing law specified a "standard range" of 49 to 53 months for the offense. The law allowed the court to impose a sentence above the standard range if it found " 'substantial and compelling reasons justifying an exceptional sentence.' [Citation.]" (Id., 124 S.Ct. at p. 2535.) A reason offered to justify an exceptional sentence could be considered only if it involved factors other than those used to compute the standard range sentence. (Id., 124 S.Ct. at pp. 2537-2538.) The trial court imposed an exceptional sentence of 90 months, 37 months beyond the maximum standard range. It determined that the exceptional sentence was warranted because the defendant "had acted with 'deliberate cruelty,' a statutorily enumerated ground for departure in domestic-violence cases. [Citation.]" (Ibid.)

The United States Supreme Court concluded that, because the facts underlying the finding of "deliberate cruelty" had been neither admitted by the defendant nor found true by a jury, the 90-month exceptional sentence violated the defendant's constitutional right to a jury trial. The court noted that, in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435], it had expressed the following rule: " 'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " (*Blakely*, supra, 124 S.Ct. at p. 2536.) The *Blakely* court held that the " 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. [Citation.] 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." (Id., at p. 2537.) Applying this holding to the facts in *Blakely*, the Supreme Court determined that the statutory maximum for *Apprendi* purposes was "the 53-month statutory maximum of the standard range" (Id., at p. 2537.)



People v. Estrada

2005 | Cited 0 times | California Court of Appeal | June 22, 2005

Respondent contends that appellant forfeited his right to challenge his sentence under Blakely because he did not raise the issue in the trial court. But Blakely was decided after appellant had been sentenced.³ The holding of Blakely was not reasonably foreseeable by appellant's counsel at the time of sentencing. Accordingly, we consider appellant's Blakely claim on its merits. "Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence. [Citations.]" (People v. Welch (1993) 5 Cal.4th 228, 237-238.)

Blakely implies that the trial court was free to impose any sentence so long as it fell within the standard range under Washington law for the crime of which the defendant was convicted. Under California law, the standard range is three, six, or eight years for each of the offenses of spousal rape, forcible oral copulation, and forcible sexual penetration. (§§ 264, subd. (a), 288a, subd. (c)(2), 289, subd. (a)(1).) The statutes makes it clear that whoever commits any of these offenses is risking an eight-year sentence. Thus, by selecting the eight-year upper terms, the trial court did not exceed the statutory maximum of the standard range. The imposition of the upper terms, therefore, did not violate appellant's right to a jury trial.

We reject the proposition that, under California law, the statutory maximum sentence for Apprendi purposes is the middle term because the trial court must "order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." (§ 1170, subd. (b).) California's determinate sentencing law provides a range of three discretionary sentencing choices: the lower, middle, or upper term. The middle term must be imposed only if, in the exercise of its discretion, the trial court finds that there are no aggravating or mitigating circumstances. (See People v. Myers (1983) 148 Cal.App.3d 699, 704.) A defendant's right to a jury trial is not infringed if the trial court exercises its discretion by selecting the upper term based on aggravating factors. The upper term is within the standard range of punishment prescribed by statute for the offense of which the defendant has been convicted. In Apprendi the Supreme Court noted: "We should be clear that nothing . . . suggests that it is impermissible for judges to exercise discretion -- taking into consideration various factors relating both to offense and offender -- in imposing a judgment within the range prescribed by statute." (Apprendi v. New Jersey, supra, 530 U.S. at p. 481; see also United States v. Booker (2005) 543 U.S. [125 S.Ct. 738, 750] ["We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range."].)

B. Consecutive Terms

Pursuant to section 667.6, subdivision (d), the trial court imposed full, separate, and consecutive terms for spousal rape, forcible oral copulation, and forcible sexual penetration. The statute requires consecutive terms "if the crimes involve separate victims or involve the same victim on separate occasions." (Ibid.) Appellant contends that the imposition of consecutive terms violated Blakely because a jury did not find that the crimes were committed on separate occasions.



People v. Estrada

2005 | Cited 0 times | California Court of Appeal | June 22, 2005

Pursuant to *People v. Groves* (2003) 107 Cal.App.4th 1227, appellant does not have a constitutional right to a jury determination of this issue. In *Groves* the trial court imposed consecutive terms for two counts of forcible oral copulation based on its finding that the crimes had been committed on separate occasions. The defendant argued that he had a constitutional right to have the separate occasions issue determined by a jury. The appellate court concluded that, for Apprendi purposes, the statutory maximum for a second conviction of a section 667.6, subdivision (d), sex offense "is the full consecutive term" (*Id.*, at p. 1231.) The court reasoned: "The mandatory imposition of this maximum possible sentence does not constitute an increase in the maximum possible sentence." (*Ibid.*) The court therefore held that a defendant is not constitutionally entitled to have a jury determine whether section 667.6, subdivision (d), sex crimes were committed on separate occasions. (*Id.*, at pp. 1231-1232.)

Groves was decided prior to *Blakely*, but *Blakely* does not affect the validity of its holding. As in *Groves*, no *Blakely* violation occurred here because the mandatory full, separate, and consecutive sentences imposed for the section 667.6, subdivision (d), sex offenses did not increase the penalty for those crimes beyond the statutory maximum.

The *Groves* rationale also applies to the discretionary consecutive sentence imposed for false imprisonment. Because this sentence did not increase the penalty beyond the statutory maximum, *Blakely* was not violated.

Disposition

The judgment is affirmed.

We concur: COFFEE, J., PERREN, J.

1. All statutory references are to the Penal Code.
2. Pursuant to section 1118.1, the trial court ordered the entry of a judgment of acquittal on the child abuse charge.
3. Appellant was sentenced on May 17, 2004. *Blakely* was decided on June 24, 2004.

