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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TYRONE PULLEY, Defendant and Appellant.	B233307 (Los Angeles County Super. Ct. No. VA117441)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael A. Cowell, Judge. Affirmed.

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

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General for Plaintiff and Respondent.

Defendant and appellant Tyrone Pulley (defendant) appeals from his conviction of forcible rape. He contends that the trial court abused its discretion in admitting evidence of a prior sexual assault, and erroneously instructed with CALJIC Nos. 2.50.01 and 2.21.2. Defendant also contends that the trial court used unauthorized factors to impose the upper term of imprisonment, and failed to weigh properly the aggravating and mitigating factors. Finding no merit to defendant's contentions, we affirm the judgment.

BACKGROUND

1. Procedural Background

Defendant was charged with one count of forcible rape, in violation of Penal Code section 261, subdivision (a)(2). Following a jury trial, defendant was found guilty as charged, and on May 25, 2011, the trial court sentenced him to the upper term of eight years in prison with 36 days of presentence custody credits. The trial court imposed mandatory fines and fees, and ordered defendant to register as a sex offender, submit to an AIDS test, and provide a DNA sample. Defendant filed a timely notice of appeal from the judgment.

2. Prosecution Evidence

In 2005, defendant was a chiropractor. Beronica B. sought treatment from him after she suffered a displaced disk in her back, making it difficult to walk and causing her pain in both legs and her sciatic nerve. In 2006, when the treatments did not help her pain, she stopped seeing defendant and underwent disk fusion surgery.

In 2010, after another injury, Beronica returned to defendant for treatment several times due to severe pain in her head, neck, shoulder, leg, hand, and foot. Defendant did not explain a treatment plan to Beronica; she did not speak English, and defendant communicated with her by gesturing.[1] Defendant would give her a gown, have her undress, except for her underwear, and lie on the bed in the treatment room. Defendant then massaged her with his hands and adjusted her bones. During a session one day in August 2010, defendant placed his hand on her right breast, squeezing and massaging it

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[1] Beronica had never attended school and worked from the time she was six years old. Beronica testified through an interpreter.

in one movement. Beronica felt uncomfortable and told him "no"; defendant stopped and said, "okay, okay." Defendant told her he was going to do an adjustment but he instead quickly left the room.

Though she continued to have pain, Beronica missed her next appointment because she felt uncomfortable alone in the treatment room with defendant. When defendant's office employee called about the missed appointment, Beronica agreed to come back for more treatment because she was still in pain and was afraid that she would lose insurance benefits if she delayed treatment by switching doctors. She did not mention defendant's inappropriate touching.

On August 31, 2010, when Beronica came in for her appointment, no employees were present, and defendant's last patients were just leaving. Defendant showed her into the treatment room, and as usual, she undressed, keeping her underwear and outer pants on, donned a gown, and lay on the treatment table, where defendant massaged her appropriately for about an hour. She began face-down, and when she turned face-up, defendant removed her outer pants. After Beronica closed her eyes in an effort to relax, she heard defendant breathing heavily and felt his presence close to her face. Defendant then put his left hand under her back, grabbed her left breast with his right hand and sucked her nipple.

Surprised and shocked, Beronica opened her eyes and said, "Oh doctor, you're going to get in trouble." Defendant said, "Okay," and moved to her feet, grabbed Beronica behind her knees and pulled her toward the foot of the bed, hurting her legs and spine. Defendant held Beronica's legs open, and the "terrible" pain in her back and legs prevented her from closing them. As defendant penetrated her vagina with his penis three times, Beronica felt nauseated and gagged. When defendant stopped, Beronica saw semen dripping from his penis.

Beronica dressed, and as she was leaving the office, defendant gave her the form she usually signed and told her to sign it. She signed it, left, and went to a nearby bakery that she frequented. The clerk saw that Beronica was near tears and appeared to be in shock; when Beronica told her that defendant had raped her, they called 911.

Los Angeles County Sheriff's Deputy Jonathan Cooper responded, and after speaking to Beronica at the bakery, he spoke to defendant at his office. Deputy Cooper informed defendant that a patient had accused him of sexually assaulting her by fondling and licking her breast. Defendant denied this and said that it was necessary for his patients to disrobe for medical treatment and he touched them with his hands during the treatment. When Deputy Cooper advised defendant that the victim would be taken to a hospital for a sexual assault examination, defendant's demeanor completely changed. Defendant exhaled, looked down, said, "That means you're going to get DNA," and admitted that he had fondled and licked the victim's breast, and had penetrated her vagina. Defendant admitted that he had not used a condom, and stated that he ejaculated outside her. Defendant claimed that the intercourse was consensual, the first time this happened, and that he initially lied because he was worried that his wife would find out about his indiscretion. In response to Deputy Cooper's inquiring whether a nurse had been in the office, defendant explained that it was standard practice for him to be alone with female patients because he had no employees other than a bookkeeper who worked one day per week.

Beronica had told the 911 operator about the penetration, but did not mention it to Deputy Cooper until he returned to the bakery. She then confirmed that defendant had penetrated her against her will and had ejaculated on her. Deputy Cooper testified that Beronica appeared calm, although her demeanor was consistent with the traumatized victims he had encountered in the past; she also appeared to be worried, shocked, and frightened. Beronica testified that she did not cry while speaking to the deputy because she had been taught by her family that she was not supposed to cry.

Beronica was taken to a hospital, where she was examined by a nurse. She suffered no cuts or bruises; however, there was some vaginal bleeding although she had finished menstruating two weeks earlier.

Maria S. (Maria) testified that she saw defendant two or three times for chiropractic treatment after suffering back and neck injuries in a car accident. In January 2002, Maria was alone with defendant in the treatment room as usual, lying face up on

the treatment bed in her bra and panties while defendant massaged her. Defendant's only employee had left the office for lunch. Maria's eyes were closed as he began by massaging her shoulders, but when she felt his hands massaging her breasts and nipples in a circular motion, she opened her eyes and saw defendant leaning over her as if he wanted to kiss her. Afraid and angry, Maria quickly got up, dressed, and left. Defendant did not say anything. Later, Maria told a friend what had happened and then reported defendant to the police. Since the police did not follow up, she took no further action. Maria admitted a prior theft conviction in 1998.

3. Defense Evidence

Detective Richard Walters, who interviewed Beronica a few days after the incident, testified that Beronica reported defendant having touched her breast to the woman from defendant's office who called Beronica about her missed appointment, and the woman replied that it must have been an accident.

Defendant testified that he had been a licensed chiropractor for about 19 years and had treated over 2,000 patients. In addition to spinal adjustment, treatment consisted of deep tissue massages of all areas of the body, but not female breasts or genitalia. Often the patient remained clothed or dressed in a robe or gown and underwear, and skin-to-skin contact was limited to occasions when defendant used lotion.

In 2002, when Maria was a patient, defendant's office was open three days per week and he had one employee, a female receptionist, as well as a female extern. Defendant denied touching or attempting to touch Maria's breasts with any sexual intent. He had known Maria's husband since 1995, and had rented space from him for several years.

Beronica first came in for treatment in 2005 and 2006, and returned in July 2010, due to neck pain, headaches, and sciatica. Defendant billed her insurance company for his services. Beronica's treatment included hot packs, ultrasound, and deep tissue massages. She never objected to wearing just a gown and her underwear during treatments. Defendant denied that he had ever intentionally touched Beronica's breasts prior to August 31, 2010.

When Beronica came for treatment on August 31, 2010, her demeanor or behavior was not different from the previous visit. Defendant knew she was in pain from sciatica. About 20 minutes into the massage, defendant became aroused when Beronica took a deep breath and sighed, which led to touching her breasts in a sexual manner. Defendant claimed that as he touched Beronica's breasts, he asked her whether it was "okay" and she replied "no problem." When defendant continued to massage "the area" Beronica seemed relaxed, and did not protest when he penetrated her.

To defendant's knowledge, Beronica was a willing participant in sexual intercourse, did not complain of pain, and did not appear to be shocked, scared, stunned, angry, or disgusted. Defendant admitted that he pulled Beronica's legs to the foot of the treatment table, but claimed that she helped by scooting to the edge and spreading her legs. Defendant claimed that during intercourse, Beronica masturbated and licked her finger. This went on for about 10 minutes before someone came to the office waiting room. Defendant stopped, went out while Beronica waited for him on the treatment table. When he returned they resumed having intercourse. Afterward, defendant gave Beronica tissue to clean herself, she dressed, signed the insurance form he gave her, and left the office smiling or laughing after straightening her hair.

The police arrived about an hour later. Defendant claimed that he lied to them because he did not want his wife to find out that he had an affair.

Susana Cazares worked for defendant from January 2008 until sometime in 2010. She testified that when defendant performed deep tissue massage on patients, he would leave the door of the treatment room open. Cazares did not call Beronica about her missed appointment and did not work the day of the incident. Beronica never complained to Cazares about defendant and never told her she felt uncomfortable around him.

Registered nurse and sexual assault examiner Mary Cabrera examined Beronica. Although she found no evidence of trauma, she testified that the lack of trauma did not indicate that a sexual assault did not occur. She found traces of blood, which she ascribed to remnants of menses.

Defendant's personal friend and professional colleague George Washington, testified that he had known defendant for more than five years, and had always known him to be an honest and truthful person.

DISCUSSION

I. Evidence of prior sexual assault

Defendant contends that the admission of Maria's testimony regarding the 2002 sexual assault violated Evidence Code section 352,[2] as well as his constitutional rights to due process and a fair trial.

As defendant acknowledges, evidence of a prior sexual offense is admissible in a sexual offense prosecution, subject to section 352, which requires the trial court to weigh the probative value of the evidence against its prejudicial effect. (See § 1108, subd. (a); *People v. Falsetta* (1999) 21 Cal.4th 903, 910-911, 918-919 (*Falsetta*).) The trial court's discretion under section 352 is very broad. (*People v. Wilson* (2008) 44 Cal.4th 758, 797.)

As the party claiming that the trial court abused its discretion, defendant bears the burden of demonstrating that the decision was irrational, arbitrary, or not "'grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.' [Citation.]" (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.) It is not enough to argue that reasonable people could disagree with the trial court. (*People v. Preyer* (1985) 164 Cal.App.3d 568, 573.) Nor is it sufficient to present facts which would merely support a different opinion. (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.) Further, a decision made under the ordinary rules of evidence does not ordinarily implicate constitutional rights. (*People v. Dement* (2011) 53 Cal.4th 1, 52.) As defendant did not make a constitutional argument below, we do not reach his due process claim unless and until he establishes error under state law. (*People v. Thornton* (2007) 41 Cal.4th 391, 443-444; *People v. Partida* (2005) 37 Cal.4th 428, 435-439.)

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[2] All further statutory references are to the Evidence Code, unless otherwise indicated.

Defendant contends that the trial court erred in finding the testimony more probative than prejudicial because the two incidents were so dissimilar and the assault on Maria was so inflammatory and cumulative as to evoke an emotional bias against defendant. Defendant argues that the only similarities shown by the evidence were that both women spoke only Spanish and he rubbed their breasts. Defendant argues that even the rubbing of the breasts was dissimilar because the evidence showed only an accidental rubbing of Maria's breasts.

We reject defendant's claim that the assault on Maria was accidental and thus dissimilar to the intentional assault on Beronica. Defendant's proximity to Maria's face and the massaging motion appeared to Maria to be sufficiently intentional and inappropriate to prompt her to report it to the police. In addition, when Maria quickly got up, dressed, and left feeling afraid and angry, defendant's silence showed a consciousness of guilt: he knew why she was upset and needed no explanation.

Defendant's argument relies primarily on a comparison with *People v. Harris* (1998) 60 Cal.App.4th 727 (*Harris*), in which the prior offense had occurred 23 years before, and the evidence of it was "inflammatory *in the extreme*," as it showed a "violent and perverse attack on a stranger," whereas the charged sexual offenses involved breaches of trust, not force. (*Id*. at p. 738.) The facts of *Harris* were extreme and entirely different from those in this case, where the charged crime was more inflammatory than the prior offense. The facts of *Harris* thus do not provide a helpful comparison.

Further, the *Harris* court relied on cases construing section 1101, which limits the use of character evidence in ways that section 1108 does not.[3] (*Harris*, *supra*, 60 Cal.App.4th at p. 737; see e.g. *People v. Ewoldt* (1994) 7 Cal.4th 380; *People v. Alcala* (1984) 36 Cal.3d 604.) Although a previous sexual offense might not be sufficiently

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[3] Section 1101 provides, in relevant part: "Except as provided in this section and . . . 1108, . . . evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

similar to the current offense to be admissible under section 1101, a trial court would not abuse its discretion by admitting evidence of it under section 1108, so long as it was not entirely dissimilar. (*People v. Loy* (2011) 52 Cal.4th 46, 62-63.)

Here the trial court found that the evidence of defendant's prior sexual assault on Maria was sufficiently similar to the current offense to suggest a modus operandi.[4] Both victims were defendant's patients, both having sought treatment after suffering injuries. Both were undressed and alone in the office with defendant, lying on the treatment table. Beronica was unsophisticated and spoke almost no English; Maria spoke limited English. Defendant began his assault on both victims by massaging one or both breasts. Such facts supported a finding of modus operandi and were highly probative of Beronica's claim that defendant assaulted her. (See *People v. Ewoldt, supra*, 7 Cal.4th at pp. 400-401.)

Indeed, the only dissimilarity in the two accounts is that Maria did not return and defendant did not go on to rape her -- facts which contradict defendant's claim that her testimony was unduly inflammatory or cumulative. We conclude that defendant has failed to show that the trial court abused its discretion in admitting the evidence. Defendant's due process claim thus fails as well. (See *People v. Thornton*, *supra*, 41 Cal.4th at pp. 443-444.)[5]

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[4] Evidence of modus operandi may provide exception to the exclusion of character evidence under section 1101. (See *People v. Diaz* (1992) 3 Cal.4th 495, 562.)

[5] In his reply brief, defendant acknowledges that the California Supreme Court has held that section 1108 does not violate the federal due process standards (*Falsetta*, *supra*, 21 Cal.4th at pp. 916-918), but seeks reversal on that ground to preserve the argument for review. We do not consider points raised for the first time in a reply brief. (*People v. Adams* (1990) 216 Cal.App.3d 1431, 1441, fn. 2.) In any event, we are bound by our high court's holding in *Falsetta*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

II. CALJIC No. 2.50.01

Defendant contends that portions of CALJIC No. 2.50.01, read to the jury in this case, incorrectly stated the law and violated his right to due process. The trial court instructed the jury as follows (with the challenged language in italics):

> "Evidence [has] been introduced for the purpose of showing that the defendant engaged in a sexual offense other than that charged in this case. . . . *If you find that the defendant committed a crime of sexual offense you may, but are not required to, infer that the defendant had a disposition to commit sexual offenses. If you find that the defendant had this disposition, you may but are not required to, infer that he was likely to commit and did commit the crime of which he is accused.* However, if you find by a preponderance of the evidence that the defendant committed a prior sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crime. *If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider along with all other evidence in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime. Unless you are otherwise instructed you must not consider this evidence for any other purpose*."

Defendant concedes that having considered the identical language in CALJIC No. 2.50.01, our Supreme Court has held that it correctly states the law and does not violate due process. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1012, 1016; see also *People v. Loy*, *supra*, 52 Cal.4th at pp. 74-76.) Defendant states that he has raised the argument for purposes of preserving the issue for federal review and acknowledges that this court must follow the Supreme Court's holdings. (*Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at p. 455.) We thus reject defendant's challenge to the same language of CALJIC No. 2.50.01 approved by our high court.

III. CALJIC No. 2.21.2

Defendant contends that the trial court erred in reading CALJIC No. 2.21.2 to the jury because it was not supported by the evidence and thus lessened the prosecution's burden of proof. The jury was instructed with CALJIC No. 2.21.2, as follows:

> "A witness who is willfully false in one material part of his or her testimony is to be distrusted in others. You may reject the whole testimony

> of a witness who willfully has testified falsely as to a material point, unless from all of the evidence you believe the probability of truth favors his or her testimony in other particulars."

As respondent observes and defendant concedes, defendant did not object to the instruction. A failure to object forfeits review of a contention that an instruction is unsupported by substantial evidence although it correctly states the law. (*People v. Bolin* (1998) 18 Cal.4th 297, 326.) Defendant argues that the contention should be reached despite his failure to object because his substantial rights were affected by the unwarranted reading of CALJIC No. 2.21.2. In any event, we find no error.

As defendant concedes, false-in-part instructions have "'been repeatedly approved [in this state] as a correct statement of the law, appropriately given where there is an evidentiary basis to support it. [Citations.]' [Citation.]" (*People v. Turner* (1990) 50 Cal.3d 668, 698-699.) When the language of such an instruction is neutral, does not focus attention on a particular witness, and is supported by the evidence, it does not lessen the prosecution's burden of proof. (*Id*. at p. 699.)

Sex crimes usually involve conflicting versions of the event, requiring the jury to make difficult credibility determinations. (*Falsetta, supra*, 21 Cal.4th at p. 915.) In determining whether an instruction is supported by substantial evidence, we do not resolve issues of credibility. (*People v. Tufunga* (1999) 21 Cal.4th 935, 944.) Defendant concedes that there were many conflicts here, particularly between his version and Beronica's version of the events. Instructing the jury that "[a] witness false in a material part of his testimony is to be distrusted in others" simply "'explain[s] to a jury one of the tests they may use in resolving a credibility dispute.' [Citation.]" (*People v. Beardslee* (1991) 53 Cal.3d 68, 94-95.) Defendant's three-page summary of the conflicting testimony establishes the value of such a test.

Defendant relies on dictum in *People v. Lescallett* (1981) 123 Cal.App.3d 487, 493 (*Lescallett*), recommending that a false-in-part instruction be avoided if it appears to be directed primarily at the defendant's exculpatory evidence. He contends that CALJIC No. 2.21.2 was aimed only at defense witnesses because "there was no indication of

willfully false testimony" and the only witnesses with a motive to lie were defendant and his employee Cazares. The California Supreme Court has rejected *Lescallett*'s dictum to the extent that it suggests that neutral false-in-part instructions should be excluded because the jury might apply them to the defendant's testimony. (E.g., *People v. Beardslee*, *supra*, 53 Cal.3d at pp. 94-95; *People v. Turner*, *supra*, 50 Cal.3d at p. 699; *People v. Allison* (1989) 48 Cal.3d 879, 913-916.) "'The weaknesses in [the defendant's] testimony should not be ignored or given preferential treatment not granted to the testimony of any other witness . . . . [A] defendant who elects to testify in his own behalf is not entitled to a false aura of veracity. [Citations.]'" (*People v. Beardslee*, at p. 95; see also *People v. Turner*, at p. 699; *People v. Allison*, at p. 896, fn. 7.)

The California Supreme Court's reasoning applies equally here. We conclude that the sharp conflict in defendant's and Beronica's versions of the events provided a sufficient evidentiary basis for instructing with CALJIC No. 2.21.2.

IV. Upper Term

Defendant contends that the trial court abused its discretion in imposing the upper term of imprisonment because it impermissibly considered elements of the crime as aggravating factors. A fact that is an element of the crime may not be used to impose the upper term. (*People v. Sandoval* (2007) 41 Cal.4th 825, 848; Cal. Rules of Court, rule 4.420(d).) As defendant has not demonstrated that he raised these issues in the trial court, they are not preserved for review. (See *People v. Scott* (1994) 9 Cal.4th 331, 351-353.) Regardless, defendant's contentions have no merit.

The aggravating factors found by the trial were as follows: (1) defendant demonstrated callousness by choosing a patient as his victim and having unprotected sex knowing he had Hepatitis C;[6] (2) the victim was particularly vulnerable due to her

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[6] In a footnote, defendant suggests that his psychologist's report, which includes defendant's admission that he was infected with Hepatitis C, was not evidence of that fact. We disagree, as defendant submitted the report to the court. (See *People v. Harrison* (2005) 35 Cal.4th 208, 237 [defense invited error in admitting hearsay evidence].) Moreover, defendant did not object to the prosecution's reference to his illness or to the trial court's mention of it as a basis to find callousness.

physical condition and pain, her limited education, inability to speak English, and lack of sophistication; (3) defendant took advantage of a position of trust; and (4) other offenses were committed but not charged.

It is difficult to discern from defendant's stream-of-consciousness argument what reasons underlie his assertion that each of the aggravating circumstances necessarily includes an element of the crime of rape. Without citation to authority or even a recitation of the elements of rape, defendant suggests that a rapist cannot be callous unless the victim is physically injured, but he does not explain just how this would make callousness an element of rape. With regard to the vulnerability of the victim defendant appears to contend that because rape always involves a victim and because victims are by their nature vulnerable, vulnerability must be an element of rape. With regard to taking advantage of a position of trust, defendant contends that he could not have been convicted of this offense if he had not taken advantage of his position, because his "status as a chiropractor and the victim's status as a patient were already elements of the offense." Finally, with regard to uncharged offenses, defendant argues that the factor was improperly considered because he was not charged with his earlier inappropriate touching and the evidence of the earlier offense was insubstantial. He does not explain how this circumstance was an element of rape.

The rape statute makes no mention of trust, confidence, callousness, other crimes, or the vulnerability of the victim. (Pen. Code, § 261.) Indeed, defendant does not demonstrate by any rational argument or citation to authority that any of the aggravating factors was an element of rape.[7] Although not stated as a discreet contention under a separate heading, defendant's true complaint appears to be that the trial court did not give

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[7] "Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: [¶] . . .[¶] (2) Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." (Pen. Code, § 261, subd. (a)(2).)

sufficient weight to the circumstances offered in his sentencing memorandum as mitigating factors.[8] This contention also lacks merit.

"'Sentencing courts have wide discretion in weighing aggravating and mitigating factors [citations], and may balance them against each other in qualitative as well as quantitative terms.' [Citation.]" (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) The court's broad discretion includes the authority to disregard the other circumstances without stating reasons for doing so. (*Ibid*.)

Here the sentencing record establishes that trial court properly considered the relevant criteria, including the circumstances defendant listed in his sentencing memorandum and the letters and statements of family and friends, but found only one of them to be mitigating: the absence of a prior criminal record. In his sentencing memorandum, defendant admitted that the victim was vulnerable and that he took advantage of a position of trust or confidence to commit the offense; and he admitted that these were circumstances in aggravation. Indeed, the victim was particularly vulnerable due to her recent surgery and pain, and as her chiropractor, defendant understood her vulnerability. Such factors were properly considered by the court. (See Cal. Rules of Court, rule 4.421(a)(3), (a)(4).) Further, the crime involved a threat of great bodily harm. (See *People v. Adames* (1997) 54 Cal.App.4th 198, 210 [infection of victim with sexually transmitted disease is great bodily injury].) The trial court thus appropriately found that defendant's knowledge of his condition while having forcible unprotected sex disclosed a high degree of callousness. (See Cal. Rules of Court, rule 4.421(a)(1).)

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8 The circumstances included defendant's long-standing career without discipline, his lack of a prior criminal history, his age (59), his remorse, his mistaken belief that he acted with consent, the absence of any future opportunity to breach the trust of a patient, and a claim that defendant's actions were the result of "extremely deprived judgment" on his part. The sentencing memorandum included the report of a psychologist who found him amenable to treatment. Defendant also points to the many letters of support written to the court on his behalf, and the statements of his wife, niece, sister-in-law, brother, colleague, and defendant, as well as those of his victims.

So long as a single aggravating factor is proper, it will justify the imposition of the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728; *People v. Lamb*, *supra*, 206 Cal.App.3d at p. 401.) Here, as the trial court recited several proper factors, we find no abuse of discretion in imposing the upper term.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST