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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JUAN ALCIDES LOVOS, Defendant and Appellant.	B234845 (Los Angeles County Super. Ct. No. BA376197)

APPEAL from a judgment of the Superior Court of Los Angeles County. Monica Bachner, Judge. Affirmed.

Melanie K. Dorian, 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 Timothy M. Weiner, Deputy Attorneys General, for Plaintiff and Respondent.

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Juan Alcides Lovos appeals from the judgment entered upon his convictions by jury of attempted murder (Pen. Code, §§ 664, 187, subd. (a), count 1)[1] and infliction of corporal injury on a spouse (§ 273.5, count 2). The jury found to be true the allegations that appellant personally used a deadly or dangerous weapon (§ 12022, subd. (b)(1)) and personally inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)). The trial court sentenced appellant on count 1 to the upper term of nine years, plus one year for the deadly weapon enhancement and the upper term of five years for the great bodily injury enhancement. Sentence on count 2 was imposed and stayed. Appellant contends that (1) Evidence Code section 1109 violates equal protection and the due process right to a fair trial, and (2) this case must be remanded for resentencing because imposition of the upper term was an abuse of discretion and violated his rights under the federal Constitution.

We affirm.

FACTUAL BACKGROUND

Appellant lived with his wife, Silvia H. (Silvia), and their two sons, Esteban L. (Esteban) and Favio L. On September 21, 2010, near 5:00 p.m., Silvia arrived home from work and saw appellant and Esteban outside their apartment. She approached appellant to hug him and smelled alcohol on his breath. They spoke for five minutes, during which she asked why he had been drinking so early in the week. They began "arguing a bit," appellant accusing Silvia of having an affair. She did not respond but went into their apartment. According to Esteban, in the past, appellant had made similar false accusations of infidelity, usually when he was under the influence of drugs or alcohol.

Inside the apartment, Silvia locked the doors to avoid an argument with appellant, whom she was concerned might be drunk. She heard him knocking on the door and ignored him. Ten minutes later, he was able to enter the apartment. Silvia

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

saw him inside the front door, where he produced a knife he carried and told her that no one was going to save her this time.

Appellant approached Silvia, knocking her to the floor. He stabbed her twice in the stomach area. He tried to stab her two more times, but she put up her hands to defend herself, stopped him, and attempted to grab his knife so he would not stab her any more. She received cuts on the hands in the process. Silvia denied that she tried to stab appellant with the knife with which she was cooking.

Silvia was eventually able to run outside bleeding and call for help. Appellant hurriedly left. Silvia was taken to the hospital where she had emergency surgery and remained hospitalized for four days. She suffered permanent scarring.

Later that evening, officers found appellant hiding, appearing to be intoxicated. When he was taken into custody, he said that he "didn't regret what he did" because "he had caught his wife cheating on him" and that "if he had to do it again, he would." Appellant did not appear to the officer to be remorseful.

Appellant testified in his own defense that he had consumed both cocaine and alcohol on the day of the charged incident. He claimed that after speaking outside with Silvia, he left for a short time. When he returned, he saw someone exit his apartment and jump over a fence. Appellant suspected Silvia was having an affair. He went inside, saw the bed disheveled and confronted Silvia about his suspicions. Silvia grabbed a knife and said, "Yeah, faggot. What of it?" Appellant drew his knife and held it out so Silvia would "be afraid with her knife." There was a struggle and he was cut. After the struggle, his head "got all foggy" and everything went dark. From that point, he had no recollection of events or how he got to the location where he was arrested.

When asked at trial whether, in his fury, he had wanted to kill his wife, he responded, "I don't remember in that moment. I don't know." Later, during his questioning, he denied that he made that statement. But before trial, he had made that

statement to Detectives Michelle Pagan and her partner, Detective Gutierrez, who had interviewed him before his arrest.[2]

DISCUSSION

I. Admission of prior incident of domestic violence

A. Background

The People filed a pretrial motion to admit evidence of a 2003 incident of domestic violence by appellant against Silvia, in which, according to the prosecutor, appellant confronted her at her place of work, pulled her hair and punched her with a closed fist, finally pulling a knife and threatening to kill her. Appellant objected, arguing that it was more prejudicial than probative under Evidence Code section 352 and too remote in time. The prosecutor argued that because it occurred within 10 years of the charged incident, there was no question whether it was relevant. She further argued that it demonstrated a pattern by appellant threatening to kill Silvia, accusing her of cheating and using a knife. The trial court ruled the evidence was more probative than prejudicial and granted the People's motion.

Silvia then testified that in 2003, appellant called her at work and asked her to meet him outside to give him some keys. When she came outside, he grabbed her by the hair and punched her with a closed fist on the left side of her face. Silvia denied that appellant had pulled a knife on her or made any threats or accusations of infidelity on that day.

B. Contention

Appellant contends that Evidence Code section 1109,[3] which allows the admission of prior acts of domestic violence as propensity evidence, violates his due

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[2] Appellant also told Detectives Pagan and Gutierrez that he suspected Silvia of having multiple affairs and had followed her earlier on the day of the incident. He admitted telling paramedics that he did not regret what he had done to Silvia, repeating that statement to the detectives.

[3] Evidence Code section 1109 provides in pertinent part: "(a)(1) Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is

process right to a fair trial and equal protection. He argues that the Evidence Code section 352 standards, which ameliorate unfairness in admission of propensity evidence, are too lax to protect against erroneous admission of prior domestic violence incidents. He also argues that Evidence Code section 1109 violates equal protection because it allows admission of prior domestic violence offenses to show propensity to commit the charged domestic violence offense, but does not allow such evidence for all other offenses.[4] This contention is meritless.

C. Purpose and application of Evidence Code section 1109

The general rule against evidence of criminal propensity, as embodied in Evidence Code section 1101, subdivision (a), is a longstanding one, designed to insure that a defendant is convicted for what he has done, not for who he is. (*People v. Falsetta* (1999) 21 Cal.4th 903, 913 (*Falsetta*).) In the mid-1990's, the Legislature carved out exceptions to this general rule for defendants charged with sexual offenses (Evid. Code, § 1108) and with acts of domestic violence (Evid. Code, § 1109). In each case, other similar misconduct was made admissible because of the critical need for this evidence "'given the serious and secretive nature of [these] crimes and the often resulting credibility contest at trial.'" (*Falsetta*, *supra*, at p. 911.)

However, both the Legislature and the courts have been mindful of the potency of such evidence and risk that a jury might be tempted to convict a defendant for his past conduct although his current charges have not been proven beyond a reasonable doubt, thereby implicating due process. To guard against this risk, the Legislature

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accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by [Evidence Code] Section 1101 if the evidence is not inadmissible pursuant to [Evidence Code] Section 352. . . . [¶] . . . [¶] (e) Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice."

[4] Evidence Code section 1108 similarly allows prior sex offenses to show propensity regarding a sex charge and Evidence Code section 1109, subdivision (a)(2) allows prior elder abuse to show propensity regarding an elder abuse charge.

expressly stated that the admission of evidence of other misconduct is permissible only if it "is not inadmissible pursuant to [Evidence Code] section 352." (Evid. Code, §§ 1108, subd. (a), 1109, subd. (a)(1).)

D. Constitutionality of Evidence Code section 1109

1. Due process

"To establish that [Evidence Code] section 1109 . . . violates due process, 'defendant must carry a heavy burden. The courts will presume a statute is constitutional unless its unconstitutionality clearly, positively, and unmistakably appears; all presumptions and intendments favor its validity. [Citations.] In the due process context, defendant must show that [Evidence Code] section [1109] offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. [Citations.] The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair.' [Citation.]" (*People v. Williams* (2008) 159 Cal.App.4th 141, 146.)

While our Supreme Court has not ruled on the constitutionality of Evidence Code section 1109, it has considered the constitutionality of parallel Evidence Code section 1108,[5] which addresses prior sex offenses. The Supreme Court concluded in *Falsetta* that Evidence Code section 1108 does not violate due process. (*Falsetta, supra*, 21 Cal.4th at p. 922.) *Falsetta* explained: "In summary, we think the trial court's discretion to exclude propensity evidence under [Evidence Code] section 352 saves [Evidence Code] section 1108 from defendant's due process challenge . . . By subjecting evidence of uncharged sexual misconduct to the weighing process of [Evidence Code] section 352, the Legislature has ensured that such evidence cannot be

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[5] Evidence Code section 1108 provides in pertinent part: "(a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by [Evidence Code] Section 1101, if the evidence is not inadmissible pursuant to [Evidence Code] Section 352."

used in cases where its probative value is substantially outweighed by the possibility that it will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury. ([Evidence Code] § 352.) This determination is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence. [Citation.] *With this check upon the admission of evidence of uncharged sex offenses in prosecutions for sex crimes, we find that* [*Evidence Code*] *section 1108 does not violate the due process clause.'*" (*Falsetta, supra*, at pp. 917–918.)

Defendants are also protected from the improper use of criminal propensity evidence because at a defendant's request the jury can be instructed in accordance with CALCRIM No. 852 that, "If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of [the charged offense]." "This instruction will help assure that the defendant will not be convicted of the charged offense merely because the evidence of his other offenses indicates he is a 'bad person' with a criminal disposition." (*Falsetta, supra*, 21 Cal.4th at p. 920.)

We find *Falsetta's* due process reasoning applicable to Evidence Code section 1109 because Evidence Code sections 1108 and 1109 can properly be read together as complementary portions of the same statutory scheme. "A bill analysis prepared for those who voted to enact [Evidence Code] section 1109, states that, '[t]his section is modeled on the recently enacted Evidence Code 1108, which accomplishes the same for evidence of other sexual offenses, in sexual offense prosecutions.' (Assem. Com. on Public Safety, Analysis of Sen. Bill No. 1876 (1995–1996 Reg. Sess.) June 25, 1996, p. 3.) The analysis goes on to indicate, 'Proponents argue that in domestic violence cases, as in sexual offense cases, special evidentiary rules are justified because of the distinctive issues and difficulties of proof in this area. Specifically, evidence of other acts is important in domestic violence cases because of the typically repetitive nature of domestic violence crimes, and because of the acute difficulties of

proof associated with frequently uncooperative victims and third-party witnesses who are often children or neighbors who may fear retaliation from the abuser and do not wish to become involved.'" (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1333; see also *People v. Johnson* (2000) 77 Cal.App.4th 410, 420.)

Though the Supreme Court has not decided whether Evidence Code section 1109 violates due process, several appellate courts have concluded that it does not. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310–1313 (*Jennings*) [Evidence Code Section 1109 not violative of due process or equal protection. "[T]he constitutionality of [Evidence Code] section 1109 under the due process clauses of the federal and state constitutions has now been settled"]; *People v. Brown, supra,* 77 Cal.App.4th at pp. 1331–1334; *People v. Johnson, supra,* 77 Cal.App.4th at p. 420; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1028 [rejecting claim that Evidence Code section 1109 violates due process because it dilutes the requirement of proof beyond a reasonable doubt]; *People v. Price* (2004) 120 Cal.App.4th 224, 240; *People v. Cabrera* (2007) 152 Cal.App.4th 695, 704; *People v. James* (2000) 81 Cal.App.4th 1343, 1352 ["the constitutionality of [Evidence Code] section 1109 is supported by the same rationale that sustains [Evidence Code] section 1108"]; *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095–1096.)

Appellant acknowledges that, relying on *Falsetta*, appellate courts have rejected the due process challenge to Evidence Code section 1109 that he makes here. He argues, however, that *Falsetta* must be reconsidered in light of the Ninth Circuit opinion in *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769 (*Garceau*), reversed on other grounds in *Woodford v. Garceau* (2003) 538 U.S. 202, which held that using other crimes evidence to infer propensity violates due process. We are not bound by opinions of lower federal courts (*In re Douglas* (2011) 200 Cal.App.4th 236, 248), but are bound by the determination of the California Supreme Court in *Falsetta* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455). There is nothing in *Garceau* which leads us to believe that the issues presented here do not fall clearly within *Falsetta's* determinations.

2. Equal protection

Neither *Falsetta* nor any other California Supreme Court decision has decided whether California Evidence Code sections 1108 or 1109 violate equal protection. Although the Supreme Court in *Falsetta* was not faced with an equal protection challenge to Evidence Code section 1108, it cited with approval *People v. Fitch* (1997) 55 Cal.App.4th 172, 184–185 (*Fitch*), which did reject an equal protection challenge to Evidence Code section 1108, stating: "*Fitch* likewise rejected the defendant's equal protection challenge, concluding that the Legislature reasonably could create an exception to the propensity rule for sex offenses, because of their serious nature, and because they are usually committed secretly and result in trials that are largely credibility contests. [Citation.] As *Fitch* stated, 'The Legislature is free to address a problem one step at a time or even to apply the remedy to one area and neglect others. [Citation.]' [Citations.]" (*Falsetta, supra*, 21 Cal.4th at p. 918.)

In our opinion, the *Fitch* equal protection analysis applies equally to admission of evidence of a defendant's commission of prior acts of domestic violence under Evidence Code section 1109. "'"The concept of equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment."'" (*People v. Applin* (1995) 40 Cal.App.4th 404, 409.) Consequently, "'[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' [Citations.]" (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199.)

On its face, Evidence Code section 1109 treats all defendants charged with domestic violence equally; the only distinction it makes is between such domestic violence defendants and defendants accused of other crimes. As explained in *Jennings*, in rejecting an equal protection challenge to Evidence Code section 1109, "Like the sex crimes examined by the court in *Fitch*, domestic violence is quintessentially a secretive offense, shrouded in private shame, embarrassment and ambivalence on the part of the victim, as well as intimacy with and intimidation by the

perpetrator. The special relationship between victim and perpetrator in both domestic violence and sexual abuse cases, with their unusually private and intimate context, easily distinguishes these offenses from the broad variety of criminal conduct in general. Although all criminal trials are credibility contests to some extent, this is unusually—even inevitably—so in domestic and sexual abuse cases, specifically with respect to the issue of victim credibility. The Legislature could rationally distinguish between these two kinds of cases and all other criminal offenses in permitting the admissibility of previous like offenses in order to assist in more realistically adjudging the unavoidable credibility contest between accuser and accused. The facts that other crimes such as murder and mayhem may be more serious and that credibility contests are not confined to domestic violence cases do not demonstrate the absence of the required rational basis for the Legislature's distinction between these crimes." (*Jennings*, *supra,* 81 Cal.App.4th at p. 1313; see also *People v. Price*, *supra,* 120 Cal.App.4th at pp. 240–241 [rejecting equal protection challenge to Evidence Code section 1109].)

II. Imposition of upper term sentence

A. Background

Appellant's criminal record consisted of a 1992 conviction of misdemeanor driving under the influence and a drug possession charge for which he successfully completed deferred entry of judgment in 2007. He had abused drugs and alcohol on the day of the charged incident.

At the sentencing hearing, appellant argued that his insignificant prior record, his intoxication from drugs and/or alcohol at the time of the incident, and his prior successful performance on probation were all factors in mitigation that should have subjected him to the low term. The trial court thought otherwise. It indicated that it had reviewed the probation report and sentencing memoranda filed by the parties. It found no mitigating circumstances with respect to the crime, other than a minimal criminal record. The trial court found that appellant's voluntary intoxication was not an "unusual mental or physical condition" that significantly reduced his culpability,

and that regardless, the mitigating factors were outweighed by "many aggravating circumstances," including infliction of great bodily injury, great violence was involved, the defendant was armed with a weapon, the victim was vulnerable because she was alone, and the crime involved planning. The trial court considered the same factors in imposing the upper term on the great bodily injury enhancement, stating that the defendant was engaged in violent conduct indicating that he presented a serious danger to society.

Accordingly, the trial court sentenced appellant to the upper term of nine years on the attempted murder count plus one year for the deadly weapon enhancement and the upper term of five years for the great bodily injury enhancement. It sentenced him to the upper term of four years on count 2, plus six years for the same enhancements on count 1, staying the sentence on count 2 pursuant to section 654.

B. Contentions

Appellant contends that the trial court abused its discretion in sentencing him to the upper term, violating his federal constitutional rights and requiring remand for resentencing. He argues that the trial court failed to take into account the mitigating circumstances and based the upper term on findings that were also the basis of the enhancements or were found by the trial court and not found to be true by the jury. Finally, appellant argues that there is insufficient evidence to support the vulnerability factor. We conclude that while all of the factors considered by the trial court in imposing the upper term may not have been proper, there was ample reason to impose that term, and it is not reasonably probable that the trial court would modify the sentence if we were to remand for resentencing.

C. Upper term sentencing

Section 1170, subdivision (b) provides that when there are three possible terms of imprisonment for the commission of a crime, "the choice of the appropriate term shall rest within the sound discretion of the court." (*People v. Frandsen* (2011) 196 Cal.App.4th 266, 278; see also *People v. Sandoval* (2007) 41 Cal.4th 825, 843–844.) Section 1170, subdivision (c) requires the court to "state the reasons for its sentence

choice on the record at the time of sentencing. . . ." "Sentence choices that generally require a statement of a reason include [¶] . . . [¶] . . . (4) Selecting one of the three authorized prison terms referred to in section 1170(b) for either an offense or an enhancement." (Cal. Rules of Court, rule 4.406(b).)

"In determining the appropriate term, the court may consider the record in the case, the probation officer's report, other reports, including reports received pursuant to Section 1203.03, and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing." (§ 1170, subd. (b); Cal. Rules of Court, rule 4.420(b).)

The trial court imposed the upper term on count 1 and the great bodily injury enhancement based upon its findings in aggravation that (1) appellant inflicted great bodily injury, (2) great violence was involved, (3) appellant was armed with a weapon, (4) the victim was vulnerable because she was alone, and (5) the crime involved planning, sophistication and professionalism. California Rules of Court, rule 4.421(a) and (b) sets forth circumstances in aggravation relating to the crime and to the defendant, which includes all of the aggravating factors found by the trial court. California Rules of Court, rule 4.423(a) and (b) sets forth some factors in mitigation, including that the defendant had no prior record or insignificant record of criminal conduct, the defendant suffered from a mental or physical condition that significantly reduced culpability and the defendant's prior performance on probation was satisfactory. The enumeration in the rules of some criteria for making the discretionary sentencing decisions does not prohibit application of other criteria "reasonably related to the decision being made." (Cal. Rules of Court, rule 4.408.) The factors in aggravation or in mitigation are to be established by a preponderance of the evidence. (*Cunningham v. California* (2007) 549 U.S. 270, 288 (*Cunningham*).)

We agree with appellant that factor numbers 1 and 3 could not properly be considered in imposing the upper term. Section 1171, subdivision (b) provides that the sentencing court may not rely on the same fact to impose both a sentence enhancement

and the upper term. (See also *People v. Bowen* (1992) 11 Cal.App.4th 102, 105; Cal. Rules of Court, rule 4.420(c) ["a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so"]; see also § 1170, subd. (b).) The trial court imposed the personal use of a deadly weapon enhancement. It was therefore improper to impose the upper term based upon the fact that appellant used a deadly weapon in his assault. Similarly, the trial court imposed the great bodily injury enhancement, and, hence that fact was improperly used as a basis for imposing the upper term.

However, a preponderance of the evidence justified the true findings with respect to the other three aggravating factors found by the trial court. The trial court found that appellant's crime involved great violence. But appellant argues that "[w]hile Silvia did sustain numerous injuries, it cannot be said that a reasonable jury would have found this to constitute 'great violence, . . .'" The question is not whether a jury would likely have made such a finding, but rather whether there was a preponderance of the evidence to support the trial court's finding. There was.

Appellant attacked Silvia in the house, knocking her to the floor. He then engaged in a life-and-death struggle with her, repeatedly stabbing her with the knife. He stabbed her twice in her stomach area and tried to stab her additional times, failing only because Silvia used her hands to divert the blows, in the process suffering hand wounds from the knife. Blood spatter was on the floor, and Silvia was able to run out of the house bleeding. Had she not done so, appellant might have succeeded in stabbing her to death. It is hard to see how such a brutal physical attack can be viewed as anything but great violence.

The other aggravating factors were similarly supported by a preponderance of the evidence. The trial court found that Silvia was vulnerable, and appellant's attack was planned. Appellant believed that she was cheating on him. He had followed her car around the morning of the charged incident. When she came home and appellant was standing with Esteban, appellant accused her of cheating. However, he did not

attack her then, when his son was present, but waited until she was alone in their apartment, warning her that "no one was going to save [her] this time." The trial court could have justified the upper term on any one of the three properly found factors as the upper term can be supported by a single factor in aggravation. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433; *People v. Castorena* (1996) 51 Cal.App.4th 558, 562, fn. 10.)

Appellant argues that the trial court failed to take into account the mitigating factors of appellant's insignificant criminal record and that substance abuse was a major factor in the commission of the current offenses. We disagree. In determining the appropriate sentence to select for a particular defendant, California Rules of Court, rule 4.420 requires the trial court to weigh factors in aggravation or mitigation. Weighing the factors is not the same as counting them, as the trial court can assign such value to each factor as is appropriate. (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401 ["'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.]"]) It is clear that the brutality of the attack and the danger such conduct presents to society outweighed the single mitigating factor found by the court.

Furthermore, "'[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. . . . In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.'" (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977–978.) It is presumed that it considered all relevant criteria unless the record affirmatively demonstrates otherwise (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 835–836) and that it applied the correct statutory and case law. (*People v. Jacobo* (1991) 230 Cal.App.3d 1416, 1430 [""It is a basic presumption indulged in by reviewing courts that the trial court is presumed to have known and applied the correct statutory and case law in the exercise of its official duties""].)

Nothing in the record suggests that the trial court failed to take into account appellant's minimal criminal record, which the court specifically mentioned in its ruling. We also find the trial court's conclusion that voluntary intoxication is not a mitigating factor to be a reasonable one.

From the foregoing analysis, it is clear that the trial court gave proper reasons for its sentencing choice. That being so, a reviewing court will set aside the sentence only if it is "reasonably probable [that] the [trial] court would have chosen a lesser sentence had it known that some or all of the reasons for selecting the upper term were improper." (*People v. Price* (1991) 1 Cal.4th 324, 492; *People v. Avalos* (1984) 37 Cal.3d 216, 233.) It is not reasonably probable that the trial court would change the sentence here. Even eliminating the aggravating factors that were elements of the enhancements, the aggravating factors still outnumbered the factors in mitigation. The principal factor was the brutality of appellant's attack. Appellant repeatedly stabbed Silvia. Further, there were numerous other factors in aggravation not even mentioned by the trial court, which it could consider on remand. For example, there was evidence that this was not the first time appellant had beaten Silvia. In 2003, he pulled her hair and punched her in the face. He was also particularly cruel and callous, telling Silvia before his brutal attack that no one was going to save her this time. While the trial court did not articulate these factors, we presume it was aware of and considered all of the facts.

D. Aggravating factors did not have to be found by jury

Citing *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), appellant argues that the aggravating factors, other than those that were elements of the enhancements that were considered by the trial court were improper because they were not found true by the jury. We conclude that under more recent authorities there is no requirement that aggravating factors used to impose the upper term be found to be true by the jury beyond a reasonable doubt.

In *Apprendi*, the United States Supreme Court held that a defendant has a constitutional right to have the jury, not the trial judge, decide all facts, except for prior convictions, that increase the penalty for a crime beyond the prescribed statutory maximum. (See also *Blakely v. Washington* (2004) 542 U.S. 296, 301; *Cunningham, supra*, 549 U.S. at pp. 288–289.) In *Cunningham,* the high court concluded that because California's DSL "authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." (*Cunningham, supra*, at p. 293, fn. omitted.) The court found the middle term in California's DSL, which was the presumptive term absent aggravating or mitigating factors, to be the relevant statutory maximum for the purpose of applying *Apprendi* and its progeny.

In response to *Cunningham,* the California Legislature passed Senate Bill No. 40, which amended section 1170, subdivision (b) so as to eliminate the presumptive middle term in the triad of sentencing options available. Instead, section 1170 then provided that the trial court has discretion to select the upper, middle or lower term. Because the upper term sentence is now the statutory maximum, factors which a trial court may rely upon in imposing the upper term need not be decided by a jury beyond a reasonable doubt because they do not increase the penalty beyond the statutory maximum. (See *People v. Sandoval, supra,* 41 Cal.4th at pp. 843–844.)[6]

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[6] Prior to January 1, 2010, section 1170.1, subdivision (b), pertaining to selection of the term of an enhancement, suffered from the identical constitutional infirmities identified by the United States Supreme Court in *Cunningham* and was similarly unconstitutional. (*People v. Lincoln* (2007) 157 Cal.App.4th 196, 205.) As a result, effective January 1, 2010, the Legislature amended section 1170.1 to comply with the Sixth Amendment by providing: "If an enhancement is punishable by one of three terms, the court shall, in its discretion, impose the term that best serves the interest of justice, and state the reasons for its sentence choice on the record at the time of sentencing."

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
DOI TODD

_____,J.
CHAVEZ