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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. LAWRENCE LAMONT CALHOUN et al., Defendants and Appellants.	D042645 (Super. Ct. Nos. SCD170791, SCD170276)

APPEALS from judgments of the Superior Court of San Diego County, David J. Danielsen, Judge. Judgments affirmed in part, reversed in part and remanded.

Greg M. Kane, under appointment by the Court of Appeal, for Defendant and Appellant Lawrence Lamont Calhoun.

Anthony J. Dain, under appointment by the Court of Appeal, for Defendant and Appellant George Kenneth Waller, Jr.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Douglas C. S. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Lawrence Lamont Calhoun appeals a judgment after the jury found him guilty on two counts of vehicular manslaughter with gross negligence (Pen. Code, § 192, subd. (c)(1)) and found true the related allegations that he fled the scene of the crime after committing those offenses (Veh. Code, § 20001, subd. (c)).[1] Although Calhoun does not challenge his Penal Code section 192, subdivision (c)(1) convictions, he contends: (1) the trial court erred by denying his Penal Code section 995 motion to dismiss the section 20001, subdivision (c) allegations because they do not apply to persons who do not personally or directly commit the underlying offenses; (2) there is insufficient evidence to support the jury's true findings on the section 20001, subdivision (c) allegations; (3) section 20001, subdivision (c) is void for vagueness and violates his due process rights if it applies to persons who are vicariously liable for the underlying offenses; (4) the trial court erred in instructing on section 20001, subdivision (c); and (5) the trial court erred in assuming it did not have Penal Code section 1385 discretion to dismiss the section 20001, subdivision (c) allegations.

Codefendant George Kenneth Waller, Jr., appeals a judgment after the jury found him guilty on two counts of vehicular manslaughter with gross negligence (Pen. Code, § 192, subd. (c)(1)). Waller contends the trial court abused its discretion by imposing upper six-year terms for those offenses based on an aggravating circumstance that multiple victims were involved.

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1 All statutory references are to the Vehicle Code unless otherwise specified.

We requested, and have received from the parties, supplemental briefing on the effect, if any, of *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531] (*Blakely*) on the sentences imposed on the defendants in this case. Waller's supplemental brief asserts *Blakely* requires that his upper six-year terms be vacated. Calhoun's supplemental brief concedes *Blakely* does not apply to his case. The People's supplemental brief asserts Waller waived any *Blakely* claim but, if not waived, *Blakely* does not apply to the trial court's imposition of the upper terms.

FACTUAL AND PROCEDURAL BACKGROUND

At about 7:00 p.m. on October 6, 2002, Calhoun and Waller were racing their cars side-by-side on Imperial Avenue in San Diego. Although the posted speed limit was 50 miles per hour, the two cars apparently were traveling faster than 70 miles per hour. After Waller's car passed Calhoun, it struck a vehicle driven by Shanna Jump, who was turning left on Imperial Avenue from the opposite direction Calhoun and Waller were driving. After the Waller-Jump collision, Calhoun made a U-turn, drove back to the scene of the accident, and then left the scene and drove home.

Jump and her passenger, Brian Hanson, were killed. Jump's other passenger, Michael Hanson, survived but suffered great bodily injury. Waller's passenger, Jasen Moore, survived but suffered great bodily injury.

An amended consolidated information charged Waller and Calhoun each with two counts of second degree murder (Pen. Code, § 187, subd. (a)), two counts of vehicular manslaughter with gross negligence (Pen. Code, § 192, subd. (c)(1)), and two counts of

reckless driving causing bodily injury (§ 23104, subd. (a)). The information also alleged that after committing the gross vehicular manslaughter offenses Calhoun fled the scene of the crime (§ 20001, subd. (c)).[2] After a joint trial, the jury found Waller and Calhoun each not guilty on the two counts of second degree murder, guilty on the two counts of vehicular manslaughter with gross negligence, and guilty on the two counts of reckless driving causing bodily injury. The jury also found true the allegations that after committing the gross vehicular manslaughter offenses Calhoun fled the scene of the crime.[3] The court sentenced Waller to the upper term of six years for the first count of vehicular manslaughter with gross negligence, a concurrent upper six-year term for the second count of vehicular manslaughter with gross negligence, and concurrent terms of 180 days for each of the two counts of reckless driving causing bodily injury, for a total term of six years. It sentenced Calhoun to the middle term of four years for the first count of vehicular manslaughter with gross negligence with a consecutive five-year enhancement for fleeing the scene of the crime, a concurrent four-year term for the second count of vehicular manslaughter with gross negligence, and concurrent terms of

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2 The information also alleged that in committing the gross vehicular manslaughter offenses, Waller and Calhoun personally used a deadly weapon (Pen. Code, § 1192.7, subd. (c)(23)) and personally inflicted great bodily injury (Pen. Code, § 1192.7, subd. (c)(8)), but the prosecution subsequently dismissed those allegations as to Calhoun.

3 In a bifurcated court trial, the court found not true the allegations Waller personally used a deadly weapon and found true the allegations he personally inflicted great bodily injury in committing the gross vehicular manslaughter offenses.

180 days for each of the two counts of reckless driving causing bodily injury, for a total term of nine years.[4]

Waller and Calhoun each filed timely notices of appeal.

DISCUSSION

I

CALHOUN'S APPEAL

Section 20001, Subdivision (c) Allegations

Calhoun contends the trial court erred by denying his Penal Code section 995 motion to dismiss the section 20001, subdivision (c) allegations because, he argues, that enhancement does not apply to persons who do not personally or directly commit the underlying offenses.

A

Before trial Calhoun filed a Penal Code section 995 motion to dismiss the two section 20001, subdivision (c) allegations that he fled the scene of the crime after the gross vehicular manslaughter offenses. At his sentencing, Calhoun argued the trial evidence showed his guilt on the two counts of vehicular manslaughter with gross negligence was derivative and imputed to him for aiding and abetting Waller's commission of those offenses. By imposing the section 20001, subdivision (c)

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[4] The court stayed execution of the second five-year enhancement for fleeing the scene of the crime.

enhancements on Calhoun, the trial court implicitly denied Calhoun's Penal Code section 995 motion.[5]

B

Section 20001, subdivision (c) provides: "A person who flees the scene of the crime *after committing a violation of* Section 191.5 of, *paragraph (1) or (3) of subdivision (c) of Section 192 of*, or subdivision (a) or (c) of Section 192.5 of, *the Penal Code*, upon conviction of any of those sections, in addition and consecutive to the punishment prescribed, shall be punished by an additional term of imprisonment of five years in the state prison. This additional term shall not be imposed unless the allegation is charged in the accusatory pleading and admitted by the defendant or found to be true by the trier of fact. The court shall not strike a finding that brings a person within the provisions of this subdivision or an allegation made pursuant to this subdivision." (Italics added.)

Under Penal Code section 192, manslaughter is defined as the unlawful killing of a human being without malice and consists of three types, including vehicular manslaughter, which includes: "(c)(1) Except as provided in [Penal Code] Section 191.5, *driving a vehicle in the commission of an unlawful act, not amounting to felony, and with gross negligence; or driving a vehicle in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence*. [¶] . . . [¶] (3) Driving

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5 Neither Calhoun nor the People cite any portion of the record showing the trial court expressly denied Calhoun's Penal Code section 995 motion.

a vehicle in violation of Section 23140, 23152, or 23153 of the Vehicle Code and in the commission of an unlawful act, not amounting to felony, but without gross negligence; or driving a vehicle in violation of Section 23140, 23152, or 23153 of the Vehicle Code and in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence."[6] (Pen. Code, § 192, subd. (c), italics added.)

In closing argument, the prosecutor argued Calhoun was guilty of the vehicular manslaughter with gross negligence charges because Waller's commission of those offenses was a natural and probable consequence of Waller's commission of an unlawful speed contest that Calhoun aided and abetted.[7] The trial court instructed the jury on the principles of aiding and abetting the commission of a crime, including a modified version of CALJIC No. 3.02:

"[A]s to defendant Calhoun only, you are instructed as follows:

"One who aids and abets another in the commission of a crime or crimes is not only guilty of that crime or those crimes, but is also guilty of any other crime committed by the principal which is a natural and probable consequence of the crimes originally aided and abetted.

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6 Penal Code section 191.5 defines the offense of gross vehicular manslaughter while intoxicated.

7 The prosecutor alternatively argued Calhoun was guilty of vehicular manslaughter with gross negligence because he directly and actively participated in the unlawful speed contest.

"So, in order to find defendant Lawrence Lamont Calhoun guilty of the [two vehicular manslaughter with gross negligence and other charged offenses] with respect to aiding and abetting, you must be satisfied beyond a reasonable doubt that:

"1. The crime of speed contest, in violation Vehicle Code section 23109[, subdivision] (a) was committed;

"2. That the defendant aided and abetted that crime;

"3. That a co-principal in that crime committed the [two vehicular manslaughter with gross negligence and other charged offenses]; and

"That those [charged] crimes . . . were a natural and probable consequence of the commission of the crime of speed contest."

C

Calhoun asserts section 20001, subdivision (c) does not apply to persons who do not personally or directly commit one of the listed underlying offenses, here vehicular manslaughter with gross negligence. He argues that section 20001, subdivision (c)'s text and legislative history and analogous case law support an interpretation that the enhancement applies only to direct perpetrators of an underlying offense and not to those convicted of aiding and abetting the direct perpetrators. The parties have not cited, and we have not found, any cases interpreting section 20001, subdivision (c) in the context of aiding and abetting an underlying offense. We therefore consider the instant question of law to be one of first impression.

In reviewing a trial court's interpretation of a statute, we apply an independent or de novo standard of review. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.) In interpreting a statute, our objective is to ascertain and effectuate legislative intent. (*Ibid*.) We look first to the language of the statute and give effect to its plain meaning. (*Ibid*.) Although we look first to the text of the statute, we also may consider extrinsic aids. (*Ibid*.) "When the language is susceptible of more than one reasonable interpretation, we look to the legislative history of the statute and the wider historical circumstances of its enactment in ascertaining the legislative intent. [Citation.]" (*Clayton v. Superior Court* (1998) 67 Cal.App.4th 28, 32.) Furthermore, if a penal statute's language is reasonably susceptible of two constructions, the construction more favorable to the criminal defendant will be adopted. (*People v. Davis* (1981) 29 Cal.3d 814, 828.)

Known as "Courtney's Law," section 20001, subdivision (c) was enacted in 1996. (Stats. 1996, ch. 645, § 1, p. 2982.) It provides a consecutive five-year enhancement in addition to the punishment prescribed for a qualifying underlying offense (e.g., Pen. Code, § 192, subd. (c)(1)) if the jury finds the defendant fled the scene of the crime after committing that underlying offense. (§ 20001, subd. (c).) The statutory language does *not* expressly state whether the enhancement applies to persons who only aided and abetted the commission of an underlying offense, in addition to those persons who directly committed the underlying offense. Accordingly, we must interpret section 20001, subdivision (c) to resolve the issue of whether that statute applies to persons who merely aided and abetted the commission of an underlying offense.

We look first to the text of section 20001, subdivision (c). The crucial term is "committing" in the phrase "person who flees the scene of the crime after committing a violation of [an underlying offense]." (§ 20001, subd. (c).) A common definition of "commit" is "to do; perform; perpetrate . . . ." (Random House Dict. of the English Language (2d ed. 1987), p. 412, col. 2.) The preferred usage of its variant, "commission," is, according to one authority, "in the sense 'the action of doing or perpetrating (as a crime).' " (Garner, A Dict. of Modern Legal Usage (2d ed. 1995), p. 176.) Penal Code section 31, enacted in 1872, defines as "principals": "All persons concerned in the commission of a crime, . . . whether they directly *commit* the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed." (Italics added.)

Under Penal Code section 31, a person is guilty of a crime if he or she promotes, aids, or encourages its commission, knowing the perpetrator's unlawful purpose and intending to facilitate that purpose. (*People v. Beeman* (1984) 35 Cal.3d 547, 554-555.) *Beeman* quoted a lower court's opinion favorably: " 'An aider and abettor's fundamental purpose, motive and intent is *to aid and assist the perpetrator in the latter's commission of the crime*.' [Citation.]" (*Beeman*, *supra*, at p. 556, quoting *People v. Vasquez* (1972) 29 Cal.App.3d 81, 87, italics added.) Both common and legal usage distinguish a perpetrator's direct commission of an offense from an aider and abettor's promotion, aid or encouragement of the perpetrator's commission of that offense.

The legislative history of section 20001, subdivision (c) does not suggest a legislative intent that its provisions apply to aiders and abettors of the underlying offense.

We granted the People's unopposed request for judicial notice of documents constituting the legislative history of section 20001, subdivision (c). (Evid. Code, §§ 452, subd. (c), 459, subd. (a).) However, the People do not cite anything in that statute's legislative history suggesting legislators intended the enhancement to apply to aiders and abettors or that they were even aware of the possibility the statutory language could be construed as applying to aiders and abettors. Rather, as Calhoun notes, the legislative history submitted by the People shows legislators were concerned about direct perpetrators of certain offenses who flee the scene of the crime, making it more difficult to prosecute them for the underlying or other offenses. Section 20001, subdivision (c) was enacted "in memory of Courtney Cheney of Roseville, who was killed by a drunken driver with a long history of driving under the influence." (Stats. 1996, ch. 645, § 1.) In a report of the Senate Committee on Criminal Procedure on Assembly Bill No. 1985, the "[e]xpressed [p]urpose" of the bill (which would enact section 20001, subdivision (c)) according to its author was described: "On April 9, 1995, Courtney Cheney of Roseville was struck from behind and killed by a drunk driver. The killer had numerous other drunk driving convictions. . . . At the request of the parents of Courtney Cheney, and at the suggestion of the judge in the Courtney Cheney case, the bill makes violation of [Penal Code section] 191.5 unambiguously a strike, and it creates a five year enhancement for fleeing the scene of the crime. The judge in the case felt that the person who flees the scene should receive an additional five years because the effect of fleeing is to destroy evidence (by reducing the driver's BAC at time of testing) which, had the evidence been available, might have led to conviction for a more serious crime than violation of [Penal Code

section] 191.5." (Sen. Com. on Crim. Proc., analysis of Assem. Bill No. 1985 (1995-1996 Reg. Sess.) as amended July 1, 1996, pp. 3-4.)

That report described the bill's proposed five-year enhancement:

"Existing law provides for a penalty of up to 4 years in prison for fleeing the scene of an accident where death or permanent, serious injury occurs. This bill provides an additional enhancement of 5 years, to be added to the existing penalty if the person flees the scene after committing gross vehicular manslaughter while intoxicated; vehicular manslaughter with gross negligence; vehicular manslaughter DUI; vehicular manslaughter involving a vessel with gross negligence; or vehicular manslaughter involving a vessel DUI.

"The sponsor and the author believe this additional penalty is necessary because when a person who is DUI flees the scene of an accident where a death has occurred and they are not caught immediately, it is hard if not impossible to later prove that they were DUI. This [enhancement] will create an added deterrence to keep people from fleeing accidents where a death may have occurred." (Sen. Com. on Crim. Proc., analysis of Assem. Bill No. 1985 (1995-1996 Reg. Sess.) as amended July 1, 1996, p. 5.)

Accordingly, legislative history supports an inference that legislators intended section 20001, subdivision (c)'s provisions to apply to direct perpetrators of the underlying offense and not to those persons who merely aid and abet the perpetrators of that offense.

Analogous case law supports Calhoun's assertion that section 20001, subdivision (c) should be interpreted to apply only to direct perpetrators of an underlying offense and

not to those persons who merely aid and abet the perpetrator of that offense. In *People v. Walker* (1976) 18 Cal.3d 232, the Supreme Court addressed the issue of whether former Penal Code section 12022.5's enhancement for firearm use applied only to personal users of firearms or also to those who aided and abetted the firearm user. (*Walker,* at pp. 235-236, 241-242.) At that time, Penal Code section 12022.5 provided: " '*Any person who uses a firearm in the commission* or attempted commission of a robbery, assault with a deadly weapon, murder, assault with intent to commit murder, rape, burglary, or kidnapping, upon conviction of such crime, shall, in addition to the punishment prescribed for the crime of which he has been convicted, be punished by imprisonment in the state prison for a period of not less than five years. . . ." (*Walker*, at p. 236, fn. 1, italics added.) *Walker* stated: "*Generally, if a statute is intended to impose a derivative liability on some person other than the actor, there must be some legislative direction that it is to be applied to persons who do not themselves commit the proscribed act*. Such a direction is found in [Penal Code] section 31 which fixes responsibility on an aider and abettor for a crime personally committed by a confederate. *But the statute which defines aiders and abettors as principals in the commission of a criminal offense does not also purport to impose additional derivative punishment grounded on an accomplice's personal conduct*, as those statutes which provide for such increased punishment ' "do not define a crime or offense but relate to the penalty to be imposed under certain circumstances." ' [Citations.] *Hence the rules which make an accused derivatively liable for a crime which he does not personally commit, do not at the same time impose a*

derivatively increased punishment by reason of the manner in which a confederate commits the crime." (18 Cal.3d at pp. 241-242, italics added.)

The court also cited legislative history and the general rule that statutory ambiguities be resolved in a criminal defendant's favor and concluded former Penal Code section 12022.5's enhancement applied only to those who personally use a firearm in the commission of a qualifying offense. (*Walker,* at pp. 235-236, 241-244.)

In *People v. Piper* (1986) 42 Cal.3d 471, the court addressed the similar issue of whether former Penal Code section 1192.7, subdivision (c)(8)'s language (i.e., "any felony in which the defendant uses a firearm") applied to defendants who did not personally use a firearm. (*Piper,* at pp. 475-478.) *Piper* described *Walker*'s reasoning: "Because former [Penal Code] section 12022.5 *contained no explicit suggestion that derivative liability was intended*, we concluded in *Walker* that the statute should be interpreted to apply only to defendants who personally used a firearm." (*Piper,* at p. 476, italics added.) *Piper* noted:

"Since *Walker*, the Legislature has been quite explicit when it intends an enhancement provision to apply to a defendant even though he himself does not commit the proscribed act. For example, [Penal Code] section 12022, subdivision (a)--which provides a one-year enhancement for '[a]ny person who is armed with a firearm in the commission . . . of a felony'--goes on specifically to provide that '[t]his additional term shall apply to any person who is a principal in the commission or attempted commission of a felony if one or more of the principals is armed with a firearm, whether or not such person is personally armed with a firearm.'

"[Penal Code section 1192.7,] [s]ubdivision (c)(8), of course, contains no similar language indicating that it was intended to apply even when the defendant himself did not personally use a firearm. Accordingly, the principle of interpretation applied in *Walker* supports the conclusion that the subdivision should be construed to apply only to defendants who personally use a firearm in the commission of a felony." (*People v. Piper*, *supra*, 42 Cal.3d at p. 477, fn. omitted.)

Piper also cited the general rule that statutory ambiguities be resolved in a criminal defendant's favor and concluded the enhancement applied only to defendants who personally use a firearm in the commission of a felony. (*Id*. at pp. 477-478; see also *People v. Rener* (1994) 24 Cal.App.4th 258, 267 [holding Penal Code section 12022.3's enhancements for a person's use of or being armed with a firearm applies only to direct perpetrators and not to those vicariously liable as aiders and abettors].)

People v. Alvarez (2002) 95 Cal.App.4th 403 described the *Walker* rule: "[T]o find the statute has vicarious application, there must be an express legislative direction to that effect." (*Alvarez,* at p. 409.) *Alvarez* concluded in its circumstances: "[S]ince we find no Legislative direction to the contrary, we interpret the '[a]ny person who used, or attempted to use, a deadly weapon' language in [Penal Code] section 1203, subdivision (e)(2) as limiting application to *personal* use of a deadly weapon." (*Ibid*., italics added.)

As Calhoun also notes, there is a general rule that statutory language should be resolved in favor of a criminal defendant to the extent reasonably possible. *Keeler v. Superior Court* (1970) 2 Cal.3d 619 (superseded by statute on another ground as noted in *People v. Taylor* (2004) 32 Cal.4th 863, 870) stated: "It is the policy of this state to

construe a penal statute as favorably to the defendant as its language and the circumstances of its application may reasonably permit; just as in the case of a question of fact, the defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of language used in a statute. [Citation.]" (*Keeler,* at p. 631.) Application of that general rule in Calhoun's case supports an interpretation of section 20001, subdivision (c) that its five-year enhancement applies only to persons who directly commit the underlying offense and not to persons who aid or abet the direct perpetrator.

Considering the language of section 20001, subdivision (c), its legislative history, analogous case law, and the general rule of statutory interpretation in favor of a criminal defendant, we conclude section 20001, subdivision (c) does *not* apply to persons who do not personally or directly commit an underlying offense. Rather, that statute's enhancement applies *only* to direct perpetrators of an underlying offense. Had the Legislature intended that the provisions of section 20001, subdivision (c) apply to aiders and abettors of an underlying offense, it could have expressly so provided. (Cf. Pen. Code, § 12022, subdivision (a)(1) ["This additional term shall apply to any person who is a principal in the commission of a felony or attempted felony if one or more of the principals is armed with a firearm, whether or not the person is personally armed with a firearm."].)

The People argue that had the Legislature intended section 20001, subdivision (c) to apply only to persons who directly commit an underlying offense, it could have so expressly provided. However, we infer from the absence of language expressly providing

that section 20001, subdivision (c) applies to aiders and abettors that the Legislature intended this statute to apply only to persons who directly commit an underlying offense. Other courts have rejected similar arguments by the People. In *People v. Rener*, *supra*, 24 Cal.App.4th 258, the court stated: "[The People argue] the Legislature's failure to insert the word 'personally' as it has done when amending other sections means it did not intend to limit liability to direct personal conduct. However, the obverse argument is at least as strong--i.e., the Legislature's failure to insert the word 'personally' means the Legislature believes its use of the words 'any person' sufficiently communicates its intent to impose only direct liability, especially given the number of cases which state these words imply direct liability and not vicarious liability. [Citations.]" (*Id*. at p. 267.)

We are not persuaded the absence of express language in section 20001, subdivision (c) restricting its application to only persons who directly commit the underlying offense shows that enhancement necessarily applies to aiders and abettors as well.

The People also cite as support for their position our opinion in *People v. Wood* (2000) 83 Cal.App.4th 862, which involved section 20001, *subdivision (a)* and not subdivision (c). Section 20001, subdivisions (a) and (b) define as an offense, and not an enhancement, a driver's failure to immediately stop his or her vehicle "involved in an accident" resulting in injury to any person and failure to then take certain actions,

including rendering reasonable assistance to any injured person.[8] In *Wood*, we noted the gravamen of a section 20001, subdivision (a) offense is not the initial injury of a victim, but leaving the scene without presenting identification or rendering assistance. (*Wood*, at p. 866.) That offense could apply to drivers who are merely "involved," but not otherwise responsible for, an accident. (§ 20001, subd. (a).) That standard of criminal liability is broader than section 20001, subdivision (c)'s enhancement if the driver flees "after committing" an underlying offense. Because *Wood* involved a different statute, different statutory language, and an offense rather than an enhancement, we conclude it is inapposite to this case and does not provide support for the People's position. Furthermore, we conclude section 20001, subdivision (a)'s language (i.e., "involved in an accident") does not provide us with assistance in interpreting section 20001, subdivision (c)'s language (i.e., "flees the scene of the crime after committing a violation").

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[8] Originally enacted in 1959, section 20001, subdivision (a) now provides: "The driver of any vehicle involved in an accident resulting in injury to any person, other than himself or herself, or in the death of any person shall immediately stop the vehicle at the scene of the accident and shall fulfill the requirements of Sections 20003 and 20004." (§ 20001, subd. (a); Stats. 1959, ch. 3, p. 1661.) Section 20001, subdivision (b) provides: "(1) Except as provided in paragraph (2), any person who violates subdivision (a) shall be punished by imprisonment in the state prison, or in a county jail for not more than one year, or by a fine of not less than one thousand dollars ($1,000) nor more than ten thousand dollars ($10,000), or by both that imprisonment and fine. [¶] (2) If the accident described in subdivision (a) results in death or permanent, serious injury, any person who violates subdivision (a) shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than 90 days nor more than one year, or by a fine of not less than one thousand dollars ($1,000) nor more than ten thousand dollars ($10,000), or by both that imprisonment and fine. . . ."

The People also cite *People v. McCoy* (2001) 25 Cal.4th 1111 as support for their position. However, *McCoy* involved an aider and abettor's liability for an *offense*. (*Id*. at pp. 1116-1123.) Because *McCoy* does not involve the application of an *enhancement* to an aider and abettor of an underlying offense, it is inapposite and does not persuade us to reach a contrary conclusion.

D

Because section 20001, subdivision (c) applies only to persons who directly commit an underlying offense and does not apply to aiders and abettors of those persons, it does not apply to Calhoun in the circumstances of this case and the trial court erred by not granting his Penal Code section 995 motion to dismiss the section 20001, subdivision (c) allegations. The parties agree that Calhoun did not personally or directly kill either Jump or Brian Hanson, the deceased victims in this case. Therefore, Calhoun's guilt of the Penal Code section 192, subdivision (c)(1) offenses must have been based on vicarious liability as an aider and abettor of Waller, the person who directly killed the victims with his car. For purposes of section 20001, subdivision (c), vicarious or derivative liability as an aider and abettor of a person who directly committed a Penal Code section 192, subdivision (c)(1) offense is insufficient to constitute fleeing the scene of a crime "after committing" that offense. (§ 20001, subd. (c).) Accordingly, the trial

court erred by imposing on Calhoun two 5-year enhancements under section 20001, subdivision (c).[9]

II

WALLER'S APPEAL

Imposition of Upper Terms

Waller's original brief contends the trial court abused its discretion by imposing upper six-year terms for his Penal Code section 192, subdivision (c)(1) offenses based on an aggravating factor that multiple victims were involved. Subsequently, in response to our request for supplemental briefing on the effect, if any, of *Blakely v. Washington*, *supra*, 124 S.Ct. 2531 on the sentence imposed on him, Waller submitted a supplemental letter brief contending the trial court's imposition of the upper six-year terms also violates the standards set forth in *Blakely*. Specifically, he asserts that under *Blakely* he was denied his constitutional rights to have a *jury* determine the facts in support of an aggravated sentence *and* to have those facts determined by *proof beyond a reasonable doubt*.

A

The jury found Waller guilty on two counts of vehicular manslaughter with gross negligence (Pen. Code, § 192, subd. (c)(1)) and two counts of reckless driving causing

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9 Because we dispose of Calhoun's appeal of the section 20001, subdivision (c) enhancements on this ground, we need not address his alternative contentions.

bodily injury (§ 23104, subd. (a)). At Waller's sentencing, the trial court received and considered the probation department's report that listed one aggravating circumstance--Waller's prior performance on probation was unsatisfactory (Cal. Rules of Court, rule 4.421(b)(5)).[10] The probation report recommended the court impose the middle term of four years for Waller's first gross vehicular manslaughter conviction and a consecutive 16-month term (one-third the middle term of four years) for his second gross vehicular manslaughter conviction. The court also received and considered Waller's statement in mitigation and the prosecutor's statement in aggravation. The prosecutor argued there were four aggravating circumstances relating to the crimes and three aggravating circumstances relating to Waller.[11] The prosecutor requested the trial court impose the upper six-year term for Waller's first gross vehicular manslaughter conviction, a consecutive 16-month term for his second gross vehicular manslaughter conviction, and consecutive six-month terms for each of his two convictions for reckless driving causing bodily injury.

The trial court noted consecutive sentencing was "theoretically possible" because there were separate victims in a violent crime. However, the court sentenced Waller to the upper six-year term for the first count of vehicular manslaughter with gross

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10 The probation report also listed one mitigating circumstance--Waller had not sustained any other criminal convictions since 1995 (Cal. Rules of Court, rule 4.408(a)).

11 However, none of those alleged seven aggravating circumstances were subsequently cited by the trial court when it explained its reasons for imposing the upper terms for Waller's two convictions of gross vehicular manslaughter.

negligence, a concurrent upper six-year term for the second count of vehicular manslaughter with gross negligence, and concurrent terms of 180 days for the two counts of reckless driving causing bodily injury, for a total term of six years. The court explained its reasoning for selecting the upper six-year term for each of Waller's two gross vehicular manslaughter convictions:

"In selecting the upper term, the Court has to weigh circumstances in mitigation as provided by the sentencing rules, as against those in aggravation. And I think the mitigants, in Mr. Waller's case, have already been talked about, in some respect, his lack of significant criminal record . . . [a]nd his background[.] *[I]n aggravation, the Court would cite that this defendant was convicted of other crimes for which consecutive sentences could have been imposed, and there are separate victims of the crime involving violence*.

"I am using that aggravating factor as a basis for imposing the aggravated term. I think it outweighs all of the mitigation referred to by counsel and by the probation department. I am ordering terms to run concurrently." (Italics added.)

B

Waller contends the trial court erred by imposing the upper six-year term for each of his two gross vehicular manslaughter convictions based on the aggravating circumstance of multiple victims. He asserts that a multiple-victim aggravating circumstance should not apply when, as in this case, there is only one victim per criminal count.

As Waller notes, there is a split of authority on the issue of whether a multiple-victim aggravating circumstance applies if there is only one victim charged for each criminal count. "Before they were amended in 1991 to delete references to multiple victims, California Rules of Court, [former] rules 421(a)(4) and 425(a)(4) provided as an aggravating circumstance and a criterion affecting concurrent and consecutive sentences, respectively, the fact that 'The crime involved multiple victims.' The reason for its inclusion in these rules was to further the intent of the Legislature that prison terms be proportionate to the seriousness of the offense. [Citation.]"[12] (*People v. Valenzuela* (1995) 40 Cal.App.4th 358, 363, fn. omitted.)

In the line of cases *rejecting* the assertion that a multiple-victim aggravating circumstance can apply when there is only one victim charged for each count, *People v. Humphrey* (1982) 138 Cal.App.3d 881 stated: "The trial court improperly relied on the multiple-victim factor under [former] California Rules of Court, rule 425(a)(4), in sentencing defendant consecutively on the two robbery counts, each count involving only one victim. . . . [W]e find the rule applies only to a situation where a defendant is convicted of two or more counts or crimes and at least one of those counts involves multiple victims. Because the multiple-victim factor refers to the singular 'any of the

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12 The fact that an aggravating circumstance is deleted from the rule expressly listing certain aggravating circumstances does not necessarily preclude its future use by a trial court as an aggravating circumstance. California Rules of Court, rule 4.408(a) provides: "The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. Any such additional criteria shall be stated on the record by the sentencing judge."

crimes' and whereas other factors listed in rule 425 refer to the plural 'crimes,' the Legislature must have intended the (a)(4) factor *not* to apply to a multiple-conviction situation where no one count involves more than one victim. Our statutory interpretation . . . is harmonious with the Fifth District Court of Appeal decision in *People v. Lawson* (1980) 107 Cal.App.3d 748, 758 [165 Cal.Rptr. 764]." (*Id*. at pp. 882-883, fn. omitted.)

Humphrey's holding was favorably cited in *People v. Arviso* (1988) 201 Cal.App.3d 1055, 1059 ["[T]he crimes did not involve multiple victims within the meaning of [former] rule 425(a)(4), as each count alleged only a single victim."]; *People v. McNiece* (1986) 181 Cal.App.3d 1048, 1061 (disapproved on another ground in *People v. McFarland* (1989) 47 Cal.3d 798, 804-805); and *People v. Levitt* (1984) 156 Cal.App.3d 500, 517.) In *People v. Lawson*, *supra*, 107 Cal.App.3d 748, cited in *Humphrey*, the Court of Appeal rejected the trial court's reliance on an aggravating circumstance of multiple victims in imposing the upper term for a robbery conviction, stating: "[T]he crime . . . did not involve multiple victims. It involved one victim. The court may not find that the crime at issue, singular not plural, involved multiple victims (see [former] Cal. Rules of Court, rule 421(a)(4)) by adding victim(s) from independent crimes." (*Id*. at p. 758.)

In the line of cases *accepting* the assertion that a multiple-victim aggravating circumstance can apply when there is only one victim charged for each count, *People v. Valenzuela*, *supra*, 40 Cal.App.4th 358 relied on a "transactionally related" theory as support for imposition of consecutive sentences for multiple crimes, each of which

involved only one victim, stating: "Without the 'transactionally related' analysis, this trial court would be unable to impose a consecutive term for the killing of the husband and would be faced with the unpleasant reality of being forced to allow his death to go unpunished. . . . Valenzuela's drunk driving resulted in the death of two people, not just one. The trial court should have the discretion to make Valenzuela 'pay' for both deaths." (*Id*. at p. 365.) Although we do not disagree with *Valenzuela*'s general desire to support the imposition of greater (e.g., consecutive) punishment when a defendant is convicted on two counts of gross vehicular manslaughter, we disagree with its interpretation of the multiple-victim aggravating circumstance. *Valenzuela* quoted another case to describe the "transactionally related" theory: "[T]he Court of Appeal in *People v. Coulter* (1983) 145 Cal.App.3d 489 [193 Cal.Rptr. 476] held: 'Where . . . multiple crimes are so closely connected in time and place as to comprise a single criminal transaction a sentencing court may impose the aggravated term for one of the crimes based upon a finding of multiple victims involved in the entire criminal transaction. . . . [¶] [Cases subsequent to *People v. Guevara* (1979) 88 Cal.App.3d 86 [151 Cal.Rptr. 511] have found the phrase 'transactionally related' convenient in distinguishing between those cases where a finding of multiple victims is proper because of the circumstantial cohesiveness of multiple crimes each involving a single victim, and those cases where the crimes are sufficiently separated in time and circumstance such that a multiple victim finding is unwarranted.' (145 Cal.App.3d at pp. 491-492.)" (*Valenzuela*, *supra*, at pp. 363-364.)

We are unpersuaded by *Valenzuela,* cases cited therein and by the People in this case that a multiple-victim aggravating circumstance can apply when there is only one

victim per conviction. With respect to imposition of a sentence for a particular offense for which there is only one victim, that particular "crime" did *not* "involve multiple victims." (*People v. Humphrey*, *supra*, 138 Cal.App.3d at pp. 882-883; *People v. Arviso*, *supra*, 201 Cal.App.3d at p. 1059; *People v. McNiece*, *supra*, 181 Cal.App.3d at p. 1061; *People v. Levitt*, *supra*, 156 Cal.App.3d at p. 517; *People v. Lawson*, *supra*, 107 Cal.App.3d at p. 758.) Accordingly, the trial court in this case erred by relying on the multiple-victim aggravating circumstance to impose the upper six-year term for each of Waller's two gross vehicular manslaughter offenses.

C

Although the trial court erred by relying on the multiple-victim aggravating circumstance to impose the upper six-year terms, the record could support an inference that was not the only aggravating circumstance on which the court relied in imposing the upper term for each of Waller's two gross vehicular manslaughter offenses. As the People note, the trial court expressly noted it could have imposed consecutive sentences for those two offenses, yet chose to impose concurrent, upper terms. In imposing the upper terms, the court stated: "*[I]n aggravation, the Court would cite that this defendant was convicted of other crimes for which consecutive sentences could have been imposed, and there are separate victims of the crime involving violence*." California Rules of Court, rule 4.421(a)(7) lists as an aggravating circumstance relating to the crime the fact that: "The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed." Therefore, the record could support an inference the trial court may have relied on two

separate aggravating circumstances in imposing the upper terms: (1) "multiple victims;" and (2) the fact it *could* have imposed consecutive terms for the two offenses but chose to impose only concurrent terms. Although only one valid aggravating circumstance is necessary to uphold the imposition of an upper term (*People v. Zamora* (1991) 230 Cal.App.3d 1627, 1637), we cannot say on the basis of this record the trial court would have imposed the upper terms based solely on the one remaining valid aggravating circumstance. Weighing the multiple mitigating circumstances against that one aggravating circumstance, the court might instead have chosen to impose a consecutive term for Waller's second gross vehicular manslaughter conviction, as recommended in the probation report, in which event there would have been no aggravating circumstance permitting the imposition of the upper term.[13] Because we cannot conclude on this record that it is reasonably probable the trial court would have imposed the same upper

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13 We note that consecutive terms for Waller's two gross vehicular manslaughter offenses presumably would not be barred by Penal Code section 654, which provides: "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . ." Although Waller's two gross vehicular manslaughter convictions presumably arose out of the same act, separate punishment for both convictions is permitted because that act was an act of violence that harmed more than one person. (*People v. McFarland*, *supra*, 47 Cal.3d at p. 803 ["[T]he general rule permitting multiple punishments when multiple injuries result from a single act of violence, governs this matter. As noted above, 'A defendant may properly be convicted of multiple counts for multiple victims of a single criminal act . . . where the act prohibited by the statute is centrally an "*act of violence* against the person." ' [Citations.] Plainly, vehicular manslaughter with gross negligence constitutes a crime of violence against the person. [Citation.]"]; see also *People v. Champion* (1995) 9 Cal.4th 879, 934-935; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1023; *People v. Garcia* (1995) 32 Cal.App.4th 1756, 1781.)

terms for Waller's two gross vehicular manslaughter convictions had it not considered the inapplicable multiple-victim aggravating circumstance, we remand this matter for resentencing of Waller. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People Avalos* (1984) 37 Cal.3d 216, 233 [reviewing court must remand for resentencing "where it cannot determine whether the improper factor was determinative for the sentencing court."]; *People v. Smith* (1980) 101 Cal.App.3d 964, 967-968 [matter remanded for resentencing]; cf. *People v. Dozier* (1979) 90 Cal.App.3d 174, 178-179 [error was harmless because there were no mitigating circumstances for trial court to weigh against "multitude of aggravating factors."].)

D

Although the People argue Waller waived the trial court's sentencing error by not objecting at the sentencing hearing, we conclude he did not have a meaningful opportunity to object to the court's error and therefore did not waive that error. *People v. Scott* (1994) 9 Cal.4th 331 stated: "[T]he waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices. Included in this category are cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons. [¶] . . . Although the court is require to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court's statement of reasons are easily prevented and

corrected if called to the court's attention." (*Id*. at p. 353.) Nevertheless, *Scott* recognized there are exceptions to its general rule regarding waiver of sentencing errors: "Of course, there must be *a meaningful opportunity to object* to the kinds of claims otherwise deemed waived by today's decision. *This opportunity can occur only if*, during the course of the sentencing hearing itself and before objections are made, *the parties are clearly apprised of* the sentence the court intends to impose and *the reasons that support any discretionary choices*." (*Id*. at p. 356, italics added.)

In this case, prior to the trial court's pronouncement of Waller's sentence, Waller was *not* apprised of the reason (or reasons) supporting the court's discretionary sentencing choice of imposing the upper six-year term for each of his gross vehicular manslaughter convictions. In fact, neither the multiple-victim circumstance nor the consecutive-sentence "nonimposition" circumstance was cited as an aggravating circumstance in the probation report or the prosecutor's statement in aggravation. Prior to the court's sentencing decision, there was no reference to either of those possible aggravating circumstances by the parties, the probation department, or the trial court. Rather, those circumstances were first mentioned by the trial court at the time it pronounced its sentencing decision. Furthermore, Waller's counsel could have reasonably understood the trial court's express reliance on "that aggravating factor" as referring to the multiple-victim circumstance, which was cited immediately prior to that

phrase.[14] In so doing, Waller's counsel could not reasonably be charged with immediately understanding the full ramifications of that cited aggravating circumstance. As we noted in part II.B., *ante*, there is a split of case authority on whether the multiple-victim aggravating circumstance applies when there is only one victim per offense. Not only had this court not yet addressed the issue, but the most recent appellate decision (in 1995) was *People v. Valenzuela*, *supra*, 40 Cal.App.4th 358, which upheld that application of the multiple-victim aggravating circumstance. (*Id*. at p. 365.) Also, the multiple-victim aggravating circumstance is a rather esoteric one, having been deleted in 1991 as an aggravating circumstance listed in the California Rules of Court. (*Id.* at p. 363.) Therefore, it would be unreasonable to expect Waller's counsel to immediately comprehend the "objectionability" of the multiple-victim circumstance cited as an aggravating factor for the first time by the trial court on pronouncing Waller's sentence. We conclude Waller did not have a "meaningful opportunity to object" to the trial court's sentencing error (*Scott*, *supra*, at p. 356) and did not waive the sentencing error contention.

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14 To the extent that language was ambiguous whether it referred to the multiple-victim circumstance or to the earlier-cited consecutive-sentence "nonimposition" circumstance, we believe in the circumstances of this case it would be unreasonable to expect Waller's counsel to instantly perceive that ambiguity in order to object and presumably obtain clarification regarding the court's intended meaning of the phrase "that aggravating factor." Furthermore, we believe that ambiguity in the court's language did not satisfy *Scott*'s requirement that the court "clearly apprise" the parties of the reasons supporting its discretionary sentencing choice of imposing the upper term for each of Waller's gross vehicular manslaughter convictions. (*People v. Scott*, *supra*, 9 Cal.4th at p. 356.)

E

Although Waller contends the trial court's reliance on a multiple-victim aggravating circumstance as support for imposition of the upper six-year terms also violates *Blakely*, we need not address that question because we have resolved the matter on other, nonconstitutional grounds in part II.B., *ante*. (*Kollander Construction, Inc. v. Superior Court* (2002) 98 Cal.App.4th 304, 314; *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 65.)

In any event, it appears *Blakely* does not apply to the sentencing error asserted by Waller. *Blakely* involved application of the rule expressed in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, that: " '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " (*Blakely*, *supra*, 124 S.Ct. at p. 2531.) However, in interpreting the meaning of "statutory maximum," *Blakely* stated: "[T]he '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*. [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his [or her] proper authority." (*Blakely*, at p. 2537.)

In this case, the jury's verdicts clearly reflected factual findings that Waller was guilty of one count of gross vehicular manslaughter in killing Jump and guilty of another count of gross vehicular manslaughter in killing Brian Hanson. Therefore, to the extent the trial court in sentencing Waller relied on the aggravating circumstance that there were separate victims of violent crime, or "multiple victims," that circumstance was based solely on the charged offenses of which the jury found him guilty beyond a reasonable doubt.[15] The upper term based on that circumstance was therefore imposed "*solely on the basis of the facts reflected in the jury verdict*." (*Ibid.*) The upper term was "impose[d] *without* any additional findings" by the trial court. (*Ibid*.) Similarly, to the extent the upper term was imposed because concurrent terms were imposed under circumstances in which consecutive terms could have been imposed, no additional findings by the jury were required. Accordingly, although we find error under California law, we doubt the trial court's error violated Waller's Sixth Amendment rights as interpreted by *Blakely*.

DISPOSITION

We reverse the true findings on the section 20001, subdivision (c) allegations against Calhoun and vacate the two five-year enhancements imposed on him; we vacate

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15 To the extent the trial court also referred to Michael Hanson and Jasen Moore, who were injured but not killed in the accident, the jury also found Waller guilty in separately charged offenses of reckless driving with bodily injury (§ 23104, subd. (a)) as to each of those victims. Therefore, the "multiple victims," or separate victims of violence, cited by the trial court were reflected in the jury's verdicts.

the two upper six-year terms imposed on Waller; and we remand both matters for resentencing consistent with the views expressed in this opinion. In all other respects, we affirm the judgments.

CERTIFIED FOR PUBLICATION

McDONALD, J.

I CONCUR:

McINTYRE, J.

McCONNELL, P. J., Concurring and Dissenting.

I concur in the majority opinion's result with respect to Calhoun's appeal, and with respect to the *Blakely* issue in Waller's appeal. (*Blakely v. Washington* (2004) __U.S.__ [124 S.Ct. 2531].) I dissent from the portion of the majority opinion vacating the two upper six-year terms imposed on Waller on his two gross vehicular manslaughter convictions and remanding the matter for resentencing.

In selecting the six-year upper terms, the court explained that "in aggravation, the Court would cite that [Waller] was convicted of other crimes for which consecutive sentences could have been imposed, *and* there are separate victims of the crime involving violence." (Italics added.) That language indicates the court's reliance on two separate aggravating factors, the first of which the majority opinion notes is properly used in selecting an upper term. The court, however, arguably created ambiguity by adding, "I am using *that* aggravating factor as a basis for imposing the aggravated term." (Italics added.)

It is undisputed, however, that Waller raised no objection at the trial court. In *People v. Scott* (1994) 9 Cal.4th 331, 351, the court explained: "[T]he right to challenge a criminal sentence on appeal is not unrestricted. In order to encourage prompt detection and correction of error, and to reduce the number of unnecessary appellate claims, reviewing courts have *required* parties to raise certain issues at the time of sentencing. In such cases, lack of a timely and meaningful objection forfeits or waives the claim. [Citations.] These principles are invoked as a matter of policy to ensure the fair and orderly administration of justice." "Although the court is required to impose sentence in

a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing." (*Id.* at p. 353.)

It has been held, for instance, that a criminal defendant cannot argue for the first time on appeal that the court aggravated a sentence based on erroneous or flawed items in a probation report. (*People v. Scott, supra,* 9 Cal.4th at pp. 351-352, citing *People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 725.) In *People v. Scott,* the court held "the waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices." (*People v. Scott,* at p. 353.) The court elaborated that "[r]outine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention. As in other waiver cases, we hope to reduce the number of errors committed in the first instance and preserve the judicial resources otherwise used to correct them." (*Ibid.*)

The ambiguity here regarding aggravating factors could easily have been resolved at the trial court had Waller objected. I would affirm the judgment as to Waller based on waiver principles.

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McCONNELL, P. J.