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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ROBIN RINALDO LAMMERS, Defendant and Appellant.	H025678 (Santa Clara County Super. Ct. No. 132803)

Defendant Robin Rinaldo Lammers was charged with multiple counts of violating Penal Code section 484[1] (grand theft), and related criminal violations of the Civil Code. The charges stemmed from defendant's marketing and sale of distributorships involving the sale of rebuilt automotive engines. A number of defendant's customers were defrauded, lost money they invested in the distributorships, and were not told about defendant's past felony conviction and other legal problems.

After a three-day jury trial, defendant was convicted on September 14, 1990, of four counts of grand theft and eight related counts of violating the Seller Assisted Marketing Plan Act, Civil Code section 1812.200 et seq. (SAMP Act). A month and a half later, defendant failed to appear for sentencing, a bench warrant issued, and bail was

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

forfeited. Following defendant's apprehension 12 years later when he attempted to reenter the country, the court sentenced defendant to a total prison term of seven years.

Defendant challenges the conviction, claiming, inter alia, (1) that there was insufficient evidence that his admission of a sentencing enhancement under section 12022.1 was knowing and voluntary, (2) error in the admission of evidence of defendant's prior felony conviction, and (3) various sentencing errors, including error under the United States Supreme Court's recent decision in *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531] (*Blakely*). We conclude that there was no prejudicial error requiring retrial of the charged crimes; however, we find insufficient evidence that defendant's admission of the enhancement was knowing and voluntary, and we conclude that there was *Blakely* error and other sentencing errors. We therefore reverse and remand the case for the limited purpose of resentencing.

FACTS

I. *Introduction*

There is no reporter's transcript available from the trial. On April 2, 2003, an administrator from the court below confirmed that the reporter's notes for the 1990 trial were destroyed and that the court reporter is deceased.[2] We therefore granted on May 30, 2003, defendant's motion for leave to prepare a settled statement. On July 21, 2003, we granted defendant's motion for leave to prepare an additional settled statement (concerning motions in limine heard by the trial court on September 4, 1990). The trial judge and trial counsel met and ultimately the trial judge filed a settled statement, as well

[2] The Superior Court noted that the court reporter's notes were destroyed "pursuant to Government Code Section 68152[, subdivision] (j)(7)." Defendant contends--a point not rebutted by the Attorney General--that destruction of the reporter's notes under that Government Code section was not proper because they were not destroyed at a time "after final disposition of the case." (Gov. Code, § 68152.)

as a supplemental settled statement (summarizing the first day of trial, including in limine proceedings).[3]

In view of the absence of a reporter's transcript reflecting the trial proceedings, the facts below are taken from the settled statement filed by the trial court on July 11, 2003. We present a summary of the evidence from the trial utilizing the applicable standard. We resolve factual conflicts in support of the verdict. (*People v. Holt* (1997) 15 Cal.4th 619, 667-668.)

II. *Prosecution Witnesses*

A. *Raymond Wells*

Defendant asked Raymond Wells to become president of a company defendant was forming, American Dynasty Corporation (ADC), because defendant did not want his ex-wife to find out about the new business.[4] Wells signed the incorporation papers for defendant's business, and Wells was listed as ADC's president, secretary, and chief financial officer; however, he had no responsibilities and had no investment in the company.[5] There was an office lease for the business in his name and purporting to bear Wells's signature; Wells, however, did not sign the lease.

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[3] The settled statements were based primarily upon the notes of the trial judge. The deputy district attorney who handled the trial had no notes from the trial. Defense counsel had trial notes that included both evidentiary matters and matter reflecting attorney thought processes and evaluation. Defense counsel had "no independent recollection of the evidentiary issues involved in the trial." He advised further that he did not have his client's authority to participate in the evidentiary aspects of preparation of the settled statement.

[4] Two ADC customers, Michael Long and Bruce Jorgensen, were told by defendant that a company called Bridgeman Engineering was a wholly-owned subsidiary of ADC. Counsel stipulated, however, that it was untrue that ADC owned Bridgeman. Further, after Jorgensen questioned defendant about the ownership of Bridgeman, defendant sent a letter to him indicating that neither defendant nor ADC owned Bridgeman.

[5] Barry Blaney corroborated Wells's testimony that Wells was the president of ADC in name only and had no responsibilities with the company.

Wells received telephone calls from unhappy ADC customers, including Peter Mascola. Wells referred the calls to defendant. Wells also began receiving service of process concerning ADC in March 1988. Wells resigned from the company in April 1988.

B. *Barry Blaney*

Barry Blaney originally employed defendant at RBA Vending. In late 1987, defendant solicited Blaney to go into business with him regarding the sale of automobile engines. Blaney agreed to go into business with defendant.[6]

Defendant incorporated ADC; Blaney was not a shareholder. Defendant and Blaney discussed the SAMP Act, including the requirement that there be a filing before distributorships were sold. Defendant said that he would do the filing and later told Blaney that he had, in fact, accomplished it.[7]

Blaney understood that he was to locate a manufacturing facility for the business. Ultimately, Blaney located a shop in Sacramento. Blaney's responsibilities were to run the day-to-day business in Sacramento and to run the shop, while defendant was responsible for the sales end of the business. Blaney was never a signatory on the general account of ADC.

ADC ran advertisements for distributorships in late 1987. Blaney worked on the advertisements, and defendant approved the text. The first purchaser was Gregory Mattingly; at that time, there was neither a distributorship earning over $100,000, nor a San Mateo County distributorship that was doing well.

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[6] As was the case with various investors, Blaney was not aware that defendant had a prior mail fraud conviction, was the subject of a pending restraining order, or that he had a felony charge pending against him.

[7] Blaney testified on cross-examination that he understood that the Secretary of State had rejected the ADC filing because the type font was too small.

Blaney testified that it was difficult to contact defendant because he could not be reached at locations where he was supposed to be. Creditors pressured Blaney for payment but defendant controlled the money for the business and Blaney could not locate him. In addition, employees were unhappy because Friday payrolls were late.

Blaney borrowed a total of $56,000 (in two installments) from his in-laws, and put the money into the business. The second payment of $26,000 was used for payroll and for creditors. After this payment was exhausted, defendant encouraged Blaney to borrow additional funds to lend to the business. At some point during the first three months of 1988, Performance Systems Unlimited (PSU) closed down. After the shop closure, Blaney attempted suicide because he feared that he could not pay back the money lent by his in-laws.

C. *Peter Mascola*

In January 1988, Peter Mascola read an advertisement in the San Jose Mercury News concerning selling rebuilt engines. Because Mascola had been out of work, the advertisement appealed to him as a way to get back in business. Mascola responded to the advertisement and met defendant at ADC's office. Defendant told Mascola that ADC already had 10 distributors, that he intended to sell 100 distributorships, and that a distributor could earn between $100,000 to $150,000, or even more. Defendant told Mascola that he would need to provide a $5,000 cashier's check for a distributorship. He told Mascola that he would hold the check until Mascola visited the manufacturing facility and gave his approval.

Mascola had a second meeting with defendant on January 21, 1988, at which time he gave defendant the required cashier's check and filled out a contract. The next day, Mascola visited the plant, PSU, in Sacramento. Mascola concluded that the facility--contrary to defendant's statements--could not produce 20 engines per day. Mascola also determined that he would need to sell 10 engines per week in order to earn $100,000. He decided not to go forward with the investment; however, he was not aware at the time

that his $5,000 deposit had already been deposited by defendant into an ADC bank account.

After Mascola attempted to contact defendant without success, he delivered a letter to ADC (dated January 28, 1988) canceling his distributorship. On February 11, 1988--after missing two scheduled meetings--defendant told Mascola that he would receive a refund of his deposit when defendant sold another distributorship. Mascola never received the refund.

Defendant never told Mascola that defendant had been convicted previously of mail fraud. Defendant also never told him that defendant was the subject of a restraining order, or that he had a pending felony charge. These facts would have been significant to Mascola, had defendant informed him of them.

D. *Steve Rulli*

Steve Rulli read an advertisement in the Contra Costa Times in November 1987; he was interested in the business opportunity because of its projections of high income and because he wanted to own his own business. He met with defendant the next day. Defendant told Rulli that some distributorships had been sold but that there were some still available. Defendant described the cost of the distributorship as $19,750; for this price, Rulli would receive 10 engines, a hoist, stands, five retail garage outlets, training, advertising, and a sign.

At the next meeting (this time with Blaney), Rulli signed a distributorship agreement and gave Blaney a check for $9,750. After receiving a letter of acceptance from ADC, Rulli located a place for his new business, gave a security deposit, and paid the first month's rent. On December 15, 1987, Rulli made a second payment of $9,750 to ADC.

Rulli expected to receive the promised goods, customer information, training, advertising, and signs shortly after he made the second payment. He received four engines on February 2, 1988. Thereafter, he started to worry, and attempted to reach

defendant and Blaney without success. Rulli ultimately received five more engines, one advertisement, and some printed material; however, he did not receive a sign, training, or five retail outlets. Rulli closed his business in late May 1988. When Rulli was able to reach defendant, he told Rulli that PSU went out of business on March 25, 1988, and defendant promised to pay some of Rulli's rent. Rulli lost approximately $30,000 from the venture.

Defendant did not tell Rulli that defendant had been convicted of mail fraud, or that he was the subject of a restraining order. Likewise, defendant never told him that there was a pending felony charge against defendant.

E. *Gregory Mattingly*

Gregory Mattingly saw an advertisement in the San Jose Mercury News in November 1987. Mattingly met with Blaney and defendant; Blaney introduced defendant as his partner, and then excused himself. Defendant showed Mattingly a presentation book and told him that the business opportunity had a cost of $19,500; for this price, Mattingly would receive 10 engines, a hoist, a sign, printing, 10 accounts/contacts, and advertising. Defendant said that one distributorship was netting almost $100,000 and that another distributorship in San Mateo was doing well.[8] Defendant said that Mattingly would have to complete an application for the distributorship and pay a deposit of $4,000. Mattingly completed the application and delivered it to ADC in Cupertino. A few days later, Blaney told Mattingly that the application had been accepted and that he needed to come to the office to sign a contract. Mattingly signed an agreement on December 3, 1987, and paid the $4,000 deposit.

Mattingly found a location for his new business and paid the balance of the fee for the distributorship on December 10, 1987. In early January 1988, he traveled to Sacramento to pick up three engines at PSU; a week later, a fourth engine was delivered

[8] As noted above, Blaney testified that neither statement was true.

to him in Santa Cruz. Mattingly received a total of 19 engines. He never received any leads for the business. He became dissatisfied with ADC's performance and complained about it over the telephone to defendant.[9]

Mattingly closed his business on March 1, 1988. He lost $22,000 in the venture.

Defendant never told Mattingly that defendant had been convicted of mail fraud, or that he was the subject of a restraining order. Defendant also never told him that defendant had a pending felony charge against him.

F. *Dow Thompson*

Dow Thompson lived in Ceres, California, and saw an advertisement in the Modesto Bee in December 1987. Defendant told Thompson that the cost of the distributorship was $24,950, which included a $5,000 down payment. Defendant said that a distributor would receive 10 engines, advertising fliers, newspaper advertisements, and other things. Defendant said that he had a Modesto account lined up that wanted 10 engines. Defendant also told Thompson that other distributorships were doing well.

Thompson sent in an application to ADC along with a check for $5,000. ADC accepted the application on December 28, 1987.[10] Thompson then toured the facility January 1, 1988. After a second tour, Thompson gave defendant a check for the balance for the distributorship. Thompson understood that ADC was supposed to deliver engines in March 1988. He received only one hoist and printed invoices.

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[9] Commencing on December 3, 1987 to March 1, 1988, Mattingly tried to reach defendant by telephone two times a day. He only spoke with defendant once or twice during that three-month period.

[10] The settled statement refers to a date of "December 28, 1988." It is clear to us from our review of the summary of Thompson's testimony, including the context and the remainder of the relevant dates listed, that this was a typographical error.

Defendant did not tell Thompson that defendant had been convicted of mail fraud or that he was subject to a restraining order. Thompson also was not told that defendant had a felony charge pending against him.

G. *Stipulated Evidence*

The parties stipulated in the presence of the jury that defendant graduated from Santa Clara University Law School, and that defendant was a member of the California State Bar until 1968. Counsel also stipulated that defendant was charged in the municipal court on September 16, 1987, with a felony violation of Government Code section 6201 and was subsequently held to answer in the superior court.

III. *Defense Witnesses*

Defendant called one witness, George Payne--an investigator employed by the district attorney's office, who was originally called as a prosecution witness. Payne testified that he interviewed Mattingly, who said that the week before he stopped receiving engines, he had a profit of $1,000.

PROCEDURAL BACKGROUND

Defendant was charged by an amended information with five counts of grand theft, violation of section 484 (counts 1-5), and 10 counts of violating the SAMP Act (counts 6-15). The amended information named five separate victims: Mascola, Thompson, Rulli, Mattingly, and Bray. It alleged an enhancement under section 12022.1, i.e., that defendant committed the offenses while he was out of custody on bail pending trial on a felony, namely, a violation of section 6201 of the Government Code.

Defendant was charged under Civil Code section 1812.217 (counts 6-10) with willfully violating the SAMP Act because, inter alia, he did not inform the victims (i.e., investors in the distributorships) that defendant had been previously convicted of a felony involving fraud, or that he was subject to a currently effective injunction relating to business activity. The remaining five counts of violation of the SAMP Act (counts 11-15) charged defendant under Civil Code section 1812.217 with willfully engaging,

directly or indirectly, in acts, practices or courses of business that operated as a fraud and deceit upon the victims.

A jury trial commenced on September 6, 1990. Prior to submission of the case to the jury, the prosecution dismissed counts 5, 9, and 14. On September 14, 1990, after all-day deliberations on September 12 and 13, the jury found defendant guilty on counts 1 through 4, 6 through 8, 10 through 13, and 15.

On October 18, 1990, the court heard and denied defendant's motion for a new trial and continued the sentencing hearing to November 1, 1990. Defendant failed to appear at the sentencing hearing on November 1, 1990, and the court ordered the issuance of a bench warrant and ordered the forfeiture of bail.

After defendant's apprehension, on February 21, 2003, the court sentenced defendant. As discussed in greater detail, *post*, the court imposed a total term of seven years. Defendant filed a notice of appeal from the judgment on February 27, 2003.[11]

DISCUSSION

I. *Contentions On Appeal*

Defendant asserts seven challenges to the judgment. These seven claims of error are as follows:

1. The enhancement under section 12022.1 must be reversed because there was insufficient evidence from the record to conclude that defendant's admission of the enhancement at the outset of the trial was knowing and voluntary.

2. The court committed prejudicial error when it admitted defendant's prior conviction of violation of Government Code section 6201 in connection with counts 11 through 15.

[11] The abstract of judgment was corrected on December 8, 2003, to correct a technical error concerning count 9, one of the counts dismissed before submission of the case to the jury.

3. The inadvertent admission of People's exhibit 39--the docket sheet from municipal court concerning defendant's prior conviction of violating Government Code section 6201--resulted in prejudicial error to defendant.

4. The trial court erred when it imposed concurrent sentences for the convictions for counts 6, 7, 8, 10, 11, 12, 13, and 15.

5. The trial court erred by imposing an additional restitution fine of $200 under section 1202.45 because that statute was enacted in 1995, seven years after defendant was convicted of the crimes charged in this case.

6. The court prejudicially erred in its failure to instruct the jury that defendant was required to have knowledge of a duty to act before he could be convicted of his failure to act in the manner prescribed under the SAMP Act, and therefore the convictions under counts 6, 7, 8, and 10 must be reversed.

7. The court imposed upper-term sentences for the convictions on all offenses based upon aggravating circumstances that were not part of the jury's factual findings. Under *Blakely*, *supra*, ___ U.S. ___ [124 S.Ct. 2531], this sentence violated defendant's right to a jury trial guaranteed under the United States and California Constitutions.

We discuss each of these claims of error, *post*.

II. *Validity Of Admission Of Section 12022.1 Enhancement*

A. *Contentions of the Parties*

The amended information alleged that the charged offenses were committed while defendant was released on bail in a pending felony case (violation of Gov. Code, § 6201), thereby justifying a sentencing enhancement under section 12022.1, subdivision (b).[12] At

[12] "Any person arrested for a secondary offense which was alleged to have been committed while that person was released from custody on a primary offense shall be subject to a penalty enhancement of an additional two years in state prison which shall be served consecutive to any other term imposed by the court." (§ 12022.1, subd. (b).) As used in the statute, " '[p]rimary offense' means a felony offense for which a person has been released from custody on bail or on his or her own recognizance prior to the (continued)

trial, defendant admitted the enhancement, pursuant to a stipulation under which the prosecution agreed that the enhancement would not be read to the jury as a result of its admission by defendant.

Defendant argues that the sentence based on the admitted section 12022.1 enhancement must be reversed. He asserts that a condition precedent for the validity of the admission of the enhancement allegation was his advisement at trial of constitutional rights, including the right to a jury trial, to confront witnesses, and the privilege against self-incrimination. Defendant cites *People v. Howard* (1992) 1 Cal.4th 1132 (*Howard*), in support of his position. He maintains that the record fails to specifically demonstrate that he was advised of any of these constitutional rights before admitting the section 12022.1 enhancement. On this basis, he asserts that the sentencing based upon the enhancement must be reversed.

The Attorney General admits that the record is less than satisfactory given the absence of a reporter's transcript. This fact notwithstanding, the Attorney General argues that there was sufficient evidence that defendant was advised of his constitutional rights prior to admitting the enhancement.[13]

B. *Discussion of Defendant's Admission of Enhancement*

The sole evidence pertaining to whether defendant was admonished of his constitutional rights prior to admitting the section 12022.1 enhancement consisted of (1) a short summary in the clerk's minutes, and (2) a brief reference in the settled statement.

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judgment becoming final, including the disposition of any appeal, or for which release on bail or his or her own recognizance has been revoked." (§ 12022.1, subd. (a)(1).) The statute also defines "secondary offense" as "a felony offense alleged to have been committed while the person is released from custody for a primary offense." (§ 12022.1, subd. (a)(2).)

[13] The Attorney General states: "In sum, the record in this case, wholly lacking in a reporter's transcript, is perhaps at the extreme of what could qualify under the *Howard* rule of harmless error."

The clerk's minutes from the first day of trial reflect the following: "The defense offers a stipulation to admit the Section 12022.1 enhancement if it is not read to the jury. This stipulation is accepted. The defendant is voir dired regarding the admission of the 12022.1 enhancement. The defendant waives all rights, and the waiver is made knowingly and intelligently, without any promises or influence of any substances. The court accepts the plea and orders it be entered." The settled statement contains the following brief summary: "[T]he attorneys stipulated that if the defendant admitted the violation of Penal Code section 12022.1, the Government Code [§ 6201] violation would not come into evidence. The court voir dired the defendant, and the defendant admitted the Penal Code section 12022.1 allegation." From this record, there is insufficient evidence upon which to base a conclusion that defendant's admission of the section 12022.1 enhancement was knowing and voluntary under the totality of the circumstances.

In *Boykin v. Alabama* (1969) 395 U.S. 238, 242, the United States Supreme Court held that "[i]t was error, plain on the face of the record, for the trial judge to accept [the defendant's] guilty plea without an affirmative showing that it was intelligent and voluntary." It concluded that a guilty plea implicated a waiver of several federal constitutional rights, which waiver could not be presumed: "First, is the privilege against compulsory self-incrimination . . . . Second, is the right to trial by jury. [Citation.] Third, is the right to confront one's accusers. [Citation.] We cannot presume a waiver of these three important federal rights from a silent record." (*Id.* at p. 243, fn. omitted.)

Shortly after the *Boykin* decision, our Supreme Court was asked to decide whether a defendant's guilty plea was invalid because the waiver of constitutional rights was accomplished "more by inference than by express language." (*In re Tahl* (1969) 1 Cal.3d 122, 126.) The court in *Tahl* interpreted *Boykin* to require that "each of the three rights mentioned--self-incrimination, confrontation, and jury trial--must be specifically and expressly enumerated for the benefit of and waived by the accused prior to acceptance of his guilty plea." (*Id.* at p. 132.)

Five years later, the California Supreme Court extended the *Boykin/Tahl* rule requiring express admonitions and waivers to instances in which the defendant admitted a prior conviction in connection with sentencing. (*In re Yurko* (1974) 10 Cal.3d 857.) In addition to advising the defendant of the three constitutional rights and obtaining defendant's knowing and voluntary waiver thereof, the court noted that defendant must also be advised of the penal consequences of his prior-conviction admission. (*Id.* at pp. 863-864.) More specific to our case, the Supreme Court has impliedly held that the *Boykin/Tahl* rule applies where the defendant admits the truth of a sentencing enhancement charged under section 12022.1. (See *People v. Adams* (1993) 6 Cal.4th 570 (*Adams*) [holding that defendant's stipulation to certain facts representing some, but not all, of the elements of a § 12022.1 enhancement does not trigger *Boykin/Tahl* rule that court ensure on record that stipulation was knowing and voluntary].)[14]

In *Howard*, the Supreme Court held that "*Yurko* error involving *Boykin/Tahl* admonitions should be reviewed under the test used to determine the validity of guilty pleas under the federal Constitution. Under that test, a plea is valid if the record affirmatively shows that it is voluntary and intelligent under the totality of the circumstances. [Citations.]" (*Howard*, *supra*, 1 Cal.4th at p. 1175.) Thus, although the trial court in *Howard* did not admonish the defendant concerning his privilege against

[14] The Supreme Court in *Adams* made a clear distinction between admission of the truth of a section 12022.1 enhancement, on the one hand, and a stipulation of certain factual elements included in the enhancement. (*Adams*, *supra*, 6 Cal.4th at pp. 582-583.) In the latter instance, "[w]hile the stipulation must be voluntary and intelligent, it is not mandatory that the court ensure that this appears on the face of the record." (*Id.* at p. 582.) Since the record here makes clear that defendant admitted *the truth of the enhancement*, this case does not present an instance described in *Adams* of a *factual stipulation* that is exempt from the *Boykin/Tahl* rule. (Cf. *People v. Little* (2004) 115 Cal.App.4th 766 [holding that, contrary to the Attorney General's position that it was factual stipulation, defendant's stipulation that he was under the influence of controlled substance in violation of Health & Saf. Code, § 11550, subd. (a) required a showing that the stipulation was knowing and voluntary under *Boykin/Tahl* and *Howard*].)

self-incrimination, the Supreme Court nonetheless concluded that defendant's admission of the prior conviction was voluntary and intelligent from a review of the totality of the circumstances. (*Id.* at p. 1180.) Recently, the Supreme Court elaborated that in applying the *Howard* "totality of the circumstances" test, the reviewing court "must go beyond the courtroom colloquy to assess a claim of *Yurko* error. [Citation.] Now, if the transcript does not reveal complete advisements and waivers, the reviewing court must examine the record of 'the entire proceeding' to assess whether the defendant's admission of the prior conviction was intelligent and voluntary in light of the totality of circumstances. [Citation.]" (*People v. Mosby* (2004) 33 Cal.4th 353, 361.)[15]

Where the record is silent that the defendant received admonitions as to *any* of the three constitutional rights at the time he admitted the prior conviction, appellate courts have typically reversed the sentence enhancement based on the special finding, concluding that the admission did not satisfy *Boykin/Tahl*. (*People v. Mosby*, *supra*, 33 Cal.4th at pp. 361-362; see also *People v. Campbell* (1999) 76 Cal.App.4th 305, 309-310; *People v. Stills* (1994) 29 Cal.App.4th 1766, 1770-1771; *People v. Moore* (1992) 8 Cal.App.4th 411, 417-418.) The court will not infer a knowing and voluntary waiver of constitutional rights in connection with the admission of prior convictions from the defendant's familiarity with the criminal justice system. (See *People v. Campbell*, *supra*, 76 Cal.App.4th at p. 310.)

Here, there is insufficient evidence from the record to establish that defendant's admission of the section 12022.1 enhancement was knowing and voluntary. As the Supreme Court noted in *Howard*, an adequate record of express admonitions and waivers in connection with guilty pleas or admissions of prior convictions is very important: "[It

[15] *Mosby* was decided in July 2004, after defendant and the Attorney General here filed their respective briefs discussing the issue of the validity of defendant's admission of the section 12022.1 enhancement.

is] the only realistic means of assuring that the judge leaves a record adequate for review. [Citation.]" (*Howard*, *supra*, 1 Cal.4th at pp. 1178-1179.)

In this instance, there is no basis from which we may conclude that defendant was specifically admonished of his constitutional rights and/or that he expressly waived them. The summary indication in the clerk's minutes and in the settled statement that defendant was "voir dired" does not constitute a sufficient record of such specific admonishment and/or waiver. Likewise, the clerk's entry to the effect that "defendant waives all rights, and the waiver is made knowingly and intelligently," does not support a conclusion that defendant was advised under *Boykin/Tahl*; a generic statement that defendant "waives all rights" is no substitute for evidence that defendant knowingly and voluntarily waived the specific constitutional rights to a jury trial, confrontation, and the privilege against self-incrimination.

We see no distinction between cases where the reporter's transcript demonstrates that the defendant was not properly admonished and expressly waived his constitutional rights (see, e.g., *People v. Stills*, *supra*, 29 Cal.App.4th at pp. 1770-1771), and the instant case where there is no reporter's transcript at all. In both instances, "*there were no admonitions* with respect to any of the three constitutional rights" evident from the record. (*People v. Campbell*, *supra*, 76 Cal.App.4th at p. 310.) The absence of evidence that defendant knowingly and voluntarily waived his constitutional rights in admitting the enhancement thus requires reversal of the judgment insofar as it imposed a two-year consecutive sentence enhancement under section 12022.1.

III. *Admission Of Prior Government Code Section 6201 Conviction*

A. *Contentions of the Parties*

Over defendant's objection, the court admitted evidence of defendant's prior conviction of Government Code section 6201 that involved defacing a family law court order. This evidence was admitted in connection with counts 11 through 15 (violations of the SAMP Act).

Defendant contends that it was error to admit this prior conviction. He argues that the conviction of violating Government Code section 6201 was not made admissible as a recognized exception excluding prior bad acts evidence under Evidence Code section 1101, subdivision (b); the prior conviction was not relevant to show motive, opportunity, or intent. (Evid. Code, § 1101, subd. (b).) The Attorney General responds that the trial court did not abuse its discretion by admitting the prior conviction. He argues, alternatively, that, even if the evidence was erroneously admitted, the error was "decidedly harmless" in light of the "overwhelming" evidence of defendant's guilt.

B. *Admissibility of Uncharged Crimes Generally*

We begin by identifying the applicable standard of review. As our high court has indicated, we review a trial court's admission of uncharged-crimes evidence "for an abuse of discretion, examining the evidence in the light most favorable to the court's ruling. [Citation.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 120; see also *People v. Kipp* (1998) 18 Cal.4th 349, 369, 370.)

Evidence of a person's conduct on one occasion is generally not admissible to prove the conduct at issue at trial. Evidence Code section 1101, subdivision (a), provides: "Except as provided in this section and in [Evidence Code] Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Thus, evidence of the commission of other crimes is generally inadmissible if its purpose is simply to show defendant's criminal propensity or bad character. (*People v. Gibson* (1976) 56 Cal.App.3d 119, 127.)

Evidence of other crimes, however, may be admissible for a limited purpose under certain circumstances: "Nothing in [Evid. Code, § 1101] prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge,

identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act." (Evid Code, § 1101, subd. (b).)

Evidence of other uncharged crimes must be viewed with caution. As our Supreme Court has elaborated: "The admission of any evidence that involves crimes other than those for which a defendant is being tried has a 'highly inflammatory and prejudicial effect' on the trier of fact. This court has repeatedly warned that the admissibility of this type of evidence must be 'scrutinized with great care.' '[A] closely reasoned analysis' of the pertinent factors must be undertaken before a determination can be made of its admissibility." (*People v. Thompson* (1980) 27 Cal.3d 303, 314, fns. omitted.)

The degree of similarity between the uncharged and charged crimes required for the admission of the uncharged crime under Evidence Code section 1101, subdivision (b) varies, depending upon the purpose for admitting the evidence. Where the uncharged offense is used to prove identity, the two crimes must be very similar. (*People v. Catlin*, *supra*, 26 Cal.4th at p. 120.) "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] '[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act . . . .' [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant ' "probably harbor[ed] the same intent in each instance." [Citations.]' [Citation.]" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402; see also *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1210.)

It is because of the potential for prejudice inherent in uncharged-crimes evidence that a noted authority has concluded that "[a]ny doubts as to relevancy for a purpose other than as proof of the defendant's disposition, propensity, or character trait, made inadmissible by Evid. [Code] § 1101 [subdivision] (a), should be resolved in favor of the defendant and against admissibility. [Citation.]" (2 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 3d ed. 2004) Evidence of Character, Habit, and Custom, § 33.25, p. 723.)

C. *Analysis of Claimed Error*

Although our review is hampered by the absence of a reporter's transcript or other record evidencing the basis for the court's ruling, we see little, if any, similarity between the uncharged crime and the charged violations of the SAMP Act. The crimes themselves are quite dissimilar and involved wholly different victims. Further, the uncharged crime does not include specific intent to defraud as an element. (See *Loder v. Municipal Court* (1976) 17 Cal.3d 859, 863-864 [no specific intent required by Gov. Code, § 6200]; see also *People v. Tomalty* (1910) 14 Cal.App. 224, 229-230 [under predecessor statutes, Pen. Code, §§ 113, 114, fraudulent purpose is not an element of the crime of destroying or defacing public document].)

Likewise, the nexus between the apparent underlying conduct for the uncharged crime and defendant's alleged fraudulent intent under the SAMP Act is not readily apparent. Assuming--as defendant argues and as the Attorney General concedes--that the prior conviction was offered to show defendant's intent to defraud the distributors in violation of the SAMP Act, the connection between the prior crime and the charged crimes is very tenuous, at best.[16] It is difficult to see how defendant's alleged intent to

[16] Defendant's motion for new trial below noted that the evidence of the Government Code section 6201 charge "was offered by the prosecution under Evidence Code Section 1101[, subdivision] (b) to show other 'business' practices by the Defendant. The only theory to which such evidence could have been relevant was evidence of the Defendant's intent to defraud, since the Court found no criminal intent was necessary for SAMP Act violations. The [Government Code] Section 6201 case involved alteration of (continued)

lower his child support obligations by defacing a court order (i.e., the uncharged crime) has any tendency to establish his alleged intent to defraud investors in rebuilt automotive engine distributorships.

Moreover, we find wholly unpersuasive the Attorney General's contention that the uncharged crime was admissible because there were "[n]umerous instances of manipulation of documents" presented to the jury in connection with the charged crimes. First, our review of the settled statement does not lead us to such a sweeping conclusion. Second (and more significantly), the charged crimes were not based upon the alteration or "manipulation" of public documents.

Evidence of defendant's conviction for defacing a court order does not "tend logically, naturally and by reasonable inference to prove the issue(s) on which it [was] offered." (*People v. Robbins* (1988) 45 Cal.3d 867, 879.) Even viewing the evidence in a light most favorable to the trial court's ruling, we nonetheless conclude that it was error to admit evidence of defendant's prior Government Code section 6201 conviction.

D. *Whether Error Was Prejudicial*

We examine the trial court's error under the *Watson*[17] standard to determine whether, absent the erroneous admission of such evidence, it is reasonably probable that the jury would have reached a result more favorable to defendant. (See *People v. Tassell* (1984) 36 Cal.3d 77, 89, overruled on another ground in *People v. Ewoldt*, *supra*, 7 Cal.4th 380, 401.) It is appellant's burden of showing prejudice under the *Watson* standard. (*People v. Calpito* (1970) 9 Cal.App.3d 212, 222; *People v. Rodriguez* (1966) 243 Cal.App.2d 522, 526.)

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a court order in [defendant's] divorce proceedings to reduce his child support. The evidence had no relation to any business activity or any victim alleged herein."

[17] *People v. Watson* (1956) 46 Cal.2d 818, 836.

In this instance, after examining the entire record, we cannot conclude that it is reasonably probable that the jury would have reached a result more favorable to defendant, absent admission of the prior Government Code section 6201 conviction. There was testimony--repeated by several witnesses--that defendant had a prior conviction of felony mail fraud, and that he had failed to disclose this fact in his dealings with potential investors. There is no indication from the record that defendant objected to the admission of evidence concerning *this particular* prior conviction. Moreover, it is clear that any such objection would have been without merit, since defendant's nondisclosure of such prior felony conviction was one of the statutory bases for the prosecution's multiple charges of violating the SAMP Act. (See Civ. Code, §§ 1812.206, 1812.217.)[18] This criminal mail fraud conviction would in all likelihood have had a greater potential impact upon a jury than defendant's conviction for defacing a court document. Since the jury properly heard evidence of the mail fraud conviction (and defendant's nondisclosure of it to investors), we cannot conclude that the additional evidence of violating Government Code section 6201 had an adverse effect upon the outcome of the case. We thus conclude that any error in admitting this evidence does not warrant reversal.

IV. *Admission Of Municipal Court Docket Sheet*

People's exhibit 39 was a docket sheet from the prior charge of violating Government Code section 6201. The prosecution withdrew this exhibit after defendant agreed to admit the prior conviction in connection with the section 12022.1 sentencing

[18] Civil Code section 1812.217 make it a criminal violation, inter alia, for anyone to willfully violate any provision of the SAMP Act. Such violations under the Act would include any failure to disclose in the information sheet given under a seller assisted marketing plan, whether the seller or any of the seller's officers, directors, trustees or partners, have "been convicted of a felony or misdemeanor . . . if the felony or misdemeanor involved an alleged violation of this title, fraud, embezzlement, fraudulent conversion or misappropriation of property." (Civ. Code, § 1812.206, subd. (b)(1).)

enhancement. The trial court, however, inadvertently included this exhibit among the trial exhibits considered by the jury during deliberations.

Defendant contends that admission of this exhibit was prejudicial error. He argues that the jury was thereby allowed to consider extraneous matter in the docket sheet, such as the identification of defendant's counsel in that prior criminal matter, John Williams, who was also defense counsel in the trial of the subject charges. This extraneous fact--defendant claims--was highly prejudicial because the prosecution argued that defendant could, with the help of "a skillful lawyer," take minimal action to avoid criminal liability for the charges considered by the jury.

The Attorney General concedes that "the exhibit was mistakenly placed before the jury." Again, however, he argues that the error was harmless. We agree.

As we have discussed in part III, *ante*, we do not view the evidence of defendant's conviction under Government Code section 6201 as having a prejudicial effect upon the outcome of the case. We reject defendant's claim that the fact that the docket sheet identified defendant's attorney as being the same counsel representing defendant on the charged offenses was highly prejudicial. Even were we to accept as true defendant's hearsay assertion that the prosecution made reference in closing argument to defendant potentially hiring "a skillful lawyer" to avoid criminal liability in connection with the SAMP Act charges, we do not view that argument--coupled with admission of the docket sheet--as having a "highly prejudicial" impact. As we have discussed, *ante*, the uncharged offense of defacing a court order bore *no relationship to* the charged offenses. We simply do not view the fact that defendant was represented by the same attorney in both matters would have had a significant impact on the jury's deliberations.

Again, given the more significant evidence that defendant was previously convicted of felony mail fraud--a federal offense, and evidence which was *clearly admissible*--we cannot conclude that it is probable that the outcome would have been more favorable to the defendant, were the Government Code section 6201 violation

excluded. We conclude under the *Watson* standard that the erroneous admission of the docket sheet identifying this charge was not prejudicial to defendant.

V. *Imposition Of Concurrent Sentences*

Defendant contends that the court erred in its imposition of concurrent sentences for convictions on certain counts relating to violations of the SAMP Act (i.e., counts 6, 7, 8, 10, 11, 12, 13, and 15) He asserts that the concurrent sentences involved multiple punishment for the same conduct for which he was sentenced under the grand theft counts (counts 1-4). Specifically, defendant argues that: (a) convictions under counts 8 and 13 were based upon the same conduct as the count 1 conviction (concerning victim Mascola); (b) convictions under counts 10 and 15 were based upon the same conduct as the count 2 conviction (concerning victim Thompson); (c) convictions under counts 7 and 12 were based upon the same conduct as the count 3 conviction (concerning victim Rulli); and (d) convictions under counts 6 and 11 were based upon the same conduct as the count 4 conviction (concerning victim Mattingly).[19] He contends that the imposition of these concurrent sentences for the SAMP Act convictions was multiple punishment for four indivisible courses of conduct with respect to the four victims noted above, and was thus proscribed by section 654.[20]

The Attorney General concedes that the counts for which defendant received concurrent sentences should have been stayed under section 654. The Attorney General notes: "[T]he record amply shows that the acts of deception practiced by [defendant]

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[19] In his argument on appeal, defendant identified incorrectly the SAMP Act counts that corresponded with the grand theft counts in the amended information. (For instance, he incorrectly identified counts 6 and 11 [which relate to the victim Mattingly] with count 1 [relating to the victim Mascola].) For clarity, we have corrected these errors in our discussion in this section.

[20] "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." (§ 654, subd. (a).)

which led to his conviction of the SAMP Act charges were the identical acts of deception which led to his conviction on the grand theft and fraud charges."

The court's imposition of a sentence with respect to the SAMP Act convictions running concurrent with the sentences on counts 1 through 4 ran afoul of section 654. The convictions under the SAMP Act counts were based upon the same course of conduct that resulted in the convictions under counts 1 through 4. (See *People v. Perez* (1979) 23 Cal.3d 545, 551.) Accordingly, we conclude that the trial court erred in its imposition of a sentence on counts 6 through 8, 10 through 13, and 15 running concurrent with the sentence imposed on counts 1 through 4; the concurrent sentence for the SAMP Act convictions must be stayed under section 654.

VI. *Imposition Of Restitution Fine*

The court imposed a restitution fine of $200 pursuant to section 1202.4, a fine that defendant does not challenge on appeal. The clerk's minutes and abstract of judgment, however, reflect the imposition of an additional restitution fine under section 1202.45;[21] that fine is noted as entered and suspended. Defendant *does* challenge this additional restitution fine.

Defendant argues that this additional fine violates ex post facto principles because section 1202.45 was not enacted until 1995, seven years after defendant's conviction. He cites *People v. Callejas* (2000) 85 Cal.App.4th 667 (*Callejas*), in support of his position. The Attorney General does not contend otherwise.[22]

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[21] "In every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4. This additional parole revocation restitution fine shall be suspended unless the person's parole is revoked." (§ 1202.45.)

[22] The Attorney General's position is that, while the correctness of the decision in *Callejas* may be debated in another case, "given the minimal fine in this case, we do not believe it is a useful expenditure of this Court's resources and time to entertain this issue. (continued)

In *Callejas*, the defendant in 1998 was initially granted probation and ordered to pay a restitution fine of $200 pursuant to section 1202.4 for the crime of driving under the influence committed in 1993. (*Callejas*, *supra*, 85 Cal.App.4th at p. 669.) In 1999, the trial court had found that the defendant had violated the terms of his probation, revoked his probation, sentenced defendant to two years in state prison, and imposed and stayed a parole revocation fine under section 1202.45. (*Callejas*, *supra*, 85 Cal.App.4th at p. 669.) The defendant successfully challenged on appeal the parole revocation fine on the ground that it violated ex post facto principles because it was punishment imposed under a statute enacted in 1995, two years *after* defendant committed the crime to which it related. (*Id.* at p. 678.) The court explained: "A law which increases the punishment for a crime after the crime has been committed is the very model of an ex post facto law." (*Id.* at p. 671, fn. omitted.)

Callejas is on point and prohibits the imposition of the additional restitution fine of $200 under section 1202.45 that was apparently imposed in this case. We thus conclude that, on remand, the abstract of judgment must be amended to strike the parole revocation fine of $200 under section 1202.45.

VII. *Failure To Instruct On Knowledge Of SAMP Act Requirements*

A. *Contentions of the Parties*

Defendant was charged in counts 6, 7, 8, and 10 with willful violations of Civil Code section 1812.217 of the SAMP Act. The amended information alleged that these violations involved: (1) the failure to file disclosure statements with the Secretary of State; (2) the failure to inform the four victims of defendant's prior felony conviction involving fraud; (3) the failure to inform the four victims that defendant was subject to an injunction relating to business activity; and (4) providing the four victims with a

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We therefore do not object to the Court's striking of the suspended fine from the Abstract of Judgment."

representation of income or earning potential relating to the venture in violation of the SAMP Act.

Defendant claims that in order to be convicted on these counts, the prosecution was required to show that defendant had knowledge of the requirements of the SAMP Act. He contends that the court prejudicially erred in its failure to instruct the jury that defendant was required to have such knowledge before he could be convicted of his failure to act in the manner prescribed under the SAMP Act.[23] Defendant relies in large part upon *People v. Garcia* (2001) 25 Cal.4th 744 (*Garcia*), in support of his position.

The Attorney General responds that, in order to be found guilty of willfully violating the SAMP Act under Civil Code section 1812.217, the prosecution need not show that the defendant had knowledge of the Act's requirements. The Attorney General cites *People v. Mott* (1983) 140 Cal.App.3d 394 (*Mott*), in support of this position.

B. *Discussion of Claim of Instructional Error*

The Supreme Court has described generally the distinction between general intent and specific intent crimes: "When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the

[23] Defendant contends that this issue was preserved on appeal. He cites a reference in the settled statement to the fact that "[t]he defense argued that CALJIC [No.] 3.31 (specific intent) should apply to all counts." (The court gave an adapted version of CALJIC No. 3.31 as applied to the four grand theft counts, counts 1-4.) The record does not demonstrate that defense counsel below made the specific argument advanced on appeal--i.e., that the prosecution was required to prove that defendant had knowledge of a duty to act in a certain manner under the SAMP Act. The Attorney General, however, does not address this procedural issue and thus impliedly concedes that defendant preserved the issue for appeal.

crime is deemed to be one of specific intent." (*People v. Hood* (1969) 1 Cal.3d 444, 456-457.)

The term "willfully" when used in a statute does not usually connote a specific intent crime: "The use of the word 'willfully' in a penal statute usually defines a general criminal intent, absent other statutory language that requires 'an intent to do a further act or achieve a future consequence.' [Citations.]" (*People v. Atkins* (2001) 25 Cal.4th 76, 85; see also *People v. Prevost* (1998) 60 Cal.App.4th 1382, 1391-1393 [§ 593d, former subd. (b), distribution of unauthorized cable converters]; *People v. Bell* (1996) 45 Cal.App.4th 1030, 1043 [Civ. Code, § 892, rent skimming]; *People v. Stark* (1994) 26 Cal.App.4th 1179, 1181-1184 [§ 484b, diversion of construction funds].) As defined generally by the Penal Code, "[t]he word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage." (§ 7, subd. 1.)

The statute in question here (Civ. Code, § 1812.217) uses the term "willfully" in the context of the commission of acts or omissions that violate the provisions of the SAMP Act.[24] It does not require that the defendant intend "to do some further act or

[24] "Any person, including, but not limited to, the seller, a salesman, agent or representative of the seller or an independent contractor who attempts to sell or lease or sells or leases a seller assisted marketing plan, who willfully violates any provision of this title or employs, directly or indirectly, any device, scheme or artifice to deceive in connection with the offer or sale of any seller assisted marketing plan, or willfully engages, directly or indirectly, in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person in connection with the offer, purchase, lease or sale of any seller assisted marketing plan shall, upon conviction, be fined not more than ten thousand dollars ($10,000) for each unlawful transaction, or imprisoned in the state prison, or imprisoned in county jail for not more than one year, or be punished by both such fine and imprisonment." (Civ. Code, § 1812.217.)

achieve some additional consequence," as required for a specific intent crime. (*People v. Hood*, *supra*, 1 Cal.3d at p. 457.)

The Court of Appeal in *Mott*, *supra*, 140 Cal.App.3d 394, reached the same conclusion. In *Mott*, the defendant, charged under Civil Code section 1812.217, asserted that a conviction for violating the SAMP Act required knowledge of the registration and disclosure requirements of the Act. (*Mott*, *supra*, 140 Cal.App.3d at p. 402.) The court rejected this challenge, concluding that "knowledge of the unlawfulness of an act or omission is not required." (*Id.* at p. 403.) In so holding, the court in *Mott* reasoned, quoting from our Supreme Court in *People v. Snyder* (1982) 32 Cal.3d 590, 592-593, as follows: " ' "It is an emphatic postulate of both civil and penal law that ignorance of a law is no excuse for a violation thereof. . . . If a person accused of a crime could shield himself behind the defense that he was ignorant of the law which he violated, immunity from punishment would in most cases result." [Citations.] [T]he crucial question is whether the defendant was aware that he was engaging in the conduct proscribed by that section. [Citations.]' " (*Mott*, *supra*, 140 Cal.App.3d at p. 403.)

The holding in *Garcia*, *supra*, 25 Cal.4th 744--a case decided over a decade after defendant's conviction herein--does not compel a contrary conclusion here. In *Garcia*, the Supreme Court was considering criminal liability under a statute entirely dissimilar from the SAMP Act. In *Garcia*, the defendant challenged his conviction for failing to register as a convicted sex offender in the city in which he was domiciled; he contended that the statute (§ 290, former subd. (g)(3)), making it a felony for anyone who "willfully violates" the registration provision required that he *actually know of* such duty to register. (*Garcia*, *supra*, 25 Cal.4th at p. 752.) The Supreme Court agreed with defendant. (*Ibid.*)

In *Garcia*, the Supreme Court was considering criminal liability under a statute entirely dissimilar from the SAMP Act. The registration statute in *Garcia* imposed criminal liability based merely upon the defendant's presence in a city, coupled with his failure to register as a convicted sex offender. Here, while some of the acts or omissions

that create the potential for criminal liability under Civil Code section 1812.217 involve a *failure to register* (e.g., the failure to register with the Secretary of State as required by former Civ. Code, § 1812.203),[25] other acts or omissions constitute SAMP Act violations of a very different nature. We conclude that the holding in *Garcia* did not abrogate *Mott* or otherwise convert the general intent crime of willfully violating the SAMP Act into a specific intent crime. Accordingly, we find no instructional error by the trial court regarding the SAMP Act counts.

VIII. *Claimed Blakely Violation*

A. *Contentions of the Parties*

The trial court imposed the upper base terms for each count of conviction. Specifically, using count 1 as the principal term, the court imposed the upper term of three years. It noted that it had considered both the mitigating and aggravating circumstances in coming to the conclusion that the upper term was warranted. The court cited "that there was planning and sophistication and professionalism [by] which the crimes in this case were carried out. And there were plenty of facts indicating that there was premeditation in the execution of the crimes."

Defendant claims that, under *Blakely*, *supra*, ___ U.S. ___ [124 S.Ct. 2531], he was deprived of his constitutional right to a jury trial when the trial court imposed an upper-term sentence for each of the crimes of which he was convicted. The Attorney General responds: (1) defendant forfeited any claim of error under *Blakely* by failing to raise the issue below; (2) *Blakely* does not apply to California's determinate sentencing laws; and (3) any *Blakely* error was harmless.

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[25] At the time defendant was charged, the SAMP Act required registration with the Secretary of State. Civil Code section 1812.203 was later amended to require that the registration must be filed with the State Attorney General. (See Stats. 1990, ch. 1491, § 2, pp. 6910-6912.)

We conclude below that defendant's upper-term sentence deprived him of his constitutional rights as held in *Blakely*, and that defendant did not forfeit this challenge by not raising it at the sentencing hearing below (that took place over one year *before Blakely* was decided). We first review *Blakely* and the prior decision on which it relied, *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*).

B. *Supreme Court Precedent*

In *Apprendi*, the United States Supreme Court considered the constitutionality of New Jersey law that permitted an enhancement that could result in potentially double the maximum sentence for possession of a firearm in the event that the judge determined by a preponderance of the evidence that a hate crime had been committed. (*Apprendi*, *supra*, 530 U.S. at pp. 468-469.) The Supreme Court concluded that the New Jersey practice could not stand, holding 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." (*Id.* at p. 490.) This principle, the court explained, derives from two constitutional rights, namely, the right to trial by jury, and the prohibition against depriving a person of liberty without due process of law. (*Id.* at pp. 476-477; see also *Ring v. Arizona* (2002) 536 U.S. 584, 603-609.)

In *Blakely*, at issue was the constitutionality of Washington determinate sentencing laws under which, as applicable to the case before the Supreme Court, a class B felony held a "standard range" of punishment of 49 to 53 months, while another statute authorized the judge to impose an "exceptional sentence" up to a maximum of 10 years, where there existed " 'substantial and compelling reasons justifying an exceptional sentence.' [Citation.]" (*Blakely*, *supra*, ___ U.S. at p. ___ [124 S.Ct. at p. 2535].) The defendant in *Blakely* pleaded guilty to a class B felony by admitting the elements of second-degree kidnapping and domestic-violence and firearm allegations. (*Ibid.*) Although the State recommended sentencing at the "standard range" between 49 and 53 months, the judge, citing the fact that defendant "had acted with 'deliberate cruelty,' "

"imposed an exceptional sentence of 90 months--37 months beyond the standard maximum." (*Ibid.*)

Defendant argued on appeal that the Washington sentencing procedure deprived him of his federal constitutional right to a jury trial to determine beyond a reasonable doubt all of the facts required for the sentence imposed. (*Blakely*, *supra*, __ U.S. at p. ___ [124 S.Ct. at p. 2536].) The court held "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [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." (*Blakely*, *supra*, ___ U.S. at p. ___ [124 S.Ct. at p. 2537].) The judge had relied on a fact not found by the jury or admitted by the defendant; accordingly the Supreme Court concluded that the sentence in *Blakely* was invalid. (*Id.* at p. ___ [124 S.Ct. at p. 2538].)

C. *Discussion of Defendant's Blakely Challenge*

1. *Forfeiture*

The Attorney General contends that defendant here forfeited his objection to the upper-term sentence by failing to specifically object at the time of the sentencing hearing. The term "waiver" has been applied both to the intentional relinquishment of a known right and the forfeiture of a claim by failing to timely assert it. (*People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. 6.) " 'The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had. . . .' " (*People v. Walker* (1991) 54 Cal.3d 1013, 1023.)

The holding in *Apprendi* had been understood to apply to sentence enhancements; before *Blakely* was decided, it was not commonly understood that it had application to aggravating factors in sentencing. Thus, we believe it reasonable that a defense attorney-

-of course, being unable to foresee the Supreme Court's decision in *Blakely* decided nearly a year and one-half after sentencing--would not object at sentencing to the court's reliance upon factors not decided by a jury beyond a reasonable doubt in imposing an upper-term sentence. We find no forfeiture due to defendant's failure to object at sentencing, and we will address his claim of *Blakely* error on its merits.[26]

2. *Application of Blakely to upper term sentence*

We begin by acknowledging that the question of whether *Blakely* applies to upper-term sentencing may be the subject of future clarification by our Supreme Court.[27] With that prelude, we conclude that defendant's *Blakely* challenge has merit.

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[26] In the wake of the *Blakely* decision, a number of California appellate decisions have addressed this issue of forfeiture. We have previously rejected forfeiture arguments by the Attorney General in two decisions that are not yet final. (See *People v. Ackerman* (2004) 124 Cal.App.4th 184; *People v. Jaffe* (2004) 122 Cal.App.4th 1559, 1583.) The First District has similarly held in a decision not yet final that the defendant did not forfeit his *Blakely* challenge. (See *People v. Picado* (2004) 123 Cal.App.4th 1216.) The Supreme Court has granted review in a number of cases in which the appellate courts had likewise rejected forfeiture arguments. (See, e.g., *People v. Barnes* (2004) 122 Cal.App.4th 858, 879, review granted Dec. 15, 2004, S128931; *People v. Vaughn* (2004) 122 Cal.App.4th 1363, 1369, review granted Dec. 15, 2004, S129050; *People v. Butler* (2004) 122 Cal.App.4th 910, 918-919, review granted Dec. 15, 2004, S129000; *People v. Lemus* (2004) 122 Cal.App.4th 614, 620, review granted Dec. 1, 2004, S128771; *People v. George* (2004) 122 Cal.App.4th 419, 424, review granted Dec. 15, 2004, S128582; *People v. Ochoa* (2004) 121 Cal.App.4th 1551, 1564-1565, review granted Nov. 17, 2004, S128417.)

[27] The Supreme Court has granted review in two cases involving *Blakely* issues. In *People v. Towne*, review granted July 14, 2004, S125677, the high court will consider, inter alia: "(2) Does [*Blakely*], preclude a trial court from making findings on aggravating factors in support of an upper term sentence? (3) If so, what prejudicial error standard applies, and was the error in this case prejudicial?" The Supreme Court also granted review in *People v. Black*, review granted July 28, 2004, S126182, on these issues: "(1) What effect does [*Blakely*] have on the validity of defendant's upper term sentence? (2) What effect does *Blakely* have on the trial court's imposition of consecutive sentences?"

In our application of *Blakely* to the sentencing here, we must initially ascertain "the prescribed statutory maximum" sentence. (*Apprendi*, *supra*, 530 U.S. at p. 490.) This "prescribed statutory maximum" 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*." (*Blakely*, *supra*, __ U.S. at p. __ [124 S.Ct. at p. 2537].)

Under California's determinate sentencing law, "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." (§ 1170, subd. (b); see also Cal. Rules of Court, rule 4.420(a) ["middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation"].) The middle term is thus the "presumptive" sentence, absent aggravating or mitigating factors warranting imposition of an upper-term or lower-term sentence, respectively. (*People v. Arauz* (1992) 5 Cal.App.4th 663, 666.) Rule 4.421 of the California Rules of Court provide a nonexclusive list of 16 factors in aggravation that the sentencing judge may consider.[28]

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[28] Rule 4.421 identifies "[c]ircumstances in aggravation" as: "(a) Facts relating to the crime, whether or not charged or chargeable as enhancements, including the fact that: [¶] (1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness. [¶] (2) The defendant was armed with or used a weapon at the time of the commission of the crime. [¶] (3) The victim was particularly vulnerable. [¶] (4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission. [¶] (5) The defendant induced a minor to commit or assist in the commission of the crime. [¶] (6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process. [¶] (7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed. [¶] (8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism. [¶] (9) The crime involved an attempted or actual taking or damage of great monetary value. [¶] (10) The crime involved a large quantity of contraband. [¶] (11) The defendant took advantage of a position of trust or confidence to commit the (continued)

Aggravating or mitigating circumstances need be proved to the sentencing judge only by a preponderance of the evidence. (Cal. Rules of Court, rule 4.420(b).)

The sentencing provision applicable here specifies that the grand theft count is "punishable by imprisonment in any of the state prisons for 16 months, or two or three years." (§ 18; see also § 489, subd. (b).) Defendant argues that the middle term of two years was thus the "prescribed statutory maximum," i.e., "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Blakely*, *supra*, __ U.S. at p. __ [124 S.Ct. at p. 2537].) We agree.

We conclude that, for purposes of applying *Blakely*, the middle term is the relevant statutory maximum in the absence of the fact of a prior conviction, the jury's finding or defendant's admission of an aggravating factor.[29] In this instance, the court based its finding that the upper term was appropriate solely upon the conclusion as an aggravating fact that "[t]he manner in which the crime was carried out indicates planning,

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offense. [¶] (b) Facts relating to the defendant, including the fact that: [¶] (1) The defendant has engaged in violent conduct which indicates a serious danger to society. [¶] (2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness. [¶] (3) The defendant has served a prior prison term. [¶] (4) The defendant was on probation or parole when the crime was committed. [¶] (5) The defendant's prior performance on probation or parole was unsatisfactory. [¶] (c) Any other facts statutorily declared to be circumstances in aggravation." (Cal. Rules of Court, rule 4.421.)

[29] Our conclusion that the prescribed statutory maximum under California's determinate sentencing law is generally the middle term punishment prescribed by the applicable sentencing statute is consonant with two of our prior decisions that are not yet final. (See *People v. Ackerman*, *supra*, 124 Cal.App.4th 184; *People v. Jaffe*, *supra*, 122 Cal.App.4th 1559.) As noted in footnote 27, *ante*, two cases are pending before the California Supreme Court in which the court has specifically identified the issues before it as including questions concerning *Blakely*'s application to upper-term sentences imposed under California's determinate sentencing law. (See *People v. Towne*, review granted Jul. 14, 2004, S125677; *People v. Black*, review granted Jul. 28, 2004, S126182.)

sophistication, or professionalism." (Cal. Rules of Court, rule 4.421(a)(8).)[30] Plainly, this aggravating fact was not one that was either the subject of a jury finding or of defendant's admission. Accordingly, we conclude that it was error under *Blakely* for the trial court to have imposed an upper-term sentence for the convictions for grand theft and for SAMP Act violations.

3. *Harmless error*

While disputing that *Blakely* applies to upper-term determinate sentences, the Attorney General urges that, assuming arguendo *Blakely* applies here, any sentencing error was harmless. He urges that "*Apprendi* error does not warrant relief if it is harmless beyond a reasonable doubt" under the *Chapman* test.[31] We agree that *Blakely* error must be examined to determine whether the failure to obtain jury findings on the aggravating factors for sentencing was harmless beyond a reasonable doubt. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326 [*Chapman* test applied to instructional error with regard to element of sentence enhancement].)

The Attorney General asserts that any *Blakely* error in this instance was harmless beyond a reasonable doubt because the jury would have found one or more aggravating

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[30] The trial court reasoned as follows: "The court has selected count one as the principal term, and for count one the court will impose a sentence of three years, which represents the upper term of the three terms provided by law. The reasons for imposing the upper term in this case is [*sic*] that I've considered both mitigating and aggravating circumstances surrounding this case as set out in Rules of Court rule 414, rule 421 [*sic*]. [¶] Those that impressed me both greatly with respect to the upper term is [*sic*] the fact that there was planning and sophistication and professionalism with which the crimes in this case were carried out. And there were plenty of facts indicating that there was premeditation in the execution of the crimes. That fact or that criteria far outweighs [*sic*] the circumstances in mitigation in the court's view and warrants the court's imposition of the upper term."

[31] *Chapman v. California* (1967) 386 U.S. 18, 24. We note that our Supreme Court is examining the prejudicial error standard for *Blakely* error in *People v. Towne*, review granted July 14, 2004, S125677. (See fn. 27, *ante*.)

circumstances to be true, had the issue been submitted for its determination. The Attorney General contends that "there was overwhelming evidence . . . that [defendant] did premeditate and show great sophistication in his deliberate defrauding of numerous innocent victims." Further, the Attorney General asserts that "one of the aggravating factors found by the sentencing court was [defendant's] service of a prior prison term," which is an exception under *Blakely* to the requirement that a jury decide matters that are used to increase the maximum sentence imposed for the defendant's crime. We reject these arguments.

First, we cannot say that the error under *Blakely* was harmless beyond a reasonable doubt; we cannot conclude that the trial judge's finding that defendant's crime was the result of "planning and sophistication and professionalism" was supported by "overwhelming evidence." The jury made no such finding, and, particularly given the scant record here, we are unwilling to posit that it *necessarily would have* reached such conclusion.

Second, the Attorney General is incorrect in asserting that the trial court cited defendant's service of a prior prison term as an aggravating factor justifying an upper-term sentence. The court *did* cite the fact that defendant had served a prior prison term; it did so, however, in connection with its conclusion that the sentences for counts 2 through 4 should be served consecutively to the sentence on count 1. It did *not* cite defendant's prior prison record as an aggravating factor for imposing an upper-term sentence.

Accordingly, we cannot conclude that the sentencing error under *Blakely* was harmless beyond a reasonable doubt. We therefore reverse the upper-term sentence for each of the 12 counts for which defendant was convicted.[32]

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[32] The trial court also imposed the upper-term sentence of three years each for counts 2 through 4, as well as the SAMP Act counts (counts 6-8, 10-13, 15) based upon the same findings of aggravation made in count 1. It stayed all but one-third of the middle term sentence for counts 2 through 4, thereby imposing consecutive sentences of (continued)

DISPOSITION

We reverse the judgment for the limited purpose of resentencing. The trial court erred, insofar as it (1) imposed a two-year sentence enhancement under section 12022.1 based upon defendant's admission of said enhancement (without evidence that such admission was based upon a knowing and voluntary waiver of defendant's constitutional rights), (2) imposed an upper-term sentence (in violation of *Blakely*) as to each of the counts for which defendant was convicted, (3) imposed concurrent sentences with respect to counts 6 through 8, 10 through 13, and 15 without staying such concurrent sentences pursuant to section 654, and (4) imposed a $200 parole revocation fine under section 1202.45 ex post facto.

We remand for resentencing (1) with respect to each of the 12 counts for which defendant was convicted, consistent with this opinion and *Blakely*; and (2) for determination of the truth of the enhancement allegation under section 12022.1. After resentencing, the new judgment (in addition to the new sentence imposed on the 12 counts for which defendant was convicted and any enhancement properly imposed under section 12022.1), shall (a) omit any reference to a parole revocation fine imposed under section 1202.45, stricken by this court, and (b) reflect the fact that the sentences as to counts 6 through 8, 10 through 13, and 15 running concurrent with the sentence imposed

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eight months each for a total subordinate term of two years. (See § 1170.1, sub. (a).) It imposed concurrent three-year sentences for each of the SAMP Act counts. As we have discussed in part V, *ante*, the court erred in imposing concurrent sentences on the SAMP Act counts, and we reverse the sentence as to these counts for this additional reason.

on counts 1 through 4, are stayed pursuant to section 654 as long as the judgment of conviction on counts 1 through 4 remains in full force and effect.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.