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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JAMES IRVIN YOUNG III, Defendant and Appellant.	B175732 (Los Angeles County Super. Ct. No. BA202316)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bob S. Bowers, Jr., Judge. Affirmed as modified.

Cheryl Barnes Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lawrence M. Daniels and Lance E. Winters, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant James Irvin Young III appeals from a judgment of conviction entered after a jury found him guilty of nine counts of sale of securities without qualification (Corp. Code, § 25110), eight counts of using false statements in the sale of a security (*id*., § 25401), one count of fraudulent practices in the sale of securities (*id*., § 25541), and six counts of grand theft (Pen. Code, § 487, subd. (a)). The jury found true the allegations that the property loss on four counts exceeded $150,000 (*id*., § 12022.6, subd. (a)(2)). Following his conviction, the trial court sentenced defendant to state prison for a term of 13 years and ordered him to pay restitution to his victims.

On appeal, defendant challenges the sufficiency of the evidence to support the finding the prosecution commenced within the limitations period, and he claims instructional and sentencing error. While we affirm the convictions, we agree there was sentencing error and modify the judgment accordingly.

FACTS

In September 1994, Aubrey Fenderson (Fenderson) saw an ad for employment as a telephone salesperson for Telephonic Yellow Pages (TYP). He met with defendant, who hired him. His job was to telephone businesses, inform them of TYP's services and ask if they wanted to participate. In December 1994, defendant held a meeting, at which he stated that he was looking for investors in TYP. Fenderson invested $15,000 with defendant.

In January 1995, Daniel Webb (Webb) called Ric Bullard (Bullard), looking for investors in TYP. Bullard said he did not have any money to invest. Webb said he could use his credit card. Bullard spoke to defendant, who repeated what Webb had told Bullard. Bullard invested $27,000. Defendant mailed him some promissory notes. Bullard received some payments, but about $25,000 remained unpaid.

No one informed Bullard that defendant previously had been convicted of selling unqualified securities, selling securities by misrepresentation and fraudulent practices in the sale of securities. No one informed Bullard that in March 1993, defendant had been served with an order to cease and desist selling securities in connection with Panda International Resources or any other unqualified or nonexempt securities.

Webb called Hassan Atef-Vahid (Atef-Vahid) in June 1995. Webb was looking for investors in TYP. He said investors would make a lot of money when the company went public. Webb guaranteed a 12 percent return. Webb offered Atef-Vahid a $15,000 unit at half price. Atef-Vahid invested $7,500.

No one told Atef-Vahid about defendant's previous convictions or the cease and desist order. No one told Atef-Vahid that TYP was losing money.

A telemarketer called Ken Massey (Massey) in June 1995 seeking investors in TYP. When told he could invest $7,500 and receive credit for $15,000, Massey invested the $7,500. While Massey received a subscription agreement, he did not recall seeing the portion indicating that defendant had pled no contest to securities violations. No one told Massey about defendant's previous convictions, the cease and desist order or that TYP was losing money.

Paul Herman (Herman) received a telephone call in August 1995 regarding investment in TYP. Herman requested additional information. Defendant called Herman, told him he would receive a return of 12 percent on his investment, and said he had invested $100,000 of his own money in the company. On November 13, 1995, Herman invested $5,000 in TYP.

Although Herman received a prospectus for TYP, he saw nothing in it regarding defendant's previous convictions. No one told him about defendant's previous convictions, the cease and desist order or that TYP was losing money.

Larry Hegland (Hegland) learned about TYP from one of his partners in late 1995. He loaned $20,000 to TYP. In February 1996, Hegland met with defendant, who told him TYP was doing well and urged him to invest in the company. Hegland gave defendant a check for $100,000 and asked that his prior loan be considered part of his

investment. On February 26, Hegland invested an additional $80,000. No one told Hegland about defendant's previous convictions, the cease and desist order or that TYP was losing money.

In April 1996, Robert Strange (Strange) received an unsolicited telephone call asking him to invest in TYP. When he said he was interested, defendant spoke to him and told him the company already was profitable. Strange invested $10,000. No one told him about defendant's previous convictions, the cease and desist order or that TYP was losing money.

William Potter (Potter) received a telephone call about investing in TYP in May 1996. He received a second call at the end of the month, then a third call, this one from defendant. Potter was told that TYP was making a profit, and he was promised an 18 percent return on his investment. He sent TYP a check for $20,000. He never received a return on his investment. No one told him about defendant's previous convictions, the cease and desist order or that TYP was losing money.

Michelle Heaton received a flier advertising TYP in 1995. Because her husband Gary was confined to a wheelchair, Webb came to their house to talk to them. Mr. Heaton told Webb he wanted to invest but could not afford to do so. He said he would try to cash in a life insurance policy. Eventually, he was able to cash it in for $65,000.

Defendant arranged to bring the Heatons to TYP's office. They gave defendant a check for $55,000. They filled out a subscription agreement but did not read it. At defendant's direction, Mrs. Heaton wrote that she had invested in high risk investments before and was aware of the risk. Defendant did not tell the Heaton's about his previous convictions, the cease and desist order or that TYP was losing money. The Heatons received $8,000 to $10,000 on their investment.

Kathy Holguin (Holguin) is an investigator with the California Department of Corporations. Holguin had investigated defendant and assisted in prosecuting him in 1990.

On May 16, 1996, Holguin received a prospectus and offering material for TYP. The material identified defendant as one of the partners in the company. It offered

prospective customers the opportunity to invest in a company that was in operation and already profitable.

Holguin investigated and learned that TYP did not have a permit to sell securities to the public. While notices claiming an exemption for qualification had been filed, exemption had not been granted.

Department of Corporations Forensic Examiner Steven Rodman (Rodman) went to TYP's office in early 1997 and spoke to defendant. Pursuant to a subpoena, defendant gave Rodman profit and loss statements for TYP. These showed a loss for 1995 of $942,382 and for 1996 of $794,555, and a total loss of $1,718,721. Rodman also received a list of investors. The total invested in the company was $2,085,283, with $300,000 in income unaccounted for. The action in this case commenced on May 12, 2000.

Defense

George Anderson (Anderson) knew both defendant and Hegland. At some point in the mid-1990s, after talking with defendant, Anderson invested several hundred thousand dollars in TYP. From the investment material he received, he learned of defendant's previous securities convictions. No one told him about the convictions or the cease and desist order.

Anderson told Hegland about TYP. He told Hegland about defendant's previous convictions. He also told Hegland that because TYP was growing, it presently was losing money.

Corporate securities attorney Bennett Yankowitz began representing TYP in 1995. He prepared a private offering memorandum for TYP. He placed a paragraph in the memorandum summarizing defendant's prior convictions. He was unaware of the cease and desist order.

Defendant was released from prison in July 1993 and started TYP in August 1994. He incorporated TYP in September 1994 and became the chief executive officer. Interested in bringing in investors, he hired Webb in December 1994 to be TYP's

Director of Acquisitions. Other employees were hired to work with Webb in March or April 1995.

Webb sent investors an investment package. If defendant received an investment package back from an investor, he tried to speak personally to the investor. He spoke to the majority of the investors.

Defendant saw a February 1995 financial statement for TYP in April 1995. At that time, he thought TYP was in good financial condition. He did not see another financial statement until September or October 1995. He did not know before then whether TYP was making a profit.

At some point, defendant had to move money from one account to another to pay expenses. By May 1996, defendant sensed that TYP's expenses were exceeding income. Defendant told investors that TYP was generating income, but he did not tell them that expenses were exceeding income. Additionally, the cover letter sent to investors told them TYP already was profitable.

Defendant acknowledged speaking to Bullard regarding investing in TYP. He denied suggesting that Bullard use a credit card when Bullard said he did not have access to any money at that time. He told Bullard about his prior convictions and that TYP had a positive cash flow.

Defendant never told Massey he could receive a $15,000 share of TYP for $7,500. He told Massey about his prior convictions and that TYP was generating a lot of revenue. He did not tell Massey or other investors about the cease and desist order, in that he did not think it was material.

Defendant did not solicit an investment from Fenderson. He told Fenderson about his prior convictions.

Defendant did not tell Herman about his prior convictions. When Herman said he could not fill out the financial portion of the subscription agreement, defendant said it would not be a problem. Defendant believed Herman qualified as an investor, in that he owned his own business.

Defendant sold options to Hegland because he could not sell any more shares of TYP. He did not tell Hegland about his prior convictions.

When defendant spoke to Heaton's husband, Mr. Heaton said he had invested before, he had sold his business and paid off his house. The Heatons did not tell him their sole source of income was Social Security or that they would have to cash in a life insurance policy in order to invest. Defendant read the entire subscription agreement to the Heatons and believed they were qualified as investors based upon their history of investment.

Early in 1997, defendant realized TYP was going to fail. He closed the business. He lost $100,000 of his own money on TYP. He acknowledged that this was money he drew as salary from TYP. He also acknowledged using a company credit card for personal expenses but insisted that he reimbursed TYP for all charges. He denied that TYP was a scam or that he lied to investors or used tricks or scams to get their money.

Defendant liked to believe that he knew what was going on with TYP. He knew that what Webb was selling was securities. He thought the securities were unqualified or exempt.

CONTENTIONS

Defendant contends the evidence is insufficient to support the jury's finding that the prosecution was commenced within the limitations period. We disagree; the evidence is sufficient.

Defendant further contends the trial court erred in instructing the jury regarding the scienter required for the crime of selling unqualified securities. The instruction given was correct.

Defendant asserts his sentence must be modified to avoid the proscription against multiple punishment. We agree and modify his sentence.

Finally, defendant contends imposition of the upper term sentence violated his Sixth Amendment right to a jury trial. The contention lacks merit.

DISCUSSION

Sufficiency of the Evidence

The jury was required to determine whether the prosecution was commenced within the limitations period. The court instructed the jury that the prosecution was commenced May 12, 2000. The jury could convict defendant only if it found the thefts were discovered within four years of the commencement of the prosecution. The court further instructed the jury that it could not convict defendant if the prosecution could have been commenced more than four years prior to May 12, 2000 because, with the exercise of reasonable diligence, the victims or law enforcement could have discovered the thefts. The court defined discovery as awareness of loss or misconduct and that it was caused by criminal means.

Defendant claims that the Department of Corporations received information sufficient to put it on inquiry on January 26 and December 24, 1995, when defendant filed the exemption notices for the private placement offerings for TYP. When Holguin later received the prospectus for TYP, she recognized defendant's name and checked to see if the Department had issued to defendant a permit to sell qualified securities. In checking, she learned of the exemption notices and the lack of permits.

Defendant argues that in 1995 the Department of Corporations had the same information that Holguin received in 1996, and it was familiar with defendant's name, having served him previously with the cease and desist order. It therefore could have begun its investigation on January 26 or December 24, 1995, more than four years prior to the commencement of the prosecution.

As the People point out, the Department of Corporations did not have the same information as Holguin: it did not have the prospectus indicating that defendant had begun selling securities despite not yet having received a permit to do so. It had no additional information to suggest defendant was using fraud to sell the securities. It thus did not have "actual notice of circumstances sufficient to make [it] suspicious of fraud

thereby leading [it] to make inquiries which might have revealed the fraud." (*People v. Zamora* (1976) 18 Cal.3d 538, 572, italics omitted.)

The record showed that Holguin received the prospectus on May 16, 1996 and began her investigation. The prosecution was commenced on May 12, 2000, within four years of her receipt of the prospectus. Substantial evidence thus supports the jury's determination that the prosecution was commenced within the limitations period. (*People v. Zamora*, *supra*, 18 Cal.3d at p. 565.)

Jury Instruction

Corporations Code section 25110 (section 25110)[1] prohibits the sale of any security unless it has been qualified or is exempt from qualification. Corporations Code section 25540 (section 25540) makes it a crime to violate section 25110 willfully.

The trial court instructed the jury that "[i]t is unlawful for any person to willfully offer or sell a security in an issuer transaction without first having obtained a qualification of such security from the Commissioner of Corporations of the State of California unless such security is exempted." In order to prove the commission of the crime, the prosecution was required to prove "1. That a security was offered or sold in this state; [¶] 2. That such conduct was willful; and [¶] 3. That at the time the security was offered or sold, such offer or sale had not been qualified with the Commissioner of Corporations of the State of California."

The court also instructed the jury pursuant to CALJIC No. 1.20 that "[t]he word 'willfully' when applied to the intent with which an act is done or omitted means with a purpose or willingness to commit the act or to make the omission in question. The word

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1 Section 25110 provides in pertinent part: "It is unlawful for any person to offer or sell in this state any security in an issuer transaction . . . unless such sale has been qualified . . . or unless such security or transaction is exempted or not subject to qualification . . . ."

'willfully' does not require any intent to violate the law, or to injure another, or to acquire any advantage."

It is defendant's position that the trial court's instructions were erroneous, in that the crime also requires knowledge that the security is unqualified and not exempt from qualification.[2] In support of his position, he relies on *People v. Simon* (1995) 9 Cal.4th 493.

Simon addressed the mental state necessary for conviction of a violation of Corporations Code section 25401 (section 25401), which makes it "unlawful for any person to offer or sell a security in this state . . . by means of any written or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." Section 25540 penalizes willful violation of section 25401.

The question before the court was whether sections 25401 and 25540 required knowledge of the false or misleading nature of the statement for conviction, despite the lack of an express requirement to that effect in the statutes. (*People v. Simon*, *supra*, 9 Cal.4th at p. 507.) The court first acknowledged an appellate court holding that the Legislature's omission of a knowledge requirement indicated that knowledge was not an element of the offense. (*Id*. at pp. 507-508; see *People v. Johnson* (1989) 213 Cal.App.3d 1369, 1375.)

The court proceeded to examine federal securities laws, on which California's securities laws were patterned, but it found no clear answer to its question in the federal statutes. (*People v. Simon*, *supra*, 9 Cal.4th at pp. 509-513.) The court then examined California's statutory scheme. Section 25401 was included in part 5 of Division 1 of the

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[2] The issue is before the Supreme Court in *People v. Salas* (2004) 119 Cal.App.4th 805, review granted September 29, 2004, S126773. *Salas* held that the crime of violation of section 25110 includes a requirement of knowledge that the security was unqualified and not exempt.

Corporate Securities Law of 1968, which identifies fraudulent and prohibited practices. (*Simon*, *supra*, at p. 514.) Section 25540 falls within section 6, governing enforcement of securities laws. (*Simon*, *supra*, at p. 514.)

Violation of section 25401 may be addressed by administrative action (Corp. Code, § 25530), civil suit for rescission or damages (*id*., § 25501) or criminal prosecution (§ 25540). (*People v. Simon*, *supra*, 9 Cal.4th at pp. 514-515.) Knowledge of the false or misleading nature of the statement made is not required for an administrative action. (*Id*. at pp. 515-516.) It is, however, required for a civil suit. (*Id*. at p. 516.) The court did not believe that the Legislature could have intended that knowledge be required for civil liability but not for criminal liability. (*Id*. at pp. 516-522.) It therefore concluded that knowledge of the false or misleading nature of the statement made is required for conviction of the violation of section 25401. (*Id*. at p. 522.)

Section 25110 is included in part 2 of Division 1 of the Corporate Securities Law of 1968, which addresses qualification of securities. Violation of this section, as with a violation of section 25401, may be addressed by administrative action (Corp. Code, § 25530), civil suit for damages (*id*., § 25503) or criminal prosecution (*id*., § 25540). A civil suit for damages based on a violation of section 25110, however, does not require knowledge that the securities sold were unqualified or not exempt from qualification. (*Id*., § 25503.)

As noted in *People v. Corey* (1995) 35 Cal.App.4th 717 at page 729, in addition to the difference in requirements for civil enforcement of sections 25110 and 25401, the potential criminal liability for violation of section 25110 is much less than for violation of section 25401. Because of these distinctions, the *Corey* court concluded that the rationale behind the decision in *Simon* does not apply to section 25110. (*Corey*, *supra*, at p. 729.) The *Corey* court thus held that knowledge is not required for criminal conviction of violating section 25110. (*Ibid*.)

We agree with *Corey*. In the absence of a statutory knowledge requirement or a compelling basis for imposing one, we hold that knowledge that the securities sold were unqualified or not exempt from qualification is not required for conviction of a violation

of section 25110. The trial court therefore did not err in instructing the jury as to this offense.

Penal Code Section 654

Penal Code section 654[3] protects against multiple punishment for "multiple statutory violations produced by the 'same act or omission.'" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) It applies when multiple offenses were "merely incidental to, or were the means of accomplishing or facilitating one objective." (*Ibid*.)

Here, the trial court imposed prison terms for using false statements in the sale of a security, imposed concurrent terms for sale of securities without qualification, and stayed the sentences for grand theft under Penal Code section 654. Defendant contends, and the People agree, that the concurrent sentences imposed for the sale of securities without qualification also must be stayed under section 654. We agree as well. All offenses were the means of accomplishing a single objective: the sale of securities in order to take the victims' money. Accordingly, we will modify the judgment to stay the sentences on counts 3, 5, 8, 14, 22, 24, 27 and 30 and the enhancements on counts 22 and 30.

Upper Term Sentence

Defendant's contention that the imposition of the high term on counts 1 and 2 violated his Sixth Amendment right to a jury trial is based on the holding of *Blakely v. Washington* (2004) 542 U.S 296, ___ [124 S.Ct. 2531, 2537], that the maximum sentence a judge may impose is that permitted by the facts established by the jury verdict or admitted by the defendant. The California Supreme Court recently has held that *Blakely*

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[3] Penal Code section 654 provides: "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. . . ." (Subd. (a).)

does not preclude exercise of judicial discretion to impose the upper term sentence based on aggravating factors found by the court. (*People v. Black* (2005) 35 Cal.4th 1238, 1244.) We consequently reject defendant's contention.

The judgment is modified to stay, pursuant to Penal Code section 654, the sentences on counts 3, 5, 8, 14, 22, 24, 27 and 30 and the enhancements on counts 22 and 30. As so modified, the judgment is affirmed. The clerk of the court is directed to prepare an amended abstract of judgment and forward a copy to the Department of Corrections.

NOT TO BE PUBLISHED

SPENCER, P.J.

We concur:

MALLANO, J.

ROTHSCHILD, J.