Filed 2/6/07 P. v. Ayyar CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. RAJAN RAMA AYYAR, Defendant and Appellant.	2d Crim. No. B180936 (Super. Ct. No. 1014375) (Santa Barbara County)

Rajan Rama Ayyar appeals from the judgment entered after a jury convicted him of 10 counts of grand theft by false pretenses (counts 1, 2, 5-8, 13-16; Pen. Code, § 487, subd. (a)),[1] fraud in the sale of securities (count 3; Corp. Code, §§ 25401, 25540), engaging in a fraudulent securities scheme (count 4; Corp. Code, § 25541), and four counts of forgery (counts 9, 11, 12, 17; § 470, subd. (c)). The jury found that appellant took property in excess of $2.5 million (§ 12022.6, subd. (a)(4)), and on counts 1 through 4 and 6, that appellant took property valued in excess of $100,000 (§1203.045). The jury further found, as to counts 2 through 4, counts 6 through 9, and counts 11 through 17, that the victims did not discover the crimes until after August 15, 1996, a time within the four year statute of limitations. (§§ 801.5; 803, subd. (c)

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

The trial court sentenced appellant to 12 years 4 months state prison, ordered $1,780,726.67 direct restitution (§ 1202.4, subd. (f)), and ordered appellant to pay a $500 restitution fine (§ 1202.4, subd. (b)) and a $500 parole revocation fine (§ 1202.45).

We affirm the convictions but reverse the sentence. Because the offenses were committed prior to 1997, former section 1170.1, subdivision (a) applies and provides that the subordinate term sentence may not exceed five years. Appellant received a subordinate term of seven years four months. In recalculating the sentence, the trial court may not impose a subordinate term that exceeds five years, or impose a total aggregate sentence that exceeds the original sentence of twelve years four months. (See *e. g.*, *People v. Castaneda* (1999) 75 Cal.App.4th 611, 614.)

Facts and Procedural History

This case arises out of a series of real estate transactions in which limited partnership interests, loans, promissory notes, deeds of trust, and real estate interests were sold to unsophisticated investors. Appellant, a Lompoc real estate broker, touted himself as a multimillionaire financial adviser and lured investors by offering lucrative investment opportunities with high rates of return.

It was later discovered that appellant was operating a Ponzi Scheme and had lied about the ownership interests and underlying security for the investments. Appellant paid monthly interest-only payments to most of the investors, without the investors realizing anything was wrong. When investors asked about the trust deeds securing their investments, appellant provided forged and altered documents to perpetuate the illusion that the investments were safe.

The Santa Barbara County District Attorney started a criminal investigation in April 1997, but because of the complexity of the transactions, referred the investigation to the Department of Justice and other state agencies. A criminal complaint was filed by the Attorney General on August 15, 2000.

The jury convicted appellant of the following offenses:

Gateway Housing Project – Grand Theft (Counts 1-2), Fraud In Sale Of Securities (Count 3), and Fraudulent Securities Scheme (Count 4)

In 1994 and 1995 appellant sold limited partnership interests in Gateway Housing 2010 (Gateway), a California limited partnership created by appellant to build luxury townhouses in Lompoc. Appellant was the general partner of Gateway and told investors Lance McBride, Edward Dannemiller, Jeffrey Globus, Lawrence Globus, Charles Krischer, and Barbara Mintzer that their investments were secured by a $2.4 million first deed of trust and would be paid off in two to three years. Appellant represented that the investments were low risk, that Gateway owned the property free of any encumbrances, and that the property was worth $4 million.

Appellant collected $1,674,500 from 21 investors but did not record a first trust deed to secure the limited partner investments. He also failed to disclose that the property was encumbered by other liens.

Appellant later changed the project from luxury townhouses to low income housing to qualify the project for low income housing tax credits totaling $12 million. Appellant sold the tax credits to Related Capital Company (Related Capital) for $7,796,250 as part of a joint venture agreement based on the representation that his real estate company, Vista Nirvana, Inc., was the only limited partner. Appellant received a $779,625 advance from Related Capital for development expenses and spent most of the money (about $540,000) on personal expenses and unrelated real estate projects.

In 1997, the limited partners discovered that their investments were not secured by a first trust deed and that appellant had sold the low income housing tax credits. It was also discovered that appellant had executed and recorded a $450,000 first trust deed on the Gateway property in favor of John and Carol Hoffman without the consent of the limited partners.

Count 5 – Theft by False Pretenses - 536 North U Street

In July 1995, appellant advised Edward Dannemiller to buy a 14-unit apartment building with him. The property was located at 536 North U Street,

Lompoc. Dannemiller invested $40,000 and assumed a $361,286 mortgage based on the representation that appellant would manage the property and make the mortgage payments.

After appellant defaulted on the mortgage payments, Dannemiller demanded that appellant buy him out. Appellant said he would pay back Dannemiller and assume the mortgage. He showed Dannemiller a letter addressed to the mortgage lender stating that appellant was assuming the loan obligation and that appellant was the owner. On December 23, 1996, Dannemiller deeded the property over to appellant. Appellant, however, did not assume the mortgage as promised, failed to refund Dannemiller's investment, and defaulted on the mortgage.

Count 6 – Theft By False Pretenses – 536 North U Street

Between September 1995 and January 1996, appellant convinced Lance McBride to invest $180,000 in exchange for a deed of trust on the 536 North U Street property. Appellant said the borrower was Amrish Patel and owned a 50 percent interest in the property. Appellant represented that McBride would receive an undivided 50 percent interest in the property and the property would be sold in May 1996, at which time McBride would recoup his investment plus $20,000. Appellant said that he would execute a personal guarantee which would give McBride "*tremendous overkill security for your investment . . . .*."

After McBride invested the money, it was discovered that appellant had not recorded the trust deed as promised and had not granted McBride an ownership interest in the property. Patel, the purported borrower, did not own the property. Edward Dannemiller, the true owner of the property, did not know anything about the loan.

Count 7 - Theft By False Pretenses – 916 West Arnold Avenue

In May 1995, appellant solicited a $20,000 loan from Lance McBride purportedly secured by a second trust deed on a single family residence at 916 West Arnold Avenue, Lompoc. Appellant said the property was worth $160,000 and that McBride would receive a $22,000 note and deed of trust from the owners, Kishu and

Umeeta Chotirmal. Appellant represented that McBride would receive monthly interest-only payments and that the loan would mature in January 1997.

After McBride loaned $20,000, the interest-only payments stopped in March or April 1996. Appellant assured McBride that the problem would be straightened out. McBride later discovered that appellant had not assigned or recorded a trust deed to secure the loan. The property owners knew nothing about McBride or the loan.

Counts 8 & 9 – Grand Theft By False Pretenses and Forgery – Princess Estates

In March 1995, appellant induced Lawrence Globus to invest $100,000 in Princess Estates, a Santa Maria development. Appellant represented that he had a $3.5 million equity position in the property, but in fact only had an option to purchase. Appellant said that his equity interest would secure Globus' loan and that Globus would receive monthly interest-only payments until the loan matured.

After Globus discovered that appellant only had an option to purchase the property, appellant gave him a deed of trust on other property (Quality Suites Hotel in Lompoc). The deed of trust, however, did not have a county recorder stamp. When Globus questioned him about the document, appellant sent him a second copy with a forged recorder's stamp.

Appellant defaulted on the monthly payments in September 1996 and gave Globus a $30,000 check as partial payment and to extend the loan due date. After appellant stopped payment on the check, Globus discovered that the trust deed on the Quality Suites Hotel property was worthless.

Counts 11-12 - Forgery - Oakglen Development

In 1995 and 1996 appellant sold limited partner interests in Oakglen, a condominium development in San Luis Obispo County. Appellant represented that the investors would receive a $160,000 promissory note secured by a fractionalized first trust deed on the property which was owned by appellant's company, Vista Nirvana, Inc.

Lawrence and Sarah Globus invested $15,000, Jeff and Sharon Globus invested $9,812.50, and Stanley Backlund invested $20,000. Appellant gave them what appeared to be a recorded first trust deed. After appellant stopped making monthly interest-only payments, the investors discovered that the trust deed was forged. When Lawrence Globus confronted appellant about putting a false recorder's stamp on the trust deed, appellant did not deny it.

Count 13 – Theft by False Pretenses - 2025 Sweeney Road

In January or February 1996, Barbara Mintzer and Alfred Mintzer invested $85,000 based on appellant's representation that the loan was secured by a note and deed of trust on a 10 acre parcel located at 2025 Sweeney Road, Lompoc. After the loan funded, Barbara Mintzer asked for documentation. Appellant gave Mintzer two promissory notes totaling $85,000 and a document entitled "*[c]ollateral assignment of interest held by Rajan Ayyar, general partner and limited partner in Santa Rita, II, a California limited partnership*." Appellant said the investment would be paid off when the property was sold in October 1996. In August 1996, appellant told Mintzer that the payoff would be delayed.

The Mintzers were not paid. In April 1997, they discovered that there was no trust deed securing the investment.

Counts 14 & 15 – Theft by False Pretenses - 300 East Anthony Way and 705 North C Street

In August 1994, appellant induced Charles Krischer to purchase a residence at 300 East Anthony Way, Lompoc. Appellant represented that the house was worth $170,000 and that he could buy it for $150,000 if they each put up $15,000. Krischer paid appellant $15,000, obtained a $120,000 loan secured by a deed of trust, and executed a $20,000 promissory note secured by a second trust deed in favor of Vista Nirvana, Inc. Appellant said the $20,000 note was repayment for money appellant had advanced for the purchase.

It was later discovered that appellant did not put up $15,000 for the purchase. Appellant bought the property on August 19, 1994, and sold it to Krischer

the same day at an inflated price. Appellant used a double escrow in which his company, Vista Nirvana, Inc., acted as a straw man to defraud Krischer.

After escrow closed on the Anthony Way property, appellant advised Krischer to buy a triplex at 705 North C Street, Lompoc for $165,000. Krischer assumed an existing loan for $123,000 and was told by appellant to execute a $25,000 promissory note in favor of Vista Nirvana, Inc. secured by a deed of trust. The property was owned by appellant's employee, Kevin Leonard, who purchased the property a few weeks earlier for $127,000. Using Leonard as a straw man, appellant resold the property to Krischer at a marked up price.

Krischer made monthly mortgage payments but suffered mounting financial losses. In June 1996, appellant agreed to take back the property, assume the mortgage, and cancel the $25,000 note to Vista Nirvana, Inc. Krischer deeded the property back to appellant, but appellant failed to assume the mortgage as promised. Krischer lost $9,731 in interest payments.

Counts 16 & 17 – Grant Theft & Forgery – 150 South Sixth Street

On December 12, 1995, Jeffrey Globus and Sharon Globus invested $10,000 based on the representation that they would receive a security interest on some commercial property at 150 South Sixth, Grover Beach. Appellant told Globus that the investment was secured by a deed of trust and that the owner, Robert Newdoll, wanted a short term loan. Appellant gave Globus a note and deed of trust that appeared to be recorded. It was later discovered that the deed of trust was a forgery and that the loan was a hoax. The owner of the property, Newdoll, borrowed no money from appellant and received no money from Globus.

Forensic Audit

Sue Tankersley, an investigative auditor for the California Department of Justice, reviewed appellant's personal and business accounts for the period January 1995 through September 1997. Tankersley testified that there were many check overdrafts and cash deposits which was unusual for a real estate business. Appellant

regularly overdrew on the accounts and transferred funds to cover overdrafts. Funds were commingled between accounts and used for unrelated purposes. Appellant invoked his line of credit more than 300 times to cover overdrafts and wrote more than 400 NSF checks.

Tankersley determined that appellant was operating a Ponzi scheme, using new investor money to pay off other investors. Appellant deposited more than $5 million in investor money and transferred the money to other accounts including a personal account. The money was used to pay credit card debts, other investors, personal bills, and to facilitate transfers between accounts. Tankersley calculated that appellant had more than $8 million in outstanding loans with interest rates ranging from five to twenty-four percent. The average monthly debt service was $113,421.

Substantial Evidence – Counts 1-4 - Gateway

Appellant argues that that the evidence does not support the conviction for grand theft by embezzlement (count 1), false pretenses (count 2), fraud in the sale of securities (count 3), and engaging in a fraudulent securities scheme (count 4). As in every sufficiency-of-the evidence case, we "consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trial court reasonably deduced from the evidence in support of the judgment. . . . The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt. [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) On review, we may not substitute our judgment for that of the jury, reweigh the evidence, or reevaluate the credibility of witnesses. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

The conviction on count 1 was based on the embezzlement of $779,625 advanced to Gateway in 1996. After appellant changed the project to low income housing, Related Capital purchased the low income housing tax credits and advanced Gateway $779,625 for development costs. Appellant spent $540,000 of the advance on personal expenses and other real estate projects.

Appellant did not tell the Gateway limited partners about the tax credits sale or the $779,625 advance. When appellant negotiated the sale, he told Related Capital the only limited partner was Vista Nirvana, Inc. Pursuant to a joint venture agreement, Related Capital substituted in as the sole limited partner and acquired a 99 percent share of the project. Gateway investors testified that they would not have approved the tax credits sale or appellant's use of the $779,625 advance had they known about it. Attorney Eugene Cowan, who represented appellant in the sale of the tax credits, testified that the failure to provide an accounting to the limited partners would be a breach of fiduciary duty.

Embezzlement is a theft arising from the fraudulent misappropriation of property by a person to whom it has been entrusted. (*People v. Creath* (1995) 31 Cal.App.4th 312, 318.) " 'The gist of the offense is the appropriation to one's own use of property held by him for devotion to a specified purpose other than his own enjoyment of it.' [Citation.]" (*Ibid.*) It requires the intent to temporarily deprive the owner of his property. (*People v. Britz* (1971) 17 Cal.App.3d 743, 751.)

The specific intent to deprive Gateway of $779,625 was evidenced by appellant's concealment of the tax credit sale, the failure to obtain limited partner approval for the sale, the failure to provide an accounting, and appellant's use of Gateway money for personal expenses and other projects.

Appellant defended on the theory that he used the $779,625 to reimburse himself for development expenses already paid. The jury discredited appellant's testimony and a letter by an accountant which was used to qualify the project for the low income housing tax credits. The letter stated that Gateway had accrued more than $3 million in expenses from December 1989 through October 30, 1996 But the accountant, Stephen Tracy, could not say what costs were actually paid or whether appellant personally paid for the project costs. One of the cost items was a $320,000 architect bill which appellant claimed was paid before December 6, 1995. The architect, Thomas Courtney, testified that none of the fees were paid.

A defendant charged with embezzlement may assert a claim of right defense where "the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable." (§ 511.) The jury rejected the defense because appellant did not appropriate the Related Capital money openly and with notice to the limited partners. Appellant concealed the taking. (See e.g., *People v. Wooten* (1996) 44 Cal.App.4th 1834, 1849.) Although appellant claimed he acted within his powers as a general partner, the evidence showed that he fraudulently took project money. (E.g., *People v. Stewart* (1976) 16 Cal.3d 133, 140.) "While there is no 'smoking gun' or a percipient witness to [appellant] carrying away a barbecue set or holding a gun on a bank teller, . . . grand theft takes many forms." (*People v. Skelton* (1980) 109 Cal.App.3d 691, 723.) The record here shows that appellant embezzled project money and used it for personal expenses and projects other than Gateway.

On counts 2 through 4 for the grand theft of Gateway investors, fraud in the sale of securities (Corp. Code, § 25401), and engaging in a fraudulent securities scheme (Corp. Code, § 25541), the evidence shows that appellant made false written and oral representations without intending to perform.[2] (See e.g., *People v. Allen*

---

[2] Corporations Code section 25401 provides in pertinent part: "It is 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 the light of the circumstances under which they were made, not misleading."

Corporations Code section 25541, subdivision (a) provides that it is unlawful for "[a]ny person who willfully employs, directly or indirectly, any device, scheme, or artifice to defraud in connection with the offer, purchase or sale of any security 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, or sale of any security . . . ."

The term "security" is broadly defined to include a note or any evidence of indebtedness, or the investment of money in a common enterprise with profits to come

(1941) 47 Cal.App.2d 735, 748 [common plan, scheme or design to defraud supported conviction for grand theft and violation of Corporate Securities Act].) Intent to defraud was established by circumstantial evidence. (*People v. Skelton, supra,* 109 Cal.App.3d at p. 723.)

Appellant told investors that their investments were secured by a $2.4 million first trust deed but never signed escrow instructions to record the deed of trust. Gateway investors testified that the first trust deed security was important and they would not have made the investment had they known the true facts. Charles Krischer, a Gateway limited partner, stated that the first trust deed "was the whole sales pitch" and "I just couldn't see how there could be any risk to this investment . . . ." Rather than record a first trust deed in favor of the limited partners, appellant borrowed $450,000 and recorded a first trust deed in favor of Carol and Jon Hoffman.

Substantial evidence supported the grand theft conviction. Twenty-one limited partners invested $1,674,500 based on appellant's false representation that the investments were secured by a first trust deed. Appellant solicited the investments to perpetuate a Ponzi scheme and diverted the money. The property remained an empty lot. The "same sufficiency of the evidence supporting the grand theft charges . . . sustains the convictions under Corporations Code section 25401 and 25541." (*People v. Skelton, supra,* 109 Cal.App.3d at p. 723.)

Substantial Evidence - Counts 14 and 15

Appellant next contends that the convictions for grand theft of Charles Krischer (counts 14 and 15) are not supported by the evidence. Krischer, an Arizona investor, was lured into buying real estate with appellant after investing in Gateway. Appellant said that he would broker the deals, that he would pay all or part of the down payment, and that the grant deeds and mortgages would be in Krischer's name.

---

from the efforts of others. (Corp. Code, § 25019; *People v. Smith* (1989) 215 Cal.App.3d 230, 237.)

Appellant guaranteed the investments and promised to take the properties back if the investments were not successful.

Appellant had Krischer purchase a single family residence at 300 East Anthony Way, Lompoc and stated that Krischer was buying the property from a police detective at below market price. Appellant, however, bought and resold the property to Krischer the same day at an $8,000 mark up. Appellant used a double escrow in which his real estate company, Vista Nirvana, Inc., acted as a straw man to carry out the fraud.

Appellant then sold Krischer a triplex at 705 North C Street, Lompoc for $165,000. Appellant told Krischer that it was "a tremendous deal" with an immediate positive cash flow, and that "[e]verything was 100 percent guaranteed." Appellant carried out the fraud by having an employee purchase the property and resell it to Krischer for a $38,000 mark up.

Krischer testified that he was bullied into making the investments and that appellant gave him a buy back guarantee. Appellant told Krischer "to leave the business to me and you take care of your medical practice." When Krischer asked appellant to take the properties back and deeded the properties to appellant, appellant failed to assume the mortgages or protect Krischer's credit. Krischer lost $9,731 in interest payments. In perpetrating the fraud, appellant received inflated real estate commission fees, interest income on two promissory notes, and grant deeds to both properties.

"The crime of theft by false presences is complete when, by means of such false pretenses, the fraud intended is consummated by obtaining possession of the property sought; . . . financial loss is not a necessary element of the crime. [Citations.]" (*People v. Brady* (1969) 275 Cal.App.2d 984, 995.) Appellant concealed that he was selling the properties at marked up prices and fraudulently represented that the investments came with a buy-back guarantee. "Proof of false factual

representation need not be by words alone; it may be implied from conduct; it may be made either expressly or by implication . . . ." (*Id.,* at p. 996.)

Sundaram Testimony

Appellant argues that the trial erred in excluding portions of Thambia Sundaram's testimony on hearsay and relevancy grounds. Sundaram, a dentist and businessman, claimed that he attended a political fundraiser in 1994 at which Santa Barbara District Attorney Tom Sneddon, Deputy District Attorney Mag Nicola, and District Attorney Investigator Timothy Rooney were present. Sundaram stated that some of the people at the meeting wanted to purchase properties owned by appellant. Sundaram allegedly heard Deputy District Attorney Mag Nicola say, "*We'll run this nigger out of town just like we're going to run the nigger out of Santa Ynez*." Sundaram heard someone speak to Timothy Rooney about a real estate investigation and that Rooney "was supposed to contact a state agent by the name of Tankersley."

Appellant offered the out-of-court statements to show "outrageous governmental conduct, the running of the statute of limitations, . . . or . . . bias and prejudice . . . ." The trial court found that Sundaram's statement was hearsay and "[t]here's no exception under the hearsay rule. And in any event, it has marginal impeachment value in terms of the testimony of Mr. Rooney. This is a case that's being prosecuted by the Attorney General's Office not the District Attorney's office."

Appellant argues that the out-of-court statements are admissible to show state of mind which goes to the issue of bias. (Evid. Code, § 1250.) Appellant did not raise the issue at trial and is precluded from arguing it for the first time on appeal. (Evid. Code, § 354; *People v. Fauber* (1992) 2 Cal.4th 792, 854.)

Waiver aside, Deputy District Attorney Nicola's purported statement that he wanted to run appellant out of town was not admissible to show bias because Nicola did not testify or prosecute the case. Nor did appellant make a showing that Investigator Rooney was biased or had engaged in misconduct.

Evidence of an out-of-court statement is "admissible if offered for a nonhearsay purpose – that is, for something other than the truth of the matter asserted – and the nonhearsay purpose is relevant to an issue in dispute. [Citations.]" (*People v. Davis* (2005) 36 Cal.4th 510, 535-536.) An out-of-court statement offered to prove the statement imparted certain information to a hearer may be admissible if the hearer's reaction to the statement is relevant to a fact sought to be proved. (*People v. Scalzi* (1981) 126 Cal.App.3d 901, 907.)

Appellant failed to identify the "hearer" at the 1994 meeting or how the hearer's reaction to the purported statements was relevant. Had appellant offered the out-of-court statements as an adoptive admission (Evid. Code, § 1221) or to show state of mind (Evid. Code, § 1250), he still had to show that the evidence was reliable. The trial court found that Sundaram's testimony, whether offered for impeachment purposes or to establish bias, lacked any indicia of reliability. (Evid. Code, § 1252.) There was no abuse of discretion. (See e.g., *People v. Edwards* (1991) 54 Cal.3d 787, 820.)

Appellant argues that admission of the out-of-court statements was constitutionally compelled but makes no showing that the trial court's order prejudiced him or denied him a fair trial. Trial courts have wide latitude under the Sixth Amendment to exclude evidence that is marginally relevant. (*People v. Jennings* (1991) 53 Cal.3d 334, 372.) The ordinary rules of evidence, including Evidence Code section 352, do not infringe on a defendant's right to due process. (*People v. Babbit* (1988) 45 Cal.3d 660, 682-683.)

We conclude that the alleged error in excluding the out-of-court statements was harmless under any standard of review. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711]; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Appellant cross-examined Rooney and others about the criminal investigation. Although appellant claimed that law enforcement maliciously targeted him before August 15, 1996, the criminal investigation did not commence until 1997,

three years after the political fundraiser.[3] Rooney learned about the real estate fraud in April 1997. Because of the complexity of the transactions, Rooney turned the investigation over to the Department of Justice and other state agencies. The Attorney General filed a criminal complaint on August 15, 2000, some six years after the 1994 political fundraiser. The exclusion of minor evidence lacking any indica of reliability did not impair appellant's constitutional right to present a defense. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 10, fn. 2; *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.)

CALJIC 4.74 – Statute of Limitations

Appellant argues that the trial court erred in instructing on the statute of limitations. Where the crime is a fraud-related offense described in section 803, subdivision (c), the four year statute of limitations begins to run after commission of or discovery of the offense, whichever is later. (§§ 801.5, 803, subd. (c); 1 Witkin Cal. Criminal Law (3rd ed. 2000) Defenses, § 223, p. 589.)

The jury received a CALJIC 4.74 instruction stating that "[t]his action was commenced on August 15, 2000. [¶] You may convict the defendant of grand theft, forgery, and securities fraud as alleged in Counts 2-4 and 6-18 only if the crimes were discovered within 4 years of the commencement of the action. [¶] However, you may not convict the defendant of theft, forgery, or securities fraud if you find that, in the exercise of reasonable diligence on the part of the alleged victim or the criminal law enforcement authorities, the crimes should have been discovered at a time more than 4 years before commencement of the action."

---

[3] Sundaram stated that the political fundraiser occurred "anywhere" between March and June of 1994. Most of the charged offenses occurred in 1995 and 1996. Two Gateway counts (counts 2 and 4) for grand theft and securities fraud allegedly occurred between April 1994 and August 9, 1995. It is highly unlikely that Rooney was talking about a criminal investigation at a political fundraiser before the crimes were committed.

The instruction defined reasonable diligence and stated that the prosecution had the burden of proving, "by a preponderance of the evidence that the theft, forgery or securities fraud as alleged in Counts 2-4 and 6-18 were discovered after August 15, 1996. [¶] In other words, if you find by a preponderance of the evidence that in the exercise of reasonable diligence any alleged victim or victims or law enforcement officer *should have discovered* a crime or crimes alleged in counts 2-4 and 6-18 before August 15, 1996, you may not find the defendant guilty of that crime or crimes. You will be provided a verdict form for this purpose." (Emphasis added.)

Appellant complains that the trial court failed to instruct that the prosecution was time barred if the statute of limitations evidence was equally balanced. The jury, however, received CALJIC No. 2.50.2 which stated:
" 'Preponderance of the evidence' means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to find that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it. [¶] You should consider all of the evidence bearing upon every issue regardless of who produced it. "

The jury was instructed to consider all the instructions and not to "single out any particular . . . instruction and ignore the others." (CALJIC 1.01.) It is presumed that the jury understood and followed the instructions. (*People v. Morales* (2001) 25 Cal.4th 34, 47.) The trial court had no duty to modify CALJIC 4.74 to state that the jury must acquit if the statute of limitations evidence was equally balanced. Such an instruction would have been cumulative of the CALJIC 2.50.2 instruction already given. (See e.g., *People v. Garceau* (1993) 6 Cal.4th 140, 193.)

Discovery - Reasonable Diligence

Appellant argues that the CALJI 4.74 instruction was incorrect because it used the phrase "should have been discovered " rather than "could have been discovered." In *People v. Zamora* (1976) 18 Cal.3d 538, our Supreme Court reversed an insurance fraud conviction on statute of limitations grounds. The court stated that

"the uncontradicted evidence produced at trial shows that with the exercise of reasonable diligence the facts constituting the acts of grand theft *could have been discovered* at an earlier time." (*Id*., at p. 565-566, emphasis added.)

We reject the argument that the trial court was required to instruct that the prosecution was time-barred if the offenses "could have been discovered" before August 15, 1996. CALJIC 4.74 is based on *People v. Swinney* (1975) 46 Cal.App.3d 332, a grand theft case. There, the Court of Appeal held that concealment of the wrong deferred but did not indefinitely suspend the statute of limitations. (*Id*., at p. 343.) The court remanded the case with directions to amend a statute of limitations allegation and suggested that the jury receive the following statute of limitations instruction: " 'You may not . . . convict the defendant of grand theft if you find that, in the exercise of reasonable diligence on the part of the injured person or the criminal law enforcement authorities, the theft should have been discovered at a time more than three years before [the date the prosecution was commenced]. "Discovery" does not mean mere awareness of a loss; nor does a mere loss in and of itself suggest a likelihood of theft. "Discovery" means awareness that the loss was caused by criminal means.' " (***Id***., at p. 345.)

The same tolling factors are set forth in CALJIC 4.74 which was given here. The jury was instructed that it could not convict if, in the exercise of reasonable diligence by the victim or law enforcement authorities, the fraud should have been discovered more than four years before commencement of the action.

Appellant opines that the phrase "should have been discovered" lowered the prosecution's burden of proof because it connotes a greater duty to investigate criminal activity. The phrase "could have been discovered" would permit a jury to find that the fraud might have or could have been discovered at an earlier date. We reject the argument because a "might have discovered" or "could have discovered" instruction conflicts with the reasonable diligence standard set forth in CALJIC 4.74.

The jury was also instructed that appellant's fiduciary relationship with the victims was a factor to be considered in determining reasonable diligence.[4]

As discussed in *People v. Zamora*, *supra*, 18 Cal.3d at pages 571-572, "[t]he crucial determination is whether the law enforcement authorities or the victim had actual notice *of circumstances sufficient to make them suspicious of fraud thereby leading them to make inquiries which might have revealed the fraud*." That standard is set forth in CALJIC 4.74 which defines reasonable diligence, discovery, and whether the criminal activity should have been discovered at an earlier date.

---

[4] The CALJIC 4.74 instruction stated: " 'Reasonable diligence' means the usual care exercised by the ordinary, prudent person in the conduct of his or her affairs."

The jury received a second instruction entitled "REASONABLE DILIGENCE" which stated: "Whether an alleged victim has exercised reasonable diligence within the meaning of CALJIC 4.74 is a question for you to decide. In determining this question, you may consider anything that has a tendency to prove or disprove the exercise of reasonable diligence, including, but not limited to, any of the following:

"(1) statements and conduct of the defendant and the alleged victims;

"(2) the reasonableness of reliance by the alleged victim on the defendant's conduct or statements, including defendant's assurances, if any:

"(3) the reasonableness of any inquiry or non-inquiry by an alleged victim;

"(4) the knowledge, experience, and expertise of the alleged victims and the defendant;

"(5) the nature of the relationship between the alleged victim and defendant, and the existence or non-existence of any facts or circumstances relevant to the relationship.

"You may consider among other things, whether the relationship between the defendant and each alleged victim, as it relates to CALJIC 4.74, was of a fiduciary nature. In a fiduciary relationship, such as, for example, between an agent and principal, or between a real estate broker and his client, the agent or broker, must act with undivided loyalty and honesty towards the principal and/or client. There is a duty on one in whom loyalty and honesty is reasonably placed, to make full disclosure of all material facts respecting the property or relating to the transaction in question."

Although the court in *Zamora* disapproved *People v. Swinney, supra,* 46 Cal.App.3d 322 on a pleading issue, it did not disapprove the instructional language suggested in *Swinney*. (*People v. Zamora, supra,* 18 Cal.3d at pp. 564-565, fn. 26.) Appellant cites no authority, and we have found none, that the phrase "should have been discovered" in CALJIC 4.74 misstates the law. (§§ 801.5; 803, subd. (c); see CALCRIM 3410 (Lexis-Nexis Matthew Bender 2006) p. 1058 [using "should have been discovered" to define tolling of statute of limitations].)

Proof Beyond a Reasonable Doubt

Citing *Stogner v. California* (2003) 539 U.S. 607 [156 L.Ed.2d 544], appellant argues that the prosecution was required to prove the statute of limitations allegation beyond a reasonable doubt. In *Stogner,* the court held that a newly enacted statute of limitations for child molestation (§ 803, subd. (g)) could not be used to revive a time-barred prosecution without violating ex post facto principles. (*Id*., at pp. 618-619 [156 L.Ed.2d at pp. 556-557].)

Unlike *Stogner v. California,* the statute of limitations was not revived in appellant's case. Instead, the issue was tolling and belated discovery. "*Stogner* acknowledge[s] that 'courts have upheld extensions of *unexpired* statutes of limitations. . . .' [Citation.]" (*People v. Robertson* (2003) 113 Cal.App.4th 389, 393.) It is well settled that the statute of limitations is not an element of an offense and need not be proven beyond a reasonable doubt. (*People v. Zamora, supra,* 18 Cal.3d at p. 566, fn. 27.) "The proper burden is a preponderance of the evidence . . . " **(***Ibid.;* see *People v. Linder* (2006) 139 Cal.App.4th 75, 85; *People v. Riskin* (2006) 143 Cal.App.4th 234, 241.**)**

Appellant's argument that *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] requires a higher burden of proof, i.e., proof beyond a reasonable doubt, is equally without merit. A statute of limitations finding does not change the elements of a charged offense or the punishment. (*People v. Riskin, supra*, 143 Cal.App.4th at p 241; *People v. Linder*, *supra*, 139 Cal.App.4th at p. 85.) "[T]he *Apprendi* line of cases does not call into question the clear California case authority

holding the prosecution's burden of proof on the statute of limitations issue is a preponderance of the evidence . . . . [Citations.]" (*Ibid.*) Appellant cites no federal or state authority that the burden of proof on a statute of limitations issue is proof beyond a reasonable doubt. (See *People v. Riskin*, *supra*, 143 Cal.App.4th at p. 242; *Renderos v. Ryan* (9th Cir. 2006) 469 F.3d 788, 796.)

Assuming, arguendo, that the CALJIC 4.74 instruction failed to state the correct burden of proof or misstated the reasonable diligence standard for belated discovery, the alleged error was harmless beyond a reasonable doubt. (*People v. Williams* (2001) 26 Cal.4th 779, 790; *Neder v. United States* (1999) 527 U.S. 1, 10-11 [144 L.Ed.2d 35, 47-48].) Although the victims experienced investment problems in 1996 based on appellant's failure to make monthly interest-only payments, there was no evidence that the victims should have discovered the crimes before August 15, 1996. (*People v. Swinney*, *supra*, 46 Cal.App.3d at p. 344.)

The record shows that the fraud was discovered in early 1997 when Lawrence Globus determined that the Oakglen trust deed was a forgery. Globus confronted appellant and said that the county recorder's office was starting an investigation. Appellant told Globus to "[t]urn off the investigation" and urged Globus to blame the forgery on someone else such as Globus' grandchildren.

Globus informed Gateway investors who, in March 1997, discovered irregularities in other investments.

Timothy Rooney, the district attorney investigator, testified that he spoke to Globus, "the first victim in this case, on April 1st of '97." Rooney started the criminal investigation a few days later but determined that the transactions were too complex. He referred the matter to the Department of Justice, the Department of Corporations, and the Department of Real Estate on April 21, 1997.[5] Rooney testified

---

[5] Rooney's testimony about the complexity of the transactions was corroborated by Thomas Castelo, the attorney and accountant for investor Alan Konheim. Castelo believed the trust deeds were valid, but suspected fraud because appellant had mismanaged Konheim's investments. In May 1996, Castelo hired a private

that it was "[w]ay too premature" to know whether appellant had committed any crimes.

Appellant argues that Barbara Mintzer filed two civil complaints alleging that she was defrauded in April 1996. Mintzer's attorney, however, testified that the fraud allegations were put in the complaints only to satisfy civil pleading requirements. When the civil actions were filed, Mintzer only knew that appellant had defaulted on the monthly interest-only payments. Appellant made assurances to Mintzer and the other investors that everything would be cleared up. Mintzer did not suspect a fraud until Lawrence Globus told her in early 1997 that the Gateway first trust deed was a fraud. In April 1997, Mintzer learned that the trust deeds on her investments were forged and worthless.

In determining whether the victims exercised reasonable diligence in discovering the fraud, the jury was instructed to consider: appellant's statements, conduct, and assurances; the knowledge and experience of the victims as novice investors; the reasonableness of any inquiry or non-inquiry by the victims; and appellant's fiduciary relationship with the victims.

Substantial evidence supported the finding that the statute of limitations was tolled until August 15, 1996. Appellant used limited partnerships, corporations, double escrows, straw man conveyances, forged documents, false county recorder stamps, and 16 bank accounts to conceal the fraud. Thirteen of the bank accounts were at First Valley Bank, a bank that was acquired by three successor banks. The testimony of the investigative auditor (Sue Tankersley) and title insurance officers established that the fraud was difficult to detect. Appellant not only duped investors

---

investigator and reviewed business records, property profiles, title policies, and recorded documents to determine whether appellant had defrauded Konheim. Castelo's investigation, however, did not involve other investors or law enforcement. The jury acquitted appellant on the grand theft counts alleging Konheim as victim (counts 10 and 18).

and bank officials, but the attorney and accountant who assisted him in qualifying Gateway for low income housing tax credits.

The most sophisticated investor was Related Capital, a national syndicator in the resale of low income housing tax credits. Related Capital was a 30 year old company with extensive experience in real estate developments, limited partnerships, and corporate investments. Despite its business acumen, appellant convinced Related Capital to provide $7.9 million project financing in exchange for $12 million in low income housing tax credits. Appellant's sales pitch was so convincing that Related Capital advanced $779,625 for project expenses on August 13, 1996, only to discover weeks later that it had been lured into a real estate fraud.

The individual investors were far less sophisticated than Related Capital and had far less information to discover the fraud. Substantial evidence supported the jury finding that the victims and law enforcement officials did not discover, or in the exercise of reasonable diligence should have discovered the criminal activity before August 15, 1996.

Subordinate Term Sentence

The trial court sentenced appellant to an upper five-year term on the fraudulent securities scheme count (count 4; Corp. Code, § 25541) and imposed 11 consecutive eight-month terms (one-third the midterm) on counts 1, 5 through 8 and 11 through 16. In calculating the sentence, the trial court declined to impose an excessive taking enhancement (§ 12022.6) because "an appropriate sentence in this case is something less than the maximum sentence that could be imposed by law. . ."

Appellant argues, and the Attorney General agrees, that subordinate term violates former section 1170.1, subdivision (a). When appellant committed the offenses, former section 1170.1, subdivision (a) provided that the total subordinate term could not exceed five years. Based on ex post facto principles, the trial court was required to apply the sentencing laws in effect when the offenses were committed. (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1170-1171.) On remand, the trial court may reconsider all sentencing choices, including imposition of the excessive

taking enhancement. (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1258-1259; *People v. Sanchez* (1991) 230 Cal.App.3d 768, 771-772.)

Appellant's remaining arguments have been considered and merit no further discussion.

Conclusion

We reverse the sentence and remand for recalculation of appellant's sentence with directions that: (1) the aggregate subordinate term not exceed five years based on former section § 1170.1, subdivision (a); and (2) the total aggregate sentence not exceed the original sentence of twelve years four months. (See e g., *People v. Castaneda, supra*, 75 Cal.App.4th at p. 614.)[6] In all other respects, the judgment of conviction is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P.J.

We concur:

COFFEE, J.

PERREN, J.

[6]The Attorney General notes that the abstract of judgment incorrectly states that a $10,000 restitution fine (§ 1202.4, subd. (b)) and a $10,000 parole revocation fine (§ 1202.45) were imposed. Appellant was ordered to pay a $500 restitution fine and a $500 parole revocation fine. Those findings should be reflected in the new abstract of judgment on resentencing.

Brian E. Hill, Judge

Superior Court County of Santa Barbara

_____

Conrad Petermann, 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, Supervising Deputy Attorney General, Michael R. Johnsen, Deputy Attorney General, for Plaintiff and Respondent.