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NOT TO BE PUBLISHED IN OFFICIAL REPORTS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. DAVID ANTHONY ESPINO, Defendant and Appellant.	H029708 (Santa Clara County Super. Ct. No. CC467194)

Defendant was convicted by jury trial of second degree murder (Pen. Code, § 187), failing to stop at the scene of an injury accident (Veh. Code, § 20001, subds. (a), (b)(1)), failing to stop at the scene of an accident resulting in property damage (Veh. Code, § 20002, subd. (a)), reckless driving causing great bodily injury with a prior conviction (Veh. Code, § 23104, subd. (b)), driving with a suspended license (Veh. Code, § 14601.2, subd. (a)) and being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)). The trial court committed him to state prison for a term of 15 years to life for the murder count consecutive to a three-year upper term for the Vehicle Code section 20001 count.

On appeal, defendant contends that (1) the trial court prejudicially erred in refusing to modify the implied malice instruction upon his request, (2) his trial counsel was prejudicially deficient in failing to request modification of the voluntary intoxication instruction, (3) the trial court prejudicially erred in excluding evidence of defendant's

good character, and (4) the imposition of an upper term violated defendant's right to a jury trial on any aggravating circumstance. In a petition for a writ of habeas corpus, defendant repeats his claim that his trial counsel was prejudicially deficient in failing to request modification of the voluntary intoxication instruction. We conclude that the trial court did not make any prejudicial instructional or evidentiary errors, defendant's trial counsel was not prejudicially deficient, and the trial court did not violate defendant's constitutional rights in imposing the upper term. We dispose of defendant's habeas petition by separate order.

I. Factual and Procedural Background

Defendant was convicted of "driving impaired" in October 1989 and again in December 1990. In 1991, defendant completed "driving while impaired classes." Defendant also completed traffic school three times. He attended an eight-hour "live class" in March 1998 and again in January 2001, and took an "on-line course" in January 2003. These classes covered the issue of impairment as a result of using drugs and driving and "conveyed" the message that driving under the influence of drugs was dangerous.

On the evening of July 4, 2002, defendant, who was under the influence of PCP, drove his mother's car over a curb, across a sidewalk, through a chain link fence, and into the playground of a San Jose elementary school. The police found him disoriented, unable to walk well, unresponsive and mumbling incoherently. A duffle bag in the car contained twelve baggies of PCP or methamphetamine. Defendant was arrested, convicted of driving under the influence, placed on probation and ordered to attend a substance abuse program. His driver's license was suspended.

Although he felt bad about damaging his mother's car, defendant did not stop using PCP. In August 2002, defendant began a court-ordered 16-week, 12-step substance abuse counseling and relapse prevention program. He told his substance abuse counselor

that PCP caused him to have hallucinations. Defendant acknowledged that he could not drive a car safely when he had been using PCP. His counselor specifically discussed with defendant the dangers of driving under the influence of PCP. The counselor told defendant "you need to stop driving [under the influence of PCP] because you may hurt somebody one day or hurt yourself." The counselor also told defendant "you cannot say that you don't know anymore." Defendant actively participated in and completed the substance abuse program.

Nevertheless, defendant continued to smoke PCP regularly. Defendant had a habit of smoking PCP in the early afternoon before or during his drive to work. When defendant smoked PCP, he would become "[i]ncoherent" and "lethargic" and appear to "be like in a daze." The effects of PCP generally last for four to six hours. PCP impairs vision and hampers coordination, making it difficult to walk and significantly slowing reaction time, and it also causes an inability to concentrate.

On February 19, 2004, defendant smoked PCP while he was driving his red van to work between 12:30 and 1:30 p.m. On February 19, at about 1:30 p.m., Rona Brodrick was driving a minivan from Saratoga to Los Gatos on Highway 9. Brodrick was in the eastbound lane at a point where Highway 9 was a two-lane roadway. Defendant's large red van, also traveling eastbound, passed Brodrick "very closely" in the westbound lane. The red van passed so close to Brodrick's minivan that Brodrick "felt it was nearly going to collide with me." After the red van moved back into the eastbound lane in front of Brodrick, it briefly ran slightly off the side of the road into the dirt.

The red van, which was weaving but not speeding, thereafter moved back into the westbound lane, causing at least two cars that were traveling west in the westbound lane to "get out of the way off the road in order to not get hit." Brodrick saw that the red van came "very close" to colliding with the cars in the westbound lane. The red van stayed in the westbound lane for about the length of a city block before returning to the eastbound lane. Brodrick called 911 from her cell phone as the red van continued to proceed in an

erratic manner down Highway 9 to the point where it became a four-lane roadway. The red van's erratic movements so frightened another motorist that she rushed home and called 911. Brodrick tried to follow the van, but she lost sight of it when it accelerated away from her. When she last saw it, it was in the far right lane. She soon came upon the scene of an accident in which two bicyclists had been hit by a vehicle.

Jack Fisher was driving his truck eastbound on Highway 9, on the four-lane section of the roadway, at about 1:30 p.m. on February 19 when he saw a red van being driven erratically. It was going 30 to 40 miles per hour. The red van "veered" left and right and then "tailgated the car in front of it." Two bicyclists were riding on the far right edge of the shoulder, with one riding 10 feet in front of the other. Both bicyclists were wearing helmets and "green fluorescent vests."

Robert Mahrer was also driving eastbound on Highway 9. The red van came up very fast behind Mahrer's vehicle, and the left front of the red van hit Mahrer's vehicle "pretty hard" from behind.[1] When it hit Mahrer's vehicle, the red van already had a flat right front tire.[2] After striking Mahrer's vehicle, the red van moved over to the right, swerved "[f]ully into the shoulder of the road," and passed Mahrer's vehicle on the right. When the red van was four or five car lengths ahead of Mahrer's vehicle, the red van "just ran right over" the two bicyclists riding on the shoulder of the roadway. The red van, which was going approximately 38 miles per hour after it hit Mahrer's vehicle, traveled about 295 feet down the roadway between its collision with Mahrer's vehicle and its collision with the bicyclists. The red van hit the first bicyclist and then "ran right over the top" of the second bicyclist. There was a "loud boom" when the red van hit the bicyclists, and one of the bicycles or bicyclists flew over the top of the van. The red

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[1] The bumper and "quarter panel" of Mahrer's vehicle were damaged, and Mahrer suffered a sore neck and back.

[2] In light of the damage to the rim, the flat tire had to have been caused by a collision with a "very hard solid object" such as a curb.

van's front windshield was smashed on the driver's side as a result of its impact with the bicyclists. The spot on the shoulder where the bicyclists were hit was very close to a bright yellow sign reading "DO NOT PASS" and a bus stop.

The red van came to a "skidding stop" some distance past the bicyclists, remained stopped for "a little while, then he took off again." Fisher followed the red van. The red van stopped again about 50 to 100 yards down the road, and Fisher wrote down its license plate number. He also looked inside the van and saw that defendant was the driver. Fisher went to a gas station and contacted the police.

The red van proceeded slowly down Highway 9 until it reached Los Gatos. Defendant, who lived in San Jose, parked the van in a residential area of Los Gatos, got out, leaving the keys in the ignition, and looked at the damage to the van. Defendant looked "a little unstable, stumbled a little bit and was wobbling." When defendant noticed that someone was watching him, he walked slowly and awkwardly away. The van was quickly found by the police, and it was determined that defendant was the registered owner of the van. There was hair sticking out of the cracks in the windshield.

At 3:00 p.m. on February 19, defendant telephoned his girlfriend and asked her to pick him up in Los Gatos. When she picked him up and drove him to San Jose, he was high on PCP. Defendant told her that he "doesn't know what happened, he thinks he hit something." Defendant said he did not know where his van was. They went back to Los Gatos and drove around looking for his van but did not see it. Defendant knew that he had "hit something" and that the police would be looking for him.

James Dein, one of the bicyclists defendant hit, died within minutes. He had been wearing a yellow windbreaker and a yellow safety vest. His entire skull was cracked, probably by impact with the van. The skull fracture damaged his brain and killed him. Dein had 14 broken ribs and his back was fractured in two places. His face had hit the pavement.

Clarence Aberg, the other bicyclist run down by defendant, was severely injured, but he survived. He had no memory of the incident. His left leg was broken, and he was in a wheelchair for more than six months. Aberg also had a broken collarbone, broken ribs, a scalp wound, and a compressed vertebrae in his back. He suffered brain damage that gave him short term memory problems. Aberg was told by his doctor that he could never ride a bike again due to the damage to his head.

Defendant was arrested the day after the incident when he turned himself in to the Los Gatos police. Blood and urine tests confirmed that defendant had used PCP in the last 72 hours. Defendant's van was examined and found to be functioning properly except that the right front tire was punctured and had been driven in a deflated condition. The condition of the right front tire and rim reflected that there had been instantaneous deflation.

Defendant was charged by information with murder (Pen. Code, § 187), failing to stop at the scene of an injury accident (Veh. Code, § 20001, subds. (a), (b)(1)), failing to stop at the scene of an accident resulting in property damage (Veh. Code, § 20002, subd. (a)), reckless driving causing great bodily injury with a prior conviction (Veh. Code, § 23104, subd. (b)), driving with a suspended license (Veh. Code, § 14601.2, subd. (a)) and being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)). It was specially alleged that defendant was ineligible for probation, except in an unusual case, because he had suffered two prior felony narcotics convictions (Pen. Code, § 1203, subd. (e)(4)).

An accident reconstruction expert testified at trial that an average sober driver would have been able to stop a van traveling at the speed defendant's van was traveling within 178 feet after seeing danger. Defendant did not stop his van until he had traveled 448 feet after hitting Mahrer's vehicle. The expert concluded that defendant's van was in control, and defendant was not braking when he hit the first bicyclist. Defendant did not begin braking until 69 feet after he hit the bicyclists. When the van hit Dein, Dein was

"essentially stuck on the front of the vehicle as the vehicle continued moving until finally it started braking." Then Dein was thrown off of the hood of the van.

The defense presented no evidence at trial. Defendant's trial counsel argued that defendant was not guilty of second degree murder but of involuntary manslaughter. He did not address the other counts. The jury returned guilty verdicts on all counts.

The court imposed upper terms for the leaving the scene of an injury accident count and the reckless driving count, but it stayed under Penal Code section 654 the term for the reckless driving count. The court's sole reason for the imposition of the upper terms was that defendant was on probation at the time of the offenses. A consecutive indeterminate term of 15 years to life was imposed for the murder count. Defendant filed a timely notice of appeal.

II. Discussion

A. Implied Malice Instruction

Defendant asked the court to modify CALJIC 8.11, the standard implied malice instruction. CALJIC 8.11 says, in part: "Malice is implied when: [¶] 1. The killing resulted from an intentional act; [¶] 2. The natural consequences of the act are dangerous to human life; and [¶] 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life." Defendant wanted the trial court to replace the second numbered sentence with the following sentence: "2. The natural consequences of the act are dangerous to human life, *or phrased in a different way, there was a high probability that the act would result in death*; and." (Italics added.) The trial court declined to modify the instruction and gave the standard instruction.[3]

[3] The court also gave CALJIC 8.31, which utilizes the same language as CALJIC 8.11 in defining implied malice second degree murder.

Defendant claims that the trial court prejudicially erred in refusing to modify the standard instruction in response to his request. We find no error.

In *People v. Nieto Benitez* (1992) 4 Cal.4th 91 (*Nieto Benitez*), the California Supreme Court held that the standard implied malice instruction "correctly distills the applicable case law," and trial courts are not required to additionally instruct juries on the alternative "high probability that [the act] will result in death" formulation of the objective component of implied malice. (*Nieto Benitez*, at pp. 110-111.) We are, of course, bound by this holding. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

The only potentially significant distinction between defendant's contention here and the one made by the defendant in *Nieto Benitez* is that defendant *requested* a modification of the implied malice instruction while the defendant in *Nieto Benitez did not request* modification of the implied malice instruction. However, this is not a distinction that makes a difference.

"The trial court must instruct even without request on the general principles of law relevant to and governing the case. [Citation.] That obligation includes instructions on all of the elements of a charged offense." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) Since implied malice was an element of one of the charged offenses, the trial court had a *sua sponte* duty to give an accurate implied malice instruction.

Defendant's contention, at bottom, is that the standard implied malice instruction sets too low a standard for the objective component. He claims that his proposed addition to the instruction, defining the objective component as "a high probability that the act would result in death," states a more stringent requirement than the requirement in the standard instruction that "[t]he natural consequences of the act are dangerous to human life."

There are two problems with defendant's argument. One, defendant's proposed instruction *did not require* the jury to find that there was "a high probability that the act

would result in death." Instead, it permitted the jury to find the objective component proven if it concluded that *either* there was a high probability that the act would result in death *or* the natural consequences of the act are dangerous to human life. Because the proposed instruction would *not* have required the jury to make any finding beyond that which the standard instruction required, it would not have imposed the higher standard that defendant sought. Thus, the requested modification would have served no purpose.

Second, we are bound by the California Supreme Court's holding in *Nieto Benitez* that trial courts are not required to instruct a jury on the alternative formulation that defendant requested. The duty to instruct on implied malice is a sua sponte duty, and the trial court fulfilled that duty. The fact that defendant requested an alternative instruction did not change the trial court's instructional obligation. While a trial court may be required to give a requested instruction that addresses a subject unaddressed by the instructions that the court is required to give sua sponte, a trial court is not required to give a requested instruction on a subject that is already addressed by the court's sua sponte instructions. (*People v. Hendricks* (1988) 44 Cal.3d 635, 643.) The trial court did not err in refusing to give the modified implied malice instruction requested by defendant.

B. Voluntary Intoxication Instruction

The trial court instructed the jury that voluntary intoxication was not relevant to any of the counts. "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. In the crimes charged in Counts 1 through 6 the fact the defendant was voluntarily intoxicated is not a defense and does not relieve him of responsibility for the crime." Defendant claims that his trial counsel was prejudicially deficient in failing to request a modification of this instruction that

would have told the jury that voluntary intoxication was relevant to the knowledge element of the leaving the scene of an injury accident count.[4]

When a defendant challenges his conviction based on a claim of ineffective assistance of counsel, he must prove by a preponderance of the evidence that counsel's performance was deficient and that his defense was prejudiced by those deficiencies. (*People* v. *Ledesma* (1987) 43 Cal.3d 171, 218; *Strickland* v. *Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." (*Strickland*, at p. 694.) "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland*, at p. 694.)

The offense of leaving the scene of an injury accident does require that the driver know that a collision has occurred, but it does not require that the driver know that injury has occurred. "The driver of any vehicle involved in an accident resulting in injury to any person, other than himself or herself, or in the death of any person shall immediately stop the vehicle at the scene of the accident and shall fulfill the requirements of Sections 20003 and 20004." (Veh. Code, § 20001, subd. (a).) "[T]he driver who leaves the scene of the accident seldom possesses actual knowledge of injury; by leaving the scene he forecloses any opportunity to acquire such actual knowledge. Hence a requirement of actual knowledge of injury would realistically render the statute useless. We therefore

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[4] This contention is inapplicable to the leaving the scene of an accident resulting in property damage count. "Neither knowledge of injury nor knowledge of the seriousness of the nature of the accident is required for a conviction under Vehicle Code section 20002, which provides that a driver of a vehicle in an accident resulting in damage to property commits a misdemeanor if he fails to stop and give the required information." (*People v. Holford* (1965) 63 Cal.2d 74, 80, fn. 3 (*Holford*).)

believe that criminal liability attaches to a driver who knowingly leaves the scene of an accident if he actually knew of the injury or if he knew that the accident was of such a nature that one would reasonably anticipate that it resulted in injury to a person." (*Holford*, *supra*, 63 Cal.2d 74, 80.) "Such knowledge, however, may be imputed to the driver of a vehicle where the fact of personal injury is visible or obvious, or where the seriousness of the collision would lead a reasonable person to assume that there must have been resulting injury." (*People v. Ryan* (1981) 116 Cal.App.3d 168, 180.)

The next question is whether evidence of defendant's voluntary intoxication was relevant on the question of whether he knew that a serious collision had occurred. "(a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. [¶] (b) *Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent*, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought." (Pen. Code, § 22, italics added.)

Under Penal Code section 22, evidence of defendant's voluntary intoxication could only be admitted on the issue of "whether or not the defendant actually formed a required specific intent" for this offense. The only subjective mental state element was actual knowledge that the vehicle had been in a serious collision. "A crime is characterized as a 'general intent' crime when the required mental state entails only an intent to do the act that causes the harm; a crime is characterized as a 'specific intent' crime when the required mental state entails an intent to cause the resulting harm. [Citation.] '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 intent is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some future act or achieve some additional consequence, the crime is deemed to be one of specific intent.'" (*People v. Davis* (1995) 10 Cal.4th 463, 518, fn. 15.)

It would seem fairly straightforward that an offense which requires only knowledge that a serious collision has occurred is not a specific intent crime. After all, the definition of the crime does not refer to the intent to do any further act or achieve any future consequence. Nevertheless, defendant relies on cases holding that certain offenses have knowledge elements that are akin to specific intent requirements and therefore evidence of voluntary intoxication may be admitted to show the absence of such knowledge.

The leading case on this issue is *People v. Reyes* (1997) 52 Cal.App.4th 975 (*Reyes*). In *Reyes*, the issue was whether the defendant's voluntary intoxication was admissible under Penal Code section 22 with regard to the knowledge element of receiving stolen property. The Fourth District held that the knowledge element of receiving stolen property was a "specific intent" within the meaning of Penal Code section 22, in part because a defendant could not be convicted of receiving stolen property if he intended to restore the property to its rightful owner. (*Reyes*, at pp. 982-986.)

The holding in *Reyes* does not, however, dictate the result here. Penal Code section 496, which criminalizes receiving stolen property, *expressly* requires proof of knowledge, and *actual* knowledge is required. (Pen. Code, § 496, subd. (a) ["knowing the property to be so stolen"]; *People v. Rodriguez* (1986) 177 Cal.App.3d 174, 179 [requires "actual knowledge of the stolen character of the property"].) In contrast, Vehicle Code section 20001 makes *no mention* of any knowledge requirement, and it is well established that *actual* knowledge that an injury has occurred is *not* required. The

only *subjective mental state* required by Vehicle Code section 20001 is the awareness that one's vehicle has been involved in a serious collision.

At most, *Reyes* stands for the proposition that Penal Code section 22 permits the admission of evidence of voluntary intoxication on the question of whether a defendant had a required mental state of actual knowledge. Defendant has failed to establish that there is a reasonable probability that the jury's verdict on this count would have been different if the jury had been permitted to consider defendant's voluntary intoxication on the issue of whether he actually knew that his vehicle had been in a serious collision.

The evidence indisputably established that defendant was subjectively aware that his vehicle had been involved in a serious accident. While driving down the shoulder of the roadway at full speed, defendant admittedly knew that he "hit something." This "something" struck and smashed the windshield of his van on the driver's side, right in front of defendant's face. There was no evidence that defendant had his eyes closed or that his PCP intoxication rendered him blind. Consequently, it is not possible that defendant was unaware of the seriousness of the collision. Indeed, defendant exhibited his awareness of the nature of the collision by skidding to a stop just after the collision and remaining there for a short while before proceeding. And he further demonstrated his awareness of the serious nature of the collision by immediately proceeding to park his van in a residential area of a city where he did not reside and abandoning it there.

Defendant's prejudice argument is based on his incorrect assumption that the prosecution was required to prove that he was subjectively aware that injury had occurred and that evidence of his intoxication would have been relevant on that issue. The prosecution bore no such burden. Defendant has failed to establish that his trial counsel's failure to request modification of the voluntary intoxication instruction was a prejudicial deficiency.

C. Character Evidence

Defendant claims that the trial court prejudicially erred in excluding evidence of his "good character."

1. Background

Defendant's former girlfriend, Jennifer Bruce, testified at trial as a prosecution witness. When Bruce was contacted by the police the day after the collision, she was "not cooperative." Bruce testified that she was a daily methamphetamine user, and that she had suffered convictions for brandishing a knife and contributing to the delinquency of a minor. Bruce knew that defendant was married, that he smoked PCP, that PCP put him into "a daze," and that defendant drove under the influence of PCP.

Bruce testified that, on the evening after the collision, defendant admitted that that afternoon he had smoked PCP in his van and later "hit something." He denied hitting a person. Defendant and Bruce spent the evening watching television, had sex, and went to sleep. Defendant left the next day.

On cross-examination, defendant's trial counsel elicited Bruce's testimony that, when she picked defendant up in Los Gatos, he was upset and distraught and appeared to have a "high" level of "concern" about "what was going on." The following colloquy occurred. "Q [by defendant's trial counsel] All right. From knowing him well did you think that he was concerned only about himself or was he concerned about what may have happened to somebody else or something else? [¶] MR. BRAKER [the prosecutor]: Objection. It calls for speculation and relevance. [¶] THE COURT: It could be cross-examined. You may answer that question. [¶] THE WITNESS: He seemed to worry about just the situation. He didn't, you know, he didn't know what had happened, he looked lost. [¶] A (By Mr. Arnold) Well, you know David well. Is he the kind of person who's not at all concerned about the welfare or the safety of other people? [¶] A No. [¶] MR. BRAKER: Objection. It's irrelevant, it's improper character evidence, it's [*sic*] calls for speculation. [¶] THE COURT: It is character evidence. I'm going to sustain

the objection and strike the answer. The jury's ordered not to consider the answer for any purpose. Ask your next question."

Defendant's trial counsel thereafter elicited Bruce's testimony that she had told defendant that her mom had said she saw defendant's van on TV "and that you hit two bicyclists." Bruce testified that defendant "looked shocked. He couldn't believe it, his eyes popped out of his head." Bruce testified that defendant "got real nervous and just looked like disbelief . . . ." He appeared "concerned." The next day, she and defendant watched a news report on TV about the incident, and defendant "started crying, he got panicky, he just confused [*sic*]." "He was very very scared, very distraught, very – it looked like his world had ended."

2. Analysis

Defendant claims that the trial court prejudicially erred in striking Bruce's testimony that defendant was not the "kind of person who's not at all concerned about the welfare or the safety of other people." He claims that it is reasonably probable that the admission of this evidence would have convinced the jury that he was unaware that anyone had been injured in the collision and therefore that he was not guilty of the leaving the scene of an injury accident count.

As we have already discussed, the leaving the scene of an injury accident count did not require proof that defendant was subjectively aware that the collision had resulted in injury. The excluded evidence was irrelevant to whether a reasonable person would have concluded that the collision had caused injury. Defendant does not claim that the exclusion of this evidence was prejudicial with respect to any other disputed element of any of the charged offenses. Hence, we need not consider whether its exclusion was error.

D. Imposition of Upper Term

The trial court imposed upper terms for both the leaving the scene of an injury accident count and the reckless driving count, but it stayed the term for the reckless driving count under Penal Code section 654. The court identified only one aggravating circumstance: defendant was on probation at the time of the offenses. Defendant claims that the trial court's imposition of an upper term for the leaving the scene of an injury accident count based on this aggravating circumstance violated his Sixth Amendment right to a jury trial because this aggravating circumstance was not admitted by him or found true by the jury beyond a reasonable doubt.[5]

In *Cunningham, supra*, ___ U.S. ___ [127 S.Ct. 856], the United States Supreme Court held that California's determinate sentencing law (the DSL) violates the Sixth Amendment because it does not require a jury finding beyond a reasonable doubt on the aggravating circumstance that is required for the imposition of an upper term. "[T]he DSL violates *Apprendi*'s bright-line rule: Except for 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.'" (*Cunningham*, at p. 868.) "Because the DSL allocates to judges sole authority to find facts permitting the imposition of an upper term sentence, the system violates the Sixth Amendment." (*Cunningham*, at p. 870.) The United States Supreme Court explicitly affirmed that its

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[5] The Attorney General contends that defendant forfeited his claim by failing to raise it at his December 2005 sentencing. In *People v. Sandoval* (2007) 41 Cal.4th 825 *(Sandoval)*, as here, sentencing occurred after the California Supreme Court's June 2005 decision in *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*) and before the United States Supreme Court's ruling in *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856] (*Cunningham*), and therefore an objection would have been futile. As the California Supreme Court held in *Sandoval*, a Sixth Amendment challenge to the imposition of an upper term sentence is not forfeited by a defendant's failure to object at a post-*Black I*, pre-*Cunningham* sentencing hearing. (*Sandoval*, at p. 837, fn. 4.) Defendant did not forfeit his contention.

"bright-line rule" holding in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) applied to *any* fact, including "facts concerning the offender." (*Cunningham*, at p. 869, fn. 14.)

The Attorney General argues that the trial court's aggravated circumstance finding here did not fall within *Apprendi*'s "bright-line rule" because it is a recidivism-related fact that comes within the *Almendarez-Torres v. United States* (1998) 523 U.S. 224 (*Almendarez-Torres*) "prior conviction" exception (the *Almendarez-Torres* exception) to *Apprendi*'s general rule. In *Apprendi*, the United States Supreme Court described the *Almendarez-Torres* exception as "a narrow exception to the general rule." (*Apprendi, supra,* 530 U.S. 466, 490.) The precise contours of this "narrow exception" have never been delineated, and this issue is currently pending in the California Supreme Court in *People v. Towne,* review granted July 14, 2004, S125677.

Before *Cunningham*, the California Supreme Court held that the question of whether a prior conviction was for a "serious felony" fell within the *Almendarez-Torres* exception. It interpreted *Apprendi* to permit some judicial factfinding on "recidivism." "The [United States Supreme Court] further explained in *Apprendi* that recidivism was distinguishable from other matters employed to enhance punishment, because (1) recidivism traditionally has been used by sentencing courts to increase the length of an offender's sentence, (2) recidivism does not relate to the commission of the charged offense, and (3) prior convictions result from proceedings that include substantial protections." (*People v. McGee* (2006) 38 Cal.4th 682, 698 (*McGee*).) Because *McGee* concerned only the fact of the nature of a serious felony prior conviction (*McGee*, at p. 702), it did not resolve whether other recidivism-related facts fell within the *Almendarez-Torres* exception. It was after *McGee* that the United States Supreme Court explicitly stated in *Cunningham* that *Apprendi*'s general rule encompasses any "facts concerning the offender" other than the fact of a prior conviction.

In the wake of *Cunningham*, the California Supreme Court revisited this issue in *People v. Black* (2007) 41 Cal.4th 799 (*Black II*). In *Black II*, one of the aggravating circumstances relied upon by the trial court in imposing the upper term was that the defendant's prior convictions were "numerous or of increasing seriousness." (*Black II*, at p. 818.) The defendant argued that he was entitled to a jury finding on this aggravating circumstance. The California Supreme Court, citing *McGee*, rejected his contention and held that this aggravating circumstance fell within the *Almendarez-Torres* exception. (*Black II*, at pp. 819-820.)

"Defendant . . . reads the 'prior conviction' exception too narrowly. (See *People v. McGee* (2006) 38 Cal.4th 682 (*McGee*) [defendant not entitled to have a jury determine whether his prior conviction in Nevada qualified as a serious felony for the purpose of imposing a sentence enhancement]; see also *People v. Thomas* (2001) 91 Cal.App.4th 212, 220-223 [the exception recognized in *Apprendi* for '"'the fact of a prior conviction'"' permits a trial court to decide whether a defendant has served a prior prison term].) As we recognized in *McGee*, numerous decisions from other jurisdictions have interpreted the *Almendarez-Torres* exception to include not only the fact that a prior conviction occurred, but also *other related issues that may be determined by examining the records of the prior convictions*. (See cases cited in *McGee*, *supra*, 38 Cal.4th at pp. 703-706; see also *United States v. Smith* (6th Cir. 2007) 474 F.3d 888, 892 [no right to a jury trial concerning the circumstance whether defendant's criminal history was '" 'extensive and egregious' "'].)

"The determinations whether a defendant has suffered prior convictions, and whether those convictions are 'numerous or of increasing seriousness' (Cal. Rules of Court, rule 4.421 (b)(2)), require consideration of only the number, dates, and offenses of the prior convictions alleged. The relative seriousness of these alleged convictions may be determined simply by reference to the range of punishment provided by statute for each offense. This type of determination is 'quite different from the resolution of issues

submitted to a jury, and is one more typically and appropriately undertaken by a court.'" (*Black II*, *supra*, 41 Cal.4th at pp. 819-820, italics added, footnote omitted.)

The California Supreme Court's expansive interpretation of the *Almendarez-Torres* exception in *McGee* and *Black II* compels us to conclude that this exception also encompasses the fact that a defendant was on probation. Like the fact that a prior conviction was for a serious felony, the fact that a defendant served a prior prison term, and the fact that a defendant's prior convictions were numerous or of increasing seriousness, the fact that a defendant was on probation is "determined by examining the records" of the defendant's prior convictions and is the "type of determination [that] is 'quite different from the resolution of issues submitted to a jury, and is one more typically and appropriately undertaken by a court.'" (*Black II*, *supra*, 41 Cal.4th at pp. 819-820.) Since the on-probation aggravating circumstance falls within the *Almendarez-Torres* exception, the trial court's reliance on this aggravating circumstance to support its imposition of the upper term did not violate defendant's Sixth Amendment rights.

III. Disposition

The judgment is affirmed.

_____
Mihara, J.

WE CONCUR:

_____
Bamattre-Manoukian, Acting P.J.

_____
Duffy, J.