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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAVIER O. SALAS et al., Defendants and Appellants.	B159750 (Los Angeles County Super. Ct. No. BA204220)

APPEALS from judgments of the Superior Court of Los Angeles County. William F. Fahey, Judge. As to Javier O. Salas, affirmed. As to Stephen C. Patrick, reversed and remanded.

Douglas G. Benedon, under appointment by the Court of Appeal, for Defendant and Appellant Javier O. Salas.

Neil J. Rosenbaum, under appointment by the Court of Appeal, for Defendant and Appellant Stephen C. Patrick.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey and Thien Huong Tran, Deputy Attorneys General, for Plaintiff and Respondent.

Steve Cooley, District Attorney, Curt Livesay, Chief Deputy District Attorney, Peter Bozanich, Assistant District Attorney, and Richard A. Lowenstein, Deputy District Attorney, as Amicus Curiae, on behalf of Plaintiff and Respondent.

Javier O. Salas (Salas) and Stephen C. Patrick (Patrick) appeal from the judgments entered upon Patrick's conviction by jury of one count and Salas's convictions by jury of four counts of selling unqualified securities (Corp. Code, §§ 25110, 25540, subd. (a)).[1] The jury also found the special allegation that each of the offenses was not discovered until after July 10, 1996 (Pen. Code, § 803, subd. (c)) to be true. The trial court sentenced Patrick to 16 months in state prison, suspending sentence and placing him on three years formal probation on the condition that he spend one year in county jail. It sentenced Salas to an aggregate term of three years to be served in the Department of Corrections Los Angeles restitution center (Pen. Code, § 6227).

Appellants contend that (1) the trial court erred in instructing the jury that the statute of limitations on the charged offenses was four years instead of three; (2) even if a four-year statute of limitations is applicable, it expired prior to initiation of the prosecution; (3) the trial court erred in instructing the jury that the sale of unqualified securities is a strict liability crime; and (4) the trial court's instruction on the defense that the securities were exempt from qualification was erroneous.

We hold that violation of section 25110 is a general intent crime which carries a knowledge requirement. Although the trial court properly instructed the jury regarding general intent, it neglected to advise the jury of the knowledge requirement. As to Patrick, this error warrants reversal and a new trial to allow Patrick to present evidence that he lacked knowledge of the facts establishing that the securities were not exempt pursuant to section 25102, subdivision (f). As to Salas, however, the error was harmless.

Accordingly, we affirm the judgment against Salas and reverse the judgment against Patrick and remand the case for retrial.

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[1] All further statutory references are to the Corporations Code unless otherwise indicated.

FACTUAL BACKGROUND

The People's case

A. American Joint Ownership Interests, Inc.

In 1990, Salas formed American Joint Ownership Interests, Inc. (AJOI), to acquire properties in the Belmont District of Los Angeles for development. He was its president, secretary, treasurer, sole shareholder and the only person authorized to disburse money from its bank accounts. He boasted that he ran AJOI by himself. Codefendants Rick Berry (Berry)[2] and Patrick joined AJOI in approximately 1990 and 1993, respectively, to procure investors to purchase partnership interests in entities formed to acquire the properties. David and Carol Melland, Mary Donovan, and Edward Burke were investors in 201 Boylston Street Associates, an entity formed to purchase the property at 201 Boylston Street.

The parties stipulated that these investment transactions were securities within the Corporate Securities Law of 1968 (the Act) and that the Department of Corporations had no record of any application to qualify to offer securities in the name of Salas, Berry, Patrick, AJOI or British-American Equity Management, Inc.[3]

The examiner from the Department of Corporations, Michelle Tse (Tse), examined the bank records of 201 Boylston Street Associates. She determined that 48 people wrote checks, in round number amounts totaling $347,100, some with "201 Boylston" written in the memo section, that were placed in the 201 Boylston Street Associates account. In January 1997, as a result of a civil suit against Salas and AJOI by several investors, a receiver was appointed for AJOI. Lisa Kalaydjian (Kalaydjian), the receivership administrator, determined from 201 Boylston Street Associates' records that there were 72 "people [invested] in 201 Boylston" with various amounts of money placed next to

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2 Berry has not appealed.

3 British American Equity Management, Inc., was an entity with which Berry was affiliated.

their names. She did not know whether those people had transferred money from 201 Boylston Street Associates to other AJOI properties in connection with which some of their names also appeared.

B. David and Carol Melland

Sometime before March 1991, David and Carol Melland (the Mellands) received an unsolicited telephone call from Salas, seeking their investment in 201 Boylston Street Associates. The Mellands did not know Salas or anyone else at AJOI before the call. He told them that they would obtain "a big return in a short period of time." He also told them he had obtained their telephone number from a list of people who made investments. The Mellands did not consider themselves sophisticated investors.

In August 1991, the Mellands invested $5,000 for a 1 percent interest in 201 Boylston Street Associates,[4] executing a subscription agreement that made no mention of any partnership interest, although they had been told that they were investing in limited partnerships. They never received any partnership agreement. The Mellands believed AJOI owned 201 Boylston Street when they invested, as Salas said nothing about having to acquire it. In 1992 or 1993, they learned from Mr. Melland's broker-friend, Ron Schweder (Schweder), that AJOI did not own that property. That revelation concerned Mrs. Melland, but she did not think there was fraud or misappropriation of money, only that the project was off to a slow start. Salas reassured the Mellands that they should "hang on," he was going to acquire the property, but there were insufficient funds to do so at that time.

In 1993, when Mr. Melland was told that he would not realize profit for a couple of years, he became concerned about the investment, questioning whether it was a good one. He did not think, however, there was any mishandling of his funds. He called Salas several times and was satisfied with what he was told. He testified that he did not know if he was aware that "something was amiss at AJOI in 1995." Mrs. Melland also believed

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[4] In March 1991, the Mellands had invested $7,500 in 201 Boylston Street Associates.

it was taking too long for them to receive a return on their investment. Other than the delay, however, she did not think Salas was doing anything wrong until 1995 or 1996. In 1996, she believed there was some impropriety involved because "it was taking too long without getting anything back on [their] money."

Between September 1992 and January 1996, the Mellands received numerous letters from AJOI, some signed by Salas and some by Berry, repeatedly reassuring them and representing that 201 Boylston Street would soon be purchased. It never was.

The Mellands received a letter dated May 18, 1995 (the May 18, 1995 letter), from Berry, on CP Development letterhead, advising that Berry was no longer affiliated with AJOI. "[D]ue to certain disagreements . . . [he] tendered [his] resignation."[5] The letter concerned Mr. Melland "that there may be a problem" but did not cause Mrs. Melland concern because she thought it simply meant that Berry was leaving AJOI. Mr. Melland did not think much about whether the portion of the letter referring to "full disclosure" meant that the Mellands were not receiving full disclosure from AJOI and did not contact Berry after receiving it.

The Mellands denied receiving a letter from Berry, similar to the one sent to another investor, dated September 15, 1995 (the September 15, 1995 letter), stating that suit was being filed against AJOI and Salas regarding "improprieties and/or fraudulent

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[5] The May 18, 1995 letter provided: "This letter serves as official notification that I, Rick Berry, no longer work for or represent in any way, shape, or manner American Joint Ownership Interests, Inc. [¶] Due to certain disagreements and several other issues, I recently tendered my resignation. If any of you have any questions or if I can be of any service whatsoever, please feel free to write or call. [¶] We are thrilled to announce the 'Grand Opening' of: [¶] C P Development . . . [¶] By the way, our motto is <u>first</u> you get your money <u>back</u>, then we split the <u>profits!</u> [¶] . . . [¶] We are continuing to acquire high quality select Southern California Real Estate and for those of you interested we will have an income producing project in the near future. Any project that we are involved with will have full disclosure documentation, quarterly financial statements, timely updates, prompt K1 returns, and <u>COMPLETE CANDOR</u>."

activities regarding your investments with him."[6] They also denied receiving or seeing any other letters referring to fraud or illegal activities at AJOI or letters from other investors seeking a return of their money.

In 1997, at approximately the same time they were contacted by the receiver for AJOI, Early Lincoln, a sheriff's investigator, contacted the Mellands regarding a criminal investigation of possible fraud. Before that, they had received no information that AJOI was involved in any fraudulent or criminal activities.

C. Mary Donovan

In January 1994, Mary Donovan (Donovan) received a telephone solicitation from someone at AJOI whose name she did not recall. However, during her dealings with AJOI, she dealt with Salas, Patrick and Berry, who told her of their project and that she would earn two to four times her investment. She invested $10,000 in 201 Boylston Street Associates in January 1994, and another $10,000 the following month, in both instances signing subscription agreements. Before investing in that property, she believed she was told that AJOI already owned it. In July 1994 and June 1996, she invested $10,000 and $20,000, respectively, in two other AJOI properties.

Donovan first became aware of problems at AJOI three or four years before trial when a law enforcement investigator, Keith Cook, contacted her, and she received letters from the receiver of AJOI. Before she heard from them, the only suggestion of any problems was the May 18, 1995 letter she received. It indicated to her that "something was rotten in Denmark," but she took no action, and made no effort to contact Berry, nor

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[6] The September 15, 1995 letter provided, in part: "Please be advised that suit is being filed on American Joint Ownership Interests, and Javier Salas in regards to any improprieties and/or fraudulent activities regarding your investments with him. Despite Mr. Salas' protestations and misdirections . . . the facts are the facts and all will come out in the wash. [¶] If you wish any potential redress of any kind you may contact the attorney, Mr. Michael Koomer . . . . [¶] I have done my best to apprise you of the truth and to help you recover all funds possible. Facts are facts, and cheap hyperbole is just that . . . cheap hype. I am now out of the picture and your destiny in this matter is in your own hands. Mr. Koomer comes highly recommended and knows very well what he is doing. I urge you to call him forthwith."

did she receive a telephone call from him or from anyone telling her that there was fraud or other impropriety at AJOI. She never saw the September 15, 1995 letter.

D. Edward Burke

In February 1994, Edward Burke (Burke), who held a degree in business administration, invested $5,000 in 201 Boylston Street Associates after receiving a "cold call" from an unidentified person who turned him over to Patrick with whom he ultimately invested. He was told AJOI was going to invest in several properties that would be packaged for sale.

Between 1994 and 1996, Burke received correspondence and other communications from AJOI, mostly from Berry. Before 1997, he received no information from anyone that there was a problem with AJOI. He received the May 18, 1995 letter, which he took to mean that Berry was no longer affiliated with AJOI. He too never saw the September 15, 1995 letter.

The defense's case

Appellants testified in their defense. Salas testified that he considered applying to qualify the securities but ultimately decided not to do so because he believed that it was unnecessary. He was aware that AJOI was required to limit the number of investors to no more than 35, raise less than a million dollars,[7] have a preexisting relationship with each investor, and not advertise in order to be exempt under section 25102, subdivision (f) from having to register with the Department of Corporations. He intended to limit the number of investors to 35 or fewer and denied that there were 48 investors in 201 Boylston Street Associates as testified to by Tse, claiming that her number included people whose investments had been refunded and investors who were not part of that entity. AJOI did not advertise. All investors in AJOI properties had prior contact with

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[7] Salas was under the apparent misconception that exemption from registration under section 25102, subdivision (f) required that the total investments solicited be less than $1 million. That code section contained no such requirement in 1991 or now. (See fn. 19, *post*.)

him, Berry or others affiliated with AJOI; none resulted from "cold calls." There was never more than $1 million invested in any one property. He claimed that the investors did not invest in any particular property, but that he could place or move their money into any of AJOI's investments, although the subscription agreements executed by each investor referred to a specific property. While he averred that investors were general partners and controlled the entities, even testifying that they had input in the amounts he offered to purchase properties, he admitted that they were not expected to do anything except pay money. He testified that all of the investors who testified at trial had complained to him about possible fraud, commingling and mismanagement in 1995.

Patrick held the title of vice-president and sales manager at different times during his tenure at AJOI. They were only "throw away" titles as he had no control or management authority. He testified that he was not trying to cheat anyone and did not intend to encourage, facilitate or commit any crime. He did not know the investments were securities requiring registration, but believed they were exempt.

Berry testified that in May or June 1995, he spoke with Donovan and advised her of Salas's illegal, immoral and unethical activities. She did not believe him, told him that if she needed him she would call, and hung up. In 1995, he also telephoned Burke and told him the same things. Burke responded that he "thought as much." Berry admitted that although he tried to do so, he did not send the September 15, 1995 letter to all investors.

DISCUSSION

I. Appellants' convictions are not barred by the statute of limitations.

The parties stipulated that the first notice to law enforcement of the alleged crimes was July 10, 1996. A complaint was first filed on July 6, 2000.[8] Appellants moved to dismiss various counts pursuant to Penal Code section 995 and to acquit pursuant to Penal Code section 1118.1 on the ground that the applicable statute of limitations barred prosecution of the charges against them. The trial court denied these motions.

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8 We granted Salas's request for judicial notice of that complaint.

The trial court instructed the jury in accordance with CALJIC No. 4.74 that the applicable statute of limitations was four years from discovery of the offense by the victims or law enforcement authorities.[9] The jury found the special allegation that each of the offenses "was not discovered until after July 10, 1996, to be true" with respect to the four counts of which appellants were found guilty.

Appellants contend that the trial court erred in instructing the jury that a four-year statute of limitations applied to violations of section 25110.[10] They argue that Penal Code section 801,[11] providing for a three-year statute of limitations for offenses punishable by imprisonment in state prison, is applicable and that law enforcement

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[9] CALJIC No. 4.74, as given, provides in part: "This case was filed on July 6, 2000. The defendant may be convicted of any one of the above counts, only if the particular crime related to the count was discovered within four (4) years of July 6, 2000, the date on which this case was filed. [¶] However, the defendant may not be convicted of any crime related to a count charged if you find that in the exercise of reasonable diligence on the part of the alleged victim or the criminal law enforcement authorities, that the particular crime should have been discovered at a time more than four (4) years before this case was filed. [¶] The word 'discovered,' as used in this instruction, does not mean in respect to the alleged victim, mere awareness of loss, refusal or failure to pay money owed; nor in respect to the alleged victim, does mere loss, refusal or failure to pay money owed, in and of themselves suggest a likelihood of fraud, theft, or crime. [¶] The word 'discovered' as used in this instruction, means an awareness of facts upon which the offense charged is based, and that it was caused by a criminal means of act. [¶] 'Reasonable diligence' means the usual care exercised by the ordinary prudent person in the conduct of his or her affairs."

[10] Section 25110 makes it unlawful, with exceptions not applicable here, 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 . . . ."

[11] Penal Code section 801 provides: "Except as provided in Sections 799 [no limitation period for offenses punishable by death] and 800 [six-year limitation period for offenses punishable by imprisonment for eight years or more], prosecution for an offense punishable by imprisonment in the state prison shall be commenced within three years after commission of the offense."

authorities' first notice of the alleged offenses on July 10, 1996, was more than three years before prosecution was begun on July 6, 2000. Appellants also contend that even if a four-year statute of limitations is applicable, it began to run, at latest, after receipt of the May 18, 1995 letter, more than four years before the prosecution was initiated, because investors had sufficient information at that point to make a reasonably prudent person suspicious of criminal conduct. These contentions lack merit.

A. Section 25110 is Subject to a Four-Year Statute of Limitations

Salas was convicted of one count of selling unregistered securities to the Mellands in 1991, of two counts of selling them to Donovan in January and February 1994, and of one count of selling them to Burke in 1994, in violation of section 25110. Patrick was only convicted on the latter count. At the time appellants committed the offenses, the applicable statute of limitations was three years (Pen. Code, § 801) from the date of discovery of the offense (Pen. Code, § 803, subd. (c)).[12] The jury found that the offenses were not discovered until after July 10, 1996, thus commencing the running of the statute of limitations, at the earliest, after that date.

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12 Penal Code section 803, subdivision (c) provides that, "A limitation of time prescribed in this chapter does not commence to run until the discovery of an offense described in this subdivision. This subdivision applies to an offense punishable by imprisonment in the state prison, a material element of which is fraud or breach of a fiduciary obligation . . . including, but not limited to, the following offenses: [¶] . . . [¶] (3) A violation of Section 25540, *of any type*, or Section 25541 of the Corporations Code. . . ." (Italics added.) Section 25540, subdivision (c) is the penalty provision for "any person who willfully violates any provision of this division," which division includes section 25110 of which appellants were convicted.

Effective January 1, 1996, before the statute of limitations had even commenced to run on appellants' offenses, the Legislature amended Penal Code section 801.5[13] to provide for a four-year statute of limitations (in lieu of that statute's previous three-year limitations period) and, for the first time, applied it to any offense listed in Penal Code section 803, subdivision (c), which included violations of section 25110 by virtue of it being within the penalty language of section 25540, subdivision (a).[14] This new four-year limitations period in Penal Code section 801.5 became applicable to appellants' offenses because the original three-year period had not yet expired. (*Falter v. United States* (2d Cir. 1928) 23 F.2d 420, 425-426 [Justice Learned Hand upheld the right to prosecute within a period extended by an amendment to an existing statute if the amendment was adopted prior to the expiration of the original period of limitations]; *People v. Callan* (1985) 174 Cal.App.3d 1101, 1107-1108, disapproved on other grounds in *People v. Lopez* (1998) 19 Cal.4th 282, 292; *People v. Eitzen* (1974) 43 Cal.App.3d 253, 266-267.)

In support of their theory that the three-year statute of limitations governs, appellants point to the following language in *People v. Fine* (1997) 52 Cal.App.4th 1258, 1263: "Penal Code section 801 requires that prosecution of a violation of [section 25110] must be commenced within three years after commission of the offense." But the *Fine*

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13 Penal Code section 801.5, as amended effective 1996, provides: "Notwithstanding Section 801 or any other provision of law, prosecution for any offense described in subdivision (c) of Section 803 shall be commenced within four years after discovery of the commission of the offense, or within four years after the completion of the offense, whichever is later."

14 In 1991, the year of Salas's first offense, section 25540, subdivision (a) provided: "Except as provided for in subdivision (b), any person who willfully violates any provision of this law, or who willfully violates any rule or order under this law shall upon conviction be fined not more than two hundred and fifty thousand dollars ($250,000), or imprisoned in the state prison, or in a county jail for not more than one year, or be punished by both such fine and imprisonment; but no person may be imprisoned for the violation of any rule or order if he [or she] proves that he [or she] had no knowledge of the rule or order." In 1994, the fine was increased to $1 million.

court was not called upon to consider the limitations period applicable to section 25110. At issue only was whether the tolling provision in Penal Code section 803, subdivision (c) applied to section 25110. It is axiomatic that cases are not authority for propositions not considered. (*People v. Jones* (1995) 11 Cal.4th 118, 123, fn. 2.) Furthermore, it appears that the prosecution in *Fine* was commenced prior to the 1996 amendment of Penal Code section 801.5, when the Penal Code section 801 three-year statute of limitations was applicable to violations of section 25110. And, in making the quoted statement, the Court of Appeal in *Fine* cited no authority, conducted no analysis, and even failed to refer to Penal Code section 801.5.

Because the trial court correctly applied a four-year statute of limitations period, discovery by law enforcement of the charged offenses on July 10, 1996, was less than four years before a prosecution was initiated, and the charges were not barred.

B. The Jury's Statute of Limitations Finding is Supported by Substantial Evidence

Appellants contend that the statute of limitations began to run more than four years before initiation of the prosecution because the May 18, 1995 letter provided the victims with facts sufficient to make a reasonably prudent person suspicious of criminal activity. But the jury found otherwise. Thus, appellants' contention can only be sustained if there was insufficient evidence to support the jury's finding. "When a statute of limitations issue has been tried to a jury, on appeal the question becomes whether there was substantial evidence to support the jury's implied findings. [Citation.]" (*People v. Le* (2000) 82 Cal.App.4th 1352, 1361.)

We thus review the record to determine if there was substantial evidence to support the jury's finding. "In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the [jury's finding] to determine whether it discloses evidence that is reasonable, credible, and of solid value. . . . [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We resolve all conflicts in the evidence and questions of credibility in favor of the [jury's finding], and indulge every reasonable inference the jury could draw from the evidence. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.)

The statute of limitations does not begin to run until "after discovery of the commission of the offense." (Pen. Code, §§ 801.5, 803, subd. (c).) Reasonable diligence must be exercised in discovering crimes. (*People v. Zamora* (1976) 18 Cal.3d 538, 561-562.) "'The statute commences to run . . . after one has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on inquiry. . . .'" (*Id.* at p. 562.) "The crucial determination is whether 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*." (*Id.* at pp. 571-572.)

Substantial evidence supports the jury's finding that the violations of section 25110 "w[ere] not discovered until after July 10, 1996." The Mellands, Donovan, and Burke all received the May 18, 1995 letter from Berry, a disgruntled former employee of AJOI who resigned under obviously unhappy circumstances ("disagreements and several other issues"). The May 18, 1995 letter's comments that the practices of Berry's new company, CP Development, are candid and give investors their money back first were not obvious suggestions that AJOI had acted otherwise. The letter could reasonably have been viewed as nothing more than a solicitation of the victims' business.

In fact, none of the victims interpreted the letter to be a sign of wrongdoing at AJOI. It was the only hint of a problem that Donovan received before 1997, when she was contacted by law enforcement investigators. While it suggested to her that "something was rotten in Denmark," it did not suggest, and no one told her, that there were any fraudulent practices occurring. She took no action as a result of the letter and invested another $20,000 with AJOI more than a year and a half later. Burke understood the letter to simply mean that Berry would no longer be affiliated with AJOI. Likewise, Mrs. Melland was unconcerned by the May 18, 1995 letter because she had interpreted it to mean only that Berry had left AJOI. Although the letter concerned Mr. Melland that there might be a problem, he did not think that its reference to "full disclosure" was a comment on AJOI or Salas's conduct. None of the victims contacted Berry about the letter or received a telephone call from him to elaborate on its contents.

Apart from the May 18, 1995 letter, none of the victims believed that there was fraud. None received or saw the September 15, 1995 letter, which contained direct accusations of fraud and other wrongdoing by Salas and AJOI. Even when the Mellands learned from Schweder that, contrary to their understanding when they invested in 201 Boylston Street Associates, AJOI did not own 201 Boylston Street, Mrs. Melland believed that only meant the project was off to a slow start. She did not believe that there was fraud or misappropriation of money. Moreover, all of the victims received a series of letters painting a rosy picture about the projects and reassuring them that AJOI was acquiring the property. This evidence was sufficient to support the jury's finding that the offenses were not discovered until after July 10, 1996.

II. The trial court did not properly instruct the jury on the elements of a section 25110 violation.

A. Section 25110 is a General Intent Crime

Appellants contend that the trial court committed reversible error in giving instructions that erroneously informed the jury that selling an unqualified security is a strict liability offense. Thus, we must first consider whether a violation of section 25110 is a general intent or strict liability crime. "[S]ince we are considering a penal application of section [25110], a statute whose language is susceptible of two constructions, the court must ordinarily adopt the construction more favorable to the offender. 'The defendant is entitled to the benefit of every reasonable doubt, whether it arises out of a question of fact, or as to true interpretation of words or construction of language used in a statute.' [Citations.]" (*People v. Simon* (1995) 9 Cal.4th 493, 517-518 (*Simon*).)

A strict liability crime is one "which dispense[s] with any mens rea, scienter, or wrongful intent." (*Simon*, *supra*, 9 Cal.4th at p. 519; *People v. Malfavon* (2002) 102 Cal.App.4th 727, 740.) Traffic violations are examples. (*People v. Vogel* (1956) 46 Cal.2d 798, 801, fn. 2.) Drivers are responsible for violating traffic regulations whether or not they intend the conduct that violates the statute or whether they even know that

they have engaged in such conduct.[15] (See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331 (*Rubalcava*) ["[A] defendant may be guilty of a strict liability offense even if he does not know 'the facts that make his conduct fit the definition of the offense.' [Citation.]"].)

A general intent crime, on the other hand, requires mens rea. The intent required "is the purpose or willingness to do the act or omission [in question]." (*People v. Johnson* (1998) 67 Cal.App.4th 67, 72.) "The fact that a general intent criminal statute provides for a presumption of the requisite criminal intent merely from the doing of the act which the law declares to be a crime, (even though the defendant may not know that his act or conduct is unlawful), does not make such a statute a strict liability offense. Rather, such a statute simply shifts the criminal intent. . . . [A]n unlawful intent is *presumed* from the doing of the unlawful act. Such presumption has the legal effect of being a conclusive presumption because it is settled that, '[t]o constitute general criminal intent it is not necessary that there should exist an intent to violate the law. When a person intentionally does that which the law declares to be a crime, he is acting with general criminal intent even though he may not know that his act or conduct is unlawful.'" (*People v. Lujan* (1983) 141 Cal.App.3d Supp. 15, 28.)

To determine whether section 25110 constitutes a strict liability offense, as the People argue, we must determine the legislative intent in adopting those statutes by considering the entire regulatory scheme of the Act. Our starting point in divining this intent is the "ancient requirement of a culpable state of mind" for imposition of criminal punishment. (*Morissette v. United States* (1952) 342 U.S. 246, 250.) "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individuals to choose between good and evil." (*Ibid.*) "Generally, '"[t]he existence of mens rea is the

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[15] Thus, a driver who goes through a stop sign without stopping is guilty of violating Vehicle Code section 22450 even if the driver did not see the stop sign, and hence did not intend to go through it.

rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence . . . .'"'" (*People v. Coria* (1999) 21 Cal.4th 868, 876 (*Coria*).) This notion is embodied in Penal Code section 20, which provides: "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence."

Further, the "'"prevailing trend [is] 'away from the imposition of criminal sanctions in the absence of culpability where the governing statute, by implication or otherwise, expresses no legislative intent or policy to be served by imposing strict liability.'"'" (*Coria, supra,* 21 Cal.4th at p. 878.) Courts are reluctant to construe offenses "'requir[ing] the defendant to have knowledge only of traditionally lawful conduct'" as containing no mens rea requirement. (*Id.* at p. 880.)

The most significant factor in discerning whether the Legislature intended section 25110 to be a strict liability offense is the severity of the penalty imposed. "We generally presume that the Legislature would not attach a substantial penalty to a strict liability offense. 'Harsh penalties' are a '"significant consideration in determining whether the statute should be construed as dispensing with mens rea."' [Citations.]" (*Simon, supra,* 9 Cal.4th at pp. 509-510, fn. 13; see also *Coria, supra,* 21 Cal.4th at pp. 876-877.) "Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with mens rea. Certainly, the cases that first defined the concept of the public welfare offense [imposing strict liability] almost uniformly involved statutes that provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary." (*Staples v. United States* (1994) 511 U.S. 600, 616, italics omitted.)

Section 25540, subdivision (a) provides the penalty for violations of section 25110. In 1991, at the time of Salas's first violation of section 25110 for which he was convicted, section 25540, subdivision (a) made violation of section 25110 a felony, punishable by up to three years in state prison and a fine of $250,000.[16] The penalty was

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[16] The harshness of a penalty for purposes of assessing whether a statute calls for strict liability must be assessed based upon the maximum sentence that can be imposed, not the lesser permissible penalties, for it is the maximum penalty that establishes the risk

made even harsher in 1994, when the potential fine under section 25540, subdivision (a) was increased to $1 million. By any assessment, a felony conviction providing for up to three years in state prison and a $1 million fine is sufficiently severe so as to invoke the longstanding and fundamental notion that an individual must be aware of the conduct in which he or she is engaging before being convicted.

The language of section 25540 also belies the People's claim that violation of section 25110 is a strict liability offense. Section 25540 provides that selling such securities is criminally punishable only if "[a] person . . . willfully violates" section 25110. Penal Code section 7 explains that "'[w]illfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage." Generally, a statute proscribing willful behavior is a general intent crime. (*People v. Johnson, supra,* 67 Cal.App.4th at p. 72; see also *People v. Dollar* (1991) 228 Cal.App.3d 1335, 1340 [use of words "'willfully'" and "'maliciously'" usually signals a general intent crime].)

Further indication that the Legislature did not intend the sale of unregistered, unexempt securities to be a strict liability offense comes from the federal security acts. The Act was based on the federal model. The Legislature "may also have been aware of the legislative history of [the federal] acts, therefore, and in that history 'there is no indication that any type of criminal or civil liability is to attach in the absence of scienter.'" (*Simon, supra,* 9 Cal.4th at p. 514.) Further, although the definitive interpretation of the federal law requiring mens rea for its violations did not come for many years after the adoption of the Act, when that interpretation became clear, the Legislature made no effort to clarify that it was inapplicable to the Act. *Simon*, decided nearly a decade ago, concluded that knowledge was required to establish the violation of

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to which a person is exposed. (See, e.g., *Duncan v. Louisiana* (1968) 391 U.S. 145, 162, fn. 35 [right to jury trial for serious versus petty offenses determined by reference to the penalty authorized by a statute, not the actual penalty imposed].) In any event, Salas received the maximum penalty here.

at least some provisions of the Act and unequivocally articulated its concern with imposing the harsh penalties provided in section 25540 without a showing of knowledge. *Simon* noted the modern trend away from strict liability offenses and expressly solicited the Legislature's clarification of "which of the criminal violations of the [Act] . . . are . . . strict liability offenses and what mental states are elements of those which require scienter." (*Simon, supra*, at pp. 509-510, fn. 13.) The Legislature has remained silent, suggesting its concurrence with the modern trend requiring mens rea for criminal liability under the Act.

A notable, albeit narrow, exception to the requirement of a "culpable state of mind," has been recognized for public welfare offenses. (See *Morissette v. United States, supra*, 342 U.S. at pp. 250, 255-256; *U.S. v. Ahmad* (5th Cir. 1996) 101 F.3d 386, 391; *Staples v. United States*, *supra*, 511 U.S. at pp. 628-629 (dis. opn. of Stevens, J.).) Those are offenses pertaining to violations of statutes regulating "'dangerous or deleterious devices or products or obnoxious waste materials.'" (*Ibid*.) Examples include dangerous narcotics, hazardous substances and impure or adulterated foods and drugs. (*Staples v. United States*, at p. 629.) "The rationale of the doctrine of strict criminal liability is that, although criminal sanctions are relied upon, the primary purpose of the statute is regulation rather than punishment or correction, and that the interest of enforcement for the public health and safety requires the risk that an occasional nonoffender may be punished in order to prevent the escape of a greater number of culpable offenders." (*People v. Travers* (1975) 52 Cal.App.3d 111, 115.)

Our Supreme Court has recently stated: "'Under many statutes enacted for the protection of the public health and safety, e.g., traffic and food and drug regulations, criminal sanctions are relied upon even if there is no wrongful intent. These offenses usually involve light penalties and no moral obloquy or damage to reputation.'" (*Coria, supra,* 21 Cal.4th at pp. 876-877; see also *People v. Vogel, supra,* 46 Cal.2d at p. 801, fn. 2.) But, the public welfare exception "has not been applied in this state to offenses which, like section 25401, do not involve conduct which threatens the public health or safety and are punishable with lengthy prison terms. The exception continues to be

restricted to crimes of the type described in *Vogel* [storage of hazardous waste, transportation and disposal of hazardous waste discharge wastes into watercourses, and unlicensed possession of such waste material]." (*Simon, supra,* 9 Cal.4th at p. 521.) The provisions of the Act have not traditionally been viewed to be public welfare offenses subject to the narrow exception of the mens rea requirement. The Act regulates neither health nor safety matters.

Another aspect of section 25110 distinguishes it from public welfare statutes. "Public Welfare statutes render criminal 'a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health and safety.' [Citation.]" (*Staples v. United States, supra,* 511 U.S. at p. 629.) "Such public welfare offenses [that dispense with awareness of some wrongdoing] have been created by Congress, and recognized by this Court, in 'limited circumstances.' [Citation.] Typically, our cases recognizing such offenses involve statutes that regulate potentially harmful or injurious items. . . . In such situations, we have reasoned that as long as a defendant knows that he is dealing with a dangerous device of a character that places him, 'in responsible relation to a public danger' [citation], he should be alerted to the probability of strict regulation, and we have assumed that in such cases Congress intended to place the burden on the defendant to 'ascertain at his peril whether [his conduct] comes within the inhibition of the statute.'" (*Id.* at p. 607; see, e.g., *United States v. Freed* (1971) 401 U.S. 601, 609 [regulation of unregistered grenades does not require proof the defendant knew the grenades were unregistered. "[O]ne would hardly be surprised to learn that possession of hand grenades is not an innocent act"].) Unlike traditional public welfare offenses which by their nature alert a reasonable person that the conduct they proscribe may seriously threaten health and safety, appellants' conduct in seeking investors for real estate projects is traditionally lawful conduct that provides no such notice.

For all of the foregoing reasons, we conclude that violation of section 25110 is not a strict liability offense but rather a general intent offense, requiring proof that the proscribed conduct was intentionally accomplished.

The Attorney General, relying on the decision by our colleagues in Division Four of this Court in *People v. Corey* (1995) 35 Cal.App.4th 717 (*Corey*), argues that selling unregistered, unexempt securities is a strict liability offense.[17] *Corey* provides: "Courts have long considered a violation of section 25110 to be a strict liability offense. . . . [¶] . . . [¶] We conclude that section 25110 does not include scienter as an element which must be proved to establish that a person who offers or sells an unregistered and unexempt security is in violation of the statute." (*Corey, supra,* at p. 729.) We reject the Attorney General's contention and take issue with *Corey* on this point.

Corey was premised upon the faulty assumption that "the magnitude of potential criminal penalties for violation of section 25110 is . . . up to $1 million in fines and up to *one year imprisonment*." (*Corey, supra*, 35 Cal.App.4th at p. 729, italics added.) In fact, the maximum penalty for violation of section 25110, as provided in section 25540, subdivision (a) is *three years*. While section 25540 provides for imprisonment in state prison without specifying the duration of such imprisonment, Penal Code section 18 provides: "Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony, or to be punishable by imprisonment in a state prison, is punishable by imprisonment in a state prison for 16 months, or two or three years. . . ." Thus, appellants faced, and Salas received, a maximum sentence of three years. Because the harshness of the penalty is a significant factor in assessing whether a statute is a strict liability statute, *Corey's* miscalculation led its analysis astray. *Corey* focused its attention on attempting to distinguish between characteristics of section 25110, which it was considering, and section 25401, which *Simon* considered, rather than

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17 On October 7, 2003, the district attorney's office filed an amicus curiae letter brief in which it asserted that the jury instructions given by the trial court were general intent instructions not strict liability instructions. The Department of Justice responded to this amicus curiae brief by letter brief dated October 31, 2003, averring: "[R]espondent maintains his position set forth in the Respondent's Brief that the offer/sale of unqualified/non-exempt securities is a strict liability offense." Such a violation "does not require a scienter element. . . . All that is required is a willfulness to do the act; that is, a mere awareness of one's actions."

assessing whether the policy considerations articulated in *Simon* were applicable to a violation of section 25110. *Corey* gave too little weight to the factors we find significant. We therefore decline to follow it.

B. Section 25110 Includes a Knowledge Requirement

Having concluded that the violation of section 25110 is a general intent crime, we next consider whether that crime also carries a knowledge requirement. We recognize that sections 25110 and 25540 do not expressly include a knowledge requirement, but "[t]hat the statute contains no reference to knowledge or other language of mens rea is not itself dispositive." (*In re Jorge M.* (2000) 23 Cal.4th 866, 872 (*Jorge M.*).) The logic flowing from the nature of general intent crimes, as illustrated in a series of California Supreme Court cases, establishes that knowledge of the facts that bring a defendant's conduct within the prohibition of a criminal statute, or criminal negligence in not knowing those facts, is an element of a such crimes.

For example, in *Simon*, *supra,* 9 Cal.4th 493, the Supreme Court considered whether the Legislature intended sections 25401 and 25540, which criminalize the willful sale or purchase of securities by means of false or misleading statements or omission of material facts, to be a strict liability offense. (*Simon, supra,* at p. 507.) In determining that a violation of section 25401 was not a strict liability offense, our high court held that "knowledge of the falsity or misleading nature of a statement or of the materiality of an omission, or criminal negligence in failing to investigate and discover them, are elements of the criminal offense described in section 25401" (*Simon, supra,* at p. 522), and the trial court consequently erred in failing to so instruct the jury.[18]

Similarly, in *Coria, supra,* 21 Cal.4th 868, the Supreme Court considered whether Health and Safety Code section 11379.6, subdivision (c), manufacturing methamphetamine, required the defendant to know that the substance the defendant was

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18 Although the Supreme Court in *Simon* did not frame the issue as whether section 25110 constitutes a strict liability or general intent offense, by concluding that it did not create a strict liability offense, the court implicitly concluded that it is a general intent offense.

manufacturing was methamphetamine. The Supreme Court interpreted the statute to require that the accused know the facts bringing his conduct within the prohibition of the statute, that is, the character of the substance being manufactured. It reasoned that the statute, unlike strict liability public welfare statutes which "'usually involve light penalties and no moral obloquy or damage to reputation'" (*Coria, supra,* at p. 877), was a felony, "which is '"'as bad a word as you can give to man or thing.'"'" (*Ibid*.) "'[W]here . . . dispensing with mens rea would require the defendant to have knowledge only of traditionally lawful conduct, a severe penalty is a further factor tending to suggest that [the Legislature] did not intend to eliminate a mens rea requirement.'" (*Id.* at p. 880, italics omitted.)

Likewise, in *Rubalcava, supra,* 23 Cal.4th 322, the defendant was convicted of carrying a concealed dirk or dagger in violation of Penal Code section 12020, subdivision (c)(24). A dirk or dagger was defined by statute as "a knife or other instrument . . . that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death." At the time of the defendant's arrest, the penalty for violating Penal Code section 12020, like section 25540, subdivision (a) here, was imprisonment in county jail for one year or state prison. The defendant contended on appeal that Penal Code section 12020, subdivision (a) was a specific intent offense, requiring as an element of the offense an intent to use the concealed instrument as a stabbing weapon. The Supreme Court rejected this contention, stating: "'When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent.'" (*Rubalcava,* at p. 328.) The court continued that even though the offense before it was a general intent crime, because it "criminalizes '"traditionally lawful conduct,"' we construe the statute to contain a 'knowledge' element." (*Id*. at pp. 331-332.) Thus, to commit the crime, a defendant "must still have the requisite *guilty mind*: that is, the defendant must knowingly and intentionally carry concealed upon his or her person an instrument 'that is capable of ready use as a stabbing weapon.' [Citation.] A defendant who does not know that he is

carrying the weapon or that the concealed instrument may be used as a stabbing weapon is therefore not guilty of violating section 12020." (*Id.* at p. 332.)

A month after *Rubalcava*, in *Jorge M., supra,* 23 Cal.4th 866, the Supreme Court considered whether a violation of Penal Code section 12280, subdivision (b), which punished the possession of an unregistered assault weapon, required knowledge of the weapon's characteristics which brought it within the Assault Weapons Control Act requiring registration. The Supreme Court held that the offense was not a strict liability offense, and that the People were required to prove that the defendant knew or reasonably should have known the characteristics of the weapon which brought it within the registration requirements. (*Jorge M.*, *supra*, at p. 887.)

Each of these California Supreme Court decisions involves general intent offenses, requiring the defendant to perform intentionally the act that brought the defendant's conduct within the prohibition of the criminal statute. In other words, a defendant cannot *intentionally* engage in proscribed conduct if he or she does not know that he or she is doing it in the first place. In *Simon, supra,* 9 Cal.4th 493, the defendant could not intend to make a material misrepresentation or omission if he did not know that his or her statement was erroneous or omitted a material fact. In *Coria, supra,* 21 Cal.4th 868, the defendant could not intend to manufacture methamphetamine if the defendant did not know that was the substance being manufactured. In *Rubalcava, supra,* 23 Cal.4th 322, the defendant could not intend to carry a concealed dirk or dagger capable of ready use as a stabbing weapon if the defendant did not know he possessed a concealed dirk or dagger or that the object the defendant possessed was capable of the prohibited use. Finally, in *Jorge M.*, *supra*, 23 Cal.4th 866, the defendant could not intend to possess a prohibited firearm if he did not know that the firearm he or she possessed had the characteristics that brought it within the category proscribed by the statute.

In light of these legal principles, we hold that appellants could not have intentionally sold unregistered and nonexempt securities unless they sold such securities *knowing the facts* (or lacking that knowledge as a result of criminal negligence) that

removed the securities from the section 25102, subdivision (f)[19] exemption.[20] We thus review the challenged jury instructions to determine whether they comply with our

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[19] The record is unclear as to the precise year in which appellants first began offering interests in 201 Boylston Street Associates, and hence it is uncertain as to which version of section 25102, subdivision (f) is applicable to that offering. That section, however, has not significantly changed with regard to the issues pertinent here. The version in effect in 1991, when the first interest in 201 Boylston Street Associates was offered to the victims involved in this case, provided: "The following transactions are exempted from the provisions of Section 25110: [¶] . . . [¶] (f) Any offer or sale of any security in a transaction (other than an offer or sale to a pension or profit-sharing trust of the issuer) which meets each of the following criteria: [¶] (1) Sales of the security are not made to more than 35 persons, including persons not in this state. [¶] (2) All purchasers either have a preexisting personal or business relationship with the offeror or any of its partners, officers, directors or controlling persons, or by reason of their business or financial experience or the business or financial experience of their professional advisors who are unaffiliated with and who are not compensated by the issuer or any affiliate or selling agent of the issuer, directly or indirectly, could be reasonably assumed to have the capacity to protect their own interests in connection with the transaction. [¶] (3) Each purchaser represents that the purchaser is purchasing for the purchaser's own account (or a trust account if the purchaser is a trustee) and not with a view to or for sale in connection with any distribution of the security. [¶] (4) The offer and sale of the security is not accomplished by the publication of any advertisement. The number of purchasers referred to above is exclusive of any described in subdivision (i), any officer, director, or affiliate of the issuer and any other purchaser who the commissioner designates by rule. For purposes of this section, a husband and wife (together with any custodian or trustee acting for the account of their minor children) are counted as one person and a partnership, corporation or other organization which was not specifically formed for the purpose of purchasing the security offered in reliance upon this exemption, is counted as one person. The commissioner may by rule require the issuer to file a notice of transactions under this subdivision; provided, however, that the failure to file the notice or the failure to file the notice within the time specified by the rule of the commissioner shall not affect the availability of this exemption. An issuer who fails to file the notice as provided by rule of the commissioner shall, within 15 business days after demand by the commissioner, file the notice and pay to the commissioner a fee equal to the fee payable had the transaction been qualified under Section 25110."

[20] Of course, mistake of law is no defense to the general intent offense appellants were accused of committing. (*People v. Ramsey* (2000) 79 Cal.App.4th 621, 632; *People v. Vineberg* (1981) 125 Cal.App.3d 127, 137.)

holding herein, namely whether the trial court gave a general intent instruction coupled with an instruction on the appropriate knowledge requirement.

C. The Jury Instructions

The trial court instructed the jury on the elements of the offense of violating section 25110 as follows: "Defendant Javier Salas is charged in counts 1, 3, 22, 24 and 27. Defendant Rick Berry is charged in count 9 and defendant Steve Patrick is charged in count 27 with violating California Corporations Code Section 25540[, subdivision (a)] in that they violated California Code Section 25110. [¶] It is unlawful for any person to willfully offer to 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 such crime, each of the following elements must be proved: [¶] 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 trial court also instructed the jury regarding the intent required to violate section 25110 as follows: "In the crime of offering or selling a security that has not been qualified or exempted (Corporations Code Section 25110), a general criminal intent need only be shown. [¶] When a person intentionally does that which the law declares to be a crime, he is acting with general criminal intent -- even though he may not know that is [*sic*] act or conduct is unlawful. [¶] Proof that the defendant had an evil motive or an intent to violate the law is not required. Moreover, evidence that a defendant relied on the advice of counsel or that he acted in good faith is not a defense."

In addition to the foregoing special instructions, the trial court gave a number of pertinent CALJIC instructions including: (1) CALJIC No. 1.20 ("The 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 'willfully' does not require any intent to violate the law, or to injure another, or to acquire any advantage"); (2) CALJIC No. 3.30 ("In the crime of selling or offering to sell unqualified

securities, in violation of [C]orporations [C]ode section 25110/25540[, subdivision (a)], and offering to sell or selling a security by misrepresentation or omission of a material fact in violation of Corporations Code section 25401/25540[, subdivision (b)] there must exist a union or joint operation of act or conduct and general criminal intent. General intent does not require an intent to violate the law. When a person intentionally does that which the law declares to be a crime, he is acting with general criminal intent, even though he may not know that his act or conduct is unlawful"); and (3) CALJIC No. 4.36 ("This instruction applies only to Counts 1, 2, 3, 4, 9, 10, 22, 23, 24, 25, 27 and 28. [¶] When the evidence shows that a person voluntarily did that which the law declares to be a crime, it is no defense that he or she did not know that the act was unlawful or that he or she believed it to be lawful"). The trial court did not instruct in accordance with CALJIC No. 3.33, the strict liability instruction.

Regarding appellants' defense that the securities were exempt, the trial court instructed the jury: "An offer or sale of a security is exempted from the qualification requirements of Corporations Code Section 25110 when it meets each of the following requirements: [¶] 1. The security is not sold to more than 35 persons (not counting any officer, director or affiliate of the issuer). For purposes of this criteria, a husband and wife are counted as one person; and [¶] 2. All purchasers either: [¶] a. Have a pre-existing personal or business relationship with the offeror, or [¶] b. Are sophisticated investors by virtue of their business and financial experience or the business and financial experience of their financial advisors. (For this criteria to be met, the offeror must have made available sufficient accurate information to enable the purchaser or his financial advisor to make an informed and intelligent investment decision); and [¶] 3. Each purchaser represents that they are purchasing for their own account and not for resale of the security; and [¶] 4. The offer and sale of the security is not accomplished by any publication of any advertisement. [¶] If any of the above criteria is not present then the security is not exempted. [¶] As used in this instruction, 'preexisting personal or business relationship included any relationship consisting of personal or business contacts of a nature and duration such as would enable a reasonably prudent purchaser to be aware

of the character, business acumen and general business and financial circumstances of the person with whom such relationship exists.'"

The trial court's instructions to the jury were defective. They did not advise the jury that appellants' knowledge of the facts bringing their conduct within the prohibition of section 25110, or their criminal negligence in not knowing those facts, was an element of the People's case. (*Simon, supra*, 9 Cal.4th at p. 522.) This error was exacerbated by the instruction that it was no defense to the charge of selling unregistered, unexempt securities that appellants acted in good faith. The jury might have concluded that appellants were acting in good faith if they were unaware of the facts that made their conduct criminal (i.e., that there were more than 35 investors), but in light of that instruction, it was required to find appellants guilty. Therefore, on remand, the trial court must correct its instruction on the elements of the offense of selling unregistered, unexempt securities in violation of section 25110 in accordance with this opinion.

D. <u>Although the Trial Court Erred in Instructing the Jury on the Elements of Section 25110, the Error Was Harmless as to Salas, But Not as to Patrick</u>

Having concluded that the jury instructions were erroneous, we must still determine whether the error was prejudicial or harmless. "An instruction that omits or misdescribes an element of a charged criminal offense violates the right to a jury trial guaranteed by our federal [C]onstitution, and the effect of this violation is measured against the harmless error test of *Chapman v. California* (1967) 386 U.S. 18." (*People v. Williams* (2001) 26 Cal.4th 779, 797 (dis. opn. of Kennard, J.); see also *People v. Hughes* (2002) 27 Cal.4th 287, 353.) Pursuant to *Chapman v. California*, the error is harmless only if it can be said beyond a reasonable doubt that had the jury been properly instructed its verdict would have been the same. (*Chapman v. California*, *supra*, at pp. 23-24.) While this can be said as to Salas, it cannot be said as to Patrick.

1. *Salas*

The parties stipulated that the investments in 201 Boylston Street Associates were securities and that no application to register them had been filed. In light of the stipulations, by finding appellants guilty of selling unregistered, nonexempt securities

within the meaning of section 25102, subdivision (f), the jury necessarily found that the securities were not exempt. In order to make that finding, it had to have concluded that one or more of the requirements for exemption was unsatisfied.

The two elements of the exemption seriously contended by the People to have been lacking were the requirements that (1) there be no more than 35 investors in 201 Boylston Street Associates (§ 25102, subd. (f)(1)), and (2) either the investors had a preexisting relationship with AJOI or they were sufficiently experienced to allow them to protect their own interests (§ 25102, subd. (f)(2)). The verdict does not reveal which of the two issues the jury found against appellants, or if they found against them on both. Regardless, the instructional error against Salas was harmless.

a. Thirty-Five Investors

On the first issue, Tse, the examiner from the Department of Corporations, testified that there were 48 investors in 201 Boylston Street Associates. She reached that conclusion by counting the number of checks that were in round number amounts, written to that entity. Kalaydjian, the receivership administrator for AJOI, testified that there were 72 people reflected on the records of 201 Boylston Street Associates, with various monetary amounts written next to their names. She was unable to say whether any of those investments might have been transferred to a different AJOI entity.

Salas testified that he knew that the exemption required that there be no more than 35 investors. He boldly asserted that he oversaw the investor records that he accurately maintained, and they reflected that there were no more than 35 investors.[21] Kalaydjian confiscated those records and presumably opined as to the number of investors based upon them. Salas refuted the testimony of Tse, claiming that her calculations did not take

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21 Salas testified that the subscription agreement with investors allowed him to move investments from one of the projects to another, although the subscription agreements did not so indicate but only referred to 201 Boylston Street Associates. It appears that his asserted right to move investments may have been the basis for his testimony that there were not more than 35 investors in 201 Boylston Street Associates. We do not decide the propriety of this claim.

into account refunded investments and people who were not investors in that entity. If the jury found that the number of investors exceeded 35, they were not instructed to determine whether Salas was aware of this fact, an element of the charges against him.

That being said, the error nevertheless is harmless. Salas testified that he knew the requirements to be exempt from having to register his securities because he had been a registered representative of several broker-dealers. As previously discussed, he controlled every aspect of AJOI, essentially a one-man operation, with Patrick and the other employees being nothing more than salesmen. Given his self-proclaimed awareness of the exemption requirements, his total control over AJOI, his admitted personal supervision of records related to investors, and his involvement in conversations with investors, the evidence that Salas was criminally negligent in not knowing that there were more than 35 investors was overwhelming. Had the jury been properly instructed on the requirement that Salas know the facts bringing his conduct within the prohibition of section 25110 (i.e., that the exemption was inapplicable), or be criminally negligent in not knowing those facts, it is beyond a reasonable doubt that the same verdict would have been reached.

b. Preexisting Relationship or Sufficient Experience to Protect Own Interests

Having concluded that even if properly instructed the jury would have found Salas criminally negligent in not knowing that the number of investors in 201 Boylston Street Associates exceeded 35, our analysis could stop here, as his conviction would have to be affirmed. But for the sake of completeness and because another defendant differently situated is involved, we continue our discussion of whether the failure to instruct on knowledge was harmless error to Salas with respect to the exemption requirement of section 25102, subdivision (f)(2): that there be a preexisting relationship with investors or investors have the requisite experience to protect their interests.

The Mellands, Donovan and Burke all testified that they were solicited by means of "cold calls." Salas testified that he knew that section 25102, subdivision (f) required a preexisting relationship with investors that precluded "cold calls," and claimed that all of

the investors in 201 Boylston Street Associates had prior relationships with AJOI employees. But the preexisting relationship was required to be with "partners, officers, directors or controlling persons" of AJOI. Salas testified that only he controlled AJOI and that he made all of the decisions and controlled the finances. He was the president, secretary and treasurer. The title of vice-president, held by Patrick for a short time, was apparently a meaningless title, as Salas described it as a "throwaway title" given in lieu of salary increases, not a corporate title. Hence, there was undisputed evidence that Salas knew that not all of the preexisting relationships were with the statutorily mandated individuals. With regard to the preexisting relationship prong of section 25102, subdivision (f)(2), Salas was aware of facts that prevented the investments from being exempt.

With respect to the alternative element of section 25102, subdivision (f)(2) (that the investors could protect their own interests), our analysis is more complex. As set forth above, the trial court instructed the jury that in order for the exemption to apply, the investor had to be "sophisticated." Appellants contend that this instruction misstates the law. They argue that substituting the term "sophisticated investor," which does not appear in section 25102, subdivision (f), for an investor who could "protect [his or her] own interests in connection with the transaction" imposed a higher standard than required by the statute. (§ 25102, subd. (f)(2).) This contention has merit.

Section 25102, subdivision (f) requires that if investors do not have a preexisting relationship with the issuer of the security they, or their advisors, must have "the business or financial experience . . . to have the capacity to protect their own interests in connection with the transaction." But the jury instruction here required more, namely that they have the "business or financial experience" to make them "sophisticated investors." The term "sophisticated" connotes a higher level of experience than that necessary for investors to protect their interests. Webster's Third New International Dictionary, among other definitions of "sophisticated," defines it as "worldly wise, knowing . . . supremely cultured, finely experienced and aware." (Webster's 3d New Internat. Dict. (1961) p. 2174.) Requiring a higher level of experience, the term

"sophisticated" elevated appellants' burden of showing the requisite experience of investors to qualify for the exemption.

We conclude that this error was harmless. As set forth above, substantial evidence supports the jury's finding that Salas knew or should have known that more than 35 investors had invested money in 201 Boylston Street Associates. Because Salas cannot satisfy this prerequisite to the exemption, it is irrelevant whether the trial court wrongly instructed the jury regarding "sophisticated" investors.[22]

c. The Trial Court Did Not Otherwise Err in Giving This Instruction

Appellants also argue that part (2)(b) of the jury instruction added the requirement that in order to be a sophisticated investor, "the offeror must have made available sufficient accurate information to enable the purchaser or his financial advisor to make an informed and intelligent investment decision." They assert that this addition imposed a greater burden on them to prove this defense than imposed by the statute which contains no such language. This contention lacks merit.

Although the challenged language added in part (2)(b) of the jury instruction is not explicitly contained in the statute, we are not apprised of any requirement that a jury instruction based on a statute must blindly adhere to its every word. An instruction must only contain a clear, "correct and pertinent" statement of the law. (Pen. Code, § 1127;

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[22] Regardless, it is beyond a reasonable doubt that both Patrick and Salas failed to meet their burden. (*People v. Figueroa* (1986) 41 Cal.3d 714, 722.) Each of the victims testified that they were not only unsophisticated investors but inexperienced in investments such as that involved here. Appellants adduced no evidence that they were. The fact that the Mellands had been investing in limited partnerships for five years is not by itself evidence of an ability to protect their interests. There was no evidence they received relevant, independent investment advice from Schweder. The only evidence was that he was the first person to tell them that AJOI did not own 201 Boylston Street *after they had already invested in it believing that AJOI owned it.* At the critical time, when the Mellands were deciding whether to invest in that entity, there was no evidence they received assistance. Similarly, Burke's degree in business administration is not evidence he was able to protect his interests in the complex real estate investment offered by AJOI, and there was no evidence that he was. There was no evidence of any sort that Donovan had any business or financial acumen.

see also *People v. Hernandez* (2003) 111 Cal.App.4th 582, 589.) The challenged addition to this portion of the instruction here comports with case law interpreting the statute. (See *People v. Park* (1978) 87 Cal.App.3d 550, 565 ["'[T]here must be sufficient basis of accurate information upon which the sophisticated investor may exercise his skills. . . . [T]he shrewdest investor's acuity will be blunted without specifications about the issuer. For an investor to be invested with exemptive status he must have the required data for judgment.'"].)

Appellants also challenge this instruction, contending that it erroneously omitted the language in section 25102, subdivision (f)(4) that, "[t]he commissioner may by rule require the issuer to file a notice of transactions under this subdivision; provided, however, that the failure to file the notice or the failure to file the notice within the time specified by the rule of the commissioner shall not affect the availability of this exemption. An issuer who fails to file the notice as provided by rule of the commissioner shall, within 15 business days after demand by the commissioner, file the notice and pay to the commissioner a fee equal to the fee payable had the transaction been qualified under Section 25110." Appellants make the somewhat baffling argument that the omitted language was necessary so that the jury would know that appellants had no obligation to file a notice of intent to rely upon an exemption.

But there was no contention made by the prosecutor, nor evidence introduced to which we have been directed, suggesting that appellants had any such obligation. Thus, it was unnecessary to instruct on a matter that was not an issue in the case. (*People v. Armstead* (2002) 102 Cal.App.4th 784, 792 [a trial court must refrain from instructing on principles of law which are not only irrelevant to issues raised by the evidence but have the effect of confusing the jury].)

2. *Patrick*

The verdict against Patrick stands on a different footing. He testified that he believed the investments he was soliciting were exempt from registration. He was merely a salesman for whom there was no evidence that he knew facts making the investments nonexempt. He had no control or management authority for AJOI which might impose

upon him the duty to make certain that the exemption requirements were met or render him criminally negligent for not knowing those facts. We therefore cannot say beyond a reasonable doubt that had the jury been properly instructed regarding the knowledge requirement, the verdict would not have been different. As to him, the judgment must be reversed and the matter remanded for retrial. On remand, the trial court must correct the error in instructing on the exemption requirement contained in section 25102, subdivision (f)(2) and instruct the jury as follows: "All purchasers either: a. Have a preexisting personal or business relationship with the offeror, or b. By virtue of their business or financial experience or the business or financial experience of their professional advisors who are unaffiliated with the offeror, the purchasers can be reasonably assumed to have the capacity to protect their own interests in connection with the transaction."[23]

DISPOSITION

The judgment against Salas is affirmed. The judgment against Patrick is reversed and the matter remanded for his retrial.

CERTIFIED FOR PUBLICATION.

_________________________, J.
ASHMANN-GERST

We concur:

_________________________, Acting P.J.
NOTT

_________________________, J.
DOI TODD

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[23] To properly guide the trial court on remand, we not only correct the error in the jury instruction in the manner challenged by appellants here, but also in other respects not raised on this appeal. The instruction given, contrary to the requirements of section 25102, subdivision (f)(2), improperly utilized the conjunctive, rather than the disjunctive, between "business" and "financial experience" and referred to "financial advisors," a category narrower than that permitted by the statute which referred to "professional advisors who are unaffiliated with . . . the issuer."