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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM ROBERT STANKEWITZ, Defendant and Appellant.	F044592 (Super. Ct. No. MCR02356) **OPINION**

APPEAL from a judgment of the Superior Court of Madera County. Thomas L. Bender, Judge.

A. M. Weisman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Lloyd G. Carter and Michelle L. West, Deputy Attorneys General, for Plaintiff and Respondent.

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In this case of gross vehicular manslaughter while intoxicated and related charges, defendant contends that his constitutional right to due process of law was violated when

*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I, II, III, IV, VI, and VII.

police allowed the car he allegedly drove to be moved to commercial towing and salvage yards, and significantly altered, before he inspected it. While the failure to maintain the car in its immediate post-accident condition might have been shoddy investigatory procedure, we conclude that it did not rise to the level of a constitutional violation.

We also reject defendant's arguments that (a) the trial court erred in excluding certain evidence he offered to impeach a prosecution witness; (b) the evidence of his gross negligence was insufficient to support the charge of gross vehicular manslaughter while intoxicated; (c) the court abused its discretion in sentencing him under the three strikes law and imposing consecutive sentences; (d) the court committed error under *Blakely v. Washington* (2004) 124 S.Ct. 2531 (*Blakely*) in imposing an upper term sentence and consecutive sentences; and (e) his aggregate sentence was cruel or unusual. We publish our discussion of the *Blakely* issues.

The People concede that the court miscalculated fees and penalties it imposed on defendant. We order these corrected and affirm the judgment in all other respects.

FACTUAL AND PROCEDURAL HISTORIES

William Stankewitz (defendant) and his aunt, Wilma Lewis, spent from the morning of June 21, 1999 to the morning of June 22, 1999, driving Lewis's Mercury Cougar in and around the Big Sandy Rancheria, where defendant and Lewis both lived, and in a larger area in Madera and Fresno counties. At around 9:00 or 10:00 o'clock on the morning of June 21, defendant and Lewis began drinking beer as they drove. Defendant's girlfriend and an elderly neighbor rode with them part of the day and also drank beer. The four of them purchased and consumed at least 38 cans of beer. Late that night, defendant and Lewis arrived, both intoxicated, at a relative's house in Fresno. They continued drinking there, and headed back toward the Rancheria in Auberry in the early morning.

On the way, at about 7:00 o'clock in the morning, they were involved in a fatal accident. In a rural area, at an intersection controlled by a stop sign, the Cougar hit

another car broadside, killing the driver. Lewis was thrown from the car. As she lay unconscious on the ground, defendant knocked on the door of a nearby house and asked to use the phone. The resident called 911 and spoke to the operator and then handed the phone to defendant, who used it to call a friend. Defendant tried to hide in the yard of the house, and held his finger to his lips to warn the resident not to tell the police of his location. When officers found him, he told them he knew nothing about the accident and did not know the injured woman. He said he was in the area looking for farm work and had spent the night at the intersection sleeping in a van, which had since left. The police arrested him after finding documents bearing his name in the car. His blood alcohol level was .16 percent, double the threshold amount for driving under the influence. (Veh. Code, § 23152.)

Lewis was injured seriously in the accident. She suffered fractures of her left arm, left ankle, and eighth right rib, a dislocated left knee, and other wounds, including lacerations of her scalp and left leg. At the hospital, Lewis told officers that defendant was the driver.

Defendant appeared uninjured at the scene of the accident. Several days later, while in jail, he reported pain extending from the middle of his lower back to his right ankle and in one shoulder, which he attributed to the accident. He was treated with Motrin.

After the accident, the Cougar was moved to Ron's Towing, a commercial towing yard in Madera. There, it was kept inside a building until July 2, 1999, 10 days after the accident. On July 2, the police informed Ron's Towing that the evidence hold was released, and the car was moved outdoors. Ron's Towing covered the car's open windows with plywood to keep its guard dogs from entering, but otherwise the car was exposed to the elements. An employee of Ron's Towing testified at the first trial that the front bumper, which had come off in the accident, was placed inside the car.

As far as the record discloses, the car was not examined by anyone after the day of the accident until early August 1999, when an investigator from the District Attorney's office and two members of the California Highway Patrol's Multi-disciplinary Accident Investigation Team (MAIT) examined and photographed it. The goal of the MAIT investigation was to determine, based on the damage to the car and the injuries to defendant and Lewis, which of them was the driver.

At about the same time, an investigator with the Public Defender's office also viewed the car. He saw debris inside.

After the MAIT officers' inspection, CHP informed Ron's Towing that it no longer needed the car and it was "released from evidence." Ron's Towing sold the car to Romero's Towing, a dismantler in Los Banos, where it was moved on August 6 or August 7, 1999.

Defendant retained counsel to replace the Public Defender on August 26, 1999. The Public Defender's office incorrectly told defendant's new counsel that the car had been destroyed and was not available for inspection. Nevertheless, defendant's new investigator found the car at Romero's Towing in September 1999. It was outdoors, stacked atop another wrecked car.

Defendant's counsel arranged with the District Attorney's office to return with his investigator to Romero's Towing for an inspection. The inspection did not take place until January 4, 2000. By that time, the car had been moved to another place on the lot and altered in several ways since defendant's investigator first saw it in September: The entire front end had been cut off with a welding torch; the wheels were removed; the seat belts had been cut off; and the seat backs were damaged and in different positions than before.

Defendant was tried three times for his role in the accident. In the first trial, a mistrial was declared when the jury was unable to reach a verdict. After defendant was

convicted in the second trial, the court granted his motion for a new trial based on ineffective assistance of counsel.

In the third prosecution, defendant was charged with the following offenses: (1) gross vehicular manslaughter (of the other car's driver) while intoxicated (Pen. Code, § 191.5, subd. (a)[1]); (2) vehicular manslaughter (of the other car's driver) while intoxicated (§ 192, subd. (c)(3)); (3) driving under the influence of alcohol while concurrently committing another offense (i.e., running a stop sign) and causing bodily injury (to Lewis) (Veh. Code, § 23153, subd. (a)); (4) driving with a blood alcohol level of .08 percent or more while concurrently committing another offense and causing bodily injury (to Lewis) (Veh. Code, § 23153, subd. (b)); and (5) running a stop sign (Veh. Code, § 22450). The information also alleged three prior serious or violent felonies (all robberies) pursuant to the three strikes law.

At trial, defendant's defense was that Lewis was the driver and he was not. Both sides presented expert testimony on this issue. The two MAIT officers who examined the car testified that, based on the exterior damage to the car, they determined the direction in which the occupants moved inside the car during the crash. From that information, plus the damage to the interior of the car, the nature of the injuries to defendant and Lewis, and the fact that Lewis was ejected through the passenger window, they determined that defendant was sitting in the driver's seat and Lewis in the passenger seat at the time of the crash. Defendant's expert, Garrith Perrine, testified that he evaluated essentially the same information and reached the opposite conclusion. A third MAIT officer gave testimony to rebut Perrine's.

The jury found defendant guilty of gross vehicular manslaughter of the other driver while intoxicated (count 1); driving while under the influence and injuring Lewis

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[1]Subsequent statutory references are to the Penal Code unless indicated otherwise.

(count 3); and driving with a blood alcohol level of .08 or more and injuring Lewis (count 4).

The court found the prior conviction allegations true and denied defendant's request to dismiss prior strike convictions. On count 1, it selected the upper term of 10 years as set forth in section 191.5, subd. (c), and increased it to 30 years to life pursuant to the three strikes law. (§ 667, subd. (e)(2)(A)(i).) On count four, the court imposed a consecutive three-strikes term of 25 years to life. (§ 667, subd. (e)(2)(A)(ii).) It stayed the sentence on count 3 pursuant to section 654.

DISCUSSION

I. Preservation of evidence

Defendant contends that the post-accident management of the car by the police constituted loss or destruction of exculpatory evidence in violation of his right to due process of law. This issue was raised in a motion to dismiss that was filed and denied before the first trial.

Two cases, *California v. Trombetta* (1984) 467 U.S. 479 (*Trombetta*) and *Arizona v. Youngblood* (1988) 488 U.S. 51 (*Youngblood*), set forth the standards for a federal due process violation caused by the prosecution's failure to preserve evidence. In *Trombetta*, the court held:

> "Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, [citation], evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*Trombetta, supra*, 467 U.S. at pp. 488-489, fn. omitted.)

In *Youngblood*, the court stated that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process …." (*Youngblood, supra*, 488 U.S. at p. 58.)

It is not obvious how *Trombetta* and *Youngblood* relate to each other. Does *Youngblood* add a bad-faith test for all constitutional destruction-of-evidence challenges? Or must the defendant show bad faith when the evidence was merely "potentially useful" (*Youngblood, supra,* 488 U.S. at p. 58), but not when it had "exculpatory value" that was "apparent" (*Trombetta, supra*, 467 U.S. at pp. 488-489)? The parties in this case take opposing positions on whether *Trombetta* or *Youngblood* applies and thus on whether defendant must show bad faith to prevail.

In California courts, the *Trombetta* and *Youngblood* standards are applied in tandem. If evidence has an exculpatory value that is apparent before the evidence was destroyed, the *Trombetta* approach applies and the state has a duty to preserve it. But "[t]he state's responsibility is [more] limited when" the evidence was merely potentially useful. In that case, the state breaches its duty only if it acts in bad faith. (*People v. Beeler* (1995) 9 Cal.4th 953, 976.)

Under the approach of *Beeler*, we conclude that the state satisfied its duty under *Trombetta*, so defendant can prevail only by showing bad faith within the meaning of *Youngblood*. Defendant has not shown that, in allowing the car to be altered, the state destroyed anything with apparent exculpatory value. The essence of defendant's defense was an interpretation of the same information that the People's experts, the MAIT officers, relied on. In his appellate briefs, defendant relies on the testimony of his expert, Perrine, about contamination of the car, but that testimony does little to support defendant's claims. Perrine did not identify anything that might have happened to the car after the officers inspected it that would have compromised the defense's ability to independently evaluate the evidence. Nothing in Perrine's testimony supports the contention that alterations to the car after the MAIT inspection—the removal of the front end, wheels and seat belts, the damage to the seat backs, the continued exposure to the elements, or anything else—could have made any difference to his investigation or his conclusions. The removal of the front end might have been relevant to analyzing the

"principal direction of force"—i.e., the line of force that determined which way the occupants moved and which interior parts they would have struck—since most of the collision damage was to the front end. But Perrine agreed with the MAIT report's conclusion regarding the principal direction of force and raised no doubts about what he might have found if he had been able to examine the front end himself.

In fact, Perrine's complaints about the preservation of the car were addressed primarily to the fact that the car was left outside *before* the MAIT officers inspected it. Regarding that period, however, Perrine simply said that he could not tell what evidence might have been contaminated. As for the officers' work after that point, Perrine testified that they "did as much of a detailed workup as probably [they] could have done," and that the measurements and information they obtained were "very helpful in being able to reconstruct the accident …." Ironically, because he became involved in the case too late to inspect the car himself, Perrine relied on the facts in the MAIT report in developing his own contrary conclusions. He believed that in spite of the passage of time between the accident and the MAIT inspection, "[t]here was still physical evidence available that someone could interpret and then place specifics as to [whom] the driver might have been as a result of that physical evidence."

Perrine did call attention to a smudge or abrasion that the officers found on the glove compartment door and correlated with one of Lewis's injuries. He testified that this evidence was unreliable because the smudge could have been caused after the accident. But the smudge is not, of course, an example of evidence that was destroyed, and if its reliability was doubtful, the jury was apprised of that by Perrine's testimony.

Perrine also criticized the officers' failure to remove and closely inspect the brake and accelerator pedals. He asserted that this might have revealed damage consistent with injuries to Lewis's feet and legs, showing that she was driving. But in his appeal, defendant does not claim that the pedals were missing or unavailable for inspection when

his investigator and attorney inspected the car. Nothing in the record supports the contention that this evidence was destroyed or contaminated.

Defendant also contends that his rights were violated when the officers failed to check the steering wheel for fingerprints or perform chemical tests on interior surfaces to discover invisible traces of tissue or blood for DNA testing. Notably, defendant does not claim that when he inspected the car he attempted such testing and found it fruitless because of exposure to the elements or some other cause. Consequently, there is no basis for concluding that this evidence was destroyed even if it existed in the first place. There is no evidence that nontesting by the police constituted destruction of evidence with apparent exculpatory value. The record discloses that there may have been nothing to test and, in any event, defendant was not prevented from having tests performed.

Finally, defendant contends that the police failed to preserve evidence that may have existed on the road or ground near the accident. Perrine testified that the police could have made records of footprints, impressions in the soil, and tire tracks. But defendant offers no explanation of how such evidence might have helped him, assuming it existed.

In sum, defendant has not shown that there was evidence that was lost that might have exculpated him. We therefore cannot say that the state failed to satisfy the *Trombetta* requirement that it preserve evidence with apparent exculpatory value.

The question remains whether, under *Youngblood*, there was bad-faith destruction of evidence that was potentially useful to defendant. The police act in bad faith in destroying evidence if they have actual knowledge of its exculpatory value (even if that exculpatory value is not apparent) before they destroy it. (*Youngblood*, *supra*, 488 U.S. 51, 56, fn *.) Nothing in the record indicates that the police had actual knowledge of the exculpatory value of any evidence that was not preserved.

Defendant argues that bad faith is present because the police knew the car was important evidence to prove who was driving. Even so, the car was released from its

evidence hold only 10 days after the accident, before the defense (or the prosecution) could inspect it sufficiently. This argument represents a misunderstanding of the rule of *Youngblood*. Bad faith is established under *Youngblood* if the police actually know that evidence is exculpatory and destroy it anyway. To say the police knew the evidence was important is not to say they knew it was exculpatory. To say they allowed the car to be stored under unsecured conditions and to be damaged is not to say they allowed it to be destroyed, i.e., altered in ways that were consequential to defendant's defense.

Defendant relies on a number of cases in which courts found due process violations under *Trombetta* and *Youngblood* when police destroyed evidence that was central to the prosecution's case before the defense had access to it. In *U.S. v. Belcher* (W.D.Va. 1991) 762 F.Supp. 666, police disposed of plants before anyone had tested them. The plants formed the basis of a prosecution for marijuana cultivation. (*Id.* at p. 668.) The court granted the defendant's motion to dismiss the indictment on federal due process grounds, among others. (*Id.* at p. 672.) It stated that the plants were "absolutely crucial and determinative to [the] prosecution's outcome," and that it was "a troubling prospect if government officials can routinely destroy drugs, then argue that the drugs had no exculpatory value because the government officials 'knew' that the drugs were indeed drugs." (*Id.* at pp. 672-673.) In *Roberson v. State* (Ind.App. 2002) 766 N.E.2d 1185, the defendant was convicted of possessing a weapon while a prisoner. The alleged weapon consisted of "two halves of a food spreader (similar to a tongue depressor)," which "had been split long-ways and had rough edges." The state discarded this object before the defendant had an opportunity to examine it, and the only other evidence of it was a poor-quality photograph. (*Id.* at p. 1186.) The court reversed the conviction, citing *U.S. v. Belcher, supra,* 762 F.Supp. 666. It stated that without the physical evidence, the defendant was "faced with the monumental task of presenting a defense in which he is obliged to accept the subjective opinions of … government officials" who testified that the sticks were dangerous. (*Roberson v. State, supra,* 766

N.E.2d at pp. 1189-1190.) Finally, in *People v. Walker* (Ill.App. 1993) 628 N.E.2d 971, a robbery case, the police discarded clothing that "played a central role in defendant's defense of misidentification." (*Id.* at pp. 972, 974.) The court affirmed the dismissal of the indictment based on denial of due process. (*Id.* at pp. 973, 974.)

The present case is unlike all of these because here the car was only altered, not destroyed. If the car had been destroyed (and no photographs had been taken of it), defendant would have been deprived of access to crucial evidence. But because it was only altered, it is incumbent upon defendant to show that the alterations caused something consequential for his defense to be lost. He has failed to do so. Defendant's briefs imply that the car was destroyed as completely as the plants, sticks, and clothing at issue in the cases discussed above,[2] but that is simply not the case.

Defendant has failed to show that any exculpatory evidence was destroyed within the meaning of *Trombetta* or that the police acted in bad faith within the meaning of *Youngblood*. Therefore, he has not established a due process violation under the federal Constitution. Defendant's brief asserts that his due process rights under the California Constitution were violated as well, but he does not argue that a different analysis than that under the federal Constitution should be applied.

II. Impeachment evidence

Lewis testified for the prosecution, stating that she stopped driving before the accident and passed out in the passenger seat, while defendant got in the driver's seat. When she woke up, she was in the hospital. To impeach her, defendant proffered

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[2]For instance, defendant states that "[t]he Cougar was junked and cut up before the defense had an opportunity to have its own accident reconstruction expert inspect it. All that remained … were photographs taken by the MAIT investigators, very general descriptions of the scene and vehicle in the accident reports and diagrams, and the MAIT report." But it is undisputed that defendant's investigator and counsel saw the car in September 1999 and January 2000. Although it had undergone various alterations, nothing prevented the defense from having an expert examine it at that time. And as we have said, defendant has not shown that the alterations mattered.

evidence of her 1993 felony conviction for false imprisonment and her 1983 misdemeanor conviction for driving under the influence. The court admitted the former but excluded the latter, stating: "I think it's too remote; it's 20 years old; it's a misdemeanor; it has little probative value in my mind, so it's excluded." Defendant now argues that this ruling was an abuse of discretion under Evidence Code section 352 and violated defendant's constitutional rights. We disagree.

Evidence that a witness has committed a crime of moral turpitude generally is admissible to impeach the witness. The crime need not be one involving dishonesty. (*People v. Castro* (1985) 38 Cal.3d 301, 315.) It also need not be a felony. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-296.) Driving under the influence has been held admissible for impeachment in criminal proceedings where the witness was a recidivist felony drunk driver. (*People v. Forster* (1994) 29 Cal.App.4th 1746, 1757-1758.) We will assume, without deciding, that misdemeanor driving under the influence can constitute a crime of moral turpitude for purposes of impeachment.

Even so, we find no reversible error here. The decision whether to admit or exclude impeachment evidence is within the discretion of the trial court, as is the decision whether to admit or exclude evidence under Evidence Code section 352. (*People v. Clair* (1992) 2 Cal.4th 629, 654-655.) The California Supreme Court has stated that a trial court retains its discretion to exclude evidence under Evidence Code section 352 even if the evidence is relevant for impeachment purposes. (*People v. Clair*, *supra*, at pp. 654-655.) A court abuses its discretion if its decision exceeds the bounds of reason. (*Ibid.*) Otherwise admissible evidence should be excluded under Evidence Code section 352 "if its probative value is substantially outweighed by the probability that its admission will … create substantial danger of undue prejudice …." (Evid. Code, § 352.)

Here, the court found that the DUI conviction was remote in time and had little probative value. The potential for undue prejudice was apparent: The jury might impermissibly have used the evidence to conclude not just that Lewis lacked credibility,

but that she had a propensity for drunk driving. The court's statement implies that it concluded there was a probability of undue prejudice that substantially outweighed the probative value of the past conviction. "Surely," as in *Clair*, "another court might have concluded otherwise." (*People v. Clair*, *supra*, 2 Cal.4th at p. 655.) But that "reveals nothing more than that a reasonable difference of opinion was possible." It does not show an abuse of discretion. (*Ibid.*)

Defendant argues that the exclusion of the evidence also violated his rights to due process, confrontation, and cross-examination under the federal and California Constitutions. This argument is without merit. Defendant has cited no case holding that a trial was fundamentally unfair, or a defendant was unconstitutionally denied his right to confront or cross-examine an adverse witness, by a trial court's reasonable conclusion that impeachment evidence was substantially more prejudicial than probative. As in *People v. Boyette* (2002) 29 Cal.4th 381, 427, defendant's "attempt to inflate garden-variety evidentiary questions into constitutional ones is unpersuasive."

We note that the People's brief cites *People v. Pinkins* (1990) 272 Cal.Rptr. 100, which was issued by this court on July 31, 1990, but depublished by the Supreme Court on November 20, 1990. Without noting the depublication order, the People contend that this case supports its argument that misdemeanor driving under the influence is not a crime of moral turpitude. As defendant points out, the citation obviously violates California Rules of Court, rule 977(a). It appears that the case might even have been cited with knowledge of its depublished status, since the citation given in the brief is "223 Cal.App.3d 69A." This form of citation (with a letter following the page number) refers to orders printed in the advance sheets, and here it would have referred to an order announcing the depublication.

The violation could not have affected the result here because of our conclusion that there was no error even if the crime was one of moral turpitude. Nevertheless, the violation cannot be permitted to pass without comment. Regardless of one's opinion of

the wisdom of California's rules regarding the citation of unpublished and depublished decisions, it is unfair for the People to disregard them while criminal defendants must follow them.

III. Sufficient evidence of gross negligence

Section 191.5, subdivision (a), provides as follows:

> "Gross vehicular manslaughter while intoxicated is the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was in violation of Section 23140, 23152, or 23153 of the Vehicle Code, [these are all offenses involving driving under the influence] and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, and with gross negligence, or the proximate result of the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence."

In this case, the jury was instructed that the prosecution was required to prove the following to establish a violation of section 191.5, subdivision (a):

> "One, the driver of a vehicle violated Vehicle Code Section 23153[.] [¶] And, two, in addition to that violation, the driver of the vehicle committed with gross negligence an unlawful act not amounting to a felony, namely a violation of Section 22450 of the California Vehicle Code, dangerous to human life under the circumstances …."

These instructions conformed to CALJIC No. 8.93. Vehicle Code section 22450 requires drivers to stop at stop signs.

Defendant argues that the record does not contain sufficient evidence that, when he ran the stop sign, he did so with gross negligence or in a way that was dangerous to human life under the circumstances. He contends that "it does not appear that the failure to stop for the stop sign can be deemed to rise to the level of gross negligence" because it "occurred in a sparsely populated, low-traffic, rural area around 7 a.m." Further, no witnesses testified about any specific conditions that would have made the failure to stop a foreseeable threat to human life.

We reject this argument. "When an appellant asserts there is insufficient evidence to support the judgment, our review is circumscribed. [Citation.] We review the whole

record most favorably to the judgment to determine whether there is substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could have made the requisite finding under the governing standard of proof." (*In re Jerry M.* (1997) 59 Cal.App.4th 289, 298.) As we will explain, this standard is satisfied here.

In *People v. Wells* (1996) 12 Cal.4th 979, our Supreme Court interpreted section 192, subdivision (c)(1), which defines the basic (i.e., without intoxication) offense of vehicular manslaughter. That section contains language identical to the language at issue here: It punishes a killing that resulted from driving in the commission of "an unlawful act, not amounting to a felony" or "a lawful act which might produce death, in an unlawful manner, and with gross negligence." The court held that the "unlawful act" language requires proof of an offense that " must be dangerous under the circumstances of its commission." The offense need not be dangerous in the abstract. (*People v. Wells*, *supra*, 12 Cal.4th at p. 988.) In this case, sufficient evidence was presented if it was proved that defendant ran the stop sign in a manner that was grossly negligent under the circumstances in which he did it. Conduct is grossly or criminally negligent if it is ""such a departure from what would be the conduct of an ordinarily prudent or careful [person] under the same circumstances as to be incompatible with a proper regard for human life …."" (*People v. Sargent* (1999) 19 Cal.4th 1206, 1215.)

Here, the People's and defendant's experts agreed that the Cougar traveled through the stop sign going at least 40 miles per hour. The evidence established that defendant had been drinking almost continuously for nearly 24 hours. The parties stipulated that defendant's blood alcohol content was 0.16 percent. Defendant's assertion that it is not grossly negligent to run a stop sign at high speed while very drunk on a country road at 7:00 o'clock in the morning is unsupported by evidence and defies logic. Country roads may have less traffic than city streets, but it is still reasonably foreseeable that they will have traffic on them at any given time. The conclusion that defendant's

conduct was incompatible with a proper regard for human life is amply supported by the evidence in the record.

IV. Court's exercise of discretion in sentencing

Defendant argues that the court abused its discretion when it denied his requests to strike his prior strike convictions pursuant to section 1385 and to impose concurrent sentences on counts one and four. We disagree.

A trial court has discretion to strike prior felonies alleged for sentence enhancement purposes. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530.) In deciding whether to strike a prior felony allegation, the court must "consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [three strikes] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) We review a trial court's decision to deny a motion to strike prior strike allegations for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) The court abuses its discretion if its consideration of the factors set forth in *Williams* "'falls outside the bounds of reason.'" (*People v. Williams, supra,* 17 Cal.4th at p. 162.)

We have no doubt in this case that "in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character and prospects," defendant is within the spirit of the three strikes scheme. (*People v. Williams, supra,* 17 Cal.4th at p. 161.) Two of the three robbery convictions alleged in the information (which occurred in 1980 and 1984) included gun-use enhancements. Defendant's record also includes convictions for grand theft from the victim's person (former § 487.2); false representation of identity to a peace officer (§ 148.9); possession of marijuana (Health & Saf. Code, § 11359) while

incarcerated; and five violations of probation or parole. His juvenile history is not detailed in the record, but defendant told his probation officer that he was committed to the California Youth Authority when he was in the 10th grade. The probation report states that defendant "has not been free from custody for any substantial period of time since his arrest in 1984."

Defendant suggests that despite his criminal background, he is outside the scope of the three strikes scheme because of facts about the family in which he grew up. At the sentencing hearing, defendant's counsel represented that she had become familiar with the Stankewitz family through representation of defendant's brother in another case. She stated that the Stankewitz children "didn't have a chance from the beginning" because defendant's parents were alcoholics and abusive. The father was imprisoned for gang robberies when defendant was six years old, and the mother was imprisoned for a homicide. One of defendant's siblings was on death row, another died of a heroin overdose, a third was stabbed to death, a fourth died in an auto accident, and a fifth had a 20-year-old felony conviction but subsequently lived a law-abiding life.

While counsel's statement at the hearing that it is "not too surprising that [defendant] took to a life of crime" may be correct, we do not think this shows that he is outside the spirit of the three strikes scheme. Defendant's counsel observed that defendant had been "locked up for the last 20 years, for most of the time"; still, he committed the current offense only a few months after his most recent release. He was paroled on January 29, 1999, and discharged on April 10, 1999; the accident took place on June 22, 1999. He violated probation and parole repeatedly and offended even while in prison. The three strikes scheme was designed to control offenders who, like defendant, have repeatedly shown that lesser penal sanctions will not deter them from reoffending. The court did not abuse its discretion in concluding that defendant should receive three strikes sentences in spite of his family background.

The trial court also acted within its discretion in imposing consecutive three strikes sentences. Where a defendant is convicted of two crimes, both of which are eligible for three strikes sentences, and the two crimes were "not committed on the same occasion, and not arising from the same set of operative facts," consecutive sentences are mandatory. (§ 667, subd. (c)(6).) Where, as here, the two crimes were committed on the same occasion or arose from the same set of operative facts, the choice between concurrent and consecutive sentences is within the trial court's discretion. (*People v. Deloza* (1998) 18 Cal.4th 585, 591; *People v. Hendrix* (1997) 16 Cal.4th 508, 514.) It is settled that a sentencing court may properly impose consecutive sentences for two crimes that have two different victims. (See, e.g., *People v. Shaw* (2004) 122 Cal.App.4th 453, 459.) Lewis and the driver of the other car were the victims of defendant's two crimes. We perceive no abuse of discretion.[3]

In a supplemental brief, defendant also argues that the court erred in failing to state reasons on the record for its decision to impose consecutive sentences. Section 1170, subdivision (c), provides that a sentencing court "shall state the reasons for its sentence choice on the record at the time of sentencing." It has been held that the decision to impose consecutive sentences is a sentencing choice within the meaning of this provision. (*People v. Champion* (1995) 9 Cal.4th 879, 934, overruled on other grounds in *People v. Combs* (2004) 34 Cal.4th 821, 860.)

Although the court's practice was not ideal here, we think it made its reason for imposing consecutive sentences sufficiently clear. The court first stated that it believed consecutive sentences were required because there were separate victims. Defense counsel argued that this was incorrect, and the prosecutor conceded that the court had discretion to impose consecutive or concurrent sentences. After hearing further argument

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[3]Defendant also argues that the "court's abuse of sentencing discretion violated the federal constitutional guarantee" of due process. Because we find no abuse of discretion, we will not further address this argument.

and taking testimony from the other driver's family, the court imposed consecutive terms without further comment on the reasons. The only reasonable interpretation of these proceedings is that the court first thought it was required to impose consecutive sentences because there were separate victims, stood corrected by both parties' counsel, and then exercised its discretion to impose consecutive sentences because there were separate victims. The court should have stated this clearly, but there is no reason to remand for resentencing because, as in *People v. Champion, supra*, 9 Cal.4th at p. 934, there is no likelihood that the court would impose a different sentence.

Defendant also argues that he was denied due process of law by the court's failure to state reasons for imposing consecutive sentences because this failure precluded meaningful appellate review of the court's decision. Because we have concluded that the record shows the court's reasons with sufficient clarity to allow us to review them, we reject this argument.

V. Sentencing issues under Blakely v. Washington

On June 24, 2004, after defendant filed his opening brief in this appeal, the United States Supreme Court decided *Blakely, supra*, 124 S.Ct. 2531. Defendant filed a supplemental brief addressing *Blakely* before the People's brief was due. He contends that the court committed error under *Blakely* both by selecting the upper term as the basis for the sentence on count one and by imposing consecutive sentences. The People filed no supplemental brief addressing *Blakely*. In accordance with this Court's Standing Order 04-1, as amended August 11, 2004, we deem defendant's arguments opposed.

In *Blakely*, the Supreme Court held that a sentence for kidnapping imposed under the Washington sentencing scheme violated the defendant's Sixth Amendment right to a jury trial. (*Blakely, supra*, 124 S.Ct. at pp. 2534, 2538.) Under Washington law, the trial court could impose a sentence longer than 53 months only if it found substantial and compelling reasons to do so. (*Id.* at p. 2535.) The judge found that the crime was committed with "'deliberate cruelty'" and imposed a sentence of 90 months. (*Id.* at

p. 2534.) The Supreme Court held that this violated the Sixth Amendment as interpreted in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490. "'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Blakely*, *supra*, 124 S.Ct. at p. 2536.) It did not matter that the offense was a Class B felony and that Class B felonies carried a maximum sentence of 10 years, because the state's sentencing law did not allow the sentence to exceed 53 months without judicial factfinding. "Our precedents make clear … that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" (*Id.* at p. 2537.) The Court continued:

> "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority." (*Blakely*, *supra*, 124 S.Ct. at p. 2537.)

A. Upper term

In the present case, defendant argues that the trial court committed *Blakely* error by imposing a sentence based on the upper term for gross vehicular manslaughter while intoxicated. This argument is based on the rule that under California's determinate sentencing law, the court is required to impose the middle term unless it makes certain findings justifying the upper or lower term. This rule is set forth in a statute, section 1170, subdivision (b), and a Rule of Court, rule 4.420. Section 1170, subdivision (b), provides: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." Rule 4.420 provides:

> "(a) When a sentence of imprisonment is imposed, … the sentencing judge shall select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules. The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.
>
> "(b) Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence. Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation.…"

Defendant argues that by finding aggravating factors pursuant to this scheme, and selecting the upper term based on them, the court imposed a sentence longer than the statutory maximum as defined in *Blakely* and thereby violated his Sixth Amendment rights.

The question of whether *Blakely* applies to the imposition of upper terms is the most significant post-*Blakely* issue that has emerged in California. It is currently pending before the California Supreme Court in *People v. Towne*, review granted July 14, 2004, S125677, and *People v. Black*, review granted July 28, 2004, S126182. We need not decide the issue in this case, however, because imposing the upper term here was consistent with *Blakely* even assuming *Blakely* applies.

Blakely describes three types of facts that a trial judge can properly use to impose an aggravated sentence under a sentencing system in which an aggravated sentence must be supported by facts: (a) "'the fact of a prior conviction'" (*Blakely, supra*, 124 S.Ct. at p. 2536); (b) "facts reflected in the jury verdict" (*id.* at p. 2537, italics omitted); and (c) facts "admitted by the defendant" (*ibid*, italics omitted). The first type is at issue here.

At the sentencing hearing, the court stated the factors it relied on in selecting the upper term as the basis of the tripled three-strikes sentence it imposed for count one:

> "Regarding Count 1, the range there is 12, 18, or 30 years to life. I think the aggravated term of 30 years to life is appropriate here in that you previously engaged in violent conduct, which is evidenced by your prior record. To me, the robberies were violent. [Notwithstanding] the fact no

> one was injured. They were robberies with firearms. Your prior convictions in my mind are numerous; they're very serious. You served prior prison terms. Your prior performance on probation or parole [was] unsatisfactory."

In so stating, the court relied on three of the five aggravating factors listed in California Rules of Court, rule 4.421: "[t]he defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness" (rule 4.421(b)(2)); "[t]he defendant has served a prior prison term" (rule 4.421(b)(3)); and "[t]he defendant's prior performance on probation or parole was unsatisfactory" (rule 4.421(b)(5)).

We acknowledge that none of these is, precisely speaking, "'the fact of a prior conviction ….'" (*Blakely, supra*, 124 S.Ct. at p. 2536.) All of them presuppose one or more prior convictions, however. When the court relied on them, it was necessarily also relying on the fact of defendant's prior convictions. This means that the upper term was supported by a factor that, under *Blakely*, need not be found by a jury beyond a reasonable doubt.

The question that remains is whether it matters that the court also relied on circumstances related to but nevertheless beyond the mere fact of defendant's prior convictions: their numerousness, the prison terms, and so on. Was it improper under *Blakely* to rely on those circumstances without submitting them to a jury even though a proper factor (the priors themselves) was also present?

Several propositions relevant to this question have emerged in the California post-*Blakely* case law. It has been held that if one aggravating factor (such as a prior conviction) was properly relied on, it is irrelevant that others were also relied on, because, under California law, one aggravating factor suffices to authorize the upper term. (*People v. Harless* (2004) 125 Cal.App.4th 70, 99; see also *People v. Earley* (2004) 122 Cal.App.4th 542, 550.) It has also been held that at least some of the so-called recidivist factors are similar enough to the fact of a prior conviction that they need

not be found by a jury. (*People v. Vu* (2004) 124 Cal.App.4th 1060, 1068-1069 [numerousness of prior convictions and being on probation at time of current offense need not be found by jury].) On the other hand, it has been held that some recidivist factors are not similar enough to the fact of a prior conviction and do need to be found by a jury. If they were found by the judge, and the judge's reliance on them was not harmless, the sentence must be vacated and remanded. (*Id.* at pp. 1068-1069, 1070 [poor performance on probation may not be found by judge; judge's reliance on it and other improper factors not found harmless, so sentence vacated and remanded]; *People v. Emerson* (2004) 124 Cal.App.4th 171, 178 [if judge's reliance on prior prison term and poor performance on parole was error, it was harmless in light of defendant's many prior convictions].)

We agree with the view that, where the court imposed the upper term based on a fact properly found under *Blakely*, the sentence is not vitiated by the court's consideration of other facts as well. The heart of the analysis of a sentence under *Blakely* is the determination of the maximum sentence. The maximum sentence within the meaning of *Blakely* is the greatest sentence the judge can impose based on the facts reflected in the jury verdict or admitted by the defendant, plus the fact of the defendant's prior convictions, if any. Here, the greatest sentence the judge could impose for count one was 30 years to life, equal to the 10-year upper term for section 191.5, multiplied by three, to life. The upper term was authorized because defendant had prior convictions. (*People v. Osband* (1996) 13 Cal.4th 622, 728 [a single aggravating factor can justify the upper term]; *People v. Berry* (1981) 117 Cal.App.3d 184, 191 [defendant's two priors were not "numerous" within meaning of rule of court, but rule is nonexclusive, so the court could still view priors themselves as an aggravating factor].) Because the upper-term-based maximum was authorized by the finding of the prior convictions, it was not improper for the trial judge to make and rely on additional findings (numerousness, seriousness, and violence of priors; prison terms; performance on probation and parole)

before actually imposing that maximum. In other words, once the length of the maximum sentence is calculated using facts found properly under *Blakely*, there is no jury requirement for additional findings that the court relies on in deciding whether to impose that sentence or a lesser one.

A hypothetical example given by the Court in *Blakely* supports this conclusion:

> "In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury." (*Blakely, supra*, 124 S.Ct. at p. 2540.)

Assuming *Blakely* applies to the imposition of upper terms, a driver who commits gross vehicular manslaughter while intoxicated is entitled to no more than the middle term if no aggravating circumstances exist. But he is not entitled to the middle term if he commits the same crime while having a record of prior convictions, and as *Blakely* specifies, the Sixth Amendment does not require the existence of the prior convictions to be found by a jury. For these reasons, we conclude that the imposition for count one of a sentence based on the upper term did not constitute error under *Blakely*, assuming *Blakely* applies to upper-term sentences.

Even if we thought the court's reliance on facts other than defendant's prior convictions were erroneous under *Blakely*, in this case we would conclude that the error was harmless. First, we agree that a multiplicity of prior convictions is so closely related to the prior convictions themselves that it is within the exceptions for priors contained within *Blakely* and *Apprendi*. (*People v. Vu, supra,* 124 Cal.App.4th at pp. 1068-1069.) We also conclude that prior prison terms are within that exception. This leaves the court's findings that the prior offenses were violent or serious and that defendant's performance on probation and parole was unsatisfactory. Assuming *Blakely* prohibited the court from considering these, we nevertheless conclude that its consideration of them

was harmless. "When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper." (*People v. Price* (1991) 1 Cal.4th 324, 492.) It is not reasonably probable that the court would have chosen the middle or lower term if it had known it should consider only defendant's prior convictions, their numerousness, and his prior prison terms. It is obvious that the court thought those were important aggravating factors. The mitigating factor proposed by defendant was his personal and family history. The court stated that it considered this, but it is evident that it did not regard this factor as a strong mitigating circumstance. We are therefore confident that the court would have imposed the upper term even if the findings that defendant's prior offenses were violent or serious and that his performance on probation and parole was unsatisfactory had been excluded from consideration.

We note that the reasonably probable standard of harmless-error review set forth above, and not the beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, is the appropriate one here because the question is only whether the trial court would have reached the same result absent the assertedly improper findings. The issue is not whether those findings would still have been made had the Sixth Amendment procedures—i.e., submission to a jury for determination beyond a reasonable doubt—been used. (See *People v. Vu, supra,* 124 Cal.App.4th at pp. 1069-1070.)

B. Consecutive sentences

Defendant argues that the court committed *Blakely* error in imposing consecutive sentences. The application of *Blakely* to consecutive sentencing, another of the most frequently litigated post-*Blakely* issues, is also pending before the California Supreme Court in *People v. Black, supra,* review granted July 28, 2004, S126182. But, again, we need not decide that issue in this case. Here the imposition of consecutive sentences was proper even if *Blakely* applies. As explained above, the consecutive sentences were

supported by the fact that the two crimes had different victims. The two different victims were identified in the information. The fact that each crime had a separate victim was established by the evidence, was undisputed, and was implicit in the verdicts. Because facts reflected in a jury verdict are a proper basis for imposition of an aggravated sentence under *Blakely*, there was no error.

VI. Cruel and unusual punishment

Defendant argues that his aggregate sentence of 55 years to life, which he describes as "a de facto term of life without … parole," constitutes cruel or unusual punishment under the federal and California Constitutions. He contends that his prior strikes "occurred in the distant past, many years before the current offenses," and that he has not been convicted of murder. Therefore, he asserts, "[t]he seriousness of the offenses could be amply punished under the non-Three Strikes determinate sentencing provisions."

Defendant has not shown that his sentence constitutes cruel or unusual punishment. The sentence is within the constitutional parameters established by the case law on the three strikes statutes. (*Ewing v. California* (2003) 538 U.S. 11, 18, 19, 30-31 [three strikes sentence of 25 to life not cruel and unusual punishment under federal Constitution for current offense of shoplifting three golf clubs with three prior burglaries and a prior robbery]; *People v. Romero* (2002) 99 Cal.App.4th 1418, 1424, 1433 [three strikes sentence of 25 to life not cruel or unusual punishment under California Constitution for current offense of shoplifting magazine with a prior burglary and a prior lewd act with a child under age 14].) Defendant's sentence punishes him not "merely on the basis of his current offense but on the basis of his recidivist behavior." (*People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630.) Defendant implies that his three strikes sentences are less likely to be constitutional because they were imposed consecutively rather than concurrently, but cites no authority for this view. For all these reasons, we find defendant's sentence not to be "grossly disproportionate" and therefore not cruel or

unusual. (*Ewing v. California, supra*, 538 U.S. at p. 23; *People v. Romero, supra*, 99 Cal.App.4th at p. 1431.)

VII. Fines and penalties

Based on the recommendation in the probation report, the court imposed a variety of fines and penalties. These included a fine and penalties totaling $1,228.50 "pursuant to [section] 23536 of the Vehicle Code …." Defendant argues that the cited Vehicle Code section is inapplicable and that the probation report relied on certain statutes not in effect at the time of the offenses. He asserts that the correct figure is $1,053, consisting of a $390 fine pursuant to former Vehicle Code section 23180, a $390 penalty pursuant to section 1464, and a $273 penalty pursuant to Government Code section 76000.

The People concede the errors and do not challenge defendant's recalculation. We order the trial court to correct the assessment and the abstract of judgment.

DISPOSITION

The fine-plus-penalties assessment of $1,228.50 is vacated. The court is directed to impose a $1,053 assessment in its place and issue a corrected abstract of judgment reflecting the corrected amount and corrected statutory citations as set forth in the preceding section. The judgment is affirmed in all other respects.

_____
Wiseman, J.

WE CONCUR:

_____
Harris, Acting P.J.

_____
Levy, J.