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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. STEVEN MICHAEL TACKETT, Defendant and Appellant.	C044770 (Super. Ct. No. 01F05126)

APPEAL from a judgment of the Superior Court of Sacramento County, Maryanne G. Gilliard, Judge. Affirmed as modified.

Paul V. Carroll, 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, Senior Assistant Attorney General, John G. McLean, Stephen G. Herndon, Barbara J. Moore and R. Todd Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts III through IX.

In yet another example of the tragic consequences of driving under the influence of alcohol, an innocent husband and wife were killed and their son was greatly injured when their car was struck by a speeding truck operated by an intoxicated driver. The criminal trial that followed centered on whether the truck was being driven by defendant Steven Michael Tackett or his friend, Michael Cotham.

A jury found defendant guilty of felony driving under the influence of alcohol (DUI), felony driving with a blood-alcohol level of .08 percent or higher, and two counts of gross vehicular manslaughter while intoxicated. The jury also found that he drove with a blood-alcohol level of .20 percent or higher, personally inflicted great bodily injury upon one person, and caused death or bodily injury to four persons. He was sentenced to an aggregate unstayed prison term of 16 years and 8 months, which included an upper term, consecutive terms, and enhancements.

On appeal, defendant raises various contentions, including that the trial court erred in excluding evidence of two occasions in which Cotham recklessly drove a car while he was under the influence of alcohol. One incident occurred a year before, and the other took place almost two years after, the fatal crash.

In the published part of our opinion, we reject his claim that because the charging document alleged that Cotham was a victim of the crime of DUI causing bodily injury, evidence of Cotham's conduct on the two other occasions was admissible to show Cotham, not defendant, was the driver of the truck in the fatal collision. The claim is based on Evidence Code section 1103, subdivision (a), which states: "In a criminal action, evidence of the character

or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted" is admissible if the evidence is "[o]ffered by the defendant to prove conduct of the victim in conformity with the character or trait of character."

As we will explain, a "victim of the crime" for purposes of Evidence Code section 1103, subdivision (a) is a person at whom the defendant's conduct was directed and whose own conduct could serve to explain, justify, or excuse the defendant's conduct toward that person. Here, evidence of Cotham's character was not offered to support a claim of consent, self-defense, or any other theory of justification or excuse. Instead, defendant sought to introduce it to support his claim that Cotham, not defendant, committed the crime. However, character evidence is not admissible to support a claim of third party culpability (*People v. Davis* (1995) 10 Cal.4th 463, 501), and it would be an unwarranted expansion of the statute to adopt defendant's interpretation of Evidence Code section 1103, subdivision (a)(1).

We also reject defendant's claim that Cotham's prior conduct was admissible under Evidence Code section 1101, subdivision (b), which says that evidence of a person's conduct is admissible for a purpose other than to prove the person's disposition to commit such an act, i.e., it may be introduced to prove such things as "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not

reasonably and in good faith believe that the victim consented . . . ."

DUI and reckless driving are, unfortunately, common occurrences in California, and contrary to defendant's claim, Cotham's acts of driving were not sufficiently distinctive or unique to be admissible to establish the identity of the person who was driving the truck that caused the fatal collision in this case. Nor did Cotham's acts demonstrate a common plan to drive under the influence of alcohol. Consequently, the acts were not admissible pursuant to Evidence Code section 1101, subdivision (b).

In the unpublished parts of our opinion, we address defendant's other claims of error and conclude the judgment must be modified to correct sentencing error.

FACTS

In the afternoon of June 17, 2001, defendant's pickup truck went through a stop sign and slammed into the victims' car.

Witnesses first saw the pickup truck being driven recklessly on Fair Oaks Boulevard toward California Avenue in Sacramento County. As traffic was waiting at a red light, the truck went at a high speed onto the gravel shoulder of the road, where it passed cars in the right hand lane and spun into the intersection. As the truck was driven away, it proceeded north on California Avenue at excessive speed on the wrong side of the road and through a stop sign, running at least one vehicle off of the road.

The truck was next seen driving south on Marshall Avenue. At the intersection of Fair Oaks Boulevard and Marshall Avenue, the truck went through a stop sign at a speed of over 50 miles per hour

and collided with a car. Stephen Ramos, the driver of the car, and his wife, Melissa Madison, were killed. Their son, Christopher Ramos, suffered great bodily injury. The occupants of the truck, defendant and Michael Cotham, were thrown from the truck. Each suffered bodily injury.

Defendant and Cotham were both intoxicated at the time of the collision. Defendant's blood sample, taken about 90 minutes after the collision, showed a blood-alcohol level of .24 percent. Cotham's blood sample, taken about 40 minutes after the collision, showed a blood-alcohol level of .28 percent.

With one exception, witnesses to the events were unable to identify the driver of the truck that crashed into the Ramoses' car.

The exception was Michael Delgado, who had been defendant's friend since 1994 or 1995, and who had met Cotham once or twice. Delgado testified that on the day of the collision, he was with defendant and Cotham at defendant's home when the trio decided to go to a bar on Fair Oaks Boulevard. Defendant drove to the bar in his truck, with Cotham as his passenger. Delgado drove separately in his own vehicle. After several hours at the bar, they left, planning to return to defendant's house and then go to a restaurant to get something to eat. Defendant got into the driver's seat of his truck, and Cotham sat in the passenger's seat. Defendant and Cotham followed as Delgado drove onto Fair Oaks Boulevard. When Delgado stopped for a red light at California Avenue, defendant drove his truck on the right hand shoulder and spun out into the intersection. Delgado did not witness the fatal collision at

Marshall Avenue because, after observing defendant spin his truck at California Avenue, Delgado drove to defendant's house.[1]

Soon after the collision, Harold Durham and Nicole Major stopped to offer assistance. When they approached defendant, he asked what had happened. When told that there was a bad accident, defendant repeatedly said, "What did I do?" or "I can't believe I did this." He became upset and anxious.[2]

When California Highway Patrol (CHP) Officer Robert DiMiceli arrived at the scene, defendant was on an ambulance gurney. DiMiceli or one of the medical personnel asked defendant if he was the driver.

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[1] Claiming Delgado concocted his testimony, the defense did not present evidence of the usual motivations for witness perjury, such as an attempt to conceal personal involvement in the crime, antagonism between witness and defendant, a desire to protect a third party, or an effort to obtain leniency on potential or pending charges. Instead, it pointed to some inconsistencies in Delgado's various reports of the events and emphasized that (1) Delgado drank excessively and was an admitted drug addict who had used methamphetamine, cocaine, and marijuana, and (2) Delgado was likely intoxicated at the time of the collision because he spent the day drinking with defendant and Cotham. Based on evidence that Delgado's drinking and drug abuse had caused problems with his wife, from whom he was separated at the time of trial, the defense suggested that Delgado had lost everything in life and was alone. According to the defense, Delgado went to a restaurant after leaving the bar, did not witness any of the driving incidents, and made up his "story" after reading newspaper accounts of the incident "because he doesn't have anything in his life where he can feel important and be a hero . . . ."

[2] The defense offered medical testimony that because of defendant's intoxication and the traumatic effect of the collision, including a likely concussion, he would have been confused and his comments would have been "little more than nonsensical statements."

Defendant responded either "yes," "yes, sir," or something to that effect.[3]

The prosecution presented the testimony of CHP experts in accident reconstruction, who explained that the physical evidence and the dynamics of the collision showed defendant was the driver of the truck that smashed into the Ramoses' car. Testifying for the defense, a retired CHP expert in accident reconstruction opined that Cotham was the driver and defendant was the passenger.

Athins Christen and Scott Manning testified for the defense. Upon arriving together at a market on the corner of Fair Oaks Boulevard and Marshall Avenue, they witnessed the collision and its aftermath. Although they could not identify defendant or Cotham from the accident, both believed that the driver of the truck was thrown out against a building and the passenger was thrown out into some rocks. The building corresponded to the location where Cotham was found after the collision, and the rocks were by defendant's location. However, several matters cast doubt on the accuracy of their account of the incident. Christen's testimony regarding the order in which the truck's occupants were ejected was impeached by the inconsistent statement he had made to a defense investigator. When this was pointed out to him, Christen testified both occupants

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[3] The defense pointed out that Officer DiMiceli did not file a report on the incident and that, at the preliminary hearing, he initially said he did not have a conversation with defendant (DiMiceli later clarified that he asked only the one question and did not have what he would consider a conversation with defendant). In argument, the defense suggested that DiMiceli was simply lying about the admission.

"pretty much flew out at the same time" and he "just kinda glanced at where they went at that time." And Christen's testimony was impeached in another respect. He said the truck became airborne when it hit the car, began to flip, and stayed airborne until the truck came down on an embankment. But the experts agreed the physical evidence showed the truck did not become airborne and did not flip. Likewise, Manning's testimony that the truck became airborne and began flipping end to end, doing a somersault, was impeached by expert evidence, as was his testimony that the truck never spun (the experts agreed the truck spun with a significant counterclockwise motion throughout the incident. Both witnesses acknowledged they were shocked by the incident, which happened very quickly. It thus appears that the rapidity of the incident, the shock of the witnesses, their misperception of the motion of the truck, and evidence that defendant was the driver combined to cast doubt on their testimony regarding the relative positions of the driver and passenger after the collision.

DISCUSSION

I

Defendant argues the trial court erred in excluding the following evidence:

About one year before the fatal collision, a witness reported that he and his son were almost struck by a car that had accelerated toward their street, fishtailed as it made the turn, and sped down the street. When the car stopped, the witness confronted the driver, Cotham, who was intoxicated and belligerent. Cotham ultimately was

arrested regarding this incident, but was convicted only of resisting a peace officer.

Almost one year and eight months after the fatal collision, an officer saw Cotham speeding and then spinning the tires of his car after stopping at a red light. Cotham, whose blood-alcohol level at that time was .102 to .121 percent, was arrested and convicted of DUI.

In defendant's view, evidence of those two incidents was admissible under Evidence Code section 1103, subdivision (a)(1). (Further section references are to the Evidence Code unless otherwise specified.) We disagree.

Section 1103, subdivision (a)(1) sets forth an exception to the general rule that evidence of a person's character or trait of character, including specific instances of conduct, is not admissible to prove the person's conduct on a specified occasion. (§ 1101, subd. (a).)

As pertinent to this appeal, the statute states that "[i]n a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence" is "[o]ffered by the defendant to prove conduct of the victim in conformity with the character or trait of character." (§ 1103, subd. (a)(1).)

At common law, the introduction of such character evidence was restricted to a few situations and, when admissible, was limited to evidence of reputation. (See *Michelson v. United States* (1948) 335

U.S. 469, 476-477 [93 L.Ed. 168, 174].) The rule evolved that in defense of a charge, the defendant could present evidence of his or her good character. (See *People v. Jones* (1954) 42 Cal.2d 219, 224; *People v. Chrisman* (1901) 135 Cal. 282, 288.) If the defendant presented evidence of good character, then the prosecution could rebut with evidence of the defendant's bad character. (*People v. Hughes* (1954) 123 Cal.App.2d 767, 769.) With respect to a victim of a crime, the common law established that where self-defense was claimed in a prosecution for a crime involving violence, evidence of the alleged victim's violent and aggressive character could be introduced in support of the claim of self-defense. (See *People v. Lamar* (1906) 148 Cal. 564, 572-573.)[4]

When the Evidence Code was proposed in 1965, sections 1102 and 1103 were included to codify the limited circumstances in which character evidence could be introduced at common law. With respect to section 1103, the Law Revision Commission cited authorities reflecting that evidence of a victim's character for violence could be admitted in a trial for a crime of violence where self-defense is

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[4] The common law also allowed the defendant in a prosecution for rape or other sex crimes to support a claim of consent--or in some jurisdictions a claim that the victim was lying--by introducing evidence of the alleged victim's promiscuity. (*People v. Shea* (1899) 125 Cal. 151, 152-153; see 3 Jones on Evidence (7th ed. 1998) § 16:60, p. 238; 1 McCormick on Evidence (6th ed. 2006) § 193, pp. 775-781.) Now, however, all states prohibit or severely restrict the admissibility of propensity evidence with respect to the alleged victim of a sex crime. (See 3 Jones on Evidence, *supra*, § 16.60, p. 238.) In California, sections 782 and 1103, subdivision (c) restrict the use of such evidence.

claimed. The Commission said that section 1103 was a codification of this existing law. (Cal. Law Revision Com. com., Deering's Ann. Evid. Code (2004 ed.) foll. § 1102, p. 357.)

In this case, defendant did not seek to introduce evidence of an alleged victim's character in order to support a claim of consent, self-defense, or any other theory of justification or excuse. He wanted to use it to show that the alleged victim of a traffic collision caused by an intoxicated driver was in fact the perpetrator of the crime. However, character evidence is not admissible to support such a claim of third party culpability. (*People v. Davis, supra,* 10 Cal.4th at p. 501; *People v. Farmer* (1989) 47 Cal.3d 888, 921, disapproved on another ground in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6; see also Annot., Third-Party Similar Crimes (1994) 22 A.L.R.5th, p. 237, § 61.)

Nevertheless, defendant contends that because he was charged with felony DUI by causing bodily injuries to both Cotham and Christopher Ramos (Veh. Code, § 23153, subds. (a) & (b)), Cotham was a "victim of the crime" and section 1103, subdivision (a)(1) broadly permits the introduction of character evidence whenever it relates to the victim of a charged crime. We are not persuaded.

The word "victim" is not a word of fixed meaning; it may be used in many ways to refer to many different persons or entities. Often, but not invariably, the Legislature has provided a definition of the word when it is used in a statutory scheme. (See, e.g., Pen. Code, §§ 136, subd. (3); 679.01, subd. (b); 1191.10; 11158; Gov. Code, § 13951, subd. (g).) The basic notion of a victim of a crime

is the person who was the object of the crime--the person against whom the crime was committed. (*People v. Birkett* (1999) 21 Cal.4th 226, 232.) However, this meaning can be limited or expansive depending upon the purpose of the statutory scheme in which it is used. (*People v. Crow* (1993) 6 Cal.4th 952, 957-960; *People v. Broussard* (1993) 5 Cal.4th 1067, 1071-1077.)[5]

We conclude that in enacting section 1103, subdivision (a)(1), the Legislature did not employ the word "victim" in the broad sense of anyone who could be said to have been injured by the defendant's conduct; instead, it intended to use the word in the limited sense of a person at whom the defendant's conduct was directed and whose own conduct could serve to explain, justify, or excuse the defendant's conduct toward that person. This was the existing common law when the Evidence Code was adopted and, as explained by the Law Revision Commission, section 1103 was intended to codify the existing law. (See *People v. Martinez* (2000) 22 Cal.4th 106, 129 [when the Legislature enacts a measure as proposed by the Law Revision Commission, the Commission's explanatory comments "are persuasive evidence of the Legislature's intent"]; *Brian W. v. Superior Court* (1978) 20 Cal.3d 618, 623.)

Indeed, a broader interpretation of "victim" for purposes of section 1103, subdivision (a)(1) would lead to anomalous results. For example, character evidence is not admissible to support a claim

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[5] The range of meaning, from extremely narrow to rather broad, that is given to the word "victim" in varying circumstances is amply demonstrated by the authorities collected in 44 Words and Phrases (2006 Cumulative Supp.), Victim, pages 247 to 272.

of third party culpability. (*People v. Davis, supra,* 10 Cal.4th at p. 501.) However, defendant's expansive reading of section 1103, subdivision (a)(1) would permit such character evidence based upon the fortuitous circumstance that the allegedly culpable third party suffered injury. This is a distinction without relevance for the purpose of a third party culpability claim.

Defendant's interpretation of the statute also would lead to absurdity. For example, because Cotham and Christopher Ramos suffered bodily injury as a result of the collision, defendant was charged in counts three and four with felony DUI and felony driving with a blood-alcohol level over .08 percent (Veh. Code, § 23153, subds. (a) & (b)). However, it would have been sufficient to allege only that Christopher Ramos suffered bodily injury. Thus, under defendant's construction of section 1103, subdivision (a)(1), the admissibility of the Cotham character evidence would turn on whether the charging document identified Cotham as having suffered injury. The law cannot be so absurd.

And in a case where evidence of a person's character is not offered to explain, justify, or excuse the defendant's conduct toward that person, it would be absurd to allow the defendant to take the position that the person *was a victim* of the crime so the defendant could introduce evidence of the person's character in order to establish that the person *was not a victim* of the crime, but instead was the perpetrator.

In addition, the definition of "victim" that defendant urges us to adopt would result in an expansive and amorphous concept of admissibility of character evidence. In a crime of violence where

self-defense is claimed, the victim's pertinent character trait is obvious and limited--his or her violent and aggressive behavior. In other instances, the allegedly pertinent character traits would be neither as obvious nor as limited. In this case, for example, the operator of the truck drove while intoxicated, in disregard of the rules of the road, in a careless and reckless manner, and without regard to the rights and safety of other persons and their property. Under defendant's theory of admissibility, any prior or subsequent conduct that reflected on any of those matters would be admissible with respect to anyone identified in the charging document as having been injured in the collision, even if the conduct did not involve driving. Such an interpretation of the statute does not make sense.

We conclude, consistent with comments of the Law Revision Commission, that section 1103, subdivision (a)(1) was a codification, rather than an expansion, of then-existing law. Thus, a victim for purposes of the statute is a person at whom the defendant's conduct was directed and whose own conduct could serve to explain, justify, or excuse the defendant's conduct toward that person.

Accordingly, the trial court wisely rejected what it correctly noted was defendant's "new and novel theory" that evidence of Cotham's character was admissible to show third party culpability.[6]

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[6] In a parting effort to convince us that evidence of Cotham's character was admissible pursuant to section 1103, defendant asserts that he was attempting to offer the evidence to explain his behavior. Not so. The driver's reckless conduct placed Cotham, defendant, the occupants of the other car, and a number of spectators in a zone of danger. However, the conduct was not

II

We also reject defendant's contention that the evidence of Cotham's character was admissible pursuant to section 1101, subdivision (b).

Section 1101, subdivision (b) is another exception to the general rule that evidence of a person's character or trait of character is not admissible to prove the person's conduct on a specified occasion. (§ 1101, subd. (a).) Under this exception, evidence of a person's conduct is admissible for a purpose other than to prove the person's disposition to commit such an act, i.e., it may be introduced to prove such things as "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented." (§ 1101, subd. (b).)

Here, defendant claims evidence of Cotham's driving in the two incidents summarized above was admissible under section 1101, subdivision (b) to prove Cotham's "identity" as the driver who caused the fatal collision with the Ramoses' car, and to show Cotham's "common plan" of "reckless and drunken driving." We are not persuaded.

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directed toward anyone in particular. The conduct of a person in the zone of danger would not explain the driver's conduct except, perhaps, to the extent the passenger was encouraging the driver, which would not be exculpatory. This was simply a case of alleged third party culpability, with the fortuitous happenstance that the allegedly culpable third party was one of the persons injured in the incident.

In order for evidence of a specific instance of a person's conduct to be admissible as proof of that person's identity as the perpetrator of similar conduct on a different occasion, the two instances of conduct "must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] 'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.' [Citation.]." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403.) This requires that the instances of conduct have sufficient characteristics in common which are sufficiently distinctive as to set them apart from other instances of similar conduct. (*People v. Rivera* (1985) 41 Cal.3d 388, 392.)

We agree with the trial court that evidence of Cotham's driving on occasions prior to and after the fatal collision in this case was not admissible to prove the identity of the driver who caused the collision.

Driving under the influence of alcohol and reckless driving are, unfortunately, common occurrences. (See, e.g., *People v. Ochoa* (1993) 6 Cal.4th 1199, 1202-1203; *People v. Bennett* (1991) 54 Cal.3d 1032, 1034-1035; *People v. Watson* (1981) 30 Cal.3d 290, 293-294; *People v. Arndt* (1999) 76 Cal.App.4th 387, 392; *People v. Valenzuela* (1995) 40 Cal.App.4th 358, 360; *People v. Minor* (1994) 28 Cal.App.4th 431, 433; *People v. Hansen* (1992) 10 Cal.App.4th 1065, 1068-1069; *People v. Von Staden* (1987) 195 Cal.App.3d 1423, 1425-1426; *People v. Oyaas* (1985) 173 Cal.App.3d 663, 666-667.) Thus, Cotham's prior and subsequent conduct was not unique and distinctive. Sad to say, but even the substantially more egregious behavior that led to the fatal

collision in this case was not unique or distinctive. (See *People v. Watson, supra*, 30 Cal.3d at pp. 293-294; *People v. Arndt, supra*, 76 Cal.App.4th at p. 392; *People v. Valenzuela, supra*, 40 Cal.App.4th at p. 360.)

In other words, the pattern and characteristics of the acts were not so unusual and distinctive to be like a signature. Nor can it be said that the acts were sufficiently similar to make them admissible under section 1101, subdivision (b). Cotham was alone in the prior incident. Although he drove at a speed that was excessive for the residential nature of the street, there is no evidence that he drove at the highly excessive speed at which defendant's truck was driven before the fatal collision. Cotham did not run through red lights and stop signs on a busy thoroughfare. In fact, he stopped after fishtailing his vehicle, rather than proceed on as did the driver of the truck after spinning out in an intersection. And, of course, there was no collision.

Defendant notes that the prior incident occurred on the Thursday before Father's Day, while the collision involved here occurred on Father's Day, albeit a year later. This gave them an "eerie resemblance," according to defendant. At trial, he tried to infuse meaning into the timing of the incidents by reference to an occasion in 1991 in which, after a verbal confrontation, Cotham assaulted his father. However, at various times, Cotham assaulted his mother, police officers, and numerous other people. Cotham's extensive history of criminal behavior dispels any notion that his misbehavior centers around his father or Father's Day.

Contrary to defendant's claim, no distinctive similarity was created by the fact that before the prior incident, Cotham had been drinking at Johnny's Bar, which was the same bar where he, defendant, and Delgado were drinking before the fatal collision, and that on each occasion Cotham left the bar in the "mid- to late afternoon." This was not unusual because both Cotham and defendant lived in the vicinity of Johnny's Bar and often went there.

Defendant views the prior incident and the fatal collision as being substantially similar because Cotham was, in the words of defendant's appellate counsel, "profoundly intoxicated" on both occasions. This overstates the record. It is true that a witness to the prior incident stated Cotham was intoxicated. But there is no evidence that he was profoundly intoxicated.

Defendant claims a distinctive similarity exists due to the fact that Cotham's driver's license was suspended at the time of each incident. But Cotham admitted that he regularly drove with a suspended or revoked license, which is common behavior by persons of Cotham's character.

Considered together, the alleged similarities between Cotham's prior behavior and the current offense are not sufficiently unique or distinctive as to imprint Cotham's "'signature'" on both. (*People v. Rivera, supra*, 41 Cal.3d at p. 393.) Hence, evidence of the prior incident was not admissible to prove identity. (*Ibid*.)

The subsequent incident also was not admissible to prove the identity of the driver who caused the fatal collision. In the later event, Cotham was observed driving at an excessive speed. After stopping for a red light, he spun his tires when the light

changed to green. He had an unlawful, but not profound, level of alcohol in his blood stream. There was nothing unique about that incident and nothing similar to the fatal collision in this case.

We also reject the claim that Cotham's prior and subsequent acts of driving under the influence of alcohol were admissible to establish a common plan.

To be admissible to establish a common plan, evidence of other conduct "must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.'" (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.) It must show the existence of a plan, rather than a series of similar, spontaneous acts. (*Id*. at p. 403; see *People v. Sam* (1969) 71 Cal.2d 194, 205; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1021.)

Experience has shown that people ordinarily do not drive under the influence of alcohol as a result of a common plan or scheme. Rather, the act is a spontaneous failure to conform one's conduct to the requirements of the law and needs of public safety. Evidence of multiple incidents of DUI may reflect a disposition to commit such acts, but it does not demonstrate a common plan or scheme of which each incident is an individual manifestation. Thus, we agree with the trial court that the evidence was not admissible to establish a common plan. (*People v. Scheer, supra*, 68 Cal.App.4th at p. 1021.)

III*

In any event, we conclude the trial court acted properly when it excluded evidence of Cotham's character pursuant to section 352,

which states: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

First, as demonstrated by the discussion in parts I and II, *ante*, the evidence had very little probative value.

Second, its presentation would have been prejudicial to the prosecution for the following reason. Like Cotham, defendant had a prior DUI conviction. And like Cotham, defendant had engaged in another incident in which his drunken and belligerent behavior resulted in his arrest and conviction. Defendant also had four convictions for driving with a suspended license and two convictions for being an unlicensed driver. In defendant's view, he should have been allowed to present character evidence regarding Cotham, even though the prosecution would have been precluded from presenting similar character evidence regarding defendant. This would have placed defendant in a false and unwarranted assumption of good character.

Third, presentation of the character evidence would have been time-consuming. The defense would have been required to present witnesses regarding Cotham's conduct on the two other occasions, and the prosecution not only would have spent time cross-examining them but also might have been required to call its own witnesses in an effort to distinguish Cotham's conduct on those two occasions from the conduct at issue here. To this

extent, the trial would be side-tracked to a collateral issue with little actual probative value.

Fourth, the evidence was not really necessary because Cotham's character was exposed to the jury in three ways. Prior to Cotham's testimony, the parties stipulated he had engaged in the following acts of moral turpitude that demonstrated a readiness to do evil: (1) in 1990, he was convicted of discharging a firearm in a grossly negligent manner; (2) in 1991, he committed assault with the intent to cause great bodily injury and did cause such injury; (3) in 1992, he assaulted a sheriff's deputy; (4) in 1993, he was convicted of taking or unlawfully driving a vehicle; (5) in 1995, he was convicted of an assault with intent to cause great bodily injury and did cause such injury; (6) in 1995, he committed an assault with the intent to inflict great bodily injury; (7) in 1997, he was convicted of passing a forged check with the intent to defraud; and (8) in 1998, he was convicted of possessing marijuana for sale. During his testimony, Cotham was surly and argumentative, saying things like, "Man, this is stupid." And witnesses to the spin out at California Avenue testified that the driver and passenger of the truck looked at each other and smiled or laughed before the truck was driven on to the fatal collision at Marshall Avenue and Fair Oaks Boulevard. Thus, it appeared that Cotham was enjoying the dangerous way in which the truck was being driven. The prosecution made no attempt to rehabilitate Cotham's character, and it is inconceivable that the jurors had any residual doubt Cotham would have behaved as did the driver of the truck. Consequently, further character evidence was unnecessary. (See *People v. Davis* (1965) 63 Cal.2d 648, 658.)

As we have noted, the trial court had discretion to exclude the evidence if the court found that the probative value of the evidence was substantially outweighed by the dangers it presented, including the undue consumption of time, prejudice, and confusion of issues. The trial court explicitly stated it understood its discretion and excluded the evidence of Cotham's character based on factors articulated in section 352. For reasons stated above, there was no abuse of discretion.

Noting that the trial court stated the sole issue before the jury was the question of who was the driver of the truck, and said the evidence of Cotham's character was being offered on this point, defendant contends "the court's reasoning suggests that the evidence had the *highest* probative value . . . ." But the court's comments, in their entirety, make it plain the court was concerned that the evidence was confusing, could mislead the jurors and direct their attention away from the issue of who was driving the truck, and might be considered by them for purposes unrelated to that question. These were appropriate considerations in the exercise of discretion under section 352.

Defendant argues that his constitutional due process right to present the evidence overrides statutory rules of evidence and the trial court's discretion. "The claim does not withstand scrutiny. As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense. Courts retain, moreover, a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice."

(*People v. Hall* (1986) 41 Cal.3d 826, 834; *Montana v. Egelhoff* (1996) 518 U.S. 37, 42 [135 L.Ed.2d 361, 367] ["the proposition that the Due Process Clause guarantees the right to introduce all relevant evidence is simply indefensible"].) While the blanket exclusion of critical evidence that goes directly to the defense may be so egregious as to offend due process (see *Crane v. Kentucky* (1986) 476 U.S. 683, 690-691 [90 L.Ed.2d 636, 645]), such is not the case here. The evidence of Cotham's character had slight probative value and was potentially misleading and confusing, and as we will explain, its exclusion did not prejudice defendant.

Although the defense did an exceptional job of presenting the theory that Cotham was the driver of the truck, there were matters that were bound to weigh against that theory in the jurors' minds.

First, from the expert testimony, it was apparent that the dynamics of the collision, the motion of the occupants of the truck, and the mechanism of the various injuries could not be reconstructed with complete accuracy. (See *Box v. California Date Growers Assn*. (1976) 57 Cal.App.3d 266, 274-275.) In considering the evidence, the jurors were not required to disregard their own common sense in favor of any particular expert. (Pen. Code, § 1127b; see *Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 636.) At the time of the collision, the Ramoses' car was traveling perpendicularly to the truck in a right-to-left direction. All of the experts agreed that at the moment of collision, the truck would have begun to decelerate and that after a very brief time (perhaps 60 to 80 milliseconds), it would have begun to spin counterclockwise as the force of the Ramoses' car translated to the truck. The occupants of the truck

were not wearing seatbelts, and upon collision, their motion in relation to the truck would be forward and to the right. After the collision, the truck displayed clear evidence that the driver struck the steering wheel with force, since it was deformed and bent to the right. Defendant suffered significant injuries consistent with blunt force trauma to the chest, including broken ribs on the right side and punctured lungs on both sides.[7] Cotham, on the other hand, did not suffer such significant chest injuries.

Second, the truck belonged to defendant, and the defense provided no explanation of why Cotham would come to be driving it. The defense also did not provide a very likely explanation of why Delgado, defendant's long-time friend, would concoct a story that would expose defendant to conviction and incarceration. The defense theory that Delgado was lonely and did it for a fleeting feeling of importance was unconvincing.

Simply stated, the evidence was not as close as defendant suggests. And because Cotham's character was so thoroughly discredited before the jury, it is inconceivable the jurors had any residual doubt that he was the type of person who would act

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[7] Defendant suffered primarily right side injuries, and the defense theory was, in part, that as the truck spun counterclockwise, the passenger would move forward and to the right, striking the passenger door with his right side. However, common sense indicates that upon striking the steering wheel and bending it to the right, the driver would himself be turned so that if he slid off the steering wheel and continued forward and to the right, his right side would be turned into the dashboard and would suffer the major force from striking the dashboard. This is consistent with defendant's right side injuries.

as did the driver of the truck. In other words, there is virtually no likelihood that defendant would have obtained a more favorable result if more evidence of Cotham's character had been introduced.

IV*

Next, defendant contends the "use of [his] prearrest silence as evidence of guilt violated his Fifth Amendment privilege against self-incrimination." We find no prejudicial error.

CHP Officer Jim Stott was lead investigator at the scene of the collision. When he left the scene, he went to the hospital to interview defendant and to determine his state of sobriety. Stott observed defendant kicking his legs and raising his arms as medical staff were treating him. Defendant appeared intoxicated in that his speech was really slurred and what he was saying did not make sense. When Stott had the opportunity, he asked defendant what had happened. Defendant said he did not remember anything. Stott asked about the last thing defendant remembered. Defendant said he did not know or did not remember. Defendant then turned his head away from Stott and closed his eyes.

Objecting to evidence of the fact that defendant turned his head and closed his eyes, defense counsel argued a "person always has a right to exercise their [*sic*] constitutional right not to speak to a law enforcement officer," and the exercise of the right cannot be used against the person.

The trial court overruled the objection, concluding defendant was not in custody and the decision in *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (hereafter *Miranda*) was not implicated.

In the familiar *Miranda* decision, the Supreme Court held that before commencing custodial interrogation, law enforcement officers must advise a suspect that he (1) has the right to remain silent, (2) anything he says will be used against him in court, (3) he has the right have counsel present, and (4) if he cannot afford counsel then counsel will be appointed for him. (*Miranda, supra,* 384 U.S. at pp. 467-472 [16 L.Ed.2d at pp. 720-722].) If the suspect then indicates he wishes to remain silent, the interrogation must cease. If the suspect expresses a wish to have counsel, the interrogation must cease until counsel is present. (*Ibid*.) In *Doyle v. Ohio* (1976) 426 U.S. 610 [49 L.Ed.2d 91] (hereafter *Doyle*), the court held the *Miranda* warnings carry an implied assurance that silence will not be used against a suspect and, thus, a decision to remain silent after the *Miranda* warnings cannot be used as evidence, even for purposes of impeachment. (*Id*. at p. 619 [49 L.Ed.2d at p. 98].)

In subsequent decisions, the reach of *Miranda* has been defined and limited, and exceptions have been made. Because the *Miranda* rule applies only after a person is taken into custody (*Stansbury v. California* (1994) 511 U.S. 318, 322 [128 L.Ed.2d 293, 298]) and because the implied assurance from the *Miranda* warnings can apply only when the warnings have been given (*Jenkins v. Anderson* (1980) 447 U.S. 231, 239-240 [65 L.Ed.2d 86, 95-96] (hereafter *Jenkins*)), the Supreme Court in *Jenkins* held that prearrest silence can be used to impeach a criminal defendant who testifies at trial. (*Ibid*.) However, *Jenkins* did not consider whether, or under what circumstances, prearrest silence may be used when the defendant

does not testify. (*Id*. at p. 236, fn. 2 [65 L.Ed.2d at p. 93, fn. 2].) The Supreme Court has not since decided that question.

A number of federal appellate court decisions have addressed the question with conflicting results. Decisions that condemned the trial use of prearrest silence include *Combs v. Coyle* (6th Cir. 2000) 205 F.3d 269, at page 283; *U.S. v. Burson* (10th Cir. 1991) 952 F.2d 1196, at pages 1200-1201; *Coppola v. Powell* (1st Cir. 1989) 878 F.2d 1562, at page 1568; and *U.S. ex rel. Savory v. Lane* (7th Cir. 1987) 832 F.2d 1011, at page 1017. Decisions that permitted trial use of prearrest silence include *U.S. v. Oplinger* (9th Cir. 1998) 150 F.3d 1061, at page 1066; *U.S. v. Zanabria* (5th Cir. 1996) 74 F.3d 590, at page 593; and *U.S. v. Rivera* (11th Cir. 1991) 944 F.2d 1563, at page 1568.

We need not weigh in on this issue because we conclude the evidence should have been excluded for another reason--it lacked sufficient probative value to show consciousness of guilt.

The United States Supreme Court has observed that "[i]n most circumstances silence is so ambiguous that it is of little probative force." (*United States v. Hale* (1975) 422 U.S. 171, 176 [45 L.Ed.2d 99, 104]; see also *Doyle, supra*, 426 U.S. at p. 617 [49 L.Ed.2d at p. 97] [silence is often "insolubly ambiguous"].) California's Supreme Court has agreed. (*People v. Simmons* (1946) 28 Cal.2d 699, 715-716 [although an arrest may be one factor that induces silence, "[m]any other forms of restraint have the same effect, such as fear, physical pain, suffering, advice of counsel, admonition as to silence, warning against self-incrimination, a belief that the accused will serve his best interests by silence, or other physical

or mental pressure. A response under any of these forms of restraint may be such as will not give rise to an inference of acquiescence or guilty consciousness"].)

Here, defendant suffered significant injuries in the collision, including a probable concussion. From the time of the collision through the next day, he periodically displayed symptoms such as combativeness, refusal of medical aid, confusion, loss of memory, inability to remember the event that led to his hospitalization, and making nonsensical statements. Before Officer Stott attempted to question him, he observed defendant kicking his legs and raising his arms, speaking in a slurred manner, and saying things that made no sense. Defendant was undoubtedly under the influence of pain and/or pain medication as well as alcohol. Before turning away from Stott, defendant twice said he did not remember anything of the collision. Under the circumstances, defendant's conduct in turning away was insolubly ambiguous and lacked sufficient probative value to show a consciousness of guilt. In view of the unsettled nature of the constitutional issue and the ambiguity of the circumstances, the evidence should have been excluded. (See *Grunewald v. United States* (1957) 353 U.S. 391, 423-424 [1 L.Ed.2d 931, 954]; *People v. Simmons, supra*, 28 Cal.2d at p. 718; *People v. Bracamonte* (1961) 197 Cal.App.2d 385, 389-390.)

For purposes of determining prejudice, we will assume the beyond-a-reasonable-doubt standard applies. Under that standard, we conclude the evidence was harmless.

Silence can sometimes be prejudicial when it is introduced with evidence of a factual statement or accusation that would otherwise

be inadmissible but which can be introduced on the theory that the silence constituted an adoptive admission. (See *People v. Simmons, supra,* 28 Cal.2d at pp. 716-719.) Silence also may be damaging to the defense if it is inconsistent with an affirmative defense which has been developed; the theory is that if the defense is true, then defendant would have spoken up earlier. (See *U.S. v. Zanabria, supra*, 74 F.3d at p. 593 [prearrest silence offered to rebut the defense of duress].)

These potentially damaging circumstances did not exist here. In questioning defendant, Officer Stott simply asked what happened, without making a factual statement or accusation. Defendant did not refuse to talk to Stott; instead, he twice said he could not remember anything about the collision--information that was beneficial to the defense. The entirety of the conversation (see § 356), together with the other evidence, amply explained why defendant did not answer further. For many of the reasons that we have concluded the evidence lacked probative value, we conclude it lacked prejudicial potential. We are satisfied beyond a reasonable doubt that the evidence that defendant turned his head and closed his eyes when questioned by Stott did not contribute to the verdict.

V*

According to defendant, the trial court erred in allowing testimony of an out-of-court statement that identified defendant as the driver of the truck.

When Officer DiMiceli arrived on the scene of the collision, Officer Stott asked him to identify or locate the driver of the truck. DiMiceli went to the location of the truck. One of the

emergency personnel handed defendant's driver's license to DiMiceli and said, "This is your driver." DiMiceli admitted he had no idea where that information came from or even whether it was accurate or not. He compared the driver's license with defendant, who was then on a gurney. DiMiceli or one of the emergency personnel asked if defendant was the driver, and defendant said he was. DiMiceli then gave the license to Stott and stated, "This is your driver."

At trial, defendant made a hearsay objection to the remark made to Officer DiMiceli that, "This is your driver." The prosecutor responded that the statement was offered for the limited purpose of explaining why DiMiceli did what he did after hearing the statement. The trial court overruled the objection and instructed the jury that the statement was admitted for this limited purpose and not for the truth of matter asserted. During instructions at the close of evidence, the court gave another limiting instruction on the issue.[8]

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[8] The limiting instruction stated: "The Court permitted testimony by California Highway Patrol Officer Robert Di[M]iceli that he was handed a driver's license belonging to [defendant] and that an unidentified individual advised him that the license belonged to the driver of the blue pickup truck. This evidence was admitted for the limited purpose of explaining what Officer Di[M]iceli testified that he did after receiving the license. The Court instructed you at the time that the evidence was received that it may not be considered by you for any other purpose. There is no evidence concerning the source of information upon which the unidentified person relied in making the statement to Officer Di[M]iceli, and it is for you to determine whether the statement was in fact made. The statement is not reliable evidence concerning who was driving the pickup truck. If you find that Officer Di[M]iceli was handed [defendant]'s driver's license and that someone made such a statement to him, you may not in any way rely upon such

Defendant argues Officer DiMiceli's conduct did not require any explanation, and the evidence was not relevant for any nonhearsay purpose.

We disagree that the evidence was wholly without relevance. A constant theme of the defense in questioning the witnesses, in presenting its own witnesses, and in argument was that the CHP officers on the scene conducted an entirely incomplete and inadequate investigation because they assumed defendant was the driver. Officer DiMiceli's participation in the investigation was brief. According to his testimony, upon being asked to locate or identify the driver, DiMiceli simply went over to defendant and asked whether he was the driver. That would leave DiMiceli open to the argument he already had assumed defendant was the driver and thus focused his attention exclusively upon defendant. The hearsay statement made to DiMiceli would explain why his initial, in fact only, participation in the investigation was to make inquiry of defendant. Since the conduct of DiMiceli and the other CHP officers on the scene was placed into question, the statement made to DiMiceli which would serve to explain his conduct and was not hearsay when admitted for this purpose. (*People v. Duran* (1976) 16 Cal.3d 282, 295; *People v. Nichols* (1970) 3 Cal.3d 150, 157.)

In any event, under the circumstances of this case, the evidence was not prejudicial to defendant. At trial, Officer DiMiceli could not identify the person who made the statement,

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evidence as tending to show that [defendant] drove the blue GMC pickup truck."

and he admitted he had no idea where the information came from or even whether it was accurate. It is unlikely the jury would give credence to a statement by an unidentified speaker with no indication of a foundation for the statement. Moreover, at the time of its admission, the trial court properly instructed the jury as to the limited purpose for which the statement was introduced, and the court gave a strongly worded instruction to that effect before deliberations. (*People v. Nichols, supra*, 3 Cal.3d at p. 157.)

More importantly, the evidence was actually pivotal to the defense in two respects.

First, the defense position was Officer DiMiceli lied in claiming that defendant admitted he was the driver of the truck. According to the defense, DiMiceli based his identification of defendant as the driver solely upon the hearsay statement by an unidentified person, and only later invented the claim that defendant made an admission. Thus, if the hearsay statement had been excluded, then the claimed admission by defendant would have been the only basis before the jury upon which DiMiceli identified defendant as the driver, and hence would have had much greater significance.

Second, as defense counsel told the jury: "Sometimes cases have a theme. In this case if there was a word that described it, a moniker, a label, a theme of this case, the theme would be a single word: Assume." It was the theory of the defense that when Officer DiMiceli told Officer Stott that defendant was the driver, Stott assumed this was true. After they learned from Delgado that

the truck belonged to defendant, the assumption became absolute, and the investigation effectively ended. Thus again, the hearsay statement to DiMiceli, which he relayed to Stott, was pivotal to the defense argument.

Because the defense made use of the hearsay statement and reaped its benefits, the introduction of the statement was not prejudicial to the defense and furnishes no basis for reversal of the judgment.

VI*

In defendant's view, even if the asserted trial court errors were not prejudicial standing alone, when taken together they require reversal of the judgment.

We have rejected the contention that it was error to exclude evidence of Cotham's prior and subsequent conduct. We have concluded that, due to the extent to which Cotham's character was discredited before the jury, exclusion of the evidence could not have prejudiced the defense. We have rejected the contention that it was error to introduce, for a limited purpose, the statement made to Officer DiMiceli by an unidentified person. We have concluded that, in view of the fact the evidence was pivotal to the defense, admission of the statement could not have prejudiced the defense. And we have agreed that evidence of defendant's prearrest silence was not prejudicial. These matters, even if assumed error, were independent of each other, entailed minimal potential for prejudice, and do not cumulatively warrant reversal.

VII*

At defendant's behest, the trial court reviewed medical and/or psychological records of Cotham and Delgado. The court found that the records contained nothing of relevance to the defense and, thus, ordered that they remain sealed.

Defendant asks us to conduct an in camera review of the records to determine whether the trial court erred. The People agree such a review is appropriate. We have reviewed the records and find no abuse of discretion in the court's decision. (*People v. Hughes* (2002) 27 Cal.4th 287, 330.)

VIII*

In sentencing defendant, the trial court imposed three multiple victim enhancements of one year each pursuant to section 23558 of the Vehicle Code. Relying on Penal Code section 654, defendant contends these sentence enhancements must be stayed. We agree with respect to two of the enhancements but conclude that one enhancement need not be stayed.

Vehicle Code section 23558 states in part: "Any person who proximately causes bodily injury or death to more than one victim in any one instance of driving in violation of Section 23153 of this code or in violation of Section 191.5 of, or paragraph (3) of subdivision (c) of Section 192 of, the Penal Code, shall, upon a felony conviction, and notwithstanding subdivision (g) of Section 1170.1 of the Penal Code, receive an enhancement of one year in the state prison for each additional injured victim. The enhanced sentence provided for in this section shall not be imposed unless the fact of the bodily injury to each additional

victim is charged in the accusatory pleading and admitted or found to be true by the trier of fact. The maximum number of one year enhancements which may be imposed pursuant to this section is three."

The substance of this statute was originally enacted in 1985 as Vehicle Code section 23182 (stats. 1985, ch. 902, § 1, pp. 2878-2879) as a response to the decision in *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345 (hereafter *Wilkoff*). (See *People v. McFarland* (1989) 47 Cal.3d 798, 805 (hereafter *McFarland*).)

In *Wilkoff,* the Supreme Court held that the felony of driving under the influence and causing bodily injury is only one offense regardless of the number of persons injured. (*Wilkoff, supra,* 38 Cal.3d at p. 353.) The Legislature responded by enacting former Vehicle Code section 23182 to provide for sentence enhancements when multiple persons are injured.

In *McFarland,* the defendant, Donald McFarland, Jr., drove while under the influence of alcohol, collided with another car, and caused one death and serious bodily injury to two other persons. Following a negotiated plea, McFarland was sentenced to prison for vehicular manslaughter with gross negligence, with concurrent terms for two counts of felony DUI. The trial court added two one-year enhancements for multiple victims pursuant to former Vehicle Code section 23182. (*McFarland, supra,* 47 Cal.3d at pp. 800-801.) The Court of Appeal concluded that McFarland could be sentenced for vehicular manslaughter but only one count of felony DUI, and that because former Vehicle Code section 23182 applied only to felony DUI at that time, the sentence for vehicular manslaughter

could not be enhanced for multiple victims. In response to that decision, the Legislature amended the statute to make it applicable to vehicular manslaughter as well as to felony DUI. (*McFarland, supra*, 47 Cal.3d at p. 802, fn. 6.)

The Supreme Court granted review and agreed with the Court of Appeal's decision. In the course of its analysis, the Supreme Court rejected the People's argument that the decision in *Wilkoff* should be overruled. (*McFarland, supra*, 47 Cal.3d at p. 805.) Noting the Legislature's amendment of former Vehicle Code section 23182 in response to the Court of Appeal's decision in *McFarland*, the Supreme Court went on to say: "As thus amended the statute provides an additional sentencing option where, as here, a single drunk-driving incident results in both death and injury." (*Ibid*.)

In footnote 8, the court added that "[o]f course, a sentence enhancement imposed pursuant to [former] Vehicle Code section 23182 may not be based upon the same count for which a separate felony drunk driving sentence is imposed." (*McFarland, supra*, 47 Cal.3d at p. 805, fn. 8.) Although this statement was dictum, it is persuasive dictum that is consistent with our understanding of the Supreme Court's interpretation of Penal Code section 654, which states in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

Penal Code section 654 has picked up a judicial gloss as to the meaning of "act or omission," and limitations and exceptions to

that gloss have been recognized. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1216.) But the basic thrust of the statute is that a single criminal act can be punished under one, and only one, provision of law that is applicable thereto.

In considering the applicability of Penal Code section 654 to sentence enhancements, the Supreme Court has drawn a distinction between enhancements that go to the nature of the offender (such as those based on the defendant's status as a repeat offender) and those that go to the nature of the crime or the circumstances of the crime (such as the use of a firearm or the infliction of great bodily injury). (See *People v. Coronado* (1995) 12 Cal.4th 145, 156-157; see also *People v. Murphy* (2001) 25 Cal.4th 136, 155-156.) Enhancements that are based on the defendant's status are not based on a criminal act or omission within the meaning of section 654 of the Penal Code. (*People v. Murphy, supra*, 25 Cal.4th at p. 156.) Thus, for example, a prior conviction that resulted in a prison term may be used both to elevate a subsequent offense to a felony and to enhance the sentence for that crime for a prior prison term. (*People v. Coronado, supra*, 12 Cal.4th at p. 159.)

In some cases, the Supreme Court has held that one enhancing factor can be used for multiple enhancing purposes based on the specific language of the applicable enhancement statutes. (*People v. Acosta* (2002) 29 Cal.4th 105, 131; *People v. Garcia* (2001) 25 Cal.4th 744, 757; *People v. Dotson* (1997) 16 Cal.4th 547, 555.) Statutory language such as "notwithstanding any other provision of law" or that punishment "shall be imposed in addition and consecutive to the punishment prescribed" may support such a result.

(*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1313.) Absent such clear statutory language, multiple use of the same enhancing factor will be prohibited. (See *People v. Jones* (1993) 5 Cal.4th 1142, 1149-1150.)

Here, we are not faced with offender status enhancements. Defendant's criminal convictions and all of the enhancing factors found by the jury were based on his conduct in committing the offenses. Nothing in the language of Vehicle Code section 23558 would indicate a legislative intent that an additional victim enhancement can be imposed regardless of whether the defendant is sentenced for a substantive offense arising from injury to that victim. To impose terms for both a substantive offense and a victim enhancement for injury to the same victim would violate the provision of Penal Code section 654 that the same act or omission can be punished under one, but only one, provision of law. Thus, we agree with defendant that Penal Code section 654 is applicable to the enhancements under Vehicle Code section 23558.

Defendant was sentenced to a principal term for vehicular manslaughter based on the death of Stephen Ramos. He was sentenced to a consecutive term for vehicular manslaughter based on the death of Melissa Madison. And he was sentenced to a consecutive term for felony DUI enhanced for the personal infliction of great bodily injury upon Christopher Ramos. Thus, defendant was sentenced for three substantive offenses involving injury or death to the three victims in the Ramoses' car. For purposes of Vehicle Code section 23558, the jury found that four persons, Cotham included, suffered injury as a result of defendant's conduct. For purposes of Vehicle

Code section 23558, Cotham is an additional victim who suffered injury and whose injuries did not otherwise result in the imposition of punishment. Accordingly, one additional victim enhancement is appropriate, but two of the enhancements imposed by the trial court must be stayed.[9]

Our conclusion makes it unnecessary to consider (1) defendant's argument that the imposition of a great bodily injury enhancement for the injuries to Christopher Ramos precludes the imposition of an additional victim enhancement for those injuries (but see Veh. Code, § 23558; Pen. Code, § 1170.1, subd. (g)), and (2) defendant's alternative argument that the additional victim enhancements for the injuries to Melissa Madison and Christopher Ramos must be reduced to one-third of the statutory term. (Pen. Code, § 1170.1, subd. (a).)

Having concluded that two of the one-year enhancements pursuant to Vehicle Code section 23558 must be stayed pursuant to Penal Code section 654, we shall so modify the judgment, thus reducing defendant's total unstayed prison term to 14 years and 8 months.

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[9] Considering Cotham to be a "victim" for purposes of Vehicle Code section 23558 is not inconsistent with our conclusion that he is not a "victim" for purposes of Evidence Code section 1103. As we explained, "victim" is a word with widely variable meaning depending on the particular statutory purpose for which it is used. In Vehicle Code section 23558, the Legislature used the word "victim" in the sense of anyone who suffers consequential bodily injury as the result of the defendant's conduct.

IX*

In his supplemental opening brief, defendant contends that the imposition of the upper term for count one and the imposition of consecutive sentences for counts two and three violated the Sixth Amendment to the United States Constitution as interpreted in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (hereafter *Apprendi*) and *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (hereafter *Blakely*).

Apprendi held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Apprendi, supra*, 530 U.S. at p. 490 [147 L.Ed.2d at p. 455].) For this purpose, the statutory maximum is the maximum sentence a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant; thus, when a court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely, supra*, 542 U.S. at pp. 302-305 [159 L.Ed.2d at pp. 413-414].)

We reject defendant's claim that imposition of the upper term violated the rule of *Apprendi* and *Blakely*. In *People v. Black* (2005) 35 Cal.4th 1238, our state Supreme Court held that while the middle term is the presumptive sentence under our determinate sentencing scheme, the upper term is the "statutory maximum" for purposes of the rule of *Apprendi* and *Blakely*. (*Id*. at p. 1257; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Thus, "the judicial factfinding that occurs when a judge

exercises discretion to impose an upper term sentence . . . does not implicate a defendant's Sixth Amendment right to a jury trial." (*People v. Black, supra,* 35 Cal.4th at p. 1244.)

In any event, in imposing the upper term, the trial court relied in part on defendant's record of prior criminal convictions, including a DUI conviction, four convictions for driving with a suspended license, two convictions for driving without a license, and one incident in which his drunken and belligerent behavior resulted in a conviction for disturbing the peace. The rule of *Apprendi* and *Blakely* does not apply to use of prior convictions to increase the penalty for a crime. (*Apprendi, supra*, 530 U.S. at p. 490 [147 L.Ed.2d at p. 455].)

The court also cited the fact that defendant's "blood[-]alcohol content was an incredible .24 percent," showing "aggravation beyond a normal driving-under-the-influence-related offense." (See Veh. Code, § 23578 [a high concentration of alcohol in the defendant's blood is a factor that may justify enhancing the penalty].) This is a fact that was included in the accusatory pleading (defendant was charged with driving with a blood-alcohol level in excess of .20 percent) and was found true by the jury.

Since these two valid factors in aggravation were sufficient to expose defendant to the upper term (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433), the trial court's consideration of other factors, in addition to defendant's prior criminal history and his high blood-alcohol level at the time of the fatal collision, did not violate the rule of *Apprendi* and *Blakely*.

We also reject defendant's claim that consecutive sentencing was improper. The rule of *Apprendi* and *Blakely* does not apply to California's consecutive sentencing scheme. (*People v. Black, supra,* 35 Cal.4th at pp. 1262-1263.)

Penal Code section 669 imposes an affirmative duty on a trial court to determine whether the terms of imprisonment for multiple offenses are to be served concurrently or consecutively. (*In re Calhoun* (1976) 17 Cal.3d 75, 80-81.) In most cases, the section leaves this decision to the trial court's discretion. (*People v. Jenkins* (1995) 10 Cal.4th 234, 255-256.) "While there is a statutory presumption in favor of the middle term as the sentence for an offense [citation], there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing." (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.)

Penal Code section 669 provides that upon the court's failure to determine whether multiple sentences shall run concurrently or consecutively, the terms shall run concurrently. This provision reflects the Legislature's policy of "speedy dispatch and certainty" of criminal judgments and the sensible notion a defendant should not be required to serve a sentence that has not been imposed by a court. (See *In re Calhoun, supra,* 17 Cal.3d at p. 82.) This provision does not relieve a sentencing court of the affirmative duty to determine whether sentences for multiple crimes should be

served concurrently or consecutively. (*Ibid*.) And it does not create a presumption or other entitlement to concurrent sentencing. Under Penal Code section 669, a defendant convicted of multiple offenses is entitled to the exercise of the sentencing court's discretion, but is not entitled to a particular result.

The trial court is required to state reasons for its sentencing choices, including its decision to impose consecutive sentences. (Cal. Rules of Court, rule 4.406(b)(5); *People v. Walker* (1978) 83 Cal.App.3d 619, 622.) This requirement ensures that the trial court analyzes the problem and recognizes the grounds for the decision, assists meaningful appellate review, and enhances public confidence in the system by showing that sentencing decisions are careful, reasoned, and equitable. (*People v. Martin* (1986) 42 Cal.3d 437, 449-450.) However, the requirement that reasons for a sentence choice be stated does not create a presumption or entitlement to a particular result. (See *In re Podesto* (1976) 15 Cal.3d 921, 937.)

Therefore, entrusting to trial courts the decision whether to impose concurrent or consecutive sentencing under California's sentencing laws is not precluded by the decisions in *Apprendi* and *Blakely*. In this state, every person who commits multiple crimes knows he or she is risking consecutive sentencing. While such a person has the right to the exercise of the court's discretion, the person does not have a legal right to concurrent sentencing, and as the Supreme Court said in *Blakely*, "that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." (*Blakely, supra*, 542 U.S. at p. 309 [159 L.Ed.2d at p. 417].)

DISPOSITION

The judgment is modified to stay, pursuant to Penal Code section 654, two of the one-year sentence enhancements imposed pursuant to Vehicle Code section 23558, thus reducing defendant's aggregate unstayed prison term to 14 years and 8 months.

As modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment accordingly, and to send a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

SCOTLAND, P.J.

We concur:

MORRISON, J.

ROBIE, J.