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CERTIFIED FOR PARTIAL PUBLICATION[1]

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. KEVIN CHARLES COLE, et al., Defendants and Appellants.	D047095 (Super. Ct. No. SCD169061)

APPEAL from judgments of the Superior Court of San Diego County, Charles Raymond Gill, Judge. Affirmed in part; reversed in part and remanded with directions.

Arthur Martin for Defendant and Appellant Kevin Cole.

Patricia Ann Scott for Defendant and Appellant Frank Robles.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette and Gary W. Schons, Assistant Attorneys General, Rhonda Cartwright-Ladendorf and Annie Featherman Fraser, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted one-time business partners Kevin Charles Cole and Frank Anthony Robles of various felony offenses involving the sale of securities, including

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1 Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts I, II, III, IV, VI, VII, and VIII.

highly speculative ones, to more than a dozen elderly investors who lost an aggregate of more than $1 million.

With respect to 14 of these investors,[2] Cole was found guilty of 14 counts of selling securities by means of false statements or omissions in violation of Corporations Code[3] section 25401 and 14 counts of selling a security without a broker-dealer license in violation of section 25210. Robles was found guilty of 11 counts of each of these crimes involving 11 of the investors. The jury found that each defendant committed at least two felonies involving fraud or embezzlement of more than $500,000 (Pen. Code, § 186.11, subd. (a)(2)), and that the total aggregate victim losses as to each defendant exceeded $150,000 (Pen. Code, § 12022.6, subd. (a)(2)). Cole also was found guilty of two counts of theft from an elder (Pen. Code, § 368, subd. (d)), and one count of

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2 For those counts involving victims who are married couples (the DaSilveiras, Roemmiches and Petersons), the counts include both members of the couple and are thus treated here as one investor.

3 All statutory references are to the Corporations Code unless otherwise specified.

residential burglary (Pen. Code, §§ 459/460).[4] The trial court sentenced Cole to 17 years in state prison and Robles to 11 years and 8 months.[5]

Cole contends all of his convictions must be reversed because the court denied his request to represent himself (see *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*)), and did not suppress evidence that was obtained as the result of an unlawful detention and arrest. Cole also contends his convictions for burglary, elder theft, three counts of selling securities without a broker-dealer license, 10 counts of selling securities by means of making false statements, and the aggregate loss enhancements were not supported by substantial evidence. In addition, Cole claims the court committed instructional error, requiring reversal of all counts of selling securities without a broker-dealer license.

Robles contends that seven of his 11 convictions for selling securities by means of making false statements must be reversed because of insufficient evidence. With the exception of the *Faretta*, illegal arrest, burglary and elder theft issues, Robles also joins in and adopts the arguments made by Cole. (Cal. Rules of Court, rule 8.200(a)(5).)

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4 The jury acquitted Cole of five counts of elder theft, two counts of burglary, one count of selling a security without a broker-dealer's license, and one count of selling a security by means of a false statement. The jury acquitted Robles of six counts of elder theft and two counts of burglary. The following counts were dismissed after the jury was unable to reach a verdict: For Cole—three counts of burglary, two counts of elder theft, one count of selling a security without a broker-dealer's license, and one count of selling a security by means of a false statement. For Robles—two counts of burglary and two counts of elder theft.

5 As to Cole, the trial court reduced the Penal Code section 12022.6, subdivision (a)(2) enhancement to the lesser included enhancement of Penal Code section 12022.6, subdivision (a)(1) [aggregate losses of $50,000]. As to Robles, the court struck the Penal Code section 12022.6, subd. (a)(2) enhancement.

For reasons we shall explain, we agree that there was insufficient evidence to support two of Cole's convictions of selling securities by means of making false statements (§ 25401) and one of Robles's convictions of the same crime. Further, 11 of Cole's convictions of selling a security without a broker-dealer's license (§ 25210) and eight of Robles's convictions of the same crime must be reversed because of instructional error. We reject the other contentions raised by Cole and Robles as lacking merit.

FACTS

Overview

From 1999 to mid-2002, at a time when there was a downturn in the stock market and financial institutions were offering extremely low interest rates, Cole, later joined by Robles, sold high-yielding, nonstock investments to elderly persons. At first, Cole sold elderly clients secured notes issued by a company that was offering an interest rate of 8 percent or more. The company in turn paid Cole a finder's fee, but he was not otherwise affiliated with the company. The company paid on time and the clients were satisfied with their investments. After Robles became Cole's partner, they continued selling these same secured notes and also sold direct investments in a pay telephone company.

Cole and Robles changed their methodology after authorities challenged the legality of the way they were conducting their investment business. In response, they formed several businesses, including Pathway Strategies, Inc. (Pathway Strategies), which sold its own promissory notes, and offered double-digit rates of return. Pathway Strategies, in turn, invested the money it obtained in higher-yielding promissory notes issued by companies that needed to raise cash. Cole and Robles kept the difference between the interest rate they had promised clients and that paid to them by the companies in which they invested. In the beginning, the business plan performed well and their customers received their interest payments on time. However, after the major company in which it invested filed for bankruptcy, Pathway Strategies found it increasingly difficult to pay its customers their promised returns and it started investing in more speculative businesses and ventures. In addition, in order to raise more cash, Cole and Robles convinced some of their customers to take out reverse mortgages or home equity loans and invest their proceeds with Pathway Strategies. Pathway Strategies sometimes did not invest these funds as Cole and Robles told their customers it would. Eventually, Pathway Strategies stopped paying its customers their interest payments and did not return the customers' principal. After Cole and Robles terminated their business relationship, Cole continued to sell promissory notes in two other companies he owned until he was arrested.

Background and Timeline

In the 1990's, Eric Scott Schoeller, a paralegal and document preparer, helped elderly clients establish living trusts. Attorney Frank Mango proposed that he perform free trust reviews for Schoeller's clients with the understanding that Mango might attempt to sell them investments. Schoeller agreed and gave Mango his client list with approximately 2,100 names. Under the proposal, Schoeller was to receive 1 percent of the sales commissions that Mango and his agents received.

Cole, a licensed life insurance salesman, worked for Mango. From 1999 to 2001, Cole reviewed the living trusts of some of Schoeller's clients—Ethel Correia, Leonora

High, Marian Goins, and Elvira and Feliciano DaSilveira—and sold them secured notes in Carlmont Capital Special Purpose Corporation II (Carlmont Capital). Carlmont Capital invested in medical receivables in the small physician group segment of the health industry.[6] None of these individuals lost money by investing in Carlmont Capital. However, these clients lost considerable sums when Cole, and later Robles, revisited them and sold them investments in other corporations or in their own businesses. Cole and Robles sold these same high-risk investments to individuals who responded to newspaper advertisements they had placed or who were referred to them through word of mouth.

On September 10, 2000, advertisements began running in the San Diego Union-Tribune for an entity identified as Pathway Financial, offering a double-digit return. Five months later, on February 8, 2001, articles of organization for Pathway Financial, LLC, were filed with the Nevada Secretary of State. Cole and Robles were listed as managers of Pathway Financial. On October 20, 2000, Cole and Robles incorporated Pathway Strategies in Nevada and listed themselves as directors in the articles of incorporation. Cole and Robles used Pathway Financial, the partnership, for advertising and in correspondence; they used Pathway Strategies, the corporate entity, to issue the promissory notes.

6 In August 1999, Medical Capital Corporation, which issued the Carlmont Capital notes, agreed to pay Cole a finder's fee of 4 percent on the amount invested in Carlmont Capital notes by those individuals who made investments through Cole.

Initially, Pathway Strategies promoted direct investments in Alpha Telcom/American Telecommunications (Alpha Telcom) which operated and maintained pay telephones in rural areas of the United States and sold these telephones to investors across the country. Alpha Telcom represented to its investors that their investments were guaranteed by its "buyback" insurance policy.[7] Alpha Telcom originally paid Robles a 12 percent commission for selling the telephones; this was later increased to 17 percent and then to 18 percent.

In November 2000, the California Department of Corporations (DOC) wrote to Cole informing him that Carlmont Capital, one of the investments he had been selling, may be a security within the meaning of the Corporations Code and that if it were, he did not have the requisite broker-dealer license. The letter asked Cole for further information. On the same day, DOC sent a similar letter to Robles. On February 7, 2001, the DOC issued Cole desist and refrain orders to stop selling investments in Carlmont Capital because it was not qualified as a security and to stop acting as a broker-dealer selling securities.[8]

At or about this same time, in the autumn of 2000, Pathway Strategies adopted a new business plan. Instead of selling direct investments in other companies, it offered its own promissory notes at double-digit returns to its clients. Cole and Robles represented

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7 Initially, there were representations that an insurance policy was issued by Lloyd's of London, but later Alpha Telcom said its policy was through a Florida insurance company.

8 Cole was served with these orders on August 1, 2001.

that Pathway Strategies would lend these proceeds to Alpha Telcom and other companies that needed immediate cash and offered an interest rate higher than the promissory notes issued by Pathway Strategies. Pathway Strategies offered its investors a promised return and kept, as corporate profit, the interest it received that exceeded this promised return.

Some of these representations proved false, and Cole and Robles did not invest the investors' money as they indicated they would. By the summer of 2001, Pathway Strategies' investors were no longer receiving their interest payments. At the end of August 2001, Alpha Telcom filed for bankruptcy. Cole and Robles's customers who had invested in Alpha Telcom—either directly or through Pathway Strategies promissory notes—did not receive their principal back. In February 2002, the U.S. District Court in Oregon found Alpha Telcom's payphone program was an investment contract and constituted a security. (*Securities and Exchange Commission v. Alpha Telcom, Inc.*

(2002) 187 F.Supp.2d 1250, 1258.)[9]

Another investment promoted by Pathway Strategies during this time period was NatureWell, a late stage start-up company that manufactured health care products. On June 28, 2001, Pathway Strategies invested $75,000 in NatureWell stock, and another $50,000 on July 30. NatureWell's subscription agreement for purchasing shares stated there was a high degree of risk and there was unlikely to be a market for the shares for a substantial period of time. In the summer of 2001, NatureWell's stock was selling for between 30 cents and 60 cents on the over-the-counter market. By February 2003, NatureWell stock was selling for between 2 cents and 4 cents. At the time of the trial, the stock was selling for about six-tenths of 1 cent. The chief financial officer of NatureWell testified that NatureWell was a risky investment in 2001.

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9 Cole, Robles and the District Attorney agreed to the following stipulation: "Alpha Telcom filed for bankruptcy in August 2001. In September 2001, a receiver was appointed to take over operations of Alpha Telcom and to investigate Alpha Telcom's financial condition. The Securities and Exchange Commission, SEC, instituted an action against Alpha Telcom, its owner, Paul Rubera, and others in the United States District Court in Oregon under federal securities laws to stop Paul Rubera from further sales of unregistered securities and to disgorge profits to Paul Rubera from such sales. [¶] The SEC also sought [a] civil penalty against Paul Rubera for violating the antifraud provisions of the federal securities law . . . . [¶] The U.S. District Court filed its decision and findings on February 7th, 2002. The court found that one: The Alpha Telcom pay phone purchase program was a 'security' within the meaning of the federal law and is required to be registered. Paul Rubera was ordered to disgorge nearly $4 million in profits from the sales of the securities. [¶] Two, Paul Rubera, although the owner of Alpha Telcom, was not a sophisticated businessman. Paul Rubera did not act with intent to deceive, manipulate or defraud investors with respect to the financial condition of Alpha Telcom or the buy-back insurance program and was not ordered to pay civil penalties."

Pathway Strategies also promoted investments in Tierra Telecom, Inc., which had developed "a proprietary black box that allowed voice-over Internet procedures." Tierra Telecom was a "restart-up" company that had previously failed and in the spring of 2001 was in dire financial straits. In July 2001, Pathway Strategies invested $125,000 in short-term Tierra Telecom promissory notes.

Between October 16, 2001, and February 4, 2002, articles of organization for Pathway Development, a limited liability company, were filed in Nevada; the last advertisement for Pathway Financial appeared in the San Diego Union-Tribune; and articles of incorporation were filed in Nevada for Pathway Management Group, Inc., listing Cole as secretary and Robles as vice president.

In May 2002, Robles and Cole terminated their business relationship. On May 17, Pathway Strategies' list of officers was amended to list Robles as the sole owner.

Cole continued to do business through Investment Revolution Strategies, Inc. (Investment Revolution Strategies) and Faith Holdings, Inc. (Faith Holdings). Both were Nevada corporations that were incorporated in 1996 and 1998, respectively.

During the summer of 2002, Faith Holdings attempted to invest in a company installing electronic "point of sale" terminals for swiping credit cards used as payment in retail stores. Cole was raising money for this investment when he was arrested.

On July 16, 2002, an advertisement for Faith Holdings was published in the San Diego Union-Tribune. The advertisement was not published after July 23. On July 31, 2002, police arrested Cole.

The Investors[10]

(1) *Ethel Correia* (counts 41 & 42 involving Cole and Robles)

The jury convicted Cole and Robles of making false statements in connection with the sale of a security (§ 25401) and making a security transaction without a broker-dealer license (§ 25210) to Ethel Correia.

In 2000, Cole reviewed and notarized the trust of Correia, who was 78 years old at the time of the trial. Cole told Correia he could help her with her investments. He recommended Carlmont Capital and told Correia that she would receive 8.75 percent interest per month. Cole did not discuss the risk of the investment. On February 3, 2000, Correia invested $120,000 in Carlmont Capital and an additional $40,000 the following month.

Nine months later, in November 2000, Cole and Robles went to Correia's home and suggested she move her investment from Carlmont Capital to Pathway Strategies, which, in turn, would invest in Alpha Telcom and provide her with a higher rate of return. Cole said there was no risk involved and the investment would be guaranteed by Lloyds of London. Cole also told Correia that his grandfather had invested $1 million in the telecommunications company.[11] During the discussion, Robles sat quietly and listened.

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10 The second amended information contained counts involving two additional investor-victims, whose transactions are not discussed. All the counts involving these individuals were either dismissed or the jury returned not guilty verdicts on the counts.

11 The record contains no evidence that this was true.

Correia withdrew her money from Carlmont Capital, and in February and April 2001, invested a total of $160,000 in Pathway Strategies promissory notes with a 14 percent interest rate. Correia believed that Cole was the sole owner of Pathway Strategies. Cole did not tell Correia that he was not licensed to sell securities in California. Correia testified she would not have invested in Pathway Strategies had she known it was a risky investment. She also noted that Cole's statement about his grandfather investing in Alpha Telcom was a factor in her decision to invest.

Correia received monthly interest checks for a year from Pathway Strategies. After the checks stopped, Correia contacted Cole, who told her to speak with Robles. Robles in turn told her to speak with Cole. Robles told her that he and Cole had not invested her money in Alpha Telcom, and he did not know what Pathway Strategies had done with her money. Correia's principal was not returned to her.

(2) *Mair Nichols* (count 25 involving Cole; counts 26 & 27 involving Cole and Robles)

With respect to Mair Nichols, the jury convicted Cole and Robles of both securities crimes. Cole was also convicted of elder theft.

In 2000, Cole reviewed the trust of Nichols, who was 74 years old at the time of the trial. Cole told Nichols that he could put her money in a better investment than mutual funds. On April 12, Nichols invested $91,000 with Carlmont Capital for a three-year term. Cole discussed another investment with Nichols, but she did not have any more money to invest.

A few months later, Cole, accompanied by Robles, went to Nichols's residence and suggested she obtain a reverse mortgage on her house. Although Nichols was at first hesitant, Cole convinced her to proceed with a reverse mortgage. Nichols testified that Robles was "passive" and mostly listened to Cole during the meeting. On July 12, 2001, Nichols received a lump sum on a reverse mortgage for $122,000, and six days later, she invested $100,000 in a Pathway Strategies promissory note with a 10 percent interest rate. Cole told Nichols this was a no-risk investment and her $100,000 would "always be there" while also earning her monthly interest payments.

In 2002, Cole convinced Nichols to cash out her Carlmont Capital investment before it matured and invest the proceeds in Pathway Strategies. On April 23, 2002, after Cole and Robles terminated their business relationship, Nichols invested $25,000 in Cole's company, Investment Revolution Strategies. Cole did not discuss the risk of this investment with Nichols; he told her he would invest the money for her.

Also in April 2002, Nichols invested $50,000 in Pathway Management Group, a Nevada corporation formed by Cole and Robles two months earlier. At trial, Nichols could not remember whether Cole or Robles suggested she make this investment. In May 2002, Nichols followed Robles's suggestion that she transfer $75,000 she had in an IRA to Pathway Management Group.

Neither Cole nor Robles told Nichols that they were not licensed to sell securities in California; Nichols stated that if they had, she would have given more thought to investing with them. Nichols did not receive her principal back on her $100,000 investment in Pathway Strategies or her $25,000 investment in Investment Revolution

Strategies.[12] At one point, Nichols expressed her concern over the investments to Robles, who told her that he had $400,000 and could cover the amount of any loss she incurred. Robles later denied making this statement to Nichols.

(3) *Marian Goins* (counts 7 & 8 involving Cole)

The jury convicted Cole of both securities crimes in his dealings with Marian Goins.

In 2000, Cole updated the trust of Goins and talked to her about her investments. Goins, who did not have any experience in investing, told Cole she did not want to make any high risk investments. Goins, who was 74 years old at the time of the trial, invested with Cole because she trusted him and he told her she would get a better return. Cole did not tell Goins that he was not a licensed broker-dealer. In June 2000, Goins wrote checks for $41,000 and $61,000 to Carlmont Capital. Goins received a three-year promissory note at 9.25 percent interest. At the end of three years, Goins received her principal back.

Cole and Robles suggested Goins invest in Alpha Telcom. Initially, Goins was going to make the investment, but changed her mind after her daughter told her it was a bad idea.

(4) *Leonora High* (counts 10 & 11 involving Cole and Robles)

The jury convicted Cole and Robles of both securities crimes for their dealings with Leonora High.

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12 At the time of the trial, Nichols's accounts in Pathway Management Group were still open, and Nichols was receiving her quarterly interest payments.

In September 2000, Cole reviewed High's trust and discussed investments with her.[13] Robles also was present. Cole and Robles suggested High invest in Alpha Telcom, telling her they had invested $500,000 of their own money in Alpha Telcom. Cole and Robles did not discuss the risk of the investment and did not tell her that they were not licensed to sell securities in California. High had only $5,000 to invest, but Cole and Robles told her the minimum amount she could invest was $10,000. High borrowed money from her insurance policy to invest $10,000 in Alpha Telcom. On October 2, 2000, High executed a contract to purchase two pay telephones; Robles signed the contract as Alpha Telcom's "representative." At one point, High telephoned Cole and told him she wanted her money back. Cole said she could not get her principal back for 10 years. After four months, the interest payments stopped. Later, Cole and Robles sent High a letter informing her that Alpha Telcom had filed for bankruptcy.

(5) *Helen Labruzzi* (counts 52 & 53 involving Cole and Robles)

The jury convicted Cole and Robles of both securities crimes for their dealings with Helen Labruzzi.

In 2000, Cole was recommended to Labruzzi, who needed more money for living expenses and to help her children. Initially, Labruzzi, who was 85 years old at the time of the trial, invested her entire savings of $46,000 in Carlmont Capital; she received her interest on time and her principal was returned. Cole met with Labruzzi three or four

13 High's testimony from the 2004 preliminary hearing was read to the jury after the court found she was unavailable to testify at trial. At the time of the preliminary hearing, High was 77 years old.

times; Robles was present at some of these meetings. Cole told Labruzzi that he could arrange for her to get money out of her house. Cole set up a reverse mortgage and drafted a new will for Labruzzi.[14]

In late September 2000, Labruzzi invested $10,000 directly in Alpha Telcom. In October 2001, Labruzzi received a net sum of $124,896.76 from her reverse mortgage, which she invested in Pathway Strategies with the understanding that Pathway Strategies was to fully invest $124,000 for her. Neither Cole nor Robles discussed whether there would be any risk to her investments.

Labruzzi received payments of $1,000 for two months. When the payments stopped, Labruzzi could not reach Cole. Robles told her that he did not know what happened to her money, and he was doing his best to pay it back. Of the $124,000 that Labruzzi invested with Pathway Strategies, records showed $99,000 went into Cole and Robles's payroll account. Bank records also showed that after Labruzzi's $124,000 check was deposited, Pathway Strategies did not make any investments. Labruzzi never received back the money she invested in Pathway Strategies and Alpha Telcom.

Cole and Robles did not tell Labruzzi that they were not licensed to sell securities in California. Had they made that disclosure, Labruzzi testified that she would have "investigated." Labruzzi also testified that if she had understood the reverse mortgage she would not have taken it out on her house.

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14 In structuring the reverse mortgage, Cole put Labruzzi's house in his name. Later, an attorney for Labruzzi changed the beneficiaries to Labruzzi and her son and daughter.

(6) *Lisa Leginus* (counts 15 & 16 involving Cole and Robles)

The jury convicted Cole and Robles of both securities crimes for their dealings with Lisa Leginus.

Leginus met Robles in 1999 after she responded to an newspaper advertisement about investments. In 2000, Robles told Leginus he had found a good, sound investment for her. Subsequently, Cole and Robles went to Leginus's house and suggested she invest in an Oregon company selling and installing pay telephones (Alpha Telcom). Leginus told Cole and Robles that she needed to be very careful with her money and "absolutely could not lose this money." Leginus, who was 73 years old at the time of the trial, was initially skeptical because cell phones were so popular, but Cole and Robles said the pay telephones would be installed in the middle of the country where people did not use cell phones. Leginus testified that she thought Cole was angry about her hesitancy to invest; Cole told her: "[Y]ou can trust me, even my grandparents invested in this." Cole and Robles also said that her investment would be insured by a Florida bank.

On February 26, 2001, Leginus invested $30,000 in a Pathway Strategies promissory note with a 14 percent interest rate. Leginus understood the entire $30,000 would be invested in the pay telephones. Leginus received payments from Pathway Strategies for more than a year. After the payments stopped, Robles told her that he and Cole were splitting up as partners, and her funds were frozen. Robles also told her that they had not invested her money in the telephones; Robles did not tell her what they had done with her money.

Cole and Robles did not disclose to Leginus that they were not licensed to sell securities in California. Leginus said that if they had told her about their unlicensed status she would not have given them her "hard-earned money."

(7) *Marjorie Maroun* (counts 22 & 23 involving Cole and Robles)

The jury convicted Cole and Robles of both securities crimes for their dealings with Marjorie Maroun.

According to her testimony at the preliminary hearing, Maroun invested $70,000 in Alpha Telcom on October 18, 2000.[15] She did not receive back her principal. Cole and Robles did not tell Maroun that they were not licensed to sell securities in California. Maroun was 81 years old at the time of the 2004 preliminary hearing.

(8) *Henry and Helen Roemmich* (counts 45 & 46 involving Cole and Robles)

The jury convicted Cole and Robles of both securities crimes for their dealings with Henry and Helen Roemmich.

In February 2001, Schoeller helped the Roemmiches take out a reverse mortgage on their house. The Roemmiches received a lump sum of $135,000. Roemmich was 92 years old at the time of the trial. Shortly thereafter, Cole and Robles contacted Roemmich about investments. Cole and Robles advised Roemmich to invest $20,000 in

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15 In March 2000, Maroun had invested $25,000 in Carlmont Capital.

a restaurant, $20,000 in a viatical,[16] and $20,000 with his stockbroker. Roemmich followed this advice.

On February 5, Roemmich and his wife invested an additional $60,000 in a 38-month Pathway Strategies promissory note with an interest rate of 14 percent. Cole and Robles promised they would never stop paying on the investment. The Roemmiches received interest payments for more than a year. When the payments stopped, Roemmich contacted Robles. Robles did not explain what happened with the Roemmiches' money and eventually stopped taking his telephone calls. Roemmich was unable to contact Cole. The Roemmiches did not receive back the principal on the $60,000 investment in Pathway Strategies, but did receive back the principal on the investments in the restaurant and the viatical.

The Roemmiches had never invested money before. Cole and Robles told them they had been in business for 14 years and had never missed a payment. Cole and Robles did not discuss risk with the Roemmiches. Cole and Robles did not tell the Roemmiches that they were not licensed to sell securities in California; had the disclosure been made, the Roemmiches would not have invested with them.

(9) *Raymond Lovins* (counts 20 & 21 involving Cole and Robles)

The jury convicted Cole and Robles of both securities crimes for their dealings with Raymond Lovins.

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16 A viatical is a sale of the life insurance policy of a terminally ill person to an investor so that the insured has money for support prior to death. When the insured dies, the investor receives a portion, or all, of the beneficiary proceeds of the policy.

In 2001, Lovins responded to a Pathway Financial newspaper advertisement for investments yielding 12 percent interest and met with Cole and Robles in their office. Cole and Robles recommended investing in a telephone company that was putting pay telephones in rural areas of the country (Alpha Telcom). Cole said he had never missed a payment on a note before, the telephone company was very strong, and the investment was practically "foolproof." Because Cole and Robles had initially tried to sell him viaticals, Lovins assumed Pathway Financial was associated with life insurance companies and was therefore a strong, secure company.

On May 14, 2001, Lovins invested $20,000 in a 38-month Pathway Strategies promissory note with a 12 percent rate of interest. Lovins, who was 58 years old at the time of the trial, acknowledged that he signed a disclaimer of guarantee on the note, but testified he read it "pretty fast" and believed the provision concerned the distinction between Pathway Financial and Pathway Strategies. Lovins received interest payments for three or four months. When the payments stopped, Lovins discovered the Pathway business telephone had been disconnected and its office was empty. Robles later told Lovins that he and Cole were no longer partners, but he expected Lovins to receive checks soon. Lovins never received his principal back.

Cole and Robles did not tell Lovins that they were not licensed to sell securities in California. Had Cole and Robles disclosed this, Lovins would have thought harder about whether to invest with them.

(10) *Carol and Donald Peterson* (counts 48 & 49 involving Cole and Robles)

The jury convicted Cole and Robles of both securities crimes for their dealings with Carol and Donald Peterson.

At the time of the trial Carol Peterson was 68 years old and Donald Peterson was 70 years old. In April 2001, the Petersons responded to a newspaper advertisement for Pathway Financial offering a 12 percent return on investments and met with Cole and Robles in their business office. Cole and Robles said they would make bridge loans that were "absolutely safe" investments in companies they had investigated with due diligence. Cole and Robles did not specify the companies in which they would invest the Petersons' money. Carol Peterson recalled a discussion about a company that installed pay telephones and a company developing "[v]oice-over Internet" software. Robles told the Petersons: "You don't need to worry about your investment. This is absolutely safe. We've done the due diligence." They also said the District Attorney's office had looked at their business, and a Small Business Administration employee and a former FBI agent wanted to work for them.

In June 2001, the Petersons invested $90,000 in a 38-month Pathway Strategies promissory note with a 10 percent interest rate. When Carol Peterson asked Cole and Robles whether they needed to be licensed "by anybody," she was told that no license was required.

Following Cole and Robles's advice, the Petersons obtained a home equity loan for $208,000. On September 12, the Petersons made two more investments with Pathway Strategies—one for $100,000 and one for $67,000. In consideration for the $100,000 investment, the Petersons received a 38-month promissory note at 10 percent interest. The $67,000 promissory note provided the Petersons were to receive 10 percent interest plus 60 percent of any interest Pathway Strategies received over 14 percent.

Also in September, based on the advice of Cole and Robles, the Petersons invested $25,000 directly with NatureWell; Cole and Robles received a commission. Cole and Robles told the Petersons the value of the NatureWell stock would probably triple in three years. Carol Peterson had tried NatureWell's migraine headache medicine and contact lens products and thought they were very good.

The Petersons also invested $78,000 in a viatical purchased through Mutual .Benefits of Florida, a company promoted by Cole and Robles. The Securities and Exchange Commission issued a restraining order against Mutual Benefits of Florida, and none of this investment was returned to the Petersons.

In July 2002, the Petersons stopped receiving monthly interest payments on their investments. Over the next 12 months, Robles continued to tell Carol Peterson that he would find a way to bring the interest payments up to date through various income-generating plans. None of them came to fruition. Robles did not return Carol Peterson's telephone calls after July 31, 2003. The Petersons did not receive back the principal on their investments.

(11) *George Quintero* (counts 34 & 35 involving Cole and Robles)

The jury convicted Cole and Robles of both securities crimes for their dealings with George Quintero.

In 2001, Cole went to Quintero's home to review his trust. Cole asked Quintero, who was 77 years old at the time of the trial, if he was interested in other investments. Cole told Quintero that with a minimum investment of $25,000, he could invest in a promissory note that paid 8 percent interest or in a viatical.

In June 2001, Quintero went to Cole and Robles's office and invested in a 36-month viatical and a 14-month $25,000 Pathway Strategies promissory note with an interest rate of 8 percent. The 14-month term of the promissory note would allow Quintero to use the principal for his planned 50th wedding anniversary celebration in Europe. Cole and Robles told Quintero that the investment was risk-free. Cole and Robles did not tell Quintero that they were not licensed to sell securities in California. Quintero testified that such a disclosure would have "[a]bsolutely" made a difference in his decision to invest with Cole and Robles.

Quintero received interest payments for 10 months. When the payments stopped, Quintero telephoned and drove to Pathway's offices to no avail. Quintero was told that Cole and Robles had moved out the previous day. Cole later told him that Robles had fired him and kept the money. Robles told Quintero that he did not know what happened to his money, but he would try to return it. Quintero never received his principal on the investment.

(12) *Albert Flory* (counts 5 & 6 involving Cole and Robles)

The jury convicted Cole and Robles of both securities crimes for their dealings with Albert Flory.

In 2000, Flory met Cole and Robles after responding to an advertisement in the San Diego Union-Tribune about well-secured investments yielding interest payments exceeding 12 percent. Cole and Robles told Flory, who was 86 years old at the time of the trial, that they offered various investments and they would put his money in the one with the highest interest yield. Flory told Cole and Robles: "[If] you lose my money, you lose your life." Cole and Robles responded the risk was low; it was as "good as gold."

On July 24, 2001, Flory invested $60,000 in a one-year Pathway Strategies promissory note with a 12 percent interest rate. At the end of the year, Flory did not receive the principal back. Flory telephoned Cole and Robles, but their business telephone had been disconnected. Their office was empty. Robles later told Flory that he was trying to collect about $200,000 from other investments.

Cole and Robles did not tell Flory they were not licensed to sell securities in California. Robles showed Flory a card that indicated he was licensed in Nevada. Flory would have acted earlier to recoup his investment had he known that Cole and Robles did not have a license to sell securities in California.

(13) *Elvira and Feliciano DaSilveira* (counts 1 & 2 involving Cole)

The jury convicted Cole of both securities crimes for his dealings with Elvira and Feliciano DaSilveira.

In 2000, Cole reviewed the trust prepared by Schoeller for Elvira and Feliciano DaSilveira, who at the time of the trial were 56 years old and 62 years old respectively. Cole suggested they invest in Carlmont Capital. Cole told the DaSilveiras that it was a low or no-risk investment. In June 2000, the DaSilveiras invested $81,000 in Carlmont Capital and received their money back after the note matured on July 6, 2001.

In 2002, Cole told Elvira DaSilveira that if she invested in his company, Faith Holdings, she would receive a 10 percent return. Cole said the new investment was low or no risk. On July 1, the DaSilveiras transferred their life savings of $104,000 to Faith Holdings, believing the entire amount was to be invested in a credit card machine company. On August 5, a superior court judge ordered Cole's Faith Holdings bank account frozen; the DaSilveiras eventually received their money back.

(14) *Elizabeth Petersen* (counts 28, 29, 30 & 31 involving Cole)

The jury convicted Cole of residential burglary, elder theft and both securities crimes for his dealings with Elizabeth Petersen.

On July 30, 2002, Cole went to Petersen's house after she responded to a newspaper advertisement for Faith Holdings that promised a 10 percent return. Petersen, who was 80 years old at the time of the trial, told Cole that she had approximately $100,000 to invest. Cole suggested Petersen purchase a promissory note issued by Faith Holdings and indicated the money would be invested in a "mom and pop" trucking company, a rest home in Florida, and a company that marketed machines to process credit card purchases for supermarkets. Cole did not discuss the risk of these investments; he also did not tell Petersen that he was not licensed to sell securities in California.

Petersen decided to invest with Cole, who insisted that she obtain a cashier's check. Cole said he would return in a few hours after Petersen went to the bank.

Petersen wanted to check out Cole and was referred to the office of the Secretary of State. She left a message with the office. When Cole returned, Petersen gave him a cashier's check for $100,000, and he gave her a promissory note. After Cole left, someone from the office of the Secretary of State returned Petersen's call and informed her that Cole had lost his brokerage license. Petersen contacted the District Attorney's office.

Petersen telephoned Cole and told him that she wanted to invest another $100,000, and she and Cole set up an appointment for the following day. When Cole returned on July 31, two police detectives were in an adjoining room listening to the conversation between Cole and Petersen. Other police detectives were situated outside so they could arrest Cole when he left the house.

Cole brought another Faith Holdings promissory note for Petersen. In response to an inquiry from Petersen, Cole told her he did not have to be licensed because he was a principal in the corporation. When Petersen pointed out that the name of the company was not on the promissory note, Cole said he would retrieve a company stamp from his car, and promptly left the house. The detectives in the house did not have time to alert the detectives outside not to arrest Cole at that time. Cole was arrested outside Petersen's house.

On August 5, Faith Holdings' bank account was frozen by court order. Petersen's money was returned to her approximately one month later.

DISCUSSION

I. *Denial of Cole's Request to Represent Himself*

Cole contends the trial court committed reversible error by denying his request to represent himself; he claims the court premised this decision solely on Cole's refusal to complete a standard acknowledgement/waiver form entitled "Acknowledgment Concerning Right of Self-Representation."[17] The contention fails.

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[17] To determine whether a defendant understands the significance and consequences of a request for self-representation, the superior courts have devised standard waiver forms, prepared from suggestions set forth in *People v. Lopez* (1977) 71 Cal.App.3d 568, 572 to 574. (See *People v. Silfa* (2001) 88 Cal.App.4th 1311, 1321.)

In San Diego Superior Court, the form is entitled "Acknowledgement Concerning Right of Self-Representation," and gives the defendant various advisements that are to be acknowledged with initials and a signature. The form sets forth the charges and the maximum punishment that can be imposed upon conviction of the offense(s) and includes the following acknowledgements:

- No special treatment will be given to the defendant representing himself;
- All substantive and procedural rules of law must be followed;
- The defendant has a right to an attorney;
- The prosecution will be represented by an experienced and skilled attorney;
- The defendant representing himself will not have greater library privileges or extra time to prepare for motions or for trial;
- A special investigator for the defendant will not be provided unless the defendant can demonstrate a need for one;
- The defendant has the right to testify at trial but need not testify;
- Any disruptive behavior by the defendant will result in termination of the right to self-representation;
- The defendant cannot claim incompetency of representation in an appeal of the case; and
- The court advised the defendant that self-representation is almost always unwise.

On August 28, 2007, we granted the Attorney General's unopposed motion to take judicial notice of the "Acknowledgement Concerning Right of Self-Representation." (Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

Factual Background

On January 31, 2005, Gary Roberts, Cole's sixth counsel, asked the court to continue the trial—then scheduled to begin on March 7, 2005—to allow him time to adequately prepare.[18] Cole agreed to the continuance request, but also said he wanted to represent himself. The court continued the trial to May 23, 2005, and said it would consider Cole's self-representation request on February 4, 2005.

On February 4, Cole told the court that he wanted to represent himself with the assistance of an advisory counsel. During this hearing, the court inquired whether the prosecutor had filled out the charges on the standard "Acknowledgement Concerning Right of Self-Representation" form. Cole interposed: "I'm not signing that, so it's a moot point." Asked by the court why he refused to sign the form, Cole replied: "Because I don't believe, as an individual wanting to represent myself, I should sign a waiver of any sort. And I have looked at that, and there's several issues on that that I don't acquiesce to." The court told Cole the form contained all the necessary disclosures about self-representation and signing the form would show that Cole understood "the rights and obligations of self-representation." Referring to prior hearings—including those on the *Marsden* motions—and Cole's refusal to sign the form, the court also expressed concern over whether Cole could participate in the proceedings "in a manner that would lead to a

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18 Roberts was Cole's third appointed attorney; Cole also had had three retained attorneys. Up to that point, Cole had made two *Marsden* (*People v. Marsden* (1970) 2 Cal.3d 118) motions requesting the court appoint new counsel. The most recent *Marsden* motion, which sought to relieve Roberts, was heard January 12, 2005.

fair and equitable trial for all parties, as well as following court procedures that would not lead to disruption." Ultimately, the court found the self-representation request was equivocal because it was conditional on the appointment of advisory counsel and, on this basis, the court denied Cole's request to represent himself. Cole has not challenged this ruling on appeal.

The issue of self-representation was revisited on March 3, when Cole again asked to represent himself. At this hearing, he no longer sought appointment of an advisory counsel. During the hearing the following colloquy occurred:

> "THE COURT: Mr. Cole, is it your request still for me to allow you to represent yourself?
>
> "DEFENDANT COLE: Yes, Your Honor.
>
> "THE COURT: And Mr. Cole, have you filled out the *Lopez* waiver form?
>
> "DEFENDANT COLE: No, sir.
>
> "THE COURT: Why have you not filled that out?
>
> "DEFENDANT COLE: I have no intentions of signing a waiver.
>
> "THE COURT: Why is that?
>
> "DEFENDANT COLE: You want me to go point by point?
>
> "THE COURT: I want you to explain to me, [to the] best of your ability, why you won't sign the waiver form.
>
> "DEFENDANT COLE: Well, after I read *Faretta*, the case, I don't see that there's any requirement where I'm required to sign or give a waiver of any of my constitutional rights. [¶] I understand that it's your responsibility to make sure that I understand the severity of the decision, and that I'm going to be treated as any other attorney and will be required to follow the procedures and whatnot; but as far as

> signing a waiver, I don't believe that that's anything that I'm required to do. And so I'm declining to sign a waiver, but I do want—I still want to represent myself, however.
>
> "THE COURT: Mr. Cole, I appreciate your request to represent yourself. I am, however, not going to allow that to occur. [¶] And the reason being is that your request is with conditions, and those conditions that you are imposing—are trying to impose include a failure to sign the form that has been upheld by California law. Your interpretation of *F[a]rretta* and my interpretation differ. [¶] I would also suggest your failure to sign, which is similar to the previous hearing we had on your request to represent yourself, indicates to me that really what you're trying to do is to obstruct these proceedings. And I'm going to suggest to you that it's further evidence, in my mind, that the—your request would create delay and confusion in this process. [¶] And because of your failure to acknowledge the requirements that are set up by *Lopez* and *F[a]retta* by signing the form, I'm going to refuse and deny your request. [¶] Mr. Cole, you've made your record, and you've now made it twice at a previous hearing and today. At this point I'm denying the request. At—
>
> "DEFENDANT COLE: You can't do that, Your Honor.
>
> "THE COURT: Mr. Cole, yes, I can. You have recourse through the appellate process if you believe that my decision is wrong. I can deny it.
>
> "DEFENDANT COLE: If I sign the waiver, you'll give it to me?
>
> "THE COURT: I'm not getting into a discussion with you. I've explained to you my decision. I explained it to you last time. And this conversation now ends. [¶] . . . [¶]
>
> "DEFENDANT COLE: I'll be damned."

Legal Principles

The Sixth Amendment explicitly grants a criminal defendant the right to counsel, and, as interpreted by the United States Supreme Court in *Faretta*, *supra*, 422 U.S. 806 at pages 819 to 820 and 835 to 836, it also grants a defendant the right personally to defend himself or herself. (See *People v. Dunkle* (2005) 36 Cal.4th 861, 908.) An accused's right to counsel and right of self-representation are mutually exclusive. (*People v. Marshall* (1997) 15 Cal.4th 1, 20.) While the right to counsel is "self-executing," the right of self-representation is not; the defendant must "make a timely and unequivocal assertion of the right of self-representation." (*Id.* at pp. 20-21.)

A defendant's request for self-representation is effectively a waiver of the right to counsel and must be made knowingly, intelligently, voluntarily and unequivocally, after being informed of the dangers and disadvantages of self-representation. (*Faretta*, *supra*, 422 U.S. at pp. 835-836; *People v. Valdez* (2004) 32 Cal.4th 73, 98-99; *People v. Dunkle*, *supra*, 36 Cal.4th at p. 908.) The court must be certain that the defendant "'knows what he is doing and his choice is made with eyes open.'" (*Faretta*, *supra*, at p. 835.) "[T]he waiver of counsel must be knowing and voluntary—that is, the defendant must 'actually . . . understand the significance and consequences' of the decision, and the decision must be 'uncoerced.'" (*People v. Stewart* (2004) 33 Cal.4th 425, 513, italics omitted.) "The right to representation by counsel persists until a defendant affirmatively waives it, and courts indulge every reasonable inference against such waiver." (*People v. Dunkle*, *supra*, at p. 908.)

As articulated by our Supreme Court in *People v. Marshall*, *supra*, 15 Cal.4th at page 23: "The court faced with a motion for self-representation should evaluate not only whether the defendant has stated the motion clearly, but also the defendant's conduct and other words. Because the court should draw every reasonable inference against waiver of the right to counsel, the defendant's conduct or words reflecting ambivalence about self-representation may support the court's decision to deny the defendant's motion. A motion for self-representation made in passing anger or frustration, an ambivalent motion, or one made for the purpose of delay or to frustrate the orderly administration of justice may be denied."

Analysis

Faretta and its progeny make clear that a defendant's self-representation request is properly denied when the request is: equivocal and/or conditional; not accompanied by a waiver of the right to counsel that is voluntarily, knowingly and intelligently made; or made for the purpose of delay or to frustrate the orderliness of the proceedings.

Contrary to Cole's claims, the court did not deny his *Faretta* request solely because he refused to sign the *Lopez* form. Rather, the record shows the court based its denial on at least two proper factors: Cole's effort to frustrate and disrupt the proceedings; and his refusal to waive his right to counsel.

In *People v. Welch* (1999) 20 Cal.4th 701, 734, the California Supreme Court made clear that a trial court may deny a *Faretta* motion when it reasonably believes, based on the defendant's prior conduct, that self-representation will cause disruption in the proceedings. "'The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law'" that are "critical to the viable functioning of the courtroom." (*Ibid*., quoting *Faretta*, *supra*, 422 U.S. at p. 835, fn. 46.)

The record supports the court's stated concerns about Cole's ability to conduct himself in a way that would not disrupt the proceedings. By the time of the March 3 hearing, Cole's actions made clear that he expected special treatment and that he was intent on delaying the proceedings. At his arraignment, Cole interrupted the proceedings to object that he had not been advised of his rights even though his counsel indicated otherwise. Then, when the court started to make the advisement, Cole interrupted again and said: "I'm not going to proceed with that. I need to have a discussion with you first, sir." Additionally, although repeatedly admonished to speak through counsel, Cole ignored the court's directive and insisted on speaking directly with the judge.

Cole's interest in delaying the court proceedings was also evident in his numerous requests to change counsel and the inevitable continuance(s) associated with each change. Roberts was Cole's sixth attorney since the proceedings began. At the time of his second self-representation request, Cole had had three retained counsel, three appointed counsel, two *Marsden* hearings, and two *Faretta* hearings. When a defendant "juggl[es] his *Faretta* rights with his right to counsel interspersed with *Marsden* motions," the defendant can be seen as attempting "'"to obstruct the orderly administration of justice."'" (*People v. Williams* (1990) 220 Cal.App.3d 1165, 1170.)

Cole's attitude toward the "Acknowledgement Concerning the Right of Self-Representation" was further evidence that Cole was attempting to not only frustrate the orderliness of the proceedings, but to interfere with the court's obligation to confirm he was knowingly giving up his right to appointed counsel. When the court attempted to discuss the form with Cole on February 4, he said he did not "acquiesce" on several points on the form. Cole took a similar attitude on March 3, when he again made clear he did not intend to waive any rights and insisted that based on his reading of *Faretta*, his request for self-representation did not require him to "give a waiver of any of [his] constitutional rights."

A voluntary, knowing and intelligent waiver of the right to counsel is a prerequisite to self-representation. As our Supreme Court has pointed out, the right to counsel and the right to self-representation are mutually exclusive. (*People v. Marshall*, *supra*, 15 Cal.4th at p. 20.) "The right to representation by counsel persists until a defendant affirmatively waives it, and courts indulge every reasonable inference against such waiver." (*People v. Dunkle*, *supra*, 36 Cal.4th at p. 908.) "[I]n order to protect the fundamental constitutional right to counsel, one of the trial court's tasks when confronted with a motion for self-representation is to determine whether the defendant truly desires to represent himself or herself." (*People v. Marshall*, *supra*, at p. 23.)

On two occasions the court attempted to use the standard form to confirm that Cole understood the responsibilities and consequences of the right to forego counsel and thereby had made a voluntary and knowing waiver of his right to counsel. But on both occasions Cole interrupted this process and remained adamant that he was not going to acquiesce to certain requirements. As a direct result, the court had no way of knowing which issues Cole found unacceptable. Was it the fact that he would not be given special treatment because of his pro. per. status? That he must follow all substantive and procedural rules of law? That he would not automatically be provided with a special investigator? That he gave up the right to raise ineffective assistance of counsel on appeal with respect to his self-representation? Or was it that he waived his right to counsel? Because of Cole's own conduct, the court was left without a valid waiver of the right to counsel from a defendant claiming he wanted to represent himself, and no ability to determine if the request was knowingly and intelligently made.

We agree that a denial of a *Faretta* request cannot be based *solely* on the refusal to sign a written waiver. (See *People v. Silfa*, *supra*, 88 Cal.App.4th at pp. 1321-1322 [although standard acknowledgement/waiver form has been approved as a tool to inform defendant of dangers of self-representation and to ensure a knowing and voluntary waiver of counsel, the form is not "a test that a defendant seeking self-representation must pass"].) Further, the standard "*Lopez*" form is not the only way for a trial court to determine whether a defendant's request to represent himself or herself is knowingly and intelligently made. The court can obtain a valid oral waiver of the right to counsel if proper advisements are made and the defendant demonstrates an understanding of the risks and responsibilities of self-representation.

But when a defendant refuses to allow the court to undertake its obligation to confirm that his or her waiver was voluntarily, knowingly and intelligently made, as Cole did here, there cannot be a valid waiver. By his obstructionist conduct on February 4 and March 3, Cole made it clear that an attempt to elicit a valid oral—as opposed to written—waiver would have been futile as well.

Finally, we reject Cole's claim that because he did not engage in the same type of misconduct as the defendant in *People v. Welch*, *supra*, 20 Cal.4th at page 735, who "belligerently denied awareness of a calendar date that was set in his presence; [] turned his back on the trial court when addressing it; [] interrupted the trial court several times to argue what the court had declared to be a nonmeritorious point; [] accused the court of misleading him; [] refused to allow the court to speak and [] refused several times to follow the court's admonishment of silence," the court erred in denying his *Faretta* motion. Admittedly, the defendant in *Welch* caused more disruption in the courtroom than Cole, but this is not determinative. The standard is not whether a defendant's misconduct and/or manipulative behavior rivals that of disorderly, manipulative defendants in other cases. Rather, the court must analyze each case individually and carefully evaluate the nature and import of the defendant's behavior. Although Cole's conduct was not belligerent and did not present a security concern, he used a more subtle way to disrupt and delay the proceedings: changing retained counsel, requesting changes in appointed counsel; ignoring the court's admonishment to allow his counsel to speak on his behalf; and insisting on self-representation but interfering with the court's ability to determine the validity of that request. (See *People v. Carson* (2005) 35 Cal.4th 1, 10.) The trial court could reasonably infer from the defendant's aggregate conduct that self-representation would cause disruption. (See *People v. Welch*, *supra*, at p. 735.)

II. *Legality of Search of Cole's Vehicle*

After Cole left Elizabeth Petersen's residence, police arrested Cole and searched his vehicle incident to the arrest. Cole contends the police illegally searched his vehicle, claiming the officers lacked probable cause to arrest him. Accordingly, Cole maintains the court erred by denying his motion to suppress evidence seized from the vehicle. Further, Cole contends that upon remand the court must determine whether evidence obtained by police when they searched his residence with a warrant should be suppressed as derivative evidence or "fruit of the poisonous tree" (*Wong Sun v. United States* (1963)

371 U.S. 471, 488) that was tainted by the unlawful arrest and illegal vehicle search. Both contentions are unavailing.

Factual Background

On July 30, 2002, Petersen gave Cole $100,000 to invest in Faith Holdings after seeing a newspaper advertisement for the firm. In return, Petersen received a promissory note. Later that same day, Petersen spoke with state officials, learned that Cole was not licensed and contacted the police. The case was assigned to Detective Mark Michel of the San Diego Police Department's Elder Abuse Division. After speaking with Petersen, Michel ascertained that Cole did not have a license to conduct business in the city of San Diego, was not licensed to sell securities in California and had been ordered by the DOC not to conduct business as a securities or investment broker within California. Michel also learned that Petersen had made an appointment with Cole to return to her residence at 1:00 p.m. on July 31 to invest another $100,000 with him.

When Cole arrived at Petersen's residence on July 31, Michel and another detective were already inside the house so they could monitor the transaction, and a number of detectives and officers were outside. The plan anticipated the officers outside would arrest Cole when he left the residence after completing his transaction with Petersen. As Cole reviewed the second transaction with Petersen, he acknowledged that he did not have a license to sell securities, but said he did not need one because he was the owner of the business. At one point, Petersen questioned why the company name was not on the promissory note; Cole said he would remedy this by getting a business stamp that he had in his vehicle and promptly went to get the stamp. Cole moved quickly, before Michel could advise the officers outside not to take Cole into custody at that time, and the officers arrested Cole as he left the house, as originally planned. Michel testified he arrested Cole for grand theft of an elder. Michel testified that he also believed he had probable cause to arrest Cole for selling securities without a broker-dealer license. Michel explained: "As those [Corporation Code] violations had been explained to me on the telephone, and as I had looked in the Corporations Code and in the Penal Code that morning[,] [i]t was apparent to me that this element had been met[.] [B]ut I know from previous experience that just meeting the element of a crime doesn't always guarantee prosecution. Before I charged him with those particular sections, I wanted to consult again with the Department of Corporations."

The trial court found Michel used reasonable, objective standards to establish probable cause to arrest Cole and denied the suppression motion.

Legal Principles

In reviewing the denial of a motion to suppress evidence, we apply well-settled law. First, we review the record in the light most favorable to the ruling below and defer to trial court's findings of fact, whether express or implied, if they are supported by substantial evidence. Second, we "independently apply the proper constitutional standards to those facts." (*People v. Valenzuela* (1999) 74 Cal.App.4th 1202, 1206-1207.) Whether a police officer acted reasonably under the established facts is a question of law subject to the appellate court's independent review. (*People v. Williams* (1988) 45 Cal.3d 1268, 1301.)

If the officers had probable cause to arrest Cole, the search of the vehicle would have been justified as a search incident to a lawful arrest. (*People v. Superior Court* (1970) 3 Cal.3d 807, 812-813.) Police officers can arrest a person without a warrant if the officers have probable cause to believe that the person arrested has committed a felony, regardless of whether a felony, in fact, has been committed. (Pen. Code, § 836, subd. (a)(3).)

Probable cause generally has been defined as a state of facts that would lead a reasonable officer of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that a crime has been or is being committed. (*People v. Ingle* (1960) 53 Cal.2d 407, 412.) There is no absolute test for probable cause to make a warrantless arrest; each case must be decided on its own facts and under the totality of the circumstances present at the time of the arrest. (*People v. Mims* (1992) 9 Cal.App.4th 1244, 1250.) Furthermore, when an arrest is lawful, it is proper to make a reasonable search, and the evidence found is admissible—even if it relates to a crime that is different from the one for which the arrest is made. (*People v. Goldberg* (1984) 161 Cal.App.3d 170, 179.)

Analysis

On this record, a reasonable police officer in Michel's situation could honestly and strongly suspect that Cole had committed a crime and was in the process of committing another. Based on his own investigation, Michel knew that Cole did not have a license to sell securities or investments in the state of California, and had been ordered not to conduct business as a securities or investment broker. Michel also had obtained information from Petersen about the previous day's transaction in which she had invested $100,000 in Faith Holdings in exchange for a promissory note with a double-digit rate of interest. As a crime victim and witness, Petersen was a citizen-informant and her information was presumably reliable. (See *People v. Thompson* (2006) 38 Cal.4th 811, 819; *People v. Hill* (1974) 12 Cal.3d 731, 761, overruled on another ground in *People v. DeVaughn* (1977) 18 Cal.3d 889, 896, fn. 5.) Moreover, Cole had returned to Petersen's house on July 31 to conduct a second, similar transaction. This constituted probable cause to justify the warrantless arrest of Cole; it far exceeded "'"mere suspicion"'" as Cole urges. At the very least, there was strong evidence that Cole was selling a security without the required license.

Cole makes too much of the point that he was arrested earlier than Michel had anticipated; as Cole puts it, he was arrested "prematurely during a bungled sting operation." Relying on Michel's testimony that if he had had more time to radio the officers outside he would have told them not to arrest Cole as he left the house, Cole argues that he was arrested before probable cause was established.

Michel's preferred timing of the arrest is irrelevant with respect to whether there was probable cause to support the arrest. As we have explained, the police had probable cause to arrest Cole before the second transaction with Petersen was consummated based on the first transaction. Cole is mistaken when he characterizes the arrest as "unlawful" and as "occurring prior to the further development of any probable cause."

It also is of no import in determining probable cause whether Michel or the officers outside the residence arrested Cole. "[O]fficers can make arrests based on information and probable cause furnished by other officers." (*People v. Ramirez* (1997) 59 Cal.App.4th 1548, 1553.) "[W]hen police officers work together to build 'collective knowledge' . . . , the important question is not what each officer knew . . . , but how valid and reasonable the probable cause was that developed in the officers' collective knowledge." (*Id*. at p. 1555.)

Cole argues that when Michel told him he was being arrested for grand theft and elder abuse there was "no reasonable factual basis to effect an arrest for theft" because Michel could not have "discerned that Cole intended to steal Petersen's money, as opposed to intending to invest and pay her interest on it." Again, Cole is mistaken.

"[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. By hypothesis, therefore, innocent behavior will frequently provide the basis for a showing of probable cause; to require otherwise would be to *sub silentio* impose a drastically more rigorous definition of probable cause than the security of our citizens' demands." (*Illinois v. Gates* (1983) 462 U.S. 213, 244, fn. 13; see also *People v. Costello* (1988) 204 Cal.App.3d 431, 446.)

Cole tries unsuccessfully to bootstrap Michel's testimony that the detective was not familiar with the Corporations Code violations to attack the finding of probable cause with respect to selling securities without a broker-dealer license. "'It is not the actual state of the officer's mind that is determinative. It is the circumstances that determine the right to arrest, and if they be such as to constitute reasonable cause for believing that a felony has been committed the officer may arrest, even though he has some doubt about the matter.'" (*People v. Reed* (1962) 202 Cal.App.2d 575, 578.)

We find no merit in Cole's challenges to the probable cause finding and the legality of his arrest. Since the arrest was lawful, the search of Cole's vehicle was legal as a search incident to a lawful arrest. (See *People v. Superior Court*, *supra*, 3 Cal.3d at pp. 812-813.) Further, since neither the arrest nor the vehicle search was illegal, there was no fruit of the poisonous tree to taint subsequent searches. The issue need not be revisited on remand.

III. *Sufficiency of Evidence of Burglary*

In count 28 of the second amended information, Cole was charged with residential burglary (Pen. Code, §§ 459/460) in that he "unlawfully enter[ed] a building occupied by ELIZABETH PETERS[E]N with the intent to commit theft." Cole challenges his burglary conviction, claiming there was insufficient evidence that he entered Petersen's house with the specific intent to deprive her of property (money), which is an element of theft.[19] Cole is mistaken.

Burglary is defined by statute as the entry of a building "with intent to commit grand or petit larceny or any felony." (Pen. Code, § 459.) Thus, the two elements of entry and the felonious intent are not only necessary, but sufficient to complete the crime of burglary, whether or not the intended felony is actually committed. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041-1042.) The burglary or entry is a means of

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19 The jury found Cole and Robles not guilty of burglary counts involving the Roemmiches and Correia. The jury was deadlocked on the remaining burglary counts—those involving Goins, Leginus and Labruzzi—and a mistrial was declared on those counts.

facilitating the commission of the theft or felony. (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1246-1248.) The defendant's intent to commit the crime must exist at the time of entering the building. (*People v. Hill* (1967) 67 Cal.2d 105, 119.)

For property to be stolen or obtained by theft it must be taken with a specific intent—namely, "the intent to permanently deprive the owner of possession of the property." (*People v. Avery* (2002) 27 Cal.4th 49, 54, italics omitted.) The taking of the property of another is not theft absent this intent. (*People v. Butler* (1967) 65 Cal.2d 569, 573, overruled on another point in *People v. Tufunga* (1999) 21 Cal.4th 935, 939.) The specific intent with which an act is performed is a question of fact. (*People v. Kranhouse* (1968) 265 Cal.App.2d 440, 449.) "Because intent is rarely susceptible of direct proof, it may be inferred from all the facts and circumstances disclosed by the evidence. [Citations.] Whether the entry was accompanied by the requisite intent is a question of fact for the [fact finder]. [Citation.] 'Where the facts and circumstances of a particular case and the conduct of the defendant reasonably indicate his purpose in entering the premises is to commit larceny or any felony, the conviction may not be disturbed on appeal.'" (*People v. Kwok, supra*, 63 Cal.App.4th at p. 1245.)

"'In reviewing the sufficiency of evidence . . . , the question we ask is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."'" (*People v. Young* (2005) 34 Cal.4th 1149, 1175, italics omitted.) As an appellate court, we "'must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) "This standard applies whether direct or circumstantial evidence is involved." (*People v. Catlin* (2001) 26 Cal.4th 81, 139.)

If the verdict is supported by substantial evidence—that is, evidence which is reasonable, credible, and of solid value—we accord due deference to the verdict and will not substitute our evaluations of the witnesses' credibility for that of the trier of fact. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1078.) A conviction will not be reversed for insufficient evidence unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" the conviction. (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

On this record, we find substantial evidence that Cole committed residential burglary by entering Petersen's residence and taking the $100,000 cashier's check with the specific intent to steal Petersen's money—that is, with the intent to permanently deprive Petersen of her property.

In July 2002, when Cole solicited Petersen's investment in Faith Holdings, Cole's business was on the brink of financial disaster. Faith Holdings had no investments. Over the past seven months interest payments owed by Cole's businesses to earlier investors—Leginus, Quintero, Correia, the Petersons, the Roemmiches and Labruzzi—had stopped. Cole was unable to return the principal owed to Flory and Quintero as their investments matured and became due. Despite this dismal record, Cole was running newspaper advertisements promising 10 percent return on investments that were "TOTALLY PROTECTED from the day to day stock market volatility."

Moreover, by this time, the DOC had issued Cole a cease and desist order to stop selling securities. Cole had used the money invested by Nichols, who was a recent investor, in Cole's other company, Investment Revolution Strategies, for consumer purchases and expenses rather than putting the money in a viable investment.

A jury reasonably could deduce that Cole, who was in financial straits and had used money from a recent investor for personal expenses instead of investing it, was intending to take and permanently deprive Petersen of her money, or at least some portion of it, when he entered her residence and left with her cashier's check for $100,000 on July 30, 2002. This specific intent to commit theft is further bolstered by Cole's actions after Petersen's $100,000 investment was deposited in a Bank of America account and subsequently frozen by court order. In a letter dated August 13, 2002, Cole requested the freeze be lifted because the money was needed "for critical corporate operations; office rent, advertising and licensing." The jury reasonably could find that Cole did not intend to invest Petersen's money; he planned to use the money as if it were his own to extricate himself from the financial crisis he had put himself in.

Cole points to contrary evidence, presented through business associate David Svec, that Cole was intending to invest Petersen's money in a company whose business was to install credit card machines in retail stores. The jury was free to reject the defense theory that Cole intended to invest Petersen's money in a legitimate business. "It is the exclusive function of the trier of fact to assess the credibility of witnesses and draw reasonable inferences from the evidence." (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330.)

IV. *Sufficiency of Evidence of Elder Abuse by Theft*

Cole was convicted of two counts of committing elder abuse by theft, one involving Nichols and the other involving Petersen. Cole challenges these convictions, contending there was insufficient evidence he had the specific intent to permanently deprive the victims of their money. We disagree.

A person commits elder abuse by theft when he or she takes property worth more than $400 from a person whom he or she knows or reasonably should have known is at least 65 years old with the specific intent to permanently depriving the elderly person of his or her property. (Pen. Code, § 368, subds. (d), (g); *People v. Avery*, *supra*, 27 Cal.4th at p. 54.)

As explained in Part III, *ante*, there was substantial evidence that Cole had the specific intent to permanently deprive Petersen of her money.

Similarly, there was substantial evidence that Cole had the specific intent to permanently deprive Nichols of her money.

On April 23, 2002, Nichols invested $25,000 in Investment Revolution Strategies. Cole told Nichols he would invest the money for her. The next day Nichols's check and another $5,000 check were deposited in the Investment Revolution Securities bank account. The previous account balance was $110. Subsequently, numerous disbursements from this account were made; none of them involved an investment. A forensic accountant testified that $8,458 was disbursed for credit card purchases, including $1,316 to a BMW dealer. Another $20,000 was disbursed from the account on May 7, but the forensic accountant could not determine what that money was used for.

As with Petersen, it was significant that at around this time, Cole's business affairs had begun to unravel. Interest payments due to Leginus, Lovins and Correia had stopped. A jury could reasonably infer that Cole intended to use Nichols's money for his own purposes and not to make a legitimate investment for her.

V. *Challenges to the Convictions for Selling Securities Without a Broker-Dealer License (§ 25210)*

Cole, joined by Robles, contends the convictions for selling securities without a broker-dealer license (§ 25210) must be reversed on three grounds. With respect to counts 8, 11 and 23 (involving investments with Carlmont Capital and/or Alpha Telcom), Cole claims he and Robles did not know these investments were securities. Second, Cole maintains the remaining counts (involving investments with the Pathway entities, Faith Holdings, and Investment Revolution Strategies) must be reversed because he and Robles were not broker-dealers within the statutory definition, and even if their activities fell within the statutory definition there was insufficient evidence to support this factual finding. Third, Cole maintains all of the convictions for violating section 25210 must be reversed because the court's instructional errors (a) reduced the crime to a strict liability offense, (b) deprived them of a mistake of law defense, and (c) eliminated the affirmative defense of a good faith belief that one is exempted from the licensing requirement of section 25210. For reasons we shall explain, we agree instructional error eliminated their good faith affirmative defense and conclude the error was prejudicial as to certain counts. We reject the other claims.

General Legal Principles

In order to assess the validity of these contentions, we first address the mental states required to establish a criminal violation of section 25210 and next examine affirmative defenses.

Section 25210 was enacted as part of a comprehensive reform of California's securities laws passed by the Legislature as the Corporate Securities Law of 1968 (the Corporate Securities Law). (§ 25000 et seq.; see generally 1 Marsh & Volk, Practice Under the Cal. Securities Laws (2007) § 1.01 et seq. (Marsh & Volk).) The primary objective of the Corporate Securities Law was the "creation of a balanced regulatory scheme to cope with the problems of modern securities markets in California." (Marsh & Volk, *supra*, § 1.01, p. 1-3.) As is relevant here, all offers and sales of securities in California must be qualified with the Commissioner of the DOC (the Commissioner) unless specifically exempted. (§ 25110.) Only broker-dealers may sell securities, unless exempted. (§ 25210.) Deceptive practices, such as utilizing false or misleading statements in the purchase or sale of securities, are prohibited. (§ 25401.)

Section 25210 provides that unless statutorily exempted, "no broker-dealer shall effect any transaction in, or induce or attempt to induce the purchase or sale of, any security in this state unless the broker-dealer has first applied for and secured from the commissioner a certificate, then in effect, authorizing that person to act in that capacity." (§ 25210, subd. (a).) A violation occurs when an individual acting in the capacity of a broker-dealer (as defined by statute) sells a security (also defined by statute) without the requisite certificate (license). The focus of this section is directed at the individual acting in the capacity of a broker-dealer, as opposed to those sections (i.e., § 25110) that focus on the nature of the instrument sold to the public. The license requirement is designed to regulate the conduct of those selling securities, thereby protecting the public against unscrupulous operators.

Section 25540, subdivision (a), sets forth the criminal sanctions for violations of section 25210. It provides: "Except as provided for in subdivision (b), any person who *willfully* violates any provision of this division, or who *willfully* violates any rule or order under this division, shall upon conviction be fined not more than one million dollars ($1,000,000), or imprisoned in the state prison, or in a county jail for not more than one year, or be punished by both that fine and imprisonment; but no person may be imprisoned for the violation of any rule or order if he or she proves that he or she had no knowledge of the rule or order." (Italics added.)[20]

There is little authority examining the mental state required for criminal violations of section 25210. We find guidance in two California Supreme Court cases which address this issue in related statutes: *People v. Simon* (1995) 9 Cal.4th 493 (*Simon*), dealing primarily with misrepresentations in the sale of securities (section 25401); and *People v. Salas* (2006) 37 Cal.4th 967 (*Salas*), dealing primarily with the sale of unregistered or unqualified securities (section 25110).

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20 Section 25540, subdivision (a) sets forth the punishment for nonfraudulent violations of the Corporate Securities Law. Fraudulent violations, such as making misrepresentations in the sale of securities (§ 25401), are punishable by a maximum $10 million fine and/or imprisonment for two, three or five years. (§ 25540, subd. (b).)

In the seminal case of *Simon,* the high court analyzed whether section 25401, which prohibits the sale or purchase of securities by means of written or oral communications containing materially false statements or omissions, requires a culpable mental state. The court concluded that it did, rejected the contention that section 25401 is a strict liability crime, and placed on the prosecution the obligation of showing the defendant had guilty knowledge that the statements he or she made were false. (*Simon, supra,* 9 Cal.4th at pp. 507-522.) The court reached these conclusions even though the statute itself does not expressly require knowledge of the false or misleading nature of a statement or omission to disclose.

In reaching its conclusion that violation of section 25401 requires a culpable mental state, the *Simon* court relied on several factors. First, it noted that section 25540, the section that sets forth the criminal penalties for violations of the Corporate Securities Law, proscribes only "'willful'" violations. Such language, the court pointed out, typically connotes a crime is a general intent crime—not a strict liability crime—and observed that general intent crimes ordinarily required mens rea, scienter or wrongful intent. (*Simon, supra,* 9 Cal.4th at pp. 507, 519.) Second, the *Simon* court recognized that the imposition of criminal liability without the requirement of criminal intent or criminal negligence is the exception and is usually reserved for a crime aimed at "protect[ing] public health and safety and [one where] the penalties are relatively light." (*Id*. at p. 521.) Section 25401, it observed, does "not involve conduct which threatens the public health or safety" and the punishment for a violation of the statute, prison and substantial fines, is not a light one. (*Simon, supra,* at p. 521.) Third, the legislative history strongly reflected an intent to impose criminal liability only for *intentional* misstatements in the sale of securities. (*Id*. at p. 513.) Fourth, the *Simon* court applied the rule of leniency: "'The defendant is entitled to the benefit of every reasonable doubt,'" including questions arising from "'the construction of language in a statute.'" (*Id*. at pp. 517-518.)[21]

After rejecting the notion that section 25401 is a strict liability crime, the *Simon* court further determined that section 25401 required a showing that the defendant had "knowledge of the falsity or misleading nature of a statement or of the materiality of an omission, or criminal negligence in failing to investigate and discover them" and made clear that guilty knowledge is an element of the crime. (*Simon*, *supra*, 9 Cal.4th at p. 522.)[22] In reaching this conclusion, the court relied heavily on a related section which permits private individuals to seek tort damages for violations of section 25401. (§ 25501.) The court emphasized that although private actions are allowed, an injured investor is entitled to damages "*only* if the seller was aware of or was negligent in failing to be aware that his representations were misleading." (*Simon*, *supra*, at p. 516; § 25501.) The court found it highly unlikely the Legislature intended to require knowledge of the falsity of a statement or materiality of an omission for recovery in a

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21 The *Simon* court also justified its holding on other factors unique to section 25401, and therefore not relevant to an analysis of section 25210. (See *Salas*, *supra*, 37 Cal.4th at p. 978.)

22 Although the six to one majority in *Simon* did not expressly label section 25401 a "specific intent crime," the effect was the same, as the lone dissenter noted. (*Simon*, *supra*, 9 Cal.4th at p. 524 (dis. opn. of Mosk, J.).)

civil action while allowing imposition of substantial criminal penalties (at that time prison and $10,000 fine) on the seller of securities regardless of the seller's knowledge that his or her statements were false or misleading. (*Simon, supra*, at p. 517.) "We presume the Legislature did not intend to enact a statute of doubtful validity. If knowledge or criminal negligence is not an element of [section 25401], criminal penalties would be imposed for conduct less culpable than that for which recovery in a private civil action is not permitted, an unreasonable application of the statutory scheme." (*Id*. at p. 522.)

A decade after *Simon*, our Supreme Court in *Salas*, *supra*, 37 Cal.4th at page 981, revisited the Corporate Securities Law and applied the teachings of *Simon* to section 25110, which prohibits any person from selling unregistered or unqualified securities. The court held section 25110 is not a strict liability crime and required a showing of criminal culpability. The *Salas* court reiterated *Simon*'s observation that mens rea generally attaches to criminal offenses, except for those limited situations involving public health or safety and imposing relatively light penalties. The *Salas* court concluded this general rule applied to section 25110, noting that section 25110, like section 25401, does not relate to public health and safety, and it imposes severe punishment—up to a $1 million fine and a three-year prison term. (*Salas, supra,* at p. 978.) The *Salas* court also rejected the Attorney General's argument that *Simon* should be overruled and pointed out that the basic principles that led the *Simon* court to find section 25401 was not a strict liability offense are still valid and apply equally to section 25110. (*Salas, supra,* at p. 979.) "In *Simon*, we invited the Legislature to clarify which criminal violations of section 25540, enacted as part of the Corporate Securities Law of 1968—which included both sales by misrepresentation or omission (the issue in *Simon*) and sales of an unregistered security (the issue here)—'are strict liability offenses and what mental states are elements of those which require scienter.' (*Simon*, *supra*, 9 Cal.4th at p. 510, fn. 13.) But although the Legislature has frequently amended the Corporate Securities Law of 1968 in the 10 years since we decided *Simon*, it has not abrogated *Simon* or clarified the mens rea of crimes punishable under section 25540. We infer legislative acquiescence in *Simon*'s conclusion that a conviction for unlawful sale of securities that entails a relatively severe punishment requires guilty knowledge." (*Salas*, *supra*, 37 Cal.4th at p. 979.)

However, the *Salas* court departed from the *Simon* analysis regarding scienter and burden of proof. (*Salas*, *supra*, 37 Cal.4th at p. 982.) Whereas *Simon* held that knowledge of the falsity of a statement or the materiality of an omission (or criminal negligence) was an element of section 25401, which the prosecution was obligated to prove, in *Salas* the high court held guilty knowledge is not an element of section 25110. Instead, it concluded that a defendant's reasonable good faith belief that a security is exempt from registration is an affirmative defense for which the defendant bears the initial burden of proof. (*Salas*, *supra*, at p. 982.)

In part, this conclusion was driven by practical considerations and, in part, by statutorily mandated burdens of proof. The *Salas* court reasoned that because the Legislature, in enacting the Corporate Securities Law, had prohibited the sale of unregistered or unqualified securities, but had identified 30 statutory exemptions for section 25110 violations (and given DOC the authority to authorize even more), prosecutors could face a difficult practical problem trying to prove that a defendant knew that a security was exempt. (*Salas, supra,* at p. 981.) Additionally, as part of the Corporate Securities Law, the Legislature specifically placed on the defendant the "'burden of proving an exemption or exception from a definition.'" (*Salas, supra,* at p. 981; see § 25163.) In light of these considerations, the *Salas* court applied the "rule of convenience and necessity" (which places the burden of proving an exonerating fact on the defendant if the fact's existence is peculiarly within the defendant's knowledge and proof of its nonexistence would be difficult), and held "lack of knowledge that a security is not exempt (or criminal negligence) is an affirmative defense, on which the trial court must instruct only if the defendant presents enough evidence to raise a reasonable doubt." (*Salas, supra,* at pp. 981-982.)

In large measure, the conclusions reached in *Simon* and *Salas* and the rationale supporting those holdings resolve the issues raised in this appeal concerning the mental states associated with violations of section 25210. Applying this reasoning, we conclude that section 25210 is a general intent crime, not a strict liability offense, and that a defendant's reasonable good faith belief he or she was not required to have a license is an affirmative defense; guilty knowledge is not an element of the crime.

Like the sections analyzed in *Simon* and *Salas,* the penalties that can be imposed for violating section 25210 are identified in section 25540 and require "willful" conduct. As these cases make clear, a statute proscribing "willful" behavior typically is a general intent crime, as opposed to a strict liability offense. (See also *People v. Johnson* (1998)

67 Cal.App.4th 67, 72; *People v. King* (2006) 38 Cal.4th 617, 623.) Similarly, strict liability is usually reserved for crimes that relate to public health and safety *and* impose relatively light penalties (*Simon*, *supra*, 9 Cal.4th at p. 521; *Salas*, *supra*, 37 Cal.4th at p. 978), criteria that do not apply to section 25210. Moreover, the high court's observation that the legislative history preceding passage of the Corporate Securities Law evidenced an intent to criminalize only intentional conduct applies with equal force to sections 25210, 25401 and 25110.

In considering whether guilty knowledge is an element of section 25210 or relevant to an affirmative defense, we find section 25210 more analogous to section 25110 than it is to section 25401, and apply the reasoning of the *Salas* court. First, sections 25210 and 25110 share a similar purpose: to assure that the DOC has regulating authority over securities transactions in the state, with section 25210 proscribing an unlicensed broker-dealer from selling securities, and section 25110 proscribing the sale of unqualified or unregistered securities. Similarly, unlike section 25401, sections 25210 and 25110 explicitly refer to exemptions, and the Legislature has placed the burden of proving exemptions on the defendant. (See § 25163.) Unlike section 25401,[23] which involves fraudulent conduct, neither section 25210 nor 25110 per se involves fraudulent acts, and perpetrators of sections 25210 and 25110 crimes are subject to lesser criminal

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23 Section 25401 is located in the Corporations Code under the heading of "Fraudulent and Prohibited Practices" under the Corporate Securities Law of 1968. (Title 4, Div. 1, Part 5.) Furthermore, the criminal penalties for violations of section 25401 and two other fraudulent securities sections are higher than those for other violations of the Corporate Securities Law. (See §§ 25540, subds. (a), (b).)

punishment under section 25540, subdivision (a) than violators of section 25401. (See fns. 20 & 23, *ante*.) Finally, as noted in *Simon*, a compelling reason for its holding that guilty knowledge is an element of criminal violations of section 25401 was the fact that the comparable civil statute (§ 25501) required guilty knowledge before an injured investor could prevail in a civil action for damages against a seller who made misleading statements in the sale of a security. (*Simon*, *supra*, 9 Cal.4th at pp. 509, 516-517.) The court understandably rejected the notion that a civil litigant seeking damages had to prove that the defendant knew the statements were misleading, but that a prosecutor seeking criminal penalties was relieved from this obligation. By contrast, the comparable statutes allowing for civil actions of sections 25210 and 25110 (§ 25501.5, 25503)[24] do not require guilty knowledge on the part of the seller.

Accordingly, we conclude that "guilty knowledge" that a broker-dealer's license was required is not an element of section 25210. Rather, section 25210 is a general intent crime, and "no further mental state beyond willing commission of the act proscribed by law" is required. (*People v. Sargent* (1999) 19 Cal.4th 1206, 1215.) "In other words, it is sufficient for a conviction if the defendant intentionally did that which the law declares to be a crime." (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1437-1438.) But guilty knowledge is relevant as an affirmative defense and a nonlicensed broker-dealer who

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24 Section 25501.5 was enacted in 2004. (Stats. 2004, ch. 575, § 2, p. 3553.) The Legislature also amended Code of Civil Procedure section 1029.8, which makes specified unlicensed persons who injure others liable for treble damages, to include broker-dealers. (Stats. 2004, ch. 575, § 1, p. 3552.)

participates in a securities transaction in this state can affirmatively defend himself or herself on the basis of a reasonable and good faith belief that he or she is exempt from the licensing requirement of section 25210, and/or a reasonable and good faith belief that he or she is excluded from the statutory definition of broker-dealer. (See § 25004.)[25] The defense bears the initial burden of proof on this issue, and if the defense presents enough evidence to raise a reasonable doubt that the defendant believed he or she was not exempt or not excluded from the licensing requirement of the statute, the court is required to instruct on this affirmative defense.

Cole, joined by Robles, mistakenly argues that the *Simon* court held that an element of section 25110 (sale of a nonexempt security that has not been registered with the DOC) is knowledge that the sold security was unregistered or unqualified, and, therefore, we should find that an element of the analogous section 25210 is knowledge that the broker-dealer's license is required. We reject this argument because the premise is wrong. *Simon* did not hold an element of section 25110 is knowledge that the security was unregistered or unqualified. The *Simon* court did address section 25110, but not on

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25 The parties repeatedly use the word "exempt" from the licensing requirement of section 25210 even though factually the statutory exemptions do not apply here. A broker-dealer is exempt from the requirements of section 25210 if, among other things, the broker dealer (a) is registered under the Securities Exchange Act of 1934; (b) has not previously had a certificate denied or revoked; and (c) has no place of business in California and does not direct offers to sell or buy in the state except to designated persons or institutions. (§ 25200.) On this factual record, the exemptions have no relevance to this case. A more accurate nomenclature for the defense presented by Cole and Robles is they were excluded from the statutory definition of broker-dealer (§ 25004) and therefore did not require broker-dealer licenses.

the issue of scienter. Rather, the court considered the defendant's challenge to his convictions under section 25110 based on instructional error. The *Simon* court held it was error not to instruct "on the magnitude of a defendant's burden of proof" when he or she offers an "'exemption' defense." (*Simon, supra*, 9 Cal.4th at p. 496.) The high court did not hold knowledge is an element of section 25110.

Analysis

1) *Violations of section 25210 involving Carlmont Capital and Alpha Telcom*

Cole and Robles contend their convictions under section 25210 involving investments in Carlmont Capital and Alpha Telcom must be reversed because these transactions took place before it was legally determined that the transactions involved securities. In essence, Cole and Robles argue they did not have knowledge that the investments they sold in Carlmont Capital and Alpha Telcom were securities transactions, and, therefore, they cannot be held criminally liable for selling these investments without a broker-dealer license. The contention is without merit.

As noted, section 25210 is a general intent crime. Knowledge that an investment is a security (and therefore requires a broker-dealer license) is not an element of criminal violations of section 25210. Although the prosecution must prove that the particular investment is a security as defined by statute (see § 25019), that is a question of fact for the jury. (*People v. Frederick* (2006) 142 Cal.App.4th 400, 413.) Here, the jury was properly instructed on the definition of a security, and determined the investments were securities. All that is required under section 25210 is that Cole and Robles intentionally committed the proscribed act—selling securities without a broker-dealer's license.

Assuming arguendo that at the time Cole and Robles sold investments in Carlmont Capital and/or Alpha Telcom they had no license and did not know the investment they were selling was a security, all the elements of the crime would have been satisfied nonetheless.

To the extent the appellants are arguing that at the time they sold Carlmont Capital and/or Alpha Telcom there had been no legal determination the notes were securities, the argument fails. The licensure requirement of section 25210 is designed to protect the unsophisticated investing public from unscrupulous and incompetent broker-dealers; among other things, to become a licensed broker-dealer, one must qualify by examination and meet financial responsibility requirements. It would be antithetical to the protective purpose of section 25210 if the statute came into play *only* when there has been a legal determination that an investment is a security. If that were the case, there would be no protection for investors whose investments predated the legal determination by effectively giving the proscribed activity (selling securities without a license) immunity for their illegal conduct.[26]

2) *Violations of section 25210 involving Pathway entities, Investment Revolution Services and Faith Holdings*

With respect to the investments they solicited in Pathway Strategies, Investment Revolution Services and/or Faith Holdings, Cole and Robles contend the prosecution

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26 Appellants' reliance on language in section 25540 that requires knowledge for violations of a DOC rule or order is misplaced. Cole and Robles were prosecuted for selling securities without a broker-dealer's license in violation of section 25210—not for violating a DOC rule or order.

failed to prove that they were broker-dealers and therefore needed to be licensed under section 25210.[27]

The basis of Cole and Robles's argument is that they were not acting as broker-dealers when they sold promissory notes issued by their own corporate entities because in those transactions they did not fall within, or were excluded from, the statutory definitions of broker-dealer. If one is not a broker-dealer, their argument continues, he or she does not violate section 25210 by not having a broker-dealer's license. We agree section 25210 is not violated if the defendant is not a broker-dealer as defined by section 25004, or fits within one of the enumerated exclusions. But their argument fails as they have misinterpreted the relevant statutes.

Both Cole and Robles met the statutory definition of broker-dealer and did not fall within any exclusions to the definition of broker-dealer. "'Broker-dealer' means any person engaged in the business of effecting transactions in securities in this state for the account of others or for his own account." (§ 25004, subd. (a).) It excludes the issuer of the security and an agent of the issuer or the broker-dealer.[28]

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27 Neither Cole nor Robles dispute that these investments were security transactions.

28 Section 25004, subdivision (a) provides in pertinent part: "'Broker-dealer' means any person engaged in the business of effecting transactions in securities in this state for the account of others or for his own account. 'Broker-dealer' also includes a person engaged in the regular business of issuing or guaranteeing options with regard to securities not of his own issue. 'Broker-dealer' does not include any of the following: [¶] (1) Any other issuer. [¶] (2) An agent, when an employee of a broker-dealer or issuer. . . ."

Cole and Robles admit they met the definition of a broker-dealer and acknowledge they were not the issuers of the Pathway Strategies, Investment Revolution Strategies and Faith Holdings promissory notes they sold; rather, the corporate entities were the issuers. Instead, Cole and Robles argue they were not broker-dealers because they fall within the following exclusionary language of the statute: "'Broker-dealer' does not include . . . [¶] . . . [¶] (2) An agent, when an employee of a broker-dealer or issuer." (§ 25004, subd. (a).) The argument fails.

An agent is defined in section 25003 as any person who represents either a broker-dealer or an issuer in effecting or attempting to effect purchases or sales of securities. (§ 25003, subd. (a).) Section 25003 further provides that an officer or director comes within the definition of an agent if he or she receives a commission for the purchase or sale of the securities. (§ 25003, subd. (d).) Cole and Robles were far more than employees of these three corporations; they were corporate officers and/or directors. As such, they could only be agents if they received a commission for the sale of these securities. (§ 25003, subd. (d).) There was no evidence that either Cole or Robles received a commission in connection with the promissory notes they sold in Pathway Strategies, Investment Revolution Strategies or Faith Holdings. As corporate officers/directors who did not receive a sales commission, Cole and Robles were not agents within the meaning of section 25003 and therefore do not fall within the exclusion for agents in the definition of broker-dealer in section 25004. As broker-dealers, Cole and Robles were required to obtain a license to sell securities, and their failure to do so was in violation of section 25210.

Our interpretation of the statutory language is in keeping with the broad scope of the Corporate Securities Law in protecting the public from unscrupulous practices in the sale of securities. "'The approach of the 1968 California Corporate Securities Law is to sweep *all* transactions in securities within the regulatory net . . . . The 1968 Law then specifically exempts those transactions and securities where regulation is considered unnecessary or too burdensome.'" (*Nationwide Investment Corp. v. California Funeral Service, Inc.* (1974) 40 Cal.App.3d 494, 502, quoting 21 Stan. L.Rev. (1968) 152, 157.) The Court of Appeal continued: "We also believe the 1968 act was designed to prevent individuals or others from operating in certain fringe areas of security transactions without a license." (*Nationwide Investment Corp., supra,* at p. 502.)

We reject Cole's convoluted interpretation that officers and/or directors who do not receive sales commissions should be excluded as well. Cole claims there is no logical reason to differentiate between officers and/or directors who receive sales commissions and those who do not. He argues: "The only logical way to read the statutes is to identify section 25004, subdivision (a)(1)'s exemption [exclusion] of 'any other issuer' as extending to officers of corporate issuers when those officers are not receiving commissions." According to Cole, "[t]his makes sense because . . . the officer is not receiving special compensation for selling his corporation's securities, the seller of the securities is in effect the corporation, *the issuer,* and the issuer does not need a broker-dealer license."

As an appellate court, we must presume the Legislature meant what it said in section 25003, subdivision (d)—namely, corporate officers or directors are agents only when they receive a sales commission. In the absence of positive evidence to the contrary regarding the intent of the Legislature, we must interpret clear and unambiguous statutes in a clear and unambiguous manner. (*Nationwide Investment Corp. v. California Funeral Service, Inc.*, *supra*, 40 Cal.App.3d at p. 502.) Cole and Robles's argument is one that is appropriately made to the Legislature, not to this court. Had the Legislature intended to exclude all corporate officers and/or directors from the definition of broker-dealer—and therefore culpability under section 25210—it could have done so. Instead, the Legislature wrote and enacted section 25003, subdivision (d).

Further, in our view, Cole and Robles's interpretation is inconsistent with policy reasons behind the Corporate Securities Law. Under their argument, the law would allow individuals to set up a corporation and sell securities without any oversight or licensing, which would be in conflict with the purpose of the Corporate Securities Law. By requiring a licensee to meet "minimum standards of training, experience and miscellaneous qualifications, and appropriate examinations," the licensing statute protects the public. (*Nationwide Investment Corp. v. California Funeral Service, Inc.*, *supra*, 40 Cal.App.3d at p. 503.)

In a related claim, Cole and Robles argue there was insufficient evidence that they were broker-dealers subject to the licensing requirement of section 25210 when they sold promissory notes involving the Pathway entities, Investment Revolution Strategies and/or Faith Holdings. We disagree. Both the prosecution and Cole presented expert testimony on the issue. The prosecution securities expert opined that Cole and Robles were acting as broker-dealers and were required to be to be licensed. The defense expert disagreed.

Cole and Robles attack the prosecution's securities expert, claiming his testimony was not credible and the defense securities expert's testimony was credible. It is the jury's job to assess the credibility of witnesses, and a reviewing court cannot reweigh the evidence. (*People v. Koontz, supra*, 27 Cal.4th at p. 1078.) "[I]t is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which a determination depends." (*People v. Thornton* (1974) 11 Cal.3d 738, 754, disapproved on another ground in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12.) There was substantial evidence that Cole and Robles were brokers-dealers. Additionally, the jury was properly instructed as to the statutory definitions and exclusions, and it made a factual determination that Cole and Robles were broker-dealers.

3) *Jury instructions on section 25210*

Alternatively, as to all counts involving appellants' lack of a broker-dealer license, Cole and Robles contend the trial court erred when it instructed the jury (1) on the necessary mental state required to violate section 25210, and (2) that a mistake of law is not a defense. These contentions are without merit. However, Cole and Robles also claim the court should have instructed sua sponte on the validity of a good faith belief defense. On this last claim, we disagree as to Carlmont Capital and Alpha Telcom, but agree with respect to those counts involving the Pathway entities, Faith Holdings and Investment Revolution Strategies.

a) *Required mental state*

The court instructed the jury the "necessary mental state" for section 25210 was "'willfully.'" In setting forth the elements of the crime, the court informed the jury that the prosecution must establish that the defendant's "conduct (selling a security) was willful." Cole and Robles argue the court should have informed the jury that the required mental state for a licensing violation was "knowingly" rather than "willfully." They are mistaken. As we have explained, section 25210 is a general intent crime, which requires the defendant to intentionally do the illegal act. No further mental state beyond the willing commission of selling securities without a broker-dealer license is required. Contrary to Cole and Robles's argument, knowing one needs a broker-dealer license is not an element of the crime. The court properly instructed on the mental state required for a criminal violation of section 25210.

b) *Mistake of law*

Cole and Robles also assert that the court erred by instructing the jury that a mistake of law is not a defense and this instruction removed their valid defense of a good faith belief that they did not need broker-dealer licenses. The argument lacks merit. Generally, mistake of law is not a defense to a crime. (See 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses § 37, pp. 368-369.) "If the act itself is punishable when knowingly done, it is immaterial that the defendant thought it was lawful." (*Id.* at § 36, p. 367.) Criminal intent in a general intent crime "is merely the intent to commit the prohibited act, not the intent to violate the law." (*Ibid.*) For example, in *People v. Young* (2001) 92 Cal.App.4th 229, 235, 237, the Court of Appeal held the defendant's belief that the marijuana he was carrying was medicine under the Compassionate Use Act and therefore he was acting legally was a mistake of law, which was not a defense to the general intent crime of transporting marijuana. "'"It is an emphatic postulate of both civil and penal law that ignorance of a law is no excuse for a violation thereof. Of course it is based on a fiction, because no man can know all the law, but it is a maxim which the law itself does not permit anyone to gainsay."'" (*Id*. at p. 234.)

Mistake of law can be a valid defense when the crime requires specific intent if the mistake of law negates the specific intent of the crime. (1 Witkin & Epstein, Cal. Criminal Law, *supra*, Defenses, § 37 at p. 369.) But because section 25210 is a general intent crime—not a specific intent crime—mistake of law is not a defense to the crime. The court did not err by instructing the jury that mistake of law is not a defense.

c) *Good faith defense*

Cole, joined by Robles, also argues that the trial court had a sua sponte obligation to instruct the jury that a good faith belief that they were not required to obtain a broker-dealer license was a valid defense to criminal violations of section 25210. For the reasons stated, we agree this is an affirmative defense, and the court must instruct sua sponte on applicable defenses if not inconsistent with the defense theory of the case. (See *People v. Montoya, supra,* 7 Cal.4th at p. 1047.) However, because this is an affirmative defense, Cole and Robles bore the initial burden of producing evidence that supported a reasonable doubt whether they had such a good faith belief. (See *Salas*, *supra*, 37 Cal.4th at pp. 981-982.) In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defendant's evidence, but only whether "'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt.'" (*Id.* at p. 982.) The threshold is not high; it does not include a predetermination by the court of the credibility of witnesses and what evidence it believes or disbelieves. (*People v. Tufunga*, *supra*, 21 Cal.4th at p. 944.) "'"Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused. [Citation.]" [Citation.]'" (*Ibid*.)

Our review of the record shows Cole and Robles did not meet this burden with respect to the direct investments they sold in Carlmont Capital and/or Alpha Telcom. However, Cole met his burden with respect to the investments he sold in the Pathway entities, Faith Holdings and Investment Revolution Strategies, and Robles met his burden with respect to the investments he sold in Pathway Securities.

After receiving DOC letters of inquiry concerning Carlmont Capital, Cole and Robles changed their approach and sold promissory notes issued by their own corporation, Pathway Strategies. At trial, Cole's expert testified that a director/officer of a corporation issuing its own securities (as was the case with Pathway, Faith Holdings and Investment Revolution Strategies) was not required to have a broker-dealer's license. The prosecutor's expert disagreed. This conflict, coupled with evidence showing that when Carol Peterson asked Cole and Robles if they were required to be licensed, they told her no license was required, and Cole gave Elizabeth Petersen the same response, was sufficient to raise a reasonable doubt whether Cole and Robles had a good faith belief that they were not required to be licensed. The Attorney General totally discounts the statements to Peterson and Petersen as mere misrepresentations made to consummate the transactions with these two investors. Although this is one reasonable interpretation, it is not the only one. We find these statements, in conjunction with the defense expert's testimony and the change in business strategy, enough to require an instruction.

Under these circumstances, it was error not to instruct on the affirmative good faith belief defense with respect to Cole's and Robles's section 25210 counts solely involving the Pathway entities, Faith Holdings and Investment Revolution Strategies.

The question remains whether the error was prejudicial. We conclude it was because it was reasonably probable that an outcome more favorable to Cole and Robles might have been reached had the jury been instructed on the good faith belief defense with respect to their convictions of the section 25210 counts that involved investments in the Pathway entities, Faith Holdings, or Investment Revolution Strategies. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837; see also *Simon*, *supra*, 9 Cal.4th at p. 506 & fn. 11.) The jury was not told that a defendant's good faith belief that he or she is not required to be licensed as a broker-dealer is a valid defense to criminal violations of section 25210. As far as it knew, there were no valid affirmative defenses and the prosecution was entitled to a verdict in its favor if the elements of the crime were proven beyond a reasonable doubt. It should have been up to the jury, as trier of fact, to determine whether Cole and Robles were exercising a good faith belief that they did not need to be licensed as brokers-dealers in selling securities that were issued by their own corporations. Here, two properly qualified experts disagreed on this issue, but the jury did not know it could consider this conflict as evidence supporting defendants' affirmative defense. As an appellate court, it is not within our purview to determine this factual issue. Having met their initial burden of proof to justify a good faith belief instruction with respect to those counts, the failure to instruct on this affirmative defense must be deemed prejudicial with respect to Cole's section 25210 convictions of counts that involved the Pathway entities, Faith Holdings, or Investment Revolution Strategies and Robles's section 25210 convictions of counts that involved the Pathway entities. Accordingly, the error necessitates reversal of the judgment entered on 11 of Cole's section 25210 counts and eight of Robles's section 25210 counts.[29]

VI. *Sufficiency of the Evidence Supporting Convictions under Section 25401*

Cole was convicted of 14 counts of selling securities by means of false statements or omissions (§ 25401), and Robles was convicted of 11 counts of the same offense. Cole contends that 10 of the 14 counts were not supported by substantial evidence. Robles contends the evidence was insufficient to support convictions of seven of the 11 counts. Their basic argument is insufficient evidence supported the scienter element of section 25401—knowingly making false statements or omitting material facts at the time of these transactions. As to Cole, we agree count 7 (Goins) and count 22 (Maroun) must be reversed for insufficient evidence; and, as to Robles, count 22 (Maroun) must be reversed for insufficient evidence. Substantial evidence supports all other counts.

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29 With respect to Cole we are reversing the judgment entered on the following: count 2 (DaSilveiras); count 6 (Flory); count 16 (Leginus); count 21 (Lovins); count 27 (Nichols); count 31 (Petersen); count 35 (Quintero); count 42 (Correia); count 46 (Roemmiches); count 49 (Petersons) and count 53 (Labruzzi). With respect to Robles, we are reversing the following: count 16 (Leginus); count 21 (Lovins); count 27 (Nichols); count 35 (Quintero); count 42 (Correia); count 46 (Roemmiches); count 49 (Petersons); and count 53 (Labruzzi).

The convictions for the section 25210 counts involving only direct investments in Carlmont Capital and/or Alpha Telcom stand.

A. *Counts Challenged Only by Cole*

Count 1 (The DaSilveiras)

In 2002, Cole contacted the DaSilveiras, who had invested in Carlmont Capital in 2000, about investing money in Faith Holdings for a 10 percent return. Cole said the investment involved a company manufacturing credit card machines and there was low or no risk. On July 2, the DaSilveiras invested $104,000—their life savings—in Faith Holdings. The DaSilveiras believed the entire amount was to be invested in this credit card machine company and did not give Cole permission to do anything else with the money.

Substantial evidence supported Cole's conviction of selling securities to the DaSilveiras by means of false statements or material omissions on this count. By mid-2002, Cole's businesses were in dire financial straits, other investors had not received interest payments owed to them for as long as 10 months, and Faith Holdings had no investments. Under these circumstances, a jury could reasonably conclude that telling the DaSilveiras that they were making a low- or no-risk investment of their life savings was a material misrepresentation, as was the promise of a 10 percent return.

Cole's reliance on the testimony of Svec, the business consultant who was trying to arrange a deal between Faith Holdings and RGJ Merchant Services, a company that placed point-of-sales terminals in retail stores, is unavailing. First, the deal had not materialized. Second, the jury was entitled to reject Svec's testimony and conclude he offered nothing but speculation as to how successful the deal would be and whether it would generate enough money to pay Faith Holdings investors a 10 percent return.

Count 30 (Petersen)

We apply the same analysis to count 30 involving Petersen that we applied to count 1. Petersen invested in Faith Holdings within days of the DaSilveiras. The dismal state of Cole's businesses was the same when Petersen made her investment as it had been when the DaSilveiras made their investment. Both the DaSilveiras and Petersen responded to a newspaper advertisement for Faith Holdings promising 10 percent returns on investments that were "TOTALLY PROTECTED." Although the record does not indicate that Cole verbally told Petersen there was little or no risk, the jury could reasonably believe Petersen relied on the advertisement's misrepresentation that the investment was "TOTALLY PROTECTED." Substantial evidence supported the jury's verdict that Cole knowingly misrepresented material facts in selling securities to Petersen.

Count 7 (Goins)

In 2000, Cole went to the residence of Goins, who earlier that year had invested in Carlmont Capital. Cole suggested she invest in Alpha Telcom. When she had invested in Carlmont Capital, Goins told Cole that she did not want to invest in high-risk investments. Cole did not tell Goins that he would receive a commission, he was not a licensed broker-dealer, or that Alpha Telcom was a risky investment. Goins was intending to invest $28,000 in Alpha Telcom but did not after her daughter told her it was a bad idea.

We conclude there was insufficient evidence to support the jury's finding that Cole made misrepresentations in selling or offering to sell securities to Goins. The Attorney

General points to Cole's failure to tell Goins that he was not licensed to sell securities in California. But Goins said she invested with Cole because she trusted him; there is no showing the nondisclosure was material to her. The Carlmont Capital investment turned out to be successful as represented by Cole. Further, Goins's investment in Carlmont Capital and the unconsummated investment in Alpha Telcom took place well before the DOC first notified Cole that investments in Carlmont Capital could be securities and DOC's further communications with him. Similarly, the would-be investment in Alpha Telcom occurred well before the financial evidence indicates Cole should have been aware the company was doing poorly. As our Supreme Court held in *Simon*, *supra*, 9 Cal.4th at page 522, to be guilty of section 25401, a defendant must have "knowledge of the falsity or misleading nature of a statement or of the materiality of an omission, or criminal negligence in failing to investigate and discover them." Such knowledge is an element of section 25401. (*Simon, supra*, at p. 522.) The record lacks substantial evidence that in 2000 when he dealt with Goins, Cole knew that any statements he made were misleading or false or that a more thorough investigation would have revealed information material to these dealings. We reverse the conviction.

B. *Counts Challenged by Robles Only*

Count 5

In July 2001, Flory invested $60,000 with Pathway Strategies for one year at 12 percent interest. At the end of the one-year period, Flory did not receive his principal. Flory testified he dealt principally with Robles. Robles told Flory that the risk was low;

the investment was as "good as gold."[30] Neither Cole nor Robles disclosed that they were not licensed to sell securities in California. Flory testified that he would have acted earlier to recoup his investment had he known that Code and Robles were not licensed.

Substantial evidence supports Robles's conviction on this count. Robles's statement that the investment was as "good as gold" was a material misrepresentation. Further, Robles's nondisclosure of his unlicensed status was a material omission.

We are unpersuaded by Robles's argument that he did not have any knowledge at the time of the transaction that Flory's investment in Pathway Strategies would not perform and produce the promised return. The only reasonable inference to be drawn from the as "good as gold" statement is that there was no risk. But Robles knew Pathway Strategies was in the business of making loans to companies that were willing to pay interest rates exceeding 12 percent, and that often the rate of return of an investment is directly related to the risk it carries. In July 2001 a 12 percent rate of return was high compared to both low-risk investments (i.e., bonds) and more aggressive investments, such as stocks and mutual funds.

Robles also argues that Flory did not rely on the as "good as gold" statement in making the investment. Although the jury reasonably could have reached that conclusion based on Flory's testimony acknowledging that he was greedy and that there is a certain amount of risk in investing, the jury also could have reasonably concluded that Flory

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30 At the preliminary hearing, Flory had testified that Cole and Robles had not discussed what sort of risk was involved; "[t]hey just said this was . . . like money in the bank."

relied on the as "good as gold" statement as signifying the risk was low. We cannot second-guess a jury's resolution of a factual issue that is supported by substantial evidence.

Robles also points to the disclaimer Flory signed, which stated: "No guarantee . . . can be given as to the financial success of this venture . . . ." We are not persuaded. It was up to the jury to determine how much weight to give to the verbal "good as gold" statement and to the written disclaimer, which Flory may or may not have read.

Robles claims his failure to disclose he was not licensed to sell securities in California was not a *material* omission. We disagree. Robles showed Flory a card showing he was licensed in Nevada; the jury could have reasonably found that by doing so Robles was conveying that he had the necessary license, which would make his failure to disclose a lack of a California broker-dealer's license a *material* omission.

Count 26 (Nichols)

Nichols's initial dealings were solely with Cole. After Robles became involved, Cole continued to play a more dominant part than Robles in the sales pitches made to Nichols. In July 2001 Nichols, using the bulk of the proceeds of the reverse mortgage, invested $100,000 in a Pathway Strategies promissory note with a 10 percent interest rate. Both Cole and Robles signed the promissory note on behalf of Pathway Strategies. Neither Cole nor Robles discussed the risk of the investment, but Nichols believed it was a safe investment. Neither Cole nor Robles mentioned that they were not licensed to sell securities in California; Nichols testified that had she known that they were not licensed she would have given more thought to investing with them. She never received back the money from Pathway Strategies.

Substantial evidence supports Robles's conviction on this count. Robles attempts to minimize his significance in Nichols's investments in Pathway Strategies, but the jury could reasonably find that Robles also played an important role. By the time Robles signed the promissory notes, he was thoroughly familiar with the day-to-day business operations of the Pathway entities, knew that promises he and Cole had made to other investors were not being met, and was aware that some of the companies they were touting (i.e., Tierra Telecom) had a negative cash flow. From this, the jury could reasonably conclude that Robles was not a passive participant and that Nichols's decisions to invest were influenced, at least in part, by Robles's presence. After Cole and Robles terminated their business relationship, Nichols continued to follow Robles's advice as well as Cole's advice in making investments. Nichols also expressed to Robles her concerns about her investments.

Count 34 (Quintero)

In June 2001 Quintero went to Cole and Robles's office and invested $25,000 in a 14-month Pathway Strategies promissory note. Quintero told Cole and Robles that he intended to use the $25,000 to pay for his planned 50th wedding anniversary celebration in Europe the following year. Cole and Robles told Quintero the investment was risk-free and "secure."[31] Neither Cole nor Robles told Quintero that they were not licensed to sell securities in California. Quintero testified that had he known that Cole and Robles were not licensed he "[a]bsolutely" would not have invested with them.

Substantial evidence supported Robles's conviction on this count. In June 2001 Pathway Strategies was investing in Tierra Telecom and NatureWell. Tierra Telecom had a negative cash flow, and Cole and Robles had been told it was a risky investment. Cole and Robles also were informed that NatureWell was a risky investment. In light of this, the statements that Quintero's investment was risk-free or "secure," were misrepresentations. Also, Cole and Robles's failure to disclose they were unlicensed to sell securities in the state was a material omission to Quintero, who said he "[a]bsolutely" would not have invested with them had he known they were unlicensed.

Robles argues that the $25,000 Quintero invested in Pathway Strategies was a fraction of his net worth and, therefore, there was no risk to Quintero in making the investment. Quintero's net worth is irrelevant. The question is not how much damage a particular investor can absorb; the question is whether Robles and Cole knowingly misrepresented material facts in the sale of the securities. Robles and Cole knew that investing in Tierra Telecom and NatureWell was risky. Instead of disclosing the risk, Robles and Cole, at the very least, should not have told Quintero that his investment was

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31 On cross-examination, Robles's trial counsel was able to cast some doubt on Quintero's claim that Robles and Cole had told him that his investment was risk-free. Counsel introduced Quintero's testimony at the preliminary hearing, when he had denied that he was told that his investment was risk-free. Quintero's trial testimony that he was told his investment was "secure" was not impeached.

"secure." (See fn. 31, *ante*.) Moreover, Quintero made it clear he did not want to lose the $25,000 because he was planning to use it for his planned anniversary trip to Europe. Robles's contention that Quintero was unconcerned about the risk of $25,000 lacks evidentiary support.

Robles also argues the jury should have discounted Quintero's testimony that had he known Robles and Cole were not licensed to sell securities in California, he "[a]bsolutely" would not have invested with them. An appellate court does not second-guess the jury's credibility calls.

C. *Counts Challenged by Both Cole and Robles*

Count 10 (High)

In 2000, Cole and Robles went to High's residence and suggested she invest in Alpha Telcom. Cole and Robles told High that they had invested $500,000 of their own money in Alpha Telcom; however, High testified she did not believe this. At their urging, High borrowed an additional $5,000 from her insurance policy to make the minimum allowable investment in Alpha Telcom. Cole and Robles did not tell High this was a high-risk investment or that they were not licensed. At one point, High telephoned Cole to get her money back. Cole told her that she would not be able to get her principal back for 10 years. After four months, High stopped receiving her interest payments. Subsequently, Cole and Robles wrote High a letter stating Alpha Telcom had filed for bankruptcy.

Substantial evidence supported the jury's verdict that Cole and Robles were guilty of violating section 25401. They knowingly misrepresented that they had invested

$500,000 in Alpha Telcom. Cole claims the prosecutor did not prove that Cole and Robles did not invest $500,000 of their own money in Alpha Telcom. We disagree. Given the totality of the evidence, the jury reasonably could infer that neither Cole nor Robles, individually or collectively, had $500,000 of their own money to make such an investment.

Cole and Robles's alternative argument is that because High did not believe they had made the $500,000 investment, the misrepresentation was not material. But when Cole and Robles made this misrepresentation they did not know that High would be skeptical of its veracity. A jury could reasonably conclude that Cole and Robles believed that by falsely telling High they had invested $500,000 in Alpha Telcom they were making a material representation—that is, it would increase the chances that a reasonable person in High's situation would invest in the company.

Further, there is no doubt that Cole and Robles's failure to disclose this was a high-risk investment was a material omission. High, at age 77, was an elderly person who had only $5,000 to invest and had to borrow an additional $5,000 from her insurance policy. At the very least, Cole and Robles were criminally negligent for not determining the risks involved with investing in a company that would no longer be making promised interest payments within four months and shortly thereafter file for bankruptcy.

Count 15 (Leginus)

In February 2001, Leginus invested $30,000 in a Pathway Strategies promissory note after Cole and Robles told her Pathway Strategies would invest her money in Alpha Telcom. At first, Leginus was skeptical. When Leginus told Cole and Robles that she could not afford to lose her money, Cole reassured Leginus that her money was secure. Cole and Robles said they had investigated Alpha Telcom, there was an insurance policy on money invested with the company, and she would not lose her money. Cole told Leginus that his grandparents had invested in Alpha Telcom. Neither Cole nor Robles told Leginus that they were not licensed to sell securities in California. After Leginus received interest payments for more than a year, Robles told her that he and Cole were splitting up as partners and her funds were frozen. Robles also told Leginus they had not invested in the telephones but did not tell her what they had done with her money. Leginus testified that if Cole and Robles had disclosed their unlicensed status, she would not have given them her "hard-earned money."

Substantial evidence supports the jury's verdicts. First, Cole and Robles falsely told Leginus that her $30,000 would be invested in Alpha Telcom; none of her money was invested in the company. Second, Cole and Robles omitted telling Leginus that they were not licensed to sell securities in California. This was a material omission as Leginus, who had some skepticism about investing, testified that had she known Cole and Robles were not licensed she would not have invested with them. Third, Cole and Robles, at the very least, misrepresented the thoroughness of their investigation; in 2000, some states had issued cease and desist orders to Alpha Telcom. Notwithstanding Cole's argument that there was no proof that his grandparents did not invest in Alpha Telcom, the jury reasonably could have concluded this representation was not true. Convincing Leginus to make the investment had not been easy, and a rational jury could infer that

Cole's statement about his grandparents was an attempt to eliminate Leginus's doubts and convince her that the investment was secure.

Count 20 (Lovins)

In May 2001, Lovins invested $20,000 in a 38-month promissory note with Pathway Strategies at 12 percent interest with the understanding it would be invested in Alpha Telcom. Cole told Lovins that he had never missed a payment on a note before, the telephone company was strong, and the investment was "foolproof." Neither Cole nor Robles disclosed that they were not licensed to sell securities in California. Lovins testified that had he known they were unlicensed he would have thought harder about whether to invest with them. Bank records showed that Cole and Robles invested Lovins's money in Alpha Telcom.

Substantial evidence supports Cole's and Robles's convictions of selling securities to Lovins by means of misrepresentations or material omissions. In essence, Cole's statement that Lovins's investment was "foolproof" was equivalent to saying it was a no-risk or low-risk investment. As such, the statement constituted a misrepresentation; in mid-2001, Alpha Telcom was doing poorly financially and several states had issued cease and desist orders for Alpha Telcom. Further, Cole and Robles's failure to disclose that they were not licensed to sell securities in California was a material omission in light of Lovins's statement that he would have thought "harder" about investing with them had he known about their lack of licenses.

Cole and Robles point out that Lovins signed a disclaimer acknowledging there was no guarantee for the investment and the need for prudence. Lovins testified that he did not read the disclaimer closely and believed the provision concerned the distinction between Pathway Securities and Pathway Financial. This evidence was before the jury, which was free to give the disclaimer and Lovins's testimony whatever weight it deemed appropriate. Lovins testified he presumed Pathway Financial was affiliated with large insurance companies and therefore was a strong company. The jury reasonably could have concluded that Lovins's presumption that his investment in Pathway Strategies was safe would have been affected had Cole and Robles disclosed that they were not licensed.

Count 22 (Maroun)

At trial, Maroun was unavailable and her preliminary hearing testimony was read. This brief testimony revealed that prior to her $70,000 investment in Alpha Telcom in October 2000, Maroun had successfully invested in Carlmont Capital through Cole, and that she had no memory of the Alpha Telcom investment, the transaction leading to it, or statements made by Cole and Robles. Maroun was unable to identify either Cole or Robles at the preliminary hearing. There was no evidence presented that in October 2000 when Cole and Robles were dealing with her that either made misrepresentations to her or that surrounding circumstances should have alerted them to problems with Alpha Telcom. Although Maroun testified neither Cole nor Robles disclosed that they were not licensed to sell securities in California, there was no evidence that this would have made any difference to Maroun.

We conclude Cole's and Robles's convictions of selling securities to Maroun by means of misrepresentations and material omissions were not supported by substantial evidence. We reverse these convictions.

Count 41 (Correia)

In November 2000, Cole and Robles went to Correia's home and suggested she move her $160,000 investment in Carlmont Capital to Alpha Telcom. Cole told Correia that there was no risk involved in investing in Alpha Telcom and the investment would be guaranteed by Lloyds of London. Cole also told Correia that his grandfather had invested $1 million in Alpha Telcom. In April 2001, Correia invested $160,000 in a Pathway Strategies promissory note. Correia believed her money would be invested in Alpha Telcom, but Robles told her afterward that her money had not been invested in Alpha Telcom. Correia testified she would not have invested in Pathway Strategies had she known it was a risky investment.

Substantial evidence supports Cole's conviction of violating section 25401 in selling securities to Correia. Cole made material misrepresentations in telling Correia that the investment carried no risk and that his grandfather had invested $1 million in Alpha Telcom. Correia testified that she would not have invested her money if she had known it was risky. Correia also testified that Cole's representation about his grandfather's investment was a factor in her decision to invest. As in the case of count 15 involving Leginus, we are unpersuaded by Cole's argument that there was no proof that his grandparents did not invest in Alpha Telcom. The jury reasonably could conclude this representation was not true, especially in light of the fact that Cole told some investors his grandfather had invested $1 million and to others he said the amount was $500,000.

We also conclude Robles's conviction on this count was supported by substantial evidence under an aider and abettor theory of culpability.

A defendant is liable as an aider and abettor when he or she (1) has knowledge of the perpetrator's unlawful purpose, (2) intends to commit or encourage the offense, and (3) by act or advice aids or encourages commission of the offense. (*People v. Hill* (1998) 17 Cal.4th 800, 851.) Although presence at the scene of the crime is not alone enough to establish aider and abettor status, it is a factor that may be considered, along with companionship with the perpetrator and conduct before and after the crime. (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.) The requisite conduct occurs if the defendant in any way, directly or indirectly, aided the perpetrator by acts or encouraged him or her by words or gestures. (*Id.* at p. 411.) As to intent, a person's knowledge of the criminal purpose and failure to prevent the crime is not sufficient to show aiding and abetting; rather, the person must share the perpetrator's criminal purpose. (See *People v. Stankewitz* (1990) 51 Cal.3d 72, 90-91; *People v. Sully* (1991) 53 Cal.3d 1195, 1227.) Because intent is inherently difficult to prove by direct evidence, intent may properly be inferred from "'the act itself, together with its surrounding circumstances. . . .'" (*People v. Edwards* (1992) 8 Cal.App.4th 1092, 1099.)

Robles accompanied Cole to the meeting with Correia, and, although Cole did the talking, Robles's presence bolstered Cole's sales pitch. Robles, along with Cole, signed the promissory notes on behalf of Pathway Strategies. Because he was Cole's business partner, the jury could have reasonably inferred that Robles shared Cole's business objectives, even if it meant misrepresenting the financial stability of investments to potential investors. From the evidence, the jury could properly infer that Robles shared the profits with Cole, was aware of the contacts Cole was having with clients and what he told clients about Alpha Telcom, knew the true financial status of Alpha Telcom, and was familiar with the investment objectives of their mutual clients, including Correia. Further, Robles sent Correia her interest checks and handled her inquiries after the investment was made. Although Robles "did not personally make the false representation[s] to [Correia], [he] actively participated in the transactions with knowledge of their fraudulent character. [He] thus aided and abetted in the commission of the crime, and was punishable as a principal under section 31 of the Penal Code." (*People v. Barker* (1960) 53 Cal.2d 539, 543; see also *People v. Mauldin* (1960) 181 Cal.App.2d 184, 190.)

Count 45 (the Roemmiches)

In February 2001, the Roemmiches invested $60,000 in a Pathway Strategies promissory note. Cole and Robles told the Roemmiches that they had been in business for 14 years and had never missed a payment. Neither Cole nor Robles disclosed that he did not have a license to sell securities in California. Roemmich testified that had he known Cole and Robles were unlicensed, he would not have invested with them.

Substantial evidence supports Cole's and Robles's convictions of violating section 25401 in selling securities to the Roemmiches by means of misrepresentations and/or material omissions. The failure to disclose their unlicensed status was a material omission to the Roemmiches. Further, the evidence contradicted Cole and Robles's claim that they had never missed a payment; the jury reasonably could have concluded this was a misrepresentation.

Count 52 (Labruzzi)

In September 2001, Labruzzi invested $10,000 in Alpha Telcom. Robles signed the agreement as Alpha Telcom's representative. The following month, Labruzzi, after taking out a reverse mortgage on her house, invested $124,000 in a Pathway Strategies promissory note with the understanding her money would be invested. Cole and Robles did not discuss with Labruzzi any risk in making these investments. Neither Cole nor Robles disclosed they were not licensed to sell securities in California. Labruzzi testified that if they had told her that they were unlicensed, she would have "investigated." Of the $124,000 that Labruzzi invested in Pathway Strategies, $99,000 went into the company's payroll account.

Substantial evidence supported Cole's and Robles's convictions of violating section 25401 in selling securities to Labruzzi. Cole and Robles did not invest Labruzzi's money as they stated they would. Cole and Robles did not discuss risk, which was a material omission. Their failure to disclose their unlicensed status also was a material omission to Labruzzi.

Cole and Robles argue there was no evidence that they knew of any of the risks involved in Labruzzi's investments. We are unpersuaded. Alpha Telcom filed for bankruptcy in August 2001 and they were touting Alpha Telcom as a sound investment in September. Moreover, by October 2001, Pathway Strategies was investing in high-risk ventures, such as Tierra Telecom and NatureWell. Given these circumstances, the failure to discuss risk with Labruzzi was a material omission.

VII. *Unanimity Instruction*

Cole, joined by Robles, contends the trial court erred by not giving a unanimity instruction because some of the counts of selling securities by means of misrepresentations and/or material omissions involved more than one transaction.[32] Cole also contends a unanimity instruction should have been given with respect to the burglary count involving Petersen. The Attorney General argues any error was invited because the defense objected to giving a unanimity instruction. We reject this argument because what the Attorney General claims was a defense objection was too vague to constitute invited error. Therefore, we shall reach the merits of the issue.

Legal Principles

"Defendants in criminal cases have a constitutional right to a unanimous jury verdict." (*People v. Napoles* (2002) 104 Cal.App.4th 108, 114.) When a defendant is charged with a single criminal act but the evidence reveals more than one instance of the charged crime, either the prosecution must select the particular act upon which it relies to prove the charge or the jury must be instructed that it must unanimously agree beyond a

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32 Specifically, Cole and Robles claim a unanimity instruction should have been given with respect to the section 25401 counts involving Nichols, Quintero, the Roemmiches, the Petersons, and Labruzzi. Cole also claims a unanimity instruction was necessary for the section 25401 counts involving the DaSilveiras, Goins, Maroun, Correia and Petersen. Since we are reversing counts 7 involving Goins and 22 involving Maroun for insufficiency of the evidence, we need not include those counts in our discussion of this issue.

reasonable doubt that defendant committed the same specific criminal act. (*People v. Moore* (1986) 185 Cal.App.3d 1005, 1014; *People v. Brown* (1996) 42 Cal.App.4th 1493, 1499-1500.) In such circumstances, an instruction along the lines of CALJIC No. 17.01, which tells the jury it must unanimously agree upon the act or acts constituting the crime, must be given sua sponte if not requested. (*People v. Moore, supra*, 185 Cal.App.3d at p. 1014.) The purpose of the unanimity instruction is to prevent a verdict that results from some jurors believing the defendant committed one act and others believing the defendant committed a different act, without agreement on what conduct constituted the offense. (*People v. Washington* (1990) 220 Cal.App.3d 912, 915-916.)

As our Supreme Court has explained: "[T]he unanimity instruction is appropriate 'when conviction on a single count could be based on two or more discrete criminal events,' but not 'where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.' [Citation.] In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction." (*People v. Russo* (2001) 25 Cal.4th 1124, 1134-1135.)

A unanimity instruction is not "'required, however, if the case falls within the continuous course of conduct exception. This exception arises in two contexts. The first is when the acts are so closely connected that they form part of one and the same transaction, and thus one offense. [Citation.] The second is when . . . the statute contemplates a continuous course of conduct of a series of acts over a period of time. [Citation.]'" (*People v. Avina* (1993) 14 Cal.App.4th 1303, 1309.)

Acts viewed as a continuous course of conduct because they are a single transaction typically have a close temporal connection. (See *People v. Crandell* (1988) 46 Cal.3d 833, 875.) As to acts separated by significant periods of time, they may fall within the second category of the continuous course of conduct exception if the statute defines an offense that may be continuous in nature. (*People v. Avina*, *supra*, 14 Cal.App.4th at p. 1309.) That is, when the issue presented to the jury is whether a defendant committed a course of conduct and not whether he committed a specific act on a specific day, the jury need not unanimously agree on a specific act. (*People v. Higgins* (1992) 9 Cal.App.4th 294, 301.) The actus reus of a continuous-course-of-conduct crime is not a specific act, but rather a series of acts occurring over a substantial period of time, generally on the same victim and generally resulting in cumulative injury. (*People v. Whitham* (1995) 38 Cal.App.4th 1282, 1296.)

Analysis

Cole contends a unanimity instruction was required with respect to count 41 involving Correia. We disagree. There were two different transactions involving Cole and Correia—the investment in Carlmont Capital and the Pathway Strategies promissory note. The original Carlmont Capital transaction took place before Cole learned that Carlmont Capital was a security; thus, his failure to disclose his lack of a broker-dealer license did not constitute a crime under section 25401, which has a knowledge element. Similarly, there was no evidence that Carlmont Capital was a risky investment; hence, criminal liability did not attach under section 25401 to Cole's failure to discuss risk with Correia with respect to this investment. Accordingly, the evidence did not reveal more than one instance of the charged crime. The only criminal act for which the District Attorney's office could have successfully prosecuted Cole was the second transaction involving Pathway Strategies. The manner in which the prosecution presented the evidence and argued this count made clear that it was the Pathway Strategies investment that was at issue.[33]

We similarly reject Cole's contention that a unanimity instruction was required with respect to count 1 involving the DaSilveiras, who invested in Carlmont Capital and Faith Holdings. The evidence was lacking that Cole made misrepresentations or material omissions with respect to Carlmont Capital. However, the evidence was overwhelming that Cole was guilty of violating section 25401 with respect to the DaSilveiras' investment in Faith Holdings. A unanimity instruction was not needed.

Cole and Robles contend a unanimity instruction was required with respect to count 34 involving Quintero. We disagree. Quintero made two investments with Cole and Robles—a 36-month viatical and a $25,000 promissory note with Pathway Strategies. Since the viatical was not a security, the only basis for their convictions for count 34 was the promissory note transaction. A unanimity instruction was not needed.

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33 Robles did not challenge the lack of a unanimity instruction with respect to count 41.

Cole and Robles contend a unanimity instruction was required with respect to count 45 involving the Roemmiches. We disagree. Following Cole and Robles's advice, the Roemmiches invested $20,000 in a viatical, $20,000 in a restaurant, and $20,000 with his stockbroker. These investments are not at issue, nor did the prosecution argue or imply they were. The only basis for Cole's and Robles's convictions under section 25401 in count 45 was the subsequent $60,000 Pathway Strategies promissory note. A unanimity instruction was not needed.

Cole contends a unanimity instruction was required for counts 28 (burglary) and 30 (misrepresentation in selling securities) involving Petersen. We disagree based on the continuous course of conduct exception. On July 30, 2002, Petersen invested $100,000 in a Faith Holdings promissory note at 10 percent interest. After looking into Cole's background, Petersen contacted law enforcement and then told Cole to return the following day because she wanted to invest an additional $100,000. The July 30 sale and the July 31 unconsummated sale were only a day apart and were so closely connected that they merged and constituted a single transaction. Further, on July 31 when Cole returned, he brought with him a letter signed by him that stated: "This letter will acknowledge receipt of your cashiers checks totaling $200,000.00." The letter showed that at the time Cole viewed the two transactions as merging into one. The same reasoning applies to the burglary count—a unanimity instruction was not necessary because of the continuous course of conduct exception.

Cole and Robles contend a unanimity instruction was required for count 26 involving Nichols, count 48 involving the Petersons, and count 52 involving Labruzzi. We agree.

However, because the record shows that these errors were "harmless beyond a reasonable doubt," reversal is not required. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson, supra,* 46 Cal.2d at p. 836; cf. *People v. Stankewitz, supra*, 51 Cal.3d at p. 100 [assuming unanimity instruction erroneously omitted, but finding no prejudice where "the inference is inescapable" that defendant was properly found guilty unanimously].)[34]

Based on the record, the inference is inescapable that the jury unanimously convicted Cole and Robles of section 25401 in count 48 involving the Petersons on the basis of the couple's three investments in Pathway Strategies and their investment in NatureWell. The misrepresentations and material omissions made by Cole and Robles regarding Pathway Strategies were the same in June 2001, when the Petersons invested $90,000, as they were on September 12, 2001, when the Petersons made two additional investments (with different interest terms) totaling $167,000 in Pathway Strategies. As to the Petersons' investment in NatureWell, Cole and Robles said the stock would triple in three years without discussing risks. Given the start-up status of the company and

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[34] We do not here decide whether failure to give a unanimity instruction in this case should be evaluated under the *Watson* or *Chapman* harmless error standard. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 185-186 [documenting split in authority but applying *Chapman* standard].) As the error here is harmless under either standard, we proceed as if the stricter burden applies.

statements made by Cole and Robles, their failure to discuss risk was a material omission. The only logical inference to be drawn is that the jury would have convicted Cole and Robles of violating section 25401 based on all three of the Pathway Strategies investments by the Petersons and their NatureWell investment. We conclude, therefore, that any error with respect to the failure to give a unanimity instruction on count 48 was harmless beyond a reasonable doubt.

Likewise, an inescapable inference to be drawn from the record is that the jury unanimously convicted Cole and Robles of count 52 involving Labruzzi on the basis of her Alpha Telcom investment and her Pathway Strategies investment. Given the overwhelming evidence supporting guilt on both of these investments, we conclude that any error with respect to the failure to give a unanimity instruction on count 52 was harmless beyond a reasonable doubt.

We reach the same conclusion as to Cole's and Robles's convictions on count 26 involving Nichols. We need not consider Nichols's investment in Carlmont Capital in this context for reasons stated above in our rejection of the need for a unanimity instruction with respect to the count involving Correia. We also can eliminate Nichols's $50,000 investment in Pathway Management Group in April 2002, and her $75,000 investment in Pathway Management Group in May 2002. At the time of the trial, the two Pathway Management Group accounts remained open, and Nichols continued to receive her quarterly interest payments.

The remaining investments Nichols made were the $100,000 Pathway Strategies promissory note in July 2001, and the $25,000 investment in Investment Revolution

Strategies in April 2002. There was overwhelming evidence that Cole and Robles violated section 25401 with respect to the Pathway Strategies promissory note. There also was overwhelming evidence that Cole violated section 25401 with respect to Nichols's investment in Investment Revolution Strategies. The only logical inference to be drawn is that the jury would have convicted Cole and Robles of violating section 25401. We conclude, therefore, that any error with respect to the failure to give a unanimity instruction on count 26 was harmless beyond a reasonable doubt.

VIII. *Sufficiency of the Evidence to Support Enhancements*

Cole and Robles contend there was insufficient evidence to support the jury's findings for the aggravated white collar crime enhancement under Penal Code section 186.11, subdivision (a)(2). Cole also contends the evidence was insufficient to support the jury's finding on the enhancement under Penal Code section 12022.6. These contentions are without merit.

Penal Code section 186.11 reads in pertinent part: "(a)(1) Any person who commits two or more related felonies, a material element of which is fraud or embezzlement, which involve a pattern of related felony conduct, and the pattern of related felony conduct involves the *taking* of more than one hundred thousand dollars ($100,000), shall be punished, upon conviction of two or more felonies in a single criminal proceeding, in addition and consecutive to the punishment prescribed for the felony offenses of which he or she has been convicted, by an additional term in the state prison as specified in paragraph (2) or (3). This enhancement shall be known as the aggravated white collar crime enhancement. [¶] (a)(2) If the pattern of related felony conduct involves the *taking* of more than five hundred thousand dollars ($500,000), the additional term of punishment shall be two, three, or five years in the state prison." (Italics added.)

Penal Code section 12022.6 reads in pertinent part: "(a) When any person *takes*, damages, or destroys any property in the commission or attempted commission of a felony, with the intent to cause that *taking*, damage, or destruction, the court shall impose an additional term as follows: [¶] "(1) If the loss exceeds fifty thousand dollars ($50,000), the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose a term of one year." (Italics added.)

Cole and Robles argue that the word "taking" or "takes" in the statutes means stealing or theft, and since they did not steal anyone's money the enhancements are not applicable. (Cole was convicted of two counts of elder abuse by theft and maintains neither count was supported by substantial evidence. We rejected this claim in Part IV, *ante*. Robles was not convicted of elder abuse by theft.)

Although our research has not disclosed any opinions construing the "taking" language of Penal Code section 186.11, there is authority on the subject in connection with Penal Code section 12022.6.

In *People v. Superior Court (Kizer)* (1984) 155 Cal.App.3d 932, 935, the appellate court rejected an argument similar to the one presented in this appeal involving the meaning of "take" in Penal Code section 12022.6. The Court of Appeal said: "'Steal' is but one meaning of the word 'take.' (See Webster's New Internat. Dict. (3d ed. 1961) pp.

2232, 2329-2331.) Where a word of common usage has more than one meaning, the one which will best attain the purpose of the Legislature should be adopted in construing a statute. [Citation.] To construe the word 'takes' in [Penal Code] section 12022.6 as meaning 'steals' is to give it a restricted meaning which is inconsistent with the legislative intent of deterring large-scale crime, the legislative goal in enacting the statute." (See also *People v. Kellett* (1982) 134 Cal.App.3d 949, 959; *People v. Loera* (1984) 159 Cal.App.3d 992, 1002.)

We reject Cole's challenge to his enhancement under Penal Code section 12022.6. (*People v. Superior Court (Kizer)*, *supra*, 155 Cal.App.3d at p. 935.) We also find the analysis and reasoning in *People v. Superior Court (Kizer)* is instructive as to the meaning of "taking" in Penal Code section 186.11. Applying this analysis, we conclude the aggravated white collar crime enhancements were properly imposed on Cole and Robles.

In an alternative argument, Cole assumes that we can only consider his two elder abuse by theft convictions—counts 25 (Nichols) and 29 (Petersen)—totaling $125,000. Therefore, Cole contends his white collar crime enhancement should be reduced to an enhancement under Penal Code section 186.11, subdivision (a)(1), which carries a lesser prison term than Penal Code section 186.11, subdivision (a)(2). Cole's assumption is wrong. We are not limited to his convictions on the two elder abuse theft convictions because, as explained above, the white collar crime enhancement encompasses more than thefts.

DISPOSITION

As to Cole, the judgment of conviction on counts 7 (Goins) and 22 for (Maroun) for selling securities by means of false statements or omissions in violation of section 25401 is reversed. As to Robles, the judgment of conviction on count 22 (Maroun) for selling securities by means of false statements or omissions in violation of section 25401 is reversed.

The judgments of conviction for 11 of Cole's counts and eight of Robles's counts of selling a security without a broker-dealer's license in violation of section 25210 as outlined in footnote 29, *ante*, are reversed. The case is remanded for a new trial on these counts only, and for resentencing.

In all other respects, the judgments are affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.