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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SAHAK JEIRANIAN, Defendant and Appellant.	B227938 (Los Angeles County Super. Ct. No. BA338994)

APPEAL from a judgment of the Superior Court of Los Angeles County. William N. Sterling and C. H. Rehm, Judges. Reversed in part and affirmed in part.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Margaret E. Maxwell, Deputy Attorneys General, for Plaintiff and Respondent.

Sahak Jeiranian appeals from the judgment entered upon his convictions by jury of two counts of felony intentional evasion of cigarette tax (Rev. & Tax Code, § 30480, counts 1-2),[1] misdemeanor unlicensed cigarette distribution (§ 30149, count 4), misdemeanor possession of false or fraudulent cigarette stamps (§ 30473.5, count 5) and misdemeanor possession of unstamped cigarettes (§ 30474, count 6).[2] The trial court suspended imposition of sentence and placed appellant on 60 months formal probation on count 1 and 36 months formal probation on the remaining counts. Appellant contends that (1) his convictions of counts 1 and 2 must be reversed because section 30480 defines a penalty rather than a substantive crime, (2) the jury's verdict that count 4 was a felony must be reformed to reflect a misdemeanor conviction, (3) federal and state due process clauses require reversal of appellant's convictions because the trial court erroneously denied his motion to dismiss the charges due to undue delay in prosecution, and (4) federal and state due process clauses and the Sixth Amendment right to a jury determination of facts require reversal of counts 1, 2, 4 and 6 because the trial court erroneously gave an aiding and abetting instruction.

We reverse in part and affirm in part.

FACTUAL BACKGROUND

The prosecution's evidence

Regulation of sale of cigarettes

In order to distribute cigarettes in California, a California seller's permit and a cigarette distribution license are required. The cigarette license is for a particular location, the only location at which unstamped cigarettes can be possessed, unless prior

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[1] All further statutory references are to the Revenue and Taxation Code unless otherwise indicated.

[2] The trial court dismissed count 3 for felony intentional evasion of cigarette tax pursuant to Penal Code section 1118.1. The trial court also dismissed the enhancement allegations contained in Penal Code section 1203.045, that the crimes involved theft over $100,000, and Penal Code section 12022.6, subdivision (a)(2), that appellant took property in excess of $150,000.

notice is given to the State Board of Equalization (Board). A cigarette stamp is proof that the cigarette tax has been paid. Cigarette stamps can only be purchased by a licensed cigarette distributor, who must make monthly reports to the Board of the cigarettes and stamps it purchased and the cigarettes it distributed. The current tax on cigarettes is $.87 a pack or $8.70 a carton.

Initial response to complaint

On December 17, 2001, responding to a complaint, Jose Novo (Novo), a Board investigator, and another investigator inspected the Royal Cigars, Inc. (Royal) retail store, in the Hye Plaza mini-mall, located at 5112 Hollywood Boulevard (Hollywood store). Novo saw 200 to 300 cartons of cigarettes and loose packs of cigarettes in the public area of the store. Thirty to 40 packs of cigarettes bore Virginia stamps, not California tax stamps. Virginia taxes cigarettes at a lower rate than California.

Appellant was alone in the store and identified himself to the investigators as Jack J. When the investigators asked to speak with the owner, appellant said that he was the owner. When asked to present identification, appellant refused and said he was not the owner, first stating that the owner was a man then that the owner was a woman, who was in Armenia. Ultimately, appellant produced a driver's license, bearing the name "Sahak Jeiranian." Appellant refused to allow the investigators to inspect the store and asked them to leave, which they did.

Investigation of Board records

In March 2002, Marzo Sacasa (Sacasa), supervising tax investigator for the Board, began investigating Royal. He checked licensing documents maintained by the Board and found an "Application for Seller's Permit" for Royal, signed by appellant, along with his driver's license and social security card, required for the application. Sacasa noted that the signature on the driver's license and application were dissimilar. Further, the application provided that Royal's projected monthly revenue was $500, an unusually low amount that would not even cover expenses.

On May 8, 2001, a cigarette distributor's license was issued to Royal at the Hollywood store, allowing it to maintain unstamped cigarettes there. When Royal

relinquished this license on September 17, 2001, it could no longer possess unstamped cigarettes, purchase stamps or distribute cigarettes. Royal did not purchase, or report the use of, any tax stamps in the period May 8, 2001, until September 18, 2001. Distributor tax reports filed by Royal for May and June 2001 indicated no cigarette sales, nor did Royal report any sales exempt from taxation. After September 18, 2001, no one held a license to distribute cigarettes at the Hollywood store. Sacasa also determined that no notification of a secondary location was ever received for Royal's license.

Sacasa located an application for a seller's permit submitted on August 15, 2001, by Sofya Simonyan (Simonyan) for Cigars, Incorporated (Cigars), at the Hollywood store. Simonyan also applied for a distribution license. The signature on that application was not the same as the signature on the application for the seller's permit.

Cigarette deliveries to appellant's apartment

In 2001 and 2002, Watkins Motor Lines, Inc. (Watkins) made weekly deliveries of cigarettes to Royal, at appellant's apartment, at 5702 Lexington Avenue, in Los Angeles (Lexington apartment). For each delivery, the driver received daily delivery receipts from the dispatcher containing the name of the sender, the recipient's name and address and a description of the items delivered. After delivering the items, the driver wrote the day and number of boxes delivered on the receipt, signed it and obtained a customer's signature. A Royal employee had to be present to sign for the deliveries. Numerous delivery receipts from 2001 and 2002 reflected the signature of "Suzie," on behalf of Royal.

Surveillances of appellant

Beginning in 2002, 10 or 11 surveillances of the Lexington apartment were conducted. On August 9, 2002, Sacasa conducted such a surveillance and watched a Watkins driver deliver cigarettes to the location. A woman exited the apartment and signed for the delivery. In his report, Sacasa identified Gohar Pndlian (Pndlian), appellant's sister-in-law and owner of the Lexington apartment building, as "Suzie," who signed the delivery receipts. On September 11, 2002, Sacasa watched another Watkins delivery but could not see who accepted it.

In 2002, Sacasa also watched the Hollywood store one morning and saw appellant open the business. On a different day in July, he saw appellant close the business for the evening.

Discovery of Cigars product at Gilmar Manor

On October 1, 2002, Novo went to Gilmar Manor, a residential treatment facility in Van Nuys, to investigate a complaint. The manager gave him 39 cartons and nine packs of unstamped cigarettes. A stamp inside the carton identified "Royal" or "Cigars," at Hye Plaza. Gilmar Manor was not a licensed cigarette distributor.

Execution of search warrants

On April 2, 2003, Sacasa executed search warrants for three locations; first at the Lexington apartment, then at the Hollywood store, and lastly, at Simonyan's residence.

Appellant's residence

Appellant and his wife, Rita Jeiranian (Rita), were present in their pajamas during a search of the Lexington apartment. Investigators recovered, among other items, (1) 1,278 counterfeit California tax stamps, (2) 900 cartons of unstamped cigarettes in the master bedroom, and additional unstamped cigarettes in another bedroom, (3) an order form for 11 sheets of cigarette tax stamps and a check payable to the Board for $474, dated December 20, 2001, for cigarette tax stamps, which request the Board denied because the listed distributor's license was canceled, (4) correspondence, dated May 8, 2001, addressed to "Suzie" at Royal, from the Board, describing the requirements of being a cigarette distributor licensee in California, including a copy of the distributor's license issued to Royal, (5) a notice to the Board that Royal would no longer be a distributor and the Board's acknowledgment of the request to cancel the license, (6) an envelope addressed to Royal, attention "Suzie," at the Lexington apartment, containing documents from the Bureau of Alcohol, Tobacco, and Firearms, including an application for a permit to obtain a manufacturer of tobacco products license and other documents signed by "Akop Jeiranian" as owner, (7) bank statements and canceled checks drawn on a single Bank of America account written to known cigarette distributors outside

California,[3] (8) credit applications to cigarette distributors, including the name "Suzie" and "Akop Jeiranian," from Royal, listing other out-of-state distributors as credit references, (9) an American Express checkbook naming "Sahak Jeiranian, Royal Cigars" on the checks, (10) a fictitious business name statement bearing the signature of Simonyan, doing business as Royal, (11) a substantial number of shipping documents, mostly to the Lexington apartment, with only a few to the Hollywood store, the purchase invoices documenting sales by Tobacco Center, Inc. to Royal and (12) $45,000 in cash.

By correlating delivery receipts and invoices, Sacasa was able to determine that Royal purchased 10,980 cartons of cigarettes in 2001, requiring taxes of $95,576, and, purchased 7,680 cartons of cigarettes in 2002, requiring taxes of $66,816, for a total of $162,342 in taxes owing.

Hollywood store

During the search of the Hollywood store an incomplete commercial lease for the space occupied by Royal was uncovered. A sign on the wall of the store acknowledged that it sold unstamped cigarettes, and another sign warned customers that they assumed the risk of buying them. Investigators also found 1,240 cartons of cigarettes, 80 percent of which were unstamped, though this was then an unlicensed location. A counterfeit Board cigarette distributor license in the name of Royal was posted on the wall.

Simonyan's apartment

The search of Simonyan's residence failed to yield any evidence regarding importation of cigarettes into California or export to Armenia.

Interview of appellant during search of his residence

During the search of the Lexington apartment, Sacasa spoke with appellant. Appellant denied owning Cigars. He claimed that his friend and business partner Simonyan was the owner. She operated an import/export business, shipping cigarettes to

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[3] Sacasa subsequently subpoenaed records from the Bank of America account corresponding to the canceled checks and bank statement found at appellant's apartment and analyzed the deposits and withdrawals. For 2001, deposits equaled $273,745 and withdrawals $281,823. For 2001-2003, the average deposit was $37,000 per month.

Armenia.[4] Appellant claimed she was in Armenia, but investigators found her at her residence in the Hollywood area. When asked if he had a distributor's license, appellant said that it was at the Hollywood store. But only the counterfeit permit that was hanging on the wall was found there. When shown an invoice from Brazilian Tobacco, bearing the name "Suzie," appellant claimed not to know who she was. He denied ever purchasing California tax stamps, doing business as Royal or holding any license under his name or Royal's name.

Appellant did acknowledge, however, that some shipments of cigarettes were delivered to his apartment and unstamped cigarettes were present there because the Hollywood store was too small. He claimed that he shipped unstamped cigarettes to Simonyan, and documentation for those shipments was at the Hollywood store. Investigators failed to locate that documentation there. Appellant claimed that he prepared the bank deposits and Simonyan's boyfriend, "Johnny," made the deposits. Appellant said that he was not compensated, but Simonyan paid a mortgage on property he owned in Armenia. He said that neither his wife nor Pndlian were involved in the business.

Appellant said that the $45,000 cash recovered in the search of the Lexington apartment came from apartment rentals owned by Pndlian. Two checks, in the amount of $16.29, with the word "cigarettes" on the memo line, payable to Royal were mingled with the cash. Appellant claimed that the checks should have been made out to Cigars, but the purchaser must have been confused by the signage, which was there before Simonyan became the owner.

Preparation of Cigar's tax returns

Jack Bedevian (Bedevian), an accountant, prepared the 2002 and 2003 sales and use-tax returns for Cigars, located at the Hollywood store. The return reported gross sales and collected tax and listed Simonyan as the owner. On multiple occasions,

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[4] Cigarettes sent to Armenia were exempt from the cigarette stamp tax.

appellant brought Bedevian information needed to prepare the returns. Once prepared, appellant picked up the returns, though Bedevian never saw who signed them.

The defense's evidence

The defense's theory of the case was that appellant was a mentally challenged alcoholic, incapable of hatching the elaborate tax evasion scheme, but was used by Simonyan as her dupe. In 2001 through 2003, Ashot Mezhlumyan owned a restaurant on the first floor of Hye Plaza. He saw appellant there daily, roaming around all day, cleaning the property and working without pay for the landlord. He knew that a man named Armen owned Royal.

Tigran Dmirchyan was not employed and spent his days at Hye Plaza. He collected rent checks for Hakop Mkhchian, Hye Plaza's owner, thereby learning that Armen owned the cigarette store. Mkhchian died in 2003 or 2004. Dmirchyan did not collect rent from appellant.

Odet Gandipinyan (Gandipinyan) was a friend of Simonyan, having lived with her for three years. Gandipinyan met Armen Agajanyan (Armen) through Simonyan. She met appellant, who Armen introduced as "Crazy Sahak," at Royal, which was Armen's store. Gandipinyan socialized with appellant, Simonyan and Armen several times a week. She often saw Simonyan and Armen, who knew each other from Armenia and had a romantic relationship, together. Gandipinyan believed that appellant and Armen were friends, as Armen lived in appellant's apartment and appellant did work for him. Gandipinyan did not know what arrangement, if any, they had with regard to running Royal.

DISCUSSION

I. Section 30480 penalty provision or substantive crime

A. Background

Appellant was convicted by jury of counts 1 and 2. The amended information alleges in count 1 as follows: "On or about and between January 1, 2001 and December 31, 2001, in the County of Los Angeles, the crime of INTENTIONAL EVASION OF CIGARETTE TAX, in violation of REVENUE AND TAXATION CODE

SECTION 30480, a Felony, was committed by SAHAK JEIRANIAN, who violated Part 13 of Division 2 of the Revenue and Taxation Code with the intent to defeat or evade the determination of an amount due required by law to be made. It is further alleged that the amount of tax liability aggregated twenty-five thousand dollars ($25,000) or more in a 12-consecutive-month period."

Count 2 contains the identical allegation, except that the time period alleged is "[o]n or about and between January 1, 2002 and December 31, 2002."

B. Contentions

Appellant contends that section 30480 defines only a penalty provision and not a substantive crime. He argues that a crime is committed only when a statute prohibits or commands an act and provides a punishment. The purpose of section 30480 is not to create a substantive crime, but to elevate to felonies violations of the substantive misdemeanor crimes in Chapter 10 of Division 2, related to the distribution of cigarettes and collection of cigarette taxes.

The People contend that section 30480 sets forth a substantive offense, and even if it does not, appellant forfeited this challenge by failing to demur to the accusatory pleading.

We conclude that this claim was not forfeited and that section 30480 is a penalty provision, not a substantive offense.

C. Forfeiture

Appellant claims that counts 1 and 2 do not allege a crime. "'"[U]nless there is in force at the time of the commission or omission of a particular act a statute making it a crime or public offense, no one can be adjudged to suffer punishment for its commission or omission."'" (*People v. Vasilyan* (2009) 174 Cal.App.4th 443, 449 (*Vasilyan*).) A court lacks subject matter jurisdiction and cannot affirm a conviction for a crime that does not exist. (*Id.* at p. 450 ["It is fundamental and it cannot be questioned that a judgment that is void for lack of subject matter jurisdiction is subject to collateral attack"]; *People v. Wallace* (2003) 109 Cal.App.4th 1699, 1704 (*Wallace*) ["we cannot affirm a conviction and sentence imposed for a crime that does not exist"].) Subject

matter jurisdiction cannot be conferred by waiver or forfeiture. (*People v. Medina* (2009) 171 Cal.App.4th 805, 817.) Thus, appellant's failure to demur to the accusatory pleading could not constitute a forfeiture of the claim he now asserts.

D. Penalty or substantive offense

A substantive crime or public offense is defined as "an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: [¶] 1. Death; [¶] 2. Imprisonment; [¶] 3. Fine; [¶] Removal from office; or [¶] 5. Disqualification to hold and enjoy any office of honor, trust, or profit in this State." (Pen. Code, § 15.)

An enhancement is "an additional term of imprisonment added to the base term." (Cal. Rules of Court, rule 4.405(3).) "[S]tatutory provisions which are not 'enhancements' in the strict sense are nevertheless 'penalty provisions' as opposed to substantive offenses where they are 'separate from the underlying offense and do[ ] not set forth elements of the offense or a greater degree of the offense charged. [Citations.]'" (*Wallace, supra,* 109 Cal.App.4th at p. 1702.) "[A] penalty provision prescribes an added penalty to be imposed when the offense is committed under specified circumstances. A penalty provision is separate from the underlying offense and does not set forth elements of the offense or a greater degree of the offense charged. [Citations.]" (*People v. Bright* (1996) 12 Cal.4th 652, 661, disapproved on other grounds in *People v. Seel* (2004) 34 Cal.4th 535, 550, fn. 6.) Phrased slightly differently, a penalty "'"'focus[es] on an element of the commission of the crime or the criminal history of the defendant which is not present for all such crimes and perpetrators and which justifies a higher penalty than that prescribed for the offenses themselves.' [Citation.]" [Citations.]'" (*People v. Muhammad* (2007) 157 Cal.App.4th 484, 492–493.)

1. Statutory construction

Section 30480 states: "Notwithstanding any other provision of this part, any person who violates this part with intent to defeat or evade the determination of an amount due required by law to be made is guilty of a felony when the amount of tax liability aggregates twenty-five thousand dollars ($25,000) or more in any 12-

consecutive-month period. . . . Each offense shall be punished by a fine of not less than five thousand dollars ($5,000) and not more than twenty thousand dollars ($20,000), or imprisonment for 16 months, two years, or three years, or by both the fine and imprisonment in the discretion of the court."

In construing a statute, "[t]he fundamental rule is that a court 'should ascertain the intent of the Legislature so as to effectuate the purpose of the law.'" (*People v. Black* (1982) 32 Cal.3d 1, 5.) The court considers the words of the statute in the context of the statutory framework, giving "'significance . . . to every word, phrase, sentence [,] and part of an act in pursuance of the legislative purpose,'" and avoiding a construction that renders some words surplusage. (*Ibid*.) If the language is clear, the statute's plain meaning generally controls. (*People v. Dieck* (2009) 46 Cal.4th 934, 940.) If the statutory language permits more than one reasonable interpretation, however, it is ambiguous, and we turn to other sources, including legislative history and public policy, to resolve the ambiguity. (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) We must bear in mind that "'"[t]he defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute."' [Citations.]" (*People v. Craft* (1986) 41 Cal.3d 554, 560.)

Section 30480 is contained in Division 2, entitled "Other Taxes," Part 13, entitled "Cigarette Tax," Chapter 10, entitled "Violations." Chapter 10 contains numerous statutes setting out misdemeanor offenses pertaining to cigarette distribution and related taxes, including: section 30471, failing or refusing to file any report required or failing or refusing to allow an inspection by the Board; section 30472, making a false or fraudulent report with the intent to evade tax determination; section 30473.5, possessing, selling or purchasing false or fraudulent stamps; section 30474, selling packages of cigarettes without tax stamps; section 30474.1, selling counterfeit cigarettes; section 30475, transporting cigarettes without a permit; section 30476, placing or selling unstamped packages of cigarettes in a vending machine; and section 30478 purchasing by retailer of cigarettes for resale except from a person licensed pursuant to this part.

The express language of section 30480 strongly suggests that it is not a separate offense but merely an increase in the penalty for violating one of the existing misdemeanor statutes in Part 13, when the amount of tax involved exceeds $25,000 in any 12-consecutive-month period. It refers to violating "*this part*," a reference to other offenses in Part 13. (§ 30480, italics added.) It does not specify any precise conduct that is mandated or proscribed or identify any particular substantive crime, but simply elevates certain existing crimes from misdemeanors to felonies. (See *Vasilyan, supra,* 174 Cal.App.4th at p. 448; Pen. Code, § 15.) It focuses on one element of the commission of the crime, the amount of the tax evasion, which is not present in all such crimes, and which justifies an increased penalty. (*People v. Muhammad, supra,* 157 Cal.App.4th at pp. 492–493.)

The People argue that the reference in section 30480 to "this part" refutes appellant's contention that section 30480 was intended to pertain solely to offenses in Chapter 10. We see no significance in this distinction. Part 13 can be violated by actions proscribed not only in Chapter 10, but in other Chapters in that part. (See, i.e., § 30149, in pt. 13, ch. 3.) The crucial point is that offenses violating Part 13 are all subject to the elevation of the punishment if the added circumstance of section 30480, that there is more than $25,000 of taxes owing, is present.

The People also argue that section 30480 twice "selected and used the term 'offense' in describing both section 30480 and its scope." The People point to the title of section 30480, which is "Intentional evasion; offense; punishment." However, publisher's titles for statutes are unofficial, and thus insignificant when construing the statute. (*In re Gina S.* (2005) 133 Cal.App.4th 1074, 1083, fn. 9.) In the text of section 30480, the section states that "[e]ach *offense* shall be punished by a fine. . . ." (Italics added.) This use of the term "offense" is also irrelevant as it does not say that the "offense" to which it refers is set forth in that statute.

2. Legislative history of section 30480

The legislative history of section 30480 corroborates our conclusion that that section is a penalty. It was added by Assembly Bill No. 1555 in 1987. Most of the other

sections in Part 13 were already in existence. A letter, dated September 11, 1987, to then–Governor George Deukmejian, by Assemblyman Thomas McClintock, the Bill's principal author, states: "Under current law, if a taxpayer is found guilty of tax evasion under the Sales and Use Tax Law and other excise taxes administered by the State Board of Equalization, he can only be convicted of a misdemeanor, regardless of the amount of taxes evaded. As a result, there is no significant criminal deterrent to tax fraud involving these taxes, nor will District Attorneys commit much time to prosecuting what can only be punished as misdemeanors. There are already felony penalties for tax evasion under the Personal Income Tax Law and the Corporation Tax Law. [¶] Assembly Bill 1555 creates a felony penalty for willfully evading sales and excise taxes, but only if the amount evaded is $25,000 or more in one year." (Assemblyman McClintock, letter to Governor George Deukmejian re Assem. Bill No. 1555 (1987-1988 Reg. Sess.) Sept. 11, 1987.)

The Bill Analysis/Enrolled Bill Report (the "Report") states: "The Board has had difficulty in getting local district attorneys interested in pursuing criminal charges for business tax evasion because the penalty for such evasion is only a misdemeanor. . . . [¶] AB 1555 would make it a felony for any person to willfully evade a determination of $25,000 or more in any 12-month period for each of the following business tax programs: . . . [¶] . . . [¶] 3. The cigarette tax . . . " The "SUMMARY OF LOCAL IMPACT" section of the Report states: "Revises penalties for violation of various tax programs." (Assemblyman McClintock, Enrolled Bill Rep. on Assem. Bill No. 1555 (1987-1988 Reg. Sess.) Sept. 17, 1987.)

The Senate Rules Committee analysis stated that, "The purpose of this bill is to *increase the penalty* for intentional or fraudulent evasion of the sales and excise tax laws in large cases." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis, Assem. Bill No. 1555 (1987-1988 Reg. Sess.) as amended Aug. 18, 1987, italics added.)

This legislative history amply demonstrates that the Legislature was concerned by the lenient punishment meted out by the violations of the cigarette tax laws. It reflects

the legislative intent to increase the penalties on existing crimes related to the cigarette tax, rather than to create a wholly new offense.

3. Wallace case

We find the *Wallace* case to be instructive. There, the Court of Appeal concluded that Penal Code section 422.7, increasing a crime from a misdemeanor to a felony if it involves a hate crime,[5] is a penalty provision and not a substantive offense. That statute, the court stated, "'"focus[es] on an element of the commission of the crime or the criminal history of the defendant which is not present for all such crimes and perpetrators and which justifies a higher penalty than that prescribed for the offenses themselves." [Citation.]'" (*Wallace, supra,* 109 Cal.App.4th at p. 1702.) Similarly, in the matter before us, the statute focuses on the magnitude of the tax evasion as a basis for elevating the crime from a misdemeanor to a felony.

The People argue that *Wallace* is distinguishable. The Court of Appeal there noted that Penal Code section 422.7 was applicable only if charged in the accusatory pleading. It found that to be significant because the language requiring charging the section in the accusatory pleading would have been unnecessary if Penal Code section 422.7 provided a substantive crime, which must be charged. We do not find this distinction persuasive. Though section 30480 does not include a pleading requirement, *Wallace* stated only that the presence of such a requirement is evidence that the statute is a penalty, not that its absence mandates that it is not a penalty.

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[5] Penal Code section 422.7 provides in part: "[A]ny crime which is not made punishable by imprisonment in the state prison shall be punishable by imprisonment in the state prison or in a county jail not to exceed one year, by a fine not to exceed ten thousand dollars ($10,000), or by both that imprisonment and fine, if the crime is committed against the person or property of another for the purpose of intimidating or interfering with that other person's free exercise or enjoyment of any right secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States and because of the other person's race, color, religion, ancestry, national origin, disability, gender, or sexual orientation, or because the defendant perceives that the other person has one or more of those characteristics, under any of the following circumstances, which shall be charged in the accusatory pleading."

E. Alternative offense alleged in counts 1 and 2

Though we find that section 30480 is a penalty for which appellant cannot be convicted, we must still determine whether appellant was convicted of any crime that was properly alleged in counts 1 and 2. A reference to the wrong statute in an accusatory pleading is of no consequence where specific allegations in the accusatory pleading and evidence at the preliminary hearing give the defendant notice of the charge. (*People v. Hillard* (1989) 212 Cal.App.3d 780, 783; *People v. Thomas* (1987) 43 Cal.3d 818, 826.) "[I]t is clear that a valid accusatory pleading need not specify by number the statute under which the accused is being charged. . . . [¶] . . . '[T]he specific allegations of the accusatory pleading, rather than the statutory definitions of offenses charged, constitute the measuring unit for determining what offenses are included in a charge.'" (*People v. Thomas, supra,* at p. 826.)

To satisfy due process requirements, an accusatory pleading must give the accused adequate notice of the charges against him "in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial." (*In re Hess* (1955) 45 Cal.2d 171, 175.) This means, for example, that a conviction is invalid if it is of a lesser offense not set forth in the information and not necessarily included in an offense that was set forth; the defendant is not adequately warned of the possibility of being convicted of the lesser offense under those circumstances. (See *People v. Lohbauer* (1981) 29 Cal.3d 364, 368.)

Hence, the fact that section 30480 was alleged in counts 1 and 2 is not the end of our analysis. The information, considered in conjunction with the preliminary hearing, must be evaluated to determine whether an offense besides section 30480 was properly alleged. The information here provides no clue as to which of the myriad of offenses related to cigarette distribution and taxing was violated. It simply alleges that appellant intentionally evaded the cigarette tax, without specifying what he did to do so. While the preliminary hearing, indicated numerous violations by appellant of cigarette distribution and taxing statutes, it provides no guidance as to which violation was intended to be alleged in counts 1 and 2. We cannot randomly select one.

Moreover, this is not a case in which counts 1 and 2 simply misnumbered the applicable statute. The People intentionally sought to assert section 30480, believing it to be an offense. Hence, the misnomer analysis is inapplicable here.

II. Reformation of count 4 to reflect a misdemeanor conviction

A. Background

Section 30149 provides that engaging in the business of a distributor without a license is a misdemeanor. Count 4 of the amended information specifically alleges that a violation of section 30149 is a misdemeanor. At the sentencing hearing, the trial court referred to count 4 as a misdemeanor The minute order for that hearing states the same thing. However, the jury verdict for that count, states that a violation of section 30149 is a *felony*.

B. Contention

Appellant contends that the jury verdict form for count 4 must be reformed to reflect a misdemeanor conviction. We agree.

C. Clerical error

The statement in the jury verdict form that violation of section 30149 is a felony is a mere clerical error. It has no bearing on the elements of the charged offense and to correct it is not a modification of the verdict. California has long recognized that courts have authority to correct clerical errors in court documents. (See 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Judgment, § 174, pp. 202–203.)

While the judgment, the oral pronouncement by the trial court at the sentencing hearing, correctly reflects that the offense is a misdemeanor, as does the minute order of the sentencing hearing, we cannot anticipate what, if any impact, the erroneous designation as a felony in the verdict form might have in the future. The trial court should therefore correct the verdict form on remand to reflect that count 4 is a misdemeanor.

III. Unconstitutional delay in prosecution

A. Background

On October 22, 2008, appellant filed a motion to dismiss the charges against him, claiming that undue delay in filing of those charges denied him due process. On January 6, 2009, and February 19, 2009, evidentiary hearings on the motion were conducted. The evidence adduced at those hearings is as follows.

1. Appellant's evidence of prejudice

The investigation of appellant began in November 2001. Search warrants that resulted in the seizure of evidence from the Lexington apartment and the Hollywood store were executed 16 months later. Hundreds of invoices which were the core of the case against appellant at his preliminary hearing were obtained in those searches. On the day of the searches, investigators interviewed appellant, Simonyan, and Jack Pavente, the bookkeeper.

In late 2002, Novo received a complaint that Gilman Manor, a residential treatment facility, was selling unstamped cigarettes. There, Novo found 39 cartons of unstamped cigarettes with labels saying, "Cigars," at the Hollywood store. Novo interviewed Vladimir Chertok (Chertok), the manager of the facility, but failed to ask him from whom at Cigars he purchased the cigarettes. Novo made no attempt to locate, contact or subpoena Chertok again. In April or May 2008, Jessie Karoglian (Karoglian), defense counsel's paralegal, tried to interview Chertok, but was unable to locate him.

On another occasion, Mitchell Hermann (Hermann), a licensed private investigator, went with Karoglian, who was to act as the interpreter, to interview Simonyan. She refused to speak with them, claiming her right to remain silent. Hermann also spoke with a security guard at the Hye Plaza who said that the owner of that mini-mall had died several years earlier.

Appellant's wife, Rita, testified that appellant was on medication for a mental condition and had been receiving social security disability for 16 years. He abused alcohol, suffered from depression and had lost his memory since his arrest. He had been getting worse over the years and had "no memory at all."

There was substantial evidence of appellant's guilt without Chertok's and Simonyan's testimony, based on Royal's bank records and the invoices used to determine the amount of tax liability. In Simonyan's interview, she gave information tending to implicate appellant, not exculpate him. She denied filling out the application for the seller's permit, and her signature on it looked similar to that which was on an application appellant had previously submitted. Simonyan was still available to testify.

2. Trial court ruling

At the conclusion of appellant's evidence, defense counsel argued that appellant was prejudiced by the delay because witnesses were uncooperative, could not be found, and appellant suffered from memory loss. The trial court found that appellant was prejudiced by the delay because "A, the time passage inherent in any delay like this; two, the fact that the witnesses now appear to be unavailable or perhaps their memories have faded; and, three, Mr. Jeiranian does appear, at least inferentially, to have some memory issues at this time." Having made out a case of prejudice, the prosecution then had to explain the delay.

3. The prosecution's evidence explaining delay

The People introduced evidence to explain the lengthy delay in initiating this action. Sacasa was supervising tax auditor for the Investigation Division of the Board, which investigates felony fraud tax evasion claims related to many taxes, in addition to tobacco and cigarette taxes. He described the broad geographical area covered by his office and the limited number of investigators available.

Sacasa also described the chronology in the handling of this case. It came to the Board's attention in 2001, following a routine inspection of the Hollywood store by a Board inspector. Four months later, the case was assigned to an investigator, who prepared preliminary background information on the store.

The case was then assigned to Sacasa, who began his investigation in February 2002. He attempted to determine the owner of the Hollywood store. He obtained shipping documents from Board headquarters showing that Watkins was shipping unstamped tobacco and cigarettes to California and that there were shipments to the

Lexington apartment. Sacasa conducted a couple of surveillances of that apartment, following which he prepared a search warrant. Board procedures required that before the warrant could be executed, it had to first be approved by Sacasa's supervisor, followed by approval of the area administrator, then by Board headquarters in Sacramento and finally by the Board's legal department, a time-consuming process. After the search warrants were executed, Sacasa issued subpoenas to banks for Royal's records. It took six months to receive these records.

After receiving all of these documents, Sacasa prepared a schedule from hundreds of invoices recovered in the search. This "extensive audit" had to be reviewed by a reviewer in the investigation unit for numerical errors, followed by review by the supervising tax auditor. Then, Sacasa prepared a "Prosecution Criminal Complaint Packet" (Packet), which included the documentary evidence uncovered, the criminal audit and documents reflecting the investigation that had been conducted. The Packet filled 4, four-inch binders. It was reviewed by a supervisor and then went to an area administrator for approval.

Sacasa received the approved Packet on January 31, 2005. He did not immediately submit it to the district attorney's office, in part, because he obtained information that appellant was operating a new store. He had to investigate that allegation before referring the matter to the district attorney. An investigator went to the new location, and appellant denied that he was the owner, stating that the owner was away and he was the manager.

Sacasa finally presented the Packet personally to the district attorney's office on April 13, 2005. The case was assigned and reassigned to four deputy district attorneys before finally being assigned to attorney James Belna, who tried the case. Belna filed the case in July 2007. According to Belna, tobacco tax prosecutions involve special aspects and legal procedures not present with routine theft-fraud cases. Prosecutors experience a learning curve with tobacco tax cases. None of the deputy district attorneys who had the case before Belna had ever prosecuted such a case. Additional delay occurred because one of the deputies handling the case before Belna wanted further investigation into the

feasibility of an income tax evasion charge. A few witnesses were interviewed, and bank information was obtained from two banks.

Argument on motion to dismiss

At the conclusion of the People's evidence, defense counsel argued that the prosecutor had failed to establish adequate justification for the delay to outweigh the prejudice he suffered. There was only a single document binder given to the district attorney that presented the entire case. Most of the information in it was obtained in the April 2003 searches. Much of the delay was the result of unexplained changing deputies handling the case.

The prosecutor argued that appellant failed to establish any specific prejudice, that any prejudice was minor and speculative, and that the delay was justified by the complexity of the case, the large number of documents, the Boards internal review process and the need for additional investigation.

Ruling

The trial court denied appellant's motion on the grounds that (1) the delay was caused by an ongoing investigation involving thousands of pages of documents, (2) there was no evidence the delay was a deliberate attempt to gain a tactical advantage, (3) appellant failed to show any specific prejudice by the delay, (4) the government agencies involved proceeded with due diligence to prosecute given available resources, and (5) the delay was "investigative delay."

B. Contention

Appellant contends that the trial court erroneously denied his motion to dismiss, which was based upon preaccusation delay. He argues that he was prejudiced by the lack of cooperation of witnesses and his loss of memory due to longstanding mental health issues and alcohol abuse. He further argues that the delay was inexcusable because there were few witnesses, not that many documents and much of the delay was the result of unexplained transfers of the case to different deputy district attorneys. This contention lacks merit.

C. Standard of review

We review for abuse of discretion a trial court's ruling on a motion to dismiss for prejudicial prearrest delay. We defer to any underlying factual findings if substantial evidence supports them. (*People v. Cowan* (2010) 50 Cal.4th 401, 430 (*Cowan*).) Whether preaccusation delay is unreasonable and prejudicial to a defendant is a question of fact. (*People v. Mirenda* (2009) 174 Cal.App.4th 1313, 1330.)

D. Protection against preaccusation delay in prosecution

"A defendant's state and federal constitutional speedy trial rights (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15, cl. 1) do not attach before the defendant is arrested or a charging document has been filed. [Citation.] Nonetheless, a defendant is not without recourse if a delay in filing charges is prejudicial and unjustified. The statute of limitations is usually considered the primary guarantee against overly stale criminal charges [citation], but the right of due process provides additional protection, safeguarding a criminal defendant's interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence [citation]." (*People v. Abel* (2012) 53 Cal.4th 891, 908 (*Abel*).) The due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution protect a defendant from the prejudicial effects of lengthy, unjustified delay between the commission of a crime and the defendant's arrest and charging. (*Cowan, supra,* 50 Cal.4th at p. 430.)

E. Methodology for determining unconstitutional preaccusation delay

A defendant seeking relief for undue delay in filing charges must first demonstrate resulting prejudice, such as by showing the loss of a material witness or other missing evidence, or fading memory caused by the lapse of time. (*Abel, supra,* 53 Cal.4th at p. 908.) Prejudice to a defendant from precharging delay is not presumed. (*People v. Nelson* (2008) 43 Cal.4th 1242, 1250 (*Nelson*).) "If the defendant establishes prejudice, the prosecution may offer justification for the delay; the court considering a motion to dismiss then balances the harm to the defendant against the justification for the delay.

[Citation.] But if the defendant fails to meet his or her burden of showing prejudice, there is no need to determine whether the delay was justified. [Citations.]" (*Abel, supra,* at pp. 908–909.)

1. Prejudice

Appellant claims that the nearly six-year delay in bringing charges against him prejudiced him in four principal ways. (1) He suffered memory loss due to his mental disorder and alcoholism so that at the time of trial, he could not remember much of what occurred in the relevant time period. (2) Because of the passage of time, Chertok, who purchased unstamped cigarettes from Cigars, could not be located or contacted and was never asked by the prosecution who at Cigars sold him the cigarettes. (3) Simonyan, who appellant believed was the true owner and mastermind of the illegal cigarette-sale operation, refused to speak with appellant's representatives. (4) A Hye Plaza security guard, who might have been able to identify the owner of Cigars, had died a few years earlier.

The trial court found that the claimed prejudice was unspecific and minimal. This finding is supported by substantial evidence. Appellant's wife testified that appellant had suffered mental and drinking problems for 16 years and that the problems had gotten worse over time. Appellant's counsel filed a declaration stating that appellant could not recall where he was on the specific dates on which it was alleged cigarettes were delivered to his apartment, he did not recall the whereabouts of Armen and Simonyan on those dates, could no longer recall the names and address of witnesses who might be able to confirm his claim that Simonyan and Armen owned and operated the cigarette store, and could not remember the contents of his statements to police. However, there was no evidence of the extent to which appellant's memory had already deteriorated due to his problems by the time his apartment was searched in 2003 or a reasonable time thereafter. Without this evidence, it is impossible to assess the extent of his memory loss attributable to any *undue* delay in filing charges.

Furthermore, it is doubtful, that appellant would recall details, such as where Simonyan, or Armen were at the time of the deliveries, even after a much shorter delay.

Where appellant, Simonyan and Armen were at those times is not central to the issues in the case, as the important point is that the cigarettes were delivered to, and stored in, appellant's apartment. Appellant's inability to remember the names and addresses of persons who might be able to identify Armen is also of little significance as that evidence is cumulative of evidence at trial that Armen was the owner of the cigarette store from 2001-2003. With regard to appellant's claim that he did not recall the content of his statement to police, he testified during a hearing outside the jury's presence that he did.

Appellant's claim that the inability to locate Chertok was prejudicial is equally speculative. There was no showing that Chertok had not become unavailable long before the filing of this case and hence his unavailability was not the result of the delay. It is also speculative as to whether Chertok knew who actually sold him the unstamped cigarettes. Even if Chertok could identify the person who sold him those cigarettes, there is no assurance that that person owned the store.

Appellant's claim that Simonyan would not speak with him and her assertion of the privilege against self-incrimination to his prejudice is also speculative. There is no evidence that she would have spoken with appellant at an earlier time. Her prior statement to the police implicated appellant by denying her involvement in the cigarette store and denying that the signature on the application for the seller's permit was hers, when it appeared to have similarities to appellant's signature.

It is also significant that appellant must have been aware that he was a suspect, at latest, in April 2003, when he was at home when the search warrant was executed and he was questioned by investigators. (See *Cowan, supra,* 50 Cal.4th at p. 432.) By that time, appellant had an incentive to record any exculpatory information he had and to concern himself with locating the witnesses who might assist him.

Finally, the strong evidence against appellant make his claims of prejudice appear inconsequential. Watkins delivery documents reflected that it made regular deliveries to appellant's apartment, totaling thousands of cartons of cigarettes, though that location was unlicensed. Appellant also brought tax information to Bedevian, needed for Bedevian to prepare the 2002 and 2003 sales and use tax returns for Cigars. The search

of appellant's apartment uncovered hundreds of invoices for the shipment of cigarettes, 900 cartons of unstamped cigarettes, over 1,700 counterfeit tax stamps and $45,000 in cash. In December 2001, Novo went to Royal where he saw appellant, who at first said he was the owner of the business. Sacasa conducted a surveillance of Royal in 2002 on two different days. One day, he observed appellant opening the Hollywood store and on another day he saw him locking it at the end of the day. An application for a seller's permit was in appellant's name. In light of this impressive array of evidence, appellant's "'bare statement'" of inability to recall and other speculative claims "'realistically cannot be considered more than minimal prejudice.'" (*Cowan, supra,* 50 Cal.4th at p. 432.)

2. Excuse for delay

The trial court found that the delay in proceeding against appellant was the result of an ongoing investigation involving thousands of pages of documents, the government agencies involved proceeded with due diligence to prosecute given available resources, the delay was "investigative delay and there was no evidence the delay was a deliberate attempt to gain a tactical advantage."

While the delay of nearly six years in prosecuting appellant is troublesome, there is substantial evidence to support the trial court's findings. Sacasa testified to the limited resources of his division. It had few tax-fraud investigators and a large geographical area with millions of people to oversee. Moreover, the Board had a fairly extensive hierarchy necessary to approve the issuance of search warrants and approve referring the case to the district attorney. The district attorney's office had numerous district attorneys handling the matter before it reached the attorney who tried it. Transfers of attorneys to other divisions and the lack of attorneys with expertise in handling tax fraud cases accounted for much of the more than two-year delay before appellant was arrested and an accusatory pleading filed.

"A court may not find negligence by second-guessing how the state allocates its resources or how law enforcement agencies could have investigated a given case. '. . . Thus, the difficulty in allocating scarce prosecutorial resources (as opposed to clearly intentional or negligent conduct) [is] a valid justification for delay. . . .'" (*People v.*

Nelson, supra, 43 Cal.4th at pp. 1256–1257.) For the same reason, the difficulty in allocating scarce investigative resources provides a valid justification for delay. (*Abel, supra*, 53 Cal.4th at p. 911.) Given severe budget constraints on government, delays due to lack of resources are likely to become increasingly prevalent.

Appellant suggests that the police had enough evidence to arrest him shortly after the April 2003 search warrants, as those warrants uncovered the documents that were at the core of the People's case. While the investigation and handling of this case was not perfect, no investigation ever is, there is no evidence of delay to gain advantage or evidence of negligence. As the Supreme Court said in *Nelson*, "[a] court should not second-guess the prosecution's decision regarding whether sufficient evidence exists to warrant bringing charges. 'The due process clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's decision as to when to seek an indictment. . . . Prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt.'" (*Nelson, supra*, 43 Cal.4th at p. 1256.) Indeed, "'"[a] prosecutor abides by elementary standards of fair play and decency by refusing to seek indictments until he or she is completely satisfied the defendant should be prosecuted and the office of the prosecutor will be able to promptly establish guilt beyond a reasonable doubt."'" (*Cowan, supra*, 50 Cal.4th at p. 435.**)**

IV. Erroneous aiding and abetting instructions

A. Background

The trial court instructed the jury on aiding and abetting in accordance with CALCRIM Nos. 400[6] and 401.[7] Appellant's counsel objected to neither instruction.

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6 CALCRIM No. 400 states: "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. [¶] A person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator."

B. Contentions

Appellant contends that the trial court erred by giving, aiding and abetting instructions with respect to counts 1, 2, 4 and 6, thereby violating his federal and state due process rights and his Sixth Amendment right to have the jury determine the facts. He argues that "violations of those penal provisions of Division Two, Part 13, Chapter 10 of the Revenue and Taxation Code can be committed only by the person responsible for payment of the tax due when cigarettes are distributed."[8] This contention lacks merit.

C. The trial court's obligation to instruct the jury

In criminal cases, "'"even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case."'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

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[7] CALCRIM No. 401 states: "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. [¶] Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime. [¶] If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor. [¶] If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor."

[8] We need not consider appellant's contention that the trial court erred in giving aiding and abetting instructions with regard to counts 1 and 2 in light of our conclusion in part I, *ante*, reversing those convictions.

D. Principles of aiding and abetting

"All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission . . . are principals in any crime so committed." (Pen. Code, § 31.) A person is liable for aiding and abetting when, (1) with knowledge of the unlawful purpose of the perpetrator (2) with the intent or purpose of committing, or encouraging, or facilitating the commission of the crime, that person and (3) by act or advice aids, promotes, encourages, or instigates the commission of the crime. (*People v. Gibson* (2001) 90 Cal.App.4th 371, 386.) The test of whether a person aided or abetted in the commission of an offense is "whether the accused in any way, directly or indirectly, aided the perpetrator by acts or encouraged him by words or gestures." (*People v. Villa* (1957) 156 Cal.App.2d 128, 134.)

E. Analysis

1. Statutory scheme

Count 4 alleges a violation of section 30149, unlicensed cigarette distribution, which states: "Any person required to obtain a license as a distributor under this chapter who engages in business as a distributor without a license or after a license has been canceled, suspended, or revoked, and each officer of any corporation which so engages in business, is guilty of a misdemeanor." The jury was instructed that to prove appellant was guilty of section 30149, the People had to prove that he engaged in a business of a distributor and when he did so, he did not have a valid distributor's license.

Section 30011 defines a distributor as a person who distributes cigarettes or tobacco products or who sells or accepts orders for cigarettes or tobacco products which are to be transported from outside of California to a consumer within this state.

Section 30008 states that distribution includes the sale of untaxed cigarettes or tobacco in California, the use or consumption of untaxed cigarettes or tobacco in California or placing untaxed cigarettes or tobacco products in a vending machine or in retail stock for the purpose of selling them to consumers.

Count 6 alleges a violation of section 30474, possession of unstamped cigarettes, which states in part: "(a) Any person who knowingly possesses, or keeps, stores, or retains for the purpose of sale, or sells or offers to sell, any package of cigarettes to which there is not affixed the stamp or meter impression required to be affixed under this part, when those cigarettes have been obtained from any source whatever, is guilty of a misdemeanor. . . ." The jury was instructed that to find appellant in violation of section 30474, the People had to prove that he knowingly possessed for sale a package of cigarettes which had no tax stamp affixed.

2. No evidence that cannot aid or abet

Appellant argues that this "statutory scheme suggests that only individuals who receive the direct economic benefit from the sale of unstamped cigarettes have criminal liability for violations of statutes which have 'distribution' or being a 'distributor,' as an element of the crime." Appellant reaches this conclusion because "[o]nly the individual who receives the revenue from the distribution of the taxes would have the means to pay the stamp tax. It would not make sense to impose responsibility for payment of a tax on an individual who did not receive the economic benefit of the transaction. Furthermore, it was unlikely the Legislature intended to impose criminal liability, as well as civil liability for the unpaid taxes, upon every incidental participant, such as store clerks, in the sale of unstamped cigarettes." We are not convinced.

Neither section 30149 nor 30474 deal with, or require, the payment of the tax on the distribution of cigarettes or tobacco. Nor do they evidence an intent to limit their application only to the direct perpetrator. They criminalize distributing cigarettes without a license and possessing them for sale without a tax stamp on them, respectively. Neither statute seeks any tax that may be owing by reason of the distribution of the cigarettes. Neither statute precludes aider and abettor culpability.

We see no reason why only the person who receives the revenue from the sale of cigarettes can be punished under these statutes, nor why only that person "would have the means to pay the stamp tax." It makes perfect sense that anyone knowingly involved in

the conduct prohibited by sections 30149 and 30474, whether as the direct perpetrator or as one aiding that person, should be responsible for violating those sections.

Appellant cites several cases for the proposition that some statutes preclude aider and abettor culpability. We find them to be inapposite. For example, in *In re Meagan R.* (1996) 42 Cal.App.4th 17, the juvenile court found the minor guilty of burglary by entering a residence with the intent to aid and abet her own statutory rape. The Court of Appeal reversed, concluding that where crimes necessarily involve two or more persons, and where no punishment is provided for the conduct of one of the participants, that party cannot be charged with criminal conduct either on a conspiracy or aiding and abetting theory. (*In re Meagan R.*, *supra*, at pp. 24–25.)

Nothing in the statutes here suggests that they are limited to the conduct of two or more persons and that no punishment was intended as to one of them. (See also *Gebardi v. United States* (1932) 287 U.S. 112, 119–120 [woman cannot be guilty of conspiracy to commit the Mann Act]; see also *Williams v. Superior Court* (1973) 30 Cal.App.3d 8, 15.)

In *D'Amato v. Superior Court* (2008) 167 Cal.App.4th 861, also cited by appellant, the Court of Appeal held that a disinterested public official could not be prosecuted for legislative acts that aid and abet another official in having an interest in a contract that he or she made in an official capacity. To conclude otherwise would violate the separation of powers because a legislator without a personal financial interest has legislative immunity for damage suits based on legislative acts. The Court of Appeal found an intent in Government Code section 1090, which precluded members of the Legislature and other government officials from being financially interested in any contract made by them in their official capacity, to exclude aider and abettor liability. The statute imposed liability only on the member having an interest, not on the body as a whole, evincing an intent to exclude members of the legislative body who do not have a financial interest in the contract. (*D'Amato v. Superior Court*, *supra*, at p. 873.)

The matter before us does not involve the very specific separation of powers and legislative immunity issues present in *D'Amato v. Superior Court*, *supra*, 167 Cal.App.4th 861.

F. Harmless error

Even if it was error to instruct the jury on aiding and abetting, given the overwhelming strength of the evidence that appellant was a direct perpetrator of the offenses in counts 4 and 6, rather than simply an aider and abettor, as discussed in part IIIE1, *ante*, he was not prejudiced by the aiding and abetting instructions. We conclude beyond a reasonable doubt that he would not have received a more favorable verdict had that instruction not been given. (*People v. Palmer* (2005) 133 Cal.App.4th 1141, 1157 [misdirection of the jury, including incorrect, ambiguous, conflicting, or wrongly omitted instructions that do not amount to federal constitutional error, are reviewed in *People v. Watson* (1956) 46 Cal.2d 818, 836].)

DISPOSITION

Appellant's convictions of counts 1 and 2 are reversed. The judgment is otherwise affirmed. On remand, the trial court is directed to correct the guilty verdict on count 4 to reflect that the offense charged is a misdemeanor, not a felony.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ