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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. PHOEBE CHANEL CHAO et al., Defendants and Appellants.	B266774 (Los Angeles County Super. Ct. No. GA089540)

APPEAL from judgments of the Superior Court of Los Angeles County, Suzette Clover, Judge. Affirmed.

Eisner Gorin, Alan Eisner, Dmitry Gorin; Brad K. Kaiserman for Defendant and Appellant Phoebe Chanel Chao.

Alex Coolman, under appointment by the Court of Appeal, for Defendant and Appellant Peter An Chao.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Connie H. Kan, Deputy Attorneys General, for Plaintiff and Respondent.

Appellants Phoebe Chanel Chao (Phoebe) and Peter An Chao (Peter) appeal from the judgments entered following their convictions by jury on seven counts of theft by false pretense, with the amount of each theft greater than $950 (Pen. Code, § 487, subd. (a); counts 1 – 4, 6 – 8)[1] and Phoebe's conviction for perjury (§ 118; count 12). We affirm.

FACTUAL SUMMARY

1. People's Evidence.

a. *Count 1: Xia English.*

Xia English testified as follows. English heard about an advertisement in a Chinese-language newspaper regarding appellants' loan company, later identified as Active Statewide Funding (ASF). English went to the company and met appellants.

In February 2009, English attended a seminar given by Phoebe. Phoebe, speaking in Mandarin, said that, under President Obama, small business loans were available to applicants with a minimum credit score of about 720. English told Phoebe that English's credit was not good. Phoebe said English could still apply for the loan because Phoebe had a "Temporary Rapid Credit Score Increase" program that would increase English's credit score about 80 points for each $800 payment to Phoebe. English paid and Phoebe showed her paperwork indicating English's credit score had increased from 500 to 800. English did not know whether the paperwork was fake and did not independently check her credit.

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[1] Unless otherwise indicated, subsequent section references are to the Penal Code.

Phoebe gave English an alleged loan application from Orchard Bank in New York (Orchard) to complete. English submitted the application and, about six weeks later, Phoebe said Orchard had approved a $500,000 loan. Phoebe told English she needed to go with Peter to notarize a document, allegedly from Orchard, entitled, "Business Corporate Loan Terms." Phoebe indicated everything needed to be done quickly. English testified the document was "the loan documents that they told me it's been approved." (*Sic.*) The document consisted of a single page and purported to be a commitment letter "constitut[ing] a loan [to English] from Orchard Bank a subsidiary of HBSC" of $500,000 (People's exh. Nos. 7 & 12).

On one occasion when English made a payment to appellants, Phoebe told English she had a credit delinquency that had to be resolved before the bank would fund her loan. Phoebe said English had to bring a $4,050 cashier's check right away. English ran over to their office, and Phoebe had Peter take English to the Bank of America, which was on the bottom floor of the office building. English bought the cashier's check with Peter and Peter told the banker what to do.

Phoebe said notarizing would cost $140. English complained she usually paid $10. Phoebe replied, " 'No, that's not good. Only this lady's notarize [*sic*] is good. We never have a problem. You have to pay $140.' " Phoebe also said English had to pay the $140 to appellants, plus $50 to Federal Express, and a few thousand dollars for a loan origination fee. English and Peter went to the notary.

Phoebe told English she needed to wait for the loan to fund. Phoebe would always find some problem, and would tell English she needed to pay to solve each problem. English testified

Phoebe had English make payments to the accounts of ASF, "Dragon Funding," and "ASF Services." Concerning these, English testified, "I deposit money to her account."

Phoebe would forward to English emails that Phoebe said were from the bank. Only the bank's name and a department, and not the bank's email address or phone number, would be in the email. English asked to speak directly to the bank because Phoebe had said the bank would simply check English's credit score. Phoebe would indicate there were multiple problems which she would solve for more money. English paid her. Phoebe told English by phone, not emails, how much money was needed. English testified, "Every time when I pay [Phoebe]. . . [s]he said, 'This will be the last time. After that, your loan will be coming out. We'll hear next Monday' or something like that." There were always problems.

When English had no more money to give to Phoebe, Phoebe began avoiding her. However, on one occasion, Phoebe told English that Phoebe was in Canada and did not know when she would return. Phoebe also said she would return in a few weeks. English had seen in appellants' office a few times a person named "Gil Rodriguez." She denied knowing him as Guillermo and denied knowing that name. Rodriguez told English that Phoebe was "here" and had never gone to Canada.

Phoebe forwarded by email to English an alleged email, dated October 28, 2009, from Brandon Keen at Orchard to Phoebe. The alleged email was entitled "Information on the funding cutoffs." In Phoebe's email, she stated the alleged email had been sent to all funding companies. Phoebe also stated, "It's the end of the year. The bank cut off the loan and will not fund any more." An attached alleged letter from Orchard stated, "All

of the government funds are exhausted. There's no more money to lend."

English called Orchard, and Orchard told her it had issued no such loan and there was "no such department." English never received a loan. She never asked for, or received, a $25,000 loan from Phoebe personally.

English had paid to appellants over $40,000 for the alleged loan application process. Phoebe rejected English's request for a refund. Phoebe also indirectly threatened English. Phoebe told English, " 'We all have guns in our drawers. And Peter and I are good at martial arts. One time this guy causing us trouble, we beat him bloodily.' " (*Sic*.) Documentary evidence of payments English made to Phoebe or to ASF for the alleged loan application process were admitted into evidence.

b. *Count 2: Tina Kwan.*

Tina Kwan and appellants were friends. In 2008, Kwan told Phoebe that Kwan needed a business loan. Phoebe said she had a government-approved company that could lend up to $500,000 in Obama Stimulus Program funds. Kwan asked why appellants had been approved. Phoebe said "their company" had been selected and she had received a letter from the government. Kwan asked to see the letter. Phoebe emailed her something about the Obama Stimulus loan. Kwan told Phoebe, " '[t]his is something you get from the Internet, but it doesn't show me that you guys did get the fund.' " Phoebe replied, " 'This is confidential. How can I give it to you and everybody pass it around? We cannot give you the letter to see it.' " However, Phoebe said she might let Kwan see it the next time they met. Phoebe never showed such a letter to Kwan.

Kwan went to Phoebe's office to obtain a $500,000 loan. Phoebe ran Kwan's credit and said it looked fine. Phoebe said she could get the loan for Kwan because appellants' company made the lending decision. Phoebe also said they were "incorporated" with Texas Champion Bank (TC). Phoebe said "they need to make a package," submit it to TC, and "they would get approval." Phoebe waved at Kwan what Phoebe claimed was a "loan approval" document reflecting TC's approval of someone else's loan. Kwan was told to pay a fee of about $7,000 or $8,000.

Phoebe checked Kwan's credit score; it was over 700. However, Phoebe said Kwan's credit records reflected late payments. Kwan offered to call the credit card company but Phoebe said she could immediately fix the problem for a few hundred dollars. Accordingly, Kwan paid $600 or $700 to Phoebe.

Phoebe later told Kwan that Phoebe had fixed the credit report, and " 'we have to start the C.P.A. to do the package.' " Phoebe asked Kwan for a returned check, bank statement, and tax return; Kwan provided these. Phoebe also kept asking Kwan for money. At times, Phoebe would ask Kwan for money to pay the certified public accountant (CPA). Phoebe indicated Dragon was the name of the CPA's company. Kwan deposited money into the Dragon account because Phoebe said the CPA was working on Kwan's case.

A few months later, Phoebe told Kwan the loan had been approved and Kwan needed to obtain a $900 cashier's check to pay a closing fee to TC. Kwan said she could get the cashier's check on her own, but Phoebe said Kwan had to go with Peter to the bank within their building to get the check.

Kwan and Peter went together and had notarized what Kwan thought was a loan document. Kwan asked Peter why the name Active Statewide was not on the document, and he replied, " 'This is the way it is.' " She also asked why the document was only one page, and he said Obama loans were different from other business loans. Kwan asked for a copy of the document, but Phoebe told her that Phoebe would give all documents to Kwan upon funding.

Phoebe or Peter told Kwan she could expect the funding check within 48 hours after notarizing the documents, but she received nothing. Phoebe said there was still a problem with Kwan's credit regarding late charges, and Kwan needed to pay $800 to fix the problem. Kwan called her credit card company, and the company said Kwan had no credit problem. However, when Kwan explained this to Phoebe, she said Kwan's explanation was not enough and Kwan needed to pay $100 to extend the loan. Kwan said she had solved the problem and did not need an extension.

Kwan called TC and spoke to Randy Garcia. He said TC had no business with Active Statewide. Kwan called Phoebe and asked what happened to the loan. Phoebe said Kwan did not pay to extend it, therefore the loan no longer existed. Kwan by email asked Phoebe for a letter indicating TC had cancelled the loan.

During the alleged loan application process, Phoebe forwarded by email to Kwan alleged emails to Phoebe from Stacy Mathews and Brandon Keen as underwriter managers from the "Corporate Funding Department" of TC. The alleged emails contained no name, phone number, or address for a company. Kwan asked why that was, and Phoebe replied, " 'That's the way it is.' "

Kwan also received from Peter an email stating, "We need an explanation for all of the lates on credit." The email forwarded an alleged email from "Corporate Funding Department, Brandon Keen, underwriter manager." Kwan called the institution and determined no such person worked there. Penny Lau, Kwan's friend, was one of appellants' victims, and Lau told Kwan that Lau knew other applicants that had been "scammed." Kwan met a "Mexican guy" at appellants' office but did not remember his name. Kwan never spoke to that person about the loan.

c. Count 3: Penny Lau.

In October or November 2009, Lau met appellants through a woman named Lucy. Lau went with Lucy to appellants' Arcadia office because Lau wanted a business loan. Lau initially met with appellants and discussed the loan, but Lau mainly spoke with Phoebe.

Phoebe said the loan was initiated by President Obama to help small businesses, and TC would be the lender. Phoebe also said Lau's credit should be checked first and, if it was good, Lau could borrow $300,000 to $500,000. Phoebe checked Lau's credit score for $80, and determined her credit rating was 800. Phoebe said with such an excellent credit rating, Lau's loan could be processed very quickly for a one-time fee of $980, which Lau paid.

Phoebe later claimed Lau's loan had problems, and asked for money on four or five occasions. Lau paid Phoebe a total of $6,800 during the alleged loan application process. Lau asked appellants for copies of the loan documents, but Phoebe said Lau would get them only "when all the loan is in place." Lau asked for receipts for cash payments, but Phoebe would not provide any.

Phoebe later told Lau " 'the loan ha[d] arrived,' " Lau needed to have "it" notarized, and Lau needed to provide a cashier's check in the amount of at least $1,200. On December 11, 2009, Lau had notarized a document purporting to be on TC letterhead and entitled, "Business Corporation Loan Terms." Lau was told she would receive funds from the bank within a week of her signing the document, but she did not receive funds. On December 16, 2009, Lau signed a document, purporting to be on TC letterhead, entitled, "Borrower's Certification and Authorization."

On December 25, 2009, Lau asked Phoebe about the funds. Phoebe said the bank had a problem, if Lau wanted the loan she needed to make another payment, Phoebe would help resolve the problem, and Lau would receive her loan. Lau refused. She asked for a refund, but appellants told her she needed to pay additional money or lose all money previously paid. Lau called appellants repeatedly, but they eventually refused her calls. During cross-examination, Lau was shown a signature on defense exhibit F. Lau denied the signature was hers and denied having seen the document before. Phoebe's counsel then asked if Lau received a $1,285 refund on December 17, 2009. Lau replied, "I have never received this. This is a lie, which is totally blatant. How can you say this?" Documentary evidence of certain payments Lau made was admitted into evidence.

d. *Count 4: Wen Zhang.*

In October 2009, Wen Zhang applied for a business loan with appellants. Phoebe explained to her the loan was part of a small business loan program offered by President Obama, Phoebe's company was like a guarantor or insurance company, Phoebe had millions of dollars of deposits with Bank of America,

and Phoebe could get the loan. Zhang initially discussed a $200,000 loan. Phoebe told Zhang that based on Zhang's credit, she was ineligible for a larger loan. Zhang paid Phoebe money to raise Zhang's credit score. Zhang eventually asked for a $500,000 loan.

The prosecutor asked if Phoebe gave different reasons why Zhang had to give Phoebe money. Zhang replied some money she paid went to the CPA and Phoebe said everything would be done by the CPA. Phoebe also told Zhang she had to establish a company in downtown to get the loan she wanted. Zhang told Phoebe that Zhang had her own company, but Phoebe told her Phoebe had to establish a company for her. Phoebe further told Zhang she needed to set up an office to get the loan. Zhang paid $10,000 to $20,000 to rent office space for the new company. Zhang kept paying money for office rent, a utility, and permits. Zhang also bought money orders and gave them to Phoebe, who said they were for the lending bank in Texas. Phoebe did not give Zhang the name of the CPA that Zhang was supposedly paying; Zhang wrote the checks to Phoebe.

Zhang testified she wrote other checks to a CPA company and Phoebe said the name of the company was Dragon. Peter took Zhang to a notary to sign documents, and Zhang paid $480 for the notary. Every time Zhang made a payment, Phoebe would tell Zhang, " 'the loan is almost there.' " Phoebe would then claim, " 'The CPA made a mistake. We need to pay money.' " Zhang asked Phoebe what kind of office had been rented for Zhang's new company. Phoebe did not tell her. Zhang also asked to see documents from the CPA. Phoebe did not provide any. Phoebe kept telling Zhang that when everything was done, Phoebe would provide all the information and materials to

Zhang. That did not happen. Phoebe also told Zhang that Peter was Phoebe's cousin and assistant. Appellants never gave, or loaned, money to Zhang. Zhang paid a total of about $43,000 for the alleged loan application process.

In April 2010, Zhang's husband began complaining that he and Zhang had been paying money for over six months without receiving a loan. Zhang became very suspicious so she went to Phoebe's office to look for her. Zhang saw Peter and asked where Phoebe was. Peter said he did not know and "[Phoebe was] not working here. She's not in this company." Documentary evidence of payments Zhang made to appellants, Dragon, "Active," "ASW Service," and TC were admitted into evidence.

e. *Count 6: Lucy Weng.*

In August 2009, Qiao (Lucy) Weng met appellants at their Arcadia office after appellants discussed "Obama loan[s]" for small businesses. Weng talked with Phoebe. Phoebe checked Weng's credit score for $80 and told her that, if she had a good credit score, she could apply for a $200,000 to $500,000 loan. Phoebe later told Weng she had a very good credit score, i.e., above 700. Phoebe said the lender would be Champion Bank (Champion) in Texas. Phoebe said there was a loan processing fee of $4,000 to $5,000. Weng paid it.

Phoebe would call Weng and urgently tell her to come to Phoebe's office to make payments. Phoebe threatened to close Weng's case if she did not come. Phoebe would say Weng's credit score was not that high, Weng needed to pay to repair it, or a bank document contained an error. Phoebe kept telling Weng the loan would arrive soon, but it did not.

Weng became suspicious and called Phoebe, but Phoebe did not answer. However, on one occasion, Weng spoke with Phoebe

and asked for a refund. Phoebe claimed her partner, the boss of Dragon, had taken the money. Phoebe never told Weng much about Dragon. Phoebe told Weng that Phoebe did not take her money and that Phoebe never cheated her.

Peter had told Weng that the loans were excellent and he had asked Weng to refer people. Weng paid the application processing fee for three other families. Weng paid a total of about $30,000 to Phoebe for the alleged loan application process. This represented $8,000 for Weng and the rest for other families.

During cross-examination, Weng denied she ever purchased clothing from Phoebe. She acknowledged selling two bottles of herbal medicine to Phoebe. Phoebe never returned the bottles and Weng never gave her a refund for them. During her testimony concerning this, Weng asked, "Why did I have to refund the money to her?" She also asked, "What does this have to do with the loan?" Weng also said, "It's ridiculous" and "total lies." Documentary evidence of payments Weng made to appellants' company "Active" was admitted into evidence.

f. *Count 7: Bing Chen.*

In November 2009, Bing Chen met appellants through Weng. Chen wanted a $200,000 loan to open a store. She spoke only to Phoebe and in Mandarin. At some point, Phoebe told her President Obama had a policy of making small loans, and Chen was entitled to a loan of between $100,000 and $400,000. Phoebe asked her to pay a fee for a credit score check. Phoebe said Chen needed to pay more to have her credit repaired. Phoebe also said the loan would come from Champion. Phoebe kept telling Chen to make payments, each time telling her the loan would " 'be here any minute.' "

Peter took Chen to get a document notarized, and she paid for it. He also took her to the bank and asked for money. She paid him $1,000 at the bank, but he did not give her a receipt. Peter said he would provide everything after the loan was processed. Chen also asked for copies of the alleged loan documents. Peter said he would mail all loan-related documents to her after loan approval. Chen later asked for a refund, but when she called appellants' office it was closed and no one answered. Chen paid between $7,000 and $8,000 to appellants for the alleged loan application process. Documentary evidence of payments Chen made was admitted into evidence.

g. *Count 8: Yu Chuan Sun (Stacy).*

Yu Chuan Sun (also known as Stacy Chun, hereafter, Stacy) testified as follows. A January 31, 2009 advertisement in a Chinese-language newspaper said, " 'Need fast money[?]' " and " 'Do you need money urgently? Do you want to be a boss by yourself? Do you want to pay off the money that you borrowed before? We can help you to get loan amount. One hundred thousand to two hundred thousand at least. If your credit score is over 700, it is very simple. It will not affect your credit. Call 626-831-3363 or 626-627-0811. We will certainly help you.' " These phone numbers belonged to Phoebe and "Active."

Stacy and her husband wanted a loan to invest in real estate. In November 2009, Stacy met with appellants through Weng. Phoebe told Stacy and her husband that they could receive a $200,000 loan through the Obama Care Program based on their credit. They paid Phoebe $1,800 in cash for a credit report. Two days later, Phoebe very reluctantly provided a receipt. Phoebe told them their credit score was about 740, but Stacy and her husband could receive a $500,000 loan if their

score was 800. Phoebe repeatedly asked them for money and, each time, said it was urgent and asked the couple to deposit money immediately into Phoebe's accounts. Phoebe gave Stacy and her husband account information for the "Active" and Dragon accounts. Phoebe said the Dragon account belonged to an accounting company with which she was associated.

Between November 2009 and January 2010, Peter took Stacy and her husband to get documents notarized. Phoebe told them that after the notarizing, all related documents would be delivered to Champion and, two days later, Stacy and her husband would receive their money. The couple did not receive the loan funds.

When Stacy asked Phoebe about this, Phoebe said the bank had questions about the provided financial reports, and there might be delay pending a bank investigation of the documents. Phoebe then asked for more money.

Phoebe faxed Stacy what Phoebe claimed was an authorization form permitting Champion to check credit scores and financial reports. Stacy signed and emailed it to Phoebe. After making repeated payments, Stacy and her husband started asking Phoebe questions and stopped making payments. Phoebe gave a lot of excuses and explanations, including that the credit scores were not perfect and Stacy's financial reports had problems. Stacy asked for a refund, but Phoebe said "the boss of Dragon already fled," she could not locate him, and, therefore, she could not refund Stacy's money. Stacy testified People's exhibit No. 32 summarized another exhibit containing copies of checks that Stacy paid to Phoebe from an account of Stacy and her husband. Stacy made the payments after Phoebe demanded them for various alleged loan-related reasons. The payments

totaled $16,310. Documentary evidence of payments Stacy made were admitted into evidence.

h. *Count 12: Perjury.*

The testimony of Jeannette Benites, a senior motor vehicle representative of the Department of Motor Vehicles (DMV) and documentary evidence, established as follows. On August 8, 2001, Phoebe applied for a driver's license, number D4241884, under the name Ramona Lei Wang (People's exh. No. 34). The application asked, "Have you ever applied for, or been issued, a California driver license . . . ." Phoebe checked the box indicating "no."

On September 25, 2001, Phoebe applied for a driver's license, number D4241884, under the name Lei Wang (People's exh. No. 34). The application asked, "Have you ever applied for, or been issued, a California driver license . . . ." Phoebe checked the box indicating "yes." Based on the application, DMV, on October 4, 2001, issued a license to Phoebe.

On August 1, 2003, Phoebe applied for a driver's license, number D6099742, under the name Lei Chao (People's exh. No. 36). The application asked, "Have you ever applied for, or been issued, a Driver License . . . in California, . . . using a different . . . [name or number]." Phoebe checked "no."

On October 30, 2008, Phoebe applied for a driver's license, number D6099742, under the name Phoebe Chanel Chao (People's exh. No. 53). The application asked, "Have you applied for a Driver License . . . in California . . . using a different name or number within the past ten (10) years?" She checked "yes." She also handwrote on that line, "Lei Chao."

On November 20, 2008, Phoebe applied for a driver's license, number D6099742, under the name Phoebe Chanel Chao

(People's exh. No. 35). The application asked, "Have you ever applied for a Driver License . . . in California . . . using a different name or number within the past ten (10) years?" She checked "no."

Phoebe certified or declared each of the two 2001 statements, the 2003 statement, and the 2008 statements under penalty of perjury. The certification for the 2003 application and the certification/declaration for the November 20, 2008 application (the two applications the prosecutor relied on for the perjury charge) were each immediately preceded by the following: "I have read, understand and agree with the contents of this form . . . ."

i. *The Investigation.*

In December 2010, Arcadia Police Detective Brian Oberon contacted English by phone. She said appellants had "scammed" her out of about $40,000, when she was trying to get a business loan at ASF. Oberon interviewed about seven other complainants.

The office of appellants' business, ASF, was located at 150 North Santa Anita, suite 490, in Arcadia. On July 8, 2011, Oberon conducted surveillance of the office. Oberon spoke to Peter at the location. Peter said he had a business, ASF, at the location, but claimed it no longer existed. Oberon went to Peter's Arcadia residence.

On September 29, 2011, a search warrant was executed at appellants' office and residence. Oberon found authorization forms for credit checks related to 11 complaining witnesses, including named victims in the present case, and another document containing the names of complaining witnesses, including English, Kwan, and Weng. Five computers were also

seized. Oberon did not find on their hard drives anything related to documents pertaining to the victims' loans. Police searched file cabinets and separate drawers. There were hundreds of loan files but none related to the complaining witnesses. One loan file, containing an application for a refinance loan, pertained to Jose Rodriguez. Oberon testified none of "the complaining witnesses claim[ed] that Guillermo had anything to do with this fraud."

j. *Appellants' Statements To The Police.*

(1) Initial statements.

Police arrested appellants and Oberon interviewed them. Peter said he was the owner of ASF, but as of May 2011, it no longer existed because business was bad. ASF did mortgage and real estate funding, business loans, and refinancing. Peter denied having employees, claimed he had subcontractors, but provided no names when Oberon asked for them. According to Peter, ASF did not promise to deliver loans to any of the complaining witnesses in this case. Peter acknowledged the victims signed commitment letters. Peter did not describe what the commitment letters were, but said they did not guarantee loan approval.

Phoebe told Oberon the following. Phoebe's name was Phoebe Chanel Chao. Phoebe might have had a driver's license under the name Lei Chao. A DMV photograph under the name Lei Wang (which Oberon showed to Phoebe) depicted Phoebe's sister.[2] However, Phoebe also told Oberon that Lei Wang was Phoebe's birth name.

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[2] Oberon testified the photograph depicted a person who looked like Phoebe.

Oberon testified Phoebe "went back and forth" regarding whether Lei Wang was Phoebe's birth name or her sister's name. Oberon asked Phoebe to explain why she had two identifications. Phoebe asked if she had to tell him. Oberon told her it was up to her. She offered no explanation.

Phoebe also told Oberon the following. From about 2005 or 2006, to early January or February 2010, Phoebe was secretary of ASF. She helped customers with payments and credit. Phoebe did not process loans. "Guillermo" was helping with business corporate loans.

Phoebe said she and English were good friends. English borrowed $25,000 from Phoebe to buy a house. English disappeared without paying Phoebe back. Phoebe remembered Lau. Phoebe gave Lau a full refund because Lau was difficult.

Oberon showed Phoebe forms that English and Kwan gave to Oberon. Oberon showed Phoebe a document allegedly from Orchard, dated September 14, 2009, and signed by English. The document was entitled, "Business Corporation Loan Terms" and stated it was a commitment letter constituting a $500,000 loan from Orchard to English. Oberon showed Phoebe a document allegedly from TC, dated December 11, 2009, and signed by Lau. The document was entitled, "Business Corporation Loan Terms" and stated it was a commitment letter constituting a $500,000 "Texas Bank" loan to Lau. Phoebe recognized the documents, denied knowing they were fake, and said Guillermo "did it" and gave them to Phoebe.

During cross-examination of Oberon, he testified that during his September 29, 2011 jail interview of Phoebe, she said the following. "Guillermo told us to do some loans" and, regarding People's exhibit No. 7, he "helped them" with loans.

Guillermo supplied the business loan documents to English and Lau.

(2) Phoebe's November 2011 statements.

On November 17, 2011, Oberon spoke with Phoebe at her request and she told him the following. At one point Kwan had worked for Phoebe. The two had a bad relationship because Kwan wanted commissions for bringing business to Phoebe's company. Phoebe's birth name was Lei Wang and Phoebe lied to Oberon earlier, fearing he would freeze the money in her bank account.

Oberon showed Phoebe a list of the victims and she recognized most of their names because they had come to ASF to get business loans. Phoebe said Kwan was "in charge of all the victims," Kwan had persuaded them to file police reports, and the victims would say whatever Kwan wanted them to say. The loans of people on the list were cancelled.

Phoebe told Oberon that she and ASF checked the people's credit and charged them $50. Phoebe initially denied using an outside vendor to check people's credit, but Oberon showed her the outside vendor's price list obtained during the investigation, told her she was lying, and she then admitted using an outside vendor. Oberon asked why there were no loan files if she was working on loans for people. She replied Guillermo was in charge of that and she had no explanation. Phoebe said she would look for the files but she never provided them.

During cross-examination of Oberon, he testified that during his November 17, 2011 interview of Phoebe, she said Guillermo was the one responsible for doing business loans with all the victims. Guillermo put the documents in People's exhibit No. 7 together "from a corporate funding expert in Los Angeles."

Phoebe interacted with the alleged victims because, unlike Guillermo, she spoke Chinese. Phoebe also said Guillermo and Peter had opened a bank account. However, Oberon also testified that, based on information from that bank, "it all came back to [appellants]."

On November 28, 2011, Oberon again met with Phoebe. He previously had asked her for documentation that she or ASF performed any service for the victims. On the above date, she gave Oberon no loan documents but did provide documents claiming English and Zhang borrowed $25,000, and $35,000, from her. None of the documents were notarized.

(3) December 2012 statements.

On December 11, 2012, Oberon interviewed appellants again and spoke with Peter first. Oberon showed Peter a list of the claimed victims and asked if he had any loan documents pertaining to them. Peter denied having documents or copies, claimed a messenger picked them up, and denied knowing what happened to them thereafter. Peter acknowledged he had worked on loans for these people and none of the victims' loans were approved. Oberon asked Peter to identify the messenger, but Peter could not provide the name, address, or any information about the messenger.

Peter told Oberon that Peter charged $300 for notary service and, when Oberon asked why that amount, Peter said it depended on how much time he needed to spend with the persons. Peter said the notary cost him $10. Oberon testified the notary's office was about 200 yards from, and in the same parking structure as, Peter's office.

Oberon showed Peter a fake bank document, purportedly "Business Corporate Loan Terms" from Orchard that had been signed by English on September 14, 2009. (People's exh. Nos. 7 & 12.) Oberon also showed him a fake $250,000 check payable to ASF and Sho Mu Lin (People's exh. No. 1). Peter denied making the documents, claimed they came from a messenger, and when Oberon asked for clarification, Peter could not elaborate. Peter could not provide the messenger's name or office. Peter did not say the documents came from Guillermo.

Oberon showed Peter a list of the complaining witnesses and asked why police found only credit authorization forms in his office and no other documents relating to the witnesses. Peter claimed the reason was the messenger had picked them up. Oberon testified the victims told him how much money they had lost to appellants. Oberon asked Peter to explain how he could charge English almost $40,000. Peter had no explanation.

On December 11, 2012, Oberon interviewed Phoebe. Oberon showed her a list of the victims' names and she recognized the names. Phoebe said she did not have copies of the loan documents. She also said Kwan was a friend and all the victims would follow whatever Kwan said. Phoebe first said she charged $50 to run people's credit, then said she charged $60.

Oberon testified he showed Phoebe a form marked "Exhibit W." The prosecutor asked what that was, and he replied, "They're all the potential victims. Out of the 16 that were brought to our attention, I wasn't able to make contact with, I believe, four of them to confirm if they were victims or not."

The prosecutor asked Oberon if Phoebe explained why the complaining witnesses had given so much money to appellants. Oberon testified Phoebe said some of the victims on the list

bought dresses or Louis Vuitton wallets from her. Phoebe provided no supporting documentation. She claimed her father had a clothing business in China. Phoebe told Oberon that she loaned Zhang money to help Zhang's husband with a lawsuit in China.

Phoebe told Oberon that Guillermo dealt with the victims to help process their loans, and he interfaced with the Chinese-speaking victims. The prosecutor asked whether Phoebe admitted that neither she nor "Active" obtained loans for people on the victims list. Oberon replied Phoebe said "they had started loans, but they were all cancelled" by ASF.

Phoebe told Oberon she directed the complaining witnesses to deposit money in appellants' three accounts: a Bank of America account, the Dragon account, and the Active Statewide Services account. Oberon determined the first two accounts had balances of 69 cents and $1.15, and the third was closed. Later during Oberon's investigation, he learned appellants had two additional OneWest Bank accounts, one in the name of Lei Wang, the other in the name of Peter Chao. The first had a balance of about $1.5 million; the second about $1,000. Phoebe said the money deposited in the "Chao accounts" was for "business corporate loan terms."

During cross-examination, Oberon testified that during the December 11, 2012, interview, Phoebe's comments about Guillermo were "[s]imilar to what she had always been telling me: that [Guillermo] was the one responsible for cheating these people out of their money." Phoebe said appellants were helping people improve their credit.

k. *Falsified Documents.*

Randy Garcia, a TC loan review officer, testified as follows. Garcia reviewed all TC loans and knew all the names of TC's employees. He did not recognize appellants and never conversed with them, and TC did not do business with ASF. TC did not do business in California. The "Borrower's Certification and Authorization" form (People's exh. No. 4), allegedly from TC, was not generated by that bank. The document misspelled the word "Authorization"; a TC document would not contain that error. Garcia opined the document was a forgery or fake. Brandon Keen was not a TC employee.

Carey Stewart, Texasbank's chief financial officer, testified he did not recognize appellants. He opined a check purporting to be from Texasbank, payable to ASF (and Sho Mu Lin) (Peo. exh. No. 1) in the amount of $250,000, was a forgery or fraud. Stewart did not recognize any names on a list of names as belonging to bank employees. The prosecutor showed Stewart an alleged email sent to Phoebe by Brandon Keen as an underwriter manager and pertaining to English's loan application. Stewart testified he did not believe the email was from Texasbank. The bank did not have an underwriting manager or an employee named Brandon Keen.

Tony Ng, HSBC's branch manager, testified that HSBC took over Orchard, and Orchard was HSBC's credit card division. Around 2009 and 2010, Orchard was not making corporate or mortgage loans. Ng was shown a form (People's exh. No. 7) allegedly from Orchard and entitled, "Business Corporate Loan terms." Ng said the document did not seem legitimate. The document had an Orchard logo, but since HSBC had absorbed

Orchard, its logo should not have been on the document. Orchard did not do business loans.

Patsy Porter, a notary public, testified she charged $10 per signature in accordance with the law. She said Peter came to her office in 2009 and 2010 with the named victims in this case.[3]

2. Defense Evidence.

a. *Phoebe's Testimony.*

(1) The theft by pretense allegations.

In defense, Phoebe testified as follows. In 2001, Phoebe emigrated to the United States and her name was Lei Wang. In 2003, she married Peter and applied for a driver's license under her married name, Lei Chao. Since 2005, she had helped Peter in his business by answering the phone, doing paperwork and, later, credit repair.

In 2005, Guillermo started working at ASF and mainly dealt with Spanish-speaking clients. He split proceeds evenly with appellants. In 2008, he told appellants they could start a lending business through President Obama's small business loan program, and appellants could find Chinese-speaking clients. Guillermo told Phoebe to place an advertisement in a newspaper indicating their business could obtain $100,000 to $200,000 in loans for applicants with a minimum credit score of 700 to 720. Guillermo told appellants to talk with the Asian customers, and he would work in the "back" with lender funding and everything else.

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[3] After the prosecution rested, neither appellant made a Penal Code section 1118.1 motion for judgment of acquittal.

Phoebe first met English in February 2009. She charged English $50 to check her credit, and determined it needed repair. It took about six months to raise English's credit score to about 700.

Guillermo told her " 'You guys just help [English] apply [for a loan].' " Phoebe had English complete the loan application, which Phoebe then gave to Guillermo. Guillermo had said he had his own messenger service. English paid Phoebe about $1,000 for the loan application fee. Two weeks later, Guillermo gave Phoebe "English's application form that's like a commitment letter from Orchard." At Guillermo's direction, Phoebe called English and told her to notarize the document. In March 2009, Phoebe personally loaned English about $25,000. English paid her back almost the entire amount. When English asked for a status update on her loan, Phoebe would ask Guillermo for the update, then forward it to English.

Kwan paid Phoebe $7,000 in loan application fees, including those for two other loan applicants. Phoebe checked Zhang's credit score and it was about 670. Guillermo and Peter said it was too low, so Phoebe fixed Zhang's credit although Phoebe was not an expert. Zhang paid Phoebe about $800 for credit repair. In November 2009, Zhang borrowed $35,000 from Phoebe, and paid it back.

In July 2009, Weng first came to Phoebe's office. Her credit was good. Weng paid the loan application fees for many other people after asking Phoebe if Weng would get commissions. Phoebe indicated commissions were not up to her. Phoebe sold Weng a Louis Vuitton wallet, and purse, boots, and dresses. Phoebe bought vitamins from Weng. Phoebe returned to Weng

perhaps seven bottles of vitamins and Weng gave her a refund of perhaps $245.

In August 2009, Stacy applied for a loan through the program set up by Guillermo. Stacy came with her husband and referred about five people. She made payments for loan applications for herself, her husband, and three other people. Phoebe received about $14,000 from Stacy for five people. Stacy asked for a commission for referrals. After Stacy signed the loan application, Phoebe gave it to Guillermo.

In August or September 2009, Chen first came to Phoebe's office. Chen gave Phoebe a cashier's check which Phoebe gave to Guillermo. Phoebe also testified she deposited it into Guillermo's account.

In October 2009, Lau came to Phoebe's office for a loan. Lau gave Phoebe a cashier's check which the latter gave to Guillermo. Phoebe gave the commitment letter to Guillermo and a copy to Lau. At one point, Lau asked for a refund. Guillermo told Phoebe that if "they want to cancel, we cannot refund anything." However, Lau signed defense exhibit F and Phoebe gave her a $1,285 cash refund.

Phoebe said she never directly communicated with Brandon Keen. Guillermo told Phoebe to ask him if she ever had questions. She asked him why there was no email address in the address line for emails from the bank, and he said many banks just show "bank" or "corporation," without an email address.

Peter and Guillermo ran the credit checks for the victims. Phoebe gave Guillermo payments for credit repair, and Guillermo gave appellants $300 to $350 out of the loan application fee. Guillermo did all the work "on the loan."

Phoebe said Guillermo lied and was cheating all the people. Guillermo also stole money all the time. In 2010, Phoebe believed he was a thief. Phoebe lied to Oberon that Lei Wang was Phoebe's sister. Phoebe lied because she was concerned he would "freeze the account."[4]

(2) The perjury allegation.

Phoebe testified she emigrated to the United States in 2001. On August 6, 2001, Phoebe first applied for a driver's license under the name Ramona Lei Wang. Phoebe's counsel asked whether Phoebe saw on the form (People's exh. No. 34) the question, " 'Have you ever applied for or been issued a California driver's license, identification card, or instruction permit.' " She replied that she saw it and that she had checked "no" in answer to that question.

In July 2003, Phoebe applied again under the name Lei Chao after she married Peter Chao (People's exh. No. 36). The application asked, "Have you ever applied for, or been issued, a Driver License . . . in California . . . using a different [name or number]." Phoebe checked "no." Phoebe's counsel asked why Phoebe answered no. During Phoebe's partially incoherent answer, she said, "I don't know."

In 2008, Phoebe again applied because she wanted to correct the name to Phoebe Chanel Chao (People's exh. No. 35). The application asked, "Have you ever applied for a Driver license . . . in California . . . using a different name or number

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[4] Phoebe, outside the presence of the jury, called Jose Rodriguez as her witness. Rodriguez, represented by counsel, was sworn but invoked his right against self-incrimination. The trial court found Rodriguez was invoking that right on advice of counsel and excused him.

within the past ten (10) years?" She checked "no." The prosecutor asked why. Phoebe's answer was partially incoherent, but she stated, "I don't know" and suggested there was language confusion.

(3) Shoplifting evidence.

During direct examination, Phoebe testified she was arrested in 2003. She went to Macy's, bought two necklaces for $35 each, and went home. She saw a booklet, inside of which was a coupon indicating "buy one, get one for free." She went back with the coupon and took another two pieces at $35 each. What she did was wrong. When she went to court, she showed the judge her receipt and the coupon. She "didn't plead contest." (*Sic.*) She testified, "I not even hire attorney." (*Sic.*)

During cross-examination, the prosecutor indicated he wanted to question her about her "shoplifting conviction" and Phoebe replied without objection, "Okay." Phoebe testified she bought two necklaces for $35 each and had a receipt. She saw something similar inside a catalog and said she should get two for free. She tore up a two-for-one coupon and returned to Macy's, took two pieces, and left the store. Alexander Sun was a lawyer, he helped her, but he did not represent her in the shoplifting case. He may have appeared at counsel table and announced that he was appearing for Phoebe but she did not know because her English was bad. Alexander Sun did not charge Phoebe.

b. *Peter's Testimony.*

Peter testified as follows. Peter and Guillermo (Jose G. Rodriguez) were the registered owners of Active Statewide Home Services as reflected on a fictitious business name statement. Guillermo told appellants he wanted help with his new business,

which involved business and corporate funding. That business was involved with the charges in the present case. Guillermo said he would handle everything that needed to be done regarding loans under the Obama Loans Stimulus program. He explained to Phoebe how the advertisement for the business should be written. Guillermo told appellants, especially Phoebe because she spoke Chinese, that she would handle Chinese clients. Guillermo said he would tell appellants what to do.

Peter and Phoebe were present during the initial meetings with the complaining witnesses. English and Yan Min came to Peter's office, and the two had a conversation with Phoebe. The conversation was in English and Chinese. English asked for a commission for referring Yan Min, Peter asked Guillermo if this was all right, and Guillermo said yes.

Kwan asked for commissions, and Phoebe paid her $3,000. Peter was present during discussions with Lau about commissions. The conversation was in English and Chinese. Lau requested and received a refund of the application fee.

Peter provided to the complaining witnesses "documents," not knowing they were false. When he learned they were false, he tried to find out as much as he could from Guillermo, but Guillermo did not tell him much. No loans were funded to the complaining witnesses. Peter was familiar with what loan documents looked like, and had dealt with dozens, if not hundreds, of different banks in his lending career. Emails he had received from banks reflected the institution's domain name.

Peter claimed Kwan "represented" most of the victims. Phoebe told Peter that Kwan cancelled those victims' loans and asked for a refund. Peter also testified the loans with TC did not fund and the victims cancelled their own loans. The parties

stipulated that on September 14, 2009, English told a police officer that "the company" had a loan processor named Gil Rodriguez, also known as Jose Rodriguez.[5]

3. Rebuttal Evidence.

On September 29, 2011, Oberon executed the search warrant in the house and arrested appellants. Oberon told Peter that numerous people were claiming they had been defrauded and Peter or Phoebe had guaranteed loans. Oberon asked Peter for an explanation, but he never mentioned Guillermo. On December 12, 2012, Phoebe came to the Arcadia police station and gave a recorded statement. She said appellants did not obtain loans for the victims, but never said the reason was that the victims allegedly cancelled their loans.

ISSUES

Phoebe claims (1) insufficient evidence supports her convictions, (2) she was denied effective assistance of counsel, (3) the trial court erroneously failed to provide her a Chinese-English interpreter, and (4) the prosecutor committed misconduct, and Phoebe's trial counsel rendered ineffective assistance of counsel by failing to object to the misconduct.

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[5] John Florit, a character witness, testified he met appellants in 2004, and together they began originating mortgage trust deeds. In 2012, Florit started a company with appellants. Appellants' reputations in the commercial finance and general finance community were quite good. They were upstanding and very generous.

Peter claims (1) the trial court improperly denied his motion to discharge his retained counsel, (2) the trial court erred by giving CALCRIM No. 1804 to the jury, (3) the trial court erroneously failed to instruct sua sponte concerning mistake of fact, (4) the trial court erroneously failed to give sua sponte a unanimity instruction, (5) Peter's trial counsel rendered ineffective assistance of counsel, and (6) cumulative prejudicial error occurred.

DISCUSSION

1. Sufficient Evidence Supports Phoebe's Convictions.

Phoebe contends there is insufficient evidence to support any of her convictions. When determining a sufficiency claim, our role "is a limited one." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 (*Ochoa*).) We determine "whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt" and when doing so "we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*Ibid.*) Our power begins and ends with the determination whether there is substantial evidence, contradicted or uncontradicted, to support the judgment. (*People v. Hernandez* (1990) 219 Cal.App.3d 1177, 1181-1182.)

a. *The Theft By False Pretense Convictions.*

Phoebe claims there is insufficient evidence supporting her theft by false pretense convictions. We reject the claim.

The court instructed the jury with CALCRIM No. 1804 on the elements of theft by false pretense and on the meaning of

"false pretense."[6] The instruction sets out three basic elements: (1) a false pretense or representation by the defendant, (2) intent to defraud the owner of his or her property, and (3) actual reliance by the owner. (*People v. Jackson* (1987) 193 Cal.App.3d 393, 401.) A false pretense can be implied from statements made in conjunction with conduct intended to deceive. (*People v. Smith* (1984) 155 Cal.App.3d 1103, 1146-1147.)

Significantly, Phoebe "does not dispute that the victims in this case were, indeed, victims of a fraud." She argues there was insufficient evidence she "knowingly and intentionally deceived the clients," and argues the issue is "whether sufficient evidence supported a finding that Phoebe knowingly defrauded the victims or whether she was an unknowing participant in Jose 'Guillermo' Rodriguez's scheme." Implicit in this assertion is that *someone* "knowingly and intentionally" deceived the victims. The issue

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[6] The instruction stated in pertinent part, "Each defendant is charged in [counts 1 – 4, and 6 – 8] with grand theft by false pretense in violation of Penal Code section 487. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. That defendant knowingly and intentionally deceived a property owner by false or fraudulent representation or pretense; [¶] 2. That defendant did so intending to persuade the owner to let that defendant or another person take possession and ownership of the property; [¶] AND [¶] 3. The owner let that defendant or another person take possession and ownership of the property because the owner relied on the representation or pretense. [¶] . . . [¶] Someone makes a false pretense if, intending to deceive, he or she does one or more of the following: [¶] . . . [¶] 2. Makes a misrepresentation recklessly without information that justifies a reasonable belief in its truth."

before this court is whether there was sufficient evidence Phoebe was such a person, whether or not Guillermo also was.

There was abundant evidence that Phoebe knowingly and intentionally deceived and defrauded the victims. As our Factual Summary discusses in detail, Phoebe followed the same basic procedure for all of the victims: she met with them and explained they could qualify for an "Obama loan" upon payment of a significant fee, checked their credit scores, claimed their credit scores needed repairs at a significant cost, prepared their loan applications, had documents notarized at a significant cost, found "problems" which needed to be addressed at a significant cost, told them the loans had been approved and would soon be funded, announced that the loans would not be funded, and then avoided contact with the victims. Throughout the process Phoebe collected significant amounts of money from the victims at every turn, and in no instance did any of the victims ever obtain a loan.

Phoebe's conduct involved clear deception. She used false and fraudulent documents: emails from bank employees, forms and commitment letters bearing bank names, and papers containing names of bank employees who never existed. And she made patently false statements to the victims, which several of them uncovered with simple phone calls to the banks.

The evidence of Phoebe's personal involvement was so extensive that the jury could have readily concluded that she was the leading and central figure in the scheme to defraud the victims. The evidence was more than sufficient to support the conclusion that Phoebe knowingly and intentionally participated in each step of the scheme. Although Phoebe claims she only did what Guillermo told her to do, the jury could reasonably reject that claim, as there was no evidence to support it other than

Phoebe and Peter's self-serving testimony. We accordingly conclude there was sufficient evidence to convince a rational trier of fact, beyond a reasonable doubt, that Phoebe committed theft by false pretense as to each of the victims.

b. *The Perjury Conviction.*

Phoebe claims insufficient evidence supports her perjury conviction. We disagree.

The court instructed the jury on perjury with CALCRIM No. 2640.[7] The prosecutor argued to the jury that there were two perjurious documents: the August 1, 2003 and November 20, 2008 driver's license applications (People's exh. Nos. 35 & 36).

As our Factual Summary reveals, Phoebe gave false answers under penalty of perjury in both documents. The August 1, 2003 application, under the name Lei Chao for driver's license

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[7] CALCRIM No. 2640 stated, "The defendant Phoebe Chanel Chao is charged in Count 12 with perjury in violation of Penal Code section 118. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant declared under penalty of perjury under circumstances in which such declaration was permitted by law; [¶] 2. When the defendant declared, she willfully stated that the information was true even though she knew it was false; [¶] 3. The information was material; [¶] 4. The defendant knew she was making the statement under penalty of perjury; [¶] 5. When the defendant made the false statement, she intended to declare falsely while under penalty of perjury; [¶] AND [¶] 6. The defendant signed and delivered her declaration to someone else intending that it be circulated or published as true." The instruction later stated, "The People allege that the defendant made the following false statement: That she had not previously applied for a California driver's license using a different name or a different driver's license number."

number D6099742, and the November 20, 2008 application, under the name Phoebe Chanel Chao for driver's license number D6099742, both asked whether Phoebe previously had applied for a driver's license in California using a different name. Phoebe checked "no" on both applications, and this was false.

Both applications were signed under penalty of perjury, and both asserted "I have read, understand and agree with the contents of this form . . . ."

This evidence is clear and straightforward. The applications demonstrated no confusion on Phoebe's part and indicated she knew how to answer "yes" when she wanted to do so. There was evidence she clearly knew how to express herself in writing (see, e.g., fn. 9, *post*).

There was sufficient evidence to convince a rational trier of fact, beyond a reasonable doubt, that Phoebe committed perjury. None of Phoebe's arguments compel a contrary conclusion.

2. Phoebe Was Not Denied Effective Assistance of Counsel.

Phoebe contends she was denied effective assistance of counsel because her attorney failed to object to evidence at trial. "To establish ineffective assistance of counsel, ' " 'a defendant must first show counsel's performance was "deficient" because his "representation fell below an objective standard of reasonableness . . . under prevailing professional norms." ' " ' [Citation.] ' "[T]here is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " ' [Citation.] 'In the usual case, where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on

appeal unless there could be no conceivable reason for counsel's acts or omissions.' [Citation.]" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1051.) Finally, "[F]ailure to object rarely constitutes constitutionally ineffective legal representation." (*People v. Boyette* (2002) 29 Cal.4th 381, 424.)

a. *Oberon's Testimony Regarding Potential Victims.*

Phoebe contends her trial counsel was ineffective by failing to object to Oberon's testimony about potential victims. We disagree.

The information contained 11 counts alleging Phoebe committed theft by false pretense. During the People's direct examination of Oberon, he testified he showed Phoebe a form marked exhibit W. The prosecutor asked what it was, and Oberon testified without objection, "*They're all the potential victims. Out of the 16 that were brought to our attention, I wasn't able to make contact with, I believe, four of them to confirm if they were victims or not*." (Italics added.) Oberon testified some were out of the country and some he could not find. He also testified "the complaining witnesses that [he] filed on were those that [he] located." The prosecutor asked if exhibit W "is just a list of our complaining witnesses and associated claim loss" and Oberon replied, "Exhibit W, no. There were no figures. It's just a list of names." After the People's last witness, the court, at the People's request, dismissed counts 5, and 9 through 11.

Phoebe argues Oberon testified there were "sixteen potential complaining witnesses" *beyond* the victims named in counts 1 through 11, and the answers invited jury speculation that "the extent of [appellants'] offense was much broader than that which was being *charged*" (italics added). Phoebe contends her trial counsel rendered ineffective assistance by failing to

object to that testimony on relevance and Evidence Code section 352 grounds. This has no merit.

Read in context, Oberon's answer was not that there were "sixteen potential complaining witnesses" pertaining to offenses *beyond* those charged in counts 1 through 11. Instead, Oberon testified 16 people were "brought to [his] attention," he was unable to contact four of the 16, and there were *12* "potential victims" who were the "complaining witnesses that [he] *filed* on." (Italics added.) There were in fact a total of 13 victims originally alleged in counts 1 through 11, because counts 5 and 8 each originally alleged two victims. Accordingly, Phoebe's counsel reasonably could have refrained from objecting because Oberon's answer correctly pertained to victims alleged in the counts in this case.

b. *Hearsay Objections.*

Phoebe contends her attorney was ineffective by failing to object to six areas of testimony on the ground of hearsay. We reject each argument.

First, during the People's direct examination of Oberon, he testified about a detective's role generally upon receiving a police report, and in this case his initial conduct involved the investigation of complaints by English. The prosecutor asked that Oberon's subsequent testimony relating statements of complaining witnesses be received, not for its truth, but as foundation concerning how he conducted his investigation. The court told the jury that Oberon would testify as to those statements "for foundational purposes only" and they were "not to be considered for the truth."

Oberon later testified English generated a police report. The prosecutor asked for "a summary of what she claimed was true," and Oberon replied without objection "she was scammed out of approximately $40,000 in trying to get a business loan at Active Statewide Funding." He also testified without objection that English "identif[ied] [appellants as] the principals or the people who owned the company."

Phoebe argues her trial counsel rendered ineffective assistance by failing to object on hearsay grounds to Oberon's testimony. We reject the argument. Phoebe's counsel reasonably could have refrained from posing a hearsay objection because counsel anticipated that English herself would provide admissible testimony on the issue – which is in fact what happened later in the trial.

Second, during the People's direct examination of Oberon, he testified he participated in the execution of the search warrant at appellants' residence. The prosecutor observed that during Phoebe's opening statement, her trial counsel said guns were pointed at appellants' heads during the search. The prosecutor indicated he wanted to talk about "procedure" and asked Oberon whether officer safety was an issue. Oberon replied yes and later indicated police do not know what people are thinking or who is inside a residence. The prosecutor asked, "Did you have any information that they [appellants] had dangerous weapons?" Oberon replied without objection, "*It was reported that Peter had guns*." (Italics added.)

Phoebe argues her trial counsel rendered ineffective assistance by failing to object on hearsay grounds to Oberon's testimony. We disagree. The statement that Peter had guns was nonhearsay, admissible to prove the statement's effect on the

listener. (*People v. Scalzi* (1981) 126 Cal.App.3d 901, 907.) Oberon explained his reaction of employing officer safety procedures during execution of the warrant, which was admissible to show that Oberon's actions were not those of a heavy-handed officer who had prejudged appellants' guilt, and to support Oberon's credibility. Phoebe's trial counsel reasonably could have refrained from posing a hearsay objection for this reason.

Third, during the People's direct examination of English, she testified she attempted to report Phoebe's conduct to the police. She later testified without objection, "*the bank told me, 'There is no such loan we issued, and there is no such a department.'* So then I decided to report to the police." She then testified the bank she contacted was Orchard and "after [English was] told there's no such department, [English] went to the police."

Phoebe argues her trial counsel rendered ineffective assistance by failing to object on hearsay grounds to English's testimony. The argument is without merit. Phoebe's counsel reasonably could have refrained from posing a hearsay objection to the bank's statements to English because counsel anticipated that a representative of the bank would provide admissible testimony on the issue – which is in fact what happened later in the trial.

Fourth, during the People's direct examination of Kwan, she testified she spoke with Randy Garcia of TC. The following then occurred without objection: "[The Prosecutor]: This is offered for foundation. [¶] Q What did Randy tell you? [¶] A He said they have no business doing [*sic*] with Active Statewide."

Phoebe argues her trial counsel rendered ineffective assistance by failing to object on hearsay grounds to Kwan's testimony. The argument is unpersuasive. Phoebe's counsel reasonably could have refrained from posing a hearsay objection to Randy Garcia's statement to Kwan because counsel anticipated that a representative of TC would provide admissible testimony that TC had no business with ASF or Active Statewide – which is in fact what happened later in the trial.

Fifth, during the People's direct examination of Kwan, the prosecutor referred to an alleged email from "Corporate Funding Department, Brandon Keen, underwriter manager" and later asked, "Q Did you have any idea who this person was?" Kwan replied without objection, "Yes. I called them. They do not have such person."

Phoebe argues her trial counsel rendered ineffective assistance by failing to object on hearsay grounds to Kwan's testimony. The argument lacks merit. The testimony did not contain an extrajudicial statement. Even if "They do not have such person" was an implied statement by the person whom Kwan called, Phoebe's counsel reasonably could have refrained from posing a hearsay objection because counsel anticipated that a representative would provide admissible testimony that TC had no employee named Brandon Keen – which is in fact what happened later in the trial.

Sixth, during the People's direct examination of Kwan, the following occurred: "Q Without going into what Penny Lau told you, did you discuss with her that you two had a similar experience with [appellants]? [¶] A Yes."

Phoebe argues her trial counsel rendered ineffective assistance by failing to object on hearsay grounds to Kwan's testimony. We disagree. Phoebe's counsel reasonably could have refrained from posing a hearsay objection to statements by Kwan and Lau because counsel anticipated that they both would provide admissible testimony about their experiences with appellants – which is in fact what happened later in the trial.

c. Oberon's Testimony About the Search Warrant.

Phoebe contends her attorney was ineffective by failing to object to Oberon's testimony about a search warrant. We disagree.

During the People's direct examination of Oberon, he testified that on September 23, 2011, he conducted surveillance of Peter at his business and later followed Peter to his house. The following then occurred: "Q Did you determine that you had enough information to apply for a search warrant? [¶] A Yes. [¶] Q. Did you put that before a judge, and was it signed by a judge? [¶] A Yes."

Phoebe argues her trial counsel rendered ineffective assistance by failing to object to Oberon's testimony about "the procedure used to obtain the search warrant" on the ground it was irrelevant and on the ground that Oberon prejudicially used the magistrate's finding—that the information in the warrant was sufficient to justify its issuance—"to vouch for the credibility of the information." The argument is meritless.

There was evidence, apart from the challenged testimony, that a search warrant was executed in this case. "It is a matter of common knowledge that most *search* warrants are issued prior to and independent of any pending prosecution." (*People v. Case* (1980) 105 Cal.App.3d 826, 832.) It is also common knowledge

that the evidence required to support such an investigatory search warrant is less than the proof beyond a reasonable doubt required during the trial phase of a criminal prosecution. The court, using CALCRIM No. 220, in fact instructed the jury on the presumption of innocence and the People's burden of proof beyond a reasonable doubt.

In view of these considerations, Phoebe's trial counsel reasonably could have refrained from objecting to the challenged testimony, reasonably believing the jury would attach little or no significance to the issuance of a search warrant given the standard of proof at trial.

d. *The Borrower's Certification and Authorization.*

Phoebe contends her attorney was ineffective by failing to object to Oberon's testimony about false documents. We disagree.

People's exhibit No. 4 is entitled, "Borrower's Certification and Authorization" and has at its top a "Texas Champion Bank" logo. During cross-examination of Oberon, he testified that when he examined the seized computers, he would be "looking for something that would show that they could make the top part [of People's exh. No. 4] that says Texas Champion Bank." He also testified nothing like that was found.

During redirect examination, Oberon indicated his cross-examination testimony pertained to appellants' computers. The following then occurred: "Q Did you know whether or not exhibit 4 was created by using a photocopy machine and images downloaded from the Internet? [¶] A I had no clue how it was created. [¶] Q It was possible it was created on the Internet? [¶] A Yes. [¶] Q Possible, too, that it was made on the computers of [appellants] and since discarded when you came on the case? [¶] A That's true."

Phoebe argues her trial counsel rendered ineffective assistance by failing to object to the testimony as irrelevant speculation and inadmissible opinion. The argument is without merit. Phoebe's trial counsel reasonably could have refrained from objecting to the testimony that "it was possible it was created on the Internet" because a jury employing common sense could realize it was "possible" appellants created the entire document using the Internet without creating parts on a computer.

Phoebe's counsel also reasonably could have refrained from objecting to the testimony that it was "possible that [it] was 'made on computers of [appellants] and since discarded when [Oberon] came on the case' " because a jury employing common sense could know it was "possible" appellants created the document on a seized computer but deleted evidence of that before Oberon's involvement. Further, Phoebe's trial counsel reasonably could have refrained from objecting because counsel reasonably believed Oberon himself had diminished any probative value of the challenged testimony when he denied having a clue as to how the document was created.

e. *Phoebe's Prior Arrest.*

Phoebe contends her attorney was ineffective by failing to object to Oberon's brief mention of her previous arrest. This has no merit.

During the People's direct examination of Oberon, the prosecutor asked if he "r[a]n any other background information to learn more about [appellants]." Oberon testified without objection that he ran their names and addresses through a database and "learned that Phoebe had been arrested previously."

Phoebe argues her trial counsel rendered ineffective assistance by failing to object to this testimony as irrelevant, nonresponsive, and prejudicial, and as inadmissible evidence of specific acts of misconduct, and inadmissible evidence of a prior arrest. The argument is without merit. Phoebe's trial counsel reasonably could have refrained from objecting because he reasonably believed the arrest pertained to her shoplifting conviction and the People were going to introduce evidence of the offense underlying that arrest as impeachment of Phoebe during her testimony. (See *People v. Chatman* (2006) 38 Cal.4th 344, 373 (*Chatman*). The prosecutor in fact introduced such evidence later in the trial. Also, Phoebe's trial counsel reasonably could have refrained from objecting because counsel believed that, given the rest of the anticipated evidence, mere evidence of an arrest of Phoebe at an unspecified time and place for an unspecified offense would have little or no impact on her case.

f. *Phoebe's Attorney In Her Shoplifting Case.*

Phoebe contends her attorney was ineffective by failing to object to questions about Phoebe's attorney in her shoplifting case. We reject her argument.

During the prosecutor's cross-examination of Phoebe, the following occurred: "Q On January 22, 2004, you pled guilty to shoplifting. And Alexander Sun, private counsel, appeared for you, according to court records. Is that true? [¶] A I tell the court what happened exactly -- [¶] Q Is that true? Did he appear with you when you pled guilty? [¶] A I filed no context (sic). I realized it's wrong." This colloquy was part of a larger one in which the prosecutor sought to elicit from Phoebe testimony

that she pled guilty and that she was in fact represented by counsel in connection with her shoplifting case and conviction.

Phoebe argues her trial counsel rendered ineffective assistance by failing to object to the question on the ground the prosecutor was essentially testifying to the contents of a court record not admitted into evidence. She also argues the larger colloquy in which the prosecutor sought to elicit testimony from Phoebe that she was represented by counsel in connection with her shoplifting case and conviction was impermissible impeachment on a collateral matter (see *People v. Lavergne* (1971) 4 Cal.3d 735 (*Lavergne*)). We disagree.

Phoebe's trial counsel reasonably could have refrained from objecting to any question regarding the guilty plea and court records because counsel believed the People would introduce similar evidence as impeachment during Phoebe's testimony. (See *Chatman, supra,* 38 Cal.4th at p. 373.)

As to the larger colloquy, Phoebe's trial counsel reasonably could have refrained from posing a *Lavergne* objection to the prosecutor's effort to elicit testimony from Phoebe that she was represented by counsel because it was proper cross-examination. On direct examination Phoebe testified that "I not even hire attorney" (*sic*) in the shoplifting case. Her representation by a privately retained attorney was proper impeachment of that testimony.

g. Banking and Financial Records.

Phoebe contends her attorney was ineffective by failing to object to a number of exhibits containing banking and financial records. Each claim has no merit.

People's exhibit No. 15 contains copies of computer-generated customer receipts from Bank of America. English testified without objection concerning them as follows. As part of the payments Phoebe requested of English, English made deposits into Phoebe's account. English recognized the cash deposit slips in the exhibit. The prosecutor asked English how she recognized them and if they were hers. English replied, "Every time I deposit to their account, I ask the banker, 'give me the receipt so I can keep it to prove that I paid.' " Each receipt reflected money deposited into appellants' account.

People's exhibit No. 21 includes four copies of computer-generated customer receipts from Bank of America. Kwan testified without objection concerning them as follows. Kwan recognized the documents in the exhibit. They were payments to the CPA, Dragon, or Active Statewide. With each payment, Phoebe told Kwan the bank account number, and Kwan deposited money. Phoebe identified for Kwan the accounts in which Kwan deposited money.

People's exhibit No. 24 contains copies of computer-generated customer receipts from Bank of America. Zhang testified without objection that she deposited money into appellants' account, and the exhibit reflected those deposits.

People's exhibit No. 39 contains copies of computer-generated customer receipts from Bank of America. Weng testified without objection that the exhibit reflected her deposits into appellants' account, made at Phoebe's request. Exhibit Nos. 15, 21, 24, and 39 were admitted into evidence without objection.

People's exhibit No. 46 contains copes of (1) computer-generated business checking statements of Bank of America, Active Statewide Funding, Inc., Active Statewide Funding Home

Services, and Dragon Investments, and (2) the computer-generated OneWest Bank bank statements of Peter and Lei Wang. Oberon testified without objection that the documents in the exhibit were Bank of America and OneWest Bank statements "provided to [him] from the search warrants that [he] wrote."

People's exhibit No. 52 contains copies of computer-generated OneWest Bank bank statements of Lei Wang. Phoebe testified without objection on direct examination that the exhibit was a bank statement in the name of Lei Wang. Phoebe's counsel also asked, "That's your account? Lei Wang?" Phoebe replied yes.

People's exhibit No. 47 contains a copy of an IndyMac Federal Bank signature card for Lei Wang. During the People's cross-examination of Phoebe, she testified without objection she filled out the card in the name of Lei Wang, opened the account, and signed the card.

People's exhibit No. 49 contains a copy of a County of Los Angeles Auditor Controller's Special Warrant, dated July 8, 2011, for $447.12, payable to Lei Wang at 531 West Camino Real Avenue, Arcadia, California. Through a combination of questions, the prosecutor asked Phoebe if the warrant was "the County of Los Angeles sending [Phoebe] money in that name and at that address three years after [Phoebe] changed [her] name." Without objection, Phoebe replied, inter alia, "Yes, I think so" and "maybe is my house."

As to all of these exhibits, Phoebe argues her trial counsel rendered ineffective assistance by failing to object on authentication and hearsay grounds. All of her arguments are meritless. Many of the exhibits were properly authenticated by the witnesses, who referred to them as documents they received

during the business transactions discussed in their testimony. (See Evid. Code, § 1400). Defense counsel also could have reasonably believed employees from the bank or financial institutions could have been called to authenticate the exhibits as business records. (See Evid. Code, §§ 1271, 1560 et seq.)

In all events, the record contains evidence that defense counsel had stipulated to the authenticity of the exhibits. During a post-trial hearing on August 10, 2015, the prosecutor explained: "[In] every other case I've tried when there is no genuine issue as to the authenticity of bank records, both sides stipulate that they're the genuine records. That's what happened in this case. This was going to be a lengthy trial . . . . That agreement was made between the defense lawyers and myself, as it is in every other case. . . . And just to cover my P's and Q's, I [verified again] with Detective Oberon after the motion was filed and asked him if he had those affidavits on file from the bank. He said that he did. [¶] So it was an effort by a professional team of defense lawyers to make this trial move expeditiously and efficiently." For this reason, Phoebe's counsel reasonably could have refrained from posing authentication and hearsay objections to the exhibits.[8]

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[8] Argument II.C. in Phoebe's opening brief was that she received ineffective assistance of counsel because her trial counsel "failed to object to testimony about information [Detective] Oberon gleaned from *bank accounts*." (Italics added.) Respondent's brief then pointed out the prosecutor's above post-trial explanation. We note Phoebe, in her reply brief (1) characterized the prosecutor as explaining the parties "stipulated to the authenticity *and admissibility* of the information regarding [appellants'] bank accounts" (italics added), and (2) therefore, withdrew argument II.C.

h. *Emails Between Phoebe and the Victims.*

Phoebe contends her attorney was ineffective by failing to object to a number of emails. We disagree.

People's exhibit No. 18 includes emails between Phoebe and English, some of which contain emails allegedly from "Corporate Funding." People's exhibit No. 19 includes emails between Phoebe and Kwan, some of which contain emails allegedly forwarded from Brandon Keen as an underwriter manager for Corporate Funding.

Phoebe argues her trial counsel rendered ineffective assistance by failing to object to these exhibits on hearsay and discovery grounds, the latter because the prosecutor allegedly gave the emails to Phoebe on the day before trial. The hearsay ground has no merit, because the emails were from Phoebe herself and constituted admissions by a party. (See Evid. Code, § 1220.) The enclosures would have been admissible on the same basis, but in all events they were not offered for the truth; the prosecutor offered them as false and fraudulent documents that Phoebe had used to bamboozle the victims.

As for the discovery issue, Phoebe's trial counsel reasonably could have refrained from posing a discovery objection because there was nothing to be gained. In all likelihood the court would have offered to continue the trial a short time to negate any surprise. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 950 [defendant's burden to show continuance would not have cured harm from any discovery violation]; *People v. Robbins* (1988) 45 Cal.3d 867, 884 ["the usual remedy for noncompliance with a discovery order is . . . a continuance"]; § 1054.5, subd. (b).)

i. *Testimony from Complaining Witnesses.*

Phoebe contends her attorney was ineffective by failing to object to brief personal remarks by two complaining witnesses. This has no merit.

During the People's redirect examination of English, she testified without objection that she had three minor children. During the People's direct examination of Zhang, and during Peter's cross-examination of Zhang, she testified her husband suffered from cancer.

Phoebe argues her trial counsel rendered ineffective assistance by failing to object to this testimony on relevance and Evidence Code section 352 grounds. But defense counsel reasonably could have concluded as a matter of trial tactics that objecting to the testimony would have done more harm than good. The remarks were brief and spontaneous; raising an objection would have called attention to matters that would have little impact and could have caused disfavor with jurors.

j. *Cumulative Error.*

Phoebe contends that the cumulative impact of her attorney's failure to object caused prejudice. Because we have found no ineffective assistance, this argument fails. In any event, because there was overwhelming evidence of Phoebe's guilt, there was no prejudice. (See *People v. Ledesma* (1987) 43 Cal.3d 171, 217 (*Ledesma*).)

3. The Trial Court Did Not Err by Failing to Provide an Interpreter for Phoebe.

Phoebe claims the trial court erred by failing to provide a Chinese-English interpreter for her. We reject the claim.

"A person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings." (Cal. Const., art. I, § 14.) "However, an affirmative showing of need is required." (*In re Raymundo B.* (1988) 203 Cal.App.3d 1447, 1453.) The defendant bears the burden of showing the defendant could not understand English. (*Id.* at p. 1456.)

A trial court has considerable discretion in deciding whether an accused's comprehension of English is so minimal as to render the services of an interpreter necessary. (Cf. *People v. Carreon* (1984) 151 Cal.App.3d 559, 566-567.) Factors relevant to this determination include the defendant's request for an interpreter, whether one has previously been provided, and the defendant's birthplace, community, level of education in the United States, and employment history. (See *People v. Aguilar* (1984) 35 Cal.3d 785, 789, fn. 4.) We review for abuse of discretion a trial court's failure or refusal to appoint an interpreter for a defendant. (*In re Raymundo B., supra,* 203 Cal.App.3d at pp. 1453, 1455-1456, 1458; *Gardiana v. Small Claims Court* (1976) 59 Cal.App.3d 412, 418.)

Phoebe did not request an interpreter during trial. She testified in English and, among other things, said she emigrated to the United States from China in 2001. Since 2005, she had helped Peter in his business by answering the phone, doing paperwork, and later, credit repair. There were exhibits

containing Phoebe's emails, which documented her proficiency in English.[9] (People's exh. Nos. 18 & 19.)

During the post-trial hearing on appellants' motion for new trial, the court stated, "[Phoebe] testified in this case, and there was no indication whatsoever of a lack of understanding or a lack of cooperation." The court added, "But the testimony at trial in English established that [Phoebe] is well educated; that she's fluent in at least three languages. There didn't seem to be any hesitancy. And there was certainly never any request on the part of either [appellant] for an interpreter at any time in this case. [¶] [T]here didn't seem to be any difficulty. . . . [¶] There certainly wasn't in the trial, or I would have stopped it. . . . I saw [Phoebe] writing notes to her attorney. . . . [¶] There just wasn't

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[9] For example, in a May 8, 2009 exchange, English expressed frustration that she had missed a call. Phoebe replied, "Hi, [¶] I have been busy with appointments all day. I am still with some appointments and saw your email. Hopefully they can contact you next week." In a May 18, 2009 exchange, English indicated she was anxious to know what the lender was going to do. Phoebe replied, "Hi Xia, [¶] As soon as I hear something, I will let you know. Relax and don't be so anxious." In a June 3, 2009 exchange, Phoebe said, "Xia, [¶] I was told we should hear something about your application by the end of this week." In a June 5, 2009 exchange, Phoebe said, "Hi Xia, [¶] I just finish [*sic*] talking with the lender and they are forwarding the information provided to another department. We should hear back from them next week. [¶] Phoebe." In a January 6, 2010 email from Phoebe to Kwan, Phoebe said, "Hi Tina, [¶] Like I said over the phone, you did not get a loan from Texas Champion Bank. Because you did not get a loan from the bank, you will not be responsible for anything you did not get. [¶] Phoebe."

any indication whatsoever in the trial of an inability to assist counsel or an inability to understand what was happening."

Phoebe submitted a post-trial declaration to the trial court, which asserted that many of her answers during trial were to questions she did not understand, and if she had been assisted by an interpreter her testimony would have been more focused and would not have appeared evasive. But the declaration also states Phoebe took a course in basic English as a second language from 1989 to 1992; she completed 18 months of study at Pasadena City College, where she took classes in English and fashion design; she has been regularly conversing in English since 2004; and although she can speak, read and write English, she does not consider herself fluent in English. Phoebe also cited two psychiatric reports addressing her competency, which recommended that she be provided with an interpreter.

On this record, Phoebe has not satisfied her burden of demonstrating that the trial court abused its discretion by failing to appoint an interpreter for her. The trial court's observations are especially persuasive, as it stated, "There just wasn't any indication whatsoever in the trial of an inability to assist counsel or an inability to understand what was happening."

Phoebe makes an alternative claim that her attorney provided ineffective assistance by failing to request an interpreter for her. The record shows that before and during trial, Phoebe did not request an interpreter. This claim accordingly has no merit. (See *Ledesma*, *supra*, 43 Cal.3d at p. 216.)

As for both of Phoebe's claims, she has not demonstrated prejudice. (See *People v. Rodriguez* (1986) 42 Cal.3d 1005, 1010; *Strickland v. Washington* (1984) 466 U.S. 668, 694.)

4. There Was No Prosecutorial Misconduct.

Phoebe, who is joined by Peter, claims there was prosecutorial misconduct during trial. A prosecutor violates the 14th Amendment by committing conduct that infects the trial with unfairness to the degree that due process, the defendant's right to a fair trial, is denied. A prosecutor's misconduct that does not render a trial fundamentally unfair may violate state law if it uses deceptive or reprehensible methods to attempt to persuade the court or jury. (*People v. Hill* (1998) 17 Cal.4th 800, 819 (*Hill*).) A prosecutor is given wide latitude during jury argument. (*People v. Stanley* (2006) 39 Cal.4th 913, 951-952.) An appellate court reviews prosecutorial remarks to determine whether there is a reasonable likelihood the jury misconstrued or misapplied the remarks. (*People v. Sanders* (1995) 11 Cal.4th 475, 526.)

a. *The Claims were Waived.*

As to each of the claims of misconduct, there was no objection or request for a jury admonition by either appellant during trial. Appellants therefore waived each of their claims of prosecutorial misconduct. (See *People v. Gionis* (1995) 9 Cal.4th 1196, 1215 ["[g]enerally, a reviewing court will not review a claim of misconduct in the absence of an objection and request for admonishment at trial."].); *People v. Mincey* (1992) 2 Cal.4th 408, 471.) Appellants also failed to pose any constitutional objection and therefore forfeited any such issue. (See *People v. Seumanu* (2015) 61 Cal.4th 1293, 1331-1332.)

b. *Claims of Prosecutorial Misconduct.*

Phoebe asserts 16 claims of prosecutorial misconduct. None of them have any merit whatsoever.

1. People's exhibit No. 48 is a check made by Lei Wang to the DMV for "Registration Renewal" regarding "4NHB480." During closing argument, the prosecutor, after noting Phoebe had used the name Phoebe Chanel Chao in People's exhibit No. 35, remarked that Phoebe was "registering cars or at least leasing cars under her alter ego or different, concealed identity [Lei Weng]." Phoebe argues the remark is unsupported by evidence. Given People's exhibit No. 48, the quoted remark was not misconduct but was fair comment on the evidence (see *Hill, supra,* 17 Cal.4th at p. 819), including the evidence of perjury.

2. During closing argument, the prosecutor remarked, "this is really important but something that was repeated -- the notion that these fraudulent documents had to be made on a computer is really false. They could have been made on a computer that [appellants] got rid of or sold or whatever. The fact there is no forensic computer evidence of the creation of the documents means nothing because it appears [appellants] make documents from the photocopy machines." Phoebe argues the remark is unsupported by evidence. The quoted remark was fair comment on the evidence and within the wide latitude granted during argument.

3. Phoebe told Oberon she lied to him about her name, fearing he would freeze money in her account. Moreover, she told him about three of appellants' accounts, but he learned by independent investigation about their account holding $1.5 million, and another holding about $1,000. People's exhibit No. 53 is a copy of an October 30, 2008 application for a driver's license in which Phoebe applied under the name Phoebe Chanel Chao and acknowledged she had previously used the name Lei Chao. During closing argument, the prosecutor, after referring to

that exhibit, remarked that Phoebe "created another identity under Lei Wang to hide money from creditors. Perhaps even for tax evasion. But she's not charged with that." Phoebe argues these remarks were unsupported by evidence. The remarks were fair comment on the evidence and within the wide latitude granted during argument.

4. During closing argument, the prosecution remarked, "Did you notice, when I asked Xia English to produce her documentation, I said to her 'Go to your computer and print them out directly. Don't photocopy them. [¶] You can see that's what was done. You can see in the margins how many drafts are in her in-boxes. Look at [appellants'] purported copies. There's nothing in the margins to show a direct printout. Even if you printed it out and photocopied it, that information should be there. It was created and cut and pasted just like the phony e-mails of Texas Champion Bank." Phoebe argues the remark was impermissible prosecutorial testimony about the emails' authenticity. The remark was fair comment on the evidence.

5. During closing argument, the prosecutor remarked, "As I do these cases, like this one, unfortunately, I don't meet the victims until the very end. Usually, it's not that way, but through circumstances that are strange, it happened in this one. [¶] I urge you to consider these are not numbers and dry names. These are people." Phoebe argues the remark was unsupported by evidence and invited speculation. Prosecutors are given wide latitude during argument and the remarks were not prosecutorial misconduct.

6. During the People's cross-examination of Phoebe, the prosecutor asked her, "On January 22, 2004, you pled guilty to shoplifting. And Alexander Sun, private counsel appeared for you, according to court records. Is that true?" She replied, "I tell the court what happened exactly . . . ."

During closing argument, the prosecutor remarked, "Let me pose this question: do you trust Phoebe Chao to tell the truth? This is someone who committed a shoplift. And thinking that I didn't have the docket on the case, she testified under oath that she pled because she didn't have a lawyer and there was a misunderstanding regarding the coupon. She told you that under oath, not knowing that I had the document. [¶] 'Isn't it true that you did have a lawyer Miss Chao?' She was caught. Well, then the story changed. He was a friend. . . . In her mind, if someone is a friend, they lose their bar card. . . . I don't know. But do you trust that person?"

Phoebe argues the prosecutor's remarks contain misstatements. There was evidence, apart from the shoplifting conviction, that Phoebe engaged in shoplifting and had a private lawyer in her case. Prosecutors are given wide latitude during argument. No prosecutorial misconduct occurred.

7. During closing argument the prosecutor stated, "When she said it was a mix-up regarding the coupon -- . . . I had a copy of the report." Notwithstanding Phoebe's argument to the contrary, this remark was not prosecutorial misconduct but fair comment on the evidence, because the jury reasonably could have inferred from the context of the prosecutor's cross-examination that the prosecutor had a copy of a police report.

8. During the prosecutor's direct examination of Oberon concerning officer safety and execution of the search warrant at the house, he testified that when he served the warrant at the house, he did not know who was inside. The following then occurred: "Q So you don't know, for example – I'm not suggesting that this is true, your Honor -- that [appellants] had a relative that was wanted for murder that was staying at the house. You didn't know that? [¶] A That's correct."

Phoebe asserts the remark was "a bold-faced attempt to prejudice the jury by not only associating [appellants] with a violent criminal, but suggesting that [appellants] were actually harboring a violent criminal." We disagree. The prosecutor made clear he was offering evidence of Oberon's state of mind concerning the need for officer safety. A juror could readily understand that the reference to a wanted murderer was hyperbole. No prosecutorial misconduct occurred.

9. During closing argument, the prosecutor referred to his "witness list" and named the alleged victims pertaining to counts 1 through 4, and 6 through 8. He then remarked, "These cross-outs are because I chose - - for purposes of getting you back to your lives before you died of old age, I decided you either believe this case or not. I can bring in more witnesses or I can't. So I made a decision not to present that evidence. So you shouldn't convict the defendants on those because they're no longer part of this case." Phoebe argues this was impermissible vouching for witnesses, violating their right to confrontation. No prejudicial prosecutorial misconduct occurred.

10. During opening statement the prosecutor said, "it started with an ad in a Chinese newspaper. . . . The ad says 'Easy Money. No Good Credit Required.' . . . 'If you want to be

your own boss. Loans up to $500,000. No good credit required.' " The prosecutor misspoke because the advertisement did not state, "no good credit required," and it did not expressly refer to "$500,000." Phoebe argues the prosecutor's misstatements were misconduct. However, no prejudicial prosecutorial misconduct occurred.

11. During opening statement, the prosecutor said, "none of the victims said they had any interaction with Guillermo." During closing argument, the prosecutor suggested there was no evidence of the involvement of someone named Guillermo "other than out of the mouths of someone accused of perjury and her husband."

Phoebe argues "English testified that she had actually met with 'Gil Rodriguez,' as she referred to Guillermo, on multiple occasions." Phoebe cites page 1583 of the reporter's transcript in support of this claim, but it does not reflect that English "referred to Guillermo" as "Gil Rodriguez." Phoebe has failed to support this claim.

12. During closing argument, the prosecutor remarked concerning Phoebe, "this seasoned [businesswoman] is claiming that she made a loan of $35,000 cash to a stranger [Zhang] with bad credit a few days after she met her with no collateral, didn't keep the original, didn't notarize it, and just gave her a bag of cash."

Phoebe argues "Yet Phoebe *did* testify that she was provided security by Zhang, specifically in the form of the corporate entity AWCH, International, LLC." The prosecutor's reference to collateral was incidental to his other remarks about the informal and undocumented nature of the transaction

claimed by Phoebe. No prejudicial prosecutorial misconduct occurred.

13. Peter testified during direct examination that on January 26, 2010, he and Guillermo had a dispute; Guillermo took his computers and files and left; after January 26, 2010, Peter communicated with Guillermo mainly by phone and messenger; and "right around May 12[, 2010] or just a little bit before," Peter's communications with Guillermo ended. During closing argument, the prosecutor remarked that "on May 10, 2010, they [Peter and Guillermo] cut off all contact."

Phoebe argues "The prosecutor argued that [appellants] had no contact with Guillermo after January 26, 2010." This is wrong. The prosecutor referred to the cut-off date as May 10, 2010, and while this was two days off, the difference was inconsequential. No prejudicial prosecutorial misconduct occurred.

14. During the People's redirect examination of English, she testified she had three minor children. During the People's direct examination of Zhang, and during Peter's cross-examination of Zhang, she testified her husband suffered from cancer. Phoebe argues these remarks impermissibly appealed to jury sympathy, emotions, and passions. In context, the witnesses' remarks appear to have been spontaneous, and it cannot be said they were inadmissible. No prejudicial prosecutorial misconduct occurred.

15. During closing argument, the prosecutor remarked, "I urge you to consider these are not numbers and dry names. These are People. We have evidence of someone who went through a divorce, Xia English, with three minor children and paid the [appellants] $40,000 and tapped out completely trying to

care for three people. [¶] Wen Zhang left her cancer-ridden husband and flew to L.A. just to go to the notary public for no reason. It was bogus. That is not a number and a name. That's a deep effect on someone's life. You leave a sick husband's bedside. It's bad enough to do that for a good reason. For a completely fictitious reason? This is real."

Phoebe contends the prosecutor impermissibly appealed to jury sympathy. However, "[T]he prosecutor is not required to shield the jury from all favorable inferences about the victim's life or to describe relevant events in artificially drab or clinical terms." (*People v. Millwee* (1998) 18 Cal.4th 96, 138.) This was fair argument, and no prosecutorial misconduct occurred.

16. A statement from OneWest Bank in the name of Lei Wang and admitted into evidence showed a previous balance of $1,811,860.92, and an ending balance of $1.5 million (People's exh. No. 46). During closing argument, the prosecutor referred to Phoebe's "bank statement, which at one point had over two million dollars in it under Lei Wang."

During closing argument, the prosecutor commented upon People's exhibit No. 53, a copy of an October 30, 2008 application for a driver's license in which Phoebe applied under the name Phoebe Chanel Chao and acknowledged she previously had used the name Lei Chao. The prosecutor remarked, "What is significant about this is that she doesn't mind telling the truth here because what she's trying to do is build a different identity under Lei Wang. She's writing checks, registering cars under Lei Wang. . . . [She's] created another identity under Lei Wang to hide money from creditors. Perhaps even for tax evasion. But she's not charged with that. She doesn't care if California knows she has a license under Lei Chao, but she never mentions Lei

Wang." The prosecutor later remarked, "she doesn't want the State of California to know she's got bank accounts under Lei Wang and is writing checks and transferring money back and forth between she and her husband and other people."

Phoebe contends the prosecutor presented no evidence as to the source of the funds, inaccurately referred to the account as containing over $2 million, and invited jury speculation, envy, and emotion concerning whether she was hiding money. But there was no dispute the bank account was Phoebe's, and at one point it contained $1.8 million in funds. While there were some misstatements in the prosecutor's arguments, the overall tenor was fairly supported by the evidence. No prejudicial prosecutorial misconduct occurred.

c. *There Was No Prejudice.*

During its final charge to the jury, the court read CALCRIM No. 222, which instructed the jury that nothing attorneys said, including questions, and remarks during opening statements and closing arguments, was evidence. We presume the jury followed that instruction. (Cf. *People v. Sanchez* (2001) 26 Cal.4th 834, 852.) There was overwhelming evidence of guilt as to both appellants. In light of the evidence and the instructions given, we conclude any prosecutorial misconduct alleged above was not prejudicial under any conceivable standard (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705] (*Chapman*)).

We also conclude that no cumulative prejudicial prosecutorial misconduct occurred, appellants were not denied their right to a fair trial, and no ineffective assistance of counsel resulted from any failure by defense counsel to object to any prosecutorial misconduct.

5. The Trial Court Properly Denied Peter's Motion to Discharge Counsel.

Peter contends the trial court improperly denied his motion to discharge his private attorney, by applying the wrong legal standard. We find no error.

a. *Relevant Proceedings.*

The case was first called to trial on October 15, 2014, and appellants were represented by the same attorney at that time. The attorney indicated Peter wanted to retain his own separate counsel. Over the prosecutor's objection, the court granted the request and continued the case to November 18, 2014, and stated "this case needs to be ready to move forward in 30 days."

Peter retained attorney Herb Barish, who substituted as counsel on November 18, 2014. The court continued the case to January 29, 2015, for pretrial and trial setting proceedings, and another trial continuance was granted to February 17, 2015. Trial commenced on February 19, 2015, and jury selection began.

On February 20, 2015, Peter filed a motion to discharge Barish as his counsel.[10] In Peter's three-page supporting declaration he expressed multiple reasons for his dissatisfaction with Barish. Peter also acknowledged "that allowing [Peter] to fire [Barish] will disrupt these proceedings." Peter stated he wanted attorney Antony Myers to substitute for Barish, but Myers would not take over during trial and needed 30 to 60 days to be ready for trial.

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[10] There are discrepancies in the dates. The motion is file-stamped February 20, 2015, but the papers bear the date of February 22, 2015.

The court heard the motion during the afternoon session on February 23, 2015. The court indicated that "[Peter] did deliver to the court a motion for discharge of counsel this morning." And the court stated that the jury was outside the courtroom and waiting to enter. The prosecutor objected to Peter's motion, noting the court would have to discharge the jury, the prosecutor had committed substantial resources to the case, and the prosecutor had two, and possibly three, witnesses scheduled to fly from Texas to appear. The prosecutor and Myers left the courtroom, and Peter expressed no objection to Phoebe's counsel remaining.

The court then asked Barish to respond to the motion. Barish said: he thought Peter was disturbed because Barish asked him very tough questions, partly as preparation for cross-examination; Barish had met with both appellants, who were basically presenting the same version of events; Barish was joining his strategy with that of Phoebe's counsel; Barish had discussions with Peter during noon breaks for the last week; and Barish knew where Peter stood and how to proceed at trial. Barish also said that although Peter complained that Barish had not hired an investigator, Peter had instructed him to forego an investigator against Barish's advice; and Barish had researched the law and developed a trial strategy that he was ready to apply.

The court then told Peter there were problems with his motion: Peter's declaration recited events occurring before the case was called for jury trial; Peter said Barish would not "accommodate" meeting with Peter, but not that Barish had not met with him; and Peter complained that there was no investigator, but Barish had said this resulted from Peter's

directions. The court summarized, "I just don't see a basis for granting this motion."

Peter responded to the court by stating: Barish had suggested retaining an investigator, but in light of the extra fee Peter decided they probably would not need one; in response to tough questions from Barish, Peter had conducted research, found answers to some of the questions, and emailed a response to Barish, but Barish never responded; Peter and Barish met only three times, the last of which was February 16, 2015; Peter talked with Barish briefly and generally during trial; and Barish told him his strategy was to maintain that the present case should have been simply a civil matter.

The court stated that Peter was present when the case was set for trial, when the case was assigned to the present court, and during jury selection on February 19 and 20, 2015. The court concluded, "There is absolutely no reason, when we're in the midst of jury selection, to relieve Mr. Barish; certainly not based on his performance thus far. And there is a jury waiting outside."

After a further exchange among the court, Peter and Barish, the court indicated there was no need for further argument, and the prosecutor and Myers reentered the courtroom. The court then announced it was denying Peter's motion to discharge Barish as counsel. Jury selection resumed, and later that day the jury was sworn.

b. *The Motion Was Properly Denied.*

Peter claims the trial court committed error by denying the motion, particularly because it wrongly applied the "analytical framework drawn from *People v. Marsden* (1970) 2 Cal.3d 118 [(*Marsden*)]." We reject the claim.

" 'The right to retained counsel of choice is—subject to certain limitations—guaranteed under the Sixth Amendment to the federal Constitution. [Citations.] In California, this right "reflects not only a defendant's choice of a particular attorney, but also his decision to discharge an attorney whom he hired but no longer wishes to retain." [Citations.]' " (*People v. Maciel* (2013) 57 Cal.4th 482, 512 (*Maciel*).)

"The right of a nonindigent criminal defendant to discharge his retained attorney, with or without cause, has long been recognized in this state." (*People v. Ortiz* (1990) 51 Cal.3d 975, 983 (*Ortiz*). "While we do require an *indigent* criminal defendant who is seeking to substitute one *appointed* attorney for another to demonstrate either that the first appointed attorney is providing inadequate representation [citations] or that he and the attorney are embroiled in irreconcilable conflict [citation], we have never required a *nonindigent* criminal defendant to make such a showing in order to discharge his *retained* counsel." (*Id.* at p. 984.)

However, " 'The right to discharge a retained attorney is . . . not absolute. [Citation.] The trial court has discretion to "deny such a motion . . . if it is not timely, i.e., if it will result in 'disruption of the orderly processes of justice . . . .' " ' ([Citation]; see *Morris v. Slappy* (1983) 461 U.S. 1, 11 [75 L.Ed.2d 610, 103 S.Ct. 1610, 103 S.Ct. 1610] ['Trial judges necessarily require a great deal of latitude in scheduling trials.'].)" (*Maciel*, *supra,* 57 Cal.4th at p. 512.)

In *Maciel*, our Supreme Court addressed the same argument concerning misapplication of *Marsden* that Peter has made here. In that case, trial had been continued several times and was set to begin about six weeks later. The defendant was unhappy with his privately-retained attorney and wanted time to find new counsel. The court conducted an in camera hearing, at which it considered the defendant's reasons for desiring a new attorney. The court denied the motion, stating various grounds that included the delay and disruption which would be caused by a new attorney, the absence of a conflict of interests, and the absence of any grounds constituting abandonment or inadequate representation by counsel. (*Maciel*, *supra,* 57 Cal.4th at pp. 512-513.) At the end of the hearing, it stated " 'The court has denied the—we'll call it a *Marsden* motion.' " (*Id*., at p. 513.)

On appeal, the court rejected the defendant's argument that the trial court had erred by applying a *Marsden* standard: "Defendant asserts that the trial court incorrectly applied the standard in [*Marsden*] for substituting one appointed counsel for another rather than the *Ortiz* standard for discharging retained counsel and appointing new counsel. Under *Marsden* and its progeny, a ' "defendant is entitled to relief if the record clearly shows that the appointed counsel is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result." ' [Citation.] Defendant relies on the fact that the trial court stated at the conclusion of the hearing: 'The court has denied the—we'll call it a *Marsden* motion.' Defendant also cites the trial court's statements that it did not 'think' that counsel was 'incompetent' or had 'abandoned'

defendant, or that there had been 'some breakdown between you two to the point where there is an actual conflict of interest.'

"Contrary to defendant's assertion, the trial court did not deny the motion merely because defendant had failed to demonstrate that counsel was incompetent or had abandoned him or that there was an irreconcilable conflict between defendant and counsel. In evaluating whether a motion to discharge retained counsel is 'timely, i.e., if it will result in "disruption of the orderly processes of justice" ' [citation], the trial court considers the totality of the circumstances [citations]. Although a defendant seeking to discharge his retained attorney is not *required* to demonstrate inadequate representation or an irreconcilable conflict, *this does not mean that the trial court cannot properly consider the absence of such circumstances in deciding whether discharging counsel would result in disruption of the orderly processes of justice*. Here, *defendant* raised numerous concerns about retained counsel in his declaration filed in support of the motion to discharge counsel, and the trial court did nothing improper in discussing those concerns with defendant at the hearing." (*Maciel*, *supra,* 57 Cal.4th at pp. 513-514, second and third italics added.)

The same is true here. The trial court considered all relevant aspects of Peter's motion to replace Barish, and it expressed its proper concern with the delay and disruption that would result from granting the motion. Trial had already commenced, and an anxious jury was waiting in the hallway. The court properly considered the matters raised by Peter and Barish in measuring the consequences of going forward without a new attorney. Unlike *Maciel*, the court never described the proceeding as a "*Marsden* motion," and its comments indicated a

proper focus on the legally relevant considerations. The court properly denied the motion on the ground of untimeliness. (See *Maciel*, *supra,* 57 Cal.4th at pp. 513-514; *People v. Turner* (1992) 7 Cal.App.4th 913, 918-919.)

6. The Court Did Not Err by Giving CALCRIM No. 1804.

Peter, joined by Phoebe, claims the trial court erred by instructing the jury with CALCRIM No. 1804, pertaining to theft by false pretense.[11] This claim has no merit.

"A defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant." (*People v. Cross* (2008) 45 Cal.4th 58, 67-68.) The correctness of a jury instruction is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. (*People v. Carrington* (2009) 47 Cal.4th 145, 192.) We review the instructional issue de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

Peter's arguments focus on the instruction's phrase, "Makes a misrepresentation *recklessly without information that justifies a reasonable belief* in its truth." (Italics added.) Peter argues that language in *People v. Marsh* (1962) 58 Cal.2d 732, 736 (*Marsh*) "has influenced the standard that applies to the intent involved in employing a false pretense, and has thereby shifted the burden of proof to the defendant."

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11 The instruction is quoted in footnote 6, *ante*.

Peter cites *Marsh's* statement that "[E]ven if the defendants made false representations but made them in the bona fide belief, *based upon reasonable grounds*, that they were true, no offense was committed. In other words, a conviction of theft based on false representations cannot be sustained if the false representations were made in the actual *and reasonable* belief that they were true." (Italics added.) The above language immediately followed *Marsh's* observation that, "Under section 484 of the Penal Code an essential *element* of that offense is that defendant had the specific *intent to defraud*. [Citation.]" (*Marsh, supra,* 58 Cal.2d at p. 736, italics added.)

In addressing this argument, we consider the entire charge to the jury, including CALCRIM No. 220, which instructed on the People's burden to prove a defendant guilty beyond a reasonable doubt. We must assume the jurors were intelligent persons and capable of understanding and correlating all given instructions. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1089 (*Ramos*).) A reasonable jury would consider CALCRIM Nos. 1804 and 220 together. A reasonable jury would thus understand that the *People* were required to *prove beyond a reasonable doubt*, as pertinent here and stated in CALCRIM No. 1804, that appellants, "intending to deceive," "[m]ade[] a misrepresentation recklessly without information that justifies a reasonable belief in its truth." (Cf. *Ramos*, at pp. 1089-1090.)

In this context, a jury could not read CALCRIM No. 1804 as shifting the burden of proof or the burden of production to the defendant. The instruction expressly assigns the burden to the prosecution, and nothing suggests that the defendant has any burden at all. In their arguments to the jury, both the prosecutor

and defense counsel recognized the prosecution's burden of proof as to all issues.

Peter's arguments have no merit, and we conclude the trial court did not err, constitutionally or otherwise, by giving CALCRIM No. 1804 to the jury. Any instructional error was harmless, in light of the overwhelming evidence of appellants' guilt and the remaining instructions given by the court. (See *Watson*, *supra,* 46 Cal.2d at p. 836; *Chapman*, *supra,* 386 U.S. at p. 24.)

7. The Trial Court Did Not Err by Failing to Instruct Sua Sponte on Mistake of Fact.

Peter, joined by Phoebe, claims the trial court erred by failing to instruct sua sponte on mistake of fact. Peter asserts the "central defense position was that [appellants] mistakenly believed in the truth of what turned out to be fraudulent representations by Guillermo," and this mistaken belief could have defeated a finding that appellants acted with recklessness. This claim has no merit.

Courts do not have a duty to instruct sua sponte on mistake of fact "even if substantial evidence supports the defense . . . provided the jury is properly instructed on the mental state element of the charged crime." (*People v. Lawson* (2013) 215 Cal.App.4th 108, 117.) The jury was properly instructed on the mental state element of theft by false pretense through the language of CALCRIM No. 1804, and the trial court therefore had no sua sponte duty to instruct on mistake of fact. In addition, Peter's arguments are based on his peculiar view of CALCRIM No. 1804, which we have rejected.

The trial court did not err by failing to instruct on mistake of fact sua sponte. Any instructional error was harmless under any conceivable standard, in light of the overwhelming evidence of appellants' guilt, the court's other instructions, and the jury's rejection of appellants' factual arguments. (*Watson*, *supra,* 46 Cal.2d at p. 836; *Chapman*, *supra,* 386 U.S. at p. 24.) Similarly, any constitutionally deficient representation of appellant stemming from the failure of his trial counsel to request a mistake of fact instruction was not prejudicial. (*Ledesma, supra,* 43 Cal.3d at p. 217.)

8. The Trial Court Did Not Err by Failing to Give Sua Sponte a Unanimity Instruction.

Peter, joined by Phoebe, claims the trial court erred by failing to give sua sponte a unanimity instruction as to the counts on which he was convicted. We reject the claim.

"The key to deciding whether to give the unanimity instruction lies in considering its purpose. The jury must agree on a 'particular crime' [citation]; it would be unacceptable if some jurors believed the defendant guilty of one crime and other jurors believed her guilty of another. But unanimity as to exactly *how* the crime was committed is not required. Thus, the 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* . . . 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 (*Russo*), italics added.)

Moreover, when "multiple acts constitute *one* discrete criminal event" (*People v. Sanchez* (2001) 94 Cal.App.4th 622, 631, italics added), a defendant's "assertion of multiple defenses [does not] require[] a unanimity instruction." (*Id.* at p. 635; see, *id.* at pp. 635-636.) We review this issue of instructional error de novo. (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 568.)

In the present case, Peter argues a unanimity instruction was required because "the prosecutor described alternative *theories* through which the jury could reach a conviction" and "[t]he defense also put forth multiple *theories*." (Italics added.)

None of these considerations, alone or in combination, obligated the court to give a unanimity instruction. They were at best multiple theories of guilt, and multiple defenses, pertaining to the "single discrete crime" (*Russo*, *supra,* 25 Cal.4th at p. 1135) or " 'one discrete criminal event' " (*ibid.*) of which Peter was convicted in each count.

The trial court did not err by failing to give sua sponte a unanimity instruction. Any instructional error was harmless under any conceivable standard, in light of the overwhelming evidence of appellants' guilt, the court's other instructions, and the jury's rejection of appellants' arguments. (*Watson*, *supra,* 46 Cal.2d at p. 836; *Chapman*, *supra,* 386 U.S. at p. 24.)

9. Peter Was Not Denied Effective Assistance of Counsel.

Peter contends he was denied effective assistance of counsel because his attorney failed to object to evidence at trial. This claim is similar to Phoebe's, and it is governed by the same legal standard that we discussed in addressing her claims. (See part 2 of our Discussion, *ante*.) Peter asserts three specific claims of ineffective assistance, but none has merit.

1. Peter argues his trial counsel rendered ineffective assistance of counsel by failing to object to Oberon's testimony about potential victims. This is the same claim made by Phoebe, and we reject it for the same reasons discussed for her claim. (See part 2.a. of our Discussion, *ante*.)

2. Peter argues his trial counsel rendered ineffective assistance by failing to object to People's exhibit No. 4, a "Borrower's Certification and Authorization" that was purportedly from "Texas Champion Bank." This is the same claim made by Phoebe, and we reject it for the same reasons discussed for her claim. (See part 2.d. of our Discussion, *ante*.)

3. Peter argues his trial counsel rendered ineffective assistance by failing to object to Oberon's answers during cross-examination by Phoebe. In that exchange, Oberon said Phoebe told him that Guillermo and Peter had opened a bank account, and he testified without objection that, "Based on the information that the bank provided me, it all came back to Peter and Phoebe." During later cross-examination, Oberon added he examined records and observed "documentation showing that Peter and Phoebe were the only two people on that account who were authorized to sign or do activity on the account."

Peter argues his trial counsel rendered ineffective assistance by failing to object to Oberon's testimony on authentication and hearsay grounds. This is essentially the same claim made by Phoebe in regard to her attorney's failure to object to banking and financial records. We reject Peter's claim for the same reasons discussed for Phoebe's claim. Oberon testified about banking records, and counsel had stipulated to the authenticity of these records; also defense counsel could have reasonably believed employees from the bank could have readily authenticated the exhibits as business records. (See part 2.g. of our Discussion, *ante*.)

Like Phoebe, Peter contends the cumulative impact of his attorney's failure to object caused prejudice. Because we have found no ineffective assistance, this argument fails. In any event, because there was overwhelming evidence of Peter's guilt, there was no prejudice. (See *Ledesma, supra,* 43 Cal.3d at p. 217.)[12]

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[12] Peter has grounded all of his claims on the federal Constitution, as well as state law. We also reject his federal constitutional claims.

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON, (MICHAEL) J.*

We concur:

EDMON, P. J.

LAVIN, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.