Filed 8/22/13 P. v. Liu CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LI CHING LIU, Defendant and Appellant.	B233580 (Los Angeles County Super. Ct. No. NA081311)

APPEAL from a judgment of the Superior Court of Los Angeles County. Arthur H. Jean, Judge. Affirmed.

Janet J. Gray, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

A jury convicted Li Ching Liu, also known as Susan Liu (appellant) of theft from an elder or dependent adult by a caretaker in violation of Penal Code section 368, subdivision (e).[1] The trial court sentenced appellant to the upper term of four years in prison. Appellant was ordered to pay restitution in the amount of $909,400.

Appellant contends that (1) the trial court erred in failing to instruct the jury sua sponte on the defense theory of "claim of right"; (2) the trial court erred in failing to instruct the jury sua sponte with the unanimity instruction; (3) the trial court erred in permitting the investigating officer to testify regarding recognizable patterns in elder abuse cases; (4) the trial court improperly excluded impeachment evidence of a prosecution witness; (5) there was insufficient evidence to support the conviction; (6) there was insufficient evidence to support the restitution award; and (7) the judgment must be reversed because the statute of limitations had expired.

Finding no error, we affirm.

FACTS

Prosecution Evidence

A. Events Prior to Appellant Becoming Caretaker

Sherry Liou[2] was born in Taiwan on May 20, 1936, and immigrated to the United States when she was a young woman. In the late 1970's she purchased the Gardena Motel and sponsored her younger brother and other siblings to come to California. Sherry purchased a property in Atlanta, Georgia, and her brother and his family helped her manage the property. Sherry purchased a number of properties in California and eventually acquired the Westhaven Shopping Center (Westhaven) on Brookhurst Street in Westminster. Sherry avoided paying capital gains tax when she bought and sold commercial property by doing a tax-free exchange. Sherry was very close with David

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[1] All further statutory references are to the Penal Code unless otherwise stated.

[2] To avoid confusion and not out of any disrespect, we will refer to members of the Liou family and others by their first names.

Liou (David) and Jennie Liou Massey (Jennie) her younger brother's children. Sherry did not cook for herself and regularly ate dinner at her siblings' homes. David and Jennie also visited Sherry at her home in Long Beach and always felt welcome. They spoke regularly with her, either at her home or office. Sherry was a "self-made lady" who "did everything herself." She was very intelligent and did all her own negotiations. She took a lot of time to make her decisions which were always "very well thought out." Sherry was described as "frugal" and "she and her money were not easily parted." It would be "out of her character" to give large cash bonuses or gifts to nonfamily members.

James J. Sullos, a certified public accountant, had been Sherry's accountant since the 1980's when she returned to California from Atlanta. He prepared quarterly financial statements and annual tax returns for all her properties including Westhaven. John Vozenilek became Sherry's attorney around 1989, and advised her on tenant problems, contract issues, and "anything related to the shopping center." Sam Stovall was Sherry's insurance agent and he specialized in hotel insurance. He first met Sherry in 1988 and insured her commercial properties including Westhaven.

Sherry purchased a long-term care insurance policy from Genworth Financial (Genworth), formerly G.E. Financial, on February 7, 2000, when she was 63 years old. The policy paid $100 per day to cover the cost of a nursing home, assisted living, or in-home health care services. Under the policy, a caretaker could not be a family member. In February 2002, when Sherry was 65 years old, she suffered a "rather severe and fairly large hemorrhage" to the brain. Thomas DiJulio, the consulting neurologist at Long Beach Memorial Hospital noted that her "prognosis was grave, that the outlook was not good, and that significant neurologic recovery was uncertain." As a result of the hemorrhagic-type stroke, Sherry suffered paralysis of the left side of the body and had auditory and visual hallucinations.

In April 2002, when Sherry left the hospital, appellant and one other person were hired to take care of her 24 hours a day at Sherry's house in Long Beach. Appellant was the daytime caretaker from April 2002 through September 2008, while at least five

different people provided nighttime care for Sherry during the same time period. Every six months, Genworth conducted in-home functional assessments to determine if an insured met the definition of terminally ill and remained eligible under the policy.

A computer assisted tomography (CAT) scan dated April 22, 2008, revealed "extensive deep white matter ischemic changes" which reflected a worsening of the condition that was observed in 2002. Sherry suffered a subsequent stroke approximately two weeks prior to undergoing a CAT scan dated August 9, 2008. That scan indicated that there was atrophy of the right hemisphere of her brain, where the initial stroke occurred. Sherry died on May 2, 2010.

B. Appellant Assumes Caretaker Duties

When Sherry was released from the hospital, Jennie visited her regularly at her home in Long Beach. Over time, Jennie noticed the home was getting dirty. There was a lot of dust, and rings of mold in the toilet. Sherry had always kept her home very clean and tidy and Jennie told appellant she should hire a housekeeper or clean the house. Jennie also started to notice that Sherry had "sleepies" in her eyes, her hair was matted, her teeth looked "filmy," and she sometimes smelled of urine. Jennie did not like the way appellant "talked down" to Sherry, treating her as if she was a child. Appellant pulled Sherry by her underwear when she needed to lift her up. When Jennie complained, appellant told her she would take care of everything and it was none of Jennie's business. It became more difficult for Jennie to keep in contact with Sherry. Sometimes she rang the doorbell and heard voices inside but no one answered. When Jennie tried calling, the telephone rang without answer. Jennie wanted to report her suspicions but felt ashamed that her family did not take care of Sherry and was concerned that Sherry or Jennie's parents would be embarrassed if she did report the alleged abuse. Finally in 2004, Jennie called Adult Protective Services (APS) because she suspected elder abuse.

David regularly spoke to Sherry about Westhaven. They discussed the tenant leases and what could be done to increase the rent. He was her favorite relative and she

told him that one day the property would be his. In 2002 after suffering the stroke, Sherry gave David a car worth $87,500 and asked him to advise her on Westhaven. David owned a business in Northern California and saw Sherry on the weekends when he came back to the Los Angeles area. Many times when he visited the house he was told by appellant and other caretakers that Sherry was contagious or that she did not want to be bothered. A number of unsuccessful attempts to visit Sherry took place, and by the end of 2002, David stopped trying to contact her.

While in the hospital recovering from her February 2002 stroke, Sherry asked Sullos to manage Westhaven for her. Sullos was paid $5,000 per month for his services. He leased vacant units, sent monthly statements, collected rents, and paid the bills. He also paid Sherry's personal household bills, including her home and life insurance policies, nursing fees, and appellant's monthly salary of $2,400. Sullos was also the trustee of her life insurance trust and the executor of her will. He became a check signer on Sherry's account at Bank of America, and visited her house approximately once a week to collect the mail and pay her bills. Sherry's personal expenses totaled about $10,000 per month. Around the end of 2002, Sherry asked Sullos to give her an allowance of $20,000 per month, over and above the payment of her monthly expenses.

C. Sale of Westhaven

In early 2005, Sherry told Sullos she wanted to sell Westhaven and asked him to find a buyer. Sullos informed Sherry that Westhaven provided substantial monthly income for her and an outright sale would have significant tax consequences for her. Sullos acquired two offers of $16 million, one of which was accompanied by a good faith deposit of $100,000 or $150,000 into escrow.

John Vozenilek's wife Belinda, typed letters and did other office work for Sherry, when Sherry visited the attorney's office. Sherry was concerned because people were coming to her house and asking her to sign papers. She felt overwhelmed. When Belinda heard that Sherry received offers to buy Westhaven she went to Sherry's home to find out if Sherry was being coerced. Sherry told Belinda she did not want to sell

Westhaven. Appellant and several other people were at the house and Sherry seemed intimidated. Sherry was "not herself."

Sherry rejected the offers of $16 million for Westhaven presented by Sullos, and sold the property for $13.5 million. The sale closed on January 19, 2005, and Sherry netted a little over $6 million.

D. Termination of Sherry's Advisors

In the fall of 2004, Sullos was told by appellant that he would no longer be a signer on Sherry's bank account. Appellant sat with Sherry at the dining room table when Sullos came to conduct business. Sullos still wrote the checks to pay Sherry's bills but he was told to leave them for Sherry to sign. During a visit to Sherry's house in early 2005, Sullos was informed by an attorney named Roger Hsu, that he was relieved of all his duties to Sherry. Sullos was never given an explanation why he had been discharged. Shortly afterwards, Sullos received a letter from Hsu stating he was no longer the executor or a beneficiary of Sherry's will, or the trustee of her trust. The premiums were not paid on Sherry's life insurance policy and ultimately the policy lapsed.

In early 2005, Belinda Vozenilek paid a second visit to Sherry's home. Sherry showed Belinda a diamond tennis bracelet and a diamond necklace she had purchased while shopping with appellant. The jewelry was gaudy compared to anything Belinda had seen Sherry wear in the past, and it "wasn't [Sherry's] style" to wear flashy jewelry. Sherry acted like "a little kid" looking at the jewelry and Belinda thought she was "nuts" because Sherry offered the bracelet to her. Shortly thereafter, John and Belinda Vozenilek received a letter from Hsu informing them that their services were no longer needed.

Stovall met with Sherry once a year to discuss her various insurance policies. She was a "wonderful lady" who he regarded as a "grandmother figure" to him. After Sherry's stroke he grew concerned because her insurance policies were lapsing and he was unable to contact her. It was uncharacteristic of Sherry to let her policies lapse and he paid the premiums a couple of times with his own money. Stovall finally managed to

visit Sherry at her home. He received "strange responses" from Sherry and "it just didn't feel kosher, didn't seem right." Stovall spoke with Sullos and several of Sherry's family members, and eventually called APS to file a report. Around that time, Stovall was notified that his professional services to Sherry were no longer needed.

Sullos was worried that Sherry was "doing things that were very uncharacteristic of herself" and tried to contact her. She had terminated her relationship with him, Vozenilek, and Stovall, all of whom had worked for her for twenty years. She wanted to sell property without doing a tax-free exchange. When Sullos called Sherry's house, appellant would answer the telephone and hang up when she learned it was he.

E. Sherry's Financial Transactions

Katy Chen worked at the Monterey Park branch of the Los Angeles National Bank (L.A. Bank). After her stroke, Sherry and appellant visited L.A. Bank about once a week. Sherry wore expensive jewelry to the bank and on one occasion told everyone that her necklace cost $100,000. When cash was withdrawn from Sherry's accounts, the majority of the withdrawals were for $5,000 to $7,000. Appellant requested the amount and Sherry confirmed for Chen and the other bankers by nodding her head. The teller counted the money and appellant would take the money. A bank is required to file a currency transaction report with the Internal Revenue Service, when a deposit or withdrawal exceeds $10,000.

In 2005, Sherry asked Chen to come to her house on the weekends, to open her mail, and to pay the bills. Sherry paid Chen $50 for about two hours work each weekend. Sherry paid to take appellant, her nighttime caretaker, and Chen on a trip to Las Vegas, and gave Chen $500 to spend. Sherry also gave Chen pearl earrings, a diamond ring, and a $10,000 bonus after Westhaven was sold.

On January 20, 2005, Sherry opened four certificates of deposit (CD). One CD was for $720,000 and the other three were for $500,000 each. That same day, Sherry obtained a cashier's check for $355,000, which was paid to appellant and deposited into two of appellant's bank accounts, and a cashier's check for $100,000 made out to

Sherry's nighttime caretaker. The following day, Sherry wrote a check to herself for $500,000. On February 3, 2005, Sherry closed the CD's with penalties. In 2007, Sherry opened a one-year CD for an amount in excess of $4 million dollars. Sherry returned to the bank accompanied by appellant less than one month later, and withdrew the money. She incurred significant financial penalties for doing so.

Alice Wu, appellant's daughter-in-law began working as a teller at the San Marino branch of the East West Bank in July 2004. Appellant and Sherry came to the bank about twice a week and appellant told Wu that Sherry was "rich." Wu was also responsible for looking at overdrawn accounts and noticed that there were a lot of withdrawals from Sherry's account and that her name showed up on the list of overdrawn accounts.

Janet Chao was a regional manager at East West Bank and worked at the San Marino branch. She first met Sherry when Sherry obtained a loan to purchase Westhaven, but only saw her once or twice a year because Sherry lived in Long Beach. After her stroke, Sherry, accompanied by appellant, regularly visited the East West Bank. Prior to her stroke Sherry always had large balances in her accounts and never withdrew cash. Later the balances were low and there were a lot of cash withdrawals and suspicious activity. Rather than pay for something directly from her East West Bank account, Sherry wrote checks on her East West Bank account to send money through the L.A. Bank. Sherry also obtained a large cashier's check payable to appellant's boyfriend. Appellant explained to the bank staff that her boyfriend could get Sherry a much higher interest rate than the bank could provide.

Chao observed Sherry during her visits to East West Bank and sometimes Sherry did not appear to be aware of what was happening. Sherry did not recognize or acknowledge Chao when Chao said "hi" to her. Chao saw appellant showing off jewelry in the bank and heard her say she got the jewelry from her boyfriend who was rich. Chao saw appellant's boyfriend waiting outside the bank. Chao reported her concerns to the bank's risk management team, who then filed a report with APS. Chao also filed a report with the Long Beach Police Department.

Angela Chi was the chief financial officer at L.A. Bank and was responsible for reviewing large transactions at the bank. She saw that Sherry was cashing a number of checks at L.A. Bank that were drawn on her East West Bank account. She instructed the Monterey Park branch of L.A. Bank to stop cashing the checks. Chi saw appellant and Sherry in a restaurant in Monterey Park while she was visiting the branch office to conduct further investigation. Sherry was dressed very poorly and was on a "leash" held by appellant. Later when Chi saw them in the bank and the branch manager identified them, Chi made the connection with her investigation. Chi reported the suspicious activity and the bank filed a report with APS.

Janet Ngo, a forensic accountant with the Los Angeles County District Attorney's Office, testified about an analysis she conducted on bank accounts belonging to Sherry, appellant, and Abolfath Okhovat. Okhovat was appellant's boyfriend. Appellant had 46 different bank accounts, some of which were held solely in her name, while others were held in joint ownership with either her son, Allen Shih,[3] or Wu. During the six years appellant worked for Sherry from 2002 to 2008, a total of $909,400 was directly traceable from four of Sherry's bank accounts to appellant.[4] This was comprised of $785,700 deposited directly from Sherry's accounts to appellant's accounts, a cashier's check for $75,000 made payable to appellant, and $48,700 in checks payable to cash and endorsed by appellant.

Money was also transferred from Sherry's accounts to Okhovat's accounts. Two cashier's checks totaling $300,000 were paid from Sherry's accounts to Okhovat's accounts in 2007, and $146,348.38 was paid from Sherry's account to The Gold Store,

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[3] Appellant's son is also known as Yun Tang Shih.

[4] This amount was in addition to appellant's stated monthly salary of $2,400, which totaled $172,800 over the course of the six years she was employed by Sherry.

owned by Okhovat.[5] In December 2007, two checks totaling $66,500 were made payable to cash and endorsed by Shih, appellant's son.

In addition to appellant's 6-year salary of $172,800, the total amount of money that left Sherry's accounts in the six years she was cared for by appellant was $2,805,047. Sherry withdrew $1,441,799 in cash (or checks made out to Sherry that were cashed). Appellant received $909,400, and Okhovat was paid $453,848.

Appellant drove an old car when she began working for Sherry in April 2002. Sherry owned a 1997 Mercedes and claimed it as a business deduction on her taxes. Sullos valued the car between $30,000 and $40,000. On January 4, 2003, the Mercedes was retitled in Okhovat's name. Sherry told Sullos she sold the Mercedes to appellant for $10,000. Sullos did not see a matching deposit in any of her bank accounts at the time. Title to a 2005 Lexus, which was leased jointly by Sherry and appellant on September 20, 2004, was later changed to Okhovat. On February 15, 2007, appellant purchased a 2004 Porsche for $36,000. On July 30, 2007, a 2003 BMW was purchased for $31,500, and title was placed in Shih's name.

In October 2008, appellant gave Shih and Wu $410,000 in cash to be used as a down payment for a house in Temple City. Appellant and Okhovat moved into the house with Shih and Wu.

F. Genworth Assessments of Sherry

Sherry's long-term disability insurance company, Genworth, conducted assessments approximately every six months to determine if Sherry was still eligible for benefits. A nurse visited Sherry's home to see if she needed help with daily activities, including money management. The nurse also administered a "Folstein" mini mental examination which measured mental decisionmaking and orientation. Appellant was identified as a contact person for Sherry but Genworth experienced difficulty scheduling regular in-home assessments.

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[5] An additional $7,500 in checks were payable to cash, but were endorsed by The Gold Store.

On December 19, 2002, Sherry scored 28 out of 30 on the Folstein test. She did not know the day of the week and was not able to repeat a sentence. She was assessed as incapable of handling her finances.

On June 24, 2003, Sherry scored 16 out of 30 on the Folstein test. It was noted that Sherry was "incapable of handling money" and her caregivers performed that task. Sherry was unable to follow commands and her cognitive abilities were assessed at 50 to 60 percent.

On December 31, 2003, Sherry scored 22 out of 30 on the Folstein test, and she was assessed as incapable of handling her money.

On July 16, 2004, Sherry scored 24 out of 30 on the Folstein test. She did not know the date and was unable to write a sentence or draw a diagram. She was assessed as incapable of handling her money.

On September 21, 2005, Sherry scored 25 out of 30 on the Folstein test. It was noted that Sherry had impaired vision and was "extremely forgetful." Sherry told the nurse that she had recently sold property and it "bothered" her and was "an issue for her." Appellant told the nurse that Sherry used a secretary for financial assistance. Sherry was assessed as totally dependent on others for money management.

On May 24, 2006, Sherry scored 21 out of 30 on the Folstein test. Appellant was present and gave the nurse information to complete the assessment form. Sherry was rated as dependent in all areas except money management.

On May 24, 2007, Sherry scored 19 out of 30 on the Folstein test. Sherry did not know the season, the date, or the state she lived in. Sherry was assessed as "independent" for money management based on information provided to the nurse by appellant and because Sherry could sign her name.

On December 4, 2007, Sherry scored 20 out of 30 on the Folstein test. Sherry was unable to identify the season or the date, and could not write a sentence. Sherry was rated "partially dependent" for money management because appellant informed the nurse

that Sherry had the assistance of a financial assistant. Appellant did not provide the name of the financial assistant to the nurse.

Sherry's last assessment occurred on June 11, 2008, when she scored 25 out of 30 on the Folstein test. Appellant was present during the assessment and Sherry was rated "independent" in the area of money management.

G. Investigations

On March 3, 2006, Gian Del Bello, a social worker with APS, went to Sherry's house to investigate allegations of physical and financial abuse. Sherry and an unidentified caregiver were present and Del Bello spoke with Sherry alone. Sherry was reluctant to provide information but stated she did not want family visiting because they wanted money. She discussed the Westhaven sale and said she had fired her accountant. Sherry was well-dressed and groomed and the house was "adequately clean." Del Bello did not sense any immediate danger and left the house. He reviewed the APS reports filed by Jennie, and Stovall, and closed the case.

Genworth notified Sherry in April 2004 that it was not receiving caregiver bills on a regular basis and some of the bills were predated. Individual daily invoices listing specific activities were required and the invoices submitted all appeared to be typed and repetitious. Genworth was also concerned because the invoices showed the caregiver worked seven days a week, while the assessment nurses were told that Sherry's sister cared for her on Sundays. On November 1, 2006, Michael Elly, a private investigator hired by Genworth went to Sherry's house. Appellant was agitated and upset that Elly came unannounced. Appellant described the care she provided for Sherry but when Elly tried to talk to Sherry, appellant said Sherry did not speak English. Appellant said she was paid $2,400 per month with occasional bonuses, but could not remember the amounts of the bonuses. Appellant said she took Sherry to the bank every couple of days. Sherry suffered from memory loss and hallucinations. Appellant was hesitant to provide information and refused to give Elly her home address or telephone number. Elly had to

ask appellant to leave the room when he spoke with the nighttime caretaker, because appellant wanted to be present during the interview.

In July 2007, two employees of East West Bank filed APS reports. In August 2007, Chi's assistant at L.A. Bank, Ben Tsugawa, filed a report with APS. In September 2007, Del Bello accompanied by a Long Beach police officer returned to Sherry's house. Sherry was well-groomed but the house appeared more cluttered than it was in 2006 and there were papers and files scattered around. Sherry was still hesitant to disclose information and expressed difficulty remembering things.

David was summoned to the hospital when Sherry suffered her second stroke in 2008. Sherry told him she did not want to live in a nursing home and asked for his help. Sherry was in default on her mortgage, and she was behind on property taxes and medical bills. The bank accounts were depleted with balances only in the thousands. Sherry only had life insurance, long-term disability insurance, and her monthly social security payment. David filed a report with APS on July 15, 2008, and a second report on July 25, 2008.

Del Bello returned to Sherry's home within approximately five days of receiving the July 15, 2008, report, filed by David. The house was in disarray as it had been when he visited in 2007. Sherry's ability to communicate had diminished. She told Del Bello that appellant was her primary caregiver but "rarely comes by" anymore. Del Bello advised David to have Sherry assessed for mental capacity and to consider obtaining a conservatorship over her to protect her assets.

Long Beach Police Detective Stacey Holdredge received telephone calls from Chao at East West Bank and also spoke with Del Bello regarding his investigation. On October 22, 2008, Detective Holdredge interviewed Sherry at her home. Following the interview, Detective Holdredge obtained search warrants for bank records pertaining to appellant, Okhovat, and Shih. Detective Holdredge searched for appellant for approximately eight months before appellant turned herself in and was arrested on August 17, 2010.

H. Expert Testimony

Dr. Susan Bernatz, a neuropsychologist, examined Sherry for purposes of this prosecution and testified that in her expert opinion, Sherry did not have the capacity to independently manage her finances between 2002 and 2008.

Dr. Bernatz reviewed Sherry's medical and psychological records from 2002 to 2008, Genworth's records, and the APS reports. She explained the reasons why she determined Sherry was financially incapacitated during each of the years from 2002 to 2008, and why she believed Sherry's condition did not improve over time. In her opinion, Sherry may have been able to write a check or give large bonuses to her caregivers, but she would not have been able to "understand and have appropriate judgment" as to the consequences of giving the money. Dr. Bernatz opined that the bonuses of $300,000 and $100,000 raised a "red flag" for her because people do not generally give caregivers such large bonuses. Furthermore, there was no independent person or accountant involved in the transaction to advise Sherry of the tax consequences. Dr. Bernatz explained that in cases of elder financial abuse, the elder is often isolated from family members. There is no outside contact to act as a check and balance.

Dr. Bernatz opined that Sherry's condition degenerated. Sherry scored 11 out of 30 on the Folstein test administered in January 2009. Her reliability as an accurate informant was very poor. When asked if she had sold Westhaven, Sherry responded "1031"[6] referring to a tax-deferred exchange of property which Sherry utilized in most transactions, but not when selling Westhaven.

Detective Holdredge testified that there are "certain patterns that are reflected" in elder financial abuse cases where the victim is a woman and the abuser is a caregiver. The victim's family has access at the beginning and the caregiver can even appear helpful in order to gain the trust of the victim and family. Once the trust has been established, the victim is isolated from the family. Banking transactions increase and "the money

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[6] Title 26 United States Code section 1031.

starts flying out of the victim's accounts." Assets are also distributed to other people and the abuse continues until the abuser is removed. Those patterns were identifiable in this case.

Defense Evidence

Robert Winkler worked at The Gold Store in Thousand Oaks. Sherry and appellant visited the store eight or nine times between 2005 and 2008. Sherry bought a Rolex watch, a diamond bracelet, and a diamond necklace. She appeared to understand what she was doing and always spoke to him in English and negotiated to get the cheapest price. Her health appeared to improve over time.

Attorney Roger Hsu was introduced to Sherry by the real estate agent who handled the sale of Westhaven. Hsu represented her in 2004 and 2005 when she was sued for breach of contract in relation to the sale of Westhaven. He testified that Sherry was always able to answer his questions, and when deposed during the breach of contract lawsuit answered the questions posed to her by opposing counsel. Sherry was active during the settlement discussions and rejected a tentative agreement of $180,000 that Hsu had negotiated from the plaintiff's initial settlement demand of approximately $300,000. A settlement was reached on the day of trial.

On January 28, 2005, Hsu drafted an agreement in which Sherry paid appellant $300,000 as an employment bonus. Sherry had already paid the money and the agreement was to ensure that appellant was responsible for all tax consequences. Hsu had no doubts about Sherry's mental capacity. He believed Sherry understood what she was doing, otherwise he would not have allowed her to sign the agreement. He did not remember Sherry having vision or memory problems.

In February 2005 Sherry met with Charles Sutton, to amend her trust. Sutton worked as an attorney in the same law office as Hsu. Sutton met with Sherry alone for a few minutes to ensure she understood why she was there and to satisfy himself there was no "puppeteering" taking place. Sutton tried out "simple Mandarin" on Sherry but she preferred to communicate in English. Appellant and Hsu returned and they all met for

approximately 30 minutes to go over the details. Sherry had Sullos removed as the trustee and as a beneficiary. She asked that her sister become the trustee and gave Sullos's portion to charity.

Leo Peng, an insurance agent, met Sherry in late 2004 through appellant. At first, Sherry did not trust Peng. He met with her several times and she asked "a lot" of questions about New York Life before eventually buying an annuity. Sherry invested a total of $5 million in annuities in 2005. Peng advised Sherry on how she could make withdrawals without incurring penalties. Sherry started withdrawing money from the annuities less than a year after buying them. Appellant called Peng each time Sherry wanted to withdraw money. Sherry could deal directly with the home office but as a courtesy Peng provided appellant with the form for Sherry to sign. Peng always verified the signature was Sherry's and faxed the forms to the process center. He processed a December 6, 2005 request for $240,000 "real quick" for appellant and Sherry because "they said they need[ed] the money real quick."

In addition to the December 6, 2005, withdrawal request there were many others. On January 23, 2006, Sherry requested a withdrawal for an unknown amount during a period when no penalties were incurred. On February 6, 2006, Sherry made another penalty free withdrawal; and on February 21, 2006, a check was made payable to Sherry in the amount of $99,250. On May 30, 2006, Sherry requested a withdrawal of $300,000. On October 16, 2006, Sherry requested $400,000. On January 22, 2007, Sherry received $100,342 during a penalty-free period. On February 5, 2007, Sherry received $98,440, also penalty free. On July 2, 2007, Sherry cancelled one policy and received $235,000 as a payout. On September 12, 2007, Sherry requested $200,000. On December 8, 2007, she made another request for $250,000. On February 23, 2008, Sherry received $72,637. She made a further withdrawal of $250,000 on April 29, 2008, and a final request for $50,000 was processed on October 14, 2008. Sherry's annual statements revealed that as of January 19, 2007, she incurred $52,688 in penalties, and as of February 4, 2008, she incurred $44,505 in penalties, as a result of early withdrawals from the annuities.

Kitak Leung, a certified public accountant, first met Sherry in November 2004. Leung was introduced to Sherry by the real estate agent who handled the sale of Westhaven. Sherry sought advice on the tax consequences of the sale and it appeared to Leung that she understood what she was doing. Leung prepared Sherry's taxes in 2005 and 2006. In January 2005, Leung helped appellant incorporate a business called Echo Century in San Marino.

Dr. Timothy Collister, a clinical psychologist, reviewed some medical records, interview reports, and Dr. Bernatz's report. He opined that Sherry's ability to manage her finances may have varied over time, but for the majority of the time period between 2002 and 2009, she "was probably competent to manage her own affairs."

Appellant testified on her own behalf. Sherry paid her $2,400 per month to work from 8:00 a.m. to 8:00 p.m., seven days a week. In the beginning appellant lived upstairs in Sherry's guest room. After one year, a nighttime caretaker worked Sundays and appellant took that day off. Sherry asked appellant to become her driver when Sherry's regular driver failed to show up. Sherry agreed to pay appellant $100 per day, plus $50 for gas, or approximately $3,000 per month, over and above her regular monthly salary of $2,400. After approximately six months, Sherry paid appellant an extra $1,000 per month. After another six months, Sherry paid appellant an extra $2,000 per month. A year later, Sherry paid appellant an extra $3,000 per month, and by the end of her employment Sherry was paying appellant an extra $4,000 per month in addition to her regular salary.

Appellant received additional bonuses for foregoing her vacation and every year the bonus was different. Sherry paid her a bonus of $300,000 when Westhaven was sold. Appellant did not remember why she got the other payments but Sherry wanted to give her money while she was alive. She testified that Sherry told Hsu "I want [appellant] to get it." Sherry said she could not include appellant in her will because when she died her family would not want appellant to get the money. On December 14, 2007, appellant signed her son's name on a check for $50,000 made out to cash because it was her bonus

and she was depositing it in her son's account. On December 20, 2007, she received an additional bonus and signed her son's name on another check for $16,500.

Appellant used her own "very old car" to drive Sherry at the beginning. Sherry then bought a Toyota Camry for appellant to drive and put the title in appellant's name because Sherry was afraid of being sued. In 2003, appellant paid Sherry $15,000 for Sherry's Mercedes and gave the car to Okhovat. In 2004, Sherry cosigned for a Lexus but appellant paid $530 per month to lease the car. In 2007, appellant purchased a used Porsche for herself and a BMW for her son. In 2008, she gave the Lexus to Okhovat. Appellant testified that Sherry gave the nighttime caregiver a $100,000 bonus, gave Chen $10,000, and gave Chao a lot of jewelry. Appellant used her $300,000 bonus from the sale of Westhaven to start a business for her son. Appellant was the president of Echo Century, which was listed as a legal business, but bought and sold wholesale jewelry. Appellant said she did not "know legal or no legal" and did not "know how to run a business." Appellant closed the business two years after opening it. Appellant purchased a home for herself and made a down payment of $410,000 using the money she had saved from working for Sherry for seven years.

Appellant never told Sherry that Okhovat was appellant's boyfriend because Sherry did not want her to have a boyfriend. Okhovat's partners at The Gold Store, "Ben and Mo," offered $12 million to buy Westhaven. Sherry asked appellant to drive her to Thousand Oaks to check and see if they owned a jewelry business. Sherry loaned Okhovat $300,000 because he was the CEO of The Gold Store and he could pay her a better interest rate on her money than the bank. Appellant could not explain why Okhovat received other money from Sherry and guessed it was for jewelry.

Sherry invested her money in annuities with Peng because he could get a better return on the money than the bank. Sherry always needed money and regularly asked appellant to call Peng. Appellant remembered one of the times when Sherry needed money was when she was sued by a realtor in connection with the sale of Westhaven. Sherry talked to the judge and "cut the deal" to pay $250,000.

Appellant denied meeting Elly, the Genworth investigator. She did not give any information other than a list of medications to the Genworth nurses who visited every six months to assess Sherry. Appellant denied treating Sherry badly or talking to her like a child. She took Sherry to all of her doctor appointments including to see Dr. Tseng when Sherry had difficulty sleeping. Dr. Tseng first prescribed sleeping pills but when Sherry said they did not work, he suggested she visit casinos. Sherry asked appellant to drive her to the casinos. They drove to Las Vegas and on other occasions went to Pechanga or Pala Casinos. Sherry gave appellant and the nighttime caregiver money to gamble. Appellant admitted she had a gambling problem about 15 years prior.

Appellant testified that she was fired by David on September 8, 2008.

DISCUSSION

I. Jury Instruction Re Claim of Right

Appellant contends that the trial court committed reversible error by failing to instruct the jury on the claim-of-right defense. Appellant did not request the instruction but argues "there were significant facts that would allow the jury to have found that appellant took the money under a claim of right" and the trial court had a sua sponte duty to give the instruction.

Errors in jury instructions are questions of law which we review de novo. (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1424.)

In criminal cases, "'"even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." [Citation.]'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) This duty to instruct, sua sponte, on general principles closely and openly connected with the facts encompasses an obligation to instruct on defenses that are supported by the evidence. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047; see also *People v. Breverman, supra,* at p. 157.)

'"[A] trial court is not required to instruct on a claim-of-right defense unless there is evidence to support an inference that appellant *acted* with a subjective belief he or she had a lawful claim on the property.' [Citation.] Whether or not the evidence provides the necessary support for drawing that particular inference is a question of law. [Citation.] Although a trial court should not measure the substantiality of the evidence by undertaking to weigh the credibility of the witnesses, the court need not give the requested instruction where the supporting evidence is minimal and insubstantial. . . . [Citations.]" (*People v. Barnett* (1998) 17 Cal.4th 1044, 1145, fn. omitted.)

Furthermore, the defense "does not apply where, 'although defendant may have "believed" he acted lawfully, he was aware of contrary facts which rendered such a belief wholly unreasonable, and hence in bad faith.'" (*People v. Wooten* (1996) 44 Cal.App.4th 1834, 1849, quoting *People v. Stewart* (1976) 16 Cal.3d 133, 140.) "[C]oncealment (or absence of concealment) is relevant when a claim-of-right defense is raised in connection with theft by whatever means." (*People v. Fenderson* (2010) 188 Cal.App.4th 625, 644.)

Applying the foregoing rules, we conclude there was no substantial evidence supporting the inference that appellant acted with the requisite bona fide belief. There was, however, ample evidence of Sherry's behavior to show that appellant's belief in a claim of right was unreasonable and in bad faith. Appellant was present each time Sherry scored poorly on the Folstein mental examinations, and when most of the nurses determined Sherry was unable to manage her finances. There was testimony from Janet Chao that Sherry did not appear to be aware of what was happening when seen at the East West Bank. Belinda Vozenilek testified that Sherry acted like a child staring at flashy jewelry and irrationally offered to give her an expensive bracelet. Appellant told Elly that Sherry suffered from hallucinations and had memory loss. At least one nurse who assessed Sherry described her as "extremely forgetful."

There was additional evidence of appellant's bad faith and her intent to conceal the nature and frequency of the financial transactions. She claimed she could not remember the specific amounts of the bonuses she received. She testified that she signed

her son's name on two checks made out to cash which she claimed were intended as her bonuses. She was hesitant to provide information to Elly and refused to disclose her address or telephone number. She lied to Elly and told him that Sherry could not speak English to prevent him from asking her questions. She isolated Sherry from her family and close business associates during the time she took most of the money from Sherry's accounts.

The trial court had no sua sponte duty to give such an instruction because there was no substantial evidence to show that appellant reasonably believed that she had a right to the money. (*People v. Felix* (2001) 92 Cal.App.4th 905, 911.) Hence, the trial court did not err in failing to instruct on claim-of-right.

Having examined the record, we are persuaded that even if the trial court erred in failing to give a claim-of-right instruction, that error was harmless under any standard of review. (Cf. *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Sherry's finances were depleted and the testimony and evidence that large sums of money were transferred from Sherry to appellant was uncontroverted. Given the state of the trial evidence we are convinced that had a claim-of-right instruction been given the result of appellant's trial would have been the same.

II. Unanimity Jury Instruction

A. Contention

Appellant contends that the court erred in failing to instruct the jury sua sponte with the unanimity instruction to ensure that all the jurors agreed on the specific act that constituted the offense because there were a number of acts from which the jury could have found that appellant was guilty of theft from an elder by a caretaker.

B. Applicable Law

A jury verdict must be unanimous in a criminal case. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) Where the accusatory pleading charges a single offense, and the evidence shows the defendant committed more than one act that could constitute that offense, the prosecutor must elect among the crimes or the jury must be instructed that

the defendant can be found guilty only if the jurors unanimously agree the defendant committed the same, specific act comprising the crime. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.) The unanimity requirement is intended to eliminate the danger that the defendant will be convicted even though there is no single offense that all jurors agree he or she committed. (*People v. Russo, supra,* at p. 1132.) Where required, a unanimity instruction must be given sua sponte. (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 274–275.)

In certain narrow circumstances, however, neither election nor instruction is required. This exception actually has two discrete aspects. "'The first is when the acts are so closely connected that they form part of one and the same transaction, and thus one offense. [Citation.] The second is when . . . *the statute* contemplates a continuous course of conduct of a series of acts over a period of time. [Citation.]' [Citation.]" (*People v. Gunn* (1987) 197 Cal.App.3d 408, 412, quoting *People v. Thompson* (1984) 160 Cal.App.3d 220, 224.)

The "'continuous conduct'" rule also applies when the defendant offers essentially the same defense to each of the acts and there is no reasonable basis for the jury to distinguish between them. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100.) When the defendant offers the same defense to all the charged criminal acts, and "the jury's verdict implies that it did not believe the only defense offered," failure to give a unanimity instruction is harmless error. (*People v. Diedrich* (1982) 31 Cal.3d 263, 283.)

C. Analysis

Appellant was convicted of caretaker theft as defined in section 368, subdivision (e), which is part of a statutory scheme enacted by the Legislature to punish those suspected of abusing or neglecting elders or dependent adults. (*People v. Heitzman* (1994) 9 Cal.4th 189, 202–205.)

Section 368, subdivision (a), sets out the Legislature's intent for the elder abuse statute, and states "that crimes against elders and dependent adults are deserving of special consideration and protection . . . because elders and dependent adults may be

. . . less able to protect themselves, to understand or report criminal conduct, or to testify in court proceedings on their own behalf."

We look to the nature of the conduct prohibited by the statute to discern if the statute can be violated by repetitive or continuous acts or only by a single act. Burglary is defined as occurring when a person enters a defined structure with felonious intent. (§ 459.) The crime is completed at the moment the person enters the structure. (*People v. Brady* (1987) 190 Cal.App.3d 124, 133.) On the other hand, while child abuse statutes may be violated by a single act, they more commonly involve repetitive or continuous conduct. (*People v. Ewing* (1977) 72 Cal.App.3d 714, 717.) The elder abuse statutes are modeled after child abuse statutes and are intended to afford the elderly a high level of protection. (*People v. Heitzman*, *supra*, 9 Cal.4th at p. 202.) The statutes recognize that elderly people's failing health can render them particularly vulnerable to the type of crimes defined in section 368. The prohibited acts in subdivision (e) include "theft, embezzlement, forgery, or fraud, or . . . identity theft." Similar to child abuse, these are types of crimes that may be violated by a single act or by continuous conduct.

To determine the necessity of an unanimity instruction with respect to a violation of section 368, subdivision (b)(1), the court in *People v. Rae* (2002) 102 Cal.App.4th 116, reviewed the decisions interpreting child endangerment statutes (§ 273a). *Rae* involved a continuous course of neglect of an elder over a one-month period. (*Rae*, *supra*, at pp. 118–121.) Rae held the trial court properly refused to give a unanimity instruction in the circumstances of that case, reasoning the alleged offense involved conduct that was continuous in nature, similar to the offenses of failure to provide for a minor child, child abuse, contributing to the delinquency of a minor and animal cruelty. (*Id.* at p. 122.)

In concluding that "Penal Code section 368 may be violated by a continuous course of conduct," the court found section 368, subdivision (b)(1), was "focused on the effect of the crime on the victim." (*People v. Rae*, *supra*, 102 Cal.App.4th at p. 123.) The court also found significant that "[t]he wrongful acts were successive, compounding, and interrelated." (*Ibid.*) The defendant's acts of neglect and failure to provide

appropriate care resulted in malnourishment, dehydration, and unhealthy living conditions. (*Ibid.*)

A second court also reached the conclusion that physical elder abuse in violation of section 368, subdivision (b)(1), does not require a unanimity instruction. In *People v. Racy* (2007) 148 Cal.App.4th 1327 (*Racy*), the defendant was convicted of residential robbery and elder abuse in violation of section 368, subdivision (b)(1). Defendant "'zapped' [the victim] in the leg with a stun gun, causing him substantial pain." (*Racy, supra,* at p. 1333.) The victim retreated to his bedroom and defendant gave chase. The victim lay on his bed and put his feet up in the air so he "'could kick if necessary.'" (*Id.* at p. 1331.) For the next 10 minutes, defendant asked the victim for money while he "'zapped'" the stun gun eight to 10 times in the air. Defendant then tipped the victim over and grabbed his wallet, tearing the victim's jeans pocket. (*Ibid.*) The court held the jury could rely on "any or all of the circumstances and conditions" of the case to support the charge of felony elder abuse without the need for unanimous agreement on a particular circumstance or condition. (*Id.* at p. 1334.)

The elder abuse in *Rae* occurred over a period of one month with the beginning and ending dates set out in the information. (*People v. Rae, supra,* 102 Cal.App.4th at p. 121.) In the instant case, the prosecutor charged appellant with a single count of elder financial abuse by a caretaker over a period of six years. The case was charged and tried on the theory that appellant committed multiple ongoing thefts over time and not a particular theft on a particular day. The prosecutor argued that over the course of the six years, appellant isolated Sherry, who had suffered a debilitating stroke, from her friends and family. Appellant then took control of Sherry's life and finances and used that control to continuously steal money from her. Appellant accompanied Sherry to different banks on a weekly basis, where increasingly larger amounts of cash were withdrawn from Sherry's accounts and ended up in appellant's accounts. Sherry invested large sums of money in CD's and annuities and withdrew the money quickly incurring financial penalties. Sherry's assets were depleted over the six years appellant cared for her, while

appellant purchased automobiles, started a business and purchased a home. The wrongful acts in this case were "successive, compounding, and interrelated." (*Rae*, *supra*, at p. 123.) Considering the legislative intent behind the statute and the particular vulnerability of an elder when the theft is committed by a caretaker, we hold that elder financial abuse in violation of section 368, subdivision (e), particularly as committed in this case, is a continuous course of conduct offense.

Appellant contends that even if there was a continuous course of conduct here, the facts of this case take it out of the exception for multiple acts which are so closely connected as to form part of one transaction. Appellant argues that "the prosecutor did not elect which receipt of money constituted theft" and that appellant "offered several defenses as to the various receipts of cash taken over the course of six years."

Appellant offered no defenses in the sense contemplated by the relevant authorities. (See, e.g., *People v. Diedrich*, *supra*, 31 Cal.3d at pp. 282–283 [finding omission of unanimity instruction prejudicial where defendant's defenses to two possible acts of bribery underlying single charged offense differed]; *People v. Thompson* (1995) 36 Cal.App.4th 843, 853 [reversing judgment because defendant's "different defenses gave the jury a rational basis to distinguish between the various acts"].) Here, appellant's defense was the same in every instance—Sherry voluntarily gave her the money as compensation for her work as a caregiver. The jury's verdict of conviction indicates that they did not believe the only common defense proffered. (*People v. Diedrich*, *supra*, at p. 283.)

The continuous conduct aspect of the exception to the general rule applies in this case because section 368, subdivision (e) contemplates conduct which can occur either in an instant or over a course of time, and the prosecutor charged and argued the case as a continuous crime rather than as a series of separate, culpable acts. Thus, we conclude the trial court did not err in failing to instruct the jury on unanimity pursuant to CALJIC No. 17.01.

III. Investigating Officer's Expert Testimony

Appellant contends that the trial court prejudicially erred in allowing Detective Holdredge to testify that certain patterns of behavior, which occurred in this case, were common in elder financial abuse cases.

The prosecutor asked Detective Holdredge if there were patterns in elder financial abuse cases involving a female victim. Defense counsel objected on the grounds that the question was argumentative. The objection was overruled. Detective Holdredge listed a number of patterns that were generally observed in scenarios where the victim was female and the suspect was a caregiver. At first, the victim's family had access to the victim and the caregiver appeared friendly and helpful in order to gain the trust of the victim and her family. When the trust had been established the victim was isolated from the family and the caretaker began to take the victim's money. In cases where the victim was a female and the suspect was a caregiver, the victim's accounts were quickly emptied and the abuse continued until the suspect was separated from the victim. Defense counsel reiterated his objection on the grounds the testimony was argumentative. The court again overruled explaining that Detective Holdredge had the expertise to offer expert testimony on the issue and it was up to the jury to determine how much weight to give her testimony.

Appellant now argues that this testimony was inadmissible because it constituted improper profile evidence. As an initial matter, we agree with the People that appellant failed to preserve these issues for appellate review by timely objecting on these grounds in the trial court. However, had appellant objected on relevance grounds or relied on Evidence Code section 352, there is no reason to assume the court would have responded differently. Even had those objections been properly preserved for our review, we would reject them on the merits. Typical patterns of elder financial abuse are not within the common knowledge of jurors.

"A profile is a collection of conduct and characteristics commonly displayed by those who commit a certain crime." (*People v. Robbie* (2001) 92 Cal.App.4th 1075,

1084.) And it is true that "[p]rofile evidence is generally inadmissible to prove guilt." (*Ibid.*) But that is not how Detective Holdredge's expert opinion was presented or argued in this case. Detective Holdredge, a 15-year veteran of the Long Beach Police Department, investigated over 350 elder financial abuse cases. The testimony she provided helped the jury to reconcile and understand much of the evidence they heard from lay witnesses regarding isolation of family members and the frequency and amount of withdrawals from Sherry's account. Detective Holdredge did not opine that appellant was guilty of the charged offense.

Appellant argues "[m]any of the so-called patterns were consistent with innocent behavior." Appellant presented a defense and testified on her own behalf and had every opportunity to portray the patterns in a favorable light. In sum, appellant's current objections to Detective Holdredge's opinion testimony were not timely interposed at trial, and are therefore not cognizable on this appeal. In any event, the subject matter to which Detective Holdredge testified was appropriate for expert opinion.

IV. Trial Court Properly Excluded Irrelevant Evidence

Appellant contends the trial court improperly excluded evidence that David stood to gain from appellant's conviction because he was a beneficiary of Sherry's trust.

During David's testimony the trial judge ordered counsel to a sidebar conference. The court expressed its concern that defense counsel's cross-examination up to that point was focused on showing that David was "a jerk," that he was "inattentive," and a "bad" nephew. Defense counsel stated he intended to ask David if he was a beneficiary of Sherry's trust and question him about his relationship with Sherry between 2002 and 2008. Counsel argued the evidence was relevant to show David's credibility and motive to convict appellant, stating, "[David] is in line to gain some money if that does in fact happen." The court ruled the evidence was irrelevant to the central issues of the case. Explaining his ruling the court stated, David was "not denying that he had no contact sometime between 2002 to sometime in 2008." The court noted that David "hasn't said one word what [Sherry] was like in between 2002 and 2008." The court permitted

defense counsel to ask David what he knew about Sherry's state of mind while he was around her prior to the end of 2002 and after he took over in 2008.

"A trial court has broad discretion under Evidence Code section 352 to 'exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' This discretion allows the trial court broad power to control the presentation of proposed impeachment evidence '"'to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.' [Citation.]"' [Citation.] On appeal, we evaluate the court's ruling by applying an abuse of discretion standard." (*People v. Mills* (2010) 48 Cal.4th 158, 195.) We find no abuse of discretion in the trial court's decision to exclude the testimony at issue here.

As the trial court noted in explaining its ruling, the central disputed issue in the trial was whether Sherry was financially abused, whether money was taken from her "when she didn't realize and understand and have the capacity to know what she was doing." The sale of Westhaven and the bulk of the transfers of money from Sherry's accounts to appellant occurred in the period between 2005 and 2008, when Sherry replaced Sullos, Vozenilek, and Stovall. David testified that he stopped trying to contact Sherry at the end of 2002 after a number of unsuccessful attempts to do so. David testified that when he took over the accounts in 2008, after Sherry went back to the hospital, the accounts were depleted and the house mortgage was in default. David's status as a beneficiary of Sherry's trust, or his relationship with his aunt between 2002 and 2008, did not have relevance to the central issue at trial. Instead, such evidence, which would have necessitated undue consumption of time and quite possibly confused the issues and mislead the jury, was properly excluded.

Appellant argues exclusion of this evidence violated her constitutional rights including her right to confrontation under the Sixth Amendment and her due process right to present a defense. Notwithstanding those constitutional rights, "trial judges retain

wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679.) As a result, "reliance on Evidence Code section 352 to exclude evidence of marginal impeachment value that would entail the undue consumption of time generally does not contravene a defendant's constitutional rights to confrontation and cross-examination." (*People v. Brown* (2003) 31 Cal.4th 518, 545.) Similarly, '"[a]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense.'" (*People v. Dement* (2011) 53 Cal.4th 1, 52.) A defendant's constitutional right to cross-examine is not violated unless the prohibited "'cross-examination would have produced "a significantly different impression of [the witness's] credibility."'" (*Ibid.*) For the reasons discussed above, cross-examination regarding David's beneficiary status or his lack of a relationship with Sherry would have had no bearing on the central issues. The exclusion of the testimony at issue did not prevent appellant from questioning David about Sherry's state of mind while he was around her. There was accordingly no denial of the right of confrontation nor infringement of appellant's right to present a defense.

V. Substantial Evidence Supported the Jury's Verdict

Appellant contends the evidence was insufficient to support her conviction.

When determining whether the evidence is sufficient to sustain a criminal conviction, "our role on appeal is a limited one." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "[T]he test of whether evidence is sufficient to support a conviction is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citations.]" (*People v. Holt* (1997) 15 Cal.4th 619, 667, italics omitted, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Reversal is not warranted unless it appears that '"upon no hypothesis whatever is there sufficient

substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

To establish a felony violation of section 368, subdivision (e), the jury was instructed that the People must prove all of the following elements: (1) appellant committed theft from Sherry; (2) Sherry was an elder; (3) the property taken was worth more than $700;[7] and (4) appellant was Sherry's caretaker. The term property includes money. (§ 368, subd. (e); CALCRIM No. 1807.)

To establish the underlying crime of theft by larceny, the People must prove all of the following elements: (1) appellant took possession of property owned by Sherry without her consent; (2) appellant had the specific intent to permanently deprive Sherry of the property; and (3) appellant took possession of the property. (*People v. Catley* (2007) 148 Cal.App.4th 500, 505 (*Catley*).)

Consistent with common law principles, the trial court instructed the jury with CALJIC No. 1.23: "To consent to an act or transaction, a person (1) must act freely and voluntarily and not under the influence of threats, force or duress; (2) must have knowledge of the true nature of the act or transaction involved; and (3) must possess the mental capacity to make an intelligent choice whether or not to do something proposed by another person. [¶] Merely being passive does not amount to consent. Consent requires a free will and positive cooperation in act or attitude."

Appellant challenges only the sufficiency of evidence supporting Sherry's lack of consent and we address only that element. Having examined the entirety of the evidence the People presented in their case-in-chief, we conclude that there is substantial proof that Sherry did not consent to give appellant the sum of approximately $909,400 and that appellant stole from Sherry under the theory of theft from an elder by a caretaker.

Dr. DiJulio, the neurologist who treated Sherry in 2002, testified that her debilitating stroke impacted her cognitive functioning, and her ability to assess risks and

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[7] The amount prescribed by the statute was $950 (Stats. 2009-2010 3d Ex Sess. ch. 28 § 9, effective Jan. 25, 2010).

benefits. There was further evidence that Sherry did not have the ability to competently run her financial interests, and was aware she needed to rely on others to help her. She asked her nephew David and her longtime advisor Sullos to help manage Westhaven for her. David was denied access to Sherry and lost contact with her. Sullos was replaced. Sherry's isolation from her family and other longtime advisors continued with the termination of her attorney and insurance agent. Sherry became totally dependent on appellant not only for assistance with physical needs but also financial planning. The isolation of family members and the dependency on the caretaker were described by experts as common traits in elder financial abuse cases.

Sherry's decisionmaking with respect to her finances after her stroke was not consistent with the "intelligent choices" she exhibited in accumulating her wealth. Prior to her stroke she worked hard and made intelligent business decisions such as buying and selling property using a tax-free exchange. After her stroke, Sherry sold Westhaven for $2 million less than offers received by Sullos and incurred a large tax bill in the process. The sale also eliminated her primary income-producing asset with which she was able to pay her monthly expenses of $10,000 and receive an allowance of $20,000 per month. Sherry invested large amounts of money in CD's and annuities, but made withdrawals almost immediately, incurring significant financial penalties. Prior to her stroke, Sherry kept large balances in her bank accounts and never withdrew cash. She did not bank at the East West Bank in San Marino because it was far from her house and business. Appellant's daughter-in-law, Wu, began working at that branch office after appellant became Sherry's caretaker. After her stroke, Sherry accompanied by appellant withdrew large sums of money on a regular basis at that location. Sherry also withdrew large sums of money on a weekly basis from her account at the L.A. Bank. Appellant told the bankers how much Sherry wanted to withdraw and Sherry nodded her head.

Sherry's demeanor and her interests and activities also changed after the stroke. Vozenilek visited Sherry at her home and testified that Sherry was "not herself" and appeared intimidated. Prior to the stroke Sherry was described as frugal and very careful

with her money. She was not a gambler or inclined to take risks with her money. After her stroke Sherry was fascinated with gaudy jewelry and took frequent trips to casinos.

Throughout her illness, Sherry was regularly assessed as dependent and unable to handle her financial affairs. Appellant was present when Sherry was assessed and provided information to the nurses. One nurse rated Sherry as independent on money management because she could sign her name if somebody put a document in front of her. The nurse acknowledged that Sherry was visually impaired and would require someone else to fill out any other needed information. Sherry's performance on the Folstein tests supported the assessments that she was dependent.

Catley, supra, 148 Cal.App.4th 500 is instructive. There, the appellate court rejected a challenge to the sufficiency of the evidence supporting a conviction for elder theft. Defendant argued that the victim, Edward Walsh, gifted to her the $17,000 of his funds that she used to buy a new car. The appellate court rejected this argument concluding that Walsh was not cognitively capable of consent and that his testimony supported a finding that he did not consent to the transfer of funds. The court explained that Walsh "testified he could not remember signing the check, or going to the bank to make the transfer of funds. At times during his testimony, Walsh could not recognize his own signature." (*Id.* at p. 505.)

Even if we were to assume that Sherry was cognitively capable of consent during the relevant period of time, which is contrary to the Genworth assessments, substantial evidence supports the conclusion that she did not do so. Sherry died before trial and could not testify. Dr. Bernatz examined and interviewed Sherry and concluded that Sherry did not have the capacity to independently manage her finances between 2002 and 2008. Testimony from other witnesses supported this conclusion. Considered in its entirety, the evidence presented by the People is sufficient to establish the elements of theft from an elder by a caretaker.

VI. Substantial Evidence Supported the Restitution Award

Appellant contends that insufficient evidence supported a restitution award in the amount of $909,400. Appellant argues that it was not established that Sherry was incompetent for the entire period of appellant's employment and that all sums other than the initially agreed upon salary of $2,400 per month were stolen funds.

Under section 1202.4, where the victim has suffered economic loss as a result of the defendant's criminal conduct, the court is required to order defendant to make restitution to the victim or victims in an "amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant's criminal conduct." (§ 1202.4, subd. (f)(3).) "A restitution order is reviewed for abuse of discretion and will not be reversed unless it is arbitrary or capricious. [Citation.] No abuse of discretion will be found where there is a rational and factual basis for the amount of restitution ordered." (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1542.) The trial court may consider almost any kind of information in calculating restitution. (*People v. Phu* (2009) 179 Cal.App.4th 280, 283–284.) "'Further, the standard of proof at a restitution hearing is by a preponderance of the evidence, not proof beyond a reasonable doubt. [Citation.]' [Citation.]" (*People v. Keichler* (2005) 129 Cal.App.4th 1039, 1045.)

Here, the jury found beyond a reasonable doubt that the amount appellant stole did not exceed $1 million because the jury found that special allegation not true. At sentencing, the court asked counsel to address the issue of restitution. The prosecution stated that the amount was $909,400 based on the findings of the forensic accountant, Janet Ngo. The trial court recognized the special allegation was not proven, and ordered the amount recommended by the prosecution.

We find there is a rational and factual basis for the specific restitution award. The bank records examined by the forensic accountant and entered into evidence indicate a total of $909,400 was paid directly from Sherry's accounts to appellant's various accounts. Upon a prima facie showing of economic loss incurred as a result of

appellant's criminal acts, the burden shifted to appellant to rebut the statement of losses. (*People v. Gemelli, supra,* 161 Cal.App.4th at p. 1543.) Defense counsel did not dispute the amount of the restitution award and submitted.

Furthermore, we note that the record in this case established that in addition to appellant's salary, and money directly traceable to either appellant or Okhovat, an additional $1,441,799 left Sherry's accounts in the six years she was cared for by appellant. This was disbursed in cash to Sherry, but was not used to arrive at the restitution award of $909,400. However, we note that appellant, while testifying, admitted receiving an additional $66,500 by signing her son's name on two checks made out to cash.

Finally, appellant refers to the minimum wage and the rate at which her overtime should have been calculated for the lengthy hours she worked for Sherry without days off or overtime. Appellant appears to contend that she was not fully compensated for the considerable services she provided. Appellant testified that in addition to regular bonuses in amounts she could not recall, she was paid extra money to drive Sherry. The additional money increased to $4,000 per month over and above her regular monthly salary. The jury rejected this explanation. We also reject appellant's contention to the extent it implies the restitution award should be stricken because appellant used self-help measures against what she reasonably believed to be violations of the state employment laws.

The trial testimony provides a rational and factual basis for the amount of money that was directly traceable to appellant and we find no abuse of discretion in the trial court's award.

VII. Statute of Limitations

Finally, appellant contends the prosecution was barred by the statute of limitations. She concedes that some of the acts of theft were committed within the limitations period but argues different intents were involved. Appellant also argues that discovery of the crime during the initial investigations triggered the running of the statute

of limitations. Appellant is mistaken on both counts as the prosecution was brought within four years of the completion of the offense.

Section 801.5 provides that a "prosecution for any offense described in subdivision (c) of Section 803 shall be commenced within four years after discovery of the commission of the offense, or within four years after the completion of the offense, whichever is later." Section 803, subdivision (c) states that "A limitation of time prescribed in this chapter does not commence to run until the discovery of an offense described in this subdivision." Section 803, subdivision (c)(11) states "A violation of subdivision (d) or (e) of Section 368."

By amended information dated April 20, 2011, appellant was charged with a single offense of theft of an elder by a caretaker, in violation of section 368, subdivision (e).[8] It was alleged that the crime took place "[o]n or between April 13, 2002 and September 30, 2008."

Appellant's argument relating to the multiple counts of theft involving multiple transactions with multiple intents is of no consequence because the prosecution filed a single count of theft in this case. Section 368 may be violated by a continuous course of conduct (see part II, *infra*; and *People v. Rae*, *supra*, 102 Cal.App.4th at p. 123), therefore the four-year statute applicable to this case does not begin to run until "completion of the offense." (§ 801.5.) The offense here was completed when appellant was fired as Sherry's caretaker on September 8, 2008, and no longer had access to or control of Sherry's financial transactions. The four-year limitations period would have begun at that time. A prosecution is commenced when an indictment or information is filed or an arrest warrant is issued. (§ 804.) The amended information was filed April 20, 2011, and the initial information was filed November 4, 2010. Appellant was

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[8] The initial information was filed on November 4, 2010, and appellant was charged with a violation of section 368, subdivision (d).

arrested on August 17, 2010, and the search warrant was issued in early 2010.[9] These dates show the prosecution was commenced well within the appropriate limitations period.

Appellant's second argument regarding the relevance of the date of discovery runs contrary to the plain meaning of the statute. As applicable to section 368, subdivision (e), the statute in pertinent part states that a prosecution "shall be commenced within four years after discovery of the commission of the offense, *or* within four years after the completion of the offense, *whichever is later*." (§ 801.5, italics added.) As explained, the prosecution was commenced within four years of the completion of the offense and as such the date of discovery is irrelevant.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J. *

FERNS

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ

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[9] Although we do not have the date the search warrant was issued, Detective Holdredge testified that she searched for appellant for eight months prior to appellant's arrest.

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