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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

NARDELL ULYSSES CARTER,

Defendant and Appellant.

B226003

(Los Angeles County  
Super. Ct. No. PA 064452)

APPEAL from a judgment of the Superior Court of Los Angeles County, Burt Pines, Judge. Affirmed.

Robert Bryzman, under appointment by the Court of Appeal, for Defendant and Appellant.

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

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Nardell Ulysses Carter appeals from his conviction by the trial court of fraudulent possession of a completed check (counts 2 & 6), fraudulent possession of a blank check (count 4), receiving stolen property (count 8) and identity theft of more than 10 victims (count 9). Appellant contends his conviction should be reversed because he did not waive a jury trial following the filing of an amended information, there was insufficient evidence of his fraudulent possession of an incomplete check and there was insufficient evidence at the preliminary hearing to support the finding of probable cause that appellant possessed the check in count 4 with the intent to complete it and defraud. We disagree and therefore affirm.

### **PROCEDURAL HISTORY**

The original information, filed September 2, 2009, charged appellant in 8 counts: identity theft in violation of Penal Code section 530.5, subdivision (a),<sup>1</sup> as to individually named persons (counts 1, 3, 5 & 7), forgery in violation of section 475, subdivision (a) (counts 2 & 4), forgery in violation of section 475, subdivision (c) (count 6) and receiving stolen property in violation of section 496, subdivision (a) (count 8). As to counts 2 and 4, it was alleged that appellant, with intent to defraud and knowing them to be forged, possessed and received *counterfeit and completed* checks with the intent to pass and facilitate their passage. It was further alleged that appellant had previously suffered 12 prior convictions.

Appellant was arraigned and pleaded not guilty to all counts. Appellant waived a trial by jury.

At the commencement of trial on January 4, 2010, the prosecution moved to amend the information (1) to amend count 2 to allege a violation of section 475, subdivision (c) instead of subdivision (a), (2) to amend count 4 to allege a violation of section 475, subdivision (b) instead of subdivision (a), and (3) to add a new count 9 to allege fraudulent possession of personal identifying information of 10 or more persons in

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<sup>1</sup> All further statutory references are to the Penal Code, unless otherwise noted.

violation of section 530.5, subdivision (c)(3). Appellant objected to the amendments, and the trial court reserved a ruling on the motion until the presentation of evidence.

The court thereafter, on January 6, 2010, granted the prosecution leave to file an amended information. Appellant waived arraignment and pleaded not guilty to count 9. The court entered a plea of not guilty for appellant on all other counts, and a bifurcated trial proceeded on counts 1 through 9 as amended.

Appellant presented no evidence at trial. The trial court found appellant guilty of counts 2, 4, 6, 8 and 9.<sup>2</sup>

Without objection, the prosecuting attorney then filed a second amended information to conform appellant's alleged priors with actual documentation. The trial court found the prior prison allegations as amended to be true.

Appellant was sentenced to a total of 10 years in state prison, consisting of the upper term of three years on count 2 as the base count plus consecutive one-year terms on seven of the prison priors. The trial court further sentenced appellant to the upper term of three years on counts 4, 6, 8 and 9, the sentences to run concurrently with the sentence on count 2. The court struck three prior convictions in the interest of justice.

Appellant timely appealed from the judgment.

## **FACTS**

### ***1. Parole Compliance Check***

On April 4, 2009, Detective Jedd Levin of the Los Angeles Police Department, a qualified expert on forgery and identity theft, had a converted garage in Los Angeles under observation as part of a parole compliance check of appellant. Detective Levin had previously arrested appellant at the same address for a financial-type crime in February 2005, when he found appellant typing information onto a forged check.

On the present occasion, Detective Levin saw appellant leave the converted garage and go into the adjacent house. The detective followed appellant into the house and saw

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<sup>2</sup> The court acquitted appellant of identity theft as to individually named persons (§ 530.5, subd. (a); counts 1, 3, 5 & 7).

a computer near the door. An image of a check created with a check writing program was displayed on the computer monitor. Appellant told Detective Levin he was using the check writing software in order to determine whether the computer was working properly.

In the converted garage occupied by appellant, Detective Levin found a blue, flexible binder on the bed. The binder contained numerous financial-type documents. These included blank checks, completed and partially completed checks, deposit slips and money orders. There were also financial documents and records from numerous individuals, including bank account information. The information was of the type that could be used to commit an identity theft crime.

## ***2. Count 2***

Detective Levin testified that during the 2009 parole compliance inspection, he found a check inside the blue binder. The check was drawn on the account of Chatsworth Rubber and Gasket Company (Chatsworth Rubber). Michelle Lepire ran that business with her brother and mother. She was familiar with the company checks and what they looked like in 2009. Only her father and mother were authorized to sign checks in 2009. Lepire testified that the check which Detective Levin found in the blue binder did not resemble the checks the company used, and it was not a Chatsworth Rubber check. There were errors on the check, such as the ZIP code, and the form of the company name used on the check was incorrect. Lepire stated the company had not had an account with Bank of America for some time and the number series on the check was wrong. Lepire did not recognize the signature on the check. She never gave appellant permission to have any of the company's information.

## ***3. Count 4***

Fazelrahman Tajyar previously operated the Tajyar Arco station. He was the only person authorized to write checks for the business. Tajyar reviewed blank checks that Detective Levin found in the blue binder in appellant's garage. The checks were imprinted with the station's name and a Bank of America number; however, the account number on the check was for an account that had been closed in 2007. The checks did

not look the same as the original checks Tajyar had on that account. Tajyar testified he did not give anyone permission to possess his business checks or financial information.

#### ***4. Count 6***

Seung Min Cha was the accountant for Kenneth Brown Design. She sometimes wrote checks for the company. Only Kenneth Brown was authorized to sign the checks. Cha reviewed a check that Detective Levin found in the blue binder in appellant's garage. The check had the company address and phone number, but it was not printed on the check stock the company used. It also purported to be check No. 1407, the number of a check the company had actually issued to Kenneth Brown. The check the detective found in the binder was not the check No. 1407 that the company had issued. Cha never authorized appellant or anyone else to create checks with the company's business information.

#### ***5. Counts 8 and 9***

Young Cho previously owned an insurance company named Kook Je Insurance Service Company. He kept his client's records in a filing cabinet. He reviewed copies of cancelled checks found in the blue binder made out to and from the company, along with other documents regarding company business. He recognized about half of the names as those of company clients. There were deposit slips and writing that he recognized and some that he did not. Cho did not give anyone permission to access any of his records.

### **DISCUSSION**

#### ***1. Waiver of Jury Trial***

Appellant contends his waiver of jury trial was ineffectual after the information was amended to modify the charges brought against him. Respondent rejoins that because the modifications were insubstantial, cumulative or justified by the preliminary hearing evidence, there was no need to obtain a new jury trial waiver from appellant. We conclude the trial court properly ruled that appellant's jury trial waiver applied to the information as amended.

Appellant originally was charged in counts 2 and 4 with forgery, a violation of section 475, subdivision (a). Those counts were amended to reflect charges of forgery, a

violation of section 475, subdivision (c) and (b), respectively. A violation of section 475, subdivision (a) requires possession, with intent to defraud, of a “forged, altered or counterfeit” document, knowing the document was forged, altered or counterfeited. Subdivision (a) does not require that the document be completed. Section 475, subdivision (b), as applicable here, requires possession of “any blank or unfinished check” with the intent to complete the check and with the intent to defraud any person. Section 475, subdivision (c) prohibits possession of “any completed check, . . . with the intent to utter or pass . . . in order to defraud any person.” The trial court reviewed the relevant CALCRIM instructions (CALCRIM Nos. 1930 & 1932) and found the elements of the various subdivisions to be “almost identical” except for an extra element of knowledge required for a violation of subdivision (a) of section 475.

As to count 2, the court found the original and the amended charge involved “the same check, the same victim, [and] the same witnesses.” It also found the defense had discovery of the evidence the prosecution intended to use to prove the charges, and that the discovery was turned over early during the proceedings. In addition, the court found the transcript of the preliminary hearing provided sufficient evidence and notice to hold appellant upon a charge of section 475, subdivision (c). The court further found appellant had shown no prejudice by the amendment.

As to count 4, the prosecution indicated it intended to rely upon four counterfeit blank checks and sought to amend the charge from subdivision (a) to (b) of section 475 accordingly. The prosecution represented that these same four checks were introduced in evidence by reference at the preliminary hearing. Defense counsel conceded that the prosecution may properly file all charges proved at the preliminary hearing even if the defendant was not held to answer the particular charge. The court reserved ruling upon count 4 until it could review the transcript of the preliminary hearing to confirm sufficient evidence had been presented to hold appellant on a section 475, subdivision (b) charge.

Appellant was originally charged in the information with four counts of identity theft (counts 1, 3, 5 & 7), in violation of section 530.5, subdivision (a), as to specifically named victims. The prosecution proposed adding a count 9, identity theft of 10 or more

individuals as a group, in violation of section 530.5, subdivision (c). A charge under subdivision (c) had a higher burden of proof as compared with a charge under subdivision (a), but no greater penalty.

The trial court reviewed the transcript of the preliminary hearing and concluded, upon reviewing the transcript and all of the exhibits presented at the preliminary hearing, that the prosecution had presented sufficient evidence at the preliminary hearing to support the amended charges. The court expressly found that the amended information dealt with the same documents, the same witnesses and the same evidence that supported the earlier charges and that it involved the same discovery already provided to the defense. When asked whether he pleaded not guilty again to the amended charges, appellant stated, “I’ve done that already,” and the court entered a denial on appellant’s behalf.

The trial court here found the statutory elements in the amended information as to counts 2 and 4, as determined by the Penal Code and jury instructions, remained “almost identical” except for the element of knowledge. The amended subdivisions also did not increase the penalty that appellant faced. When an amendment to an information is not substantial and does not increase the defendant’s potential punishment, it is not necessary to re-advise the defendant of his right to a jury trial and to obtain a new waiver. (*People v. Smylie* (1963) 217 Cal.App.2d 118, 119-122.) In *People v. Peyton* (2009) 176 Cal.App.4th 642, 659, a variance in the subdivision under the same statutory section was held to be permissible. The court noted, “‘Under the generally accepted rule in criminal law a variance [in pleadings] is not regarded as material unless it is of such a substantive character as to mislead the accused in preparing his defense . . . .’” (*Ibid.*, quoting *People v. Williams* (1945) 27 Cal.2d 220, 226.)

The present case is distinguishable from *People v. Walker* (1959) 170 Cal.App.2d 159, upon which appellant relies. In *Walker*, the information was amended to replace a charge of possession of heroin with a charge of sale of heroin, a “separate and distinct” crime and “a far more serious offense.” (*Id.* at p. 165.)

As to the addition of count 9, we find no error in allowing the amendment to the information. The information originally charged appellant in counts 1, 3, 5 and 7 with identity theft in violation of section 530.5, subdivision (a). The amendment added a count 9, charging appellant with identity theft of 10 or more individuals in violation of section 530.5, subdivision (c). The newly added count had a higher burden of proof but exposed appellant to no greater penalty.<sup>3</sup>

The circumstances at hand are unlike the case of *People v. Hopkins* (1974) 39 Cal.App.3d 107, 118-119 (*Hopkins*), in which a substantial change was made to the charges (use of a firearm rather than mere possession of a firearm) after the defendant had waived a jury trial. In *Hopkins*, the amendment resulted in an additional 10-year minimum sentence. (*Ibid.*) Here, appellant has shown no prejudice resulting from the addition of count 9 to the amended pleading. The amendment resulted in no increase in the sentence, and the trial court determined the added count was supported by the evidence presented at the preliminary hearing. The court expressly found that count 9 involved “the same documents, the same witnesses, the same evidence that supported the earlier charges, [and the] same discovery that[] [was] already . . . provided to the defense.”

## **2. *Fraudulent Possession of Incomplete Check***

Appellant contends there was insufficient evidence to support the finding that he possessed the check identified in count 4 with the intent to complete the check and defraud some person. We disagree.

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<sup>3</sup> We disagree with respondent’s contention that count 9 simply consolidated all of the victims in individual section 475, subdivision (a) counts in addition to other individuals established by the evidence. The prosecutor expressly represented to the trial court that count 9 “encompass[ed] all the other persons’ identifying information [appellant] possessed that is *not* referenced in counts 1, 3, 5, and 7.” (Italics added.) In any case, the individual names of the victims whose identities were stolen were reflected in an 11-page exhibit marked at the preliminary hearing. The trial court took care to ensure all the exhibits marked at the preliminary hearing were before it before allowing respondent to file the amended information.



In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the entire record in the light most favorable to the judgment to ascertain whether it discloses substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) Similarly, "[u]nder principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, 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." (*Ibid.*; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.) The standard of review is the same in cases in which the prosecution relies largely on circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.)

Under section 475, subdivision (b): "Every person who possesses any blank or unfinished check, . . . whether real or fictitious, with the intention of completing the same or the intention of facilitating the completion of the same, in order to defraud any person, is guilty of forgery." Count 4 charged appellant with possession of a blank check, whether real or fictitious, with the intent to complete the check and defraud someone. The blank checks introduced at trial purported to be those of Tajyar Arco drawn on an account at Bank of America. Tajyar testified that the checks, although made out in the name of Tajyar Arco, were not the original checks that Tajyar had used for that account. Accordingly, they were fictitious checks. Appellant's argument that these were "old and outdated" checks is simply irrelevant. A rational trier of fact could conclude that appellant was not necessarily intending to defraud the Bank of America by creating a fictitious check on an outdated Bank of America account. The check need not necessarily be drawn on an active bank account, nor did the name of the payor need to be exactly correct. The fictitious check need only have been good enough to pass to some unsuspecting person and to have that person give appellant money before the forgery was

discovered. A rational trier of fact could conclude from the evidence that appellant possessed the checks so that he could complete them and defraud someone.

### **3. Probable Cause**

Appellant contends there was insufficient evidence presented at the preliminary hearing to support a finding of probable cause that appellant possessed the checks in count 4 with the intent to complete them and defraud someone. We disagree.

As respondent notes, even if the evidence was insufficient to support the commitment, the defendant is not prejudiced when sufficient evidence is introduced at trial to support the trier of fact's finding as to the charge or the truth of the allegation. (*People v. Crittenden* (1994) 9 Cal.4th 83, 137; see also *People v. Booker* (2011) 51 Cal.4th 141, 157-158.) Because the evidence presented at trial was sufficient to support a finding that appellant possessed the checks in count 4 with the intent to complete them and to defraud someone, appellant's contention there was no probable cause for committing appellant for fraudulent possession of an incomplete check is without merit. In any event, we have reviewed the transcript of the preliminary hearing and concluded there was sufficient evidence to hold appellant to answer on count 4.

### **DISPOSITION**

The judgment is affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.