Filed 1/22/18 P. v. Miller CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JENNIFER MAE MILLER, Defendant and Appellant.	B278681 (Los Angeles County Super. Ct. Nos. MA064088, MA067937)

APPEALS from judgments of the Superior Court of Los Angeles County, Lisa Strassner, Judge. Affirmed with directions.

Meredith J. Watts and James Koester, under appointments by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General, and Nicholas J. Webster, Deputy Attorney General, for Plaintiff and Respondent.

In two criminal cases (MA064088 and MA067937), Jennifer Mae Miller (Miller) was convicted, in relevant part, of identity theft, forgery, and commercial burglary. On appeal, Miller contends the trial court erred in failing to provide a unanimity instruction in MA064088 and in failing to instruct the jury in MA067937 that in order to convict Miller of burglary, it had to find the value of the property Miller intended was over $950. We disagree and affirm the trial court in this respect. Miller also contends that the court should have stayed the sentences imposed in MA067937 for burglary and for forgery because these offenses were part of the same course of conduct as the identity theft. We agree only that the trial court should have stayed the burglary sentence.

BACKGROUND

I. Overview of Charges and Sentence

In case number MA064088, a jury convicted Miller of unlawful possession of personal identifying information (commonly called identity theft) in violation of Penal Code[1]

---

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

section 530.5, subdivision (c)(1) (counts 2-8) as well as forgery, in violation of section 475, subdivisions (a),(b) and (c) (counts 9-11), and possession of a controlled substance, in violation of Health and Safety Code section 11350, subdivision (a) (count 12). The jury acquitted Miller of identity theft (count 1) and possession of marijuana for sale (count 14). (There was no count 13.)

In case number MA067937, a jury convicted Miller of identity theft, in violation of section 530.5, subdivision (a) (counts 1-3), second degree commercial burglary, in violation of section 459 (counts 4-6), and forgery, in violation of section 476 (counts 7-9). On its own motion, the trial court subsequently reduced counts 4 and 5 from second degree commercial burglary to shoplifting (§ 459.5).

The trial court sentenced both cases together, imposing a total term of nine years and four months.

In case number MA067937, the court sentenced Miller to three years for count 1, the principal term. The court then sentenced Miller to eight months each for counts 2 and 3, to be served consecutively to the sentence imposed in count 1; six months each for counts 4 and 5, to be served concurrently to the sentence in count 1; two years for count 6, to be served concurrently to the sentence in count 1; and eight months each for counts 7, 8 and 9, to be served consecutively to the sentence in count 1.

In case number MA064088, the court sentenced Miller to one year each on counts 2 through 8, all to be served concurrently to the total sentence imposed in case number

MA067937. The court also sentenced Miller to eight months each on counts 9, 10 and 11, and one year for count 12, all to be served consecutively to the total sentence imposed in MA067937.

II. Prosecution Evidence

A. *Case Number MA064088*

On August 27, 2014, Los Angeles County Sheriff's Deputies Tanner and Kim were patrolling in Lancaster. Deputy Tanner saw Miller driving and initiated a traffic stop. The deputy walked to the driver side door and asked Miller for her identification. A man named "Echanique" sat in the front passenger seat.

Deputy Tanner asked Miller to get out of the car. When she did so, the deputy saw a syringe containing an off-white liquid on the driver's seat. Based on his training and experience, Deputy Tanner believed the syringe was drug paraphernalia. Both deputies searched Miller's car. Miller's purse contained a large knife, a scale, and pill bottles containing marijuana. The bottles had writing on them consistent with being sold from a marijuana dispensary. The deputies found a medical marijuana recommendation made out to Miller, which expired on March 28, 2015. Inside Miller's wallet, behind her I.D., was a bag of heroin. In the trunk of Miller's car, the deputies found a backpack with a laptop, a printer, blank check stock, and several checks in

various stages of completion.[2] Some of the checks were made out to Miller. None were made out to Echanique.

One of the checks found in the backpack was from "Mary K." and made out to a third party. A similar version of the check was found with Miller's name in the payee section. Deputies also found a check from Jennifer Kenngott made out to Miller. Kenngott later testified that someone broke into her mailbox around August 2014. She never received blank checks that were mailed to her from her bank. She did not know Miller and did not write her a check.

The deputies also found two checks from a Daniel Devere, which listed the payee as "Jennifer" or Miller. Devere later testified that he did not know who "Jennifer" was and never wrote a check to Miller. Deputies also found a modified version of a check that Veronica Franco had sent to her lawyer, "Jeffries and Associates," which still bore her original signature and personal information. However, the check had been modified so the payee was Miller. Franco later testified that she never wrote a check to Miller and did not know her. Deputies also found a check with a watermark, "[v]oid," and a "rubbed out" payee section. Another check had the address crossed out and rewritten in pen, and the payee was listed as Miller. The backpack also contained a Wells Fargo bank statement that did not belong

---

[2] Echanique gave the deputies the laptop's password. The laptop contained software used to write checks.

to Miller, as well as credit card statements that were connected to the bank account.

The deputies arrested Miller. After waiving her *Miranda*[3] rights, Miller said that forging the checks was Echanique's idea and that she merely did the work. Miller said the laptop was used to forge the checks and it belonged to Echanique. She said that the marijuana belonged to her and she provided it to others for "monetary donations," but had a "recommendation" for it. Miller claimed that the heroin belonged to Echanique and denied selling the drug. She also gave the deputies consent to search her cell phone. The deputies found several text messages on Miller's cell phone discussing the sale of drugs. When the deputies confronted Miller with the messages, she admitted selling heroin. Based on the text messages and items found in her car, Deputy Tanner opined that Miller had possessed the marijuana and heroin for the purpose of sale.

At trial, the prosecution also introduced evidence of the conduct in case number MA067937.[4] In December 2015, Miller tried to cash a check at a Palmdale Wells Fargo where Kailey Christensen worked as a manager. A teller called Christensen over because the check raised "red flags." The check was on a commonly sold check stock and had different fonts. There was also a fraud alert on the payer's account,

---

[3] *Miranda v. Arizona* (1966) 384 U.S. 436.

[4] Thus, there will be an overlap in the recitation of the facts about the two cases.

"Salvage Recycling."[5] Miller claimed the check was payment for her work at a recycling company. When Christensen asked for the specific location of the business, Miller could not provide the address or a freeway exit for the business. Christensen also called Salvage 1 Recycling. Based on the information she had gathered at that point, Christensen told Miller she was calling the police. Miller said she had children in her car and asked if she could leave. Christensen said that while she could not make her stay, Miller should wait for the police. Miller left before the police arrived.

Chester McNamara owned Salvage 1 Recycling and signed all of the company's checks. McNamara testified he did not know Miller and she was never an employee of his company. McNamara did not write or sign a check made out to Miller.

B. *Case Number MA067937*

On December 11, 2015, Miller deposited a check from Salvage 1 Recycling at a Wells Fargo bank. On December 12, 2015, Miller went to a Wells Fargo bank in Palmdale. Acting as a teller that day, Kailey Christensen cashed a check from Salvage 1 Recycling for Miller. Although the check bore inconsistent font types and was printed on a common check stock, there was no alert yet on the Salvage 1 account to suggest fraudulent activity.

---

[5] Miller had cashed two other checks from the same company in the previous days.

Only the business's owner, Chester McNamara, and the accounting manager, Michelle Stablow, issued checks on the Salvage 1 account. On December 14, 2015, Stablow noticed that two checks had cleared which appeared to be fraudulent. The checks did not use the usual font, the check numbers were out of sequence, and the checks did not include the usual notes that the business included. Check number 16600 was posted on December 11, and check number 16601 was posted on December 12—both for $945.23. A possible fraud alert was placed on the account. That same day (Dec. 14, 2015) Miller went to the Palmdale Wells Fargo bank where Christensen was working as a supervisor. The lead teller helped Miller cash check number 16604, for $1,213.88, from Salvage 1 Recycling. The teller saw that the Salvage 1 account had recent fraudulent activity and called Christensen over. Christensen saw that the check bore fraudulent markers—it used several different fonts, it did not match the other checks in the account, and it did not use the account's typical check stock.[6]

Christensen asked Miller how she had received the check. Miller said it was for employment in a scrap metal yard. Christensen pressed for specifics and asked Miller where the business was located. Miller replied with general freeway directions and said the company was in Reseda.

---

[6] Stablow later testified that although all three checks appeared to be signed by McNamara, the signature did not match McNamara's signature. Neither Stablow nor McNamara knew Miller or issued a check to her.

Christensen asked what freeway off-ramp Miller took to get there, but Miller could not tell her. At some point, Christensen spoke to McNamara and, based on the information she had gathered at that point, told Miller that she was calling the police. Miller said that she had kids in her car and asked if she could leave. Christensen recommended she stay, but Miller left before the police arrived.

The prosecution also introduced evidence of the conduct in case number MA064088. In 2014, Los Angeles County Sheriff's Deputy Jin Kim stopped Miller for a traffic violation. She had one passenger in the car. Deputy Kim searched Miller's car. He found a backpack containing blank checks, checks in different stages of completion, and checks where the names were faded and Miller's name was written over it. The checks were from at least eight different individuals. The backpack also contained a laptop with software that created checks. The checks in the backpack were only made out to Miller, not her passenger.

III. Defense Evidence

Miller presented no evidence at either trial.

DISCUSSION

I. Unanimity Instruction (Case Number MA064088)

Miller first contends that the jury should have been provided a unanimity instruction as to the forgery charges (counts 9, 10, and 11) in case number MA064088.[7] The

---

[7] In counts 9, 10, 11, Miller was convicted of violating section 475, subdivisions (a), (b) and (c), respectively. Under

Attorney General concedes Miller is correct but argues that any error was harmless "because of the strong evidence and because defense counsel conceded the offenses at closing argument." We agree.

A. *Trial Court Proceedings*

Defense counsel did not request a unanimity instruction during trial. When discussing the three forgery charges during closing argument, the prosecutor told the jury: "The first one is the 475(a). And the things I have to prove here are that the defendant possessed the forged check, that she knew that the check was forged, she intended to use the check as a real check and she possessed it with the intent to defraud. [¶] . . . [¶] And what do we have to prove that? I mean, there's an abundance. Right? You heard from three people, specifically, who told you that

---

subdivision (a), "[e]very person who possesses or receives, with the intent to pass or facilitate the passage or utterance of any forged, altered, or counterfeit items . . . with intent to defraud, knowing the same to be forged, altered, or counterfeit, is guilty of forgery." Under subdivision (b), "[e]very 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." Under subdivision (c), "[e]very person who possesses any completed check . . . whether real or fictitious, with the intent to utter or pass or facilitate the utterance or passage of the same, in order to defraud any person, is guilty of forgery."

these checks were forged, that she—they weren't issued to her."

Turning to the second forgery count, the prosecutor said: "The next one is that the defendant possessed a blank check or an uncompleted check and that when she possessed the check, she intended to complete the check, meaning, fill it out and with the specific intent to defraud. The prosecutor then went on to discuss the third forgery charge: "And the last one is that the defendant possessed completed checks and when she possessed them, she intended to use the checks in order to defraud. Again, this is very similar to the first forgery count and all of those." The prosecutor also informed the jury that they could consider previously admitted exhibits when deciding this last count.[8]

Defense counsel's closing argument conceded counts 9, 10, and 11, focusing instead on the drug charges: "And there is a reason why I'm focusing on the . . . drug charges in particular. And that's because I don't want to insult your intelligence. I'm not going to stand up here and argue that you should find [Miller] not guilty on all of the charges because the evidence was insufficient to prove her guilt beyond a reasonable doubt. You heard the evidence on the charges . . . . You saw the pictures of the checks. You saw the alterations that were made to those checks. You saw [Miller's] name on some of those checks. You saw the picture

---

[8] The previously admitted exhibits were photographs of the checks.

of the printer and the picture of the check-making software and on and on and on and on. And you can probably make an educated guess as to why [Miller] had or why [Miller] and the passenger, Mr. Echanique, had those checks and that printer and that check-making software. And that guess would probably be that she was going to try and cash, at least, some of those checks at some point in the future in order to get money." As defense counsel later summarized, "So the counts dealing with the checks, I think the evidence on those counts is sufficient."

B. *Merits*

"The key to deciding whether to give the unanimity instruction lies in considering its purpose." (*People v. Russo* (2001) 25 Cal.4th 1124, 1134.) "The jury must agree on a 'particular crime' [citation]; it would be unacceptable if some jurors believed the defendant guilty of one crime and other jurors believed her guilty of another. But unanimity as to exactly how the crime was committed is not required." (*Id.* at pp. 1134–1135.) "Thus, the unanimity instruction is appropriate 'when conviction on a single count could be based on two or more discrete criminal events,' but not 'where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.' " (*Id.* at p. 1135.) "In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the

exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction." (*Ibid.*)

As noted above, Miller was charged with three counts of forgery in case number MA064088. In count 9, Miller was charged with violating section 475, subdivision (a), in count 10, she was charged with violating section 475, subdivision (b), and in count 11, she was charged with violating section 475, subdivision (c). Rather than highlight a single specific check when discussing the individual counts, the prosecutor argued that each count was supported by all the checks found in Miller's possession. Thus, as the Attorney General concedes, conviction on a single count could be based on two or more discrete criminal events and it was error to not give a unanimity instruction. However, the Attorney General argues, this was harmless error.

There is a split of opinion as to whether the *Chapman* standard or *Watson* standard for harmless error applies in a unanimity instruction case.[9] (See *People v. Matute* (2002) 103 Cal.App.4th 1437, 1448–1449 [noting conflicting

---

[9] Under the more stringent federal standard of review set out in *Chapman v. California* (1967) 386 U.S. 18, 22–24 (*Chapman*), we must find that the claimed error was harmless beyond a reasonable doubt. Under the more lenient state standard in *People v. Watson* (1956) 46 Cal.2d 818, 836, however, we ask only if it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.

authorities].) The majority of courts addressing the issue have applied *Chapman*. (See *People v. Smith* (2005) 132 Cal.App.4th 1537, 1545; *People v. Deletto* (1983) 147 Cal.App.3d 458, 472; *People v. Wolfe* (2003) 114 Cal.App.4th 177, 185–186 (*Wolfe*); but see *People v. Vargas* (2001) 91 Cal.App.4th 506, 562 [*Watson* applies]. We will apply *Chapman* here as well.[10]

Under *Chapman*, *supra*, 386 U.S. 18, the failure to give a unanimity instruction is harmless "[w]here the record provides no rational basis, by way of argument or evidence, for the jury to distinguish between the various acts, and the jury must have believed beyond a reasonable doubt that [the] defendant committed all acts if he committed any, the failure to give a unanimity instruction is harmless." (*People v. Thompson* (1995) 36 Cal.App.4th 843, 853 (*Thompson*).) For example, where the defendant offered the same defense to all criminal acts, and "the jury's verdict implies that it did not believe the only defense offered," failure to give a

---

[10] Federal due process requires that the prosecution convince a jury of the defendant's guilt of the crime beyond a reasonable doubt. (*Wolfe*, *supra*, 114 Cal.App.4th at pp. 186–188.) However, "[w]hen the trial court erroneously fails to give a unanimity instruction, it allows a conviction even if all 12 jurors . . . are not convinced that the defendant is guilty of any one criminal event. This lowers the prosecution's burden of proof and thus violates federal constitutional law." (*Id.* at pp. 187–188.) Because the error violates federal constitutional rights, the *Chapman* standard applies. (*Id.* at p. 188.)

unanimity instruction is harmless error. (*People v. Diedrich* (1982) 31 Cal.3d 263, 283.) But if the defendant offered separate defenses to each criminal act, reversal is required. (*People v. Castaneda* (1997) 55 Cal.App.4th 1067, 1071; *Thompson*, at p. 853.) The error is also harmless "[w]here the record indicates the jury resolved the basic credibility dispute against the defendant and therefore would have convicted him of any of the various offenses shown by the evidence." (*Thompson*, at p. 853.)

Here, of course, Miller offered *no* defense to the forgery counts. When balanced against the evidence presented to the jury—photos of blank checks, altered checks, and completed checks found in Miller's trunk; a printer and a laptop with software to create checks; checks made out to Miller by people who did not know her and never wrote a check to her; as well as Miller's own admissions—any jury would have convicted her of any of the various offenses shown by the evidence. (See *Thompson*, *supra*, 36 Cal.App.4th at p. 853.)

Miller's citation to *People v. Melhado* (1998) 60 Cal.App.4th 1529 (*Melhado*) is unpersuasive. In *Melhado*, the defendant was charged with making a terrorist threat at a car repair shop. The defendant had appeared at the shop three times in one day—at 9:00 a.m., 11:00 a.m., and 4:30 p.m.—twice making threats, and twice carrying what appeared to be a hand grenade. (*Id.* at p. 1533.) The prosecutor told the court, outside the jury's presence, that he intended to use the 11:00 a.m. event as the basis for the

charge. (*Id*. at p. 1534.) During closing argument, however, the prosecutor did not tell the jury that the charge was based on the 11:00 a.m. event and instead discussed all three events, referring to both the 9:00 a.m. and the 11:00 a.m. events as threats. (*Id*. at pp. 1534–1535.) Despite the prosecutor's argument, the trial court refused to give a unanimity instruction. The Court of Appeal held this was error because, even if it were to "parse the prosecution's closing argument in a manner which suggests that more emphasis was placed on the 11:00 a.m. event than on the others . . . the argument did not satisfy the requirement that the jury either be instructed on unanimity or informed that the prosecution had elected to seek conviction *only* for the 11:00 a.m. event, so that a finding of guilt could only be returned if each juror agreed that the crime was committed at that time." (*Id*. at p. 1536.) Because the court could not say that disagreement by the jury was not reasonably probable, it could not conclude the error was harmless. (*Id.* at p. 1539.) In this case, however, we *can* say that disagreement by the jury was not reasonably probable given the quantum of evidence at its disposal, including Miller's closing argument concessions. Thus, the trial court's failure to give a unanimity instruction must be deemed harmless error.

II. Property Value (Case Number MA067937)

Miller next contends that the jury in case number MA067937 should have been instructed that in order to convict Miller of second degree commercial burglary, it had

to find that the value of the property Miller intended to take was over $950. The Attorney General argues that burglary has no value element and, therefore, the trial court did not need to instruct the jury that it must determine the value of this property. Furthermore, the Attorney General contends, any error in failing to so instruct was harmless because the property at issue—the check Miller intended to cash—was for $1,213.88. We agree.

A. *Trial Court Proceedings*

In case number MA067937, Miller was charged with identity theft (counts 1-3), second degree commercial burglary (counts 4-6), and forgery (counts 7-9). Count 4 was based on Miller's December 11, 2015, offense, count 5 was based on Miller's December 12, 2015, offense, and count 6 was based on Miller's December 14, 2015, offense.[11]

At trial, defense counsel filed a motion for judgment of acquittal on counts 4 and 5, arguing that the amount Miller took was below $950 and should have been charged as shoplifting. Defense counsel did not argue that count 6 was incorrectly charged. The motion was denied. When the parties later discussed jury instructions for count 6, defense

---

[11] On December 11, 2015, Miller successfully deposited a check from Salvage 1 Recycling at a Wells Fargo bank for $945.23. On December 12, 2015, Miller successfully cashed a check from Salvage 1 Recycling at a Wells Fargo bank for $945.23. On December 14, 2015, Miller attempted to cash a check from Salvage 1 Recycling at a Wells Fargo back for $1,213.88.

counsel did not request that the jury be instructed it must find the value of the property Miller intended to take was over $950. During closing argument, defense counsel did not discuss how much the checks were worth. After the jury returned its verdict, defense counsel renewed the motion to acquit on counts 4 and 5, which was again denied. The trial court then, on its own motion, reduced counts 4 and 5 from second degree commercial burglary to shoplifting because the value of the property taken by Miller was less than $950. The trial court did not similarly reduce count 6 to a shoplifting offense.

B. *Merits*

Proposition 47 reduced the penalties for a number of offenses. Among those crimes are certain second degree burglaries where the defendant enters a commercial establishment with the intent to steal. Such offense is now characterized as shoplifting as defined in new section 459.5. Shoplifting is now a misdemeanor unless the prosecution proves the value of the items stolen exceeds $950. *People v. Pak* (2016) 3 Cal.App.5th 1111, 1117 (*Pak*).)

As discussed below, however, the statutory definition of burglary does not include the value of the actual or intended loss as an element, nor did it in 2015 when Miller was charged with the offense. Nothing in the language of Proposition 47 identifies a change in the elements of burglary nor does Miller cite any case law to support the proposition of implied statutory amendment. Instead, Proposition 47 created a new crime of shoplifting as defined

in section 459.5. Offenses which fall within the definition of that statute must prospectively be charged as shoplifting and not burglary. Retrospectively, persons convicted of burglary, who are not otherwise ineligible, and who believe their offense should be reduced to shoplifting, must seek relief by filing a petition in the trial court. (See § 1170.18, subd. (f) [persons who have completed felony sentence for offense that would now be misdemeanor under Proposition 47 may file application with trial court to have conviction designated as misdemeanor].)

On November 4, 2014, California voters passed Proposition 47, codified as section 1170.18. "Proposition 47 makes certain . . . theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*People v. Rivera* (2015) 233 Cal.App.4th 1085 1091.) Proposition 47 also created a new crime effective November 5, 2014, shoplifting, as set forth in section 459.5 as follows: "(a) Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950). Any other entry into a commercial establishment with the intent to commit larceny is burglary. . . . [¶] (b) Any act of shoplifting as defined in subdivision (a) shall be charged as

shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property."

Burglary, at the time of Proposition 47's passage, and to this day, is defined in relevant part as follows: "Every person who enters any . . . shop, warehouse, store . . . or other building . . . with intent to commit grand or petit larceny or any felony is guilty of burglary." (§ 459; *People v. Isom* (2015) 240 Cal.App.4th 1146, 1149–1150 (*Isom*).) Nothing in the language of section 1170.18 includes any reference to modifying the statutory elements of burglary. Rather, section 459.5 is clearly intended to be a new, separate and exclusive crime for those persons who commit offenses as defined in the section. Thus, Miller was, and continues to be, governed by the statutory elements as set in section 459.

Miller's citation to *People v. Gonzales* (2017) 2 Cal.5th 858, 875–877 (*Gonzales*) is unpersuasive. In *Gonzales*, the California Supreme Court held that a second degree burglary conviction for entering a bank to cash a stolen check for less than $950 was subject to the crime of shoplifting created by Proposition 47, section 459.5. (*Id.* at p. 862.) This holding does not add an element to section 459 but rather simply reaffirms what we noted above—Proposition 47 created a new offense, the elements of which count 6 did not satisfy.[12] Although "[a] defendant must be

---

[12] CALCRIM No. 1700 supports this conclusion. The jury instruction sets out the elements of burglary without imposing a value element. The instruction then states that:

charged only with shoplifting when the statute applies," (*id.* at p. 876), the statute simply does not apply in this instance.[13] Because count 6 did not fall within the definition of section 459.5, the prosecution could not prospectively charge Miller with shoplifting rather than burglary. If Miller believes this particular offense should be reduced to shoplifting, she must file a petition in the trial court. (See § 1170.18, subd. (f).)

Lastly, any instructional error by the trial court was harmless. Omission of an element is harmless where "a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence." (*Neder v. United States* (1999) 527 U.S. 1, 17.) Here, the fact that Miller intended to cash a

---

"*If the evidence supports a defense theory that the crime was shoplifting as defined by Penal Code section 459.5*," *then* the court should instruct the jury it must find that the value of the property taken or intended to be taken was more than $950. Here, the undisputed value of the property at issue in count 6 was $1,213.88. Thus, Miller was correctly charged with burglary, rather than shoplifting, in count 6, and the jury was not required to determine the value of the property Miller intended to take.

[13] Although *Gonzales*, *supra*, 2 Cal.5th 858 was handed down after Miller's conviction, the case still draws into question whether Miller should have been charged with burglary in counts 4 and 5 in the first place. Given that the trial court ultimately reduced the counts to shoplifting, Miller does not raise the issue here.

check worth $1,213.88 was both uncontested and supported by overwhelming evidence. Nevertheless, Miller contends, it is unclear under current law whether the value of a forged check is the amount actually written on the check or some other value.[14]

A forged check may have a monetary value equal to its written value. (*People v. Lowery* (2017) 8 Cal.App.5th 533, 541, review granted Apr. 19, 2017, S240615.) If Miller had successfully cashed the check for its written value, this would be overwhelming evidence that it was worth its written value. (See *ibid.*) On the other hand, "a check may be so ineptly forged that even the most credulous clerk would refuse to honor it. A poorly forged check for a million dollars is unlikely to be cashed, and it makes little sense to assign the written value to such a check." (*Ibid.*) Here, however, Miller proffered no evidence that the check at issue in count 6 was so ineffectually forged that no teller would have cashed it. Indeed, Miller had just successfully passed two other similarly forged checks that also used various font sizes and common check stock. To that end, defense counsel argued that the checks were so realistic, Miller herself may

---

[14] For example, on June 15, 2016, the California Supreme Court granted review in *People v. Franco* (2016) 245 Cal.App.4th 679 on the following issue: "For the purpose of the distinction between felony and misdemeanor forgery, is the value of an uncashed forged check the face value (or stated value) of the check or only the intrinsic value of the paper it is printed on?"

have believed they were all legitimate. Thus, there is no evidence that the value of the forged check was anything other the actual amount written on the check.

III. Sentencing Error (Case Number MA067937)

In case number MA067937, a jury convicted Miller of identity theft, in violation of section 530.5, subdivision (a) (counts 1-3), second degree commercial burglary, in violation of section 459 (counts 4-6), and forgery, in violation of section 476 (counts 7-9). The trial court later reduced counts 4 and 5 from burglary to shoplifting (section 459.5). Miller argues that the trial court should have stayed the sentences imposed in counts 4, 5, and 6 (shoplifting / burglary) and counts 7, 8, and 9 (forgery) because they were part of the same course of conduct as counts 1, 2, and 3 (identity theft).[15]

The Attorney General concedes that Miller is partially correct. According to the Attorney General, under section 654, Miller could be separately punished for making the counterfeit checks and then, after reflecting and renewing her intent to defraud, entering the bank and cashing or

---

[15] As noted above, the court sentenced Miller to three years for count 1 (the principal term); eight months each for counts 2 and 3, to be served consecutively to count 1; six months each for counts 4 and 5, to be served concurrently to count 1; two years for count 6, to be served concurrently to count 1; and eight months each for counts 7, 8 and 9, to be served consecutively to count 1.

attempting to cash the checks.[16] In other words, Miller could be punished for forgery each time she created a counterfeit check and *separately* punished for identity theft each time she entered the bank with the intent to defraud. But because Miller's shoplifting and burglary convictions were based on the same acts as the identity theft convictions—entering the bank with the intent to defraud—the sentences imposed in counts 4, 5, and 6 should have been stayed. We agree.

A. Trial Court Proceedings

As discussed above, Miller cashed or attempted to cash forged checks on three different occasions at a Wells Fargo bank. In closing, the prosecutor summarized the case as follows: "[T]here are three counts of identity theft, three counts of commercial burglary and three counts of forgery. Now, again, each of those counts are based on the action that [Miller] took on three different occasions. Okay. The first one being December 11. December 12. And December 14. On each of those dates, [Miller] went into a Wells Fargo with a forged check from Salvage Recycling and either cashed it, deposited it into her account or attempted to deposit the check. That action of going into Wells Fargo with the forged check makes her guilty of the three crimes charged. So each

---

[16] Under section 654, subdivision (a): "An act . . . that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act . . . be punished under more than one provision."

time she went into Wells Fargo and attempted to cash that check, she's guilty of identity theft, commercial burglary and forgery." For each date—December 11, 12, and 14—Miller was convicted of identity theft (counts 1-3), burglary (counts 4-6), and forgery (counts 7-9). On its own motion, the court reduced counts 4 and 5 from burglary to shoplifting. The parties did not discuss section 654 at sentencing.

B. Merits

" ' "In general, a person may be *convicted* of, although not *punished* for, more than one crime arising out of the same act or course of conduct." ' " (*People v. Deegan* (2016) 247 Cal.App.4th 532, 541.) Thus, " ' " ' a single act or course of conduct by a defendant can lead to convictions "of *any number* of the offenses charged." ' " ' " (*Ibid.*) Nevertheless, "[s]ection 654 bars separate punishment for multiple offenses arising out of a single, indivisible course of action." (*People v. Neely* (2009) 176 Cal.App.4th 787, 800.) Its purpose is "to ensure that a defendant's punishment will be commensurate with his culpability." (*People v. Correa* (2012) 54 Cal.4th 331, 341.) " 'Whether a *course of criminal conduct* is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective of the actor*. If all of the offenses were incident to one objective, the defendant may be punished for any one of

such offenses but not for more than one.' " (*People v. Beamon* (1973) 8 Cal.3d 625, 637.)[17]

However, even if a course of conduct is "directed to one objective," it may "give rise to multiple violations and punishment" if it is "divisible in time." (*Beamon*, *supra*, 8 Cal.3d at p. 639, fn. 11.) Where a defendant's acts are "temporally separated" they "afford the defendant opportunity to reflect and to renew his or her intent before committing the next [offense], thereby aggravating the violation of public security or policy already undertaken." (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935 (*Gaio*).)

For example, in *People v. Neder* (1971) 16 Cal.App.3d 846, the defendant was convicted of three counts of forgery for using a stolen Sears credit card to charge purchases in three different departments in the same store and on the same day, and the court imposed punishment for each of the three offenses. (*Id.* at pp. 849–850.) On appeal, the defendant claimed he committed only one crime, and that punishment on all three counts was a violation of section 654 because the three acts of forgery were part of a single plan to take goods from Sears by forging the credit card slips. (*Id.* at pp. 850, 851.) Noting that "it might be said that the offenses were incident to the fundamental objective of taking goods from Sears by use of the credit card and by forging the sales slips," the *Neder* court rejected this objective as being "too

---

[17] A trial court's implied finding that the crimes were divisible must be upheld if substantial evidence supports it. (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

broad to tie the separate acts into one transaction." (*Id.* at pp. 853–854.) The court reasoned that each forgery was not a means to accomplish any other; it was not a means to the immediate end of any of the others; and each "forgery was committed for the taking of goods, separate and unrelated to the goods taken by the other forgeries." (*Id.* at p. 854.) According to the court, section 654 should not "make it a matter of indifference whether [the defendant], on entering the Sears store with the intention to obtain goods fraudulently by means of forgery, carried out the intention one or three times." (*Ibid.*)

Miller's overarching objective, like the defendant's objective in *Neder* of taking goods through the use of a stolen credit card, is "too broad to tie the separate acts into one transaction" (*Neder*, *supra*, 16 Cal.App.3d at p. 854; *People v. Andra* (2007) 156 Cal.App.4th 638; *People v. Clair* (2011) 197 Cal.App.4th 949, 960.) In other words, Miller's identity thefts and forgeries were temporally separated such that they could be punished separately. (See *Gaio*, *supra*, 81 Cal.App.4th at p. 935.) Miller committed forgery every time she made a check with the intent to defraud. (See § 476; *People v. Morelos* (2008) 168 Cal.App.4th 758, 765–766.) Miller committed identity theft every time she acquired personal identifying information and used it for any unlawful purpose. (See § 530.5, subd. (a).) Most importantly, Miller had time to reflect and renew her criminal intent between creating the forged checks and entering the bank and attempting to cash the checks. Thus,

Miller's course of conduct was divisible in time and may give rise to multiple violations and punishment. (See *Beamon*, *supra*, 8 Cal.3d at p. 639, fn. 11.)

However, although Miller could be separately punished for forgery and identity theft, Miller could *not* be separately punished for shoplifting and burglary and identity theft because these particular convictions were based on the same acts. Every person who enters any shop, warehouse, store or other building with the intent to commit larceny or any felony is guilty of burglary. (§ 459; *Isom*, *supra*, 240 Cal.App.4th at pp. 1149–1150.) "Every person who willfully obtains personal identifying information . . . of another person and uses it for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, or services" without that person's consent, is guilty of identity theft. (§ 530.5, subd. (a).)

In this case, the second element of identity theft—that the identifying information be used for any unlawful purpose—was met by Miller's commission of the shoplifting and burglary. If a defendant's crimes "were merely incidental to, or were the means of accomplishing or facilitating one objective, [the] defendant may be found to have harbored a single intent and therefore may be punished only once." (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) Here, Miller's act of entering the bank with the intent to defraud was the means of accomplishing or facilitating one objective—the identity theft. Thus, Miller could be punished

only once for the two crimes and the sentences imposed in counts 4, 5 and 6 should have been stayed.

DISPOSITION

The sentence imposed on counts 4, 5 and 6 in case number MA067937 should have been stayed pursuant to section 654. The trial court shall issue a minute order reflecting this change in judgment, prepare and file an amended abstract of judgment, and forward a copy of the corrected abstract to the Department of Corrections. In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.