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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>CATHRINE WILSON,<br><br>Defendant and Appellant. | B234143<br><br>(Los Angeles County<br>Super. Ct. No. BA332035) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Alex Ricciardulli, Judge. Affirmed.

Stuart J. Faber for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Mary Sanchez and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

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The former mayor of Temple City Cathrine (also known as Cathe or Catherine) Wilson was convicted of three counts of bribery and three counts of perjury. The bribes consisted of money given to Wilson by Jagath (Jay) Liyanage, the project manager, for a large development in Temple City. Liyanage worked for Randy Wang, who owned the property that was slated for development. The project was never built.

The perjury counts arose out of appellant's grand jury testimony following an investigation into the bribes and arose out of forms she completed under penalty of perjury, on which she identified no gifts from Liyanage.

On appeal, appellant argues that (1) the trial court erred in amending the indictment; (2) evidence was admitted in violation of her rights under the confrontation clause; (3) the court erred in instructing the jury; and (4) the court erred in sentencing her to the high term on one count of bribery. She claims her trial counsel was ineffective for failing to raise several of these issues in the trial court. None of her arguments has merit. We affirm.

**PROCEDURE**

In an indictment filed June 8, 2009, appellant, Judy Wong (a member of the Temple City council), and Scott Carwile (a person seeking election to the Temple City council) were charged with 21 offenses. Appellant was charged with three counts of bribery based on the following conduct: (1) receiving payment for a rental car from Liyanage on or about September 5, 2006 (count 1); (2) receiving $2,000 from Liyanage between March 1, 2005, and December 31, 2006 (count 2); and, (3) receiving $8,000 from Liyanage on or about January 25, 2007 (count 3). Appellant was charged with three counts of perjury as follows: (1) on or about December 15, 2008, giving false testimony to a grand jury when she stated that she had not been personally involved in negotiations regarding Wang's development, that she urged Wang to rehire Liyanage just because he was a great person, that she had no personal or financial relationship with Liyanage, that Liyanage never gave her any money, and that she never called Wang asking to meet with him alone (count 11); (2) on or about March 23, 2007, signing under oath a form requiring her to list all of her gifts and failing to report the $100 to Budget Rent A Car made at her request by Liyanage or the receipt of $2,000 cash from Liyanage (count 12);

and (3) on or about March 25, 2008, signing under oath a form requiring her to list all gifts and failing to report receiving $8,000 in cash provided by Wang and delivered by Liyanage (count 13).

Appellant was tried separately. On the last day of trial, with the agreement of the parties, the trial court amended the indictment to specify the bribes were in violation of Penal Code section 68, instead of section 86. That was the only modification. A jury found appellant guilty of all counts.

After noting that appellant's maximum sentence was nine years, the trial court sentenced her to four years in state prison. The court stated that appellant "torpedoed a $75 million project that would have greatly benefitted the residents of Temple City." The court sentenced appellant to the high term of four years on count 1, selecting the high term because appellant took advantage of a position of trust and had a role as a ringleader. The court ordered appellant's sentence on the remaining counts to run concurrently with her four-year sentence.

## FACTS

In September 2004, Wang purchased a lot in Temple City (sometimes referred to as City). The property was the subject of an eminent domain lawsuit. Wang negotiated with the City, and the parties reached an agreement that the City would drop the eminent domain lawsuit and, in return, Wang would develop the property within four years. According to the agreement, if Wang failed to develop the property within four years, the City would purchase the property from him for $5 million, less than half of the price Wang paid for it.

In 2005, Wang hired Liyanage as his project manager, until Liyanage was fired in 2007. While Liyanage was project manager, he became friendly with appellant, who was then the mayor of Temple City. As summarized below, appellant's conduct with Liyanage, while he was the project manager and while she was mayor, underlies several of the charges against her.[1]

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[1] Liyanage pled guilty to bribery.

***1. Car Rental (Bribe Count 1)***

On September 5, 2006, appellant and Liyanage went to Budget Rent A Car. According to Liyanage, he rented a car for appellant because appellant asked for his car and he was afraid he would jeopardize the development project if he refused appellant's request. Liyanage paid $108.03 for the car rental.

Appellant admitted that Liyanage paid for her rental car but claimed that she did not ask him to pay. Instead, according to her, he simply offered to pay, and she repaid him later.

***2. $2,000 Cash (Bribe Count 2)***

Liyanage testified that appellant requested $2,000 from him for a family emergency, and, in response, he gave her $2,000 in cash. Appellant acknowledged that Liyanage gave her $2,000, but she claimed it was a loan for her daughter, Terri Cohen. Cohen testified that Liyanage loaned her $2,000 for her mortgage payments. A check to pay Cohen's mortgage was dated October 24, 2006; Cohen testified that payment was made in 2006.

***3. $8,000 Cash (Bribe Count 3)***

Liyanage gave appellant $5,000 for Dave Capra, a Temple City council member. Liyanage also gave appellant $3,000 for Scott Carwile, who was running for city council. Prior to giving this money, Liyanage had a conversation with appellant about Capra and Carwile needing campaign contributions. Appellant told Liyanage that Capra needed $5,000 and Carwile needed $3,000 for their election campaigns. An email dated January 25, 2007, stated that Liyanage met appellant to give "Scott's material," and Liyanage testified that he gave appellant $8,000 for Capra and Carwile when Liyanage met her at Edward's Restaurant.[2]

Carwile testified that in 2007, he ran for city council and received $3,000 from appellant. Appellant told him that money was from a person who did not want "their [*sic*] name used."

Appellant denied all the allegations with respect to the $8,000.

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[2] Liyanage testified that he gave the money to appellant and then later testified that he gave the money to Capra in front of appellant.

***4. Grand Jury Testimony (Perjury Count 11)***

Deputy District Attorney Max Huntsman conducted a grand jury investigation into the allegations against appellant. During that investigation, appellant testified under oath, stating that she did not have a personal relationship with Liyanage, did not call Wang to meet with him alone, and never received campaign contributions. At trial, appellant testified that she was close to Liyanage. At trial, appellant admitted that she had asked Wang to meet her alone. Appellant denied receiving campaign contributions.

***5. 2007 Form 700 (Perjury Count 12)***

Form 700 is a statement of economic interest public officials are required to file. Public officials must report all gifts over $50 and must sign the forms under penalty of perjury. On March 22, 2007, appellant signed Form 700 for the preceding year and did not list any gifts in excess of $50.

Appellant acknowledged that she did not identify any gifts on her 2007 Form 700. She testified that she did not report the car rental because it was part of her per diem expense as she used the car to attend a conference, and she repaid Liyanage. She explained that she did not report the $2,000 Liyanage gave her because it was a loan to her daughter, not a gift.

***6. 2008 Form 700 (Perjury Count 13)***

On March 25, 2008, appellant signed another Form 700 in which she had to report all gifts received in 2007. Appellant did not report any gifts. She stated that she did not report the $8,000 from Liyanage because she did not receive $8,000.

***7. Other Evidence***

Wang bought an expensive watch for appellant after she showed him her arm and stated that she did not have a watch. Appellant returned the watch to Wang. The record does not disclose the date appellant received or returned the watch, but both she and Wang testified that she returned the watch to him. Wang testified that he asked Liyanage to retrieve the watch and appellant testified that she returned it because she could not accept gifts.

## DISCUSSION

### *1. Amendment of the Indictment*

Appellant argues the court erred in amending the indictment to change Penal Code section 86 (regarding bribes by a legislator or member of the legislative body) to section 68 (regarding bribes by an executive or ministerial officer). As noted, the indictment was amended on the last day of trial with the agreement of both parties.

Assuming appellant had not agreed to the amendment and thereby invited any error, the trial court did not abuse its discretion in amending the indictment. (*People v. Winters* (1990) 221 Cal.App.3d 997, 1005 [whether the prosecution should be permitted to amend the information is a matter within the sound discretion of the trial court].) A court may allow amendment of an accusatory pleading "for any defect or insufficiency, at any stage of the proceedings." (Pen. Code, § 1009; see also *People v. Burnett* (1999) 71 Cal.App.4th 151, 165.) As relevant here, "[a]n amendment to designate the proper code section is permissible and nonprejudicial if the accused is plainly informed of the nature of her offenses and the acts constituting the offenses." (*Patterson v. Municipal Court* (1971) 17 Cal.App.3d 84, 88.) Under *Patterson*, the change to designate the proper code section was within the court's discretion and appellant can demonstrate no prejudice as she had a reasonable opportunity to prepare and present her defense without undue surprise.[3]

### *2. Alleged Confrontation Clause Violation*

Appellant argues that her rights under the confrontation clause were violated because the court admitted statements by coconspirators. We disagree.

*A. Background*

Without objection, Liyanage testified that he was in communication with Judy Wong, another Temple City council member, about giving Wong $5,000. Without objection, Liyanage testified he had a plan for getting the $5,000 to Wong. Over

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[3] Appellant's statement that the indictment contained counts concerning persons other than appellant has nothing to do with the modification of the indictment to change the Penal Code section and in no manner suggests the trial court abused its discretion in modifying the indictment.

objection, he testified that the plan changed because Wong would retrieve the money only from a Chinese National. Appellant's counsel did not specify any ground for the objection, but the prosecutor asked to have the statement admitted as a coconspirator statement and the court found that the statement explained Liyanage's conduct. Without further objection, Liyanage testified that he made arrangements for Wong to pick up money from a Chinese National.

Without objection, Wang testified that Liyanage made arrangements to give money to Wong and that appellant told him to obtain $3,000 in cash for Carwile. Over objection, Wang testified that Wong asked him for money. Without objection, Wang testified that Liyanage told him the $3,000 had been given to Carwile. Without objection, Wang testified that he had to change his plan to deliver money to Wong because she was only comfortable with a Chinese National. Wang further testified without objection that he and Liyanage exchanged emails to finalize the delivery of money to Wong.

*B. Appellant's Argument Is Forfeited*

Appellant did not object on the ground that the evidence violated her right to confront witnesses and the objection therefore is forfeited. (*People v. Redd* (2010) 48 Cal.4th 691, 730.)

Appellant objected to Liyanage's testimony that Wong would retrieve the money only from a Chinese National and to Wang's testimony that Wong asked her for money. Arguably, the evidence related to Wong's receipt of money was irrelevant in appellant's trial (an issue we need not decide for purposes of this appeal). Assuming this evidence should have been excluded, its admission could not have prejudiced appellant because it concerned giving money to Wong, and did not involve appellant.

*C. No Confrontation Clause Violation*

Assuming the issue were preserved, appellant fails to show any violation of her rights under the confrontation clause.

The confrontation clause prohibits out-of-court *testimonial* statements unless the declarant is unavailable and was previously cross-examined. (*Crawford v. Washington* (2004) 541 U.S. 36, 53-54, 68-69.) Here, none of the statements appellant challenges

was testimonial. None was made during a police interrogation, during prior testimony, or at a preliminary hearing. (*Id*. at p. 68.) They were not "given and taken *primarily* . . . to establish or prove some past fact for possible use in a criminal trial." (*People v. Cage* (2007) 40 Cal.4th 965, 984.) Nor did they occur under circumstances "that imparted to some degree, the formality and solemnity characteristic of testimony." (*Ibid*.) Instead, the statements appellant challenges were akin to a casual remark among acquaintances and bore no indicia of a formal statement to government officers. (*Crawford, supra*, at p. 51.) They were not testimonial. Moreover, to the extent appellant is challenging statements made by Wang and Liyanage, both testified at trial and were subject to cross-examination.

*D. No Ineffective Assistance of Counsel*

Appellant argues her counsel rendered ineffective assistance for failing to object to all of the evidence summarized above, failing to request a hearing to determine whether there was a conspiracy between Wong and appellant, and for failing to challenge a jury instruction allowing jurors to determine whether there was a conspiracy between appellant and Wong. Assuming that the foregoing constituted deficient conduct, appellant demonstrates no prejudice. Evidence of Wong's conduct and a conspiracy between appellant and Wong was not relevant to the charges against appellant. It had no bearing on the key disputed facts whether the car rental was at appellant's request, whether the $2,000 was a gift or a loan, and whether the $8,000 was given to appellant. Because appellant demonstrates no prejudice, she fails to show she received the ineffective assistance of counsel based on counsel's failure to object to the evidence or challenge the jury instruction on conspiracy. (*People v. Loza* (2012) 207 Cal.App.4th 332, 350 [appellant claiming ineffective assistance of counsel must show prejudice].)

***3. Unanimity Instruction***

Appellant argues the court erred in not sua sponte giving the jury a unanimity instruction. According to appellant, the verdict forms fail to refer to the specific subject of the alleged bribes or the alleged statements of perjury.

"It is well established that the entire jury must agree upon the commission of the same act in order to convict a defendant of the charged offense. [Citation.] Where the

evidence indicates the jurors might disagree as to the particular act a defendant committed, the standard unanimity instruction should be given. [Citations.] Conversely, the failure to give [a unanimity instruction] does not require reversal unless 'the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged.' [Citation.] In other words, as this court has phrased it, a unanimity instruction is unnecessary 'unless there is evidence based on which reasonable jurors could disagree as to which act the defendant committed.' [Citation.]" (*People v. Brown* (1991) 234 Cal.App.3d 918, 935.)

With respect to the perjury counts, jurors were instructed as to the specific basis of each count and were instructed that they had to agree on the particular false statements appellant made in each count.[4] Appellant therefore demonstrates no instructional error with respect to these counts.

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[4] With respect to count 4 (renumbered from count 11), jurors were instructed "the People have alleged that the defendant made the following false statements at the grand jury: [¶] That she had not been personally involved in negotiations regarding Randy Wang's development; [¶] That she urged Wang to rehire Jay Liyanage just because he was a great person; [¶] That she had no personal or financial relationship with Mr. Liyanage that affected her desire to see him rehired; [¶] That Jay Liyanage never gave her any money; [¶] And that she never called Randy Wang and asked to meet with him alone."

With respect to count 5 (renumbered from count 12), jurors were instructed "the People allege that the defendant made the following statements in her Form 700 for the period covering, 2006: 'I have used all reasonable diligence in preparing and reviewing this statement, and to the best of my knowledge the information contained herein and in the attached schedules is true and complete,' while failing to report a payment of over $100 to Budget Rent A Car made at her request by Jay Liyanage and the receipt of $2,000 cash from Jay Liyanage."

With respect to count 6 (renumbered from count 13), the court instructed jurors "the People allege that the defendant made the following false statements in her Form 700 for the period covering 2007: 'I have used all reasonable diligence in preparing and reviewing this statement, and to the best of my knowledge the information contained herein and in the attached schedules is true and complete,' while failing to report receiving $8,000 cash provided by Randy Wang and delivered by Jay Liyanage."

With respect to the perjury counts, jurors were instructed "you may not find the defendant guilty unless all of you agree that the People have proved that the defendant

With respect to the bribes, the jurors could not have disagreed as to the acts appellant committed and yet convict her of the crime charged. On count 1, jurors found that appellant asked or received a bribe on or about September 5, 2006, the date Liyanage rented a car for appellant. The prosecutor argued that count 1 was the rental car "and you will be able to see that it's September 5th, 2006." Because no other act occurred on this date, jurors could not have convicted appellant unless it found that Liyanage's renting a car for her constituted a bribe.

With respect to count 2, jurors found appellant asked for or received a bribe on or between March 1, 2005, and December 31, 2006. The check for Cohen's condo was dated October 24, 2006. The prosecutor argued that count 2 was the $2,000 in cash. Defense counsel argued the $2,000 was a loan. Jurors could not have convicted appellant unless they found she received a $2,000 gift from Liyanage.

With respect to count 3, jurors found appellant guilty of asking for or receiving a bribe on or about January 25, 2007. That was the date Liyanage gave appellant money for Carwile and Capra. Appellant identifies no other conduct the jury could have based this count and the record discloses no other conduct on which jurors could have based their verdict on this count.

The jury could not have based its verdict on Wang giving appellant the watch because it was undisputed that appellant did not keep the watch, but returned it to Wang. Additionally, when the court described the charge in the context of another instruction, it did not mention the watch, but mentioned "defendant accepting a payment of $2,000 from Jay Liyanage" and "receiving $8,000 in cash provided by Randy Wang and delivered by Jay Liyanage."

As jurors could not have mistaken the basis of the counts, the alleged error in requesting a unanimity instruction was not prejudicial and cannot serve as the basis of an ineffective assistance of counsel claim. Appellant's claim that her trial counsel rendered ineffective assistance by accepting the instructions proposed by the court also lacks merit

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made at least one false statement in each count and you all agree on which particular false statement the defendant made."

because she fails to identify any instruction counsel should have proposed and fails to identify any prejudice.

***4. Upper Term Sentence***

Appellant argues the court erred in imposing the upper term on count 1. Appellant's failure to object to her constitutional right to a jury trial does not result in waiver of the issue on appeal. (*People v. French* (2008) 43 Cal.4th 36, 46.) Appellant's failure to object to the court's discretionary imposition of the upper term results in forfeiture of this issue on appeal. (*People v. Kurtenbach* (2012) 204 Cal.App.4th 1264, 1292 [unless raised at trial a defendant forfeits the argument that the court failed to properly make its discretionary sentencing choices].)

Appellant's criminal conduct occurred between 2006 and 2008. In 2007, the United States Supreme Court invalidated California's determinate sentencing law holding that it violated a defendant's right to a jury trial. (*Cunningham v. California* (2007) 549 U.S. 270, 274.) The invalidated determinate sentencing law specified that the "'court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.'" (*People v. Sandoval* (2007) 41 Cal.4th 825, 836 (*Sandoval*), quoting Pen. Code, former § 1170, subd. (b).) It was constitutionally infirm because it allowed the trial judge – instead of a jury – to find facts necessary to impose an upper term sentence. (*Sandoval,* at p. 836.) Under the new law, effective March 30, 2007, the trial judge has broad discretion to select among the three terms. (*Id.* at pp. 844-845, 836, fn. 2.) Allowing a judge discretion to impose a sentence within a statutory range does not violate a defendant's right to a jury trial. (*Id*. at p. 844.)

The 2007 amendment applied not only to sentencing hearings occurring after its passage, but also to resentencing hearings based on conduct occurring prior to its passage. (*Sandoval, supra,* 41 Cal.4th at pp. 845-846.) Thus, if this case were remanded for resentencing, the trial court would be required to apply the exact same law it already applied at appellant's initial sentencing hearing. (*Id.* at p. 847.) Appellant's claim that she should be resentenced under a different law to avoid an ex post facto violation has been rejected by our Supreme Court in *Sandoval,* at pages 855-857, which is controlling (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455). We will not

reverse for further sentencing proceedings because to do so would require the trial court to apply the same law it already applied and therefore would be "a useless and futile act and would be of no benefit to appellant." (*People v. Seldomridge* (1984) 154 Cal.App.3d 362, 365.)

Appellant's remaining arguments challenging her upper term sentence on count 1 lack merit. She claims that the trial court should not have considered her status as a ringleader, but that was an appropriate factor for the court to consider and there was evidence to support it; she directed payment to Carwile and Capra. (Cal. Rules of Court, rule 4.421(a)(4).) Moreover, appellant forfeited this claim by failing to raise it in the trial court. (*People v. Kurtenbach*, *supra*, 204 Cal.App.4th at p. 1292.) Appellant also argues that her counsel rendered ineffective assistance by failing to object to the upper term sentence. However, counsel may have chosen tactically to refrain from objecting to a sentence that included five concurrent terms. (*People v. Loza*, *supra*, 207 Cal.App.4th at p. 351 [in evaluating claim of ineffective assistance of counsel reviewing court defers to counsel's reasonable tactical decisions].)

**DISPOSITION**

The judgment is affirmed.

FLIER, J.

We concur:

BIGELOW, P. J.

GRIMES, J.