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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

THE PEOPLE, Plaintiff and Respondent, v. HUI LIN SU, Defendant and Appellant.	B232637 (Los Angeles County Super. Ct. No. MA043256)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bernie C. LaForteza, 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, Victoria B. Wilson and Erika D. Jackson, Deputy Attorneys General, for Plaintiff and Respondent.

Hui Lin Su was convicted by a jury of misappropriation of public funds (Pen. Code, § 424, subd. (a); count 1) and grand theft by embezzlement (§ 487, subd. (a); count 2) for failing to remit to the City of Lancaster the transient occupancy tax she was required to collect from her hotel guests. She was sentenced to 270 days in county jail and three years probation. We affirm.

FACTS

Su operated the Desert Inn Hotel in the City of Lancaster from January 2006 to July 2009. Pursuant to the Lancaster Municipal Code, anyone who rented lodging in Lancaster for less than 30 days was required to pay a transient occupancy tax of 7 percent per night. (Lancaster Mun. Code, § 3.16.030.)[1] The tax was to be collected and remitted to the city by hotel operators such as Su. (§ 3.16.070.) Su collected and paid the tax during the first few months she operated the Desert Inn. Beginning August 2006, however, she failed to timely pay the tax, using the money to pay the hotel's utility bills and 50-person payroll instead. Although she had considerable experience managing a hotel in Ontario, Su was not prepared for the high electricity bills in Lancaster during the summer. In February 2008, Monique Edwards, a management analyst for the city, inspected Su's records and determined that Su owed a total of $73,089.85[2] in transient occupancy taxes, excluding applicable late fees and interest. Su paid some of the taxes, but not all.

Su was charged with misappropriation of public funds under Penal Code section 424, subdivision (a) and grand theft under section 487, subdivision (a). During a six-day jury trial, the prosecution presented evidence as described above. Su testified in her own defense. Although she was warned that she may have committed fraud and that

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[1] All further section references are to the Lancaster Municipal Code unless otherwise specified.

[2] Edwards initially made an error in calculating the penalties, which resulted in an overcharge of $5,272.90 for the period of August 2007 to October 2007. The error was corrected at trial.

she could not use the tax collected for personal needs, Su stated she was not aware she could be charged with a felony for failure to pay the transient occupancy tax. Su also testified that she believed she could pay the tax late so long as she paid the accumulated late penalties and interest as well. The jury returned a guilty verdict on both counts on March 28, 2011. On April 25, 2011, the trial court sentenced Su to 3 years probation subject to 270 days in county jail and 360 hours of community service. Su was also ordered to make restitution to the city in the sum of $57,816.95. Su timely appealed.

DISCUSSION

I. The Constitutionality of the Transient Occupancy Tax

Su first contends that the occupancy tax is void for vagueness both facially and as applied, requiring reversal of her felony convictions. Su complains the ordinance is vague in a myriad of ways, none of which we find persuasive.

Due process of law is violated by "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." (*Connally v. General Const. Co.* (1926) 269 U.S. 385, 391.) A statute will pass muster only "if it (1) gives fair notice of the practice to be avoided, and (2) provides reasonably adequate standards to guide enforcement." (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 702 (*Fisher*); *Connally, supra,* at p. 391.) Fair notice, as applied here, requires that the ordinance's terms be described with a reasonable degree of certainty so that an ordinary hotel operator such as Su can understand what conduct is required of her. (*Fisher, supra,* at p. 702.) Further, the ordinance must provide sufficient standards of enforcement so that there is no threat of arbitrary application. (*Id.* at p. 703.) A statute is presumed to be valid and must be upheld unless its unconstitutionality " ' "clearly, positively and unmistakably appears." ' [Citations.]" (*Patel v. City of Gilroy* (2002) 97 Cal.App.4th 483, 488-489 (*Patel*).) We conclude the ordinance is sufficiently clear as to what it required of Su and what the standards of enforcement were.

A. The Transient Occupancy Tax

Lancaster Municipal Code section 3.16.030 provides, "For the privilege of occupancy in any hotel, each transient is subject to and shall pay a tax in the amount of seven percent of the rent charged by the operator. This tax constitutes a debt owed by the transient to the city which is extinguished only by payment to the operator of the hotel at the time the rent is paid." Transient is defined as any person "who exercises occupancy or is entitled to occupancy" of a hotel for 30 days or less. (§ 3.16.020.) " 'Hotel' means any structure, or any portion of any structure, which is occupied or intended or designed for occupancy by transients for dwelling, lodging or sleeping purposes and including any hotel, in tourist home or house, motel, studio hotel, bachelor hotel, lodging house, rooming house, apartment house, dormitory, public or private club, mobilehome or house trailer at a fixed location, or other similar structure or portion thereof." (*Ibid.*) "Each operator shall . . . make a report to the tax administrator, on forms provided by him, of the total rents charged and received and the amount of tax collected for transient occupancies. At the time the return is filed, the full amount of the tax collected shall be remitted to the tax administrator . . . . All taxes collected by operators pursuant to this chapter shall be held in trust for the account of the city until payment thereof is made to the tax administrator." (§ 3.16.070.)

The ordinance further provides that the failure to remit the tax will result in a penalty of 10 percent of the amount of the tax with any continued delinquency incurring a second penalty of 10 percent. (§ 3.16.080A & B.) Interest also accrues at the rate of one-half of one percent per month. (§ 3.16.080D.) "Any person violating any of the provisions of this chapter shall be guilty of a misdemeanor and shall be punishable according to the provisions of Chapter 1.12 of this code." (§ 3.16.150.) Chapter 1.12 provides that "[a]ny person convicted of a misdemeanor under the provisions of this code, is punishable by a fine not exceeding one thousand dollars ($1,000.00) or by imprisonment in the Los Angeles County Jail for a period not exceeding six months, or by both such fine and imprisonment."

B. Analysis

Su contends the transient occupancy tax ordinance is vague in a multitude of ways. "First, its definition of a hotel both as a structure intended for dwelling or lodging is ambiguous, if not contradictory" because a dwelling implies a permanent residence while this ordinance is intended only to apply to temporary lodging. "Second, the code relies on circular definitions," defining a hotel as a structure which is occupied by transients and defining a transient as one who occupies a hotel.

Su relies on *Britt v. City of Pomona* (1990) 223 Cal.App.3d 265 (*Britt*) to support her contention that the language of the statute fails to clearly identify who is subject to the tax. Though the ordinance in *Britt* contains some of the same language to which Su objects, it is plainly distinguishable from Lancaster's transient occupancy tax ordinance. In *Britt*, the City of Pomona amended an ordinance that imposed a tax on persons living in transient accommodations to remove 30- and 60-day time limits used to define what constitutes "transient." (*Id.* at p. 270.) The Court of Appeal held that the amended ordinance violated state and federal equal protection requirements and was unconstitutional because, without the time limit, it taxed those who planned to live indefinitely in certain types of shelter, like hotels, but not those who lived temporarily in apartments, houses, and boarding homes. It also permitted some transients who only planned to stay for a short period of time to entirely escape the tax. (*Id.* at pp. 273-275.) The court found that there was no rational basis for the subclassification of persons living in transient-type accommodations. The court also found that the ordinance was unconstitutionally vague because it defined "transients" to include both those who intended to stay for a short time and those who intended to permanently live in a hotel. Thus, the ordinance did not provide fair notice of who exactly was to pay the tax nor did it provide reasonably adequate standards to guide enforcement. (*Id.* at p. 279.)

The Lancaster ordinance does not suffer from the same constitutional problems identified in *Britt* in that it contains a 30-day time limit. This time limit resolves most of the problems identified in *Britt*, namely that there was some ambiguity as to who was to be taxed. Instead, the Lancaster transient occupancy tax is identical to the ordinance in

Patel, supra, 97 Cal.App.4th 483, which was found not to be unconstitutionally vague by the Sixth District. In *Patel*, the plaintiff hotel owner sued the City of Gilroy, contending that the definition of the terms "hotel," "occupancy," and "transient" were unconstitutionally vague because they were defined in a circular way and failed to distinguish temporary living arrangements from permanent ones. (*Id.* at p. 487.) The court held there was no ambiguity as the tax applied solely to those who occupy a hotel for 30 days or less. (*Id.* at p. 490.)

Su also complains that the enforcement procedures are impermissibly vague "inasmuch as it provides for a monetary penalty, while at the same time suggesting that non-compliance with any of the provisions is a misdemeanor." These are not mutually exclusive propositions and we see no ambiguity or conflict with such a provision. The availability of civil penalties does not deprive the city of authority to impose criminal sanctions as well. (*Stark v. Superior Court* (2011) 52 Cal.4th 368, 403 (*Stark*).)

Su next contends the ordinance is unconstitutional as applied because the city accepted late payment from her, leading her to believe she would not be charged with a crime, much less a felony. That the city accepted late payment does not mean there would not be criminal consequences to her failure to pay. Indeed, Su was warned that what she was doing could be characterized as fraud and that she was not permitted to use the money as her own.

Neither are we persuaded by Su's contention that the ordinance is unconstitutionally vague because the tax provision is so complicated even the city's own analyst made significant errors in calculating the amount due. That Edwards made mistakes in her calculations does not render the ordinance unconstitutionally vague. The ordinance clearly describes the penalties and interest associated with late payment of the transient occupancy tax.

Finally, we do not agree that the provision for a hearing in the event of a dispute is unconstitutionally vague as applied here. Su complains, "[t]he way that the code is written, it in essence requires that the hotel [] operator request a hearing, before notice of

the right to a hearing becomes operative, because they are required to give written notice of a dispute of the amount claimed due." The complaint is meritless.

The Lancaster Municipal Code provides that "the tax administrator shall give a notice of the amount so assessed by serving it personally or by depositing it in the United States mail, postage prepaid, addressed to the operator so assessed at his last known place of address. Such operator may, within ten (10) days after the serving or mailing of such notice, make application in writing to the tax administrator for a hearing on the amount assessed. If application by the operator for a hearing is not made within the time prescribed, the tax, interest and penalties, if any, determined by the tax administrator shall become final and conclusive and immediately due and payable. If such application is made, the tax administrator shall give not less than five days' written notice in the manner prescribed herein to the operator to show cause at a time and place fixed in the notice why amount specified therein should not be fixed for such tax, interest and penalties." (§ 3.16.090.) The portion of the law just quoted is a clearly outlined procedure by which a hotel operator can seek review of the tax administrator's calculations. There was no obligation by the city to otherwise provide notice of a hearing under the ordinance.

II. Sufficiency of the Evidence

Su next contends there was insufficient evidence to support her misappropriation of public funds and embezzlement convictions. We do not agree.

" 'In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses 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.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may reverse for lack of substantial evidence only if " 'upon no hypothesis whatever is there sufficient substantial evidence to support' " the conviction.

(*People v. Bolin* (1998) 18 Cal.4th 297, 331.) Here, we find sufficient evidence to support both convictions.

A. Misappropriation of Public Funds

Su was convicted under section 424, subdivision (a) of the Penal Code, which provides that, "[e]ach officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safekeeping, transfer, or disbursement of public moneys, who either: [¶] 1. Without authority of law, appropriates the same, or any portion thereof, to his or her own use, or to the use of another." "As used in this section, 'public moneys' includes the proceeds derived from the sale of bonds or other evidence of indebtedness authorized by the legislative body of any city, county, district, or public agency." (§ 424, subd. (b).)

The People's theory at trial was that Su was a person charged with the receipt, safekeeping, transfer or disbursement of public moneys. Because the tax was a debt owed by the hotel guest to the city, Su's role under the statutory scheme was one of tax collector. Under this scheme, "[a]ll taxes collected by operators pursuant to this chapter shall be held *in trust* for the account of the city until payment thereof is made to the tax administrator." (Lancaster Mun. Code, § 3.16.070, italics added.) When Su failed to timely remit the hotel tax to the city, she did so without authority of law and violated Penal Code section 424.

On appeal, Su contends she is not a person charged with the safekeeping or transfer of public moneys within the meaning of the statute. She argues the hotel tax was not collected as a separate sum but instead was part and parcel of the hotel charge paid by each guest. Further, there were penalties associated with paying the tax late, thus implying it could be paid late. Given these circumstances, Su says, she was not a person with control of public moneys. According to Su, her situation is no different than a citizen failing to pay the income tax or a landlord collecting rent and failing to pay his property taxes. Again, we disagree.

The Supreme Court has held that Penal Code "[s]ection 424 is not limited to public officers. 'Because of the essential public interest served by [section 424,] it has

been construed very broadly.' " (*Stark, supra,* 52 Cal.4th at p. 380.) Despite this statement, we have not found and the parties have not directed our attention to any section 424 cases where there was a prosecution of an individual who was not a public official or someone employed by a city, county, district or public agency. (See, e.g., *Stark,* at p. 376 [county auditor-controller]; *People v. Dillon* (1926) 199 Cal. 1 [city finance commissioner]; *People v. Aldana* (2012) 206 Cal.App.4th 1247 [county hospital administrator and administrative liaison]; *People v. Groat* (1993) 19 Cal.App.4th 1228 [manager in city department]; *People v. Evans* (1980) 112 Cal.App.3d 607 [county aid worker]; *People v. Wall* (1980) 114 Cal.App.3d 15 [parking meter collector]; *People v. Vallerga* (1977) 67 Cal.App.3d 847 [county assessor]; *People v. Lee* (1975) 48 Cal.App.3d 516 [county medical director].)

There is one case, however, which discusses a hotel operator and Penal Code section 424. In *People v. Evans* (1967) 249 Cal.App.2d 254 (*Evans*), the City of Bakersfield imposed a four percent tax on guests of transient lodging. The defendant was a hotel operator who failed to remit the tax to Bakersfield. (*Id.* at p. 256.) He was charged with 17 counts of violating former section 6.12.040 of the Bakersfield Municipal Code, which deemed each violation to be a misdemeanor subject to a fine of $25 to $500. The trial court sustained a demurrer to the complaint, finding that portion of the ordinance involving the penalty to be unconstitutional.

On appeal, the court affirmed the dismissal, but on different grounds. The court held that the ordinance was constitutional but "[t]he attempted conviction of the defendant for his omissions to make the payments described in the ordinance was rendered ineffective, because years ago the state took over the whole field of punishment for a refusal or neglect to pay public monies to the proper official; the attempt of the local legislative body to impose a different, and incidentally a lesser, penalty is, therefore, null and void." (*Evans, supra*, 249 Cal.App.2d at p. 261.) Observing that Penal Code section 424 is "general and specifically applicable to everyone in the state who is charged with the safekeeping and transfer of public monies," the court concluded the Legislature had preempted the entire field of protection for this kind of public monies. As a result,

the judgment dismissing the misdemeanor charges was affirmed. (*Evans*, at p. 261.) The court was not called upon to and made no comment on whether it was advisable to charge and convict the hotel operator with a felony under section 424.

Here, the People urge us to extend *Evans* to its natural conclusion by upholding the felony conviction of Su for failure to remit the transient occupancy tax to the city. Although we question the wisdom of charging a hotel operator with two felonies under these circumstances,[3] there was substantial evidence to support a conviction under Penal Code section 424. The evidence showed that Su collected the taxes from her hotel guests, knowing she was required to remit the taxes to the city, but willfully failed to do so.

Su's contention that she is no different from an ordinary citizen obligated to pay income tax on her salary or a landlord obligated to pay property taxes from rental income is not persuasive. The ordinance governing the transient occupancy tax clearly describes the tax as a debt between the hotel guest and the city. As a hotel operator, Su was merely the conduit between the guest and the city. As such, she is clearly one who is "charged with the receipt, safekeeping, transfer, or disbursement of public moneys" under Penal Code section 424. Income taxes and property taxes are not similarly held "in trust" for the state as the transient occupancy tax is. Further, Su's argument that the Lancaster Municipal Code's characterization of the hotel tax as a debt rather than public moneys is misplaced since section 424 includes "indebtedness" in its definition of public moneys.

B. Grand Theft by Embezzlement

Su next contends there was insufficient evidence of embezzlement because there was no evidence that the city entrusted her with any of its funds. Not so.

Penal Code section 487 defines grand theft as theft of property exceeding $950. Section 484, subdivision (a) provides the definition of theft, stating that "[e]very person

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[3] Even before she was charged, Su made a good-faith effort to comply with the ordinance, making payments totaling at least $35,000 to the city. Further, this was Su's first brush with the law and she lost her business. This was acknowledged by the city, which took the unusual step of making an appearance at the sentencing hearing to request leniency for Su.

who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft." Unlike the public official charge, which is a general intent crime, embezzlement requires the defendant to specifically intend to deprive the owner of his property and fraudulently convert or use the property for his or her own benefit. (CALCRIM No. 1806; *People v. Dillon*, supra, 199 Cal. at pp. 7-8.)

The fraud element required for embezzlement is addressed in *People v. Talbot* (1934) 220 Cal. 3 (*Talbot*). There, the defendants were officers of a corporation. They, along with other employees of the corporation, had drawing accounts from which funds were withdrawn for their personal use without the approval of the board of directors. The records established that this was a common practice in this corporation and others. The withdrawals were made openly, with no attempt at concealment, the cancelled checks were returned to the corporation, the defendants were charged on the books with all of the expenditures, and no manipulation of the accounts took place. (*Id.* at pp. 8-10.) The defendants were charged with grand theft by embezzlement.

Noting fraudulent intent is a necessary element to the crime of embezzlement, the Supreme Court explained, " 'One of the definitions of "fraud" given by the Standard Dictionary is: "Any act . . . that involves a breach of duty, trust, or confidence, and which is injurious to another, or by which an undue advantage is taken of another," and an act is declared to be fraudulent that is characterized by fraud. We think the Legislature used the word "fraudulent," in its definition of embezzlement, to distinguish an "appropriation" by an agent of money or property under circumstances that might be merely tinged with suspicion as to the agent's intent, from an appropriation for purely personal uses of the agent, as contrasted with the purpose for which the money or

property was entrusted to him. In other words, in every case where the officers of a corporation who are necessarily entrusted with the money and property of the concern use it, knowingly and intentionally, for their own purposes, there is a "fraudulent appropriation" thereof which is termed embezzlement by the statute, and the fact that such officers intended to restore the money or property is of no avail to them if it has not been restored before information laid or indictment found charging them with embezzlement [citation], and even if prior to the bringing of such charges the officers *voluntarily and actually* restore the property, such fact does not constitute a defense but merely authorizes the court in its discretion to mitigate the offense [citation]. It would seem that the legislature here has shown in very clear terms that it is the immediate breach of trust that makes the offense, rather than the permanent deprivation of the owner of his property." (*Talbot, supra,* 220 Cal. 3 at pp. 15-16.)

Here, the Lancaster Municipal Code clearly defines the transient occupancy tax as an obligation from the guest to the city. Hotel operators were obligated to collect this debt and hold it "in trust" for the city until they remitted the funds. (§ 3.16.070.) A plain reading of the ordinance belies Su's argument that she did not violate a trust. Further, it is undisputed that the Lancaster Municipal Code imposed upon Su a duty to remit the transient occupancy taxes collected by her to the city. Su voluntarily accepted this duty when she chose to operate a hotel in the city. Su breached that duty when she failed to remit the occupancy taxes as required. Under *Talbot*, the jury was permitted and did conclude that Su acted fraudulently in doing so.

III. Expert Testimony

At trial, Su sought to call a forensic accountant to provide expert testimony about how Edwards miscalculated the amount of taxes owed by Su and about Su's intent in failing to remit the taxes. The trial court found the proposed testimony to be irrelevant since Edwards had admitted on the stand she made a mistake and presented the accurate amount owed to the jury. As to the evidence of Su's intent, the trial court concluded the expert's testimony would not have assisted the trier of fact on a subject that was beyond the common experience of the jury under Evidence Code section 801. The trial court

further denied the defense's request on section 352 grounds, finding the relevance was outweighed by the danger of undue prejudice, confusion of issues and consumption of time.

Su contends on appeal that the trial court's ruling abridged her right to present a defense because the accountant would have explained how Su was being overcharged by the city. According to Su, the proposed testimony would have helped establish how, "despite her efforts to meet city demands for payment of the transient occupancy tax, that she was stymied because of the ongoing demand for excessive penalties that substantially exceeded the amount actually due by more than double."

"It is fundamental that a trial judge has wide discretion to admit or reject opinion evidence, and that a court of appeal has no power to interfere with the ruling unless there is an obvious and pronounced abuse of discretion on his part." (*People v. Clark* (1970) 6 Cal.App.3d 658, 664.) We find no abuse of discretion in the trial court's ruling. Here, the expert's proposed testimony about Edwards's errors was not relevant to the issues in the case. Su admitted she failed to remit the transient occupancy taxes she collected. There was also no dispute as to the amount of taxes owed once Edwards testified to her $5,272.90 mistake. Further, a forensic accountant is not qualified to testify about whether the city will accept current payment without making payments on back taxes. Nor was the proposed testimony relevant to Su's defense that she had a good-faith belief she was allowed to pay the taxes late so long as she also paid the accumulated penalties and interest. Su testified to these issues in her own defense. There was no indication that the expert's proposed testimony would have provided any necessary assistance to the jury, and its exclusion was not erroneous.

Because we find the proposed testimony to be irrelevant to the issues at hand, we need not reach Su's other arguments that the probative value of the testimony outweighed any prejudicial effect or that she was denied her right to present a defense.

IV. Discovery Violation

Lastly, Su claims the prosecutor violated his discovery obligations by failing to turn over exhibits, numbered 3-18, which were admitted at trial. Apparently, Su was

represented by a different counsel at trial than the one who represented her during the preliminary hearing and before. Su does not dispute that prior counsel was provided with all the exhibits admitted into evidence. Further, with the exceptions of one page and certain cover sheet notations, she acknowledges that the challenged exhibits were admitted at the preliminary hearing. Finally, the record demonstrates that during trial Su used and initially did not object to the exhibits. Despite these facts, at the close of trial Su interposed her first objection to the admission of the exhibits based on a discovery violation. On appeal, Su reiterates her discovery claim and contends sanctions were warranted. Her contention lacks merit for many reasons.

On the third day of trial, the People sought to admit the exhibits they used during trial into evidence. Though the exhibits had been referred to extensively in the questioning of witnesses, defense counsel interposed his first objection to the admission of exhibits 3-18 when the prosecution sought to admit them. The trial court admitted the remainder of the exhibits but delayed ruling on the admission of exhibits 3-18 to allow defense counsel an opportunity to review them.

Exhibits 3-18 were comprised of the daily records maintained by Su showing the rental activity for the Desert Inn for May 2007, July 2007 and January 2008 to February 2009. Each of the exhibits contained a cover sheet on which Su kept track of the amounts she received and the taxes she collected. The exhibits also included occupancy tax report forms prepared by Edwards for those periods. Some of the forms contained handwritten notations on the margins showing that Edwards recalculated the penalty due. Upon review of the exhibits, defense counsel complained that some of the face sheets on the records appeared to be different from the ones introduced at the preliminary hearing. Defense counsel then asked to reopen the matter to examine Edwards about why these records were different from the ones that were admitted at the preliminary hearing. The trial court denied the request to reopen, finding the probative value of the proposed questions would be substantially outweighed by undue prejudice, confusion and consumption of time.

On appeal, Su contends the trial court erred when it declined to grant any remedy due to the prosecution's failure to provide discovery of exhibits 3-18 to her trial counsel. Although these exhibits were introduced at the preliminary hearing and defense counsel had access to them, Su contends that the cover pages of these exhibits had new notations on them made by Edwards. Su specifically identifies the following alterations to exhibits 11 to 13: "In Exhibit 12, the penalty on the main part of the form indicates that a penalty of $4,165.90 is used, while in the margin, it shows a penalty of $416.59, a substantial difference. The column on the right sum total, suggests that the original amount was in fact $4,165.90, because the aggregate sum includes that higher amount. Similarly in Exhibit 13, the original amount indicates that $3,064.23 was calculated on an actual tax of only $3.404.70. The recalculation shows that only $340.47 was in fact due. And in Exhibit 11, on a tax due of $4,982.15, a penalty was assessed at $5,480.42, then recalculated to $498.22." There is no indication that any of the other exhibits contained any alterations. Su maintains she was prejudiced by the trial court's ruling because the failure to provide discovery of exhibits 3-18 prevented her "from having an opportunity to forumulate and effectively cross-examine the State's chief witness, Edwards about her calculations and the process by which they were changed on the eve of trial."

Penal Code section 1054.1 "independently requires the prosecution to disclose to the defense . . . certain categories of evidence 'in the possession of the prosecuting attorney or [known by] the prosecuting attorney . . . to be in the possession of the investigating agencies.' " (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1133 (*Zambrano*), overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Evidence subject to disclosure includes "[a]ll relevant real evidence seized or obtained as a part of the investigation of the offenses charged" and any "[r]elevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts." (§ 1054.1, subds. (c) & (f).) "Absent good cause, such evidence must be disclosed at least 30 days before trial, or immediately if discovered or obtained within 30 days of trial. ([]§ 1054.7.)" (*Zambrano*, at p. 1133.) "Although the prosecution may

not withhold favorable and material evidence from the defense, neither does it have the duty to conduct the defendant's investigation for him. [Citation.] If the material evidence is in a defendant's possession or is available to a defendant through the exercise of due diligence, then . . . the defendant has all that is necessary to ensure a fair trial . . . ." (*People v. Salazar* (2005) 35 Cal.4th 1031, 1048-1049.)

Upon a showing both that the defense complied with the informal discovery procedures provided by the statute, and that the prosecutor has not complied with Penal Code section 1054.1, a trial court "may make any order necessary to enforce the provisions" of the statute, "including, but not limited to, immediate disclosure, . . . continuance of the matter, or any other lawful order." (§ 1054.5, subd. (b).) The court may also "advise the jury of any failure or refusal to disclose and of any untimely disclosure." (*Ibid.*) A violation of section 1054.1 is subject to the harmless error standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Zambrano*, *supra*, 41 Cal.4th at p. 1135, fn. 13.)

We find no abuse of discretion in the trial court's ruling. It is undisputed all of the exhibits were provided to Su's previous counsel, who represented her at the preliminary hearing. Su does not cite any authority which holds the People are obligated to ensure a defendant's successor counsel is provided with a second set of all discovery already given to previous counsel. Instead, the California Supreme Court has stated there is no discovery violation if the evidence is available to the defendant upon the exercise of due diligence, even if the prosecution did not provide it. (*People v. Salazar*, *supra*, 35 Cal.4th at pp. 1048-1049.) In this case, the exhibits were available to Su through the exercise of due diligence. Su could have retrieved the exhibits from prior counsel; she does not posit that she was unable to do so. It is also undisputed the exhibits were introduced at the preliminary hearing, and could have been procured by counsel had he simply chosen to review the file from the hearing. Further, the exhibits were available for counsel to view at trial, when they were introduced through Edwards's testimony. Indeed, Su's counsel used the exact documents with which Su now takes issue when questioning Edwards.

As to the contention that the cover sheets to the exhibits were changed after the preliminary hearing, we note that Su identifies alterations only to exhibits 11-13. Su does not contend exhibits 3-10 and 14-18 have any alterations. Even as to exhibits 11-13, the changes merely show notations Su concedes were made by Edwards during trial indicating her miscalculations in the penalties associated with the occupancy taxes for July 2008 through September 2008. It is undisputed the defense knew mistakes had been made with respect to the calculation of taxes and penalties; these errors were pointed out to Edwards before trial by the defense expert. As a result, Edwards recalculated the penalties and acknowledged her errors in her testimony. Defense counsel was able to cross-examine her extensively about the errors contained in her report and the method by which she calculated the taxes and penalties due. In fact, Su's trial counsel cross-examined Edwards using these same exhibits. The changes noted by Su to exhibits 11-13 were simply not undisclosed and despite Su's protestations, they did not "sandbag" her at trial. Even if the People had disclosed these exhibits to Su a second time under Penal Code section 1054.1 prior to trial, Su would not have received the documents with the changes since they were made during the course of trial. In effect, Su was provided the exhibits, including any minor alterations, when they were available to the People. Under the circumstances, the trial court did not abuse its discretion in denying Su's request to re-open and cross-examine Edwards about the changes.

The records were primarily records provided by Su to Edwards and had been available from the beginning.

DISPOSITION

The judgment is affirmed.

BIGELOW, P. J.

We concur:

RUBIN, J.

FLIER, J.