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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

PEOPLE,

Plaintiff and Respondent,

v.

JENNIFER JOANNE ZITO,

Defendant and Appellant.

2d Crim. No. B233685
(Super. Ct. No. 2009005679)
(Ventura County)

Jennifer Joanne Zito (Zito) stands convicted of stealing more than $800,000 in cash and five vehicles over the five-year period she worked as a bookkeeper for Simi Valley Cycles (SVC). The trial court sentenced her to 18 years in prison. In this appeal, Zito does not dispute the evidence of her guilt. Instead, she argues that many of the charges are time-barred or duplicative, and that her sentence is procedurally defective. We modify the judgment to include a court facility assessment fee, and affirm the judgment in all other respects.

FACTS AND PROCEDURAL HISTORY

I. *The Crimes*

In 1999, Rod Kubes (Kubes), the owner of SVC, hired Zito as a bookkeeper on the recommendation of a friend that Zito was honest. From 2001 until she quit in March 2006, Zito pocketed cash from SVC's daily receipts. She

concealed her embezzlement by manufacturing, altering, or destroying SVC's internal records. Her actions made it nearly impossible to detect the mismatch between the actual bank deposits and SVC's records of those deposits. Through these means, Zito siphoned more than $800,000 in cash over a five-year period. She used this money to finance her horse training and show business, to remodel her home, and to lease or buy expensive cars and boats.

On five occasions during that period, Zito also stole from SVC: (1) a Yamaha 50 motorcycle on December 21, 2001; (2) a Yamaha 600 quad vehicle on January 17, 2003; (3) a Grizzly all-terrain vehicle on September 24, 2003; (4) a 2005 Yamaha TTR230 on February 25, 2005; and (5) a 2006 Yamaha TTR50 motorcycle on November 10, 2005. Zito concealed these vehicle thefts by having a straw purchaser tender a check, which Zito then removed from SVC's daily deposits. Zito used the vehicles herself, gave them away, or resold them for a profit.

II. *Discovery of the Embezzlement*

When Kubes hired Zito, he had his former bookkeeper's associates train her on SVC's procedures. Kubes did not double check Zito's work because he mistakenly believed that his tax accountant was independently verifying the accuracy of the deposits. When the accountant in 2003 complained that Zito was late with the data he needed, Kubes hired Zito an assistant. Zito objected to having an assistant in her office, so Kubes moved the assistant elsewhere because he did not want to "ruffl[e]" Zito's "feathers" and because he trusted Zito. In May 2005, the accountant informed Kubes that the sales information Zito had provided for the first quarter of 2005 was identical to the data for the same quarter in 2004, and suggested Zito was overworked or had sent the wrong figures.

Kubes would occasionally have to loan money to SVC because SVC's accounts would sometimes become overdrawn. Kubes viewed such loans as "part of doing business" because SVC was often called upon to make advance payments for sales taxes and inventory. Throughout this time, Kubes thought SVC should

have been more profitable, but his accountant assured Kubes that SVC's five percent profit margin was average.

It was not until March 2006 that Kubes became suspicious of wrongdoing. That is when Zito told Kubes that SVC's financial data had been lost on the computer, which Kubes discovered was untrue. It is also when Zito told Kubes that the accountant kept SVC's deposit records, which Kubes also learned was untrue.

III. *Prosecution*

The People filed a felony complaint against Zito on July 21, 2009. In March and April 2011, Zito proceeded to trial on the Second Amended Felony Information. The People charged Zito with six counts of corporate embezzlement (Former Fin. Code, § 3531, repealed by Stats. 2011, ch. 243, § 1, eff. Jan. 1, 2012) in counts 1 through 6, and six parallel counts of grand theft (Pen. Code, § 487), in counts 7 through 12.[1] The counts corresponded to the same underlying conduct—the aggregated theft of more than $800,000 in currency from SVC (counts 1 and 7) and the taking of each vehicle (the remaining counts). Related to these counts, Zito was tried on loss-related enhancements under section 186.11, subdivision (a)(2) and 12022.6, subdivisions (a)(2) and (b). Zito was also tried on five counts of filing false tax returns (Rev. & Tax. Code, § 19706 - counts 13-17) and one count of grand theft against a different victim (§ 487, subd. (a) - count 19).

The jury convicted Zito on these counts and found the enhancement allegations to be true.[2] The jury also found that the prosecution was timely. Before making this finding, the jury was instructed that timeliness turned on "when the victim was aware of facts that would have alerted a reasonably diligent person in

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

[2] The jury acquitted Zito of one count of identity theft and one count of forgery.

the same circumstances that that specific instance of embezzlement or theft may have been committed." (CALCRIM No. 3410.) The jury was not asked to make any findings about whether the theft of currency and vehicles was committed with a single intention, general impulse or plan.

IV. *Sentencing*

Prior to sentencing, the Probation Department issued its report and the parties filed their statements in aggravation and mitigation. After entertaining counsel's arguments, the trial court pronounced sentence and denied Zito probation.

The court selected count 1 (the corporate embezzlement count) as the principal count and imposed the upper term of four years. The court cited four reasons for choosing the upper term: (1) Zito's crime showed "planning and sophistication"; (2) "there was a great amount of loss"; (3) Zito violated a position of trust and confidence; and (4) Zito "rather cruelly stood by" as "a firsthand eyewitness" "to the pain and difficulties that she was causing [Kubes] and [SVC], and that was not sufficient to make her stop." To this four-year base term, the court added another five years of consecutive time for two different loss enhancements—namely, a two-year enhancement under section 12022.6, subdivisions (a)(2) and (b), and a three-year enhancement under section 186.11, subdivision (a)(2).

The court then imposed consecutive subordinate terms of one year (one-third the middle term of three years) on each of the vehicle embezzlement counts (counts 2 through 6). The court acknowledged that the vehicle thefts were part "of an overarching scheme of stealing from the employer." However, the court opted for consecutive rather than concurrent terms. In the court's view, "[t]he crimes were independent of each other"; "[t]hey were committed at different times"; and "there were thefts of different items and vehicles." As such, the crimes were "not part of such a tightly woven scheme that one can say this should be treated as part and parcel of the same ongoing offense." The court stayed the parallel grand theft counts under section 654. The court also ran the tax fraud and other theft

conviction consecutively, yielding a total sentence of 18 years. The court did not impose the mandatory court facilities assessment for each count as required by Government Code section 70373.[3]

DISCUSSION

I. *The Prosecution Was Timely*

Zito argues that her convictions under counts 1 through 5 and 7 through 11 must be overturned because the jury's finding that the prosecution was timely is not supported by substantial evidence. Specifically, she argues that Kubes was not reasonably diligent in uncovering her embezzlement. We review the jury's finding for substantial evidence (*People v. Wong* (2010) 186 Cal.App.4th 1433, 1444 (*Wong*)), and that finding is amply supported here.

For crimes involving breach of a fiduciary duty or grand theft, the statute of limitations period is four years and begins to run once the commission of the offense is discovered or completed, whichever comes later. (§§ 801, 801.5, 803, subd. (c).) For these purposes, a crime is discovered when the victim or law enforcement (1) learns of the crime or (2) "learns of facts which, when investigated with reasonable diligence, would make the person aware that a crime had occurred. [Citation.]" (*People v. Bell* (1996) 45 Cal.App.4th 1030, 1061; *People v. Zamora* (1976) 18 Cal.3d 538, 571-572.) Under the second prong, the facts must indicate that a crime, criminal activity or, at a minimum, wrongdoing, has occurred. (*Zamora*, *supra*, at pp. 571-572; *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 334 (*Kronemyer*).) Facts indicating a loss or other irregularity are not enough by themselves to trigger the running of the limitations period. That is because "[t]he law does not require an employer to investigate an employee absent circumstances that are sufficient to make the employer suspicious *of a crime*." (*Wong*, *supra*, 186

[3] Because this was erroneous, as the Attorney General concedes, we modify the sentence to impose the $30 fee for each of the 18 counts. (Gov. Code, § 70373, subd. (a)(1); *People v. Mendez* (2010) 188 Cal.App.4th 47, 60-61 [fee applies to convictions entered after statute's January 1, 2009 effective date].)

Cal.App.4th at p. 1447, italics added; *Kronemyer*, *supra*, at p. 334; *People v. Lopez* (1997) 52 Cal.App.4th 233, 248.) A victim's duty to investigate is even less onerous when a fiduciary relationship is involved. (*People v. Crossman* (1989) 210 Cal.App.3d 476, 482.)

Zito argues that Kubes should have started double checking her work from the outset. At a minimum, Zito contends, Kubes was surely alerted that something was amiss when SVC's profits did not match his expectations, when he had to repeatedly loan SVC money, when Zito sent the wrong sales figures to the accountant, and when Zito asked to have her assistant moved.

Zito's contention that Kubes was obligated to be suspicious from the beginning is wrong as a matter of law because it would impose a duty to investigate on the date of hire. The remaining factors Zito cites at best alerted Kubes to a possible loss or to Zito's incompetence; they did not alert him to any crime or wrongdoing. Kubes's accountant found nothing unusual or criminal about SVC's profit margin or the submission of the wrong sales figures. Kubes regularly loaned money to SVC. Kubes reasonably interpreted Zito's reaction to the assistant as a concern about job security. In sum, the jury's finding that these facts did not put Kubes on notice of criminal wrongdoing is supported by substantial evidence.

II. *The Embezzlement of Cash and Vehicles Are Separate Offenses*

Zito next argues that her five embezzlement convictions for the SVC vehicles must be overturned. She asserts that those counts are not "separate and distinct" from the embezzlement of cash underlying count 1. Separate convictions, she argues, run afoul of *People v. Bailey* (1961) 55 Cal.2d 514 (*Bailey*). Zito argues that she ran one scheme, with a single overarching intent to steal from SVC and a single methodology of removing checks or cash from the daily deposits. Because Zito did not submit the issue to the jury, our review is limited to assessing whether, as a matter of law, the "only reasonable conclusion that the jury could have drawn" was that *Bailey* bars multiple convictions. (*People v. Jaska* (2011) 194 Cal.App.4th 971, 983-985 (*Jaska*).)

Under *Bailey*, a defendant may be convicted of multiple counts of theft or embezzlement against the same victim if "the evidence shows that the offenses are separate and distinct and were not committed pursuant to one intention, one general impulse, and one plan. [Citation.]" (*Baile*y, *supra*, 55 Cal.2d at p. 519; *Jaska*, *supra*, 194 Cal.App.4th at p. 981.) *Bailey*'s mandate is nuanced. *Bailey* requires more than a showing that the defendant had the common intent to steal from the victim. Instead, *Bailey* turns on a fact-intensive inquiry into the similarity of the offenses, their proximity, and even the defendant's motive in committing them. (*Jaska*, *supra*, at pp. 984-985.)

Thus, when a defendant is engaged in a continuous scheme using the same methods and obtaining the same objects, separate charges are inappropriate. (*See People v. Packard* (1982) 131 Cal.App.3d 622, 626-627 [defendant's scheme to falsely bill movie studio may not be broken into three crimes, one for each calendar year]; *Kronemyer*, *supra*, 189 Cal.App.3d at p. 364 [defendant's scheme to drain victim's four bank accounts may not be broken into four crimes, one for each account]; *People v. Tabb* (2009) 170 Cal.App.4th 1142, 1149 [defendant's scheme to steal and resell scrap metal may not be broken into multiple counts]; cf. *People v. Camillo* (1988) 198 Cal.App.3d 981, 993-994 [defendant's scheme to obtain welfare payments properly charged as a single offense].) Similarly, multiple convictions are prohibited when the defendant steals multiple objects as part of the same indivisible transaction. (See *People v. Richardson* (1978) 83 Cal.App.3d 853, 866, overruled on other grounds in *People v. Saddler* (1979) 24 Cal.3d 671, 682, fn. 8 [defendant's theft of four warrants for money at same time may not be broken into four counts, one for each warrant]; *People v. Brooks* (1985) 166 Cal.App.3d 24, 30-31 [defendant's theft from 14 consignees at a single auction may not be broken into 14 counts, one for each victim]; *People v. Gardner* (1979) 90 Cal.App.3d 42, 47 [defendant's simultaneous shooting and theft of five pigs may not be broken into five counts, one for each pig].)

But when the defendant uses different means or acts opportunistically, separate charges are permissible. Thus, in *Jaska*, the court upheld separate charges against an employee who embezzled from his employer from the petty theft account, from company checks, and from the payroll account. (*Jaska*, *supra*, 194 Cal.App.4th at pp. 971, 985; see also *People v. Church* (1989) 215 Cal.App.3d 1151, 1159 [defendant properly charged with three petty-theft-with-a-prior counts for thefts from three offices in same building]; *People v. Woods* (1986) 177 Cal.App.3d 327, 331-332 [defendant properly charged with 12 counts, one for each bank account she used under a fictitious name, as part of a scheme to commit welfare fraud]; *People v. Sullivan* (1978) 80 Cal.App.3d 16, 20-21 [defendant not barred, as a matter of law, from being charged separately for each cashier's check created from deposit of single victim's check, but court erred in not submitting issue to jury as defendant requested].)

The facts underlying the embezzlement counts in this case do not compel the conclusion that they are all part of the same "intention," "impulse" or "plan." The embezzlements charged in counts 1 through 6 dealt with different items (cash and different vehicles), were committed on different dates, and had different purposes (to use, to give away, and to resell). Although Zito admittedly sought to steal from SVC when she embezzled the vehicles and the cash, "*Bailey* does not prohibit multiple convictions where the defendant commits a series of thefts based on *separate* intents, even if the defendant acts pursuant to the *same* intent on each occasion. [Citation.]" (*Jaska*, *supra*, 194 Cal.App.4th at p. 984.) Because the method, object, and motive varied in each of the six counts, their consolidation is not mandated as a matter of law.

III. *The Theft Offenses Are Not Lesser-Included Offenses of the Embezzlement Offenses*

Zito further asserts that the grand theft counts (in counts 7 through 12) must be vacated for two reasons. First, she posits that a jury following the court's instructions could not find that she violated the corporate embezzlement statute

without also finding that she violated the grand theft statute. Because the elements of these two crimes overlap, she contends her convictions of the lesser-included grand theft offense must be overturned under *People v. Reed* (2006) 38 Cal.4th 1224, 1227-1228. Second, Zito argues that embezzlement is a theft offense under section 490a, and it is impermissible to stand convicted of the same crime under two different theories.

Each of Zito's arguments was rejected in *People v. Nazary* (2010) 191 Cal.App.4th 727. There, the defendant argued that grand theft by an employee was a lesser-included offense of embezzlement by an employee under section 508. The Court of Appeal rejected the argument because each crime required proof of an element the other did not—namely, theft required proof of intent to deprive the owner of the property, and embezzlement required proof of intent to defraud. (*Nazary*, *supra*, at p. 742.) It further rejected the defendant's subsidiary argument that these two offenses were not separate crimes, but were instead alternative theories underlying a single crime of theft. The Court concluded that "the elements of embezzlement and grand theft by an employee, and the distinction between them, continue to exist. [Citations.]" (*Ibid.*; accord *People v. Davis* (1998) 19 Cal.4th 301, 304.)

Nazary controls. Here, the statutory elements of grand theft and corporate embezzlement each contain a different element. Grand theft requires proof of intent to deprive the owner of the property stolen. (CALCRIM No. 1806.) Embezzlement requires proof of intent to injure or defraud and that the defendant be an officer of a corporation. (CALCRIM No. 3410.) It does not matter that the grand theft instruction in this case cross-referenced the corporate embezzlement instruction for the definition of "embezzlement." The instruction incorporated the definition for the *act* of embezzlement; in no way did it incorporate the *intent* for embezzlement. The offenses are distinct. Because they are, *Nazary* compels our rejection of Zito's related argument that her theft convictions are invalid because they are alternate theories of a singular crime of theft.

IV. *Zito's Sentence Is Not Defective*

Zito raises two challenges to her sentence. She contends that the trial court violated California Rules of Court, rule 4.420(c) because its reasons for imposing the upper term sentence on the principal embezzlement count were already elements or enhancements of that offense. She also asserts that the trial court erred in imposing consecutive sentences for the subordinate embezzlement counts because they were part of the same overarching scheme.

Zito has forfeited these claims by failing to object to the trial court's sentence. (*People v. Scott* (1994) 9 Cal.4th 331, 350-353.) Zito asks us to excuse her forfeiture because she had no opportunity to object. A court need not explain its reasoning with a tentative sentence before pronouncing judgment as long as the court is willing to consider objections "at any time during the sentencing hearing . . . ." (*People v. Gonzalez* (2003) 31 Cal.4th 745, 752.) Although Zito raised no objections after the court pronounced sentence, the record indicates that Zito was advised of the possibility of an upper term and consecutive sentences in the Probation Report, was given ample time to address the court prior to the pronouncement of judgment, and was asked if there was "anything else" to address after the pronouncement. Zito's counsel was also not ineffective for not objecting because, as we discuss next, her arguments lack merit.

Zito's objection to the imposition of the upper term fails. We may set aside a sentence "only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper. [Citation.]" (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433-434.) Even if we accept Zito's argument that the trial court's reference to planning and sophistication, the amount of loss and the violation of a position of trust constitutes a prohibited "dual use of facts," we have no doubt that the trial court would have imposed the upper term based on the fourth factor alone—that Zito was unmoved by the hardship her crimes caused. Because a single factor can support the imposition of

an upper term sentence (*People v. Castellano* (1983) 140 Cal.App.3d 608, 615), there is no basis for reversal.

Zito's objection to the imposition of consecutive sentences fails for much the same reason we rejected her *Bailey* claim. Her embezzlement of the vehicles was sufficiently distinct from her embezzlement of cash. Those crimes were "committed at different times . . ., rather than being committed so closely in time and place as to indicate a single period of aberrant behavior." (Cal. Rules of Court, rule 4.425(a)(3).) We find no error in her sentence.

DISPOSITION

We modify the judgment to include the imposition of a court facilities fee of $30 per count (18 counts for a total of $540) and instruct the superior court to amend the abstract of judgment accordingly and forward a copy to the Department of Corrections and Rehabilitation. We affirm the judgment in all other respects.

NOT TO BE PUBLISHED.

HOFFSTADT, J.*

We concur:

GILBERT, P. J.

PERREN, J.

* Assigned by the Chairperson of the Judicial Council.

James P. Cloninger, Judge

Superior Court County of Ventura

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