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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. HERBERT JOHNSON, Defendant and Appellant.	B226355 (Los Angeles County Super. Ct. No. SA072751)

APPEAL from a judgment of the Superior Court of Los Angeles County, Harold Cherness, Judge. Affirmed as modified.

Johanna R. Pirko, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary Sanchez and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Herbert Johnson, appeals the judgment entered following his conviction for burglary, forgery and attempting to file a false or forged instrument, with prior serious felony conviction and prior prison term findings (Pen. Code, §§ 459, 470, 115, 667, subd. (b)-(i), 667.5).[1] He was sentenced to state prison for a term of seven years.

The judgment is affirmed as modified.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

a. *The purported sale of the house on 21st Place.*

Kevin McCauley is a housing developer who rehabilitates and sells older homes through his company, Sandalwood Properties. One of the properties he rehabilitated was a 7,000 square foot, five-bedroom house located on 21st Place in Santa Monica. In the spring of 2008, McCauley listed this house for sale at $4,995,000. As of November 2009, the house remained unsold.

McCauley's wife, Leslie, is a real estate agent. She showed the 21st Place house to prospective buyers two or three times a week. The house was unoccupied and had been filled with staged furnishings. The utilities, including electricity, water and gas, remained turned on with Sandalwood Properties paying the utility bills. Leonard DaSilva, who had been a real estate agent for ten years, also showed the house.

DaSilva first met defendant Johnson during an open house at 21st Place. Johnson was accompanied by a young man whom he introduced as his nephew. Johnson asked about the neighborhood, general property values, and the particular value of this house. He appeared to be genuinely interested.

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

Johnson subsequently called DaSilva and said he wanted to buy the house. Johnson said he would not be using an agent, but would represent himself. DaSilva said he needed a 3 percent deposit and a real estate contract in order to begin the sales process. Johnson seemed to agree to the real estate contract, but he mentioned using something called a "trade acceptance" to pay for the house. DaSilva said he didn't know what that was. DaSilva testified he later googled the term trade acceptance: "It seemed to be some very old fashioned agreement between two companies." Although DaSilva told Johnson a trade acceptance was not an acceptable method of purchasing the house, Johnson insisted it was. They had several more phone conversations. Johnson was supposed to email DaSilva a real estate contract, but said he was having difficulty transmitting it and DaSilva never received one.

On the afternoon of October 30, 2009,[2] Johnson and his son, Jahherb, went to the notary office of Paul Oliveras. Johnson presented a document for notarization which appeared to be a quitclaim deed for the house on 21st Place, purporting to transfer Johnson's interest in the house to Jahherb. Johnson and his son offered their identifications and fingerprints, and Oliveras notarized the document. On the afternoon of November 3, the notarized quitclaim deed was recorded at the Los Angeles County Recorder's Office.

Also on November 3, Johnson called DaSilva and said his nephew would be coming to DaSilva's office with a sales agreement and a check for the house. That night, the same young man DaSilva had met at the open house arrived at DaSilva's office, handed him an envelope and quickly left. When DaSilva opened it, he found a document which looked something like a check and purported to pay Sandalwood Properties the nearly $5 million asking price for the house. However, the document was obviously not a real check because there was no bank name or any bank routing numbers, and it contained several misspellings. DaSilva knew within seconds the document was a worthless piece of paper.

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[2] All further calendar references are to the year 2009 unless otherwise specified.

Johnson called DaSilva several times to ask if he had given the check to the owners. When DaSilva said he had not done so because it wasn't a real check, Johnson insisted the document was a valid check and that he had now tendered the full price for the house. He asserted this was a valid way to purchase real estate and that all DaSilva had to do was deposit the check in a bank or give it to the owners. They eventually reached an impasse because Johnson was either unwilling or unable to understand what DaSilva was telling him.

On November 6, Leslie McCauley discovered a copy of the purported quitclaim deed posted on the front door of the house where she and her husband lived. The quitclaim deed looked official and Leslie testified "it appeared that the house no longer belonged to Sandalwood Properties."

b. *The burglary at 21st Place.*

On November 6, the gardener arrived to work on the 21st Place house. He noticed the "For Sale" sign had been taken down and when he tried to get into the backyard he found the gate had been locked. Then he saw a stranger inside the house, so he called Kevin McCauley, who told him the house had not been sold and asked him to investigate. When the gardener knocked, a young man opened the door and said, "My uncle just bought the house." The gardener called the police to report a burglary.

When officers arrived, the young man was still inside the house and he was detained. He turned out to be Johnson's nephew, Antonio Oliver. The officers searched the house and found some real, i.e., non-staged items: a desktop and a laptop computer, a flat screen television, and a duffel bag containing an iPod and a Playstation gaming system. The laptop's screen displayed an active internet webpage. When an officer minimized the webpage, he saw a folder on the desktop screen; opening the folder, he discovered a quitclaim deed for the 21st Place house.

Leslie McCauley arrived at the house while the police were still there. She discovered her keys no longer opened the front door and that there were several items inside the house that did not belong there. One item was a set of keys police had found on a night stand in an upstairs bedroom; the bed appeared to have been slept in. One of

the keys opened the front door and the other opened a newly installed padlock on the backyard gate. A surveillance video taken by the front door's security camera showed a group of people approaching the front door of the house on November 5.

Oliver testified that on November 5 his cousin Jahherb invited him to "come check this house out my dad got." That night Oliver, his mother and several members of Johnson's family met at the 21st Place house to celebrate Johnson's purchase. During the gathering, Johnson announced: "I'm gonna take care of some business. I need somebody to watch the house." Because Oliver didn't have anything to do, he agreed to look after the house the following day. Either Johnson or Jahherb gave Oliver the house key so he could get in.

When Oliver arrived the next day, he brought with him a desktop computer, a television and a Playstation, so that he wouldn't be bored. Although Johnson already had a laptop computer at the house, which could access the internet, Oliver brought the desktop computer because he wanted to watch movies. He used the laptop to chat with friends on the internet via Facebook and Myspace. Oliver described being at the house that day and encountering the gardener. Up until the moment the police arrived and arrested him, Oliver had no idea there was anything wrong. He testified that, other than staying at the house, he had not had any other dealing with the house; he had not visited any notary or real estate agent.

Johnson went to the police station to find out why Oliver had been arrested. He gave Officer Richard Verbeck copies of the quitclaim deed and the check he had given DaSilva. Verbeck spoke with Johnson for a while and then arrested him. Upon searching him, Verbeck found copies of the two new keys.

Kevin McCauley testified it had cost $680 to change the locks after Oliver was discovered inside the house on 21st Place. McCauley's company, Sandalwood Properties, was paying for all the utilities at the house while it was on the market. As of the time of McCauley's testimony in June 2010, official title to the house was still in the name of Jahherb Johnson.

2. *Defense case.*

Dr. Ronette Goodwin-Matthews, a psychologist, examined Johnson for the defense. Johnson's medical records indicated he had incurred a severe head injury in a 1979 car accident, after which he was in a coma for five days, hospitalized for two months, and had to relearn how to speak, move his limbs, and feed himself. Upon discharge from the hospital, Johnson still had cognitive impairments, including difficulties with problem solving, judgment and reasoning.

Regarding the charges Johnson was currently facing, Goodwin-Matthews reviewed the preliminary hearing transcript and a probation report, and spoke with staff at the Twin Towers Correctional Facility. From these sources, she noted certain "bizarre statements" by Johnson about "being a national American," "banks functioning through the circulation of motivated exchange," using "a trade acceptance in purchasing a home" and, "as a national American, having a $10 million deposit in the Virgin Islands." Goodwin-Matthews testified these kind of statements which "didn't make sense" or "have any basis in reality" were "some of the things that I look for in making a diagnosis." Goodwin-Matthews also testified Johnson made similar bizarre statements when she interviewed him, and that he particularly focused on being able to use a trade acceptance to purchase property.

Goodwin-Matthews testified Johnson had been diagnosed at Twin Towers as suffering from a "delusional disorder" because of his "poor thought processes, . . . fixed beliefs, [and inability] to entertain alternate views," and was being treated with Risperdal, an anti-psychotic medication. Other records showed Johnson had previously been hospitalized at Patton State Hospital after having once been declared incompetent to stand trial.

Goodwin-Matthews did psychological testing on Johnson. She opined he was not malingering and that he scored in the impaired range on executive functioning tests, indicating problems with his memory as well as his ability to learn from past experiences and process new information.

In their interviews, however, Johnson was adamant there was nothing wrong with him: "He felt that he was competent, there was nothing wrong with him, that I needed to understand the trade acceptance and that this assessment was pointless because every national American has the right to conduct such a transaction." Goodwin-Matthews also testified, "One of the I.Q. questions is a general question when I'm looking at comprehension, 'Why should people pay taxes?' [¶] Well, I couldn't get a direct response. His response [was] more people should not pay taxes. Every national American – just kind of went off into a tangent about this other area."

Based on all the information she had reviewed and on her psychological testing, Goodwin-Matthews opined Johnson was suffering from both a delusional disorder and a "cognitive disorder and . . . organic brain syndrome." Organic brain syndrome is a physical disorder leading to a decrease in mental functioning as a result of brain damage. A delusion as "a very fixed belief . . . that is not based in reality." Goodwin-Matthews opined Johnson's belief that he could purchase real estate with a trade acceptance was such a delusion.

When defense counsel asked, "Does it affect your diagnosis of Mr. Johnson at all if you learned that he was involved and convicted of a charge similar to what he's facing here back in 1989, that also involved a quitclaim deed that did not appear to be true? Does that . . . piece of information affect your diagnosis of him today? Goodwin-Matthews testified: "It's the same diagnosis. An organic brain syndrome, cognitive disorder, it's the same diagnosis." Asked, "Is it your opinion that Mr. Johnson, even though it's completely unreasonable and untrue, really truly believes that a trade acceptance is a valid means of acquiring property in the United States?" Goodwin-Matthews said, "Yes, he still does." She testified Johnson's delusional beliefs about financial transactions were the result of his brain injury.

CONTENTIONS

1. There was insufficient evidence to sustain the conviction for burglary.

2. There was insufficient evidence to sustain the conviction for forgery.

3. The trial court misinstructed the jury on the elements of attempting to file a false or forged instrument.

4. The trial court erred by refusing to instruct the jury on a claim-of-right defense.

5. There was prosecutorial misconduct.

6. The trial court's inquiry into potential juror bias was flawed.

7. There was cumulative error.

8. The trial court erred by refusing to dismiss a Three Strikes prior.

9. The trial court erred by imposing a 15 percent limitation on presentence custody credit.

DISCUSSION

1. *There was sufficient evidence to sustain the burglary conviction.*

Johnson contends there was insufficient evidence to sustain his conviction for burglary. He argues the prosecution failed to prove either of the two theories on which the commission of burglary had been predicated: that Johnson entered 21st Place with the intent to commit petty theft by using the home's utilities, or that he entered 21st Place with the intent to take possession of the house by false pretenses. We conclude there was sufficient evidence to sustain both theories.

a. *Legal principles.*

"The crime of burglary consists of an act—unlawful entry—accompanied by the 'intent to commit grand or petit larceny or any felony.' (§ 459.) One may be liable for burglary upon entry with the requisite intent to commit a felony or a theft (whether felony or misdemeanor), regardless of whether the felony or theft committed is different from that contemplated at the time of entry, or whether any felony or theft actually is committed." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041-1042, fn. omitted.) That is, "the gist of [burglary] is *entry* with the proscribed intent, and . . . such an entry

constitutes the completed crime of burglary 'regardless of whether . . . any felony or theft actually is committed.' [Citation.]" (*People v. Allen* (1999) 21 Cal.4th 846, 863, fn. 18.)

"Commonly, [the burglar's intent to commit a felony or theft] must be inferred from the circumstances of the charged offense or offenses. [Citation.] ' "While the existence of the specific intent charged at the time of entering a building is necessary to constitute burglary in order to sustain a conviction, this element is rarely susceptible of direct proof and must usually be inferred from all of the facts and circumstances disclosed by the evidence." [Citation.]' " (*People v. Holt* (1997) 15 Cal.4th 619, 669.) " ' "When the evidence justifies a reasonable inference of felonious intent, the verdict may not be disturbed on appeal. [Citations.]" ' [Citation.]" (*People v. Cain* (1995) 10 Cal.4th 1, 47.)

A burglar's culpable specific intent can include a wide variety of felonies that do not involve removing property from the building. (See *People v. Mason* (1960) 54 Cal.2d 164 [entry with intent to commit felonious assault]; *People v. Martinez* (2002) 95 Cal.App.4th 581 [entry with intent to take a shower, which involved using victim's soap, shampoo and water]; *People v. Rehmeyer* (1993) 19 Cal.App.4th 1758, [entry with intent to commit indecent exposure]; *People v. Salemme* (1992) 2 Cal.App.4th 775 [entering victim's home to sell fraudulent securities]; *People v. Nance* (1972) 25 Cal.App.3d 925 [entry with intent to activate electric switch so exterior gas pump could be accessed].)

Nevertheless, the fundamental purpose of the burglary statute " 'remains an entry which invades a *possessory* [*interest*] in a building.' " (*People v. Davis* (1998) 18 Cal.4th 712, 725.) A possessory interest is "[t]he present right to control property, including the right to exclude others." (Black's Law Dict. (8th ed. 2004).)

b. *Evidence showing Johnson intended to commit any crime upon entry*.

Johnson contends there was no evidence he intended to commit *any crime whatsoever* when he entered the house: "Instead, if the evidence showed anything it was that, at the time appellant entered the house, he genuinely believed that he had purchased the house with a 'trade acceptance.' " Johnson argues he demonstrated at trial "that his

misconduct was driven by a 'delusion,' which led him to believe he, like every 'national American,' had at his disposal a $10 million Virgin Islands account with which he could purchase a $5 million house using a 'trade acceptance.' Based on this evidence, the prosecution failed to satisfy its burden [to] prove beyond a reasonable doubt that, at the time appellant entered the house, he *intended* to commit theft or any felony."

But this argument fails because the jury was not obligated to accept Johnson's state-of-mind evidence. Although Dr. Goodwin-Matthews opined Johnson's belief in the legitimacy of his purported real estate transaction was an honestly held delusion, the jury obviously disbelieved her testimony.

c. *Evidence of intent to commit petty theft.*

Johnson also contends there was insufficient evidence to prove either of the specific burglary theories presented by the prosecution. We disagree with this claim as well.

Johnson acknowledges entry with the intent to use the home's utilities can form the basis for a burglary conviction. (See *People v. Martinez, supra,* 95 Cal.App.4th at pp. 584–585 [intent to take a shower and use victim's soap and water]; see also *People v. Dingle* (1985) 174 Cal.App.3d 21, 29 [intent to make unauthorized long-distance telephone calls].) As *Martinez* explained: "The core of [defendant's] challenge is that the 'miniscule amount' of soap, shampoo and water used are not of sufficient value to qualify as property. Unfortunately for Martinez, California has drastically modified the common law definitions of property under the theft statutes. Under current California law, the item of property need only have some intrinsic value, however slight. . . . [¶] . . . [I]t is clear that the taking of any item of personal property of even slight intrinsic value can constitute larceny in California. [¶] Applying these principles to the present case, we are satisfied that intending to use the soap, shampoo and hot water of the homeowner constituted an intent to commit a larceny under the circumstances of this case. Each of the items to be taken and consumed would have some, albeit slight, intrinsic value. That is all that is required for the item to be a proper subject of larceny in this state." (*People v. Martinez, supra,* 95 Cal.App.4th at pp. 585-586.)

However, citing *In re Leanna W.* (2004) 120 Cal.App.4th 735, Johnson argues "the prosecution failed to present any evidence that appellant intended to use the utilities at the time he entered the house, or that he actually used the utilities once inside the house. As . . . explained in *In re Leanna W.*, this absence of evidence is fatal to a burglary claim based on incidental utility usage."

But Johnson's reliance on *Leanna W.* is misplaced. In that case, Leanna threw a going-away party for herself[3] at her grandmother's house at a time when her grandmother was gone and she did not have permission to use the house. Leanna invited to the party 30 or 40 people who consumed alcohol, stole cash and property from the house, and incurred a Direct TV bill for watching a boxing match and adult movies. The juvenile court concluded it could not sustain a grand theft allegation because of insufficient evidence as to what Leanna herself had done during the party. The court of appeal then concluded the same reasoning should have prevented the juvenile court from making true findings on the burglary and vandalism allegations, explaining:

"[T]he consumption of [the grandmother's] alcohol could create an inference of intent to commit a theft or felony at the time of entry into the home. Critical to this rationale, however, is a conclusion that Leanna actually took or consumed the alcohol. But the trial court expressly found that it could not tell what Leanna did while she was in the home. The fact that Leanna was present when the liquor was used does not show that she actually consumed it, much less that she had the specific intent to take it when she entered the house. The mere possibility that Leanna consumed the alcohol raises nothing more than a suspicion, which does not form a sufficient basis for an inference of fact. [Citation.] [¶] The additional basis for the court's finding of intent to commit burglary in this case was the fact that 'utilities were used' in the form of lights and 'flushing the toilet.' However, as in the case of the alcohol consumption discussed above, the record contains a dearth of evidence that Leanna actually used the home's utilities. Leanna's

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[3] Leanna had recently run away from her juvenile placement and her grandmother bought her a one-way bus ticket to Montana, where Leanna's mother lived.

grandmother testified that she and her husband left the kitchen light on continuously in their absence, and that other lights in the home were left on timers to come on at different times throughout the night. Therefore, there was no evidence that it was necessary for anyone to turn on any lights at any time throughout the evening. Moreover, the lack of clarity of Leanna's activities in the house makes the finding of utility use insufficient to support an inference of intent." (*Id*. at p. 741-742.)

Leanna W. is inapposite because it involved a one-time only event, a period of a few hours during which it was unknown what acts the juvenile herself had committed. And, given the very nature of the event, there was clearly not going to be an ongoing occupation of the house.

Here, on the other hand, the fact Johnson had the locks changed showed he did intend to commit an ongoing occupation of the property, which presumably included his intention of taking up residence there. As such, the fair inference is that Johnson entered with the intention of using the home's utilities. Moreover, there was evidence Oliver had actually used electricity during the day he spent at the house, and a fair presumption he probably used water as well.

Johnson complains "the record is barren of evidence concerning *when* the front door lock was changed," and "does not show that [he] changed the locks *before entering the house*, rather than at some point after entry, so as to support the theory that he intended at the time of entry to use the house utilities." However, it was probably impossible to change the front door lock without entering the house. (See *People v. Garcia* (2004) 121 Cal.App.4th 271, 280 [entry for burglary occurs if any part of intruder's body or any tool or instrument wielded by intruder is inside the premises].) In any event, the locks were certainly changed shortly after Johnson's initial entry, which was soon enough to permit the inference he entered with intent to take possession of the house and use its facilities. (See *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1246 ["if the defendant commits, or gives some indication of intending to commit, theft or a felony in a building shortly after entering it, no great inferential leap is necessary to conclude that the intent to commit the supporting offense existed at the time of entry"].)

Johnson also argues "there was no evidence that *appellant – rather than another member of his family* – changed the front door lock. The only evidence was that the lock was changed and that either appellant or Jahherb gave Oliver a front door key. While it could be speculated that appellant ordered the locks changed, because there is no evidence to support this theory, it must be rejected." Not so. All the evidence showed Johnson was the person in charge of the operation here: he was the one who contacted the real estate agent, purported to buy the house with a $5 million check, purported to quitclaim the house to his son, and asked Oliver to occupy the house and keep an eye on it while Johnson was gone. The evidence certainly gave rise to the legitimate inference Johnson either changed the locks himself or directed that it be done.

Hence, there was sufficient evidence to sustain Johnson's burglary conviction on the theory he intended to commit petty theft.

d. *Evidence of intent to commit theft of real property by false pretenses.*

"Section 484, subdivision (a) provides: 'Every person . . who shall knowingly and designedly, by any false or fraudulent representation or pretense, defrauds any other person of . . . real . . . property . . . is guilty of theft.' [¶] Section 484, subdivision (a) defines the crime of *theft of real property by false pretense*. Proof of this crime requires that the prosecution establish: (1) the defendant made a false pretense or representation; (2) he did so with intent to defraud the owner of the property; and (3) the owner was in fact defrauded. [Citations.]" (*People v. Sanders* (1998) 67 Cal.App.4th 1403, 1411.)

As Johnson notes, the prosecution based its false pretenses theory "on appellant's purported attempt, at the time he entered the house, to continue to deceive the McCauleys into believing the $5 million 'check' was genuine." Johnson argues the evidence was insufficient because everyone knew his representations about the check were false, citing *People v. Alba* (1941) 46 Cal.App.2d 859, 867, which noted "the crime of theft, accomplished by means of false representations . . . may not be consummated when the owner of the money or property knows the statements are false." But Johnson was not convicted of having consummated the crime of theft by false pretenses; rather, he was convicted of burglary for having *entered* another's house *with the intent of committing*

theft by false pretenses. "An intent to commit theft by a false pretense . . . will support a burglary conviction." (*People v. Parson* (2008) 44 Cal.4th 332, 354.)

Moreover, an *unsuccessful attempt* to commit the target offense is extremely persuasive evidence of what the defendant's intention was at the moment of entry. (See, e.g., *People v. Rehmeyer, supra,* 19 Cal.App.4th at pp. 1765-1766 [defendant's attempted commission of indecent exposure in victim's bedroom provided sufficient evidence to sustain burglary conviction based on entry with intent to commit indecent exposure].)

As a result, there was no need to prove anyone had actually been deceived by Johnson's check in order to convict him of burglary with intent to commit theft by false pretenses. "[I]n a prosecution for *attempted* grand theft by false pretenses it is not necessary that the defendant's intended victim be deceived by the falsity of the representations made to him." (*People v. Camodeca* (1959) 52 Cal.2d 142, 146-147, italics added; see also *People v. Fujita* (1974) 43 Cal.App.3d 454, 467 [if defendants made false representation, with intent to defraud victim, no need to show victim's reliance on the false representation to sustain conviction for attempted theft by false pretenses].)[4]

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[4] The same reasoning defeats Johnson's related argument that the second burglary theory failed because the alleged false pretense was not accompanied by a "false token" as required by statute. Even assuming arguendo Johnson's legal argument is correct, that only means he could not have been convicted for a *completed* theft by false pretenses. In *People v. Rehmeyer, supra,* 19 Cal.App.4th at p. 1767, the defendant argued "that since indecent exposure is a felony only if it takes place in an inhabited dwelling house or structure . . . , the crime does not obtain felony status until after the act of exposure has taken place inside an inhabited dwelling structure. Therefore, Rehmeyer reasons, he could not have had the requisite felonious intent for burglary when he entered the residences of Brenda C. and Christina S., and his burglary convictions for those incidents cannot stand as a matter of law." The court of appeal rejected this argument: "Whether Rehmeyer knew the intricacies of section 314 that made the act of exposure inside an inhabited dwelling structure a felony rather than a misdemeanor is irrelevant to an analysis of whether he had the requisite felonious specific intent for burglary." (*Ibid*.)

In sum, we conclude there was sufficient evidence to sustain Johnson's burglary conviction on both of the theories put forth by the jury instructions.

2. *There was insufficient evidence to sustain the conviction for forgery*.

Johnson contends his conviction on count 3 for forgery must be reversed for insufficient evidence because the purported check, "which did not contain a bank name or routing numbers, and which was marred by misspellings . . . was so obviously defective that no one could have believed it was genuine." This claim has merit.

"California early adopted the rule which was well settled by precedents that to constitute the crime of forgery, the forged instrument must be one which, if genuine, must be legally capable of working the intended fraud or injury. [Citation.] The rule was clarified in *People v. Munroe* [(1893) 100 Cal. 664], which held that while an instrument which is clearly void on its face is not the subject of forgery, the mere fact that an instrument is legally unenforceable is not a defense to a prosecution for forgery so long as upon its face it may have the effect to defraud one who acts upon it as genuine. [Citations.] [¶] . . . [¶] The purpose of the statute against forgery is to protect society against the fabrication, falsification and the uttering of instruments which might be acted upon as being genuine. The law should protect, in this respect, the members of the community who may be ignorant or gullible as well as those who are cautious and aware of the legal requirements of a genuine instrument. An instrument is not the subject matter of forgery only where it is so defective on its face that, as a matter of law, it is not capable of defrauding anyone." (*People v. Jones* (1962) 210 Cal.App.2d 805, 808-809.)

The Attorney General asserts Johnson's check, "which in all aspects, aside from the absence of a bank name and a bank number, resembled a check, was certainly not 'incapable' of deceiving anyone as it certainly would be capable of defrauding a careless, inexperienced, and undereducated recipient of such an instrument." We must disagree.

Although the document is printed on the sort of paper stock generally used for writing checks, and although there is some very official-looking printing on the back,[5] the front side of the document is immediately suspicious. There is no bank name anywhere and there are no bank account or routing numbers along the bottom. Although the payment amount as set forth in numerals correctly says $4,995,000, the spelled-out amount is different, saying: "Four Million Nine Hundred Nintyfive [*sic*] and 00/100." Underneath the payment amount, the document states: "The obligation of the Sandalwood Inc. arises out of the service 'retained' by the acceptor." Underneath that, the following appears: "PAY THUR [*sic*] ANY U.S. BANK."

We agree with Johnson this purported check was so defective on its face that no one would have believed it was genuine. The forgery conviction must be reversed.

3. *Jury instructions on count 2.*

Johnson contends his conviction on count 2 for attempting to file a false or forged instrument (§ 115) must be reversed because of instructional error. This claim is meritless.

a. *The contested instruction.*

Section 115, subdivision (a), provides: "Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within this state, which instrument, if genuine, might be filed, registered, or recorded under any law of this state or of the United States, is guilty of a felony."

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[5] The back side of the document included the usual "Please endorse here" direction and blocked-out space, as well as a printed box at the bottom stating, "This document includes the following Vanguard security features," listing "invisible fluorescent fibers" and "two solvent stains," and including a reference to the "Federal Banking Act 1967."

Johnson's jury was given the following written instruction to take into the jury room:

"The defendant is charged in count 2 with offering a false document for filing or recording, having a false document filed or recorded in violation of Penal Code section 115.

"To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant offered a false document for filing or recording in a public office in California;

"OR

"1. The defendant caused a false document to be filed or recorded in a public office in California;

"AND

"2. When the defendant did that act, he knew that the document was false;

"AND

"3. The document was one that, if genuine, could be legally filed or recorded."

During oral instruction of the jury, the trial court said:

"The defendant is charged in count 2 with offering a false document for filing or recording, having a false document filed or recorded, in violation of Penal Code section 115.

"To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant offered a false document for filing or recording in a public office in California. . . .

"*And also* the defendant caused a false document to be filed or recorded in a public office in California. . . .

"2. When the defendant did that act, he knew that the document was false.

"And 3, the document was one that, if genuine, could be legally filed or recorded." (Italics added.)

b. *Legal principles.*

"The risk of a discrepancy between the orally delivered and the written instructions exists in every trial, and verdicts are not undermined by the mere fact the trial court misspoke. 'We of course presume "that jurors understand and follow the court's instructions." [Citation.] This presumption includes the written instructions. [Citation.] To the extent a discrepancy exists between the written and oral versions of jury instructions, the written instructions provided to the jury will control.' [Citation.] Because the jury was given the correctly worded instructions in written form and . . . because on appeal we give precedence to the written instructions, we find no reversible error." (*People v. Mills* (2010) 48 Cal.4th 158, 200-201, fn. omitted.)

"If a jury instruction is ambiguous, we inquire whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction. [Citations.] ' " '[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' " [Citations.]' " (*People v. Smithey* (1999) 20 Cal.4th 936, 963-964.) An appellate court will examine the jury instructions as a whole, along with the attorneys' closing arguments to the jury, to determine if the instructions sufficiently conveyed the correct legal principles. (See *People v. Kelly* (1992) 1 Cal.4th 495, 524-527 [although trial court erroneously instructed jury it was legally possible to rape a dead body, it was not reasonably likely jury misunderstood correct law regarding felony murder and rape special circumstances given remaining instructions and attorneys' jury argument]; see also *People v. Visciotti* (1992) 2 Cal.4th 1, 58-59 [improper intent instructions were harmless error where closing arguments made jury aware specific intent to kill was element of attempted murder].)

c. *Discussion.*

Johnson argues the written instruction was deficient, because it failed to connect the "offered for filing" theory to the additional elements of knowing falsity and recordability: "[T]o accurately instruct the jury on the count 2 offense, the court needed to – *as to both theories* – separately instruct the jury that appellant was not guilty unless

he knew the deed was false, and the document was one that, if genuine, could legally be filed. However, as to the 'offering' theory the court failed to provide the jury a complete instruction. Rather, as to this theory, the court told [the] jury it had to find *only* that appellant offered the quitclaim deed for filing, whether or not he knew the document was false." Johnson then argues the oral instructions "compounded the confusion stemming from the deficient written instruction by suggesting that the jury would have to find *both* that appellant offered a false document for filing *and* that he caused another to offer a false document for filing."

We conclude, however, that although the oral instruction contained an ambiguity, there was nothing wrong with the written instruction, especially in light of the prosecution's closing argument.

The italicized portion of the oral instruction, *ante*, did seem to require a finding Johnson had *both* offered the document for filing *and* caused the document to be filed, but the written instruction made it clear these were disjunctive, not conjunctive, elements.

As for Johnson's assertion the written instruction was incomplete, we agree with the Attorney General's analysis: "Appellant appears to assert that a potential for confusion could arise in that the jury would only stop at element '1' [of the written instruction] when determining what elements were applicable to the 'offering' theory of this crime[,] while applying all three elements while applying the 'causing to be filed' theory. This cannot be a reasonable reading of the instruction. [¶] Because of the way the elements were numbered, i.e., with a number '1' for the first element (as well as a number '1' for the alternative first element), a presumably intelligent jury would see that the elements designated as numbers 2 and 3 apply equally to either alternate theories [*sic*]. Otherwise, having the designation of a number '1' – which implied there would be a subsequent number '2' – for the first alternative theory would not make sense. In other words, because there was a numbering system to signal the jurors to proceed to number '2' and number '3' for each of the two alternate theories, there could be no confusion that would lead the jury to excise the second and the third elements when determining the 'offering' theory of the crime charged."

Moreover, any possible ambiguity was clarified by the prosecutor's closing argument, which correctly showed the jury how to work its way through the elements of this offense.[6]

We conclude the jury was properly instructed with regard to the section 115 charge.

4. *Claim of right defense instruction.*

Johnson contends all his convictions must be reversed because the trial court refused to instruct the jury on a claim of right defense. This claim is meritless.

a. *Background*.

Defense counsel asked the trial court to give a claim-of-right instruction (CALCRIM No. 1863) because the crucial issue for the jury was "whether Mr. Johnson did or did not know that what he was doing was unlawful." Counsel argued that even though Johnson did not testify, there was other evidence in the record showing he "thought that what he was doing was lawful. [¶] We have all of the conduct that the various witnesses have testified to about him being very out in the open about what was going on here. [¶] We have statements from Mr. Johnson to Mr. [DaSilva] repeatedly saying that he was intending to use the trade acceptance to purchase this property. [¶]. . . [¶] The evidence certainly supports . . . a strong inference that Mr. Johnson went out and filed the quitclaim deed on the house completely out in the open, gave his thumb print, gave his driver's license information. [¶] And there is certainly substantial evidence that when he was acting here, he was doing so under a claim of right."

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[6] The prosecutor first said: "[W]hat you'll see in the instruction is that it says 1 or 1, 2, and 3. 2 and 3 are the same. But you have to decide 1 or 1, and you all have to agree on that. That's the one where unanimity comes in. You all have to agree which act. And once we get into that instruction, we'll talk about the 1 or the 1 and then 2 and then 3." Then, while showing the jury a copy of the written instruction, the prosecutor said: "Now, when I talked about the 1 or 1, this is what I'm referring to right here, 1 or 1 and 2 and 3. This is the only instruction, as I said earlier, that you all have to agree. *You all have to pick either the top one or the bottom one, but all of you have to agree on which No. 1 it is and then agree on No. 2 and No. 3*." (Italics added.)

There was also discussion about a possible mistake-of-fact instruction, with defense counsel arguing this would be more applicable to the section 115 charge for filing the quitclaim deed, whereas the claim-of-right instruction would directly address the burglary charge: "[T]he jury . . . has been provided with substantial evidence that they could determine that Mr. Johnson believed that he had actually lawfully purchased the property. And if that were the case, then that is a mistake as to a fact that affected what he did in filing this quitclaim deed."

The prosecutor complained there had been no direct evidence of what Johnson believed because he did not testify at trial. Alternatively, the prosecutor argued "the claim of right and mistake of fact [instructions] are cumulative. The mental health defense to intent or mental state [in CALCRIM No.] 3428 is directly on point with the defense's theory of the case."

The trial court ruled CALCRIM 3428, the instruction for mental defect or disorder, would be given rather than either a claim of right instruction or a mistake of fact instruction.

b. *Legal principles.*

"The claim-of-right defense provides that a defendant's good faith belief, even if mistakenly held, that he has a right or claim to property he takes from another negates the felonious intent necessary for conviction of theft or robbery. At common law, a claim of right was recognized as a defense to larceny because it was deemed to negate the *animus furandi*, or intent to steal, of that offense. (See 4 Blackstone, Commentaries 230 (Blackstone).)" (*People v. Tufunga* (1999) 21 Cal.4th 935, 938.) " ' "It has long been the rule in this state and generally throughout the country that a bona fide belief, even though mistakenly held, that one has a right or claim to the property negates felonious intent. [Citations.] A belief that the property taken belongs to the taker . . . is sufficient to preclude felonious intent. Felonious intent exists only if the actor intends to take the property of another without believing in good faith that he has a right or claim to it." ' " (*Id*. at p. 943.)

But in the usual claim-of-right cases there is some facially legitimate reason for asserting a good faith belief in the right to another's property. So it was with the two claim-of-right cases cited by Johnson. (See *People v. Marsh* (1962) 58 Cal.2d 732, 737 [trial court improperly excluded evidence that defendants' belief in the curative power of their electrical apparatus was based on information from doctors and scientists]; *People v. Russell* (2006) 144 Cal.App.4th 1415, 1429-1431 [trial court improperly denied claim-of-right instruction where defendant testified he believed motorcycle had been abandoned, testimony supported by cycle's condition and location, and by defendant's non-furtive conduct].)

This case, however, is very different. The basis for Johnson's claim-of-right defense is that he never intended to commit any crime, i.e., not theft, forgery or filing a false document, because at all times he was acting under the *delusion* he had legitimately purchased the house at 21st Place. As Johnson states, his "defense . . . was that his misconduct was driven by a 'delusion,' which led him to believe he – like every 'national American' – had a $10 million Virgin Islands bank account, which he could use to purchase real property via a 'trade acceptance.' Dr. Goodwin-Matthews opined that appellant's delusion stemmed from organic brain syndrome, which he developed as a result of his 1979 traumatic brain injury. She concluded that appellant genuinely believed he could purchase property with a 'trade acceptance,' and that his delusions remained rigidly unaffected by his previous experiences and the influences of others."

Based on CALCRIM No. 3428, the trial court instructed the jury:

"You've heard evidence that the defendant may have suffered from a mental defect or disorder. You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crime, the defendant acted or failed to act with the intent or mental state required for that crime. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant acted or failed to act with the required intent or mental state, specifically – if the People have not met this burden, you must find the defendant not guilty – on count 1, burglary, the intent is the intent to commit a theft; on count 2, false document, the defendant must have known that the

document was false or he knew that the document was false; count 3, forgery, there has to be an intent by the defendant to defraud."

A claim-of-right instruction under CALCRIM No. 1863 would have told the jury, in part: "If the defendant obtained property under a claim of right, (he/she) did not have the intent required for the crime of (theft/ [or] robbery). [¶] The defendant obtained property under a claim of right if (he/she) believed in good faith that (he/she) had a right to the specific property or a specific amount of money, and (he/she) openly took it. [¶] In deciding whether the defendant believed that (he/she) had a right to the property and whether (he/she) held that belief in good faith, consider all the facts known to (him/her) at the time (he/she) obtained the property, along with all the other evidence in the case. The defendant may hold a belief in good faith even if the belief is mistaken or unreasonable. But if the defendant was aware of facts that made that belief completely unreasonable, you may conclude that the belief was not held in good faith."

c. *Discussion.*

Johnson contends that giving only the mental defect instruction deprived him of a fair trial. We disagree.

Johnson complains that "only Dr. Goodwin-Matthews provided expert 'evidence of mental defect or disorder.' While other witnesses testified to facts suggesting appellant had a good faith belief in the legality of his actions, and that he was completely open about his misconduct, none of these witnesses could provide any 'evidence of mental disorder or defect.' Because of this, CALCRIM No. 3428 did not tell the jury what to do with the powerful testimony of these non-expert witnesses." But the instruction says, "You have heard evidence that the defendant may have suffered from a mental defect or disorder," not "You have heard *expert* evidence that the defendant may have suffered from a mental defect or disorder." To the extent this non-expert evidence tended to show Johnson truly believed he had access to a $10 million account in the Virgin Islands, and was entitled to use a trade acceptance to access that money, the evidence would have helped to show Johnson was delusional and we do not see why the jury would have ignored it.

Johnson also complains CALCRIM No. 3428 "tells the jury only that it may 'consider' evidence of mental defect or disorder . . . . Unlike CALCRIM No. 1863, CALCRIM No. 3428 is phrased permissively, permitting but not unambiguously requiring the jury to render a not guilty verdict based on the defendant's mental illness." But this ignores the context of the disputed language: right after noting the jury has received mental defect or disorder evidence, the instruction points out the prosecution was required to prove Johnson had "the required intent or mental state" for each charged offense, and that the jury was obligated to acquit if the prosecution did not meet this burden.

Moreover, there is no doubt the attorneys' closing argument focused the jury on what everyone agreed was the only contested issue: was or was not Johnson delusional.

Defense counsel told the jury: "Now, the big fundamental piece of evidence in this case and really the big question for you all is what was going on in Mr. Johnson's head? Okay? [¶] And you've heard evidence about that. Defense brought in Dr. Ronette Goodwin-Matthews . . . [¶] This is so important because this starts to give an explanation, it starts to put all this very bizarre behavior into some kind of a box where we can start to say, 'Okay. This wasn't a crime that happened here. This was an ill man. This was a deeply profoundly confused man." "Doesn't this thing look like, instead of a crime, someone who has an illness, acting in response to some very truly and honestly held but very confused and bizarre beliefs? Doesn't that look like what happened here? [¶] Aren't [*sic*] Mr. Johnson's behavior consistent with the kind of diagnosis that Dr. Goodwin-Matthews is talking about here?"

"Of course, that piece of paper is not worth $5 million. . . . [¶] But we also recognize that there are people that really do believe things that are just fundamentally untrue. The fact that they're fundamentally untrue doesn't make the belief untrue. And that's Mr. Johnson." "What you've seen is not evidence of a crime. What you've seen is evidence of a mentally ill man. We're not here to convict mentally ill men."

In response, the prosecutor told the jury the evidence showed Johnson was a perfectly sane man who claimed to have a very peculiar and self-interested view of

financial transactions: "Defense said we are not here to convict mentally ill people. That's probably one of the few things that we'll agree with. I agree with him. But that's not what's going on here."

The prosecutor attacked Goodwin-Matthews's testimony: "She said the brain injury was the significant basis of this delusion, but she couldn't tell you what the injury was, she couldn't tell you where it was, and she couldn't tell you how it affected his behavior." "[D]ecide if you believe her testimony because I think you'll all agree the defense's case rests on her believability." "[M]any antigovernment or anti-tax organizations have similar peculiar explanations for not paying their taxes or engaging in behavior which is similar to Mr. Johnson."

"Did he intend to go in the house and take it? Yes. Did he intend that somebody rely on that check as true and intend to defraud them? Yes. And did he intend to take title and possession of the house? Yes. [¶] Did he know that it was fraudulent? Look at the evidence, and you'll find that he knew that it was fraudulent, and that's why he had somebody babysitting the house, so it wouldn't be taken away from him. [¶] His behavior speaks to you, not the statements made to the doctor, not her testimony about things that she couldn't explain for you about her delusion that she wouldn't define . . . ." "[The] defense said 'We don't criminalize mental illness.' Look at the testimony from their witnesses and see if you find that testimony of mental illness or if you see that as a belief in one's self-interest." "I'm not asking you to convict somebody who is mentally ill. . . . I'm asking you to convict someone who . . . says they're holding onto a belief that's in their self-interest."

And not only did closing argument focus the jury on the question of Johnson's purported good faith belief he had legitimately moved into the house, but it appears a claim-of-right instruction would have made the prosecution's job easier, not harder. First, the record suggests Johnson was passing off his son, Jahherb, as his nephew, Oliver, which would constitute furtive behavior by Johnson. Second, the claim-of-right instruction would have contained this language: "But if the defendant was aware of facts that made that belief completely unreasonable, you may conclude that the belief was not

held in good faith." The evidence clearly showed Johnson had been made aware of such facts because DaSilva repeatedly told him the trade acceptance "check" was worthless. To get around this language, the defense would have had to rely on Goodwin-Matthews's assertion Johnson could not process this information because of his mental disorder, which goes right back to CALCRIM No. 3428.

Hence, even assuming the claim-of-right defense applied here, in the particular circumstances of this case the instruction would have been merely cumulative. As instructed, the jury had to decide if Johnson had been operating under the mistaken, but sincerely held, delusion he had legally purchased the house at 21st Place.

5. *Prosecutorial misconduct*.

Johnson contends there was prosecutorial misconduct during the cross examination of the defense expert witness and during closing argument. These claims are meritless.

a. *Legal principles.*

" 'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the *federal* Constitution when they infect the trial with such " 'unfairness as to make the resulting conviction a denial of due process.' " [Citations.] Under *state law*, a prosecutor who uses deceptive or reprehensible methods commits misconduct even when those actions do not result in a fundamentally unfair trial. [Citation.]' [Citations.]" (*People v. Salcido* (2008) 44 Cal.4th 93, 152.)

" ' "[T]he prosecution has broad discretion to state its views as to what the evidence shows and what inferences may be drawn therefrom." ' [Citation.]" (*People v. Welch* (1999) 20 Cal.4th 701, 752.) "To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's

statements." (*People v. Frye* (1998) 18 Cal.4th 894, 970, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

b. *Background*.

Both of Johnson's prosecutorial misconduct claims have to do with the prosecutor's references to a psychiatric report prepared by Dr. Kaushal K. Sharma, who had been ordered to examine Johnson before trial when defense counsel declared a doubt as to Johnson's competence. Sharma concluded Johnson was competent to stand trial.

Sharma wrote that Johnson "was aware of the background of the case and his attorney's name, he was aware that he was facing the prison sentence if convicted . . . and proceeded to tell me that all his attorney had to do was 'to show a doubt' and thus he would be found not guilty." (Sealed psych. report at 2) Sharma wrote that Johnson's "explanation regarding what he calls 'negotiable instruments' is rather peculiar. However, many anti-government or anti-tax organizations have similar peculiar explanation[s] for not paying their taxes or engaging in behavior which is similar to Mr. Johnson. [¶] The defendant stated his attorney could obtain information from a banker, call a banker as an expert witness and show that such instruments are available and thus use such testimony to be found not guilty. Mr. Johnson in response to my questioning admitted that he was willing to entertain the possibility of [a] . . . not guilty by reason of insanity defense but he was not of the opinion that he would qualify for legal insanity." (Sealed psych. report at 2)

Sharma also wrote: "Mr. Johnson other than this seemingly peculiar explanation of the alleged crime is able to perform quite normally in day-to-day functioning. He is aware of his legal predicament, he is aware of the facts and even if one disagrees with the defendant's explanation, the defendant clearly understands the possible punishment, role of various court officials, etc. [¶] The defendant's belief system may be relevant for a mental defense but it does not render him mentally incompetent to stand trial." (Sealed psych. report at 2-3)

Dr. Sharma's report was not introduced into evidence at trial, nor did he testify.

c. *Cross examination of expert.*

(1) *Background.*

While cross-examining Dr. Goodwin-Matthews, the prosecutor referred to information in Sharma's report about Johnson's prior conviction in a case which also involved a false quitclaim deed. When the trial court sustained a defense objection on the ground Goodwin-Matthews had never seen Sharma's report, the prosecutor gave her a copy to read. Goodwin-Matthews then agreed with the prosecutor's suggestion Johnson had shared with her some of the same peculiar ideas about money and negotiable instruments he had shared with Sharma. The prosecutor asked: "Now, do you see that Dr. Sharma continued saying many antigovernment or anti-tax organizations have similar, peculiar explanations for not paying their taxes or engaging in behavior which is similar to Mr. Johnson?" The trial court overruled a defense objection to this question and the following colloquy occurred:

"Q. Now, are you familiar with tax protesters?

"A. I'm not.

"Q. So you've never even tried to find out about groups of people that think that the taxes in the U.S. are illegal or illegitimate?

"A. I did not.

"Q. Would it change your opinion that there are . . . large groups of people that hold that belief?

"A. No, it wouldn't change my opinions about [Johnson]. It wasn't just one statement in terms of making my diagnosis with him. It was over sessions, my testing, medical records, my interaction with him.

"Q. So even though other people hold the same belief of what he holds, it's still delusional?

"A. No. It's not just one statement that a person makes. It's their entire presentation. It's not just a statement a person makes that I think is bizarre, again, because delusional beliefs are non-bizarre delusions."

The prosecutor then said:

"Q. I'm going to read you from Black's Law Dictionary and ask you if it changes your opinion. . . . [¶] Trade acceptance, a bill of exchange for the amount of a specific purchase drawn on and accepted by the buyer for payment at a specified time. [¶] Does it change your opinion that trade acceptance is actually a valid form of some transactions?

"A. From that statement, it sounds like trade acceptance can be a valid form of transaction. However, in this case, again, I didn't base it on just one statement. It's his entire presentation that I had seen over time."

Then, after Goodwin-Matthews said she never spoke to Johnson about possible legal defenses, there was this exchange:

"Q. Now, you've met with him for over 18 hours?

"A. Yes.

"Q. And you looked at Dr. Sharma's report. It seems that he talked to him once; correct?

"A. That's correct.

"Q. And in that one meeting, he talked to Dr. Sharma about his possible defenses, but he never talked to you about it?

"A. Again, I don't want to assume what you mean by 'possible defenses.' I –

"Q. He never told you that if his attorney could prove a doubt that he could be found not guilty, like he told Dr. Sharma?

"A. He didn't discuss it in that manner with me, no.

"Q. So he didn't talk about using a mental defense with you at all?

"A. Mr. Johnson told me that he was competent. He says others are misconstruing what he's doing. He says he is not incompetent, is what he told me.

"Q. He told you that trade acceptance is correct; is that right?

"A. He said . . . it's correct, and he told me that he was not incompetent, it was pointless in the evaluation."

(2) *Discussion*.

Johnson contends this cross examination of Dr. Goodwin-Matthews constituted misconduct because the prosecutor was relying on hearsay in Dr. Sharma's competency report. But this is commonly accepted practice.

"An expert may be cross-examined regarding the subject to which his testimony relates, the matter on which he bases his opinion, and the reasons for his opinion. (Evid. Code, § 721, subd. (a).) Therefore, a party seeking to attack the credibility of the expert may bring to the attention of the jury material relevant to the issue on which the expert has offered an opinion of which the expert was unaware or which he did not consider." (*People v. Bell* (1989) 49 Cal.3d 502, 532; see *People v. Tallman* (1945) 27 Cal.2d 209, 214 ["wide latitude is permitted in the cross-examination of an expert witness in all matters tending to test his credibility so that the jury may determine the weight to be given the testimony"].)

In *People v. Montiel* (1993) 5 Cal.4th 877, the defendant complained "that through cross examination of the defense psychiatric expert . . . the prosecutor improperly introduced, for their truth, the unfavorable details of [former] testimony by another defense expert." (*Id.* at p. 923.) Rejecting the complaint, *Montiel* explained: " 'The courts have traditionally given both parties wide latitude in the cross-examination of experts in order to test their credibility. [Citations.] Thus, a broader range of evidence may be properly used on cross-examination to test and diminish the weight to be given the expert opinion than is admissible on direct examination to fortify the opinion. [Citation.]' [Citation.] [¶] *It is common practice to challenge an expert by inquiring in good faith about relevant information, including hearsay, which he may have overlooked or ignored*." (*Id.* at pp. 923-924, italics added.)

Johnson argues it was misconduct for the prosecutor to even ask Goodwin-Matthews about Sharma's report because his opinion was completely irrelevant: Sharma had been appointed solely to evaluate Johnson's competence to stand trial, an entirely different matter than her opinion regarding Johnson's state of mind at the time of the alleged crimes. But Johnson is ignoring the fact Goodwin-Matthews *herself*

acknowledged, in her testimony, that she should have reviewed Sharma's report. Goodwin-Matthews testified it "would have been important to have . . . reviewed [Sharma's] report[,]" "and I did miss that."

Johnson also argues the prosecutor committed misconduct by using hearsay statements in Sharma's report to, in effect, "testify" about tax protesters: "[T]he prosecutor turned to Dr. Sharma's report to *affirmatively represent* that appellant's peculiar beliefs are shared by groups of people who do not believe taxes are legal. . . . The prosecutor's misuse of Dr. Sharma's report was particularly egregious as there is no indication that Dr. Sharma, who was appointed solely to evaluate appellant's competency, had any expertise on 'tax protesters.' "

This argument misses the point. There was no need for the prosecutor to surreptitiously smuggle in tax protester testimony via Sharma's report. In the first place, it is a matter of common knowledge that many people in this country espouse outlandish theories calling into question fundamental aspects of our governmental system.[7] In the

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[7] For instance, on February 23, 2012, the Los Angeles Times ran an article concerning the "sovereign citizen" movement, whose adherents cite "a patchwork of beliefs, including that the U.S. is essentially under martial law, that some U.S. constitutional amendments are invalid, and that dollars have been illegitimate since the U.S. Treasury went off the gold standard during the Great Depression," and argue "they are not subject to local, state or federal laws, and some refuse to recognize the authority of courts or police." (Bennet, Los Angeles Times (Feb. 23, 2012)<http://www.la.times.com/news/nationworld/nation/la-na-terror-cop-killers-20120224,0,5474022.story>(as of March 1, 2012.)) The federal courts, in particular, have had experience with such groups. "Many litigants articulate beliefs that have no legal support – think of tax protesters who insist that wages are not income, that taxes are voluntary, or that only foreigners must pay taxes; or think of homeowners who contend that because their property can be traced to a land grant signed by President Fillmore their mortgages can't be foreclosed." (*United States v. James* (7th Cir. 2003) 328 F.3d 953, 955.)

For an especially florid example, see *United States v. Landers* (10th Cir. 2009) 564 F.3d 1217, 1219, discussing an anti-government tract called *Cracking the Code* which "instructs its readers on the 'redemption' theory. 'Redemption' is an anti-government scheme that utilizes commercial law to harass and terrorize its targets. . . . According to the theory, [a person] has a split personality: a real person and a fictional person called a 'strawman.' The strawman came into being when the United States went

second place, the defense expert herself testified she was aware Johnson had espoused bizarre ideas about not paying taxes, about every "national American" having a $10 million account in the Virgin Islands, and about using "trade acceptances" to access the Virgin Islands account in order to purchase real estate.

All the prosecutor was doing was challenging Goodwin-Matthews's testimony by suggesting a plausible alternative explanation: Johnson was not delusional, but rather he was either a committed political extremist who was putting his ideology into action, or he was a cynical scam artist manipulating that extremist ideology for personal gain, or maybe he was a little of both. For instance, the prosecutor told the jury Johnson was having Oliver occupy the house "so that he could maintain possession of it because he knew that this was a fraud. [¶] There's no other reason in Santa Monica in that brand new house that you have to have somebody sit at your house so that you maintain possession of it. There's no reason other than he knew he didn't belong there. The defendant knew he didn't belong there. And all of this was his intention to get that house."

That Dr. Sharma, while assessing Johnson's mental state, made the connection between Johnson's views and an existing body of extremist political ideology made it legitimate for the prosecutor to ask Goodwin-Matthews if she had considered this same connection. Interestingly, Goodwin-Matthews testified she was sufficiently intrigued by Johnson's explanation of the trade acceptance concept that she "almost Googled" it.[8]

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off the gold standard in 1933 and pledged its citizens as collateral for its national debt. Proponents of the theory believe that the government only has power over the strawman and not the real person. The real person, however, can 'redeem' the fictional person by filing a UCC financing statement. This allows the real person to acquire an interest in the fictional person that trumps the government's power. Redemption theorists believe that the government must pay the real person millions of dollars to use the strawman's name or keep him in custody. If the official refuses to pay, the real person can file a lien."

[8] Goodwin-Matthews testified: "Mr. Johnson was so fixed in his belief even with me. I asked minimal regarding the trade acceptance because I needed to get through the testing. But he was so fixed in his beliefs . . . that this was something that needed to occur I almost Googled it."

The prosecutor's inherent point was that had Goodwin-Matthews made the tax protester connection, she might not have been so easily convinced Johnson was delusional.

Johnson also complains the prosecutor improperly asked Goodwin-Matthews about Johnson having discussed mental defenses with Dr. Sharma: "As with the prosecutor's 'testimony' about 'tax protesters,' by telling the jury that appellant discussed 'mental defenses' with Dr. Sharma, the prosecutor was not legitimately testing Dr. Goodwin-Matthews' opinion. Rather, the prosecutor was impermissibly introducing the content of the irrelevant report ' "as independent proof of the facts." ' " But again, this was a legitimate way of trying to impeach the expert's testimony. The prosecutor asked if Johnson had told Goodwin-Matthews he would not be found guilty if his attorney "could prove a doubt," which is what Johnson had told Sharma. The prosecutor then asked, "So he didn't talk about using a mental defense with you at all?" We cannot see the impropriety of this; it was a fair question in light of Goodwin-Matthews's arguably misguided conclusion Johnson was delusional rather than merely a political crank or a scam artist.

d. *Closing argument.*

Johnson contends "[t]he prosecutor continued her misconduct by turning to Dr. Sharma's report in closing argument as independent evidence that appellant's 'delusions' were not the product of brain injury but rather of calculated self-interest. By doing so, the prosecutor again committed misconduct by referring to facts not in evidence . . . ."

Johnson argues the following closing argument by the prosecutor constituted misconduct: "And I've never been a big quote person until I was going through this case and came across this quote from the Seventh Circuit in 1986. 'Some people believe with great fervor preposterous things that just happen to coincide with their self-interests.' [¶] And this is a case all about these tax protesters. And it's interesting that not only in Dr. Sharma's report did they talk about tax protesters, but Dr. Goodwin-Matthews asked the defendant about taxes. [¶] And this tax protester situation are people who honestly believe we don't have to pay taxes because the government is wrong and they don't get to

charge taxes on us. Yet I'll bet dollars to donuts that all of you sitting here pay your taxes. [¶] That's a peculiar or preposterous belief that coincides with self interest. Is that what's going on in this case? Absolutely." Later, the prosecutor said: "Counsel was talking about Dr. Sharma's report. And I asked her if it changed her opinion that the defendant's explanation regarding what he calls negotiable instruments is peculiar. [¶] However, many antigovernment or anti-tax organizations have similar peculiar explanations for not paying their taxes or engaging in behavior which is similar to Mr. Johnson's."

But these portions of the prosecution's rebuttal argument came *after* defense counsel first told the jury this: "Dr. Goodwin-Matthews, although she hadn't seen it before, she looked at a report from a Dr. Sharma that [the prosecutor] provided to her. [¶] Even that showed that Dr. Sharma had noted that Mr. Johnson had . . . very unusual or peculiar beliefs about money transactions." Hence, the prosecutor was *replying* to defense counsel's implied argument that even Sharma realized how crazy Johnson's beliefs were. The prosecutor was entitled to counter this argument by suggesting Johnson's ideas were not so idiosyncratic, but were part of a broader complex of extremist political ideology.

We conclude there was no prosecutorial misconduct.

6. *Inquiry into juror bias*.

Johnson contends his convictions must be reversed because the trial court failed to permit an adequate inquiry into the potential bias of one of the jurors. This claim is meritless.

a. *Background*.

During voir dire, defense counsel asked: "Is there anyone who . . . thinks that in a criminal case someone accused of a crime shouldn't be able to raise mental health or brain injury as a defense?" Prospective Juror No. 12 was one of the jurors who responded affirmatively and the following colloquy occurred:

"Juror No. 12: I've done some research in neurocognitive and neurobehavioral [*sic*]. It's hard to see how evidence of some neurologic injury would lead to aberrant behavior.

"[Defense Counsel]: Because?

"Juror No. 12: Neurobehavioral, neurocognitive behavior is kind of the final frontier of human medicine. It's kind of difficult for someone to say this is a neurologic injury that has led to an aberrant behavior.

"[Defense Counsel]: Let me ask this: [¶] Sounds like you have thought about this. Would you be willing to listen to evidence as to whether or not there is such an injury?

"Juror No. 12: Yes."

Defense counsel then asked the panel, "[I]s there anyone here feels like hearing evidence of a case that involves mental health, because of past experience you've had with yourself, a loved one, friend or family, whatever, that it would be difficult for you? [¶] This is really sort of a gut thing. If anyone has any concerns about that, this is the time to say it." The following colloquy then occurred:

"Juror No. 12: Yes. I've had two siblings, both of whom . . . had suicidal behaviors due to mental health problems.

"[Defense Counsel]: Thank you for sharing that. [¶] In your role as a potential juror in this case . . . were those experiences so difficult for you that you feel it would be difficult for you to serve as a fair and impartial juror and possibly hear evidence?

"Juror No. 12: I laid it forth in the interest of full disclosure but I would obviously do my best to be impartial."

Subsequently, a jury was sworn in, which included Juror No. 12. The following day, while the parties were conducting the voir dire of alternate jurors, Juror No. 12 asked the trial court for "a quick sidebar," saying "It's not urgent." This occurred just after

defense counsel asked the alternates a similar question about personal experiences with mental illness.[9]

Shortly thereafter the "sidebar" was held, and Juror No. 12 said: "Sorry for the inconvenience. [¶] A couple of things. [¶] Number one, I didn't mention it yesterday because it slipped my mind. It seemed important to the way you are selecting the jury. [¶] I had identity theft. It was very small. Someone opened a wireless account in my name, never paid it, dinged my credit score. It was something I was never able to press charges for. I wanted to let you know that. [¶] Secondly, maybe it was the way you were asking the questions about mental illness. I did mention yesterday I had two siblings who had suicidal behavior. I guarantee you, I believe in due process, that it was a pretty emotional thing for my family. Intellectually, I'll try to be impartial. I wanted to let everyone know."

The following colloquy then occurred:

"[Defense Counsel]: Let me ask you, you've raised two issues. One about the identity theft and one about your siblings. You've had overnight to think about it. Really the question is, the judge can tell you, the prosecutor can tell you what your role is is [*sic*] to hear the evidence, to be impartial, but there are situations where, because of our experiences, because of the topics that come up, that it's just very hard for some people. Knowing what you know about yourself right now, do you think that hearing evidence in a case where evidence about mental health could very likely be heard is gonna be difficult for you to the point where it could impair your ability to be a fair and impartial juror in this case?

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[9] Defense counsel asked the prospective alternate jurors: "Is there anybody here in their own personal life who have [*sic*] an experience with mental illness, someone who was close to them, a family member, a loved one, that affected them to a substantial degree?" "If . . . you're picked as a juror in this case you may hear some evidence about mental health. Whatever that experience you had was, do you think it would be difficult for you to be a juror in a case where you were hearing evidence about mental health and that sort of thing?"

"Juror No. 12: I would like to say it wouldn't. I would do my best.

"The Court: He is a seated juror and has been sworn.

. . . . . .

"[The Prosecutor]: We can't really get into it.

"[Defense Counsel]: I mean.

"[The Prosecutor]: What I'm saying is, we can't question him further because he's already been sworn.

"The Court: That's –

"[The Prosecutor]: We can listen to what he has to say but we can't really question him.

"The Court: Okay.

"Juror No. 12: I'll stand by my answer yesterday.

"The Court: What you did was absolutely correct."

After Juror No. 12 returned to his seat, the following colloquy occurred:

"The Court: I'm not going to excuse him.

"[Defense Counsel]: We have a situation where someone went home overnight –

"The Court: I am not going to excuse him. He brought up some things but he . . . brought it up yesterday too. I don't think it's a problem."

Questioning of the prospective alternate jurors continued. Once two alternates were sworn, there was a further discussion about Juror No. 12:

"[Defense Counsel]: Just for the record, the defense is concerned about the issues that Juror No. 12 raised. At this point we know that this juror has taken it upon himself to tell us about his concerns about his ability to be a fair and impartial juror in this case. Defense is asking the court to either remove him or to do a further inquiry into what the motivations were to cause him to come out and approach us. I am concerned about my client's rights to a fair and impartial jury and his rights under the due process clause of the federal constitution. This juror has taken it upon himself, after going home and thinking about it, to specifically come out and address these issues with us.

"[The Prosecutor]: Well, first of all, he said based on defense's line of questioning today he thought that he should bring up these issues. He went on to say that they would not affect him. He is a –

"The Court: Sworn juror.

"[The Prosecutor]: He is a sworn juror. We cannot inquire further by law. I've had this come up in further [*sic*] cases. He's a neurologist. The man's been to school for 20 plus years. When he says he's an intellectual and he can set it aside, I believe he is intelligent enough to do that and to realize what's being asked of him by the court. He also reiterated here he just wanted full disclosure. He also said that I guess it would be something the defense would be concerned about, the identity theft, but then the People could be concerned about the fact that he said the mental health issues.

"The Court: What would you want to ask him?

"[Defense Counsel]: I want to know what motivated him. He has taken it upon himself that he has concerns. Not issues I just raised today but extensive questioning yesterday, about the crime victims. Honestly, from hearing him speak, my greater concerns are about the mental health issues. He has told us again he has siblings who have had mental health issues. This is not a new issue. He has gone home and slept overnight and decided –

"The Court: That he wouldn't be able to handle the mental health issues in a fair and impartial way?

"[Defense Counsel]: I don't know. We are not being allowed to inquire. He has taken upon himself to raise this issue.

"The Court: I think you inquired quite a bit.

"[Defense Counsel]: Even after that he is saying –

"The Court: Denied. Denied."

b. *Legal principles.*

"An accused has a constitutional right to a trial by an impartial jury. [Citations.] An impartial jury is one in which no member has been improperly influenced [citations] and every member is ' "capable and willing to decide the case solely on the evidence

before it" ' [citations]." (*In re Hamilton* (1999) 20 Cal.4th 273, 293.) "Any presumption of prejudice [arising from juror misconduct] is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant. [Citation.] [¶] The standard is a pragmatic one, mindful of the 'day-to-day realities of courtroom life' [citation] and of society's strong competing interest in the stability of criminal verdicts [citation]." (*Id.* at p. 296.)

"If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty . . . the court may order the juror to be discharged and draw the name of an alternate . . . ." (§ 1089.) " 'Before an appellate court will find error in failing to excuse a seated juror, the juror's inability to perform a juror's functions must be shown by the record to be a "demonstrable reality." The court will not presume bias, and will uphold the trial court's exercise of discretion on whether a seated juror should be discharged for good cause under section 1089 if supported by substantial evidence. [Citation.]' " (*People v. Farnam* (2002) 28 Cal.4th 107, 141.) In favorably assessing the credibility and sincerity of a juror's assertion she could be impartial, the trial court has "had the benefit of observing [the juror's] demeanor" and it is therefore appropriate on appeal to accord "proper deference to this finding." (*People v. Zapien* (1993) 4 Cal.4th 929, 994.)

c. *Discussion.*

Johnson asserts the trial court erred by refusing to allow further questioning of Juror No. 12. He argues the juror's promise to " 'do his best' to remain impartial does not change the fact that he, having had the night to contemplate his jury service, felt compelled to approach the court and counsel with renewed reservations about his neutrality." Johnson adds "the record suggests that the trial court was swayed by the prosecutor's erroneous argument that further inquiry of Juror No. 12 was prohibited because he had already been sworn."

But contrary to Johnson's argument, the record does not indicate Juror No. 12 experienced "overnight" reservations about his ability to fairly judge mental health evidence. Rather, the record indicates only that the juror realized overnight he had forgotten to mention the crime victim information and then, while waiting to mention it on the following day, he again heard defense counsel inquire about personal experiences with mental health issues.

The Attorney General argues, "Under these circumstances, where the juror, no less than three times, gave the same careful answer when asked whether he could be impartial, the trial court could have reasonably determined that any further questioning on the matter would not disclose any helpful new details." We agree. " 'The decision whether to investigate the possibility of juror bias, incompetence, or misconduct—like the ultimate decision to retain or discharge a juror—rests within the sound discretion of the trial court. [Citation.] The court does not abuse its discretion simply because it fails to investigate any and all new information obtained about a juror during trial.' " (*People v. Virgil* (2011) 51 Cal.4th 1210, 1284; see *People v. Rogers* (2009) 46 Cal.4th 1136, 1149 [" 'It is established that a trial court "is in the best position to assess the amount of voir dire required to ferret out latent prejudice, and to judge the responses" ' "].)

The trial court did not abuse its discretion with regard to investigating Juror No. 12's potential bias.

7. *There was no cumulative error.*

Johnson contends the cumulative prejudicial effect of the various trial errors he has raised on appeal requires the reversal of his conviction. However, we have found at most only a few insignificant errors that were clearly harmless. Johnson's trial was not fundamentally unfair. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 1056 ["Defendant contends the cumulative prejudicial effect of the various errors he has raised on appeal requires reversal of the guilt and penalty judgments. We have rejected his assignments of error, with limited exceptions in which we found the error to be nonprejudicial. Considered together, any errors were nonprejudicial. Contrary to defendant's contention,

his trial was not fundamentally unfair, even if we consider the cumulative impact of the few errors that occurred."].)

8. *Trial court properly refused to dismiss Three Strikes prior*.

At sentencing, the trial court imposed a three-year term on the burglary conviction, which it doubled to six years for the Three Strikes prior, and then added a one-year prior prison term enhancement for a total term of seven years. Johnson contends the trial court abused its discretion by refusing to dismiss, under the authority of *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, his prior serious felony conviction for Three Strikes purposes. This claim is meritless.

"In [*People v. Williams* (1998) 17 Cal.4th 148], we considered the scope of review applicable to abuse-of-discretion claims of this sort. We described the factors that a trial court should consider when exercising its section 1385 discretion in a Three Strikes case, and we stated that a reviewing court should consider those same factors. [Citation.] Specifically, 'the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part . . . .' [Citation.] We noted, however, that appellate review of a trial court's section 1385 decision is not de novo. We said, '[T]he superior court's order [i]s subject to review for *abuse of discretion*. This standard is *deferential*. [Citations.] But it is not empty. Although variously phrased in various decisions [citation], it asks in substance whether the ruling in question "*falls outside the bounds of reason*" under the applicable law and the relevant facts [citations].' [Citation.]" (*People v. Garcia* (1999) 20 Cal.4th 490, 503.)

Johnson acknowledges he "has a lengthy adult criminal history, which includes one 1990 serious or violent felony conviction for rape," but argues that "since his 1990 conviction, appellant has not once been convicted of a violent offense. In addition, the offenses of which he was convicted in this case did not involve violence. [¶] Moreover, as trial counsel pointed out during the hearing on the *Romero* motion, appellant's history of mental illness was well documented throughout the trial. Despite this, a review of

appellant's criminal history reflected that appellant's mental condition has been largely ignored by the criminal justice system." Johnson does not, however, claim the trial court was unaware of its discretion to dismiss the Three Strikes prior.

The strike at issue was a 1990 conviction for rape. According to the probation report, Johnson has compiled a lengthy and near-continuous history of criminal behavior both before and after his rape conviction. This history includes adult convictions for the following crimes: receiving stolen property (1982); driving with a suspended or revoked license (1987); carrying a firearm in a vehicle (1987); driving with a suspended or revoked license (1989); filing a false or forged instrument, perjury and forgery (1989); theft (1992); forgery and grand theft (1993); possession of narcotics (1996); petty theft with a prior (1999). During this time there were several trips to prison, as well as assorted parole and probation violations.

Given Johnson's extensive adult criminal history, which spans almost 30 years, the trial court certainly had a sufficient basis for concluding he did not fall outside the spirit of the Three Strikes law. (See *People v. Strong* (2001) 87 Cal.App.4th 328, 338 ["the overwhelming majority of California appellate courts have reversed the dismissal of, or affirmed the refusal to dismiss, a strike of those defendants with a long and continuous criminal career"]; see also *People v. Gaston* (1999) 74 Cal.App.4th 310, 321 ["the remoteness in time of the 1981 strike priors is not significant in light of Gaston's continuous crime spree, which has substantially spanned his entire adult life"].) Given the length of Johnson's criminal history, the fact his current crimes (like most of that history) were non-violent has a diminished import. And given that the jury's verdict essentially discounted Johnson's mental disorder defense, we do not see why he believes the trial court should have relied on this factor to dismiss the prior.

In sum, we conclude the trial court did not abuse its discretion when it denied Johnson's *Romero* motion because it was not "so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

8. *Trial court erred by imposing a 15 percent limitation on presentence custody credits.*

Johnson contends the trial court erred during sentencing by imposing the 15 percent limitation on presentence custody credits that is supposed to apply to the commission of violent felonies. As the Attorney General properly concedes, this claim has merit.

During sentencing, the prosecutor said: "Because he's being sentenced on the strike, he gets 15 percent credit." The trial court agreed with this assertion, and awarded only 40 days conduct credit for Johnson's 265 days of actual custody. The Attorney General concedes there was no basis for imposing the 15 percent limitation. Being sentenced for a strike is not listed in section 2933.1 as a basis for imposing the 15 percent limitation, which applies to defendants convicted of certain violent felonies which are listed in section 667.5, subdivision (c). Of Johnson's current convictions, the only one which could have qualified would have been the burglary (§ 667.5, subd. (c)(21)) *if* it had been committed in an inhabited dwelling house at a time when someone was present. (See § 460, subd. (a).) That not being the case, the limitation was inapplicable.

The Attorney General agrees with Johnson's assertion he was entitled to 132 days conduct credit, for total presentence custody credit of 397 days. We will order the abstract of judgment amended to correct this error.

9. *Abstract of judgment must be corrected.*

We note the abstract of judgment contains a clerical error because it reflects imposition of a two-year concurrent term on the count 2 conviction for attempting to file a false or forged instrument, when the trial court actually imposed an eight-month concurrent term. Accordingly, we will order the trial court to correct the abstract of judgment. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185 [it is proper and important to correct errors and omissions in abstracts of judgment].)

DISPOSITION

Affirmed as modified. The forgery conviction (count 3) is vacated, the presentence custody credits are to be recalculated as discussed herein, and the abstract of judgment is to be corrected as discussed herein. In all other respects the judgment is affirmed. The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.