

**CERTIFIED FOR PARTIAL PUBLICATION\***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

TERESA LYNN RYAN,

Defendant and Appellant.

F047368

(Super. Ct. No. CRF15828)

**OPINION**

APPEAL from a judgment of the Superior Court of Tuolumne County. Manuel C. Rose, Judge, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution, and Eric L. DuTemple, Judge.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Lloyd G. Carter and Brian Alvarez, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I and III of the Discussion.

Appellant Teresa Lynn Ryan stands convicted, following a jury trial, of burglary (Pen. Code,<sup>1</sup> § 459; counts I-III); receiving stolen property (§ 496, subd. (a); count IV); forgery by signing another's name (§ 470, subd. (a); counts V-VI); forgery by making or passing a forged check (*id.*, subd. (d); counts VII-VIII); forgery by possessing a blank or unfinished check (§ 475, subd. (b); count IX); unauthorized use of personal identifying information (§ 530.5, subd. (a); count XI); and fraudulent use of an access card (§ 484g, subd. (a); count XII), a misdemeanor. In addition, she admitted having served four prior prison terms (§ 667.5, subd. (b)). Sentenced to a total unstayed term of 12 years 4 months in prison and ordered to pay various fines and penalty assessments, she now appeals. For the reasons that follow, we will vacate the convictions on counts V and VI and remand the matter for modification of portions of the sentence.

### **FACTS**

On September 21, 2004, appellant and Moriah Valencia entered three antique stores in Jamestown and stole purses and other items belonging to store personnel.<sup>2</sup> Generally speaking, appellant distracted the victim by asking to see something in the store, while Valencia absconded with the loot. Appellant then used or attempted to use some of the stolen checks, debit cards, credit cards, and identifications. Goods purchased with these items, together with other purloined belongings, were found in a vehicle associated with the two women. In defense, appellant admitted entering stores and asking about items that interested her, but claimed she was uninvolved in, and unaware of, Valencia's theft-related activities.

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise stated.

<sup>2</sup> Valencia, who was jointly charged with appellant, entered into a plea agreement prior to trial. Her case is not before us on this appeal.

## DISCUSSION

### I\*

#### USE OF PRIOR CONVICTIONS FOR IMPEACHMENT

##### A. Background

Appellant was alleged to have served four prior prison terms pursuant to section 667.5, subdivision (b). Because she did not move for bifurcation, it appears that fact was made known to the jury. During the hearing on motions in limine, the trial court remarked that the jurors had shown “considerable interest in knowing exactly what the priors were,” and it wondered whether jurors could be told the precise felonies of which appellant was convicted.<sup>3</sup> Defense counsel opined that, if the prior offenses were the same as the current charges, that information would be so prejudicial as to be excludable. The court recalled authority that a witness could be asked only if she was ever convicted of a felony and the date, unless she denied having suffered the prior conviction, but it asked counsel to do some research on the subject.

The issue arose again on the second day of trial, when the prosecutor pointed out that there had been, as yet, no defense motion to bifurcate trial. That being the case, he was preparing to prove the enhancement allegations to the jury. He noted that appellant not only had served four prior prison terms, but had a total of seven prior convictions, all of which were theft-related “Castro priors.”<sup>4</sup>

Appellant admitted the four prior prison term allegations, after which the court returned to the subject of impeachment. The prosecutor related that, with respect to some of the convictions for which appellant served prison terms, there were also other felonies

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\* See footnote, *ante*, page 1.

<sup>3</sup> The trial judge was sitting by assignment. As appellant observes, the record suggests he was retired.

<sup>4</sup> *People v. Castro* (1985) 38 Cal.3d 301 (*Castro*).

for which she served concurrent terms. It was his position that all were available for impeachment purposes, should appellant testify. The court then inquired about the impeachment process, observing that, as it understood the law years ago, the prosecutor could not use the prior convictions to show it was more likely appellant committed the charged offenses, but only to impeach her credibility. When the prosecutor agreed with this assessment, the court asked whether he was going to try to get before the jury the nature of the prior convictions. The prosecutor informed the court that, with the exception of a conviction for petty theft with a prior, all of appellant's prior convictions were essentially the same as the charged offenses. He cited several cases concerning sanitization of priors and concluded that the court had discretion to do just about anything it wanted to in that regard.

Defense counsel requested that the court completely sanitize the prior convictions so that appellant would simply acknowledge having suffered felony convictions. Counsel argued that informing the jury of the exact nature of the prior convictions, or even that they involved theft-related offenses, would be so highly prejudicial as to affect the fairness of the trial. Defense counsel further asked the court to consider exercising its discretion, under Evidence Code section 352, to exclude appellant's 1990 and 1991 convictions as too remote.

When asked about the number of convictions he wanted to use for impeachment, the prosecutor responded that they were all *Castro* priors, and that they evidenced a pattern of conduct. This ensued:

“THE COURT: What we have to be careful about ... is that we cannot put this lady in a situation with these priors that is – that the jury is told, basically, that these priors show that she's prone to commit this type of crime as committed, the ones that are alleged here. And I have serious doubts whether we should be allowed to go past, if she takes the stand, that. I think all I'll allow the district attorney to do would be to ask her if she ... was found guilty of a felony, and then you can list them, but without telling us what they were.

“MR. HOVATTER [prosecutor]: When the Court means list them, what does the Court –

“THE COURT: Well, you can give them – you can give her the dates, you can even say, ‘Did you suffer –’ I think I wrote down six of them here that you’re interested in. ‘Have you been – six times previous to this, been convicted of a felony?’ And she says, ‘Yes,’ I think that’s the end of it.

“That’s the way I would rule, because it’s so prejudicial, ... if you establish that these crimes are similar to the ones that are for the jury’s consideration here, that is just overwhelmingly prejudicial. And we don’t want to get a situation where she’s automatically guilty whenever he wants to accuse her of a similar crime. And ... if the jury is convinced that these are all similar crimes, they’re not going to be too interested in what evidence in this – the ones we’re trying.

“In fact, there was [*sic*] some comments by jurors yesterday that would lead me to believe that this is the way it would work. They were very curious what kind of felonies they were. So that will be – the way I will rule on it will stand.”

Appellant subsequently testified. At the conclusion of direct examination, defense counsel asked her whether she had been convicted of “several” felonies. She replied that she had. The prosecutor then promptly elicited that she was convicted of two felonies in Sacramento on May 22, 1990; one felony in Sacramento on October 8, 1991; two felonies in Los Angeles on April 14, 1995; one felony in Los Angeles on January 7, 1998; and yet another felony in Los Angeles on April 21, 1998. Later, when appellant reiterated that she had no clue anything was wrong until she and Valencia were in Staples (where a stolen check was used to make a purchase), the prosecutor questioned whether she confronted Valencia at that time. When appellant replied affirmatively, the prosecutor asked: “Okay. Now, someone who’s got all those felonies that you’ve testified to at that point, did you think, you know, ‘I got – I have just got to get away from her, call the police, do something.’” The trial court overruled defense counsel’s objection, whereupon appellant testified she did not think anything along those lines because Valencia said her boyfriend gave her the money.

Jurors were subsequently instructed that, in determining the believability of a witness, they could consider, inter alia, the witness's prior conviction of a felony. They were further instructed that such a fact could be considered only for the purpose of determining the believability of that witness; that the fact of a conviction did not necessarily destroy or impair a witness's believability; and that it was one of the circumstances jurors could consider in weighing the testimony of that witness. In his argument, the prosecutor reminded jurors of the instruction and the proper use of a prior conviction, then stated: "So, use it as one of the circumstances. But we're not talking about just one felony, we're not talking about two, we're not talking about three, we're not talking about four, we're not talking about five, we're not talking about six, we're talking about seven. And from what you learned, it wasn't seven all in one day, it was 1990, going all the way through to 1998. That's something you look at in the believability of this person."

Appellant now contends the trial court abused its discretion by failing to limit the number of prior convictions used for impeachment and by failing to exclude the three oldest convictions. Included in these arguments are claims that the court did not understand the scope of its discretion; failed to address the issue of remoteness; and permitted the prosecutor to use seven convictions for impeachment even though he had represented he would only be using six, and to use the fact of the prior convictions improperly to imply that she should have had certain knowledge.

**B. Analysis**

Subject to the trial court's discretion under Evidence Code section 352, a defendant who testifies may be impeached by any felony conviction that necessarily involves moral turpitude, even if the immoral trait is one other than dishonesty. (*Castro, supra*, 38 Cal.3d at p. 306 (lead opn. of Kaus, J.)) Thus, the test for admission of a prior felony conviction is whether the offense necessarily involves moral turpitude, and whether the risk of undue prejudice substantially outweighs the probative value of the

prior conviction. (*People v. Valdez* (1986) 177 Cal.App.3d 680, 696.) When the question on appeal concerns the exercise of the trial court's discretion pursuant to Evidence Code section 352, the trial court's ruling will be upset only if a clear abuse of discretion is shown. (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.) "[D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered. [Citations.]" (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

We first dispose of appellant's subsidiary claims. First, where a court misunderstands, or is unaware of, the scope of its discretionary powers, it cannot exercise the informed discretion necessary to a proper decision. (See *People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.) We will not presume error in this regard absent a showing on the face of the record, however (see Evid. Code, § 664; *In re Jacob J.* (2005) 130 Cal.App.4th 429, 437-438; *People v. Mack* (1986) 178 Cal.App.3d 1026, 1032), and no such showing is present here. Although the trial court's comments made it clear it had not addressed a *Castro* issue in some time, those same comments, together with its colloquy with counsel, make it equally clear the court had a good grasp of the applicable law and factors to be considered in exercising its discretion.

Second, although the court did not expressly weigh prejudice against probative value, the record demonstrates it was well aware of, and performed, its duty to balance the probative value of the proffered prior convictions against their prejudicial effect. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1187-1188; *People v. Triplett* (1993) 16 Cal.App.4th 624, 628-629.) While the court did not expressly address the issue of remoteness, that issue was clearly before it, and defense counsel did not press for an express ruling on this point. (See *People v. Hayes* (1990) 52 Cal.3d 577, 619.)

Third, we are not convinced the record establishes that the prosecutor represented he would use only six of appellant's prior convictions, or that, in light of his question as a whole, he sought to use the fact of the prior convictions for an improper purpose. In any event, we find no prejudice. (See *post.*)

We turn now to the basic issue: whether the trial court abused its discretion by allowing the prosecutor to use seven prior convictions, including three that were 13 and 14 years old, to impeach appellant's credibility. Appellant does not contend that any of the seven prior convictions (violations of §§ 475 and 496 in 1990, a violation of § 475, subd. (a) in 1991, violations of §§ 496, subd. (a) and 484/666 in 1995, and two violations of § 469 in 1998) do not necessarily involve moral turpitude. Accordingly, they were prima facie admissible. (*Castro, supra*, 38 Cal.3d at p. 316 (lead opn. of Kaus, J.)) Nevertheless, the trial court retained discretion to exclude any one or more of them if probative value was outweighed by the risk of undue prejudice. (*People v. Collins* (1986) 42 Cal.3d 378, 381 (lead opn. Of Mosk, J.)

Factors to be considered in determining whether to admit or exclude evidence of a prior conviction to impeach include "(1) whether the prior conviction reflects on honesty and integrity; (2) whether it is near or remote in time; (3) whether it was suffered for the same or substantially similar conduct for which the witness-accused is on trial; and (4) finally, what effect admission would have on the defendant's decision to testify." (*Castro, supra*, 38 Cal.3d at p. 307 (lead opn. of Kaus, J.); *People v. Beagle* (1972) 6 Cal.3d 441, 453.) The foregoing factors guide, but do not restrain, the trial court's discretion under Evidence Code section 352, and are to be considered in conjunction with any other relevant circumstances. (*People v. Collins, supra*, 42 Cal.3d at p. 392 (lead opn. Of Mosk, J.)

The fourth factor is not at issue here, since appellant testified. The third factor is similarly inapplicable, as the prior convictions were completely sanitized. With respect to the first factor, all of appellant's prior convictions involved dishonesty or lack of integrity, and appellant does not claim otherwise. As such, they were more probative of appellant's credibility than, for instance, convictions for assaultive offenses. (*Castro, supra*, 38 Cal.3d at p. 315 (lead opn. of Kaus, J.)) That this factor did not favor exclusion of the prior convictions is particularly true in light of appellant's defense at

trial: her outright denial of guilt placed her credibility directly at issue. (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925.)

Turning to the issue of remoteness, the three earliest convictions were suffered 14 and almost 13 years before the charged offenses were committed. According to the probation officer's report, appellant was born in 1958. Thus, she was in her early 30's when she suffered the 1990 and 1991 convictions. (See *People v. Burns* (1987) 189 Cal.App.3d 734, 738 [conviction for crime committed years earlier when defendant was a minor may be weighed less heavily than crime committed years later when defendant was middle-aged].) She most certainly did not lead a "legally blameless life" following these convictions, as she continued to commit felony offenses into 1998. (See *People v. Beagle, supra*, 6 Cal.3d at p. 453 [probative weight is affected where conviction occurred long before and was followed by legally blameless life].) Moreover, "the systematic occurrence of [appellant's] priors over a [lengthy] period creates a pattern that is relevant to [appellant's] credibility." (*People v. Muldrow* (1988) 202 Cal.App.3d 636, 648.) Under the circumstances, the trial court reasonably could have concluded that, despite the age of the 1990 and 1991 prior convictions, their probative value with respect to appellant's credibility substantially outweighed any prejudicial effect. (See, e.g., *People v. Turner* (1994) 8 Cal.4th 137, 200, abrogated on other grounds in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5 [12- and 13-year-old convictions not too remote]; *People v. Green* (1995) 34 Cal.App.4th 165, 183 [20-year-old conviction not too remote]; *People v. Muldrow, supra*, 202 Cal.App.3d at pp. 647-648 [10- to 20-year-old convictions not too remote]; *People v. Burns, supra*, 189 Cal.App.3d at pp. 736, 739 [20-year-old conviction not too remote].)

We likewise find no error in the trial court's failure to limit the number of prior convictions used for impeachment. "Whether or not more than one prior felony is to be admitted ... is simply one of the factors which must be weighed against the danger of prejudice." (*People v. Holt* (1984) 37 Cal.3d 436, 453.) "A series of crimes relevant to

character for truthfulness is more probative of credibility than a single lapse ....” (*Id.* at p. 452.) Here, appellant committed a series of crimes, all of which were relevant to character for truthfulness. Under the circumstances, and especially in light of the fact the jury was never informed of the similarity between the prior convictions and current offenses, the trial court reasonably could have concluded that excluding some of the prior convictions would have improperly allowed appellant to have “a false aura of veracity.” (*Beagle, supra*, 6 Cal.3d at p. 453; see *People v. Muldrow, supra*, 202 Cal.App.3d at pp. 646-647, 649 [upholding admission of six prior convictions, three of which were identical to charged offense]; *People v. Castro* (1986) 186 Cal.App.3d 1211, 1216-1217 [upholding admission of five prior convictions, all of which were identical to charged offense].)

Last, even assuming the trial court should have excluded some of the prior convictions, appellant suffered no prejudice. The evidence against her was very strong, and she still would have been impeached with a number of prior convictions. The effect on her credibility and the prosecutor’s examination and argument would have been negligible. There is no reasonable probability that she would have obtained a more favorable result. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Gurule* (2002) 28 Cal.4th 557, 609; *People v. Sanders* (1992) 10 Cal.App.4th 1268, 1270.)

## II

### **LESSER INCLUDED OFFENSES**

In counts V and VI, appellant was convicted of forgery in violation of subdivision (a) of section 470. In counts VII and VIII, she was convicted of forgery in violation of subdivision (d) of that statute. Counts V and VII were based on her conduct of signing Cynthia Carter’s name to a check and using it to make a purchase at Staples, while counts VI and VIII were based on her conduct of signing Carter’s name to a check and attempting to use it to make a purchase at Gypsy Rose Antiques. Appellant now says she could not properly be convicted of counts V and VI because forgery in violation of

section 470, subdivision (a) is a lesser included offense of forgery in violation of section 470, subdivision (d). We reach the result urged by appellant, but by way of different reasoning.

It has long been settled in this state that multiple convictions may not be based on necessarily included offenses. (*People v. Ortega* (1998) 19 Cal.4th 686, 692.) “‘The test ... of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense.’ [Citations.]” (*People v. Pearson* (1986) 42 Cal.3d 351, 355.)

In our view, the various subdivisions of section 470 do not set out greater and lesser included offenses, but different ways of committing a single offense, i.e., forgery. As originally enacted, section 470 contained no subdivisions. Even from 1990 to 1998, when the statute was divided into subdivisions (a) and (b), the various acts that constituted forgery were amassed in an undifferentiated, confusing recitation.<sup>5</sup>

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<sup>5</sup> The statute read: “(a) Every person who, with intent to defraud, signs the name of another person, or a fictitious person, knowing that he or she has no authority so to do, to, or falsely makes, alters, forges, or counterfeits, any charter, letters patent, deed, lease, indenture, writing obligatory, will, testament, codicil, bond, covenant, bank bill or note, post note, check, draft, bill of exchange, contract, promissory note, due bill for the payment of money or property, receipt for money or property, passage ticket, lottery ticket or share purporting to be issued under the California State Lottery Act of 1984, trading stamp, power of attorney, certificate of ownership or other document evidencing ownership of a vehicle or undocumented vessel, or any certificate of any share, right, or interest in the stock of any corporation or association, or any controller’s warrant for the payment of money at the treasury, county order or warrant, or request for the payment of money, or the delivery of goods or chattels of any kind, or for the delivery of any instrument of writing, or acquaintance, release, or receipt for money or goods, or any acquaintance, release, or discharge of any debt, account, suit, action, demand, or other thing, real or personal, or any transfer or issuance of money, certificate of shares of stock, goods, chattels, or other property whatever, or any letter of attorney, or other power to receive money, or to receive or transfer certificates of shares of stock or annuities, or to let, lease, dispose of, alien, or convey any goods, chattels, lands, or tenements, or other estate, real or personal, or any acceptance or endorsement of any bill of exchange, promissory note, draft, order, or any assignment of any bonds, writing obligatory,

Former section 470 was repealed in 1998, and a new section 470 was enacted wherein the various acts constituting forgery were set out, to a certain degree, in different subdivisions. (Stats. 1998, ch. 468, §§ 1-2, pp. 2704-2705.)<sup>6</sup> Thus, as enacted in 1998 and as it existed when appellant committed the offenses at issue here, section 470 provided:

“(a) Every person who, with the intent to defraud, knowing that he or she has no authority to do so, signs the name of another person or of a fictitious person to any of the items listed in subdivision (d) is guilty of forgery.

“(b) Every person who, with the intent to defraud, counterfeits or forges the seal or handwriting of another is guilty of forgery.

“(c) Every person who, with the intent to defraud, alters, corrupts, or falsifies any record of any will, codicil, conveyance, or other instrument, the record of which is by law evidence, or any record of any judgment of a court or the return of any officer to any process of any court, is guilty of forgery.

“(d) Every person who, with the intent to defraud, falsely makes, alters, forges, or counterfeits, utters, publishes, passes or attempts or offers

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promissory note, or other contract for money or other property; or counterfeits or forges the seal or handwriting of another; or utters, publishes, passes, or attempts to pass, as true and genuine, any of the above-named false, altered, forged, or counterfeited matters, as above specified and described, knowing the same to be false, altered, forged, or counterfeited, with intent to prejudice, damage, or defraud any person; or who, with intent to defraud, alters, corrupts, or falsifies any record of any will, codicil, conveyance, or other instrument, the record of which is by law evidence, or any record of any judgment of a court or the return of any officer to any process of any court, is guilty of forgery. [¶] (b) Upon a trial for forging any bill or note purporting to be the bill or note of an incorporated company or bank, or for passing, or attempting to pass, or having in possession with intent to pass, any forged bill or note, it is not necessary to prove the incorporation of the bank or company by the charter or act of incorporation, but it may be proved by general reputation; and persons of skill are competent witnesses to prove that the bill or note is forged or counterfeited.” (Fn. omitted.)

<sup>6</sup> Related statutes (§§ 475, 475a, 476, 484e, 484f, 484g, 484i) were also repealed and enacted in new form. (Stats. 1998, ch. 468, §§ 3-15, pp. 2705-2706.)

to pass, as true and genuine, any of the following items, knowing the same to be false, altered, forged, or counterfeited, is guilty of forgery: any check, bond, bank bill, or note, cashier's check, traveler's check, money order, post note, draft, any controller's warrant for the payment of money at the treasury, county order or warrant, or request for the payment of money, receipt for money or goods, bill of exchange, promissory note, order, or any assignment of any bond, writing obligatory, or other contract for money or other property, contract, due bill for payment of money or property, receipt for money or property, passage ticket, lottery ticket or share purporting to be issued under the California State Lottery Act of 1984, trading stamp, power of attorney, certificate of ownership or other document evidencing ownership of a vehicle or undocumented vessel, or any certificate of any share, right, or interest in the stock of any corporation or association, or the delivery of goods or chattels of any kind, or for the delivery of any instrument of writing, or acquaintance, release or discharge of any debt, account, suit, action, demand, or any other thing, real or personal, or any transfer or assurance of money, certificate of shares of stock, goods, chattels, or other property whatever, or any letter of attorney, or other power to receive money, or to receive or transfer certificates of shares of stock or annuities, or to let, lease, dispose of, alien, or convey any goods, chattels, lands, or tenements, or other estate, real or personal; or any matter described in subdivision (b).

“(e) Upon a trial for forging any bill or note purporting to be the bill or note of an incorporated company or bank, or for passing, or attempting to pass, or having in possession with intent to pass, any forged bill or note, it is not necessary to prove the incorporation of the bank or company by the charter or act of incorporation, but it may be proved by general reputation; and persons of skill are competent witnesses to prove that the bill or note is forged or counterfeited.”<sup>7</sup>

The overhaul of section 470 and related provisions was intended to “make [the] laws governing financial crimes more “user friendly”” and “to clarify and streamline existing law with regard to forgery and credit card fraud.” It was not intended to “change the meaning or legal significance of the law,” but “merely [to] organize[] the

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<sup>7</sup> Subdivision (d) has since been amended to add, just before the semicolon: “or falsifies the acknowledgment of any notary public, or any notary public who issues an acknowledgment knowing it to be false.”

relevant code sections into a cohesive and succinct set of laws that can be readily referred to and understood.” (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 2008 (1997-1998 Reg. Sess.) as introduced Feb. 18, 1998, p. 2, at <[http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab\\_2001-2050/ab\\_2008\\_cfa\\_19980420](http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_2001-2050/ab_2008_cfa_19980420)>133...> [as of Feb. 28, 2006].)

In construing former section 470, courts consistently held that there was but one crime of forgery, and that the various acts proscribed by the statute were simply different means of committing that offense. For instance, in *People v. Frank* (1865) 28 Cal. 507, 513, the California Supreme Court stated: “Where, in defining an offense, a statute enumerates a series of acts, either of which separately, or all together, may constitute the offense, all such acts may be charged in a single count, for the reason that notwithstanding each act may by itself constitute the offense, all of them together do no more, and likewise constitute but one and the same offense. To illustrate our meaning, take the statute against forgery, ... where we find several acts enumerated, all of which are declared to be forgery. Thus ‘the falsely making,’ ‘altering,’ ‘forging,’ ‘counterfeiting,’ ‘uttering,’ ‘publishing,’ ‘passing,’ ‘attempting to pass’ any of the instruments or things therein mentioned, with the intent specified, is declared to be forgery. Now, each of those acts singly, or all together, if committed with reference to the same instrument, constitute but one offense. Whoever is guilty of either one of these acts is guilty of forgery; but if he is guilty of all of them, in reference to the same instrument, he is not therefore guilty of as many forgeries as there are acts, but of one forgery only. Hence an indictment which charges all of the acts enumerated in the statute,

with reference to the same instrument, charges but one offense, and the pleader may therefore at his option charge them all in the same count, or each in separate counts ....” (Accord, *People v. Leyshon* (1895) 108 Cal. 440, 442-443; *People v. Harrold* (1890) 84

Cal. 567, 568-569; *People v. Luizzi* (1960) 187 Cal.App.2d 639, 644; *People v. Keene* (1954) 128 Cal.App.2d 520, 526-527.) In *People v. McKenna* (1938) 11 Cal.2d 327, 332, the high court stated: “The crime of forgery consists either in the false making or alteration of a document without authority or the uttering (making use) of such a document with the intent to defraud. [Citation.]” (Accord, *People v. Reisdorff* (1971) 17 Cal.App.3d 675, 678-679; *People v. Swope* (1969) 269 Cal.App.2d 140, 143; *People v. McKissack* (1968) 259 Cal.App.2d 283, 287; *People v. Williams* (1960) 186 Cal.App.2d 420, 425.) In short, “[t]he false making and uttering of the same instrument ... constitutes but one offense. [Citations.]” (*People v. Neder* (1971) 16 Cal.App.3d 846, 853, fn. 2.)

Since the 1998 revision of section 470 did not change the law, either by intent or by language, we conclude that the doing of one or more of the proscribed acts, with respect to the same instrument, constitutes but one offense. Thus, subdivisions (a) and (d) of the statute do not describe separate offenses, but merely separate means of committing the same offense. This conclusion is supported by the fact that the mens rea is the same for each (intent to defraud), as is the punishment (see § 473).

We recognize that a number of the authorities cited above were concerned not with the number of convictions that could be had, per se, but with pleading requirements, and that they antedated the enactment of section 954, or at least of some of the pertinent provisions now contained in that statute. (See Historical Note, 50A West’s Ann. Pen. Code (1985 ed.) foll. § 954, pp. 64-65.) Nevertheless, a consideration of that statute does not alter our conclusion that appellant could be convicted of forgery only once each with respect to the Staples and Gypsy Rose Antiques incidents.

In pertinent part, and with italics added, section 954 provides: “An accusatory pleading may charge two or more different offenses connected together in their commission, *or different statements of the same offense* ... under separate counts .... The

prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged ....” This permits the charging of the same offense on alternative legal theories, so that a prosecutor in doubt need not decide at the outset what particular crime can be proved by evidence not yet presented. (4 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Pretrial Proceedings, § 209, p. 413.)

Under section 954, multiple convictions can be based on a single criminal act, unless one offense is necessarily included in the other. (*People v. Benavides* (2005) 35 Cal.4th 69, 97 (*Benavides*)). In *Benavides*, for example, the California Supreme Court rejected the contention that the defendant could not be convicted of lewd and lascivious conduct (§ 288, subd. (a)) in addition to rape (§ 261, former subd. (2)) and sodomy (§ 286, former subd. (c)), where the evidence supporting that conviction was the same as the evidence of rape and sodomy. The court reasoned that lewd conduct with a child is not a necessarily included offense of either rape or sodomy, and is a distinct crime. (*Benavides*, at p. 97.) In *People v. Lofink* (1988) 206 Cal.App.3d 161, a child was physically abused on two occasions, resulting in facial injuries one time and bone fractures the other. As to each, the defendant was convicted of willful cruelty toward a child under circumstances likely to cause great bodily harm and death (§ 273a, former subd. (1)) and inflicting corporal punishment on a child resulting in traumatic conditions (§ 273d). On appeal, he contended he could not properly be convicted of violating two separate child abuse statutes for the same acts or course of conduct. The Court of Appeal rejected this argument, finding that multiple charges and multiple convictions both were permitted by section 954, since the charges constituted different statements of the same offense. (*Lofink*, at p. 166.)

In the foregoing cases (and other similar authorities), while the defendant may have committed a single act or course of conduct, he or she was charged with, and convicted of, violations of *separate statutes*. While each statute may represent a different

statement of the same offense, it sets out a separate crime, not just – as in the case of section 470 – alternative ways in which the *same crime* can be committed. In the case before us, although appellant arguably committed separate acts – signing the checks and then uttering them – she did not, thereby, violate more than one statute, but simply committed acts contained in separate subdivisions of a single statute, all of which were simply different ways of violating that statute.<sup>8</sup>

We have found no case permitting multiple forgery convictions, with respect to a single instrument, under comparable circumstances. For instance, in *In re Horowitz* (1949) 33 Cal.2d 534, the defendant was charged with forgery and three other offenses after he wrote a will on a piece of paper that was blank except for his mother’s signature, procured the signatures of two purported witnesses, and, following his mother’s death, instituted proceedings for probate of the forged will. (*Id.* at p. 536.) On appeal, the California Supreme Court rejected his argument that he was being improperly punished four times for one act. The court noted that he was charged with, and found guilty of, violating four sections of the Penal Code (§§ 115 [causing to be filed a false will], 132 [offering in evidence a false will], 134 [preparing a false will with intent to allow it to be produced for a fraudulent purpose in a probate proceeding], 470 [forging a will]). It stated: “Petitioner relies upon cases which hold that one who, with reference to the same instrument, is guilty of more than one of the acts denounced by section 470 (e.g., making

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<sup>8</sup> Section 245 is an example of a statute that contains greater and lesser included offenses in different subdivisions. (See *People v. Bechler* (1998) 61 Cal.App.4th 373, 378.) Unlike the situation in section 470, however, the subdivision defining the greater offense requires proof of elements that go substantially beyond what is required by the subdivision defining the lesser offense, and the punishment for the two offenses is markedly different. (Compare, e.g., § 245, subd. (a)(2) [person who commits assault with firearm is punishable by up to four years in prison] with § 245, subd. (d)(1) [person who commits assault with firearm on peace officer or firefighter, and who knows or reasonably should know victim is peace officer or firefighter engaged in performance of duties, when victim is so engaged, is punishable by up to eight years in prison].)

and uttering a false instrument), is guilty of but one forgery; ‘notwithstanding each act may by itself constitute the offense, all of them together do no more, and likewise constitute but one and the same offense.’ [Citations.] These cases, however, are clearly distinguishable, for in each of them the above holding, or its substance, was made in answer to the contention that the indictment or information charged more than one offense (i.e., more than one violation of section 470), a mode of pleading formerly not permitted under section 954 of the Penal Code. In none of such cases did the indictment or the information purport to charge, in addition to the offense denounced by section 470 of the Penal Code, *another offense disparately defined and denounced by another code section*. [Citation.] When (after section 954 was amended to permit such pleading) an indictment charged, in separate counts, violations of section 134 and section 470 of the Penal Code, it was held that ‘Clearly, two separate offenses are set forth, and it is plain that each offense required proof of facts additional to those involved in the other’; the court rejected defendant’s contention that there was but one offense ....” (*Horowitz*, at p. 542, italics added.) Thus, although *Horowitz* permits multiple convictions for violations of distinct code sections based on conduct involving a single instrument, it does not stand for the proposition that multiple convictions of *forgery* are permissible.

Although involving a different offense, *People v. Craig* (1941) 17 Cal.2d 453, is also instructive. In that case, the defendant was convicted of two counts of rape based on a single act of intercourse, committed against the will of a 16-year-old girl. Count 1 charged forcible rape under former subdivision 3 of section 261, while count 2 (after alleging it was a different statement of the same offense) charged statutory rape upon a child under the age of consent, in violation of former subdivision 1 of the statute. (*Craig*, at p. 454.) In holding that multiple convictions were improper, the California Supreme Court stated: “Under [section 261], but one punishable offense of rape results from a single act of intercourse, although that act may be accomplished under more than one of the conditions or circumstances specified in the [statute’s] subdivisions. These

subdivisions merely define the circumstances under which an act of intercourse may be deemed an act of rape; they are not to be construed as creating several offenses of rape based upon that single act.” (*Craig*, at p. 455.) The court cited with approval a case in which it was said, ““We think the true construction of section 261 to be that thereby the legislature meant merely to put beyond doubt the rule that on an information for rape the things mentioned in the subdivisions could be proven, and would establish the crime. It is not intended to alter or establish a rule of pleading; or to create six different kinds of crime.”” (*Craig*, at pp. 455-456.)

The court noted the existence of certain rules or tests for determining whether one or more offenses result from a single act or transaction. It concluded: “Where, as here, the charge and proof disclose a *single* act of intercourse resulting from *force* employed upon a *minor*, but one punishable rape is consummated, for the proof, though dual in character, necessarily crystallizes into one ‘included’ or identical offense.” (*People v. Craig, supra*, 17 Cal.2d at p. 457.) It explained: “[I]t has been held, by way of illustration, that where one shot is fired and two persons are killed, two punishable homicides result. [Citation.] Likewise, it has been held that where one act or transaction violates the provisions of two statutes, whether of the same or different jurisdictions, it is punishable under both. [Citations.] [¶] All of these illustrations are distinguishable from the situation here confronting the court. In the cited instances, the one act or transaction either injured or affected two or more victims or ran counter to two or more separate and distinct statutes defining different crimes with variable elements. In many instances the violation of these separate statutes was complete at different stages of the commission of the single act or transaction.... But none of the foregoing distinguishable characteristics is here present. There is only one victim. There has been a violation of but one statute.... And, while the proof necessarily varies with respect to the several subdivisions of that section under which the charge may be brought, the sole punishable offense under any and all of them is the unlawful intercourse with the victim.” (*Id.* at pp. 457-458.)

Although *Craig* speaks in terms of “punishable offenses,” we think it apparent that it proscribes more than one conviction under the circumstances before it, and we find its reasoning pertinent here. Under section 954, a defendant may be convicted of any number of the *offenses* charged. Since the commission of any one or more of the acts enumerated in section 470, in reference to the same instrument, constitutes but one offense of forgery (e.g., *People v. Frank, supra*, 28 Cal. at p. 513), it follows that, under section 954, appellant could be *charged* with multiple counts of forgery with respect to the Staples and Gypsy Rose Antiques incidents, but could be *convicted* of only one such count with respect to each. Accordingly, two of the four convictions she suffered in connection with those incidents must be vacated. Since her conduct in each incident appears to be more completely covered by subdivision (d) of section 470, we will vacate her convictions on counts V and VI, which involved subdivision (a) of the statute.

### III\*

#### SENTENCING ERRORS

In pronouncing judgment, the sentencing court<sup>9</sup> utilized, as aggravating factors, that appellant’s prior convictions as an adult were numerous and for similar offenses, and that she was on parole when the present crimes were committed. It declared count I to be the principal term, and imposed the upper term of three years thereon. It imposed subordinate terms of eight months (one-third of the middle term) on each of counts II-XIII and XI, and ordered that the terms run consecutively because the offenses occurred at different times and places, and pursuant to different motivations. As to count IX, it imposed the middle term of two years, but stayed execution of sentence pursuant to section 654. As to count XII, the misdemeanor, it imposed a concurrent one-year term. Additionally, it imposed four consecutive one-year terms pursuant to section 667.5,

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\* See footnote, *ante*, page 1.

<sup>9</sup> Appellant was sentenced by a different judge than the one who presided at trial.

subdivision (b). This gave appellant an aggregate term of 12 years 4 months. The court reserved jurisdiction over the issue of restitution; imposed a restitution fine of \$2,400 pursuant to section 1202.4, subdivision (b) and imposed and stayed an equal fine pending successful completion of parole; and then imposed an unspecified fine of \$1,108 (including penalty assessments) on count I, unspecified fines of \$680 each on counts II-VIII and XI, an unspecified fine of \$690 on count IX (which it stayed), and an unspecified fine of \$326 on count XII. Appellant now raises various claims of sentencing error.

**A. Violation of Section 654**

Appellant contends the trial court imposed an unauthorized sentence by failing to stay, pursuant to section 654, the term imposed on count XI.<sup>10</sup> That count, which charged a violation of section 530.5, subdivision (a), was based on her use of Carter's identification in an attempt to pass a forged check at Gypsy Rose Antiques. Respondent concedes that, because appellant harbored a single objective when she signed Carter's check, used Carter's identification, and then passed the check at Gypsy Rose Antiques, the sentence on either count VIII or count XI must be stayed.

**B. Blakely**

Relying on *Blakely v. Washington* (2004) 542 U.S. 296, and *Apprendi v. New Jersey* (2000) 530 U.S. 466, appellant contends the trial court violated her Sixth Amendment right to trial by jury and Fifth and Fourteenth Amendment right to due process of law by imposing upper and consecutive terms based on factors not admitted by appellant or found to be true by the jury beyond a reasonable doubt. The California Supreme Court recently undertook an extensive analysis of these cases (and *United States*

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<sup>10</sup> Section 654, subdivision (a) provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

*v. Booker* (2005) 543 U.S. 220) and concluded that the imposition of upper term and consecutive sentences, as provided under California law, is constitutional. (*People v. Black* (2005) 35 Cal.4th 1238, 1244, 1254, 1261-1262.) The issue is now before the United States Supreme Court (*Cunningham v. California* (2006) \_\_\_ U.S. \_\_\_ [126 S.Ct. 1329]); we remain bound to follow *Black* until such time, if ever, as that court rules otherwise. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, appellant's contention fails.

**C. Imposition of Unspecified Fines and Penalty Assessments**

Appellant does not challenge imposition of the restitution fine, but correctly contends that the sentencing court erred by imposing fines and penalty assessments on the individual counts without stating the statutory basis or other authority therefor. Appellant asks us to strike those monetary sanctions as a result. Respondent concedes the error, but says the oversight can be corrected upon remand.

A trial court cannot impose fines and penalty assessments without statutory or other authority to do so. (See *People v. Chambers* (1998) 65 Cal.App.4th 819, 823.) All such fines, fees, and assessments, and the basis for their imposition, must be stated in the record and set forth in the abstract of judgment. (*People v. High* (2004) 119 Cal.App.4th 1192, 1200; *People v. Hong* (1998) 64 Cal.App.4th 1071, 1080, 1083.) In addition to facilitating appellate review, the inclusion of this information in the abstract of judgment assists state and local agencies in their collection efforts. (*High*, at p. 1200.)

We are not persuaded that striking the challenged fines and assessments is the appropriate remedy at this juncture. Certain fines, fees, and assessments are mandatory. (See, e.g., *People v. Talibdeen* (2002) 27 Cal.4th 1151, 1153, 1157; *People v. Terrell* (1999) 69 Cal.App.4th 1246, 1255-1257.) A sentencing court that fails to impose them has imposed an unauthorized sentence. (*People v. Talibdeen, supra*, at pp. 1153, 1157; *People v. Smith* (2001) 24 Cal.4th 849, 852-853.) We do not know whether mandatory fines and assessments are at issue here. If so, appellant is not entitled to avoid them

merely because the court erred by failing to articulate the authority under which they were imposed. Instead, the sentencing court should be given the opportunity to correct the error if it can.<sup>11</sup>

**D. Imposition of One-Year Term on Count XII**

Appellant contends, and respondent concedes, that the trial court erred by imposing a one-year term on count XII, a misdemeanor. A violation of section 484g constitutes grand theft only if the value of the things obtained in violation of the statute exceeds \$400. Here, as the prosecutor told the jury, appellant charged only \$50 to Carter's credit card. Accordingly, the offense was petty theft (§ 488), which is punishable by a fine "or by imprisonment in the county jail not exceeding six months" or both (§ 490).

**DISPOSITION**

The convictions on counts V and VI, together with the sentences imposed thereon, are vacated. The convictions on the remaining counts are affirmed. The sentence imposed on count XII is also vacated. The matter is remanded to the sentencing court with directions to (1) stay, pursuant to section 654, sentence on either count VIII or count XI; (2) articulate, both on the record and in the abstract of judgment, the statutory or other authority for the fines and penalty assessments imposed on the individual counts, or, if no such authority exists, to strike said fines and assessments; and (3) impose no more than a six-month concurrent jail term on count XII.

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<sup>11</sup> We note that, to the extent the fines and assessments may have been discretionary, appellant failed to object to their imposition and so waived any challenge, assuming the trial court is actually authorized to impose the sanctions. (See *People v. Smith, supra*, 24 Cal.4th at pp. 852-853; *People v. Scott* (1994) 9 Cal.4th 331, 356.)

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Ardaiz, P.J.

WE CONCUR:

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Vartabedian, J.

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Levy, J.