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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

A140705

v.

**(Alameda County
Super. Ct. No. H52891B)**

D'ARSI CHAMPLIN,

Defendant and Appellant.

D'Arsi and Mark Champlin were in an intimate relationship from 2004 to late 2011. During their relationship, Mark stole approximately \$500,000 from the bank account of his elderly mother, Charlotte Champlin. The prosecution charged D'Arsi and Mark with numerous felonies, including elder theft (Pen. Code, § 368, subd. (d)) and grand theft of personal property (§ 487, subd. (a)) and alleged sentencing enhancements.¹ Mark pled guilty and admitted the enhancement allegations. A jury convicted D'Arsi of 11 felonies, including grand theft of personal property (§ 487, subd. (a)) and receiving stolen property (§ 496, subd. (a)), and found true various sentencing enhancement allegations. The trial court placed D'Arsi on probation and ordered her to pay restitution.

¹ We refer to family members by their first names for clarity and convenience. Unless noted, all further statutory references are to the Penal Code. By separate order filed this date, we dispose of D'Arsi's petition for writ of habeas corpus (A148028) filed after briefing was completed on appeal.

D'Arsi appeals. She contends: (1) the court erred by excluding a recording of a December 2011 interview with a Pleasanton police officer; (2) the prosecutor violated “discovery mandates[;]” and (3) the prosecutor committed misconduct by presenting “false” evidence and making “misleading and deceptive” arguments to the jury. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We provide a brief overview of the facts here, and additional factual and procedural details in the discussion of D'Arsi's specific claims. In reviewing the factual background, we received little assistance from the respondent's brief filed by the Attorney General. Most of the citations to the record in the respondent's statement of facts are string citations at the end of lengthy paragraphs, rather than after each fact. Some of the citations do not support the facts stated. This practice violates California Rules of Court, rule 8.204(a)(1)(C) and has hindered our review in this case, where there are more than 20 volumes of reporter's transcripts.

Charges

The People charged D'Arsi with 12 felonies: grand theft of personal property between May 1, 2007 and April 1, 2012 (§ 487, subd. (a)), elder theft between May 1, 2007 and April 1, 2012 (§ 368, subd. (d)), four counts of grand theft of personal property in 2008, 2009, 2010, and 2011 (§ 487, subd. (a)), four counts of elder theft in 2008, 2009, 2010, and 2011 (§ 368, subd. (d)), receiving stolen property between December 2011 and April 2012 (§ 496, subd. (a)) and grand theft of personal property between December 2011 and April 2012 (§ 487, subd. (a)).² The People alleged numerous sentencing enhancement allegations.

² The People charged Mark with 12 felonies, including grand theft of personal property (§ 487, subd. (a)) and elder theft (§ 368, subd. (d)) and alleged sentencing enhancements. Mark pled guilty and admitted the enhancements.

The Prosecution's Case

The prosecution's theory was D'Arsi knew about Mark's theft and "actively participated" by using the stolen money to pay her mortgage so she and "Mark could own the home that was in her name outright[.]"

A. D'Arsi, Mark, and Charlotte.

D'Arsi has a degree in business and finance from Fresno State University. In the early 1990's, D'Arsi worked as a "preferred banker" at Bank of America, specializing in loans and retirement plans. She married in 1994 and had two daughters. While married, D'Arsi was the bookkeeper for her husband's construction business. She handled the "financial parts" of the business — bills, payroll, and taxes. D'Arsi, who was "good with the numbers[.]" also "took care" of the finances for the two homes she and her husband owned. In 2001, D'Arsi and her husband separated and later divorced.

In 2004, D'Arsi began dating Mark, who was also divorced with two children. Mark and D'Arsi were "joined at the hip" and did everything together: from shopping for groceries and collecting the mail to taking vacations. D'Arsi had health problems and Mark cared for her when she was ill. In 2004, Mark gave D'Arsi an expensive diamond engagement ring. In September 2007, D'Arsi opened a bank account at Wells Fargo. She and Mark married in March 2008, and Mark moved into the house D'Arsi owned in Auburn. For the duration of their marriage, Mark and D'Arsi had separate Wells Fargo bank accounts. They filed separate tax returns, but a joint community property worksheet listing their wages.

Mark owned a real estate and brokerage company. D'Arsi managed the business as an "independent consultant," making sure the company received loan payments and commissions. In 2007, the company had 25 agents in at least four locations, but business declined as the housing market faltered. Mark's income plummeted from approximately \$208,000 in 2007 to \$86,000 in 2009. In 2008, Mark was hospitalized after suffering a serious motorcycle accident. In 2010, he declared bankruptcy. In 2011, his income was \$7,000.

In 2007 — when she was 80 years old — Charlotte moved into an assisted living facility. She put \$363,000, the proceeds from the sale of her house, into a Bank of America checking account (bank account or Charlotte’s bank account). The total value of Charlotte’s assets was approximately \$500,000. Charlotte’s monthly expenses exceeded her income from pensions and social security, so she drew approximately \$1,000 per month from her bank account. She was confident her savings would support her for the remainder of her life. When Charlotte moved into the assisted living facility, she gave Mark signatory authority on her bank account. He managed her finances.

B. D’Arsi and Mark Use \$500,000 of Charlotte’s Money to Finance Their Lifestyle and Pay D’Arsi’s Mortgage.

Prosecution expert Sandra Kyzivat testified that from August 2007 to November 2011, Mark withdrew \$498,614 from Charlotte’s bank account. On 167 occasions, money from Charlotte’s account went into Mark or D’Arsi’s bank accounts. Mark withdrew money from Charlotte’s account and moved it into D’Arsi’s Wells Fargo account in one of three ways: (1) he deposited it into his Wells Fargo account and then transferred the money to D’Arsi’s Wells Fargo account; (2) he deposited it into his Wells Fargo account and wrote D’Arsi a check, which she deposited into her Wells Fargo account; or (3) he purchased a cashier’s check and deposited it into D’Arsi’s Wells Fargo account. The checks deposited into D’Arsi’s account were not signed and included the notation for deposit only. On several occasions, cashier’s checks were drawn from Charlotte’s account and deposited directly into D’Arsi’s Wells Fargo account.³

Mark used \$75,000 of Charlotte’s money on entertainment and travel for D’Arsi and their children, including taking the family on vacations to Lake Tahoe, Puerto Vallarta, Santa Barbara, Palm Desert, and Hawaii. Mark used almost \$83,000 of Charlotte’s money to purchase scrip in the form of plastic gift cards, which the family used at Subway, Safeway, Amazon, and clothing stores. During this time period, D’Arsi told one of her daughters that Charlotte had “helped out on big purchases, such as our

³ The court excluded a July 7, 2009 cashier’s check because the prosecutor failed to timely disclose it to defense counsel. See page 14, *infra*.

new washer and dryer, and our floors, and we bought a new couch, so we were told that Grandma Charlotte helped out with buying that.”

Mark also gave D’Arsi \$60,100 of Charlotte’s money. In March 2008, Mark began giving D’Arsi \$1,700 each month, which she used to pay her mortgage. From September 2008 to November 2011, Mark gave D’Arsi an additional \$500 each month “to pay down the mortgage . . . more quickly.” In 2009, D’Arsi’s monthly income was \$940.

C. Charlotte Runs Out of Money and the Police Investigate.

In October 2011, Mark told Charlotte she had run out of money and would have to share a room at the assisted living facility. Crying, Charlotte “wanted to know what happened to her money.” Mark told Charlotte he wanted to help but did not “have any money.” Shortly thereafter, Mark’s siblings obtained Charlotte’s bank statements and learned Mark had been spending Charlotte’s money.⁴ When they confronted him, Mark claimed he borrowed \$100,000 from Charlotte to buy a house. Eventually, however, Mark admitted he was “responsible” for Charlotte’s “predicament.” One of Mark’s siblings helped the Pleasanton Police Department identify the unauthorized withdrawals from Charlotte’s bank account.

In December 2011, Detective Keith Batt went to Mark and D’Arsi’s house. D’Arsi was home and she “seemed to understand” why the officers were there, and “what was happening.” D’Arsi joined Mark and the officers at the dining room table. Detective Batt would have preferred to speak to Mark alone, but he “took what [he] could get, which was they wanted both to sit there[.]” Detective Batt “didn’t want to . . . create an atmosphere where [Mark] didn’t want to cooperate[.]” Detective Batt asked Mark and D’Arsi to explain their “roles or responsibilities . . . in terms of paying bills, how things work in your family.” As they discussed “large cash withdrawals from Charlotte’s [bank] account[.]” D’Arsi said some of the money was “used to pay bills, and D’Arsi volunteered they paid insurance. And then she also volunteered some information about

⁴ Mark is one of Charlotte’s four children.

paying extra on the mortgage.” D’Arsi told Detective Batt that she and Mark “paid [] down” the mortgage using Charlotte’s money. D’Arsi did not seem surprised when Detective Batt accused Mark of stealing \$150,000 from Charlotte’s bank account. She expressed surprise only when Detective Batt said he thought approximately \$300,000 had been stolen.

D. D’Arsi Cashes Money Out of Her House.

D’Arsi petitioned to dissolve the marriage shortly after the interview with Detective Batt. She continued to refer to Mark as her husband, however, and she wrote him several checks in late 2011 and early 2012. In early 2012, D’Arsi used Mark as her loan broker when she refinanced her house, paid off her mortgage, and cashed out \$20,000.

Defense Evidence

D’Arsi’s theory was Mark stole Charlotte’s money but “hid his thefts” and “fooled everyone. He fooled D’Arsi along with everyone else.”

Istvan Morang testified as an expert in fraud examination and investigation. According to Morang, Mark withdrew funds from Charlotte’s bank account “in such a way that [the withdrawals] would not be noticeable[.]” There were no “red flags” such as increases in spending, purchases of luxury items, or extravagant travel. From 2007 or 2008 to late 2011, Mark withdrew about \$10,000 from Charlotte’s bank account twice a month. As Mark’s “cash flow from business activities decreased[.]” he “supplemented . . . with his withdraws from Charlotte’s [bank] account[.]”

Mark deposited only a “small percentage” of the money he stole from Charlotte — \$60,100 — into D’Arsi’s Wells Fargo account. Mark deposited the remainder of the money into his own Wells Fargo account, making it impossible to determine how those funds were spent, or whether D’Arsi knew about certain expenditures. D’Arsi’s spending habits were consistent and did not raise “red flags” associated “with a perpetrator of fraud[.]”

According to Morang, there were no “relevant facts” supporting a theory that D’Arsi had knowledge of Mark’s theft or assisted in that theft. Morang did not see “how

D’Arsi paying her mortgage assisted Mark in any way in his embezzlement[.]” On cross-examination, Morang conceded the money D’Arsi used to pay down her mortgage was “dirty money” and that when stolen money is put into a house in someone else’s name, it is “distanced from the original source.” Morang also admitted more than seven percent of the stolen money benefitted D’Arsi — she benefitted when Mark paid the utility bills, insurance, and DMV registration. Finally, Morang conceded D’Arsi’s monthly income was only \$940 in 2009 and she would not have been able to pay her monthly mortgage payment of \$1,700 without using money from another source.

Verdict and Sentencing

The court acquitted D’Arsi of grand theft of personal property between December 2011 and April 2012 (§§ 487, subd. (a)), 1181.1). A jury convicted D’Arsi of the remaining 11 felonies and found true various sentencing enhancement allegations. The court placed D’Arsi on probation and ordered her to pay \$524,704.14, plus interest, in restitution.

DISCUSSION

I.

The Court Did Not Err by Excluding a Recording of the Detective Batt Interview

D’Arsi claims the court erred by declining to admit a recording of Detective Batt’s December 15, 2011 interview pursuant to Evidence Code section 356. According to D’Arsi, the recording “provided context” for her statements during the interview and “[e]xcluding that accurate and unvarnished evidence allowed the prosecutor to materially mislead the jury” about the “contested issues in the case.” D’Arsi also contends the court erred by excluding the recording under Evidence Code section 352.

A. The December 15, 2011 Interview and the Court’s Ruling.

After Detective Batt testified regarding the interview, defense counsel moved to admit a recording of the entire interview pursuant to Evidence Code section 356, which allows introduction of additional parts of a conversation when needed to explain the

statement in evidence.⁵ According to defense counsel, it was “misleading” to permit Detective Batt to testify about certain portions of the interview and not others. Defense counsel also argued D’Arsi’s statements during the interview were relevant to her state of mind, i.e., whether she knew the money she used to pay her mortgage had been stolen from Charlotte’s bank account. The People opposed the request, claiming much of the recording was irrelevant and admitting it would violate Evidence Code section 352.

At the outset of the interview, Detective Batt asked Mark, “what’s the deal with mom’s finances. . . . I want to understand what the circumstances are, how we’ve gotten to where we are today. . . .” Mark claimed Charlotte had Alzheimer’s and blamed a sibling for “generat[ing] all this . . . difficulty.” Mark gave a rambling explanation of the quality of Charlotte’s care at the assisted living facility. Then he claimed “times started getting really tough” for me and Charlotte offered to loan him \$100,000 to “buy a different house” after he married D’Arsi. Mark decided not to buy the house, but he told Charlotte he would still “need some money cause it’s just not going well[.]” Charlotte responded, “whatever you need, if I have it you can use it.” Then Mark had a motorcycle accident. As he recovered, Charlotte agreed to let Mark use her money; he promised to pay her back. Mark claimed he “borrowed” approximately \$150,000 from Charlotte.

At that point, Detective Batt said Mark’s siblings believed Mark used Charlotte’s money for his own benefit. Detective Batt asked Mark, “are you authorized and entitled to spend that money?” Detective Batt said, “this could be considered elder abuse if there were something improper going on” and explained he was investigating “to determine if there’s any wrongdoing.” Detective Batt explained, “in just since 2006, we’re looking at [\$]312,000 . . . spent by you, for your own benefit, not related to paying your mom’s stuff. Would that surprise you if I were to say that number?” D’Arsi replied, “Yeah” and Mark said, “It might, you know. But uh. . . .” Detective Batt remarked, “you’ve spent . . . \$300,000. . . . I’m going to . . . ask you personal questions because I need to know the

⁵ We augment the record with the 53-page transcript of the December 15, 2011 interview. (Cal. Rules of Court, rule 8.155(a)(1)(A).)

answers to make a determination.” When Detective Batt asked, “What are your liabilities right now? What are you paying, What do you owe?” Mark said he had been paying his “dues with the real estate people” and D’Arsi said, “Insurance.” Mark elaborated: “Insurance; and then . . . I was paying . . . basically the house payment.”

Mark said the monthly mortgage payment was \$2,200 but “we’ve gotten it down.” When Mark explained the house belonged to D’Arsi, Detective Batt responded, “I understand, but if you’re paying into it, and you’re married now . . . the lines blur. Have you deposited money earnings into this account[?]” Mark replied, “Yeah[.]” Then Detective Batt asked, “I’m not seeing money coming in from you and then money going out to you. I’m just seeing you spending mom’s money. . . . Why do you take out so much cash?” D’Arsi and Mark listed certain items, such as WalMart and Costco; then Mark said, “the house being again [\$]2,000.” D’Arsi offered, “[t]he insurance” and “[t]he medical insurance is [\$]1,600.” When Detective Batt asked where all the money was going, Mark responded, “just to pay bills. . . . [¶] I would put it in my account and pay bills.”

When Mark mentioned he had been audited by the IRS from 2003 to 2008, Detective Batt suggested it was because Mark was “spending at a rate that far exceeds your stated income. . . . You’re spending mom’s money. It looks like you’re paying into your mortgage and everything else. . . .” Mark and D’Arsi conceded Mark did not make “a lot” of money and D’Arsi explained, “[w]e were screwed while [Mark] was in the hospital.” Detective Batt said, “I’m not saying that what you’re doing is OK and that it isn’t a crime, I’m just saying that I’m not sure and I’m investigating it.” Then Detective Batt explained he had spoken to Charlotte and a “[d]octor would get up on the stand and say your mom is of sound mental capacity. Your mom looked me square in the eye and said, ‘I never gave him permission to spend all that money. I’m absolutely shocked that he would do that.’” Detective Batt described Charlotte as “[s]harp as a tack . . . she says something totally different than what you say . . . you could potentially be in trouble for this, it’s gonna be your word against her’s [*sic*].” Detective Batt told Mark he had looked at Charlotte’s bank statements and “[t]here’s no question that the vast majority of the

money that was spent was solely to your benefit. Incline Village and vacations in Palm Springs, Costco and going out and spas and all that stuff's in here, and it's solely to your benefit. . . . It looks like your whole life was paid for on your mom's dime."

Mark responded, "We have [a] major difference in opinion" and Detective Batt said, "What I'm saying is, here's . . . how it looks. I don't know what picture I just painted from you. 'You look like you're goin[g] "whoa!" that's a bad picture.'" D'Arsi responded, "no idea." Detective Batt explained at length what an outsider would think about the "significant sums of money on what a lot of people don't do . . . when times are hard it is, from an outsider's perspective, not reasonable for you to spend" money on vacations and nice restaurants. "It's not that you're just paying down your mortgage. . . . paying down your mortgage on your mom's money doesn't seem reasonable to me. Going out to restaurants doesn't seem reasonable to me. . . . [B]ut what matters to me doesn't matter. What matters is the DA, who may charge you with elder abuse. . . . I think there's a strong potential, based on this evidence right here, that you could be charged with . . . financial elder abuse. There's a strong chance that the next time I see you I could be placing you in handcuffs and dragging you back to Alameda county jail with a warrant for your arrest."

After asking Mark whether he had gambling debts or problems with drugs or alcohol, Detective Batt said, "you paid down [D'Arsi's] mortgage. You paid it down." D'Arsi replied, "We did, we paid it down." Mark asked, "You mean by paying extra on the payments?" and Detective Batt said, "Yeah! . . . You paid extra. When times are hard and you take from your mother . . . and you pay extra on your mortgage. . . . And when you're not making money, how is it reasonable for you to take from your mom and pay extra on your mortgage?" At that point, Mark admitted, "[i]t was a big mistake." Detective Batt explained at length how Mark's actions hurt Charlotte and asked Mark what he was going to do when he got "arrested. . . . If and when. You going to plead guilty to elder abuse and start trying to make restitution, or are you going to fight your mom?"

In response, Mark claimed Charlotte allowed him to use her money. Eventually, he conceded he used more of his mother's money than necessary. Detective Batt opined, "I believe you committed the crime of elder abuse by taking what you didn't need. [¶] I think you're going to be charged with elder abuse." When Mark asked whether there was a possibility he could resolve the problem "without going to court[,] " Detective Batt said, "there's always a possibility." Then Detective Batt told Mark his mother had obtained a restraining order against him. Detective Batt explained how the prosecutor would file charges, Mark's options if an arrest warrant were issued, and a potential sentence. Toward the end of the interview, Mark admitted he "took advantage of some circumstances" but "it was never with ill intent to not pay back. . . ."

The court listened to a recording of the entire interview and declined to admit the entire recording, concluding much of it was irrelevant and admitting it would consume an undue amount of time in violation of Evidence Code section 352. As the court explained, admitting the recording would require "a trial within a trial" and would open "up [a] kind of Pandora's box of things" which would not "be helpful to the issues in this case[.]"

B. Evidence Code Section 356 Did Not Require Admission of the Recording.

Evidence Code section 356 provides in relevant part, "Where part of [a] . . . conversation . . . is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; . . . when a detached . . . conversation . . . is given in evidence, any other . . . conversation . . . which is necessary to make it understood may also be given in evidence." The statute "is sometimes referred to as the statutory version of the common law rule of completeness. [Citation.] According to the common law rule: "[T]he opponent, against whom a part of an utterance has been put in, may in his [or her] turn complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance." [Citation.] [Citation.]" (*People v. Parrish* (2007) 152 Cal.App.4th 263, 269, fn. 3.) The purpose of the rule "is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed. [Citation.]

Thus, if a party's oral admissions have been introduced in evidence, he [or she] may show other portions of the same interview or conversation, even if they are self-serving, which 'have some bearing upon, or connection with, the admission . . . in evidence.' [Citations.]" (*People v. Arias* (1996) 13 Cal.4th 92, 156.) We review the trial court's determination of whether to admit evidence under Evidence Code section 356 for abuse of discretion. (*People v. Pride* (1992) 3 Cal.4th 195, 235.)

The rule of completeness prevents "the use of selected aspects of a [statement] so as to create a misleading impression *on the subjects addressed*," and therefore "hinges on the requirement that the two portions of a statement be '*on the same subject*.'" (*People v. Vines* (2011) 51 Cal.4th 830, 861, quoting *People v. Arias, supra*, 13 Cal.4th at p. 156, italics added.) Evidence Code section 356 "is indisputably "subject to the qualification that the court may exclude those portions of the conversation not relevant to the items thereof which have been introduced.'" [Citations.] 'The rule is not applied mechanically to permit the whole of a transaction to come in without regard to its competency or relevancy. . . .' [Citation.]" (*People v. Williams* (1975) 13 Cal.3d 559, 565.)

The court was not required to admit the recording under Evidence Code section 356 because the entire interview was not "on the same subject" as Detective Batt's trial testimony. As discussed above, Detective Batt testified D'Arsi: (1) admitted she and Mark used Charlotte's money to pay bills, insurance, and to pay down D'Arsi's mortgage; and (2) expressed surprise only when Detective Batt accused Mark of stealing \$300,000 from Charlotte's bank account. Much of the interview concerned matters on entirely different subjects: a discussion of the quality of care at Charlotte's assisted living facility, Mark's description of his motorcycle accident and his relationship with his siblings, Charlotte's mental acuity, and Detective Batt's explanation of why charges would likely be filed against Mark. Evidence Code section 356 did not require the court to admit these "[s]tatements pertaining to other matters." (*People v. Samuels* (2005) 36

Cal.4th 96, 130 (*Samuels*).⁶ D’Arsi has not demonstrated the court erred by declining to admit the recording pursuant to Evidence Code section 356.

C. The Exclusion of the Recording Under Evidence Code Section 352 Was Not an Abuse of Discretion.

As stated above, the court excluded the recording pursuant to Evidence Code section 352. It concluded admitting the recording would require “a trial within a trial” and would open “up [a] kind of Pandora’s box of things” which would not “be helpful to the issues in this case[.]” Under Evidence Code section 352, a trial court “may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” The statute “permits the trial judge to strike a careful balance between the probative value of the evidence and the danger of prejudice, confusion and undue time consumption,” but “requires that the danger of these evils substantially outweigh the probative value of the evidence.” (*People v. Lavergne* (1971) 4 Cal.3d 735, 744.) Rulings under Evidence Code section 352 “come within the trial court’s discretion and will not be overturned absent an abuse of that discretion.” (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070.)

D’Arsi has not demonstrated the court’s ruling was an abuse of discretion. As we have explained, the recording was minimally probative because it concerned topics completely irrelevant to the central issue in the case: D’Arsi’s knowledge of — and participation in — Mark’s theft. In addition to this low level of probative value, admitting the recording would have required a significant consumption of time. Under the circumstances, the court did not abuse its discretion by excluding the recording pursuant to Evidence Code section 352. Having reached this conclusion, we need not address the Attorney General’s harmless error argument.

⁶ Detective Batt’s trial testimony did not create a misleading impression about the interview. (*Samuels, supra*, 36 Cal.4th at p. 130.) His testimony was discrete and straightforward, and demonstrated Mark and D’Arsi used Charlotte’s money to finance their lifestyle and to pay down the mortgage on D’Arsi’s house.

II.

The Prosecutor's Discovery Violation Was Not Prejudicial and the Court's Remedy Was Adequate

D'Arsi contends the prosecutor violated “discovery mandates” by withholding a key document — a July 7, 2009 cashier’s check (check or cashier’s check) — from defense counsel until after the prosecution’s expert witness testified. D'Arsi also claims the exclusion of the cashier’s check was an abuse of discretion and a violation of her due process rights.

A. The Prosecutor’s Failure to Disclose the Cashier’s Check.

Jury selection was scheduled for May 13, 2013 and opening statements for May 15. On May 13, 2013, defense counsel sought an additional day to review the prosecution’s updated expert report, and asked to move opening statements to May 16, 2013. In response, the prosecutor explained the updated expert report did not contain new information: it simply reorganized information that had been in defense “counsel’s possession for over seven months.” When the court asked whether there were “any new items” contained in the updated report, the prosecutor responded, “I don’t believe so.” The court granted the continuance request and moved opening statements to May 16, 2013. On May 15, 2013, the prosecutor gave defense counsel additional discovery, including a “duplicate” CD containing D'Arsi’s Wells Fargo bank statements.

On May 16, 2013, after the jury was empanelled, defense counsel moved “for a continuance because of late discovery that was provided yesterday.” Defense counsel noted the discovery contained new information, including real estate records and witness interviews, and a CD of “duplicate Wells Fargo records . . . I am not sure why we were provided a duplicate.” In response, the prosecutor said she provided a duplicate CD because she “came into [the case] late” and wanted to make sure “every piece of discovery” was disclosed. At her request, Detective Batt copied everything. Additionally, the prosecutor’s expert witness, Sandra Kyzivat, was concerned “some of her documents were Bate stamped and some weren’t, which would lead her to believe that maybe they weren’t turned over.” The prosecutor told defense counsel she would

provide a new CD with all of the documents, and she did. The court denied defense counsel's request for a continuance.

On May 21, 2013, Kyzivat began her first of several days of testimony. She testified Charlotte's money went into D'Arsi's Wells Fargo account on several occasions, including on July 10, 2008, when \$1,700 went from Charlotte's account into D'Arsi's Wells Fargo account. Kyzivat testified about several other instances, in 2008 and 2009, where money was withdrawn from Charlotte's bank account and deposited into D'Arsi's Wells Fargo account. Then, referring to her spreadsheet — a copy of which had been provided to the jury — Kyzivat testified, “On July 7, 2009, \$5,900 was withdrawn [from] Charlotte's Bank of America account. Two cashier's checks were purchased on that date at Bank of America. One was for \$3,500 and one was for \$2,400. The one for \$2,400 shows the purchaser is D'Arsi Champlin. [¶] It was deposited into the D'Arsi Champlin Wells Fargo bank account on the same day.”

The prosecutor remarked, “Okay. So I think we have the idea of it.” She continued, “we've already established \$451,791.80 [in] unauthorized cash withdrawals, and the total that was deposited in Mark's account was . . . \$377,210. And what is the total funds transferred to D'Arsi's account from Mark's account?” Kyzivat answered, \$36,950. She explained, “[i]n some of these cases, the unauthorized cash withdrawals were first deposited into Mark's account, then either turned around, wrote a check to D'Arsi, it was deposited to her account on the same day; or in some cases he made a transfer, a direct transfer from his account to D'Arsi's account on the same day; and in some cases the money was withdrawn from Charlotte's account, didn't go first to Mark's account, and then either transferred or have a check written, but went directly into D'Arsi's account.”

After Kyzivat finished testifying for the day, defense counsel complained the prosecutor had not provided the cashier's check referenced on Kyzivat's spreadsheet. The prosecutor initially stated the check was in the bank records, but then agreed, “that's a good point. It's not in here.” That evening, the prosecutor emailed defense counsel a copy of the cashier's check. The prosecutor had assumed the check was on the

“duplicate” CD she provided on May 13, 2013 but admitted the check was not Bates stamped and was “not sure how we missed that.”

The next morning, defense counsel moved for a mistrial or, in the alternative, to exclude the cashier’s check and for a continuance. The prosecutor accepted responsibility for failing to disclose the cashier’s check but argued D’Arsi had not been prejudiced. In response, defense counsel claimed “tactical decisions have been based on the absence of evidence, including . . . the opening and the examination of witnesses in the course of trial.” When the court asked defense counsel to be more specific, she explained, “[i]n terms of our argument about [there] being no direct evidence linking D’Arsi to this account or even this bank. . . .” The prosecutor agreed the cashier’s check demonstrated D’Arsi’s awareness of, and participation in, Mark’s theft.

The court denied the mistrial motion. It determined the cashier’s check would not be admitted unless the prosecutor laid foundation “through the cashier that that’s what happened that day.” The court denied the request for a continuance but gave defense counsel five days — a “little more time” — to prepare to cross-examine Kyzivat, and ordered Kyzivat to remove the reference to the cashier’s check from the jury’s copy of the spreadsheet. The court explained the cashier’s check “cannot be referenced in [the prosecution’s] case unless D’Arsi Champlin testifies or somebody else lays a foundation for this check to come into evidence [¶] I am not saying” the prosecutor’s failure to provide the check was “willful. . . . All I am saying, it’s not coming into evidence until the foundation is laid”

During closing argument, the prosecutor briefly referred to cashier’s checks deposited into D’Arsi’s account, but did not mention the July 7, 2009 cashier’s check. During rebuttal closing argument, the prosecutor argued the evidence created a “reasonable inference” D’Arsi was “directly involved with Mark in getting money from Charlotte’s account” and referred to several instances in 2008 where D’Arsi deposited Charlotte’s money into her Wells Fargo account.

B. D’Arsi Cannot Demonstrate Prejudice from the Prosecutor’s Discovery Violation.

D’Arsi argues the prosecutor’s failure to disclose the cashier’s check violated section 1054.1 and the court’s exclusion of the check was an insufficient remedy that “punished [her] for the prosecutor’s [discovery] violation.” Section 1054.1 requires the prosecution to “disclose to the defendant or . . . her attorney . . . [¶] [a]ll relevant real evidence seized or obtained as part of the investigation of the offenses charged[,]” as well as “[r]elevant . . . reports or statements of experts made in conjunction with the case . . . which the prosecutor intends to offer in evidence at the trial.” (§ 1054.1, subds. (c), (f).) “It is defendant’s burden to show that the failure to timely comply with any discovery order is prejudicial, and that a continuance would not have cured the harm.” [Citation.]” (*People v. Jenkins* (2000) 22 Cal.4th 900, 950.) A trial court may consider a wide range of sanctions in response to a discovery violation, and we review its ruling for abuse of discretion. (*People v. Lamb* (2006) 136 Cal.App.4th 575, 581.)

We reject the Attorney General’s claim that the court did not “find a discovery violation” but we conclude D’Arsi failed to demonstrate prejudice. *People v. Verdugo* (2010) 50 Cal.4th 263 (*Verdugo*) is instructive. In that case, the prosecutor did not timely disclose witness interview notes. (*Id.* at pp. 280-281.) The defendant claimed he “‘could not properly or effectively prepare for cross-examination of witnesses,’ that ‘his ability to impeach the witness[] was adversely impacted,’ and that ‘[t]imely disclosure of the information would have enabled counsel to adjust his theory of the case to fit the facts.’” (*Id.* at pp. 281-282.) The California Supreme Court rejected this argument, concluding the defendant’s “generalized statements” (*id.* at p. 282) failed to “demonstrate prejudice from the prosecutor’s violation of section 1054.1.” (*Id.* at p. 281.) According to the *Verdugo* court, the defendant did “not explain what counsel would have done differently if the notes had been disclosed sooner.” (*Id.* at p. 282.) The same is true here. Here as in *Verdugo*, defense counsel’s “generalized statements” about making “tactical decisions” were “insufficient to demonstrate prejudice” from the prosecutor’s failure to timely disclose the cashier’s check. (*Ibid.*)

On appeal, D’Arsi claims the discovery violation prejudiced her because the cashier’s check gave the impression she purchased the check, but there was no proof she “personally purchased” it. This argument is not persuasive. At trial, Kyzivat testified at length — and over several days — about how money was withdrawn from Charlotte’s bank account and deposited into D’Arsi’s bank account. Kyzivat’s testimony about the cashier’s check was a mere seven lines of a 2,000-page transcript. D’Arsi concedes the cashier’s check was “utterly unremarkable” and just one of “numerous other deposits[.]” The cashier’s check was not the focus of the prosecutor’s closing argument. As a result, D’Arsi was not prejudiced by the prosecutor’s late disclosure of the check.

Nor can D’Arsi demonstrate the court’s remedy for the discovery violation was inadequate. At D’Arsi’s request, the court excluded the check and directed Kyzivat to delete the reference to the check from the jury’s copy of the spreadsheet. “Ordinarily, a curative instruction to disregard improper testimony is sufficient to protect a defendant from the injury of such testimony, and, ordinarily, we presume a jury is capable of following such an instruction.” (*People v. Navarrete* (2010) 181 Cal.App.4th 828, 834.) We reject D’Arsi’s claims, presented in conclusory fashion, that the court’s order “penalized” her, precluded her from testifying, or violated her due process rights.⁷ (See *Lyons v. Santa Barbara County Sheriff’s Office* (2014) 231 Cal.App.4th 1499, 1506 [“[a]ppellant’s remaining arguments have been considered and merit no further discussion”].)

We conclude D’Arsi was not prejudiced by the prosecutor’s late disclosure of the cashier’s check and she has not demonstrated the court’s remedy for the discovery violation was inadequate.

⁷ We reject any suggestion that the denial of D’Arsi’s request for a continuance prevented her from presenting an adequate defense. The court denied the continuance request but gave D’Arsi a “little more time” to prepare to cross-examine Kyzivat.

III.

D'Arsi's Prosecutorial Misconduct Claims Fail

D'Arsi contends the prosecutor committed misconduct by “presenting false evidence” and making “misleading and deceptive” arguments to the jury, and that the court “erred in allowing it.” ““The applicable federal and state standards regarding prosecutorial misconduct are well established. “A prosecutor’s . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so “egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.”” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ““the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.”” [Citation.]” (*People v. Navarette* (2003) 30 Cal.4th 458, 506.)

A. D'Arsi “Was Directly Involved” With Mark’s Withdrawals from Charlotte’s Bank Account.

During rebuttal closing argument, the prosecutor argued Mark was hospitalized in late 2008 following a motorcycle accident and spent weeks in a wheelchair. After his discharge from the hospital, D'Arsi drove because Mark could not “drive himself[.]” On one occasion, D'Arsi drove Mark to Las Vegas. The prosecutor argued: “I don’t know when Mark got out of his wheelchair after [late December 2008], if D'Arsi had to drive him the other times in early January [2009] or not, but I do know that between October 8th when he went in the hospital and New Year’s Eve[,] D'Arsi was directly involved with Mark getting Charlotte’s money from the Bank of America. [¶] There’s no evidence that it was anybody other than his loving wife [who] is connected to the hip. . . .”

At that point, defense counsel objected pursuant to *Napue v. Illinois* (1959) 360 U.S. 264 (*Napue*) that “an investigation has been done in this case.”⁸ The court overruled the objection. The prosecutor continued, “[t]hat is the reasonable inference[] and that’s the facts . . . if you want to claim she didn’t have any knowledge, but it’s the fact. It’s the

⁸ *Napue* concerned prosecutorial misconduct for knowingly presenting false testimony.

reality. Mark was in a wheelchair and D’Arsi is the one that was staying with him at the hospital.” Later, outside the presence of the jury, defense counsel complained the prosecutor “cannot knowingly advance false evidence . . . the Prosecutor . . . said that D’Arsi was in the bank with Mark, . . . when, in fact, we know they have had an investigator to the bank to see if anybody saw D’Arsi in the bank and they did not.” In response, the prosecutor argued “there was nothing false[.]” The court overruled the objection. It described the prosecutor’s statements as “hyberbole” and rejected the idea the jurors “think that there is evidence that D’Arsi . . . was in the bank with Mark on any day because there is no evidence to that [e]ffect.”

On appeal, D’Arsi claims the prosecutor committed misconduct because there was no evidence she helped Mark withdraw money from Charlotte’s bank account. This claim is forfeited because D’Arsi failed to request the jury be admonished. (*People v. Sandoval* (2015) 62 Cal.4th 394, 440 (*Sandoval*) [prosecutorial misconduct claim forfeited where the defendant did not timely object and request the jury be admonished].) Moreover, there was no misconduct. “[P]rosecutors have wide latitude to discuss and draw inferences from the evidence presented at trial. “Whether the inferences the prosecutor draws are reasonable is for the jury to decide.”” (*People v. Thornton* (2007) 41 Cal.4th 391, 454; *People v. Hill* (1998) 17 Cal.4th 800, 828.) Here, the jury could reasonably infer D’Arsi drove Mark to the bank to withdraw money from Charlotte’s bank account because: (1) Mark withdrew money from Charlotte’s account after his motorcycle accident, while he was a wheelchair, unable to drive; (2) D’Arsi drove Mark other places during that time period, including to Las Vegas; and (3) D’Arsi and Mark were “joined at the hip” and she cared for him after his accident. As a result, the prosecutor’s contention “fell within the permissible bounds of argument.” (*People v. Leon* (2015) 61 Cal.4th 569, 605.)

B. D’Arsi Knowingly Used Charlotte’s Money to Pay for Home Improvements.

Before trial, D’Arsi moved for an order requiring the prosecution to make an offer of proof before arguing D’Arsi “said something to the effect that ‘Grandma Charlotte’

paid for hardwood floors, a washer and dryer, or new furniture.” D’Arsi claimed she paid for those items with her own SSI money. The court denied the request, explaining: “I am not going to do that. I think we’ll hear what the evidence is when the witness hits the stand and the jury gets to hear that.”

At trial, the prosecutor asked one of D’Arsi’s daughters whether D’Arsi ever said “Charlotte was buying you things?” The daughter responded, “we were never really told that she bought the whole thing completely. It was always that she helped out on big purchases, such as our new washer and dryer, and our floors, and we bought a new couch, so we were told that Grandma Charlotte helped out with buying that.” The daughter continued, “she would say that [she] and Mark mainly bought it, but Grandma Charlotte knew that they were kind of in a pickle with money and they needed a little help so Grandma Charlotte loaned them some money.” On cross-examination, defense counsel asked, “Your mom never said in your presence that Grandma Charlotte bought her floors, did she?” D’Arsi’s daughter responded, “not that she bought them fully. She did mention that she helped us with them.”

During closing argument, the prosecutor urged the jury to reject D’Arsi’s claim that she did not know the stolen “money was Charlotte’s[.]” The prosecutor asked, “if she didn’t know before December 15[, 2011] that the money they were using was Charlotte’s . . . why is she telling her children that grandma Charlotte is helping them get new floors, if she didn’t know before December 15th. You’ll see in the bank records that the expenditure was in May of 2011. Why would you tell your daughter, grandma Charlotte is helping us get a new washer and dryer, if you didn’t know that money was coming from Charlotte before December 15th of 2011. It’s not truthful. She knew it was Charlotte’s money. She knew it all along. She participated and she spent it.” Defense counsel did not object.

On appeal, D’Arsi argues the prosecutor knowingly elicited testimony from her daughter to make it “*look like*” D’Arsi admitted using Charlotte’s money to make the home improvements. According to D’Arsi, this “misleading” argument constituted prosecutorial misconduct. D’Arsi’s claim is forfeited because she ‘failed to timely object

and request the jury be admonished. [Citations.]” (*Sandoval, supra*, 62 Cal.4th at p. 440, quoting *People v. Wharton* (1991) 53 Cal.3d 522, 566.) In any event, there was no prosecutorial misconduct. The prosecutor did not — as D’Arsi contends — elicit false testimony or “willfully deceiv[e] the jury.” In her closing argument, the prosecutor was not urging the jury to conclude the money for home improvements came from Charlotte. Instead, the prosecutor was trying to persuade the jury that D’Arsi *knowingly* used Charlotte’s money before December 15, 2011, and admitted that fact to her children. Having reached this result, we need not address the Attorney General’s harmless error argument.

C. D’Arsi’s “Money Laundering Account.”

Defense counsel moved in limine to preclude the prosecutor from referring to D’Arsi’s Wells Fargo account as the “‘money-laundering account’ for her mortgage payments.” According to D’Arsi, referring to the Wells Fargo account as a “‘money-laundering account’” was more prejudicial than probative under Evidence Code section 352. The court denied the motion and allowed the prosecutor to use the term to describe D’Arsi’s Wells Fargo account.

During her opening statement, the prosecutor told the jury she was going to refer to D’Arsi’s Wells Fargo account as the “money laundering account by name, meaning that’s what the purpose of it was; that’s not saying she’s charged with money laundering. I call it the money laundering account so you . . . can see why I am saying that and what the evidence is showing. The evidence will show that Mark’s card is being used to extract money from Charlotte’s bank account, and then Mark would put that money into his Wells Fargo account, and then it would be laundered into D’Arsi’s Wells Fargo account, and then once it was in D’Arsi’s Wells Fargo account it would then be used to do an automatic payment on D’Arsi’s mortgage.” The prosecutor noted “[t]his case is not about” money laundering and reminded the jury money laundering was not “an actual

charge” in the case. The prosecutor referred to “money laundering” when she examined Kyzivat and during closing argument.⁹

On appeal, D’Arsi contends the prosecutor’s references to “money laundering” were “misleading and prejudicial.” This vague claim — unsupported by authority — fails. (*People v. Watkins* (2009) 170 Cal.App.4th 1403, 1410 [“legal contention stated as a bare assertion without supporting authority is forfeited”].) D’Arsi has not established prosecutorial misconduct, nor that the court erred by declining to exclude the term pursuant to Evidence Code section 352.

D. “D’Arsi Takes Money that Doesn’t Belong to Her.”

From 2003 to late 2011, D’Arsi shared custody of her daughters with her ex-husband and she received monthly child support payments of \$940. In September 2011, one daughter began residing exclusively with D’Arsi’s ex-husband. On several occasions, the daughter asked D’Arsi to “sign the paperwork so . . . dad’s money wasn’t still going to” D’Arsi. D’Arsi initially refused.¹⁰ Later, however, D’Arsi wrote her ex-husband two checks reimbursing him for the child support payments while the daughter did not live with her.

Defense counsel objected to the two checks on relevance grounds and the prosecutor responded, “it supports that D’Arsi takes money that doesn’t belong to her.” Defense counsel “add[ed]” an objection pursuant to Evidence Code section 1101 and the court overruled it. During closing argument, the prosecutor referred to the checks, arguing, “D’Arsi kept taking the money” after her daughter moved out and “D’Arsi is about the money.” Defense counsel objected “that is not evidence” and the court

⁹ When the prosecutor asked Kyzivat about the term “money laundering,” defense counsel objected “it’s 352” and the court reminded the jury, “this term is used as kind of a word of art. It’s not . . . proof that it’s a money laundering account; it’s not evidence that it’s a money laundering account; it’s simply the description of an account [that] the money goes through and she is going to argue something.” The prosecutor clarified there were no money laundering charges.

¹⁰ From September 2011 to April 2012, D’Arsi received SSI payments for both daughters, even when one daughter was not living with her. In April 2012, D’Arsi repaid the SSI money.

overruled the objection and reminded the jury to “recall that counsel not testify, [if] the evidence is in the record then you can consider that.”

D’Arsi contends the court erred by admitting evidence she reimbursed her ex-husband for the child support payments she received when her daughter did not reside with her. According to D’Arsi, this evidence was inadmissible under Evidence Code section 1101, subdivision (b). “As a general rule, evidence of uncharged crimes is inadmissible to prove the defendant had the propensity or disposition to commit the charged crime. [Citations.]” (*People v. Hendrix* (2013) 214 Cal.App.4th 216, 238, citing Evid. Code, § 1101.) Evidence Code section 1101, subdivision (b), however, does not prohibit the admission of evidence of misconduct when offered as evidence of some other fact in issue, such as knowledge or absence of mistake. (*People v. Lindberg* (2008) 45 Cal.4th 1, 23; *People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) To be admissible to prove knowledge or negate a defense of mistake, the uncharged misconduct must be similar to the charged conduct. (*People v. Hendrix, supra*, 214 Cal.App.4th at pp. 242-243; *People v. Burnett* (2003) 110 Cal.App.4th 868, 881.) The admissibility of uncharged misconduct evidence “rests within the discretion of the trial court.” (*People v. Lindberg, supra*, 45 Cal.4th at p. 23.)

Even if we assume for the sake of argument the court erred by admitting the evidence, we conclude any error was harmless. (*People v. Jefferson* (2015) 238 Cal.App.4th 494, 508 [to prevail on appeal, the defendant must demonstrate the error was prejudicial under *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*)].) “Under the *Watson* standard, prejudicial error is shown where ““after an examination of the entire cause, including the evidence,” [the reviewing court] is of the “opinion” that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.’ [Citation.] ‘. . . [A] “probability” in this context does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility.’” [Citations.]” (*People v. Jefferson, supra*, 238 Cal.App.4th at p. 508.)

D'Arsi cannot demonstrate prejudicial error. The evidence demonstrated D'Arsi knowingly received money from Charlotte's bank account. On 167 occasions, money from Charlotte's account was deposited or transferred into Mark or D'Arsi's bank accounts. On several occasions, cashier's checks were drawn from Charlotte's account and deposited directly into D'Arsi's Wells Fargo account. Mark gave D'Arsi \$60,100 of Charlotte's money, which D'Arsi used to make her monthly mortgage payments and to "pay down" the principal. During a portion of this time period, D'Arsi's monthly income was \$940, and she would not have been able to pay her mortgage without the money from Charlotte's bank account. Under the circumstances, the erroneous admission of the evidence was harmless.

D'Arsi also claims the prosecutor committed misconduct by referring to the evidence during closing argument. We reject this claim because D'Arsi failed to timely object and request the jury be admonished. (*Sandoval, supra*, 62 Cal.4th at p. 440.) Finally, we reject D'Arsi's cumulative error claim. (*People v. Thomas* (2011) 51 Cal.4th 449, 508.)

DISPOSITION

The judgment is affirmed.

Jones, P.J.

We concur:

Simons, J.

Bruiniers, J.