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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

THE PEOPLE,

Plaintiff and Respondent,

v.

TAMI LYNETTE SIMPSON,

Defendant and Appellant.

C066205

(Super. Ct. No. CRF0956)

Following a jury trial, defendant Tami Lynette Simpson was convicted of second degree burglary (Pen. Code, § 459) and passing a false check (*id.*, § 470, subd. (d)). The trial court suspended imposition of sentence and placed defendant on three years' probation, subject to various terms and conditions.

On appeal, defendant contends: 1) the trial court violated her constitutional rights to confrontation, to present a defense, and to a fair trial by excluding impeachment evidence; 2) excluding the impeachment evidence under Evidence Code section 352 was an abuse of discretion; 3) she received

ineffective assistance of counsel because her attorney failed to object to the trial court's ruling based on Evidence Code sections 780 and 1101, subdivision (c); and 4) the trial court's finding that defendant has the ability to pay certain fees is not supported by substantial evidence.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Sonia Madaan's husband owns the 99 Cent & Liquor Store in Wheatland. Madaan often works at the store, which is also a registered check-cashing business. On December 24, 2008, Madaan cashed a check for \$730.02 for a person named Tami Lynette Simpson, later identified as defendant.

Madaan asked defendant for identification before cashing the check. She looked at the picture on the identification, compared it to defendant, and determined it was the same person. Madaan wrote the identification number on the back of the check. She charged defendant \$16 to cash the check, and gave the remainder to defendant in cash.

Defendant was in the store for five to seven minutes. Madaan realized the check was fake a few seconds after defendant left the store. She ran after defendant, but defendant was already leaving in a car. Madaan did not get the license plate number of the car. According to Madaan, the security cameras were not working in the store at the time.

Madaan identified defendant as the perpetrator in a photographic lineup and at trial. She remembered defendant

because this incident was the first time she had cashed a fraudulent check.

Wheatland Police Officer Oscar Magana ran the identification number on the check through the California Department of Motor Vehicles (DMV) database, found a photograph associated with that number, and determined the identification was issued to Tami Lynette Simpson.¹ On January 7, 2009, Officer Magana administered the photographic lineup to Madaan. Madaan was sure the person she identified in the lineup was the person who had cashed the check.

The fraudulent check was signed "Janice Simpson." Officer Magana thought the signature on the driver's license or identification card read "Janice Simpson." The DMV printout indicated the identification card or driver's license associated with the identification number on the check had originally been issued on April 19, 2005. The printout also indicated a duplicate had been issued on December 24, 2008 -- the same day the check was cashed.

Madaan told Officer Magana that there was no video surveillance on the day of the incident because the "memory

¹ Officer Magana testified that he was unable to determine whether Simpson had been issued a California identification card or a driver's license as the same number is issued by DMV for each. He never asked Madaan which form of identification defendant had presented. Madaan testified that she did not remember whether the identification defendant presented was a California identification card or a driver's license.

was full." She also said that the woman drove away in a green sports utility vehicle.

The parties stipulated that the check was fake or fraudulent.

DISCUSSION

I. Other Check or Checks the Defense Sought to Use for Impeachment

A. Background

On the morning of the second day of trial, the prosecutor informed the court that late in the afternoon of the previous day she received faxes of some of defendant's checks from Bank of America. The prosecutor asked defense counsel that morning about the checks, and defense counsel said he intended to use them as impeachment evidence. The prosecutor asked the trial court to exclude the materials, as they were not relevant, and their late delivery amounted to "sandbagging" the prosecution.

Defense counsel countered that the prosecution was guilty of late discovery, and asserted the materials were checks with "Tami Simpson" written on them, endorsed by the Wheatland 99 Cent & Liquor Store after the fraudulent check was cashed. Counsel stated, "If they deny that they cashed checks from Tami Simpson in the future, I can show them this, which will refresh their recollection, that they, in fact, do cash checks from Tami Simpson because it says -- it's got a date of May 22nd 2009, six months -- five, six months after this incident. It's got 'Tami Simpson' written on the check, and it's got -- and it has an endorsement by Wheatland 99 Cent and Liquor. I'm not

going to -- *I don't even anticipate entering it into evidence,* but I will use it to refresh the recollection of the store owner who cashes checks to show them that Tami Simpson is not on their blacklist of people who cannot cash checks and they do not know that Tami Simpson is not supposed to cash checks there." (Italics added.) In response, the prosecutor questioned the existence of a "blacklist" and maintained that a "poor business decision" to continue to cash checks for Tami Simpson would not be relevant.

The trial court asked defense counsel when he had given the materials to the prosecution. Counsel replied that he did not think he had to disclose impeachment materials, but that he had told another prosecutor that defendant had cashed subsequent checks at the store. The court stated it could not understand why defense counsel did not present this during in limine motions the previous day, and ordered defendant's counsel not to mention the checks in his opening statement until the court had had the opportunity to research the matter.

The prosecutor then pointed out, "this doesn't tell us who cashed the check, which employee there. So I, again, don't see any relevance" The trial court noted the point, addressed another matter, and thereafter recessed.

After the recess, the trial court indicated it had looked at a discovery treatise and had determined the defense was required to provide impeaching evidence to the prosecution. The court stated that it did not intend to initiate contempt proceedings against defense counsel, but it would give a late

discovery instruction. The prosecutor reiterated that the proposed evidence would not impeach any element of the charged offenses. The trial court replied that the checks would "go to identity and to whether or not they thought that the same individual that was in there cashing the check was the person that had cashed the fraudulent check before."

The prosecutor pointed out that there was no evidence that any of the intended witnesses had ever accepted one of the checks offered by the defense. The trial court responded: "Well, before there would be any impeachment on those grounds, [defense counsel] would have to lay a foundation, that would be done outside of the presence of the jury, that these individuals had anything to do with these later checks." The parties then discussed whether impeaching evidence was subject to discovery, after which the hearing concluded.

The trial court addressed the proposed impeachment material later in the day, after the jury was selected. The trial court stated it took the matter under submission to determine whether the defense should be allowed to "introduce evidence of a subsequent act by the victim, namely the cashing of a valid check by the Defendant." The trial court noted this court's decision in *People v. Shoemaker* (1982) 135 Cal.App.3d 442, a case addressing the admissibility of subsequent violent acts by the victim. According to the trial court, *Shoemaker* held that a defendant had "no constitutional right to present all relevant evidence in his favor" so as to preclude analysis under Evidence Code section 352. The trial court observed that the Court of

Appeal in *Shoemaker* primarily referred to provisions addressing character evidence and uncharged misconduct -- Evidence Code sections 1101 and 1103.

The trial court then found the alleged subsequent acts do "not have substantial similarity," and stated that in civil cases involving allegations of negligence, "the evidence must relate to accidents which are similar and which occur under substantially the same purposes." The trial court further noted that under Evidence Code section 1151, subsequent remedial actions are inadmissible to prove negligence or culpable conduct.

Finally, the trial court considered the proposed evidence under Evidence Code section 352. Finding that "the evidence of a prior subsequent act has minimal relevance, since there is no evidence that this also addressed a bad check," and that the proposed evidence created a substantial danger of undue prejudice and confusing the issues or misleading the jury, the trial court concluded the subsequent checks were inadmissible under Evidence Code section 352, and the defense could not mention them in the opening statement or on cross-examination.

Defendant did not further object to the trial court's ruling or make any formal offers of proof.

B. Analysis

1. Constitutional Claims

Defendant contends the trial court's ruling excluding impeachment evidence deprived her of her Sixth Amendment right

to confront witnesses, as well as her due process rights to present a defense and a fair trial. We disagree.

The Sixth Amendment right of confrontation has been described as "fundamental" to the judicial system. (*In re Anthony P.* (1985) 167 Cal.App.3d 502, 506-507.) But this does not mean it is improper to limit impeachment evidence.

"It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant . . . "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent the defense might wish." [Citations.]" (*People v. Harris* (1989) 47 Cal.3d 1047, 1091 (*Harris*), quoting *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678-679 [89 L.Ed.2d 674], italics in *Delaware*.)

While a defendant also has the due process right to present evidence on his or her own behalf (*Crane v. Kentucky* (1986) 476 U.S. 683, 690 [90 L.Ed.2d 636]), there is no meaningful analytical distinction between this and the right to confrontation. Defendant's right to due process does not

deprive trial courts of a "'wide latitude' to exclude evidence that is ' . . . , only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" [Citation.]" (*Crane, supra*, 476 U.S. at pp 689-690.)

Defendant asserts in his opening brief that the trial court's ruling deprived her of the opportunity to challenge the credibility of Madaan, the most important witness in the case. According to defendant, evidence that Madaan cashed a check for defendant five months after the crime would undercut Madaan's credibility by establishing "that she did not recognize [defendant] as the woman who presented the fraudulent check." If the defense had been allowed to use the subsequent checks, defendant argues the defense would have asked Madaan if she could recognize defendant as the woman who passed the fraudulent check five months after the crime. Defendant reasons that if Madaan answered "no," then her previous identification of defendant would be impeached, while a "yes" answer "would not be credible because it is not believable that she would cash a check for someone she recognized as having passed a bad check earlier."

Defendant's argument omits one essential fact -- that there is no proof or offer of proof in the record that Madaan was the person who cashed any subsequent check. As the prosecutor and trial court noted, defendant's offer of proof did not include any allegation that Madaan had in fact cashed any checks presented after the fraudulent check for which defendant was charged. The relevance of any subsequent check was dependent

upon Madaan being the person who cashed it. If she did not cash any subsequent checks, then the evidence shows no more than sloppy business practices by her store or negligence by her husband or some other clerk.²

Defendant attempts to address this key point in her reply brief. She contends that defense counsel initially presented several checks to the trial court and that the court must have

² At oral argument, counsel for defendant asserted that only Madaan and her husband cashed checks at the store. No such factual assertion can be found in the briefing. We do note that assertion in a request to augment the record filed by defendant on January 13, 2011, before the opening brief was filed. The portion of the record referenced in the motion to augment appears to be the following testimony on direct examination related to the fraudulent check.

["PROSECUTOR]: Now, when that check was -- were you actually the person who cashed that check?

"[MADAAN]: Yes.

"[PROSECUTOR]: How do you know that?

"[MADAAN]: I know the check.

"[PROSECUTOR]: Okay. And you remember doing it?

"[MADAAN]: Yeah. And we cash checks, so *I know that I cashed it or he cashed it.*

"[PROSECUTOR]: Okay. But how do you -- do you remember personally being the one who cashed it? (Italics added.)

At best this testimony establishes only that Madaan and her husband may have had the authority to cash checks on or about the day the fraudulent check was presented. It does not establish that Madaan and her husband were the only people associated with the store who had the authority to cash checks on May 22, 2009 or at any of the unspecified times that the other checks were purportedly cashed at the store.

"narrowed consideration of the several checks to a single check after the foundational issue was resolved." Defendant bases this speculation on the manner in which the court prefaced its ruling and the prosecutor's acknowledgment that defense counsel had had a conversation with Madaan.

After the jury was selected, the trial court began its ruling by stating: "I took under submission the issue of whether or not the Defense should be allowed to introduce evidence of a *subsequent act by the victim*, namely the cashing of a *valid check* by the Defendant." (Italics added.) The court thereafter made the ruling we summarized *ante*. Defendant notes that the court referenced a single check and contends that "[t]he record shows the most likely reason for the court considering only one of the checks was that Ms. Madaan admitted to cashing only one of the checks during a conversation with defense counsel." Defendant bootstraps this argument with the assertion that the prosecutor acknowledged that defense counsel talked with Maadan "'specifically' about *the checks*." (Italics added.) After the trial court ruled, the prosecutor stated, "Given that ruling and given that [defense counsel] did speak with Ms. Madaan earlier today specifically *on that issue*, I would request a few moments to speak with Ms. Madaan so that she doesn't, believing it's an issue, bring it up herself, which would open the door, and instead instruct her to only bring it up if asked a question that necessitates it." From this, defendant argues that if "the foundational issue had not been

resolved, the court very likely would have said so when ruling the evidence inadmissible.”

There are two problems with this argument. First, when defense counsel first addressed the court on this issue, defense counsel referred to the check evidence both in the plural and the singular. This negates the theory that the trial court narrowed the issue to one check. Second, defendant’s contention is based on pure speculation not otherwise supported by the record.

As we have noted, when the prosecutor first brought this matter to the attention of the trial court, defense counsel told the court: “*it* says -- *it’s* got a date of May 22nd 2009, six months -- five, six months after this incident. *It’s* got ‘Tami Simpson’ written on the check, and *it’s* got -- and *it* has an endorsement by Wheatland 99 Cent and Liquor. I’m not going to -- I don’t even anticipate entering *it* into evidence, but I will use *it* to refresh the recollection of the store owner” Other than the May 22, 2009 check, defense counsel never made a specific offer of proof identifying specific checks by the date on which they were purportedly endorsed. Nor did defense counsel ask that the check or checks he intended to use be marked for identification or otherwise ask the court to retain them to preserve the record. Nevertheless, contrary to defendant’s belated argument here, it appears that defense counsel was focused on one check -- the check dated May 22, 2009 -- from the very beginning.

It is a trial attorney's duty to make clear objections and clear offers of proof, and thus obtain clear rulings from the bench. (See Evid. Code, §§ 353, subd. (a), 354, subd. (a); 3 Witkin, Cal. Evidence (5th ed. 2012) Presentation at Trial, § 413, pp. 567-569.) Evidence Code section 354, subdivision (a) provides: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that: [¶] (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means." "The *substance of evidence* to be set forth in a valid offer of proof means the testimony of specific witnesses, *writings*, material objects, or other things presented to the senses, to be introduced to prove the existence or nonexistence of a fact in issue." (*United Sav. & Loan Assn. v. Reeder Dev. Corp.* (1976) 57 Cal.App.3d 282, 294, italics added.) "'It is the burden of the proponent of evidence to establish its relevance through an offer of proof or otherwise,'" and a specific offer of proof is necessary in order to preserve an evidentiary ruling for appeal. [Citation.] 'An offer of proof should give the trial court an opportunity to change or clarify its ruling and in the event of appeal would provide the reviewing court with the means of determining error and assessing prejudice. [Citation.] To accomplish these

purposes an offer of proof must be specific. It must set forth the actual evidence to be produced and not merely the facts or issues to be addressed and argued.' [Citation.]" (*People v. Brady* (2005) 129 Cal.App.4th 1314, 1332.)

Defendant never made a specific offer of proof. No attempt was made at trial to preserve copies of the checks for the record so that they would be available for appellate review.³ Indeed, based on defense counsel's statements to the trial court and his failure to identify a witness who could identify the check or checks as defendant's, it appears that defense counsel really never had any intent to introduce any check into evidence. Nevertheless, defendant asks us to rule that the trial court erred in "excluding" the check or checks based on speculation as to what happened outside the record. Speculation does not a record make. We refuse to presume defendant established a foundation for her proposed impeachment evidence when no such foundation is found in the record. Accordingly, we conclude the check or checks were not relevant to impeaching Madaan since defendant never established that Madaan in fact cashed them.

The exclusion of irrelevant, potentially confusing evidence does not violate defendant's constitutional rights to

³ Defendant's motion to augment the record on appeal by including the May 22, 2009 check was granted by this court on January 21, 2011. Defendant did not ask this court to augment the record with the other checks referenced without specificity on the record by trial counsel.

confrontation, present evidence, or a fair trial. (*People v. Lawley* (2002) 27 Cal.4th 102, 154-155 [the ordinary rules of evidence do not impermissibly infringe on the accused's constitutional right to present a defense and courts retain the discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice]; *Harris, supra*, 47 Cal.3d at p. 1091.)

Consequently, we conclude there was no constitutional error.

2. Evidence Code section 352

Defendant next contends that the trial court abused its discretion under Evidence Code section 352⁴ by applying improper legal principles, specifically considering the check or checks as evidence of the victim's subsequent conduct under Evidence Code section 1101⁵ rather than for impeachment, as offered by defendant.

⁴ Evidence Code section 352 provides: "The court in its discretion 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."

⁵ Pertinent to the trial court's analysis, Evidence Code section 1101 provides: "(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil

Although we agree with defendant that the trial court should not have engaged in an Evidence Code section 1101 analysis of defendant's offered impeachment testimony or considered Evidence Code section 1151, relating to subsequent remedial actions, the court's rationale is irrelevant. The evidence was properly excludable for lacking a foundation establishing its relevance. ""No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." [Citation.]' [Citation.]" (*People v. Zapfen* (1993) 4 Cal.4th 929, 976.) Since the evidence was properly excluded as lacking foundation, there was no abuse of discretion.⁶

II. Ineffective Assistance of Counsel Claim

Defendant contends trial counsel's failure to object to the trial court's erroneous reasoning in excluding the impeachment

wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

⁶ We therefore express no opinion on whether the evidence was properly excluded under Evidence Code section 352.

evidence constituted ineffective assistance of counsel. Specifically, defendant contends counsel should have argued that the evidence was admissible under Evidence Code sections 780 and 1101, subdivision (c).⁷ Since the evidence was properly excluded based on foundational grounds, counsel was not ineffective and defendant suffered no prejudice.⁸ "Counsel's failure to make a futile or unmeritorious motion or request is not ineffective

⁷ Evidence Code section 780 provides in pertinent part:

"Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony . . . including but not limited to any of the following: [¶] (a) His demeanor while testifying and the manner in which he testifies. [¶] (b) The character of his testimony. [¶] (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies. [¶] (d) The extent of his opportunity to perceive any matter about which he testifies. [¶] (e) His character for honesty or veracity or their opposites. [¶] (f) The existence or nonexistence of a bias, interest, or other motive. [¶] (g) A statement previously made by him that is consistent with his testimony at the hearing. [¶] (h) A statement made by him that is inconsistent with any part of his testimony at the hearing. [¶] (i) The existence or nonexistence of any fact testified to by him. [¶] (j) His attitude toward the action in which he testifies or toward the giving of testimony. [¶] (k) His admission of untruthfulness.

Evidence Code section 1101, subdivision (c) provides:

"Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness."

⁸ Defendant does not assert that counsel was ineffective because he failed to provide an offer of proof indicating that there was evidence Madaan had cashed the May 22, 2009 check or any of the other subsequent checks.

assistance. [Citation.]” (*People v. Szadziejewicz* (2008)
161 Cal.App.4th 823, 836.)

III. Fees

The trial court imposed a \$40 per month probation service fee (Pen. Code, § 1203.1b), a \$43.50 booking fee (Gov. Code, § 29550.2), a fine including penalty assessments, for a total of \$38 (Pen. Code, § 1202.5, subd. (a)), and \$600 in attorney fees (Pen. Code, § 987.8). The court determined defendant had the ability to pay. The following is colloquy pertinent to this issue that took place during the sentencing hearing:

“THE COURT: . . . And based upon the indication that you will be able to go to return to your employment with Sacramento Valley Sand driving at least a heavy equipment truck, if not being a heavy equipment operator, and it indicated that . . . you were paid \$16 an hour. And would that be for a 40 hour work week?

“THE DEFENDANT: Yes, ma’am. 40 plus.

“THE COURT: And I find that the defendant should have the ability to pay the amounts I have already indicated plus attorney fees in the amount of \$600. So do you accept the terms and conditions of probation and agree to pay the costs associate[d] with your case?

“THE DEFENDANT: Yes, I do.”

Defendant never objected to the trial court’s finding of ability to pay.

Defendant now contends there is insufficient evidence to support the trial court’s finding that defendant had the ability

to pay. The People argue that except for the contention regarding reimbursement for attorney fees, defendant has forfeited these arguments by not objecting in the trial court. We agree with the People.

The right to appellate review of a nonjurisdictional sentencing issue not raised in the trial court is forfeited. (*People v. Gonzalez* (2003) 31 Cal.4th 745, 751-755; *People v. Scott* (1994) 9 Cal.4th 331, 356.) This rule of forfeiture has repeatedly been applied to appellate challenges of a fine or fee, including challenges based on insufficiency of the evidence. (*People v. Crittle* (2007) 154 Cal.App.4th 368, 371; *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1069-1072 (*Valtakis*); *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468-1469.)

While the forfeiture rule might seem inconsistent with the requirement of a knowing and intelligent waiver of hearing on the ability to pay the cost of probation supervision (Pen. Code, § 1203.1b, subd. (a)), the knowing and intelligent waiver requirement has been found not to apply to appellate review (see *Valtakis, supra*, 105 Cal.App.4th at p. 1075). “[Penal Code] section 1203.1b and other recoupment statutes reflect a strong legislative policy in favor of shifting costs arising from criminal acts back to convicted defendants and replenishing public coffers from the pockets of those who have directly benefited from county expenditures. [Citations.]” (*People v. Bradus* (2007) 149 Cal.App.4th 636, 643.) It would be inconsistent with this legislative policy to permit convicted

defendants to stand silently by, and to raise the issue for the first time on appeal, thus draining both appellate and trial court resources in the process. (*Valtakis, supra*, 105 Cal.App.4th at p. 1076.) Defendant therefore forfeited her contention regarding the fees, other than the attorney fee order.

Regarding the order for attorney fees, we agree with the court in *People v. Viray* (2005) 134 Cal.App.4th 1186 that a forfeiture cannot "properly be predicated on the failure of [defense counsel] to challenge an order concerning his own fees" given the "patent conflict of interest." (*Viray, supra*, at p. 1215, italics omitted.)

A determination that a defendant has the ability to pay is a prerequisite for entry of an order for attorney fees. (Pen. Code, § 987.8, subd. (e).) While such a finding may be implied, the order cannot be upheld on review unless it is supported by substantial evidence. (*People v. Nilsen* (1988) 199 Cal.App.3d 344, 347; *People v. Kozden* (1974) 36 Cal.App.3d 918, 920.)

Penal Code section 987.8, subdivision (g)(2) defines "[a]bility to pay" as "the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, and shall include, but not be limited to, all of the following: [¶] (A) The defendant's present financial position. [¶] (B) The defendant's reasonably discernible future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant's

reasonably discernible future financial position. Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense. [¶] (C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing. [¶] (D) Any other factor or factors which may bear upon the defendant's financial capability to reimburse the county for the costs of the legal assistance provided to the defendant."

Between 2002 and 2009, defendant worked as a heavy equipment operator at Sacramento Valley Sand earning \$16 an hour for 40 hours a week. According to a letter from Sacramento Valley Sand, defendant was "on seasonal lay-off but will be hired back as soon as business picks up." Before her job at Sacramento Valley Sand, defendant made \$12 an hour as a certified nursing assistant. She became a certified nursing assistant through Sierra Valley Community Hospital in 1987 and obtained a medical office specialist diploma through Career College of Northern Nevada in 1991. At the time of sentencing, defendant was receiving \$550 every two weeks in unemployment benefits, \$74.50 per week in child support, and was working as a housekeeper.

Defendant was not sentenced to state prison. She had a strong employment history and marketable skills. While on "seasonal lay-off" from her job at Sacramento Valley Sand, she was at least partially employed as a housekeeper. She never

told the court she did not have the ability to pay or that she did not expect to return to her position at Sacramento Valley Sand for a prolonged period. Indeed, at a point during the sentencing hearing when defendant could have expressed such concerns, defendant clarified that she worked "40 plus" hours a week on her job at Sacramento Valley Sand, and then stated that she agreed to pay the costs associated with her case. In light of the relatively small attorney fee, substantial evidence supports the trial court's finding that defendant has the ability to pay.

DISPOSITION

The judgment is affirmed.

_____ MURRAY _____, J.

We concur:

_____ HULL _____, Acting P. J.

_____ ROBIE _____, J.