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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KELLY M. JONES,

Defendant and Appellant.

D060210

(Super. Ct. No. SCD228175)

APPEAL from a judgment of the Superior Court of San Diego County, Esteban Hernandez, Judge. Affirmed.

Kelly Jones appeals from a judgment convicting her of offenses arising from her conduct of cashing a forged check. She raises evidentiary and instructional challenges based on the trial court's admission of evidence concerning an identity theft scheme in which multiple persons cashed forged checks against the same victim's account and on the same date as Jones's conduct. She also raises evidentiary and instructional challenges based on the trial court's admission of her bank account statement. We reject her contentions of reversible error and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On May 11, 2010, Bob Katz's bank account at Bank of America was "taken over" by a fraud ring. To accomplish the takeover, the perpetrators changed the password on Katz's online access to his accounts, and "hijacked" his cell phone number by calling his carrier claiming to be him and forwarding his number to another phone number. The perpetrators had ordered checks on his account, and on May 11, multiple participants in the scheme in California and Arizona cashed, or attempted to cash, 11 checks written against Katz's account.

One of the forged checks was cashed in Jones's name at a Bank of America branch. The forged check was issued on Katz's account for \$4,600 and was made payable to Jones. For endorsement to cash the check, Jones's name was signed on the back of the check. The recorded bank data showed that the person cashed the check on May 11, 2010, and for identification the person swiped Jones's Bank of America debit card and displayed Jones's driver's license.¹ To use a debit card, the customer must use the PIN number created by the customer. Further, when cash is provided to a customer, bank tellers are trained to verify the identity of the customer with a driver's license.

To support that Jones was the person who cashed the check, the prosecution submitted various evidentiary items to show that Jones's appearance and signature

¹ When examining the data recorded by the bank at the time of the check-cashing transaction, one bank employee concluded no driver's license was displayed. However, another bank employee testified that although the notation was difficult to see, the recorded data showed a driver's license was used. Also, the teller who handled the transaction at the time the check was cashed told police that a driver's license was shown.

matched the appearance and signature of the person who cashed the forged check. The prosecution submitted two photographs of Jones and several documents containing her signed name (including a signature card and customer relations inquiry card created when her bank account was opened, and her driver's license). Also, the prosecution submitted the endorsement signature on the forged check and a surveillance photo of a woman at the bank at the time of the fraudulent check cashing.

The prosecution also presented evidence concerning other participants in the fraudulent check-cashing scheme. Robyn Concepcion cashed a \$4,900 check and Nicholas Nila cashed a \$2,500 check. Like the check cashed by Jones, these checks were cashed on May 11; they were made payable to the payee; and they were drawn on Katz's account. Jones's check was cashed at 1:48 p.m.; Concepcion's check was cashed at 2:10 p.m.; and Nila's check was cashed at 3:05 p.m. The Bank of America locations where the checks were cashed were the same or were in close proximity to each other. Prosecution witnesses testified that account takeovers frequently involve multiple checks cashed close in time so the takeover can be done quickly before the bank or customer can detect what is occurring. The money taken from Katz's account totaled \$53,000.

Concepcion was called to testify on behalf of the prosecution. She testified that on May 11 she came with a caravan of two cars from Moreno Valley to San Diego to cash a check. There were about three or four other people in the car she was in; she knew all of the people in the car with her and Jones was not one of them. A man from the other car gave her the check to cash, which had already been filled out as payable to her. She cashed the check using her own driver's license and bank account number.

At one point while they were in San Diego, Concepcion switched into the other car. She identified Nila as one of the individuals in the other car, but was not sure whether Jones was also in that car. She acknowledged that when she was shown a photo line-up by an investigator, she pointed to Jones as an occupant of the other car. She testified that she told the investigator that she "couldn't be sure but that [Jones] looked familiar." At trial she claimed she was 80 percent sure her photo line-up identification of Jones was correct, and explained she had made the identification based on Jones's smile, eyes, and "style."²

The defense theory was that Jones was not the person who cashed the check drawn on Katz's account, and that she too was a victim of identity theft. In support, defense counsel elicited testimony from the witnesses acknowledging that when two bank employees and Concepcion were shown photos of Jones, they were unable to positively identify her as the person involved in the fraudulent check-cashing activity. Further, bank employees acknowledged that identity thieves can use a device to extract the PIN number and other personal information from a debit card's magnetic strip.

² For impeachment purposes, the defense presented the jury with a portion of Concepcion's testimony at an Evidence Code section 402 hearing held prior to her trial testimony, in which she testified she could not recall if Jones was in the other car and she did not now recognize Jones. Also, defense counsel elicited testimony from Concepcion stating that she felt obligated to select someone when she was shown the photo line-up by the district attorney's investigator, and she told a defense investigator that based on the photos she had been shown she could not make a positive identification.

Jury Verdict and Sentence

The jury convicted Jones of unlawful use of personal identifying information (Pen. Code³ § 530.5, subd. (a)); burglary (§ 459); and forgery based on passing a fictitious or altered check (§ 476). She received probation with a condition that she serve 120 days in jail.

DISCUSSION

I. *Contentions of Evidentiary and Instructional Error Based on Admission of Evidence of Fraudulent Check-cashing Scheme*

Jones asserts that she was denied a fair trial because the trial court allowed the prosecution to present evidence about the fraudulent transactions committed by Nila and Concepcion against Katz's account. She contends this evidence was admitted to support a conspiracy theory, which was improper because under the prosecution's theory of the case she perpetrated all the acts underlying the charged offenses; there was no showing that she had any connection to these other individuals or their transactions; and hence the actions of these other persons were irrelevant.

Further, she asserts the prosecution was allowed to pursue a conspiracy theory based on the fraudulent scheme evidence, and that this triggered certain proof and instructional requirements under conspiracy principles that were not adhered to here. Citing these conspiracy principles, she contends the evidence concerning Nila's and Concepcion's wrongful conduct should not have been admitted without independent proof that she agreed to join a conspiracy. She also asserts the evidentiary error was

³ Subsequent statutory references are to the Penal Code unless otherwise specified.

exacerbated because the trial court did not give the limiting instructions applicable when the prosecution seeks to prove guilt based on an uncharged conspiracy.

As we shall explain, the record supports the trial court's ruling that the evidence of Nila's and Concepcion's fraudulent transactions was relevant to the charges against Jones. Further, Jones's contentions of evidentiary and instructional error based on conspiracy principles are misplaced in the context of this case.

Background

Prior to trial, the prosecution sought admission of evidence concerning other fraudulent transactions committed against Katz's account on the same date as the fraudulent transaction allegedly committed by Jones. The prosecutor asserted that the evidence showing that Jones was part of a larger plan to defraud Katz was relevant to prove that Jones acted with deliberate and fraudulent intent when she cashed the check, rather than inadvertently cashing a forged check. The prosecutor explained that other participants in the fraud plan (including Nila and Concepcion) had pled guilty, and the prosecutor wanted to introduce evidence of their convictions and of the fraudulent checks they had cashed. Also the prosecutor wanted to call Concepcion as a witness to describe the check-cashing ring and to identify Jones as one of the participants.

At an Evidence Code section 402 (section 402) hearing held prior to the court's ruling, Concepcion described her and Nila's participation in the check-cashing activity on May 11, but testified she did not recognize Jones and she did not recall if Jones was with

the people who participated in the activity on that day.⁴ Defense counsel asserted that evidence concerning the fraudulent transactions committed by other people should not be admitted because Jones was not charged with conspiracy, and at the section 402 hearing Concepcion had not linked Jones to the check-cashing scheme. Defense counsel argued that without evidence specifically linking Jones to the ring, evidence of fraudulent activity by other people lacked relevancy, was highly prejudicial, and should be excluded under Evidence Code section 352. The prosecutor agreed that Concepcion's section 402 testimony did not identify Jones as part of the ring, but asserted Concepcion's testimony was relevant to show the existence of the ring.

The trial court ruled the fraudulent scheme evidence was admissible. The court reasoned the evidence proffered by the prosecution showed that on May 11 Concepcion and Nila cashed checks drawn on Katz's account as part of a fraudulent check-cashing scheme, and the proffered evidence showing that on the same date Jones cashed a check on Katz's account could support that Jones engaged in conduct that was "part of a coordinated effort." When making its ruling, the court noted that Concepcion's section 402 testimony did not identify Jones as a participant, but the prosecution's offer of proof

⁴ After Concepcion claimed at the section 402 hearing that she could not recall if Jones was in the other car on May 11, the prosecutor asked her if she had identified someone in a photo line-up shown to her by an investigator. Concepcion responded, "I don't know." When asked why she pointed to a person in the photo line-up, she responded because the person's clothes, hair, earrings, and style were familiar. The prosecutor asked again if she had ever seen Jones in her life, and she answered, "I don't know. No."

linked Jones to the activity through such evidence as her signature card and other documentation on the check passed on the victim's account.

Relevancy and Admissibility of the Evidence

A trial court has broad discretion to determine whether evidence is relevant, and whether the evidence should be excluded under Evidence Code section 352 because its probative value is outweighed by concerns of undue prejudice. (*People v. Horning* (2004) 34 Cal.4th 871, 900; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) We do not disturb the trial court's ruling unless the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodrigues, supra*, at p. 1124.)

The record shows no abuse of discretion in the admission of the fraud scheme evidence. Contrary to Jones's contention, the record is *not* devoid of evidence showing a connection between her activity and the fraudulent activity of Nila and Concepcion. A reasonable trier of fact could infer that Jones was part of the check-cashing scheme because she cashed a large check drawn on the *same victim's account*, on the *same date*, in the *same time frame*, and in the *same geographical area*, as other people who had admitted their participation in the scheme. Supportive of this conclusion, the prosecution presented evidence showing that a common modus operandi in identity theft cases is that multiple perpetrators cash the false checks near the same time so that the crimes are accomplished before the bank or victim has a chance to realize that the victim's account has been raided.

Further, the trial court could reasonably find that, as argued by the prosecutor, the fraud scheme evidence was relevant to the issue of Jones's intent. To prove the charged offenses, the prosecution was required to show that Jones acted knowingly and intentionally when she cashed the forged check. (See §§ 459, 476, 530.5; CALCRIM Nos. 1700, 1935, 2040; *People v. Platt* (1954) 124 Cal.App.2d 123, 133.) Evidence that multiple individuals cashed forged checks on Katz's account in close temporal and spatial proximity to Jones's cashing of a forged check on Katz's account supported that Jones was part of this scheme; she knew the check was forged; and she was not merely cashing a check that she had received in good faith.

Also, the trial court was not required to conclude that the evidence created a substantial danger of undue prejudice under Evidence Code section 352. Undue prejudice does not exist merely because highly probative evidence is damaging to the defense case, but rather arises from evidence that uniquely tends to evoke an emotional bias against the defendant or to cause prejudgment of the issues based on extraneous factors. (*People v. Doolin* (2009) 45 Cal.4th 390, 438-439.) The existence of a fraudulent check-cashing scheme directed at Katz's account that correlated in time and location with Jones's cashing of a check on Katz's account was highly relevant to show Jones's knowing misconduct, and the conduct of the other participants in the scheme was no more inflammatory than Jones's alleged conduct. The record does not show an undue risk that the fraudulent scheme evidence would distract the jury from its task of determining Jones's culpability for the charged conduct. Further, although identity was the key disputed issue at trial, Jones has not shown the court abused its discretion in

admitting the fraud scheme evidence on the issue of intent. (See *People v. Waidla* (2000) 22 Cal.4th 690, 723 & fn. 5 [not guilty plea puts in issue all elements of the charges and prosecution is entitled to fully present all evidence that supports its case].)

Additionally, at trial the prosecutor succeeded in eliciting testimony from Concepcion that provided some level of evidence identifying Jones as one of the people in the second car. Given this identification evidence from Concepcion, the fraud scheme evidence was relevant, and indeed essential, to lay a foundation for Concepcion's knowledge of Jones's participation in the scheme.

Jones also argues the fraudulent scheme evidence was improperly admitted and used by the prosecution to resolve the key disputed issue of her identity as the perpetrator of the charged offenses. She asserts this was premised on illogical, circular reasoning, contending: "The People's approach assumed the check casher was Jones, then used that to draw a connection to the ring, *then used that to prove the check casher was Jones.*" (Italics added.) The record does not support this contention.

Once Concepcion failed to identify Jones during the section 402 hearing, the prosecutor proffered the fraud scheme evidence to show Jones's *intent*, not her *identity*. Consistent with this, when the trial court ruled the fraud scheme evidence was admissible, it noted that Concepcion had not identified Jones and it cited such evidence as Jones's signature card to link her to the check cashing. Thereafter, at trial, the prosecution's theory of the case did *not* suggest that merely because there was a fraud scheme against the victim's account, this supported that Jones was the person who cashed the check at issue in the case. In closing arguments, the prosecutor argued that Jones's

identity as the perpetrator was established by the evidence showing that the surveillance photo and endorsement signature matched the photographs of Jones and her signatures on other documents. The prosecutor cited the fraud scheme evidence to support that Jones acted with the requisite intent; i.e., arguing to the jury that the evidence of concerted activity by multiple persons showed Jones's conduct was not unintentional but was committed with intent to defraud and to steal.

To the extent the prosecutor also referred to the fraud scheme evidence to support that Jones was the perpetrator, this was based on the aspects of Concepcion's trial testimony that directly identified Jones, and the fact that other participants in the scheme used their own identities, not false ones, to cash the forged checks. Regarding this latter assertion, the prosecutor was entitled to urge the jury to conclude that because other known persons who raided the victim's account used their own identities, the person who cashed the check in the charged incident also used her own identity given that the incident involved the same account and was committed close in time and location. There was no improper use of the fraud scheme evidence to show identity.

Conspiracy Issues

To review Jones's challenges to the fraud scheme evidence based on conspiracy law, we summarize relevant legal principles. Evidence of an "uncharged conspiracy may properly be used to prove criminal liability *for acts of a coconspirator.*" (*People v.*

Belmontes (1988) 45 Cal.3d 744, 788, italics added.)⁵ Further, a coconspirator's *hearsay statements* may be admitted as an exception to the hearsay rule if there is a prima facie showing, independent of the coconspirator's statements, that a conspiracy existed and certain other foundational requirements are met. (*People v. Hardy* (1992) 2 Cal.4th 86, 139.) If the prosecution seeks to prove the defendant's liability for the charged offenses based on a coconspirator's acts or hearsay declarations, the trial court has a sua sponte duty to provide appropriate conspiracy instructions to the jury. (See *People v. Williams* (2008) 161 Cal.App.4th 705, 709 [instructions required in case alleging culpability based in part on conduct of person other than defendant]; *People v. Ditson* (1962) 57 Cal.2d 415, 447.) The instructions tell the jury that a conspiracy member is responsible for the acts of coconspirators committed in furtherance of the conspiracy, and define the elements of a conspiracy. (See CALCRIM NO. 416.) Further, the instructions inform the jury of the applicable restrictions on conspiracy evidence, including, for example, that the defendant is not responsible for a coconspirator's acts that do not further, or are not a natural consequence of, the plan; the jury should not consider a coconspirator's out-of-court statements unless there is independent proof of the conspiracy and the other foundational requirements are satisfied; the defendant is not responsible for acts done before the defendant joined the conspiracy; and the defendant is not culpable for acts committed after the defendant has withdrawn from the conspiracy. (See CALCRIM Nos. 417-420.)

⁵ *Belmontes* was disapproved on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at page 421, footnote 22.

None of these conspiracy principles are applicable to Jones's case. There were no hearsay statements by Nila or Concepcion that were admitted under the coconspirator hearsay exception. Thus, Jones's citation to the rule requiring independent proof of the conspiracy as a foundational prerequisite to admission of a coconspirator's out-of-court statements has no relevancy to her case.

Likewise, this case did not implicate the instructional requirements applicable when the prosecution seeks to hold the defendant liable for a coconspirator's acts under an uncharged conspiracy theory. As recognized by Jones, the record shows the prosecution's theory of Jones's culpability was entirely based on her *own* acts, and there was no allegation seeking to hold her criminally responsible for the acts of the other participants in the check-cashing scheme. That is, the prosecution did not claim that Jones was guilty of the charged offenses based on *Nila's or Concepcion's* acts of cashing checks drawn on the victim's account. Rather, Jones's culpability was derived from *her* act of cashing the forged check. Because there were no instructions or arguments suggesting that Nila's or Concepcion's check-cashing conduct could form the factual predicate to support the charged offenses against Jones, instructions pertaining to imposition of culpability based on a coconspirator's acts were irrelevant.

II. *Challenges Based on Admission of Evidence of Jones's Bank Account Statement*

Jones asserts the trial court erred in admitting evidence of her bank account statements to show that due to her lack of funds she had a motive to commit theft. She

also argues the court erred by instructing the jury on motive without a limiting instruction telling the jury not to consider her lack of funds as a motive to steal.

Prior to trial, the prosecution sought admission of Jones's bank account statements for the months of April and May 2010. The prosecutor stated that the May statement was relevant to show that Jones had cashed a check for \$4,600 in that month, as reflected in a notation indicating that the bank had withdrawn \$4,600 from her account after discovering the fraud. Further, the prosecutor contended the April statement was relevant to show her intent because her account balance was so low. Defense counsel made no objection to the April statement, but argued the May statement should not be admitted because it did not directly show the cashing of the check. The court ruled that both the April and May account statements were admissible, stating the May statement was relevant to show the \$4,600 transaction, and the April statement was relevant to show "lack of funds."

At trial, a bank security investigator testified Jones's May 2010 bank account statement showed that on May 14 the bank's check fraud claims department charged the \$4,600 check back to Jones's account. On cross-examination, defense counsel asked if the documents showed Jones's account balance on May 11. The security investigator responded that her bank statement showed her account was overdrawn. Defense counsel then asked whether a request for all the cash from a \$4,600 check on an overdrawn account should have triggered "red flags," and the investigator responded, "It should have." The prosecution submitted the May statement into evidence, but there was no reference to or admission of the April statement.

To support her contention on appeal, Jones cites the rule "that evidence presented solely to show a defendant's poverty carries a risk of undue prejudice and accordingly is inadmissible to prove a motive to commit robbery or theft." (*People v. Cook* (2007) 40 Cal.4th 1334, 1356.) Her claim of reversible evidentiary and instructional error on this ground fails. First, although the trial court ruled that her April statement could be admitted to show lack of funds, at trial the prosecutor only presented the May statement to the jury. Thus, any error in the court's ruling concerning the April statement was harmless. Second, defense counsel did not argue to the trial court that the bank statements could not properly be admitted to show motive based on lack of funds, or that the instruction on motive should be eliminated or clarified to ensure that the jury understood this rule.⁶ Accordingly, these challenges are forfeited on appeal. (*People v. Doolin, supra*, 45 Cal.4th at p. 438 [forfeiture due to failure to raise ground for exclusion of evidence]; *People v. Valdez* (2004) 32 Cal.4th 73, 137 [forfeiture due to failure to object that instruction was unsupported by evidence]; *People v. Lee* (2011) 51 Cal.4th 620, 638 [forfeiture due to failure to request clarifying instruction; court has no sua sponte duty to clarify instructions that are legally correct].)

To the extent her counsel was required to object, Jones asserts she was provided ineffective representation. To establish ineffective assistance, the defendant must show

⁶ The motive instruction stated the prosecution was not required to prove motive; however, the jury could consider whether the defendant had a motive; and having a motive could be a factor tending to show the defendant was guilty, whereas not having a motive could be a factor tending to show the defendant was not guilty. (See CALCRIM No. 370.)

that counsel's representation fell below an objective standard of reasonableness, and there is a reasonable probability that but for counsel's errors the result would have been different. (*People v. Weaver* (2001) 26 Cal.4th 876, 925.) There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and to obtain relief on appeal the record must affirmatively disclose that counsel had no rational tactical purpose for his or her act or omission. (*Id.* at pp. 925-926.) If the record does not show prejudice from counsel's alleged deficiency, we may reject the claim without determining whether counsel's performance was deficient. (*People v. Sapp* (2003) 31 Cal.4th 240, 263.)

Jones has not shown that defense counsel could not have had a reasonable tactical purpose for not objecting to the lack of funds evidence reflected in the May statement.⁷ Defense counsel elicited testimony from the bank's security investigator that because Jones's May statement showed her account was overdrawn, the bank should have been alerted that the request to receive the entire amount from the \$4,600 check was suspicious. The fact that defense counsel used the overdrawn-account evidence to criticize the bank's handling of the transaction supports that counsel may have assessed that the evidence was helpful to the defense because it supported an inference that the bank did not properly scrutinize the identity of the person claiming to be Jones at the time the forged check was cashed.

⁷ Although the May statement is not included in the record on appeal, we will assume the jury could have ascertained from the May statement that Jones's account was overdrawn even without the testimony to this effect elicited by defense counsel on cross-examination of the bank's security investigator.

Additionally, Jones's claim of ineffective representation based on the motive instruction fails under the prejudice prong. The prosecutor did not question witnesses or present closing argument to suggest that Jones had a motive to commit the crime due to lack of funds. Because this theory was not presented or developed at trial, there is no reasonable probability the jury would have reached a different result if no motive instruction, or a modified motive instruction, had been provided.⁸

DISPOSITION

The judgment is affirmed.

HALLER, Acting P. J.

WE CONCUR:

AARON, J.

IRION, J.

⁸ For the same reason, the record does not show prejudice from the presentation of the lack of funds evidence.