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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

STEPHANIE MCCAULLEY,

Defendant and Appellant.

D065530

(Super. Ct. No. SCD248348)

APPEAL from a judgment of the Superior Court of San Diego County, Howard H. Shore, Judge. Reversed and remanded for further proceedings.

Robert Booher, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Charles G. Raglund and Stacy A. Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

## I.

### INTRODUCTION

A jury found Stephanie McCaulley guilty of first degree burglary (Pen. Code, §§ 459, 460)<sup>1</sup> and receiving stolen property (§ 496, subd. (a)). After the jury rendered its verdicts, McCaulley admitted having suffered a prison prior (§§ 667.5, subd. (b), 668) and a strike prior (§§ 667, subds. (b)-(i), 668, 1170.12). The trial court sentenced McCaulley to a total term of eight years in prison.

On appeal, McCaulley claims that defense counsel provided ineffective assistance in failing to attempt to impeach the prosecution's key witness with a prior burglary conviction. We agree and reverse the judgment.

## II.

### FACTUAL AND PROCEDURAL BACKGROUND

On an evening in May 2013, Sandra Washington and her wife, Monique,<sup>2</sup> arrived home at around 10:30 and parked their car in a carport adjacent to their apartment. The carport was enclosed on top and on three sides, and contained storage units for the tenants. Washington noticed that the lock on the door of a neighbor's storage unit was broken, but she did not immediately notice anything wrong with her own storage unit.

Approximately 10 minutes later, Washington and Monique heard a scraping noise

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<sup>1</sup> Unless otherwise stated, all subsequent statutory references are to the Penal Code.

<sup>2</sup> Monique's last name does not appear in the reporter's transcript.

near the wall between their apartment and the carport and storage units. They went outside into the alley, where they saw a white two-door pickup truck. According to Washington, the passenger door was open, a male was sitting in the driver's seat, and the truck was running. Washington saw McCaulley and a third man loading items belonging to Washington and Monique, which had been inside the storage unit, into the back of the truck.

McCaulley and her accomplices saw Washington and Monique. McCaulley and the other man jumped into the truck, and the driver began to drive away. Washington and Monique got into their car and chased the truck down the alley and around the corner. As Washington and Monique chased the truck, they called the police. The dispatcher instructed them to discontinue the chase and told them that officers would be in pursuit.

San Diego Police Officer Jerrad Schnautz responded to the call. Washington, who was standing outside of her carport, flagged down Officer Schnautz and informed him of the direction that the truck had been travelling. Officer Schnautz drove approximately 100 yards down the alley, where he saw a white pickup truck that matched the description of the suspects' vehicle. McCaulley was standing outside the truck next to the passenger door, and a man was sitting in the driver's seat of the vehicle. Another responding officer found the third suspect hiding nearby.

Washington identified several items in the truck bed as belonging to her, including some clothing, a backpack, and a black bag. Shortly thereafter, at a curbside lineup, Washington identified McCaulley and the other two suspects detained by the

police as the individuals involved in the burglary. On a field line-up identification form, Washington identified McCaulley as "the female that was sitting in the middle of the truck."

### III.

#### DISCUSSION

A. *Defense counsel provided ineffective assistance in failing to move to impeach Washington with a prior burglary conviction*

McCaulley claims that defense counsel provided ineffective assistance in failing to attempt to impeach Washington with a prior burglary conviction.

1. *Factual and procedural background*

a. *The People's motion in limine to exclude evidence of Washington's prior burglary conviction*

Prior to the trial, the People filed a motion in limine in which they requested that the court exclude any evidence that Washington had suffered a burglary conviction in 1997, pursuant to Evidence Code section 352. In support of their motion, the People contended that Washington's "credibility [was] not at issue," in the case.

The trial court held a hearing on the People's motion. At the hearing, the court requested that the People summarize Washington's anticipated testimony. The prosecutor responded:

"People expect that Ms. Washington will testify that she heard some noise outside the carport next to her home, she went outside and saw a white truck fleeing from the area. She saw her items in the bed of the truck. She followed the truck, was able to identify the individuals inside the truck.

"The reason the People indicated that her credibility was not in issue in the case was because her statement, the fact that a theft had occurred, someone had burglarized the storage in her carport and identity of the witnesses, none of that is at issue in this case.

"In addition, People believe that her 1997 conviction is irrelevant to the case at hand."

In light of this offer of proof, and apparently under the impression that Washington's testimony would be limited to the fact that she had seen McCaulley sitting in the truck, and that Washington would not testify that she had seen McCaulley in possession of Washington's belongings, defense counsel responded:

"You know, I'm hesitant to concede a point like that. At the same time, it's not really the essence of my case to discredit Ms. Washington. I mean, it's not really any part of my case to discredit Ms. Washington, so, you know, I don't like to have any of these kinds of issues precluded before hearing what witnesses say and how it comes out of their mouths, but, you know, I'm not especially keen to cross her on a two-decade old, you know, conviction in a case where her credibility isn't really the central issue."

The trial court responded by rejecting the prosecutor's "blanket statement" that Washington's credibility was not an issue, stating, "When a witness testifies, her credibility is automatically in issue." However, the court stated that it understood that the People were contending that Washington's credibility was "not seriously an issue." The court continued by noting that burglary was a crime of moral turpitude, and thus was relevant to the jury's assessment of Washington's credibility. With respect to the People's request to exclude the evidence pursuant to Evidence Code section 352, the court stated the following:

"[T]he next question is whether the prejudicial impact substantially outweighs the probative value. [¶] In this case, the defense has conceded that Ms. Washington's credibility is not a central issue in the case. The age of the prior conviction, 1997, 16 years, . . . would militate against my ruling at this time that the prior conviction can be used for impeachment, so what I am going to do at this time is exclude mention of it without prejudice to the defense.

"If something comes up during Ms. Washington's testimony that I feel places her credibility more squarely in issue and justifies the use of a prior conviction, then I will reconsider allowing cross-examination with it."

b. *Washington's trial testimony*

At trial, Washington testified that on the night of the burglary she and Monique heard a scraping noise outside of her apartment. Washington and Monique went outside to investigate the noise. Washington stated that when she entered the alley, she observed McCaulley and another person "putting our belongings in the back of the truck." According to Washington, McCaulley and the other person "noticed that we noticed them, so they jumped back in the vehicle and proceeded to try to take off down the alley."

Defense counsel began his cross-examination by asking Washington, "You just testified that you saw Ms. McCaulley putting your possessions into the bed of the truck?" Washington responded in the affirmative.

Shortly thereafter, defense counsel asked, "[W]hen you identified Ms. McCaulley in the lineup, you didn't say that you saw her putting items in the bed of the truck, did you?" Washington responded, "I don't recall." Washington also confirmed that a police report indicated that she had identified McCaulley by stating, "That's the female who is

sitting in the middle of the truck," and that the report did not indicate that McCaulley had stated, "That's the female I saw putting my possessions into the cab of the truck."

Defense counsel then asked several follow-up questions concerning whether Washington had told police officers that she had seen McCaulley putting Washington's possessions in the truck:

"[Defense counsel]: And you remember speaking to a police officer about the case?"

"[Washington]: I do.

"[Defense counsel]: And you didn't tell him either that you saw Ms. McCaulley putting your personal items into the back of the truck, did you?"

"[Washington]: I believe that I did.

"[Defense counsel]: Okay. You believe that you did.

"[¶] . . . . [¶]"

"[Defense counsel]: [W]hat I'm trying to elicit is whether you told anybody that you saw Ms. McCaulley putting items into the back of the truck when this was actually fresh in your mind.

"[Washington]: There were several officers there, and I know that I spoke with several different officers, and I know that I'm pretty sure that I made that statement.

"[Defense counsel]: You're pretty sure.

"[Washington]: I know that I made that statement. I know what I saw. And I don't wear glasses, and I would be pretty sure."

c. *The parties' closing arguments*

During her initial closing argument, the prosecutor repeatedly emphasized Washington's trial testimony that she had seen McCaulley placing Washington's personal items in the truck, in urging the jury to find McCaulley guilty of both burglary and receiving stolen property.

In his closing argument, defense counsel argued that, other than Washington's testimony at trial that she had seen McCaulley holding her possessions, there was no evidence that McCaulley had committed a crime. For example, counsel argued that there was no physical evidence linking McCaulley to the items in the truck and no evidence as to why McCaulley was present in the truck or whether she had any prior relationship to the other individuals in the truck.

With respect to Washington's testimony, defense counsel suggested that Washington was not being truthful in stating that she had seen McCaulley holding Washington's belongings. In support of this contention, defense counsel argued that Washington had not told police on the night of the incident that she saw McCaulley in possession of Washington's belongings, but instead, had identified McCaulley only as the person she had seen sitting in the truck. Defense counsel suggested that Washington's trial testimony that she had seen McCaulley outside the truck in possession of Washington's belongings was an attempt to "help the prosecution secure a conviction in this case."

Counsel summarized his argument as follows:

"And really when you take away that sighting outside the truck, I mean, if you question the credibility of Ms. Washington as to that one statement, you know, this case—the evidence in this case gets very thin indeed because you're left with essentially Ms. McCaulley being found outside a truck with two guys, you know, who [*sic*] the relationship that she has with them is unknown, with a bunch of stuff in a bed of [the] truck, some of which is stolen property, some of which is not, with no evidence about how she got there or why she came to be there.

"You know, other than that identification of her standing outside the carport that Ms. Washington made for the first time today, you know, it's really just this interaction at the end when she was pulled out of the truck—or was found outside [the] truck."

In rebuttal, the prosecutor reemphasized that Washington had testified that she saw McCaulley holding Washington's possessions,<sup>3</sup> and explained that physical evidence was not needed in a case "like this . . . where a victim physically saw the individual outside her carport with her stolen items." With respect to the defense's contention that the victim "basically . . . exaggerated her story," the prosecutor argued: "[T]here was no reason to question her credibility. There was nothing that came out to question whether she was lying or that she was lying."

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<sup>3</sup> The prosecutor referred to Washington's testimony that she saw McCaulley holding her possessions on four occasions in her initial closing argument, and referred to this testimony four more times in rebuttal.

2. *Governing law*

a. *The law governing ineffective of assistance of counsel*

To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient in that it "fell below an objective standard of reasonableness," evaluated "under prevailing professional norms." (*Strickland v. Washington* (1984) 466 U.S. 668, 688 (*Strickland*); accord, *People v. Ledesma* (1987) 43 Cal.3d 171, 216 (*Ledesma*)). "When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) Thus, "[w]hen the record on direct appeal sheds no light on why counsel failed to act in the manner challenged, defendant must show that there was 'no conceivable tactical purpose' for counsel's act or omission. [Citations.] [Citation.]" (*People v. Centeno* (2014) 60 Cal.4th 659, 675 (*Centeno*)). However, "deference to counsel's performance is not the same as abdication. [Citation.] [I]t must never be used to insulate counsel's performance from meaningful scrutiny and thereby automatically validate challenged acts or omissions." [Citation.]" (*Ibid.*)

If counsel's performance has been shown to be deficient, the defendant is entitled to relief only if he can also establish that he was prejudiced by counsel's ineffectiveness. (*Strickland, supra*, 466 U.S. at pp. 691–692; accord, *Ledesma, supra*, 43 Cal.3d at p. 217.) In order to show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, supra*, at p. 694; see *Centeno, supra*, 60 Cal.4th at p. 677 [concluding that there was a reasonable probability that defense counsel's failure to object to prosecutor's closing argument "caused one or more jurors to convict defendant based on a lesser standard than proof beyond a reasonable doubt"].)

b. *The law governing impeachment of a witness with a prior conviction*

Subject to a trial court's discretion under Evidence Code section 352, California law permits the introduction of evidence of any "felony conviction which necessarily involves moral turpitude" for purposes of impeaching a witness. (*People v. Castro* (1985) 38 Cal.3d 301, 306.) It is well established that burglary is a crime involving moral turpitude. (See, e.g., *People v. Edwards* (2013) 57 Cal.4th 658, 722.)

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."

"When determining whether to admit a prior conviction for impeachment purposes, the court should consider, among other factors, whether it reflects on the witness's honesty or veracity, [and] whether it is near or remote in time . . . ." (*People v. Carter* (2014) 227 Cal.App.4th 322, 329-330 (*Carter*).) While remoteness generally lessens probative value, "convictions remote in time are not automatically inadmissible for impeachment purposes." (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925; see

e.g., *Carter, supra*, at p. 330 ["The trial court's decision to permit evidence of the 11-year-old [misdemeanor burglary and theft] convictions was not unreasonable and within its discretion"].)

3. *Application*

- a. *Defense counsel's failure to attempt to impeach Washington with her prior burglary conviction constituted ineffective assistance of counsel*

At the pretrial hearing on the prosecutor's motion in limine to exclude evidence of Washington's prior burglary conviction, the prosecutor stated that Washington was expected to testify that "she went outside and saw a white truck fleeing from the area." On the basis of this anticipated testimony, defense counsel stated that it was not the "essence of [his] case to discredit Ms. Washington." In ruling on the prosecutor's motion, the trial court explained that since "the defense has conceded that Ms. Washington's credibility is not a central issue in the case," the court would tentatively grant the motion. However, the court added, "If something comes up during Ms. Washington's testimony that I feel places her credibility more squarely in issue and justifies the use of a prior conviction, then I will reconsider allowing cross-examination with it."

At trial, something did come up that placed Washington's credibility squarely in issue. As outlined in part III.A.1.b., *ante*, contrary to the prosecutor's offer of proof at the pretrial hearing that Washington would testify that "she went outside and saw a white truck fleeing from the area," Washington testified that she saw McCaulley placing Washington's belongings in the truck. Washington's credibility in testifying in this

manner became the central issue at trial. The prosecutor referred to this testimony no fewer than *eight* times in closing argument (see fn. 3, *ante*), and argued that "[t]here was nothing that came out to question whether she was lying or that she was lying." Defense counsel contended in closing argument that Washington had not been truthful in stating that she had seen McCaulley holding her belongings, and urged the jury to "question the credibility of Ms. Washington as to that one statement."

Despite the fact that Washington's credibility had become the central issue at the trial, and notwithstanding that defense counsel viewed Washington's testimony in this regard as the only evidence tending to show McCaulley's guilt,<sup>4</sup> counsel made no attempt to impeach Washington with her prior burglary conviction. Counsel's failure to do so allowed the prosecutor to argue in closing that, "[T]here was no reason to question [Washington's] credibility. There was nothing that came out to question whether she was lying or that she was lying." We can conceive of no possible tactical reason for this omission. We are not persuaded by the People's argument that "there is a conceivable tactical basis" for counsel's failure to attempt to impeach Washington, namely that doing so "would have added little to [McCaulley's] defense." As McCaulley persuasively argues on appeal, defense counsel's impeachment of Washington with her prior burglary conviction could have significantly strengthened McCaulley's defense without any

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<sup>4</sup> After the close of evidence, defense counsel made a motion for judgment of acquittal (§ 1181.1) in which he argued that "other than this last minute, previously nondisclosed, nonmentioned sighting by the victim of my client outside of her apartment, there's absolutely nothing that would even tend to indicate that Ms. McCaulley entered the dwelling in this case." The court denied the motion.

potential tactical disadvantage, and would have been entirely consistent with counsel's strategy of attempting to discredit Washington.

Because Washington's credibility became a key issue at trial, we conclude that defense counsel's failure to attempt to impeach Washington with her prior conviction fell below an "objective standard of reasonableness," evaluated "under prevailing professional norms." (*Strickland, supra*, 466 U.S. at p. 688.)

- b. *There is a reasonable probability that, but for counsel's ineffective assistance, the result of the proceeding would have been different*

As the trial court noted at the pretrial hearing on the People's motion in limine, Washington's prior burglary conviction was relevant in assessing her credibility.<sup>5</sup> (See *People v. Plager* (1987) 196 Cal.App.3d 1537, 1545 ["every burglary conviction is relevant to the issue of credibility"].) It is far from clear that the trial court would have excluded evidence of the conviction pursuant to Evidence Code section 352 on the ground that the conviction was remote, since Washington's credibility became the key issue in the case, and the trial court expressly stated at the hearing on the prosecution's motion in limine that it would consider admitting evidence of the conviction if

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<sup>5</sup> The court stated, "[I]n this case there is relevance—the next question is whether the prejudicial impact substantially outweighs the probative value."

"something comes up during Ms. Washington's testimony that I feel places her credibility more squarely in issue and justifies the use of a prior conviction . . . ."6

Further, there is a reasonable probability that the result of the proceeding would have been different if Washington had been impeached with the prior conviction. To begin with, in assessing Washington's credibility, the jury may have attached significant probative value to the fact that Washington had suffered a prior conviction for burglary. (See *People v. Muldrow* (1988) 202 Cal.App.3d 636, 644 [stating that burglary is a "fundamentally deceitful act" demonstrating a "readiness to do evil," and that "[d]eceive, fraud, cheating or stealing are universally regarded as conduct which reflects adversely on a man's honesty and integrity." [Citation.]].)

In addition, the evidence that McCaulley participated in the charged crimes was far from overwhelming. Despite Washington's testimony that she had seen McCaulley handling her belongings, there was no physical evidence, such as fingerprints, linking McCaulley to the crimes, and there was no evidence of the relationship between McCaulley and the other individuals seen in the truck used in the burglary. Washington's credibility in testifying that she had seen McCaulley holding her belongings was the primary issue for the jury to evaluate in determining whether McCaulley was guilty of the

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6 In their brief, the People do not contend that the trial court would have excluded the evidence.

charged crimes.<sup>7</sup> Moreover, in determining whether Washington was being truthful in stating that she had seen McCaulley holding her possessions, the jury could have reasonably considered both Washington's equivocal testimony concerning whether she had made this statement to the responding police officers and the absence of any corroborating evidence that Washington had in fact made such statements to law enforcement officers.<sup>8</sup>

Further, several jury notes demonstrate both that the jury considered this to be a close case, and that the jury clearly focused on Washington's testimony in determining McCaulley's guilt. (See *People v. Diaz* (2014) 227 Cal.App.4th 362, 385 [stating that jury's questions during deliberations demonstrated closeness of the case in determining prejudice].) In one note, the jury asked, "Under 1700 section of the penal [sic]:<sup>9</sup> 'What does defendant mean?' Does it mean perpetrator / aider or abettor?" In a second note, the

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<sup>7</sup> As noted in the text, the prosecutor referred to Washington's testimony that she had seen McCaulley holding her possessions *eight* times during closing argument, and contended, "There was nothing that came out to question whether she was lying or that she was lying." Washington's prior conviction for a crime of moral turpitude would have been evidence that the jury could have considered in determining whether she was lying.

<sup>8</sup> For example, after defense counsel implied in cross-examination that Washington's testimony that she had seen McCaulley holding her belongings was "recently fabricated" (Evid. Code, § 791), the People could have offered evidence that Washington had previously made statements consistent with her trial testimony. (Evid. Code, § 1236.) No such evidence was offered.

<sup>9</sup> It appears that the jury was referring to CALCRIM No. 1700, which outlines the elements of burglary, in light of the fact that the trial court instructed the jury pursuant to a modified version of CALCRIM No. 1700 at trial.

jury also asked, "If I [*sic*] think she did not leave the truck[,] is that [*sic*] guilty of burglary?" The court responded to these questions by instructing the jury to review the court's instructions on aiding and abetting. A third jury note requested a readback of "the testimony where Ms. Washington testif[ies] Ms. McCaulley is holding the clothes."<sup>10</sup>

Finally, we are not persuaded by the People's argument that "even had counsel cross-examined and impeached [Washington] with her 16-year-old burglary conviction, and the jury therefore discounted her testimony that she saw [McCaulley] putting her belongings into the truck, there is no reasonable probability the jury would have failed to convict her on an aiding and abetting theory." Putting aside Washington's testimony that she saw McCaulley putting her belongings in the truck, there was *no* evidence, apart from McCaulley's presence in the truck,<sup>11</sup> that she aided or abetted the crimes. Indeed, Washington's testimony that she had seen McCaulley with Washington's belongings was the *only* evidence that the prosecutor mentioned in closing argument in arguing that McCaulley had aided and abetted the crimes.<sup>12</sup> For these reasons, we are not persuaded

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<sup>10</sup> Although this note was labeled "Jury Note # 3," indicating that it was sent after the first two notes mentioned in the text, it is unclear from the record precisely when the jury sent the note, or whether a readback was actually performed.

<sup>11</sup> The trial court properly instructed the jury pursuant to CALCRIM No. 401 that "the fact that a person is present at the scene of a crime or fails to prevent the crime does not by itself make him or her an aider and abettor."

<sup>12</sup> In her initial closing argument, the prosecutor stated:  
"How do we know that the defendant aided and abetted the commission of the burglary? Well, we have Ms. Washington's

that, *putting aside* such testimony, there is not a reasonable probability that the jury would have failed to convict McCaulley of the charged crimes on an aiding and abetting theory.<sup>13</sup>

Accordingly, we conclude that there is a reasonable probability that, but for counsel's failure to attempt to impeach Washington with her prior robbery conviction, the result of the proceeding would have been different. We must therefore reverse the judgment.<sup>14</sup>

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testimony that when she went outside, she physically saw the defendant throwing the belongings into the bed of the truck. She then physically saw the defendant get into the passenger side along with the other individual who was holding her property, and then they fled the area."

The prosecutor presented a similar argument in her rebuttal closing argument with respect to the aiding and abetting theory of guilt.

<sup>13</sup> Noting the absence of any evidence demonstrating the relationship between McCaulley and the other individuals in the truck, defense counsel suggested that McCaulley could have been a stranger to the other individuals in the truck who was just getting a ride, arguing, "There are reasonable explanations in the absence of any relationship between these three people that would allow a normal reasonable human being to not know that a crime was being committed while he or she was sitting in this vehicle." Defense counsel also correctly noted that there were no fingerprints or other physical evidence linking McCaulley to the stolen property.

<sup>14</sup> In so concluding, we note that this case is not at all one in which defense counsel performed incompetently throughout the trial. Rather, defense counsel effectively cross-examined Washington concerning whether she had previously informed authorities that she had seen McCaulley holding her possessions and provided a strong closing argument outlining the deficiencies in the People's case. However, for the reasons stated in the text, counsel's failure to attempt to impeach Washington with her prior burglary conviction was a significant oversight that requires reversal of the judgment.

B. *In light of our reversal of the judgment, resentencing is required on two other cases on remand*

At the sentencing hearing in this case, in addition to the eight-year sentence imposed in this case, the court also imposed a mid-term sentence of two years in another case (SCD 249809) for possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)), to be served concurrently with the term in this case. In addition, the court sentenced McCaulley to six months in custody for a misdemeanor petty theft conviction (§ 484), to be served concurrently with the felony terms imposed in this case and SCD249809.<sup>15</sup> In light of our reversal of the judgment, on remand, the trial court will have to resentence McCaulley on these two cases. (See *People v. Leon* (2008) 161 Cal.App.4th 149, 170 ["In light of the fact that the sentences in D048306 and in this case stem from the same final judgment, and in light of our disposition of this appeal [a reversal of the judgment on one count], we must remand the matter for resentencing in both cases"].)

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<sup>15</sup> The case number for the misdemeanor case does not appear in the appellate record.

IV.

DISPOSITION

The judgment is reversed and the matter is remanded for further proceedings consistent with this opinion, including the resentencing directed in part III.B, *ante*.

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AARON, J.

WE CONCUR:

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McCONNELL, P. J.

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McINTYRE, J.