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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,
Plaintiff and Appellant,
v.
PAUL ANTOINE BIANE et al.,
Defendants and Respondents.

E054422

(Super.Ct.No. FSB1102102)

OPINION

MARK KIRK,
Petitioner,
v.
THE SUPERIOR COURT OF SAN
BERNARDINO COUNTY,
Respondent;
THE PEOPLE,
Real Party in Interest.

E054735

JAMES ERWIN,
Petitioner,
v.
THE SUPERIOR COURT OF SAN
BERNARDINO COUNTY,
Respondent;
THE PEOPLE,
Real Party in Interest.

E054737

JEFFREY BURUM,
Petitioner,

v.

THE SUPERIOR COURT OF SAN
BERNARDINO COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

E054738

APPEAL AND PETITIONS FOR WRIT OF MANDATE from the Superior Court of San Bernardino County. Brian S. McCarville, Judge. Appeal affirmed in part and reversed in part. Petition for writ of mandate denied as to Mark Kirk. Petition for writ of mandate granted in part and denied in part as to James Erwin. Petition for writ of mandate granted in part and denied in part as to Jeffrey Burum.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, James D. Dutton, and Melissa Mandel, Deputy Attorneys General, for Plaintiff and Appellant.

David M. Goldstein for Defendant and Respondent Paul Biane.

Law Office of Grech & Firetag, Paul Grech, Jr. and Chad W. Firetag for Defendant and Respondent Mark Kirk.

Law Office of Rajan Maline, Rajan Maline; Law Office of Harmon & Harmon and Steven L. Harmon for Defendant and Respondent James Erwin.

Arent Fox, Stephen G. Larson and Mary Carter Andruess for Defendant and Respondent Jeffrey Burum.

This is an appeal, following reversal in part and remand from the California Supreme Court, in which the People of the State of California challenge the trial court's order sustaining, in part, the defendants' demurrers to various counts of the grand jury indictment in this action. (Pen. Code, § 1238, subd. (a).) The indictment alleges in pertinent part that defendants Mark Kirk, James Erwin, and Jeffery Burum (hereafter referred to collectively as defendants or individually by last name) committed various crimes including aiding and abetting William Postmus and defendant Paul Biane, both of whom were elected members of the San Bernardino County Board of Supervisors (the Board), to accept a bribe and/or ask for or receive a bribe; and with conspiracy to commit those crimes as well as other crimes that involve the alleged unlawful acts of several elected members of the Board. The alleged object of the conspiracy was to obtain the Board's approval of a \$102 million settlement in favor of Colonies Partners, L.P., of which defendant Burum is a general partner, in its lawsuit against the County of San Bernardino.

In addition to the People's appeal, defendants Burum, Kirk, and Erwin filed petitions for writ of mandate challenging the trial court's order overruling parts of their respective demurrers. We consolidated defendants' writ petitions with the People's appeal in order to address and resolve in a single opinion all issues related to the demurrers.

For reasons we explain below, we agree with the People’s assertion in their appeal that the trial court erred in sustaining defendants’ demurrers to the counts that allege they misappropriated public funds in violation of Penal Code section 424. We further conclude, in accordance with the Supreme Court’s directive in *People v. Biane* (2013) 58 Cal.4th 381, the trial court erred in sustaining defendant Burum’s demurrer to counts 4, 5, 7, and 8, the counts charging him with aiding and abetting bribery in violation of Penal Code section 165, and aiding and abetting in asking for and/or receiving a bribe in violation of Penal Code section 86. We also agree with the allegations of defendants Erwin and Burum in their writ petitions that the trial court should have sustained their demurrers to the counts that allege they had a conflict of interest in violation of Government Code section 1090.

Therefore, we will affirm in part and reverse in part, and/or issue a writ of mandate directing the trial court to sustain defendants’ demurrers in the manner just indicated.

I.

PROCEDURAL BACKGROUND

A. The Indictment

On May 9, 2011, a special grand jury in San Bernardino County issued a 29-count indictment naming Paul Biane, Mark Kirk, James Erwin, and Jeffrey Burum as defendants. The indictment alleged defendant Biane was an elected member of the Board; defendant Kirk was chief of staff for Gary Ovitt, an elected member of the Board; and defendant Erwin, among other things, was the agent of defendant Burum. The

indictment further alleged that between January 1, 2005 and July 12, 2007, defendants Biane, Kirk, Erwin and Burum, one of two general partners in Colonies Partners, L.P. (Colonies), conspired with each other and with unindicted coconspirators including William Postmus, an elected member of the Board, to commit the crimes of bribery in violation of Penal Code section 165 (referred to in the trial court and hereafter as target crime 1), asking for and/or receiving a bribe in violation of Penal Code section 86 (target crime 2), appropriation of public funds by a public officer without authority of law in violation of Penal Code section 424 (target crime 3), improper influence of a legislative action in violation of Government Code section 9054 (target crime 4), and conflict of interest in violation of Government Code section 1090 (target crime 5).

According to the indictment, “[t]he object of the conspiracy was to illegally obtain \$102,000,000 from the County.” As alleged in the indictment, the means for accomplishing the conspiracy were that Colonies purchased certain real property in Upland for the purpose of residential and commercial development; the property included a 67-acre flood control basin; San Bernardino County asserted easement rights over the flood control basin; in March 2002, Colonies sued the county to challenge its easement claim; that litigation confirmed the county’s easement rights, but in July 2005 only part of those rights were affirmed on appeal; some unknown time after Colonies filed its lawsuit, defendant Burum “concocted a scheme to obtain a monetary settlement . . . from the County”; between January 1, 2005 and November 29, 2006, defendant Burum allegedly corruptly influenced members of the Board through “threats, extortion, inducements, and bribery in order to secure their vote in favor of a settlement”; and

defendant Erwin allegedly joined the conspiracy by conveying threats and/or inducements from defendant Burum to Postmus, defendant Biane, and defendant Kirk. In addition, defendant Erwin allegedly agreed to accept money from defendant Burum in exchange for influencing the votes of Supervisor Postmus and defendant Biane; defendant Kirk allegedly agreed to accept money from defendant Burum in return for influencing the vote of Supervisor Ovitt. Postmus and defendant Biane allegedly joined the conspiracy by agreeing to accept a bribe in return for their votes to approve the Colonies settlement.

The indictment alleges that on November 28, 2006, Postmus, Ovitt, and defendant Biane voted to approve a settlement of \$102 million in Colonies's lawsuit against the county. Postmus and defendant Biane allegedly "voted [in favor of the settlement] knowing that they had a financial interest in the outcome, a bribe from [defendant] Burum." The indictment also alleges, "After Colonies received substantial sums of money from the settlement with the County, [defendant] Burum distributed from Colonies the agreed upon bribes and payments to Postmus, [and defendants] Biane, Kirk, and Erwin" by giving \$100,000 to political action committees created and controlled by them.

The indictment alleges numerous overt acts defendants and the unnamed coconspirators committed. We recount the details of those allegations below as pertinent to our resolution of the issues raised on appeal.

In addition to the conspiracy charged in count 1, which includes the five identified target crimes, the indictment also separately charged defendants with committing the following additional crimes, some of which are the crimes alleged as target crimes in the conspiracy count:

Defendant Biane—bribery in violation of Penal Code section 165 (count 2); asking for and/or receiving a bribe in violation of Penal Code section 86 (count 6); conflict of interest in violation of Government Code section 1090 (count 10); appropriation of public funds by a public officer without authority of law in violation of Penal Code section 424 (count 12, entitled “public officer crime”); willfully filing a false tax return in violation of Revenue and Taxation Code section 19705, subdivision (a)(1) (count 15); perjury by declaration in violation of Penal Code section 118 (count 19); and filing a false instrument in violation of Penal Code section 115, subdivision (a) (count 20).

Defendant Kirk—bribery in violation of Penal Code section 68 (count 3); obtaining money on the representation that he would improperly influence Gary Ovitt in regard to an official matter or vote, in violation of Government Code section 9054 (count 9); conflict of interest in violation of Government Code section 1090 (count 10); appropriation of public funds by a public officer without authority of law in violation of Penal Code section 424 (count 13); filing a false tax return in violation of Revenue and Taxation Code section 19706 (count 16); perjury by declaration in violation of section 118 (count 21); and filing a false instrument in violation of Penal Code section 115, subdivision (a) (count 22).

Defendant Erwin—bribery in violation of Penal Code section 165 (counts 4 & 5); asking for and/or receiving a bribe in violation of Penal Code section 86 (counts 7 & 8); conflict of interest in violation of Government Code section 1090 (count 11); appropriation of public funds by a public officer without authority of law in violation of Penal Code section 424 (count 13); forgery in violation of Penal Code section 470, subdivision (a) (count 14); willful failure to file a tax return in violation of Revenue and Taxation Code section 19706 (count 17); filing a false tax return in violation of Revenue and Taxation Code section 19706 (count 18); perjury by declaration in violation of Penal Code section 118 (counts 23, 25, 26 & 28); and filing a false instrument in violation of Penal Code section 115, subdivision (a) (counts 24, 27 & 29).

Defendant Burum—bribery in violation of Penal Code section 165 (counts 4 & 5); asking for and/or receiving a bribe in violation of Penal Code section 86 (counts 7 & 8); conflict of interest in violation of Government Code section 1090 (count 11); and appropriation of public funds by a public officer without authority of law in violation of Penal Code section 424 (count 13).

B. The Demurrers

Defendants each demurred to the indictment on the grounds the facts alleged did not state public offenses and, even if true, the alleged facts would constitute a legal

justification or excuse or other legal bar to prosecution. (Pen. Code, § 1004.)¹ In particular, all defendants demurred to the conspiracy charge alleged in count 1.² In addition, each defendant demurred to some or all of the counts in which he was charged with aiding and abetting in the commission, or actually committing, the crime alleged as a target crime in the conspiracy count. In other words, defendant Burum, joined by defendant Erwin, his alleged agent, demurred to counts 4 and 5, which alleged bribery in violation of Penal Code section 165; counts 7 and 8, which alleged violations of Penal Code section 86 based on asking for or receiving a bribe; count 11, which alleged a conflict of interest in violation of Government Code section 1090; and count 13, which alleged misappropriation of public funds in violation of Penal Code section 424.

Defendant Biane demurred to counts 2 (bribery), 6 (asking for and/or receiving a bribe), 10 (conflict of interest), and 12 (misappropriation of public funds), and defendant Kirk, in addition to demurring to count 1, demurred to count 9 (improper lobbying in violation of Government Code section 9054) and count 13 (misappropriation of public funds).

¹ Penal Code section 1004 states, in pertinent part, that, “The defendant may demur to the accusatory pleading at any time prior to the entry of a plea, when it appears upon the face thereof either: [¶] . . . [¶] 4. That the facts stated do not constitute a public offense; [¶] 5. That it contains matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution.”

² Defendants Erwin and Biane joined in defendant Burum’s arguments, and also asserted arguments of their own. Defendant Kirk separately demurred.

C. The Trial Court's Ruling

The trial court sustained defendants' demurrers in part and overruled them in part. We will recount the details of the trial court's ruling, below, as pertinent to our discussion of the issues raised by the parties.

II.

DISCUSSION

A. Standard of Review

1. *The People's Appeal*

“‘[A] demurrer raises an issue of law as to the sufficiency of the accusatory pleading, and it tests only those defects appearing on the face of that pleading.’ [Citation.]” (*People v. Manfredi* (2008) 169 Cal.App.4th 622, 626; see also *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1090 [“A demurrer to a criminal complaint lies only to challenge the sufficiency of the pleading and raises only issues of law.”].) On appeal “We review an order sustaining a demurrer without leave to amend de novo, exercising our independent judgment as to whether, as a matter of law, the complaint . . . states a cause of action on any available legal theory. [Citation.] In doing so we assume the truth of all material factual allegations, and we are required to accept them as such, together with those matters subject to judicial notice. [Citation.]” (*Honig v. San Francisco Planning Dept.* (2005) 127 Cal.App.4th 520, 524, fn. omitted.)

2. Defendants' Writ Petitions

“The Code of Civil Procedure provides that mandate ‘may be issued . . . to compel the performance of an act which the law specially enjoins’ [citation] where ‘there is not a plain, speedy, and adequate remedy, in the ordinary course of law.’ [Citation.] Although it is well established that mandamus cannot be issued to control a court’s discretion, in unusual circumstances the writ will lie where, under the facts, that discretion can be exercised in only one way. [Citation.]” (*Babb v. Superior Court* (1971) 3 Cal.3d 841, 850-851.) If defendants’ writ petitions demonstrate the trial court had no discretion to overrule their demurrers, i.e., that as a matter of law the indictment failed to a state public offense, then defendants would lack an adequate remedy at law without first incurring the time and expense at trial.

B. Judicial Notice Requests

Defendant Burum, in connection with his petition for writ of mandate, requests this court take judicial notice of the judgment of validation in San Bernardino Superior Court case No. SCVSS146272, dated March 29, 2007, attached as Exhibit A to his judicial notice request. The judgment of validation provides the factual background for the criminal indictment and the instant appeal. However, the facts alleged in the indictment are sufficient for our purpose. Therefore, the request for judicial notice is denied.

Defendants Burum, Erwin, and Kirk also request in connection with their writ petitions that we take judicial notice of the record in the related appeal. Defendants Burum and Erwin also request we take judicial notice of various documents, attached as

exhibits to their judicial notice requests, that purportedly pertain to the legislative histories of Government Code section 1090 and 9054. The appeal and writ petitions have been consolidated, as previously noted, and as a result the record in the appeal is properly before us. The documents purportedly related to the legislative histories of the noted Government Code sections are irrelevant because as we discuss below neither statute is ambiguous; therefore, we need not determine the Legislature's intent. Accordingly, the judicial notice requests are denied.

C. Motion to Dismiss Writ Petitions

The People move to dismiss the writ petitions filed by defendants Erwin and Kirk because the petitions are verified by their respective attorneys but do not include the affidavit required under Code of Civil Procedure section 446 explaining the reason why the verifications were not made by the defendant parties. The People acknowledge that defendant Erwin's attorney states in his verification that he, rather than defendant Erwin, verified the petition because he has "superior knowledge than Petitioner of the facts therein." The People contend the attorney must explain why he has superior knowledge, and that failure to do so renders the verification inadequate.

The People do not cite authority for that contention, and therefore we are not persuaded. Code of Civil Procedure section 446 offers three reasons for the attorney rather than the party to verify a pleading—the party is absent from the county where the attorney has his or her office, "from some cause" the party is unable to verify the pleading, and the facts are within the knowledge of his or her attorney. (Code Civ. Proc.,

§ 446.) Defendant Erwin’s attorney stated that he has superior knowledge of the facts and that statement comports with the statutory requirement.

Defendant Kirk’s attorney states in his verification that “[t]he matters stated in the attached declaration [*sic*] are true of our knowledge.” The statement arguably does not comport with Code of Civil Procedure section 446, but we nevertheless decline to dismiss the writ petition. One of the reasons for requiring that a writ of mandate petition be verified by the beneficially interested party is so that facts alleged in the petition can be used as evidence. (See *People v. Superior Court (Alvarado)* (1989) 207 Cal.App.3d 464, 470.) The issues raised in defendants’ writ petitions are all ones of law. For this reason, we view the verifications as adequate compliance with the requirement that writ petitions be verified. (See Code Civ. Proc., § 1086; Cal. Rules of Court, rule 8.486(a)(4).)

D. Analysis

1. Bribery in Violation of Penal Code Sections 165 and 86 (Alleged in Count 1 As Target Crimes 1 and 2, and in Counts 2, 4, 5, 6, 7 and 8 Against Defendants Burum, Biane, and Erwin)

As set out above, the indictment alleges in count 1 that defendants conspired to commit five target crimes. Alleged target crime 1 is bribery in violation of Penal Code section 165.³ The indictment alleges in count 2 that defendant Biane violated section 165, in count 4 that defendants Burum and Erwin aided and abetted Postmus in violating

³ All further statutory references will be to the Penal Code unless otherwise indicated.

section 165, and in count 5 that defendants Burum and Erwin aided and abetted defendant Biane in violating section 165.

Alleged target crime 2 of the conspiracy charged in count 1 is a violation of section 86, the crime of being a supervisor who asks for and/or receives a bribe. Count 6 of the indictment alleges that defendant Biane violated section 86 by being a county supervisor who received a bribe, count 7 alleges that defendants Burum and Erwin aided and abetted Postmus in receiving a bribe, and count 8 alleges that defendants Burum and Erwin aided and abetted defendant Biane in receiving a bribe.

Defendant Burum, joined by defendants Biane and Erwin, asserted in his demurrer he was the person who offered the bribes, and as a matter of law he could not aid and abet Postmus and defendant Biane in the crimes of receiving the bribe, nor could he conspire with any of the other defendants to commit that crime. Therefore, defendants Burum, Biane, and Erwin all argued that the facts alleged in the indictment could not establish conspiracy based on target crimes 1 (bribery) and 2 (asking for and/or receiving a bribe) nor could they establish counts 2, 4, 5, 6, 7 and 8, which allege bribery in violation of section 165 and asking for and/or receiving a bribe in violation of section 86, either as a direct perpetrator (Biane) or as an aider and abettor (Burum and Erwin).

The trial court sustained defendant Burum’s demurrer to target crimes 1 and 2, and counts 4, 5, 7 and 8, but overruled the demurrers of defendants Erwin and Biane.⁴

Defendant Erwin challenges that ruling in his petition for writ of mandate.

a. The People’s Appeal

The People contend the trial court erred in sustaining defendant Burum’s demurrer to target crimes 1 and 2 alleged in count 1, and counts 4, 5, 7 and 8, the related bribery counts, because the question of whether the person who gave the bribe also aided and abetted the receipt of the bribe is one of fact for a jury to determine. While that ordinarily is true, when the charging document alleges facts that either do not constitute a public offense (§ 1004, subd. 4) or that establish a complete defense to the crime (§ 1004, subd. 5), the factual issue can be resolved as a matter of law. Defendant Burum made both of those claims in his demurrer.

In particular, defendant Burum relied on *People v. Wolden* (1967) 255 Cal.App.2d 798 (*Wolden*), which holds that “when one statute defines a crime which necessarily requires the participation of two or more persons, but fixes punishment for only one of them, and another statute separately provides that the other participant is guilty of a distinct crime, each is guilty of a criminal offense, but the offense of which each is guilty is separate and distinct from that of the other. It follows that the definitions of accessory, aider and abettor ([§§ 31, 971]) do not operate to subject either to prosecution under the

⁴ The trial court did not specify in its order whether it was granting leave to amend. However, because the defect in the indictment involves a question of law, namely whether defendant Burum is legally capable of committing the charged crimes, we construe the order as denying leave to amend the indictment.

section proscribing the act of the other, and neither falls within the code definition of an accomplice as to the act of the other (*id.*). Bribery is such a crime. The giver whose offense is specifically made a crime ([] § 67) is not an accomplice in the separate and distinct crime ([] § 68) of the receiver [citations].” (*Id.* at pp. 803-804.)

As the Supreme Court held in *Biane, supra*, “The allegation that Burum offered a bribe, even if proved, cannot alone establish that he aided and abetted the receipt of the bribe. Neither, however, does it categorically exempt him from being charged with aiding and abetting the receipt of the bribe if he engaged in *additional* conduct to aid, promote, encourage, or instigate the commission of that crime, with knowledge of the bribe recipient’s unlawful purpose and with the intent or purpose of committing, encouraging, or facilitating the commission of the recipient’s offense. In this case, the People contend that defendants used threats, intimidation, and coercion to ensure the receipt of the bribes. [Citation.] Burum’s liability for aiding and abetting the crime of receiving a bribe under both Penal Code sections 165 (counts 4 and 5) and 86 (count 7 and 8) thus would depend on whether, in addition to offering or giving Biane or Postmus a bribe, the evidence shows that Burum also used threats, intimidation, or coercion to aid, promote, encourage or instigate others to accept the alleged bribes.” (*Biane, supra*, 58 Cal.4th at pp. 395-396.)

Because defendant Burum did not rely on any ground other than *Wolden*, as he concedes in his supplemental briefing, we must conclude the trial court erred in sustaining his demurrer to counts 4, 5, 7, and 8, and target crimes 1 and 2 alleged in the conspiracy charged in count 1.

b. Defendant Erwin's Petition for Writ of Mandate

The trial court overruled defendant Erwin's demurrer to target crimes 1 and 2, and counts 4, 5, 7 and 8, because the court found the indictment alleged he was an agent of both the bribe giver (defendant Burum) and the bribe receivers (defendants Biane and Kirk and unindicted coconspirator Postmus). Defendant Erwin contends the trial court erred. We disagree. Moreover, the Supreme Court's holding in *Biane* resolves defendant Erwin's claims.

The trial court relied on *People v. Davis*, which holds "when the bribe is accomplished through the medium of an agent, or go-between, or intermediary, the mere fact that the evidence is conclusive that such emissary is the agent or accomplice of one of the parties does not necessarily determine that such emissary is not likewise the agent or accomplice of the other party to the transaction. We can see no impossibility, legal or otherwise, in a person acting as the agent or accomplice of both the bribe giver and the bribe receiver. Each case, of course, must turn on its own facts and circumstances, and if there is any doubt as to the proper status of the emissary, the question is one, under proper instructions, for the jury. [Citation.]" (*People v. Davis, supra*, 210 Cal. at pp. 557-558.)

Relying on *People v. Davis*, the trial court found the indictment alleged defendant Erwin "is accused of being an intermediary in Burum's bribery of Postmus, Biane, and Kirk [who are] not the payor of the bribes. Erwin's involvement in those transactions was not necessary to the commission of the crimes. Under *Wolden*[,] Erwin cannot be prosecuted for conspiring with Burum to bribe Erwin but he can be prosecuted for

conspiring with Burum to bribe Postmus, Biane and Kirk.” Therefore, the trial court overruled defendant Erwin’s demurrer to target crimes 1 and 2 alleged in count 1, and counts 4, 5, 7 and 8.

The trial court’s analysis is correct under *People v. Davis*—defendant Erwin, as an alleged intermediary, can be the agent of both the bribe giver and the bribe receiver, and as an agent of the receiver can be found to have aided and abetted and conspired to receive a bribe. Defendant Erwin contends the factual allegations of the indictment establish that he acted only as an agent of defendant Burum, the bribe giver. He argues that under *Wolden*, such facts would constitute a complete defense to the aiding and abetting bribery charges because defendant Erwin, as an agent only of defendant Burum, the bribe giver, would stand in defendant Burum’s shoes. The Supreme Court, as previously discussed, rejected the argument that the bribe giver cannot as a matter of law also be an aider and abettor of the bribe recipient. (*Biane, supra*, 58 Cal.4th at pp. 395-396.) Therefore, we must also reject defendant Erwin’s argument.

2. Misappropriation of Public Funds in Violation of Section 424 (Alleged in Count 1 As Target Crime 3, and in Counts 12 and 13 Against All Four Defendants)

The indictment alleges in count 1 that all defendants conspired to commit the crime of misappropriating public funds in violation of section 424 (target crime 3, also referred to in the indictment as “public officer crime”). In count 12, the indictment alleges that defendant Biane on November 28, 2006, committed the crime of public officer crime, in violation of section 424, by being an officer and a person described in section 424 “charged with the receipt, safekeeping, transfer, and distribution of public

moneys” and that he did “in a manner not incidental and minimal without authority of law, appropriate the same, and a portion thereof, to personal use and the use of another and loaned the same or any portion thereof and made a profit out of and used the same for any purpose not authorized by law and fraudulently altered, falsified, concealed, destroyed, and obliterated any account.” Count 13 alleges that defendants Kirk, Burum and Erwin aided and abetted Postmus and defendant Biane in violating section 424.

All four defendants demurred to the target crime 3 allegation in count 1 that they conspired to violate section 424, and to the charges alleged in counts 12 and 13 on the ground that the statute applies only to acts of public officials that are not authorized by law. Because county supervisors are authorized by law to settle lawsuits, defendants asserted they could not be liable either as conspirators or aiders and abettors for violating section 424. In particular, defendant Burum (joined by defendants Erwin and Kirk) and defendant Biane argued among other things that section 424 according to its express language applies to embezzlement of public funds, or the manipulation of accounts and other acts not authorized by law. Members of a county board of supervisors are authorized by law to settle lawsuits. Therefore, defendants argued section 424 does not apply to the alleged payment of a settlement in return for an alleged bribe. Alternatively, defendant Burum argued that any other interpretation of the statute would require inquiry into the subjective motives of the supervisors in question and that inquiry would violate the separation of powers doctrine as discussed in *D’Amato v. Superior Court* (2008) 167 Cal.App.4th 861 (*D’Amato*).

The trial court agreed, relying in part on *D'Amato*, and sustained defendants' demurrers to target crime 3 of the conspiracy charged in count 1, and to counts 12 and 13. Although not expressly stated, that ruling necessarily was without leave to amend.

The People contend the trial court erred in sustaining defendants' demurrers to the section 424 allegations, first because the trial court "improperly blended two different concepts," and next because the concepts individually either do not apply or the trial court applied them incorrectly. We agree.

The first issue we must resolve is whether the alleged act of approving a settlement in return for a bribe, or a kickback, violates section 424, which provides, "Each officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safekeeping, transfer, or disbursement of public moneys, who either: [¶] 1. Without authority of law, appropriates the same, or any portion thereof, to his or her own use, or to the use of another; or [¶] 2. Loans the same or any portion thereof; makes any profit out of, or uses the same for any purpose not authorized by law . . . [¶] Is punishable by imprisonment in the state prison for two, three, or four years, and is disqualified from holding any office in this states. [¶] (b) As used in this section, 'public moneys' includes the proceeds derived from the sale of bonds or other evidence or indebtedness authorized by the legislative body of any city, county, district, or public agency. [¶] (c) This section does not apply to the incidental and minimal use of public resources authorized by Section 8314 of the Government Code."

Defendants argued in the trial court, as they do in this appeal, that section 424 only applies when the public official's action, which in this case is approving a settlement, is "without authority of law." Because county supervisors have legal authority to approve the settlement of lawsuits, defendants contend section 424 does not apply. Defendants' interpretation of the statutory language is incorrect.

According to section 424, the action that must be "without authority of law" is the public official's act of appropriating public funds "or any portion thereof, to his or her own use, or to the use of another." (See *Stark v. Superior Court* (2011) 52 Cal.4th 368, 390 ["Section 424(a)1 applies to a defendant who appropriates public money to his own use or use of another without authority of law"].) In this case, the indictment can reasonably be construed to allege that the identified county supervisors conspired to appropriate and did appropriate public funds unlawfully by authorizing the county to pay \$102 million to Colonies in settlement of its lawsuit knowing that they would receive payments from defendant Burum, the beneficiary of that settlement, in the form of bribes or kickbacks. The allegations can reasonably be construed to allege the county supervisors knew the bribes or kickbacks would be paid out of the money they had appropriated for the settlement. As a result of their alleged knowledge that part of that appropriation would be to the supervisor's own use, and consequently "without authority of law," the indictment alleges a violation of section 424.

In sustaining defendants' demurrers to the section 424 violations alleged in the indictment, the trial court incorrectly focused on the purportedly lawful act of settling the lawsuit and ignored the additional allegation that the identified supervisors appropriated a portion of the settlement money to their own use without authority of law by obtaining a kickback or bribe. The alleged act of approving a settlement knowing it includes an appropriation of money, a portion of which would go to their own use, is the act alleged to be without authority of law.

The supervisors' alleged act of approving a settlement they know includes an unlawful appropriation of money to their own use does not require an inquiry into the motives of the supervisors and therefore does not violate the separation of powers doctrine. Consequently, the trial court also incorrectly relied on *D'Amato* to sustain defendants' demurrers to target crime 3 of the conspiracy charge, and counts 12 and 13.

In *D'Amato*, the defendant city administrator recommended formation of a joint powers committee in order to obtain funding for a city project, and then the defendant approved a contract with his codefendant's consulting firm to act as the project manager. The codefendant, who was also the city's director of public works, was indicted for having a conflict of interest in violation of Government Code section 1090, and the defendant city administrator was charged with aiding and abetting the codefendant in committing that violation.

The court in *D'Amato* held the separation of powers doctrine precluded prosecution of the defendant city administrator for aiding and abetting the codefendant in violating Government Code section 1090 because, absent a financial interest on the part of the city administrator (and thus presumably his own conflict of interest), the prosecution was based on the city administrator's legally protected legislative acts. In particular, the court first observed that the object of Government Code "section 1090 of prohibiting individuals "from being financially interested in any contract made by them in their official capacity or by the body or board of which they are members is to insure absolute loyalty and undivided allegiance to the best interest of the [government agency] they serve and to remove all direct and indirect influence of an interested officer as well as to discourage deliberate dishonesty. [Citations.]" [Citation.]" [Citation.]" (*D'Amato, supra*, 167 Cal.App.4th at p. 868.) "The evil to be thwarted by section 1090 is easily identified: If a public official is pulled in one direction by his financial interest and in another direction by his official duties, his judgment cannot and should not be trusted, even if he attempts impartiality." [Citation.] Thus, where a public official holds a personal interest, criminal liability may accrue even in the absence of 'actual fraud, dishonesty, unfairness or loss to the governmental entity, and . . . without regard to whether the contract in question is fair or oppressive.' [Citation.]" (*Id.* at pp. 868-869.) "By creating a conclusive presumption of divided loyalty where a public official holds a personal financial interest, the Legislature avoided the prospect of executive and judicial officers delving into the subjective motivations of public officials performing their legislative duties. This respect for the deliberative processes of local governmental

agencies derives from the separation of powers doctrine, embodied in the California Constitution, article III, section 3: ‘The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.’” (*Id.* at p. 869.) “When the Legislature confers legislative power on a municipal body, a judicial or executive body may not interfere with that legislative power, except as the Legislature authorizes. [Citation.] [¶] ‘An . . . important corollary of the separation of powers doctrine is courts cannot inquire into the impetus or motive behind legislative action.’ [Citation.] ‘[T]he rule barring judicial probing of lawmakers’ motivations applies to local legislators as well as to members of the state Legislature or of Congress.’ [Citation.]” (*Id.* at pp. 869-870.)

Unlike *D’Amato*, the indictment at issue here alleges the identified supervisors had a financial interest in the money they appropriated for the settlement and therefore violated section 424 by appropriating funds to their own use without lawful authority. No inquiry into their subjective motives is necessary.

The indictment alleges defendant Biane was a county supervisor and therefore subject to liability under section 424. There are no similar allegations in the indictment with respect to the remaining defendants. The next issue we must resolve is whether the other named defendants, none of whom are alleged to be officers of the county, or persons charged with the receipt, safekeeping, transfer, or disbursement of public moneys, can be held criminally responsible on a theory of aiding and abetting or conspiracy to violate section 424.

Long ago, in *People v. Little* (1940) 41 Cal.App.2d 797 (*Little*), this court resolved that issue: “If authority be needed to support the conclusion that a person who is not an official may be guilty, as a principal, in the crime of misuse of public funds, it may be found in the case of *People v. West*, 3 Cal.App.2d 568, 40 P.2d 278.” (*Id.* at p. 805.) In *People v. West*, a deputy county treasurer loaned county funds to the defendant in return for the defendant’s check which was worthless because it was drawn on the defendant’s closed bank account. The defendant was charged with and convicted of violating section 424 on the theory of aiding and abetting, i.e., being the recipient of the embezzled money. The conviction was affirmed on appeal. Similarly, in *Little*, the defendant was charged with and found guilty of violating section 424 by embezzling public funds based on his conduct of receiving and spending money his girlfriend embezzled from her job as a bookkeeper with the city water department. That conviction was affirmed on appeal.

In this case, defendant Burum’s alleged act of offering and/or giving kickbacks or bribes to the county supervisors in return for their alleged act of approving the \$102 million settlement is the alleged conduct that renders the settlement an appropriation “not authorized by law,” and as such, a violation of section 424. Defendants Erwin and Kirk are alleged to have acted as the agents of defendant Burum in offering the bribe or kickback that, in turn, caused the county supervisors to have an interest in the settlement. The allegations adequately state a public offense, namely a violation of section 424.

For the noted reasons, we conclude the trial court should have overruled defendants' demurrers to counts 12 and 13, and to target crime 3 of the conspiracy charge. Therefore, we will reverse the order sustaining the demurrers to those allegations and counts.

3. Improper Lobbying in Violation of Government Code Section 9054 (Alleged in Count 1 as Target Crime 4, and in Count 9 Against Defendant Kirk)

The indictment alleges as target crime 4, that defendant Kirk violated Government Code section 9054 by conspiring with defendant Burum and his alleged agent defendant Erwin, to improperly influence San Bernardino County Supervisor Gary Ovitt to vote in favor of the Colonies settlement. The indictment charged defendant Kirk in count 9 with improper lobbying in violation of Government Code section 9054. Defendant Kirk demurred to the allegations on the ground that Government Code section 9054 only applies to the state Legislature. The trial court overruled his demurrer. Defendant Kirk challenges that ruling in his petition for writ of mandate. Defendants Burum and Erwin also contend in their writ petitions that Government Code section 9054 applies only to members of the state Legislature, and therefore the trial court should have sustained their demurrers to target crime 4 of the conspiracy charge. We disagree and conclude the trial court correctly overruled their demurrers.

Government Code section 9054 states, in pertinent part, that, “Every person who obtains, or seeks to obtain, money or other thing of value from another person upon a pretense, claim, or representation that he can or will improperly influence in any manner the action of any member of a legislative body in regard to any vote or legislative matter, is guilty of a felony.”

Defendants contend in their writ petitions that the phrase “a legislative body” is not defined in Government Code section 9054, and when viewed in context, refers only to the state Legislature and not a county board of supervisors. We do not share their view.

“Under settled canons of statutory construction, in construing a statute we ascertain the Legislature’s intent in order to effectuate the law’s purpose. [Citation.] We must look to the statute’s words and give them ‘their usual and ordinary meaning.’ [Citation.] ‘The statute’s plain meaning controls the court’s interpretation unless its words are ambiguous.’ [Citations.] ‘If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute’s purpose, legislative history, and public policy.’ [Citation.]” (*Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 387-388.)

We do not share defendants’ view that the phrase “a legislative body” as used in Government Code section 9054 is ambiguous, but even if we were to agree, we nevertheless would not agree with their claim that the Legislature intended the phrase to mean the California State Legislature and not other legislative bodies such as a county board of supervisors. Defendants base their claim in part on legislative history, including

margin notes contained in the chaptered bill, and also on the fact that section 9054 is located in a part of the Government Code that purportedly pertains only to state government, namely “Title 2, (Government of the State of California), Division 2, (Legislative Department), Part 1, (Legislature), Chapter 1.5, (General), Article 3, (Crimes against the Legislative Power).”

Despite its placement in the code, it is apparent from other provisions in Article 3—all adopted in 1943 as part of the codification of the Government Code (see Stats. 1943, ch. 134, p. 809)—that the California Legislature distinguished between “the Legislature” and “a legislative body.” The Government Code refers to the “California Legislature,” sometimes also accompanied by a reference to “either of the houses composing it,” when it means the California State Legislature. (See, e.g., Gov. Code, §§ 9050, 9051, 9052, 9053, 9053.5.) In using the phrase “a legislative body” in Government Code section 9054, the Legislature did not intend, as defendants claim, to limit that section only to the California Legislature. To put it bluntly, if the Legislature had meant to limit the statute in the manner defendants contend, the Legislature would have said so.

We also do not share defendants’ view that the phrase “improperly influence” used in Government Code section 9054 is unconstitutionally vague and/or overly broad.

“As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. [Citations.]” (*Kolender v. Lawson* (1983) 461 U.S. 352, 357.)

The phrase “improperly influence” means “the use of personal, or any secret or sinister, influence upon legislators” either in support of or opposition to the passage of an act, as opposed to “the open advocacy of the same before the legislature or any committee thereof in open session.” (*Crawford v. Imperial Irrigation Dist.* (1927) 200 Cal. 318, 321-322.) Government Code section 9054 makes it a felony for a person to ask for or obtain money (or other thing of value) upon the pretense, representation, or claim that the person can or will use personal, secret or sinister influence on a member of a legislative body in regard to a vote or legislative matter.

In arguing the statute is vague, defendant Erwin cites examples of conduct that could constitute “improper influence,” such as one legislator offering to vote for another legislator’s bill if that legislator were to return the favor. That conduct does not violate Government Code section 9054 because there is no solicitation of money or a thing of value by the first legislator. Contrary to defendant Erwin’s claim, the statute does not criminalize legitimate advocacy; it makes it unlawful for a person to claim in return for money or some item of value that one can “improperly influence in any manner the action of any member of a legislative body in regard to any vote or legislative matter.” The statute does not criminalize protected speech, as defendants contend; it criminalizes

influence peddling, i.e., claiming in return for any form of compensation that one can and/or will improperly influence a member of any legislative body in regard to a vote or other matter. In short, and contrary to defendants' assertions, Government Code section 9054 does not make it unlawful for a person to simply say he or she can improperly influence a member of a legislative body.

For each of the reasons discussed, we reject defendants' various challenges to the constitutionality of Government Code section 9054 and conclude the trial court properly overruled their demurrers to target crime 4 in the conspiracy charge, and defendant Kirk's demurrer to count 9.

4. Conflict of Interest in Violation of Government Code Section 1090 (Alleged in Count 1 As Target Crime 5, in Count 10 Against Defendants Biane and Kirk, and in Count 11 Against Defendants Burum and Erwin, for Aiding and Abetting Defendant Biane, Defendant Kirk and Postmus)

Count 11 of the indictment charges defendants Burum and Erwin with violating Government Code section 1090 by aiding and abetting defendants Kirk and Biane, and Supervisor Postmus, to commit a conflict of interest. The conspiracy alleged in count 1 of the indictment identifies Government Code section 1090 as target crime 5. Defendants Burum, Erwin and Kirk demurred to count 11 and the conspiracy allegation in count 1 based on target crime 5 on the ground that, as a matter of law, the statute does not apply to the acts of a private citizen. The trial court disagreed and overruled their demurrers.

Defendants Burum and Erwin contend in their writ petitions that the trial court erred and that Government Code section 1090 only applies to government officials and government employees, but not to private citizens. Therefore, as a matter of law, they cannot violate that statute and the trial court should have sustained their demurrers. We agree.

Government Code section 1090 states, “Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.” The penalty for being a public officer or other person precluded by law from making a contract in which the person has an interest is set out in Government Code section 1097.⁵

As previously discussed in *D’Amato, supra*, 167 Cal.App.4th 861, our colleagues in Division Three of this court observed that “the Legislature’s wording of [Government Code] section 1090 evinces the intent to exclude aider and abettor liability. Specifically, ‘where the Legislature has dealt with crimes which necessarily involve the joint action of

⁵ Government Code section 1097 states, “Every officer or person prohibited by the laws of this state from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing scrip, or other evidences of indebtedness, including any member of the governing board of a school district, who willfully violates any of the provisions of such laws, is punishable by a fine of not more than one thousand dollars (\$1,000), or by imprisonment in the state prison, and is forever disqualified from holding any office in this state.”

two or more persons, and where no punishment at all is provided for the conduct, or misconduct, of one of the participants, the party whose participation is not denounced by statute cannot be charged with criminal conduct on either a conspiracy or aiding and abetting theory. [Citation.] So, although generally a defendant may be liable to prosecution for conspiracy as an aider and abettor to commit a crime even though he or she is incapable of committing the crime itself, the rule does not apply where the statute defining the substantive offense discloses an affirmative legislative policy the conduct of one of the parties shall go unpunished. [Citation.]’ [Citation.]” (*Id.* at p. 873; see also *In re Meagan R.* (1996) 42 Cal.App.4th 17, 24.)

We share our colleagues’ view that the Legislature intended Government Code section 1090 to exclude criminal liability on either a conspiracy or an aiding and abetting theory for anyone other than public officials and public employees with a financial interest in the underlying contract. Neither defendant Burum nor defendant Erwin was a public official at the time alleged in the indictment. Therefore, the trial court should have sustained their demurrers to count 11, and to target crime 5 of count 1.

III.

CONCLUSION

The trial court should have overruled the demurrer of defendant Burum to target crimes 1 and 2 of the conspiracy alleged in count 1, and to the crimes charged in counts 4, 5, 7 and 8. We will reverse that ruling.

The trial court correctly overruled defendant Erwin’s demurrer to counts 4, 5, 7, and 8, and the related target crimes 1 and 2 alleged in count 1. Those counts allege,

respectively, that he conspired with defendant Burum and with William Postmus, a member of the San Bernardino County Board of Supervisors, to ask for and/or receive a bribe, and aided and abetted Postmus in committing those crimes, and that he aided and abetted defendant Biane in receiving a bribe. Therefore, we will affirm the trial court's ruling.

The trial court erred in sustaining defendants' demurrers to the conspiracy alleged in count 1 based on target crime 3, the crime of misappropriating public funds in violation of section 424, as well as to count 12, which alleged defendant Biane violated that section, and count 13, which alleged defendants Kirk, Burum and Erwin aided and abetted defendant Biane and William Postmus in violating that section. Therefore, we will reverse the trial court's ruling in that regard.

The trial court also erred in overruling the demurrers of defendants Erwin and Burum to target crime 5, which alleges they conspired with Postmus, defendant Biane and defendant Kirk to commit the crime of having a conflict of interest in violation of Government Code section 1090. The trial court also erred in overruling the demurrers of defendants Erwin and Burum to count 11, which charged them with aiding and abetting Postmus, defendant Biane and defendant Kirk in violating Government Code section 1090. Therefore, we will direct a writ of mandate issue commanding the trial court to sustain the demurrers of defendants Burum and Erwin to count 11, and target crime 5 of the conspiracy alleged in count 1.

We also will deny defendant Kirk's petition for writ of mandate because the trial court did not err in overruling his demurrer to count 9, the charge that he misappropriated funds in violation of Government Code section 9054, and target crime 4 of the conspiracy charged in count 1, which alleged defendant Kirk conspired with defendant Burum to commit that crime.

Finally, we reject defendant Burum's contention in his writ petition that we must dismiss the conspiracy alleged in count 1, because it does not allege any legally viable target crime. We conclude as discussed above that count 1 alleges viable target crimes.

IV.

DISPOSITION

The trial court's ruling sustaining defendants' demurrers to counts 12 and 13, and to predicate crime 3 alleged in the conspiracy charged in count 1, and dismissing those counts and allegations, is reversed.

The trial court's ruling sustaining the demurrer of defendant Burum to counts 4, 5, 7, and 8, and the related predicate crimes alleged in the conspiracy charged in count 1, and dismissing those counts and allegations, is reversed.

A peremptory writ of mandate shall issue directing the Superior Court of San Bernardino County to sustain the demurrer of defendants Burum and Erwin to count 11, which alleges a violation of Government Code section 1090, and to the related predicate crime 5 (violation of Government Code section 1090) alleged in the conspiracy charged in count 1 and to dismiss that count and allegation.

Petitioners Burum and Erwin are DIRECTED to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

The petitions for writ of mandate are denied in all other respects.

The trial court's ruling on the demurrer is affirmed in all other respects.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
Acting P. J.

We concur:

RICHLI
J.

MILLER
J.