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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

NELDA CAMPOS GARCIA,

Defendant and Appellant.

F061984 & F064479

(Super. Ct. No. VCF209407B)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Joseph A. Kalashian, Judge.

Michelle May Peterson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans, Catherine Chatman, and John W. Powell, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted appellant Nelda Campos Garcia of 13 counts arising out of multiple real estate transactions. The convictions included conspiracy to commit the felony of fraudulently obtaining money, property, or labor by false pretenses, conspiracy to commit the misdemeanor crime of making false financial statements, impersonating a notary, knowingly performing a notarial act on a false or forged deed, perjury by declaration, forgery, filing a false or forged instrument, and obtaining money, property, or labor by false pretenses.

Garcia raises multiple challenges to her convictions, including insufficient evidence, instructional error, evidentiary error, failure to state a public offense, violation of the rule articulated in *In re Williamson* (1954) 43 Cal.2d 651 (*Williamson*), and error pursuant to *People v. Marsden* (1970) 2 Cal.2d 118 (*Marsden*). She also asserts sentencing error in failing to apply Penal Code section 654.¹ Finally, she challenges the restitution order.

We conclude (1) four convictions and attendant enhancements must be reversed; (2) the trial court failed to conduct a proper *Marsden* hearing; and (3) other challenges raised by Garcia either lack merit or are not prejudicial. The matter will be remanded for the trial court to conduct a *Marsden* hearing. If the trial court concludes that a failure to replace counsel during trial substantially impaired Garcia's right to effective assistance of counsel, the trial court shall appoint new counsel and proceed accordingly. If, however, Garcia's *Marsden* motion is denied, the trial court shall resentence Garcia in accordance with this opinion and hold a new restitution hearing, as the restitution order is affected by the reversal of four convictions.

¹All further statutory references are to the Penal Code unless otherwise stated.

FACTUAL AND PROCEDURAL SUMMARY

During the period between 2000 and 2007, real estate in California, including Tulare County, was increasing in value at a rapid rate. The real estate market was fueled in part by lenders who made loans readily available to questionably qualified borrowers based upon stated income.

A stated income loan was a loan where the borrower stated his or her income on the loan application but was not required to provide any income verification. The loan officer determined whether the stated income was what a person in a similar occupation would be expected to earn. Stated income loans initially were used for self-employed borrowers with good credit, but eventually were used for subprime borrowers with low credit scores.

Full documentation loans, unlike stated income loans, required an employment verification form be included with the loan application. The employment verification form was filled out by the borrower's employer and stated the employee's position, prospects for future employment, and annual pay.

In real estate transactions, a title company typically prepares the deeds and documents needed to complete the sale. Generally, the lenders and county recorders' offices require that the signatures of the individuals signing the documents be notarized. In rare instances, a title company may rely upon a credible witness jurat in which the signature of a party who witnessed the signing of the deed is notarized, rather than the signature of the party signing the deed. A jurat is a separate acknowledgement that can be attached to the deed.

A credible witness jurat is used when a signing party is unable to provide proper identification. The credible witness certifies that the person signing is who he or she claims to be. In practice, credible witness jurats seldom are used because they are not universally accepted by lenders and county recorders' offices. Even when a credible

witness jurat is used, it is still the individual signing the deed whose signature is recorded and the signing of the deed must always take place before a notary.

Garcia's Background

Beginning in 2002 Garcia spent three to four years working as a loan officer at CTX Mortgage (CTX). Walter Hill managed the CTX office in Visalia and supervised Garcia. Garcia's annual income while at CTX ranged from \$80,000 to \$150,000. Earnings were based largely on commission and varied depending upon the size of the loan.

Hill conducted training sessions for loan officers at least twice a month. During these meetings, he would discuss current guidelines for loan applications. Hill recalled that Garcia attended most of these training sessions and seemed to understand the information provided.

It was common knowledge within the loan industry that it was illegal to lie on a loan application. Hill never told loan officers it was permissible to lie on a stated income loan or that it was permissible for them to assist someone in lying on a loan application. Hill made it clear to his loan officers that it would be improper for them knowingly to process a fraudulent application.

Members of the public generally did not know the amount of income and assets needed to satisfy an underwriter for a loan. The underwriting guidelines were always changing and professional loan officers needed to stay informed of the changes. Hill's loan officers, however, were instructed that they should not tell a stated loan applicant the minimum income required to qualify for a loan.

CTX required loan officers to interview the loan applicant. The loan officer was required to examine the applicant's credit, income, assets, employment stability, and overall finances. A loan officer could receive an application by various means, but always was required by law to give an applicant certain disclosures. Within three days of

receiving a loan application, the loan officer had to provide the buyer with a good faith estimate of fees that would be charged in connection with the transaction.

Once a loan was approved, loan documents would be sent to a title company. Several documents in the package required notarization, including the deed of trust and occupancy certificates. The notarization was important because it meant that the individual signing the document was who he or she claimed to be. Documents could be notarized only by a certified notary.

After leaving CTX, Garcia worked as a loan officer for Countryside Real Estate & Lending (Countryside) for about one and one-half years. When working for Countryside, Garcia typically would meet with the applicant and assist him or her in filling out the loan application. It was Garcia's job to explain the loan documents to the applicant. After the application was complete, it was sent to an underwriter.

Real Estate Transactions

Alma Delia Reyes, a realtor, misrepresented clients' income and other information in loan applications and misrepresented information about the real property in order to obtain loan financing for borrowers and complete sales. She was tried jointly with Garcia, and was convicted of 14 counts. She appealed her convictions, and we upheld all but one conviction in *People v. Reyes* (Apr. 26, 2013, F062305) (nonpub. opn.). Some of the following facts are taken from case No. F062305.

Reyes acted as the real estate agent for Clarita Rios and Leonel Sanchez (sometimes referred to as the couple) in their purchase of five properties—Dickran Drive, Spruce, Foster Drive, Tyson Avenue, and Terra Bella—and was their agent in the subsequent sales of the Dickran Drive, Foster Drive, and Spruce properties. With Reyes as their realtor, Rios and Sanchez bought five properties in the span of about five or six years. When Rios and Sanchez obtained loans to buy the properties, several times the loan applications had been completed by someone else before they were asked to sign

documents. On other occasions, the couple signed blank loan application documents and the documents were filled in later by someone else.

Reyes also acted as real estate broker for Alejandra Ramirez and her husband Ricardo Velazquez in a series of real estate deals.

1. Sales with Rios and Sanchez

Rios and Sanchez were husband and wife. Rios had a high school education; Sanchez spoke primarily Spanish and had not completed school beyond the elementary grade levels. Sanchez worked for Bosman Dairy and had never earned more than \$3,200 per month. Rios was a homemaker.

Dickran Drive

In 2001 or 2002 Reyes helped Rios and Sanchez purchase their first home on Dickran Drive. Sanchez's brother had to cosign the loan because the couple did not qualify based on Sanchez's income alone. The monthly payment was \$600 to \$800 per month. Rios and Sanchez rented out the Dickran Drive property and continued living on the Bosman dairy, where they were provided a home as part of Sanchez's employment benefits.

Sometime after 2005, the Dickran Drive property was sold. The couple netted around \$30,000 in profit from the sale. Reyes was the agent in the sale and made a commission.

Spruce

About two years after they bought the Dickran Drive property, Reyes told Rios and Sanchez about property for sale on Spruce. The couple decided to buy the property and move into the house. This property was larger than the Dickran Drive property. The Dickran Drive property was refinanced and the cash from the refinance was used as the down payment on the Spruce property. The monthly mortgage payments on the Spruce property were between \$1,300 and \$1,500.

The loan application for the Spruce property incorrectly stated Sanchez's monthly income as \$6,500 and overstated the couple's personal property. When Rios pointed out to Reyes that a number of items on the loan application were incorrect, Reyes told her that lying on the loan application was the only way for them to own a home. Reyes assured Rios the banks did not care about the values as long as the loan payments were made.

At the suggestion of Reyes, Sanchez was the sole purchaser on the documents and Rios signed a grant deed conveying her interest in the property to Sanchez. After renting out the Spruce property for several months, Rios and Sanchez moved into the house in mid-2005. Around this time, Sanchez quit his job and took a seven-month vacation.

The Spruce property was sold not long after, netting a profit between \$25,000 and \$50,000. Again, Reyes was the agent on the sale and made a commission.

Foster Drive

In January 2005 Reyes told Rios and Sanchez about the Foster Drive property, and the couple purchased it less than two months after purchasing the Spruce property. The Foster Drive property had three houses on it. The loan application used to purchase the Foster Drive property stated Rios had an income of \$8,500 per month. Rios and Sanchez rented out the houses on the Foster Drive property. At some point, some of their tenants failed to pay rent and were forced to move out.

At this time, Rios and Sanchez owned three properties, Dickran Drive, Spruce, and Foster Drive. The total combined mortgage payment for all three properties was approximately \$4,000 per month. They were collecting rent of approximately \$1,900 from the Foster Drive and Dickran Drive properties. Sanchez again began working at the dairy and was earning a salary of around \$1,500 to \$1,600 per month.

Five months after purchasing the Foster Drive property, Rios and Sanchez wanted to sell it. Rios told Reyes she wanted to sell it for \$499,000. It ended up selling for

approximately \$449,000 and made a profit of approximately \$85,000 for Rios and Sanchez.

Tyson Avenue

In September 2005 Reyes contacted Rios about property on Tyson Avenue that was for sale. Reyes described the property as a “fixer-upper” available for a low price. The couple purchased the Tyson Avenue property for \$120,000. The loan application for the Tyson Avenue property stated too high a figure for Sanchez’s income, overstated the value of the couple’s personal property assets, and incorrectly stated Sanchez’s job at the dairy as a breeder.

Terra Bella

In 2006 Reyes contacted Rios and told her of property in Terra Bella that was large and where animals could be kept. In September 2006 Rios and Sanchez purchased the property. Reyes told the couple the Terra Bella property needed to be purchased in Rios’s name alone. Reyes instructed Sanchez to sign a deed conveying any interest he had in the property to Rios.

Over the course of purchasing the Terra Bella property, Rios received three calls from Garcia. Garcia asked how much money Rios had in the bank. When Rios stated none, Garcia suggested listing \$22,000 on the loan application. In another conversation, Garcia asked if Rios had \$11,000 in the bank; Rios said no and faxed her bank statements to Garcia.

The loan application for the Terra Bella property contained numerous inaccuracies, including a false work history and employment income for Rios. The application stated Rios had a base income of \$7,250 and a monthly income of \$9,730, with cash in the bank of \$22,000. Rios told Reyes all this information was false, but Reyes told her not to worry as long as the payments on the loan were made. The mortgage payments on the Terra Bella loan were about \$3,000 per month.

The loan file contained a letter purporting to be from Rios that stated she worked two jobs and had been saving money for a home. Rios did not write or sign this letter. A rental confirmation form, signed by Reyes's daughter Jessica Cordero, also was in Rios's loan file. The letter stated Cordero had been renting a home to Rios. Rios did not know anyone named Jessica Cordero and she had not been renting any property.

The loan commission on the Terra Bella loan was \$9,167, of which 10 percent was paid to Countryside and the balance to Garcia.

Subsequent Events

Despite selling the Dickran Drive, Spruce, and Foster Drive properties, Rios and Sanchez were unable to keep up with the remaining mortgage payments and the Tyson Avenue and Terra Bella properties went into foreclosure. Rios and Sanchez ended up owing over \$16,000 in back taxes and having no assets. When police began investigating the transactions, Reyes told the couple not to speak to the police.

2. Sales with Ramirez and Velazquez

Ramirez and Velazquez lived in Stockton and spoke very little English. They owned a three-bedroom home in a working class neighborhood. Ramirez earned \$9 per hour as a nurse's assistant; Velazquez earned about \$1,500 a month as a janitor.

Ramirez met Reyes at the home of a family member. Ramirez told Reyes she was considering moving to Tulare to attend school and was interested in a rental; Reyes told her to buy instead.

River Oak

In July 2005, with Reyes as her agent, Ramirez purchased property on River Oak in Porterville. Reyes told Ramirez she should purchase the property in her name alone. Reyes gave Ramirez a stack of papers to sign and a brief summary of the documents she was signing.

People were living on the property when Ramirez purchased it and Reyes told Ramirez they would be paying rent. After two or three months, Ramirez told Reyes she wanted the tenants to move out so she could move onto the property.

Foster Drive

Shortly after purchasing the River Oak property, Reyes contacted Ramirez and told her of another property for sale on Foster Drive. This was the same property Reyes had sold to Rios and Sanchez that again was now for sale. Reyes told Ramirez there were three houses on the property—one for Ramirez to live in and two that Reyes could rent for her. Reyes did not tell Ramirez that the two rental houses lacked proper permits and legally could not be rented. Reyes did tell Ramirez that all the houses currently were rented, generating \$600, \$800, and \$1,200 per month in rental income. Based upon this information, Ramirez expected to collect around \$2,000 per month in rent.

Reyes told Ramirez that Velazquez was qualified to purchase the Foster Drive property and that they could sell or rent out the River Oak property in order to afford the Foster Drive property. Reyes told Ramirez and Velazquez their monthly payment for the Foster Drive property mortgage would be around \$2,800 per month.

While waiting for the sale to be completed, Ramirez was admitted to nursing school in Stockton and no longer wanted to purchase the Foster Drive property. Ramirez repeatedly tried to contact Reyes. When she finally reached her, Reyes told Ramirez she would lose her \$5,000 deposit if she failed to follow through on the purchase.

Reyes began pressuring Ramirez to follow through on the purchase and told Ramirez the seller was in the hospital and dying. At some point a letter was sent to the mortgage office by someone claiming to be Velazquez. The letter was in perfect English. Velazquez never sent or signed the letter.

One Sunday afternoon Reyes called and asked Ramirez for her home address because she was on her way with documents for her to sign. She told Ramirez to have

\$3,000 cash ready for her when she arrived. Reyes arrived around 8:00 or 9:00 p.m., along with Garcia, who introduced herself as a notary.

As soon as they arrived, Garcia stated she had forgotten to copy some of the documents and asked Ramirez if she would go with Reyes to a copy store to make copies; Garcia stayed with Velazquez. At the copy store, Reyes made numerous phone calls. After about an hour Ramirez and Reyes left the copy store without having made any copies.

While at the house alone with Velazquez, Garcia told him to sign the stack of documents she had brought with her and that the documents would be explained to him when Reyes and Ramirez returned. Velazquez spent 30 minutes signing all the documents.

Ramirez and Reyes returned without any copies. Garcia was waiting outside and told Ramirez she and Reyes had to leave. Ramirez exited the vehicle immediately. Garcia told Ramirez that Velazquez had signed all the documents. Ramirez asked for copies and asked if all the repairs to the property had been made as promised. Garcia and Reyes assured Ramirez it was “already in writing.” Garcia gave Ramirez her business card and told her to call with any questions.

The deed of trust for the Foster Drive loan was signed by someone purporting to be Velazquez, but Velazquez explained that the signature on the document was not his. The deed of trust contained the notary stamp of Garcia’s daughter, Teresa McKay-Garcia, but McKay-Garcia had not gone to Stockton and was not present when the documents were signed.

In November 2005 McKay-Garcia was living in San Luis Obispo and attending college, but she kept her notary journal at Garcia’s home in Visalia. On November 3, 2005, Garcia called McKay-Garcia and asked whether she (Garcia) could take the notary journal to a “loan doc signing” in Stockton. McKay-Garcia gave Garcia permission to

take the notary journal to Stockton and then later that night went to Visalia to notarize the documents as if she had actually been present at the signing by Ramirez and Velazquez.

McKay-Garcia notarized two deeds of trust that purported to be signed by Velazquez, although McKay-Garcia had not been present at their signing. McKay-Garcia also notarized Ramirez's signature on an interspousal transfer deed of trust.

When Ramirez and Velazquez arrived at the title company to sign paperwork for the purchase, they discovered the purchase price was \$50,000 more than they had agreed. Ramirez instructed Velazquez not to sign and the title company called Reyes. Reyes called back and told Ramirez the buyer would lower the price and that the houses would be fixed up and move-in ready as soon as the tenants vacated. Ramirez had been told she could not see the inside of the houses because the tenants were still living there.

The loan application for the Foster Drive property contained numerous false statements. The application stated Ramirez and Velazquez owned a business, made \$9,800 per month, had \$30,000 in their bank account, and had \$25,000 in personal property assets (furniture). Velazquez confirmed he signed the loan application but that someone else had filled out the application. Ramirez and Velazquez never provided any of this false information to Garcia or Reyes.

The CTX loan file for the Foster Drive property contained a letter purporting to be from Velazquez, which was in English. Velazquez stated he did not write or sign the letter; he was unable to write in English. The CTX loan file also contained a letter from an individual named Domingo Avina, who claimed to have prepared Velazquez's income tax returns. The letter stated Velazquez owned a pool service business. Ramirez and Velazquez testified they never contacted Avina or asked for this letter.

After the sale of the Foster Drive property closed, Reyes told Ramirez she still could not inspect the property because the tenants still were in the residence. Eventually, Reyes made an appointment to meet Ramirez and Velazquez at the Foster Drive property at 9:00 p.m. to hand over the keys; Reyes handed over the keys and left immediately.

Ramirez and Velazquez went inside the houses for the first time. One house was occupied by tenants. When they went inside the second home, there were no lights and it had a horrible smell. They obtained a flashlight and discovered both unoccupied houses were uninhabitable—water leaked from a broken sink, the windows were broken, electrical wires were exposed, and the carpets were littered with cat or dog feces. Ramirez and Velazquez immediately called Reyes but were unable to reach her; they tried calling 10 times. The next day they went to Reyes's home. Although Reyes's car was in the driveway, they were told she was not at home.

Ramirez and Velazquez tried to make payments on the Foster Drive property for the next year but fell behind and lost the property to foreclosure. They also were making payments on the River Oak property, where rental income covered about one-half of the monthly mortgage payment. After nearly three years, Velazquez lost his job and Ramirez's work hours were reduced. They lost this property to foreclosure.

Investigation and Trial

In September 2006, Lori Cant, a friend of Velazquez's, called the Tulare County District Attorney's Office and spoke to Investigator Dwayne Johnson. Cant reported she believed Velazquez had been given a fraudulent loan. Johnson began an investigation of some of Reyes's real estate transactions, eventually focusing on the Spruce, Foster Drive, Tyson Avenue, Dickran Drive, and Terra Bella properties.

Johnson spoke to Reyes about the Foster Drive property transactions. Reyes claimed she thought Ramirez and Velazquez could make the mortgage payments from the rental income, admitted she knew their income was not as stated in the loan documents, and then retracted that statement and verified she had not done any walk-through of the Foster Drive property with Ramirez and/or Velazquez.

Johnson spoke to Garcia seven times. Garcia admitted going to Stockton to obtain Velazquez's signature on documents involving the second Foster Drive transaction. Garcia also admitted taking her daughter's notary journal to Stockton, taking Velazquez's

thumbprint, and having Velazquez sign the notary journal. Garcia also admitted asking her daughter to notarize the documents.

Garcia also admitted to Johnson that she wrote an invoice asking for a notary fee for McKay-Garcia, knew she should not have been given custody of the notary journal, and knew it was a problem to request a fee for McKay-Garcia for services as a traveling notary when the services had not been performed. Garcia also acknowledged knowing it was wrong to have people sign documents outside the presence of the notary. Garcia knew the signed documents were going to be filed.

Garcia told Johnson that when she received the loan documents for the Terra Bella property, they already had been filled in and completed. When Johnson asked Garcia if she had filled out the loan application for the second Foster Drive transaction, she said yes, and then later retracted. Garcia claimed she had become familiar with Avina only after he had faxed a letter to CTX.

Garcia told Johnson she had six months of bank statements for Rios. When Johnson asked to see them, Garcia provided only one month's statement. Johnson eventually obtained Rios's bank statements. The statements showed Rios had a balance of approximately \$383 in July 2006 and a negative balance in August 2006; yet, the August 2006 loan application stated Rios had \$3,000 in the bank. By September 2006 Rios had approximately \$238 in the bank; yet, the loan application submitted in September 2006 again listed a \$3,000 balance.

The Office of Real Estate Appraisers received a complaint from Velazquez alleging that an appraiser, Richard Gutierrez, had overvalued the Foster Drive property. That office investigated and concluded Gutierrez had (1) overestimated both the size of the lot and of the home on the property, (2) erroneously listed garage footage as living space, (3) failed to take into account the proximity of the property to an arterial street, which lowered its value, (4) failed to use comparable sales of real properties located nearby to help establish value, instead using properties nine or 10 miles away, and

(5) fixed a value that was identical to the sales price of \$445,000 when comparable property adjacent to the Foster Drive property had sold for \$261,000 a few days before the sale to Ramirez and Velazquez. The Office of Real Estate Appraisers concluded Gutierrez had manipulated the appraisal to facilitate a sale for \$445,000; a subsequent appraisal fixed a value of \$263,500 for the Foster Drive property.

The Tulare County District Attorney's Office filed criminal charges against Reyes and Garcia. Garcia ultimately was charged with and found guilty of 13 offenses, including the felony of conspiracy to commit the crime of fraudulently obtaining money, property, or labor by false pretenses, two counts of conspiracy to commit the crime of making false financial statements, impersonating a notary, knowingly performing a notarial act on a false or forged deed, three counts of perjury by declaration, forgery, three counts of filing a false or forged instrument, and obtaining money, property or labor by false pretenses. As to multiple counts, it was alleged and found true that Garcia took, damaged, or destroyed property of a value exceeding \$50,000; it was found not true that four of the offenses were related felonies and involved the taking of more than \$150,000.²

On September 15, 2010, a probation report was submitted. The report recommended Garcia serve 180 days in the county jail and a probation term of 11 years.

On September 22, 2010, a *Marsden* hearing was held. During the hearing, the trial court agreed to appoint conflict counsel to investigate the possibility of filing a motion for a new trial. On February 17, 2011, conflict counsel indicated Garcia would not be filing a motion for new trial.

On February 17, 2011, the trial court sentenced Garcia to serve 210 days in the county jail for count 17, stayed imposition of punishment on count 16 pursuant to section

²A finding was returned as to the section 186.11, subdivision (a) special allegation only as to count 26. The jury was not asked to return a finding as to counts 10, 12, or 25.

654, stayed imposition of punishment for the section 12022.6 enhancements appended to counts 10, 12, 25 and 26 and imposed a term of 11 years on probation for the remaining counts. The trial court did not address the section 186.11, subdivision (a) enhancements on counts 10, 12, and 25, for which no findings were made.

Garcia appealed her convictions on February 22, 2011 (case No. F061984). The trial court thereafter conducted a restitution hearing and imposed restitution in the amount of \$39,470. Reyes and Garcia were jointly and severally liable for the restitution amount. Garcia appealed from the restitution order (case No. F064479). By order dated June 6, 2014, on our own motion, the two appeals were consolidated.

DISCUSSION

Garcia challenges numerous convictions on the basis of insufficiency of the evidence: (1) the three perjury convictions set forth in counts 17, 18, and 19, (2) the conspiracy to commit theft by false pretenses conviction set forth in count 10, (3) the impersonating a notary conviction set forth in count 15, (4) the knowingly performing a notarial act on a false or forged deed conviction set forth in count 16, (5) the forgery conviction set forth in count 20, (6) the three convictions set forth in counts 21, 22, and 23 for filing false or forged instruments, (7) the theft by false pretenses conviction set forth in count 25, and (8) the conspiracy to commit the crime of making false financial statements conviction set forth in count 26.

Garcia also claims that counts 16, 20, 21, 22, and 23 failed to state public offenses of which she had adequate notice. Garcia further contends the conspiracy charged in count 12 was encompassed by the broader conspiracy set forth in count 10, warranting reversal of the count 12 conviction, and that the counts 25 and 26 offenses were not supported by adequate corroboration.

Additionally, Garcia asserts instructional error warrants reversal of her convictions. Specifically, she challenges a special instruction proffered by the prosecution that referenced the fees chargeable by and the duties of a notary and

maintains the trial court failed to instruct adequately on the elements of forgery and of impersonating a notary and erred in not instructing on Government Code section 8225.

Garcia raises two evidentiary challenges. Specifically, she challenges as error the trial court's sustaining of an objection to expert testimony and the admission of a statement made by McKay-Garcia to Johnson.

Garcia challenges as unconstitutionally vague Government Code sections 8227.1 and 8227.3. She also maintains the convictions on counts 16, 20, 21, 22, and 23 must be set aside pursuant to *Williamson, supra*, 43 Cal.2d 651.

Garcia also argues the trial court failed to conduct a proper *Marsden* hearing when it appointed conflict counsel and that conflict counsel's representation amounted to a violation of her Sixth Amendment right to counsel.

Garcia challenges her sentence of 11 years' probation as unauthorized, contending it exceeds the statutory maximum allowable. Finally, she asserts cumulative prejudice and requests that any future proceedings be heard before a different judicial officer.

In the challenge to her restitution order, Garcia claims the trial court erred because (1) it awarded restitution to Velazquez, who she contends was a coconspirator, and to Ramirez, who was not on the deed of trust, (2) restitution was not supported by substantial evidence because many of her offenses did not proximately cause any losses and other amounts are based on counts that must be reversed, and (3) her due process rights were violated because the trial court prejudged the matter before the start of the contested hearing.

I. Perjury Convictions

Garcia argues her perjury convictions, counts 17, 18, and 19, must be reversed on the grounds of insufficient evidence. The count 17 conviction was based on the notarization of the interspousal transfer deed between Ramirez and Velazquez. The convictions on counts 18 and 19 were based on the first and second deeds of trust for the Ramirez/Velazquez purchase of the Foster Drive property. The second amended

indictment charged in each of these counts that Garcia committed the crime of perjury by declaration and that Garcia “unlawfully, under penalty of perjury” declared as true that the interspousal transfer deed and the two deeds of trust had been signed by Ramirez and Velazquez as stated on the face of the documents.

The People concede these convictions must be reversed.

The prosecution’s theory of these three counts was that Garcia aided and abetted McKay-Garcia in falsely certifying and notarizing the documents. To convict Garcia under an aiding and abetting theory of perjury, the prosecution first had to prove that McKay-Garcia committed perjury, as section 118, defining the crime of perjury, requires an oath or affirmation under penalty of perjury to have been made falsely. None of the notarizations, however, stated they were under penalty of perjury.

In 2005, at the time the three documents were notarized, the statute governing certificates of acknowledgement, Civil Code section 1189, did not require that the notary’s certification be executed under penalty of perjury. (Stats. 1996, ch. 97, § 1, pp. 420-421; Stats. 2005, ch. 295, § 1.) This statute subsequently was amended to require that notaries execute certificates of acknowledgment under penalty of perjury. (Stats. 2007, ch. 399, § 2.)

As the three acknowledgements were not executed under penalty of perjury, the false notarial acknowledgements did not constitute perjury within section 118. Therefore, as do the People, we agree with Garcia that the convictions on counts 17, 18, and 19 must be reversed as unsupported by the evidence.

II. Duplicate Counts

Garcia argues her conspiracy convictions on counts 10 and 12 encompass the same agreement and criminal objective; therefore, one conviction should be reversed. The People concede the point and maintain that count 12, conspiracy to make false financial statements, should be reversed and count 10, conspiracy to commit theft by false pretenses, affirmed.

Generally, “Where two or more persons agree to commit a number of criminal acts, the test of whether a single conspiracy has been formed is whether the acts “were tied together as stages in the formation of a larger all-inclusive combination, all directed to achieving a single unlawful end or result.” [Citations.]’ Citation.]” (*People v. McLead* (1990) 225 Cal.App.3d 906, 920.) In other words, “The test is whether there was one overall agreement among the various parties to perform various functions in order to carry out the objectives of the conspiracy. If so, there is but a single conspiracy.’ [Citation.]” (*People v. Lopez* (1994) 21 Cal.App.4th 1551, 1558 (*Lopez*).

As the People concede, the record shows that Garcia and others conspired to commit a number of offenses with the single objective of fraudulently obtaining the loan money to complete the second Foster Drive transaction. Both conspiracy offenses in counts 10 and 12 pertained to the second Foster Drive transaction; the conspiracy to commit theft by false pretenses (count 10) encompassed the conspiracy to make false financial statements (count 12). As stated by the United States Supreme Court in *Braverman v. United States* (1942) 317 U.S. 49, 53, “one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.”

The conspiracies charged in counts 10 and 12 concerned the same criminal agreement with the same ultimate objective; therefore, only one conviction can stand. (*Lopez, supra*, 21 Cal.App.4th at p. 1558.) Count 10 alleged a felony count (§ 532, subd. (a)) and count 12 alleged a misdemeanor offense (§ 532a, subd. (1)). The conspiracy that has the greater maximum term is the one that should be affirmed. (*Lopez*, at p. 1557.) Therefore, the count 12 conviction will be reversed and the count 10 conviction affirmed. (*Id.* at p. 1559.)

In light of our conclusion that the count 12 conviction must be reversed, we need not address Garcia’s contention of instructional error in failing to instruct on the legal principles of single versus multiple conspiracies relative to the Foster Drive transaction.

III. Evidentiary Errors

Garcia contends there were two evidentiary errors that were prejudicial: admission of hearsay and exclusion of expert testimony. Garcia has either forfeited these issues or the errors were harmless.³

Admission of Hearsay

Garcia claims the trial court erred by allowing Johnson to testify to a conversation with a third party that constituted hearsay; she contends the error was prejudicial. She argues the admission of this testimony also violated her constitutional rights under the confrontation clause. The People agree admission of the testimony was error, but argue the error was harmless. They also contend Garcia has forfeited any confrontation clause challenge.

During the trial, Garcia testified that prior to driving to Stockton with Reyes, she called the escrow officer for the second Foster Drive transaction, Carmen Navarro. Garcia claimed she told Navarro her daughter was a notary, her daughter was unable to go to Stockton, but that she (Garcia) could take the notary journal with her and have the parties sign. Garcia then testified that Navarro told her “this was something that could be done.” Garcia took the notary journal to Stockton.

In rebuttal, the prosecution called Johnson to testify. He testified Garcia never mentioned to him that Navarro indicated Garcia could use the notary journal, although Garcia was not a notary. He also testified he spoke with Navarro the night before his testimony and Navarro stated she never authorized Garcia to use the notary journal.

Immediately after Johnson testified to this comment, Garcia’s counsel objected on the grounds of hearsay. The trial court initially sustained the objection and then reversed

³Since we have concluded that count 12 must be reversed as duplicative and counts 17, 18, and 19 reversed for insufficient evidence, our analysis of the evidentiary issues and other issues addresses only the remaining convictions.

itself and overruled the objection. Outside the presence of the jury, the trial court opined that Johnson's statement would be allowed for purposes of impeachment. The following morning the trial court informed the jury it was allowing Johnson's comment into evidence.

We first address Garcia's claim that the admission of the challenged testimony violated her confrontation clause rights under the Sixth Amendment. During the trial Garcia objected on the basis of hearsay; no Sixth Amendment or confrontation clause violation was alleged. An objection on hearsay grounds does not preserve a claim that testimony constituted a violation of a defendant's confrontation clause or Sixth Amendment rights. (*People v. Catlin* (2001) 26 Cal.4th 81, 138, fn. 14 (*Catlin*)). Failure to timely raise a confrontation clause objection at trial constitutes a forfeiture of the claim. (*People v. Alvarez* (1996) 14 Cal.4th 155, 186-187.) Consequently, Garcia's confrontation clause claim is forfeited.

We turn now to Garcia's claim that Johnson's testimony regarding his conversation with Navarro was inadmissible hearsay and prejudicial. A statement that was made other than by a witness while testifying and that is offered to prove the truth of the matter stated is hearsay. (Evid. Code, § 1200, subd. (a).) Generally, hearsay is inadmissible. (*Id.*, subd. (b).) We conclude the testimony was improperly admitted, as do the People. It was admitted for the truth of the matter asserted and constituted inadmissible hearsay.

We also conclude that admission of this remark was not prejudicial under either the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836 for assessing state error or the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) for evaluating federal constitutional error. In order to find an error harmless under the more stringent federal constitutional standard, it must be shown "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Id.* at p. 24.)

We are confident the error did not contribute to the verdict because whether Navarro told Garcia she could use McKay-Garcia's notary journal is irrelevant to the issue of guilt. It is no defense to a criminal charge that a defendant did not realize he or she was breaking the law when he or she acted. (*People v. Vineberg* (1981) 125 Cal.App.3d 127, 137.) This is true even if a defendant is acting in good faith—for example, when acting based on the erroneous advice of counsel. (*People v. Snyder* (1982) 32 Cal.3d 590, 593 (*Snyder*).)

Even if, based upon an alleged statement from Navarro, Garcia believed she was acting “appropriately” and in good faith when she took McKay-Garcia's notary journal to Stockton, it is not a defense to the charges. (*Snyder, supra*, 32 Cal.3d at p. 593.)

To the extent Garcia contends the challenged testimony from Johnson affected her credibility, we disagree. The record establishes she contradicted her pretrial statements to Johnson during her trial testimony. If anything, her contradictory and self-serving trial testimony affected her credibility at trial. Her claim at trial that Navarro authorized her to use her daughter's notary journal contradicts her own pretrial statements to Johnson. She told Johnson she knew it was illegal for McKay-Garcia to give her custody of the notary journal and that it was not appropriate to have people sign notarized documents outside the presence of the notary.

Because the challenged testimony is irrelevant to the issue of guilt, and likely had no impact on Garcia's credibility as a witness at trial, we are convinced beyond a reasonable doubt that it did not contribute to the verdict. (*Chapman, supra*, 386 U.S. at p. 24.)

Expert Testimony

Garcia also challenges the exclusion of expert testimony by Todd Fitton that some loan agents would take a notary's journal to obtain a borrower's signature, even though they were not notaries.

Garcia called Fitton, a branch manager at a local mortgage company, to testify for the defense. The prosecutor conducted voir dire of Fitton as to his qualifications as an expert, after which the prosecutor indicated he would accept Fitton as an expert in loan originations, but not in underwriting or notary activities. The trial court responded, “Okay.”

Fitton then testified on direct examination regarding loan originations and stated income loans. On cross-examination Fitton was asked, “If you caught an employee posing as a notary when they were not a notary, would you fire them?” Fitton responded affirmatively. Fitton also was asked, “If you caught an employee accepting money for performing notarial services they did not perform, would you fire them?” Again, Fitton responded in the affirmative. The prosecutor also asked Fitton, “Was it acceptable for one of your agents to notarize documents themselves and take them to a licensed notary at a later date and have them notarized?” Fitton responded that he had “never personally had that happen” and had “never done any of [his] loan signings.”

On redirect, Garcia’s counsel clarified that Fitton had “never actually taken a notary book and signed or have a borrower sign loan documents,” to which Fitton responded, “Correct.” Garcia’s counsel then asked, “Have you heard of that practice happening?” The prosecutor objected on the basis that Fitton was not “an expert in notary” and the question called for a hearsay response. The trial court sustained the objection. Garcia’s counsel made no attempt thereafter to qualify Fitton as an expert in notary practices.

The trial court is charged with determining, in the exercise of a sound discretion, the competency and qualification of an expert witness to give his or her opinion in evidence. The trial court’s ruling will not be disturbed on appeal unless a manifest abuse of that discretion is shown. (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 274.)

Fitton had not been accepted as an expert in notary practices. Therefore, under Evidence Code section 801 he was not able to offer an opinion on notary practices. Since Garcia made no attempt to qualify Fitton as an expert in notary practices after the objection was sustained, the ruling that Fitton was not qualified to render an expert opinion on notary practices cannot be an abuse of discretion.

Regardless, the question asked by Garcia's counsel was designed to elicit hearsay testimony and the prosecution objected on the grounds of hearsay, as well as lack of qualification as an expert in the subject. The trial court's discretion to exclude hearsay testimony applies to defense, as well as prosecution, expert evidence. (*People v. Carpenter* (1997) 15 Cal.4th 312, 403.) Thus, even if Fitton were qualified as an expert, the trial court had the discretion to exclude testimony about whether Fitton had "heard of that practice happening" because it sought to elicit unreliable hearsay.

Furthermore, we reject Garcia's claim that defense counsel was ineffective for failing to qualify Fitton as an expert in notary practices. The information sought to be elicited by the question, namely, whether other loan agents were guilty of violating state law by using a notary journal when they were not a notary, was irrelevant. That Fitton may have "heard" of other individuals violating state law in some respect with regard to notary journals and practices had no bearing on Garcia's actions and her guilt or innocence.

Even if others engaged in the illegal practices engaged in by Garcia, she cannot assert here that a failure to file criminal charges against the others violates equal protection of the laws (Cal. Const., art. I, § 7, subd. (a)) or the uniform operation of the laws doctrine (*id.*, art. IV, § 16). (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 550-562.) Such a claim was not made in the trial court and no factual basis was established.

IV. Claims of Instructional Error

Garcia makes multiple claims of instructional error relating to a notary's duties, fees, and impersonating a notary. In addition, she contends the trial court had a sua sponte duty to instruct on the elements of Government Code section 8225. She also challenges the instructions on the forgery charge.

Notary Fees Instruction

Garcia argues the trial court erred prejudicially in issuing a special instruction crafted by the prosecution. She asserts the instruction was erroneous and led to her three perjury convictions. Because we have reversed the three perjury convictions, we need not address any claim of instructional error with respect to these charges.

Garcia also contends the instruction improperly “brought into the case front and center” allegations of “uncharged alleged wrongful acts” and that it impacted her credibility and the other charges. Thus, the entire judgment should be reversed.

Garcia raised no objection to the instruction in the trial court; consequently, the issue is forfeited. (*People v. Anderson* (2007) 152 Cal.App.4th 919, 927. Regardless, the contention fails for two reasons.

The challenged instruction read:

“Government Code Section 8211 sets out the allowable fees that a notary may charge: One, for taking an acknowledgement or proof of deed or other instrument, to include the seal and the writing of the certificate, the sum of \$10 for each signature taken; two, for administering an oath or affirmation of one person and executing the jurat, including the seal, the sum of \$10; three, a notary may receive additional fees for travel.”

First, to the extent Garcia contends the instruction was not applicable, the effect of any error was harmless. The giving of an irrelevant or inapplicable instruction generally is a technical error not warranting reversal of the judgment. (*People v. Cross* (2008) 45 Cal.4th 58, 67.) The jury was instructed to disregard any inapplicable instructions. We

presume the jury followed those instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852 (*Sanchez*.)

Second, contrary to Garcia's assertion, we see nothing in the challenged instruction that brings "front and center" other "uncharged alleged wrongful acts." Her contention simply is without support in the record.

Notary Duty Instruction

Garcia also maintains the instruction setting forth the duties of a notary was improper because there were no oaths or affirmations relevant to the charges, it confused the jury, and it damaged her credibility and thereby prejudiced her defense. The challenged instruction read:

"A notary public shall administer an oath or affirmation to the affiant; a notary shall determine from satisfactory evidence that the affiant is the person executing the document; three, the affiant shall sign in the presence of a notary."

As for Garcia's contention the instruction may have confused the jury, she had an obligation in the trial court to request a clarifying instruction. (*People v. Valdez* (2004) 32 Cal.4th 73, 113.) She does not claim any such clarifying instruction was requested by her, but rejected by the trial court.

Regardless, it is unlikely the jury was confused, considering the instructions as a whole. (*Catlin, supra*, 26 Cal.4th at p. 151.) The challenged instruction was a correct statement of law under Government Code section 8202, subdivision (a) of a notary's duties when administering oaths or affirmations. If the instruction was inapplicable or irrelevant, the jury was instructed to disregard irrelevant instructions and we presume the jury did so. (*Sanchez, supra*, 26 Cal.4th at p. 852.)

As for Garcia's contentions regarding the impact of the instruction on her credibility, she greatly overstates any possible effect of the instruction on the trial as a whole. It was her actions concerning the notarizing of documents that in all likelihood affected her credibility with the jury. She encouraged her daughter to certify signatures

on documents falsely and made sure her daughter received payment for traveling notary services that were not performed.

It is not reasonably probable Garcia would have obtained a more favorable result if this instruction had not been given. (*People v. Wharton* (1991) 53 Cal.3d 522, 571.)

Impersonating a Notary

Garcia contends the trial court erred prejudicially when it instructed the jury on the count 15 offense, impersonating a notary, because it failed sua sponte to define the phrases “purporting to act as a notary” and “in relation to.”

The trial court instructed the jury on the count 15 offense as follows:

“Government Code Section 8227.3 sets forth a definition of unlawful acts by one not a notary public. To prove a defendant is guilty of this crime, the People must prove that, one, the defendant was not a duly commissioned, qualified notary public at the time of the act; two, the defendant purported to act as a notary public in relation to a document affecting title to or placing an interest secured by a mortgage on real property consisting of a single-family residence containing not more than four dwelling units.”

The language of the instruction mirrors substantially the language of Government Code section 8227.3. That code section makes reference to Government Code section 8227.1. The instruction given to the jury included the relevant language from Government Code section 8227.1. The challenged instruction fully instructed on the offense as described in the statutes. (Gov. Code, §§ 8227.1, subd. (c), 8227.3.)

The trial court was not required sua sponte to define the phrases “purporting to act as a notary” and “in relation to” because these terms do not have peculiar legal meanings that differ from common usage. (*People v. Eastman* (1993) 13 Cal.App.4th 668, 673.) And, because Garcia failed to request any clarifying or amplifying language be added to the challenged instruction, she has forfeited any claim of error on appeal. (*People v. Rundle* (2008) 43 Cal.4th 76, 151; *People v. Guerra* (2006) 37 Cal.4th 1067, 1134, 1138.)

Government Code Section 8225

Garcia argues the trial court erred prejudicially when it failed to instruct the jury on the knowledge element of Government Code section 8225; thus, her convictions on counts 16, 20, 21, 22, and 23 should be reversed. The People correctly note that Garcia was not charged with violating Government Code section 8225; therefore, the trial court had no sua sponte duty to instruct on this code section.

Count 16 alleged a violation of Government Code section 8214.2, count 20 alleged a violation of Penal Code section 470, subdivision (c), and counts 21, 22, and 23 alleged violations of Penal Code section 115, subdivision (a). The trial court has a duty to instruct on general principles of law relevant to the issues raised by the evidence and the charges in the case. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) “The ‘general principles of law governing the case’ are those principles connected with the evidence and which are necessary for the jury’s understanding of the case. [Citations.]” (*People v. Estrada* (1995) 11 Cal.4th 568, 574 (*Estrada*).)

A trial court also has the correlative duty to refrain from instruction on principles of law that are irrelevant. (*People v. Mobley* (1999) 72 Cal.App.4th 761, 781.) Thus, “It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case. [Citation.]” (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.)

Here, it would have been error for the trial court to instruct on Government Code section 8225 because it had no application to the facts of the case.

Forgery

Garcia argues the trial court failed to instruct the jury adequately on the elements of forgery in that the trial court failed to define the phrase “falsified a document.” She further contends this error was prejudicial and warrants reversal of the count 20 forgery conviction.

The trial court instructed the jury on forgery using CALCRIM No. 1903. The trial court instructed the jury that in order to find Garcia guilty on the count 20 charge, the People had to prove (1) the defendant corrupted or falsified a document; (2) the document was a conveyance; and (3) the defendant intended to defraud when she corrupted or falsified the document.

The language of CALCRIM No. 1903 essentially mirrors the language of Penal Code section 470, subdivision (c), which provides that any person who alters, corrupts, or falsifies an instrument, with the intent to defraud, is guilty of forgery. The Authority to CALCRIM No. 1903 states this instruction instructs on the elements of the offense of Penal Code section 470, subdivision (c). (Judicial Council of Cal., Crim. Jury Instns. (2014) Authority to CALCRIM No. 1903, p. 15.) The terms “falsified” and “falsifying” as used in the instruction did not differ from their common meaning. Webster’s Dictionary defines “falsify” as “to make false; ... to alter (a record, etc.) fraudulently.” (Webster’s New World Dict. (3d college ed. 1988) p. 489.)

Garcia has provided no authority for her proposition that the trial court was obligated sua sponte to define the term “falsified a document” and we have uncovered no such authority. Only when a term has a technical meaning peculiar to the law—one different than its ordinary or common meaning—does the trial court have a sua sponte duty to instruct the jury as to its meaning. (*People v. Mayfield* (1997) 14 Cal.4th 668, 773.) If, however, the term has no technical meaning peculiar to the law, but is commonly understood by those familiar with the English language, instructions as to its meaning are not required. (*Estrada, supra*, 11 Cal.4th at p. 574.)

Also, during the trial, Garcia never objected that the instruction was incomplete and did not request any amplifying language. (*People v. Lang* (1989) 49 Cal.3d 991, 1024 [“A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested

appropriate clarifying or amplifying language.”].) Consequently, Garcia has forfeited her claim of error.

V. Sufficiency of the Evidence

Garcia challenges the sufficiency of the evidence of numerous counts: count 10, conspiracy to commit theft by false pretenses; count 15, impersonating a notary; count 16, knowingly performing a notarial act on a false or forged deed; count 20, forgery; counts 21, 22, and 23, for filing false or forged instruments; count 25, theft by false pretenses; and count 26, conspiracy to commit the crime of making false financial statements.

Standard of Review

When the sufficiency of the evidence is challenged on appeal, “the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We must presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Rayford* (1994) 9 Cal.4th 1, 23; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) It is not the function of this court to reweigh or reinterpret the evidence; rather it is the function of this court to determine whether there was sufficient evidence to support the conclusions arrived at by the trier of fact. (*People v. Perry* (1972) 7 Cal.3d 756, 785 (*Perry*).)

Count 10

Garcia contends the evidence was insufficient to support a conviction for any conspiracy as charged in counts 10 and 12. Specifically, she maintains there was no evidence she knew any information in the loan documents for the Foster Drive property was inaccurate. Because we have concluded that count 12 must be reversed as duplicative, we address the argument only as to count 10.

Count 10 charged a conspiracy to commit the crime of obtaining money, labor, or property by false pretenses to secure a loan to fund Velazquez's purchase of the Foster Drive property. It was alleged that Garcia, Reyes, the appraiser Gutierrez, and Avina, who had faxed a letter to CTX falsely claiming he had prepared Velazquez's income tax returns and that Velazquez owned a business, all conspired to commit the count 10 offense.

The elements of a conspiracy are (1) an agreement to commit a crime; (2) the intent to agree or conspire; (3) the intent to commit the offense that is the object of the conspiracy; and (4) the commission of an overt act done by a member of the conspiracy in furtherance of the agreement. (*People v. Horn* (1974) 12 Cal.3d 290, 297, 303; *People v. Brown* (1991) 226 Cal.App.3d 1361, 1367 (*Brown*)). The required overt act need not be committed by each of the conspirators; nor need it be an act which is an element of a crime or an attempt to commit a crime. (*Brown*, at p. 1367.)

Section 532 proscribes, inter alia, the act of "knowingly and designedly, by any false or fraudulent representation or pretense, defraud[ing] any other person of money" (*Id.*, subd. (a).) The elements of the offense are as follows: "(1) the defendant made a false pretense or representation to the owner of property; (2) with the intent to defraud the owner of that property; and (3) the owner transferred the property to the defendant *in reliance* on the representation. [Citations.]" (*People v. Miller* (2000) 81 Cal.App.4th 1427, 1440 (*Miller*), italics added.) In this context, "reliance" means the false representation "materially influenced" the owner's decision to part with his property; it need not be the sole factor motivating the transfer. (*Id.* at pp. 1440-1441.) Even silence can be construed to be a false statement within the statute where there is a legal duty to speak. (*People v. Rondono* (1973) 32 Cal.App.3d 164, 178.) Nor is it necessary the victim testify he or she parted with money or property because of the representation; reliance can be inferred from all the evidence. (*Id.* at p. 174.)

While acknowledging the standard of review enunciated above, Garcia's argument is a not so subtle invitation to this court to retry the case. She ignores the evidence supporting the conviction, pointing out only that which would have supported acquittal. We decline her implicit invitation; rather, we will adhere to the long-established substantial evidence rule and set forth the evidence presented at trial supporting the conspiracy charge.

Count 10 alleged three overt acts committed by the conspirators in furtherance of the conspiracy. Overt act No. 1 alleged Reyes drove to Stockton to meet with Ramirez and Velazquez; overt act No. 2 alleged Gutierrez wrote the appraisal for the transaction; and overt act No. 3 alleged Garcia submitted the loan application to the lender. Only a single overt act needed to be proven by the prosecution. (*Brown, supra*, 226 Cal.App.3d at p. 1367.)

Reyes and Garcia drove to Stockton to the home of Ramirez and Velazquez. Garcia admitted to Johnson that she and Reyes had made the drive to Stockton to obtain Velazquez's signature on documents for the second Foster Drive transaction. This was sufficient evidence to establish the requisite overt act.

As for evidence establishing the necessary agreement to commit the criminal act, circumstantial evidence is sufficient to establish the necessary agreement or mutual understanding. The agreement may be inferred from the conduct of the conspirators mutually carrying out a common purpose in violation of a penal statute. (*People v. Lipinski* (1976) 65 Cal.App.3d 566, 575-576; see also *People v. Austin* (1994) 23 Cal.App.4th 1596, 1606-1607.)

Evidence of the agreement to conspire to commit the criminal offense was abundant. As part of a plea agreement, Avina pled guilty to the offense of conspiracy to commit the crime of making a false financial statement, the count 12 conspiracy offense, and testified against the other codefendants.

Other evidence included (1) Garcia signing the loan application, which falsely stated Velazquez's assets and income; (2) Garcia's statement to Johnson that she took McKay-Garcia's notary journal with her to Stockton, knowing it was wrong to have people sign documents outside the presence of the notary; and (3) Garcia admitted that upon her return from Stockton, she had McKay-Garcia notarize the documents, even though McKay-Garcia had not witnessed the signing of the documents, and then took these documents to the title company.

The appraisal of the property by Gutierrez incorrectly classified a garage as living space, failed to analyze the Foster Drive property's proximity to an arterial street, overstated the lot size, and failed to consider comparable sales in the area. Gutierrez valued the property at \$445,000, the exact sale price to Velazquez, even though the property had been purchased less than eight months earlier for \$286,000. Stephen Simmons, the investigator for the Office of Real Estate Appraisers, concluded Gutierrez had manipulated the appraisal in an effort to facilitate the sale of the property; a review appraisal valued the property at \$263,500, as opposed to Gutierrez's value of \$445,000.

Garcia's signing of the loan application, after meeting with Velazquez in Stockton and being able to view his home and assets, is telling. The evidence established Garcia was the one who had Velazquez sign the loan documentation and Velazquez testified the loan documentation had been filled out by someone before he was asked to sign. Garcia's employer, CTX, required loan officers to examine an applicant regarding his or her income, assets, and overall finances. Garcia, however, never questioned Velazquez about this information, and the loan file delivered by her had a letter in English purporting to be from Velazquez, who could not read or write English, falsely claiming he owned a business. The circumstantial evidence warrants a reasonable inference that Garcia knew the loan file she delivered had falsely inflated Velazquez's income and assets in order to obtain the loan.

There was ample circumstantial evidence Garcia conspired with Reyes and others to submit false financial information so that Velazquez would qualify for a loan for the Foster Drive property.

Count 15

Count 15 charged Garcia with impersonating a notary, a felony under Government Code section 8227.3. This code section prohibits a person who is not a notary from doing any of the acts specified in Government Code section 8227.1, in relation to any document affecting title or a deed of trust on real property consisting of a single-family residence with not more than four dwelling units. Government Code section 8227.1 prohibits a person who is not a notary public from (1) representing to anyone that he or she is entitled to act as a notary, (2) assuming or using the title of notary public in such a manner as to convey the impression the person is a notary public, or (3) purporting to act as a notary public.

Garcia claims there was “no evidence” she had purported to act as a notary. This claim ignores her own testimony at trial and the other overwhelming evidence in the case.

Garcia admitted at trial she was not a notary public. Velazquez testified she introduced herself as a notary when she met with Velasquez in Stockton. Garcia brought with her to Stockton her daughter’s notary journal, obtained Velazquez’s thumbprint in the journal, and had him sign the notary journal with respect to the Foster Drive deeds of trust. When asked at trial whether she had performed all the basic functions of a notary when she met with Velazquez, she responded, “I’m going to say yes.”

Garcia’s actions in taking the notary journal to Stockton, representing to Velazquez she was a notary, obtaining his thumbprint and signature in the notary journal for the deeds of trust for the Foster Drive property, plus her admissions at trial that she was not a notary but had performed all the essential functions of a notary, establish all of the elements of a violation of Government Code section 8227.3. (*Perry, supra*, 7 Cal.3d at p. 785.)

Count 16

In count 16 Garcia was convicted of knowingly performing a notarial act on a false or forged deed, in violation of Government Code section 8214.2. She contends the evidence was insufficient to support the conviction. Specifically, she asserts this code section required the deed of trust itself contain false statements, not just the notarial acknowledgement and, consequently, this count failed to state a public offense. The People contend the notarial acknowledgement was part of the deed of trust. Because Garcia challenges only this one element of the offense, we address only that element.

Regardless of whether the notarial acknowledgement was part of the deed of trust, the evidence supports a determination that the deed of trust contained a forged signature. Velazquez testified that the signature on the deed of trust for the Foster Drive property was not his signature. Government Code section 8214.2 applies to notarial acts on a deed of trust that contains “any false statements or is forged, in whole or in part” (*Id.*, subd. (a).) Garcia does not address this testimony.

Based on Velazquez’s testimony, there was substantial evidence the Foster Drive deed of trust contained a forged signature, thus satisfying the element of the offense Garcia contends was not present in the evidence. (*Perry, supra*, 7 Cal.3d at p. 785.)

We also reject Garcia’s argument that count 16 failed to state a public offense. There is a difference between failure to charge a public offense and insufficiency of the evidence produced at trial to support a conviction of that offense.

Moreover, Garcia received adequate notice of the count 16 charge. Count 16 of the indictment specifically stated she was charged, along with her daughter, with violating Government Code section 8214.2. Due process requires a defendant be given adequate notice of the charges against him or her in order to have a meaningful opportunity to present a defense and prepare for trial without undue surprise. (*People v. Valladoli* (1996) 13 Cal.4th 590, 607; *People v. Bishop* (1996) 44 Cal.App.4th 220, 232.) Where, as here, a defendant has been charged in language that is substantially similar to

the statute and the statute itself is cited in the charging document, the due process right to notice has been satisfied. (§ 952; *People v. Thomas* (1987) 43 Cal.3d 818, 826.)

Count 20

Garcia argues McKay-Garcia's act of falsely notarizing a certificate of acknowledgement for the Foster Drive property deed of trust did not amount to a forgery under section 470 and therefore count 20 did not charge a public offense.

The count 20 conviction for forgery is based upon McKay-Garcia's acknowledgement of Velazquez's purported signature on the deed of trust for the Foster Drive property. McKay-Garcia signed this acknowledgement at Garcia's behest, even though Velazquez never appeared before or provided evidence of his identity to McKay-Garcia. Garcia's liability on this count was as an aider and abettor.

In 2005, when this offense was committed, section 470, subdivision (c) provided:

“Every person who, with the intent to defraud, alters, corrupts, or falsifies any record of any will, codicil, conveyance, or other instrument, the record of which is by law evidence, or any record of any judgment of a court or the return of any officer to any process of any court, is guilty of forgery.” (Stats. 1998, ch. 468, § 2.)

In order to convict Garcia as an aider and abettor to forgery, the prosecution had to establish that McKay-Garcia committed the crime of forgery and Garcia aided and abetted the forgery.

Garcia's only challenge here to this count is, as a matter of law, falsely notarizing a certificate of acknowledgement for the deed of trust does not constitute a forgery. Consequently, she asserts there was insufficient evidence to support the conviction and this count likewise failed to set forth a public offense.

In 2005, when amendments to section 470 were being considered by the Legislature, the Senate analysis noted, “This bill also *clarifies* that the crime of forgery includes falsifying an acknowledgement of a notary.” (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 361 (2005-2006 Reg. Sess.) as

amended June 28, 2005, p. 1, italics added.) This legislative history confirms, and is an expression of, legislative intent on the meaning of the statute. (*In re Vicki H.* (1979) 99 Cal.App.3d 484, 494; see also *People v. Somsy* (1920) 46 Cal.App. 377, 379-380 [forged certification of a bill of exchange is forgery].) Therefore, when McKay-Garcia falsely notarized the certificate of acknowledgement, aided and abetted by Garcia, a forgery was committed.

Garcia's assertion that *People v. Bendit* (1896) 111 Cal. 274 is controlling is incorrect. *Bendit* held that an agency endorsement without authority did not constitute forgery in 1896. The Legislature thereafter enacted legislation that specifically stated an unauthorized agency endorsement constituted forgery. (Stats. 1905, ch. 515, § 1, p. 673.) Garcia's reliance on *Bendit* fails to account for subsequent amendments to the forgery statute, as well as more recent cases holding the forms of forgery set forth in section 470 are not exclusive. (*People v. Vincent* (1993) 19 Cal.App.4th 696, 700.)

Thus, the count 20 conviction was supported by substantial evidence and the offense constituted a forgery; therefore, it also stated a public offense.

Counts 21, 22, and 23

Counts 21, 22, and 23 charged Garcia with filing false or forged instruments, a violation of section 115. Garcia contends these three convictions were not supported by substantial evidence because they were based on the false notarial certificates signed by McKay-Garcia and appended to the three deeds. Garcia argues the notarial acknowledgements are not "instruments" within the meaning of section 115. She also claims that because notarial acknowledgements are not instruments, these counts failed to state public offenses. Finally, Garcia contends the three documents are not "false or forged documents" within the meaning of section 115.

Section 115 provides, in relevant part: "Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within this state ... is guilty of a felony." (*Id.*, subd. (a).) The issue is whether a

false notarial acknowledgement attached to a deed of trust constitutes an “instrument” within the meaning of the statute.

The California Supreme Court in *People v. Murphy* (2011) 52 Cal.4th 81 (*Murphy*) noted that there is “no precise, generally accepted definition of the term ‘instrument’ for purposes of Penal Code section 115.” (*Id.* at p. 92.) While early cases, such as *People v. Fraser* (1913) 23 Cal.App. 82, took a restrictive approach to what constituted an instrument, more recent cases have adopted an expanded meaning that includes a broad range of documents filed or registered with a public entity. (*Id.* at p. 85; see, e.g., *People v. Hassan* (2008) 168 Cal.App.4th 1306, 1315-1316 (*Hassan*) [marriage certificates]; *People v. Tate* (1997) 55 Cal.App.4th 663, 667 [form documenting community service hours by probationer]; *Generes v. Justice Court* (1980) 106 Cal.App.3d 678, 681 (*Generes*) [deed filed by defendant purporting to convey an easement to herself].)

In deciding whether section 115 applies, more recent cases have focused on the purpose of the statute, which is to protect judicial and public records. (*Murphy, supra*, 52 Cal.4th at p. 93.) In *People v. Powers* (2004) 117 Cal.App.4th 291, the appellate court determined that fishing records filed with the Department of Fish and Game were “instruments” because the department relies on them to set fishing limits and manage fisheries. (*Id.* at p. 297.) In *Hassan* the appellate court concluded that confidential marriage certificates are instruments “given the requirement that they be recorded, their importance, and the vast legal consequences that flow from them.” (*Hassan, supra*, 168 Cal.App.4th at p. 1316.)

We reject Garcia’s contention that only what was defined as an “instrument” in 1872, when the code section was first enacted, qualifies as an instrument. Under the recent interpretations of the term “instrument,” as used in section 115, we conclude the notarial certificates at issue here were instruments. The purpose of the notarial

acknowledgement is to authenticate the signatures on the documents to which it is incorporated.

The deed of trust and request for notice of default both include the notarial acknowledgement. This is a standard form document consisting of seven pages, with the last page containing signature lines and a preprinted notarial acknowledgement. The blanks in the form are designed to be filled in with names, dates, and a description of the real property. The document is identified as form No. 3805 (amended 9/99) and the preprinted document states it consists of seven pages, with the first page numbered “1 of 7,” the second page numbered “2 of 7,” etc., with the last page, “7 of 7,” being the notarial acknowledgement page.

The interspousal transfer deed also includes a preprinted notarial acknowledgement designed to be recorded with the deed.

The deed of trust, consisting of a total of 15 pages, is identified as form No. 3005 (1/01), with the first page numbered “1 of 15,” the second page numbered “2 of 15,” through “15 of 15.” Page 15 of 15 is the preprinted notarial acknowledgement included as part of form.

All three of these documents were preprinted forms that included as part of the form a notarial acknowledgement. Clearly, the intent of the form is that the notarial acknowledgment be filed along with the balance of the document. Without the notarial acknowledgment, the form is incomplete.

When we focus on the purpose of section 115, to protect the integrity of public records, either the notarial acknowledgments qualify as instruments in and of themselves, or, alternatively, the entire document, of which the notarial acknowledgment is a part, qualifies as an instrument. The notarial acknowledgments were required to be recorded as an integral part of each of the three documents and legal consequences flow from the recorded documents, including the notarial acknowledgments. As such, they constituted

instruments within the meaning of section 115. (*Hassan, supra*, 168 Cal.App.4th at p. 1316.)

We similarly reject Garcia's contention that only those documents specified in Government Code section 27282, subdivision (a), or in other statutes in effect in 1872, as recordable can constitute the basis for a Penal Code section 115 charge of filing a false or forged document, and, since notarial acknowledgements are not so listed, they cannot form the basis of a section 115 conviction. The purpose of the statute is to protect judicial and public records. (*Murphy, supra*, 52 Cal.4th at p. 93.) By incorporating the notarial acknowledgement into the standard preprinted form for each of the three recorded documents, they became integral parts of the documents. All three thus were recordable documents or instruments under the definitions set forth in Government Code sections 27279, subdivision (a) and 27282, subdivision (a).

Garcia also erroneously asserts section 115 requires a writing that falsely purports to be the writing (or signature) of another. A similar contention was raised in *Generes* and rejected by the appellate court. In *Generes*, the defendant filed a deed from herself to herself, granting an easement over property she did not own. (*Generes, supra*, 106 Cal.App.3d at p. 681.) The superior court concluded the defendant's conduct did not fall within section 115 because the document in question was what it purported to be—a deed from the defendant to the defendant. (*Generes*, at p. 681.) The appellate court reversed, stating:

“Penal Code section 115 differentiates between the two categories, clearly proscribing either a false *or* a forged instrument. Obviously, as in the present case, an instrument may have the effect of defrauding one who acts on it as genuine even though it does not bear a forged signature or otherwise meet the technical requirements of a forged instrument.” (*Id.* at p. 682.)

The three documents affecting title to the Foster Drive property were not signed and notarized properly before being recorded; yet, the clear intent was that the documents

be relied upon by third parties. In our view, section 115 encompasses a false notarial acknowledgement. This view is consistent with the statute's goal of protecting the reliability and integrity of public records. (*People v. Feinberg* (1997) 51 Cal.App.4th 1566, 1579 (*Feinberg*); *People v. Bell* (1996) 45 Cal.App.4th 1030, 1061 (*Bell*).

Because counts 21, 22, and 23 charged violations of section 115, they stated public offenses. As such, the convictions will be upheld.

Count 25

Garcia contends the count 25 conviction for theft by false pretenses pertaining to the Terra Bella property should be reversed on the basis of insufficiency of the evidence.

Count 25 charged a violation of section 532, subdivision (a). That section proscribes, inter alia, the act of “knowingly and designedly, by any false or fraudulent representation or pretense, defraud[ing] any other person of money” (*Ibid.*) The elements of the offense are as follows: ““(1) the defendant made a false pretense or representation to the owner of property; (2) with the intent to defraud the owner of that property; and (3) the owner transferred the property to the defendant *in reliance* on the representation. [Citations.]”” (*Miller, supra*, 81 Cal.App.4th at p. 1440, italics added.)

A defendant may be guilty of theft by false pretenses by causing a false representation to be made, rather than by personally making it. (*People v. Singh* (1995) 37 Cal.App.4th 1343, 1368.) The August 22, 2006, loan application falsely overstated Rios's assets and income and the application was signed by Garcia as the “interviewer.” These same false figures were listed in the September 27, 2006, loan application signed by Rios. The false statements in the loan application signed by Garcia provide sufficient evidence of the first element of the offense.

Substantial evidence also supports the second element of the offense. Through her discussions with Rios, Garcia would have been aware that the assets and income listed in the loan application were false. Despite being aware the loan application contained false information, Garcia signed the August 22, 2006, application and never alerted the lender

or underwriter that the information contained therein was false. A reasonable inference is that Rios's assets and income were purposefully inflated by Garcia so that Rios would qualify for the loan and Garcia would thereby be entitled to a commission. The commission on this loan was \$9,167, of which Garcia received 90 percent or approximately \$8,250. This satisfies the scienter requirement Garcia contends is lacking.

As to the third element, the reliance element, "reliance means that the false representation "materially influenced" the owner's decision to part with his property; it need not be the sole factor motivating the transfer. [Citation.] A victim does not rely on a false representation if "there is no causal connection shown between the [representations] alleged to be false" and the transfer of property. [Citations.]" (*Miller, supra*, 81 Cal.App.4th at pp. 1440-1441.) Based upon the information provided in the application, the lender approved the loan to Rios and funded the loan. When the property fell into foreclosure, the lender was unable to recover fully on the loan.

Garcia claims there was no evidence the lender relied upon the August 22, 2006, application. She argues the lender would have relied upon the September 27, 2006, loan application that Rios signed. The two applications, however, contained the same false and inaccurate information. Rios testified she did not fill out the loan application she signed; someone else filled it out for her. A reasonable inference is that Garcia prepared the September 2006 application for Rios's signature, using false information in order to ensure Rios qualified for the loan and she (Garcia) could earn a substantial commission. Reliance, in part, by the lender on the false financial data in the loan application thus supplies sufficient evidence of the third element of the offense.

As there was sufficient evidence of all three elements, the conviction on count 25 stands.

Count 26

This count alleged Garcia conspired to commit the misdemeanor crime of making false financial statements, a violation of sections 182, subdivision (a) and 532a,

subdivision (1). It pertains to the false financial statement submitted by Rios for the Terra Bella property.

A conspiracy is an agreement by two or more persons to commit a crime. (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1024.) Proof of a conspiracy requires proof of (1) an agreement between two or more people, (2) a specific intent to agree or conspire to commit the offense, (3) the specific intent to commit the offense, and (4) an overt act committed for the purpose of carrying out the conspiracy. (*Ibid.*) A conspiracy can be committed regardless of whether the conspirators fully comprehended its scope, acted together or in separate groups, or used the same or different means. (*People v. Cooks* (1983) 141 Cal.App.3d 224, 312 (*Cooks*)). The existence of a conspiracy may be *inferred* from the conduct, relationships, interests, and activities of the alleged conspirators. (*Id.* at p. 311.)

Garcia does not deny that a conspiracy existed or that an offense was committed; her only challenge to the conviction is a claim there was no evidence she conspired with anyone to commit the offense. We disagree.

Rios testified that during the two phone conversations she had with Garcia, she told Garcia she did not have a lot of money in her bank accounts. Rios told Garcia she had only a few hundred dollars in the accounts and faxed copies of her bank statements to Garcia. Despite this information, Garcia suggested to Rios that she had between \$11,000 and \$22,000 in bank accounts. Even though Rios gave Garcia accurate information on her finances when they spoke, Garcia prepared a loan application that falsely inflated Rios's assets and income, an application Garcia signed as "interviewer" on August 22, 2006. Garcia admitted Rios told her she did not have \$22,000 in her bank accounts before Garcia inserted that figure into the loan application. It is improper for a loan officer knowingly to process a loan application that contains false information.

The false information Garcia put in the August 2006 application was repeated verbatim in the September 2006 application Rios signed. This evidence suggests the

false information inserted by Garcia into the August 2006 application was simply incorporated into the September 2006 application that was prepared for Rios's signature. This evidence was sufficient to establish a conspiracy between Garcia and Rios to falsify Rios's false financial information, thereby qualifying Rios for the loan and generating a commission for Garcia.

The evidence also supports a conclusion that Reyes was part of the conspiracy. Garcia worked with Reyes on two loans—Foster Drive in 2005 and Terra Bella in 2006. Both loans were obtained through fraud and Garcia worked with Reyes on both loan applications. Reyes encouraged Rios to sign the falsified loan application. The existence of a conspiracy may be *inferred* from the conduct, relationships, interests, and activities of the alleged conspirators. (*Cooks, supra*, 141 Cal.App.3d at p. 311.) The evidence supports the inference that Reyes and Garcia were working together on a limited number of transactions in order to carry out a fraudulent scheme.

Corroboration of Testimony

In addition to her challenge to the sufficiency of the evidence of counts 25 and 26, Garcia contends these convictions cannot be upheld because they were based on legally insufficient evidence, namely, the testimony of Rios, an accomplice, and her testimony was uncorroborated. Not so.

Section 1111 provides that a defendant cannot be convicted of an offense based upon the testimony of an accomplice unless there is corroborating evidence that tends to connect the defendant to the crime. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128.) The corroborating evidence need not establish every element of the offense, but it must be evidence that tends to connect the defendant to the crime charged independent of the testimony of the accomplice. (*Ibid.*)

Here, there was independent evidence, separate from Rios's testimony, that connected Garcia to the offenses. First, there was Garcia's admission to Johnson that she had six months worth of Rios's bank statements. This admission corroborated Rios's

testimony that she provided these bank statements to Garcia. Garcia's possession of the bank statements also established she knew the true state of Rios's finances and that the financial information set forth in the August 22, 2006, loan application was false. Despite having knowledge of the falsity of the financial information, Garcia signed the August 2006 application. This same false financial information was stated in the September 2006 application. The written loan applications established Garcia made false statements and thus connected her to the conspiracy by establishing her participation in making false financial statements in furtherance of the conspiracy.

VI. Count 15—Vagueness

Garcia contends that even if the evidence was sufficient to sustain the count 15 conviction, the conviction should be overturned because the statutes, Government Code sections 8227.1 and 8227.3, are unconstitutionally vague as applied. She asserts a person cannot reasonably be expected to know what acts constitute "purporting to act as a notary public" in relation to documents affecting title to single-family residences because the acts that constitute a violation of the statute are not specified.

The applicable principles are well established. "[A]ll 'presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears. [Citations.]" (*People v. Ramirez* (1997) 55 Cal.App.4th 47, 54.) Furthermore, "[it] is equally well settled that the person attacking the statute bears the burden of demonstrating its invalidity" (*Ibid.*)

The "vagueness doctrine bars enforcement of 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" (*United States v. Lanier* (1997) 520 U.S. 259, 266.) Only reasonable certainty is required. "We are unconcerned that the statute may be difficult to apply. A difficult standard does not make

a statute unconstitutionally vague. [Citation.] ‘[Statutes] are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language.’ [Citations.]” (*People v. Rodriquez* (1975) 50 Cal.App.3d 389, 399, fn. omitted.) “If an accused can reasonably understand by the terms of the statute that his conduct is prohibited, the statute is not vague. [Citation.] In determining the sufficiency of the notice, a statute must of necessity be examined in the light of the conduct with which the defendant is charged [citation].” (*People v. Anderson* (1972) 29 Cal.App.3d 551, 561.)

“It is impossible, given the complexities of our language and the variability of human conduct, to achieve perfect clarity in criminal statutes. Reasonable specificity exists if the statutory language ‘conveys sufficiently definite warning as to the proscribed conduct when measured by common understandings and practices.’ [Citations.]” (*People v. Basuta* (2001) 94 Cal.App.4th 370, 397.) “[S]tatutes are not automatically invalidated as impermissibly vague simply because difficulty is found in determining whether certain marginal offenses fall within their language. [Citation.]’ [Citation.]” (*People v. Serrano* (1992) 11 Cal.App.4th 1672, 1675-1676.) Moreover, “[O]ffenders cannot complain of the vagueness of a statute if the conduct with which they are charged falls clearly within its bounds [citation].’ [Citation.]” (*People v. Ballard* (1988) 203 Cal.App.3d 311, 317.)

Here, Garcia cannot complain the statute is vague because her conduct fell squarely within proscribed conduct. She introduced herself as a notary when she went to Stockton to obtain signatures; she took Velazquez’s thumbprint in the notary journal; and she directed Velazquez to sign the notary journal. She also admitted at trial that she “basically performed all the essential services of a notary” while in Stockton at Velazquez’s home. Because she was not a licensed notary, her performance of essentially all the services of a notary in conjunction with the Foster Drive documents places her squarely within the confines of actions proscribed by Government Code

sections 8227.1 and 8227.3. Thus, her vagueness challenge fails. (*People v. Murphy* (2001) 25 Cal.4th 136, 149.)

VI. *Williamson* Rule Claims

Garcia contends she improperly was charged and convicted of the offenses set forth in counts 16, 20, 21, 22, and 23 because the criminal acts should have been charged as misdemeanors under Government Code section 8225. We disagree.

Both Garcia and the People focus their arguments on what is referred to as the *Williamson* rule. Generally stated,

“Under the *Williamson* rule, if a general statute includes the same conduct as a specific statute, the court infers that the Legislature intended that conduct to be prosecuted exclusively under the special statute. In effect, the special statute is interpreted as creating an exception to the general statute for conduct that otherwise could be prosecuted under either statute. [Citation.]” (*Murphy, supra*, 52 Cal.4th at p. 86; see also *Williamson, supra*, 43 Cal.2d at p. 654.)

In the absence of some indication from the Legislature of contrary intent, the *Williamson* rule applies whenever it appears that a violation of the special statute will necessarily or commonly result in a violation of the general statute. (*Murphy, supra*, 52 Cal.4th at p. 87.) *Williamson* rule issues typically arise where the special statute is a misdemeanor, but the general statute charges a felony. (*Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1250, fn. 14 (*Mitchell*).

Here, neither party has focused on the expression of legislative intent set forth in Government Code section 8225, subdivision (c), which states: “The penalty provided by this section is not an exclusive remedy, and does not affect any other relief or remedy provided by law.” This is a direct indication from the Legislature that Government Code section 8225 is not the exclusive remedy for conduct covered by that statute, which is sufficient to remove the statute from application of the *Williamson* rule, assuming *arguendo* the rule applied to the charges set forth in counts 16, 20, 21, 22, and 23.

The language currently embodied in subdivision (c) of Government Code section 8225 was first adopted in Statutes 2005, chapter 295, section 3, with an operative date of January 1, 2006. As originally adopted, it was subdivision (b) and later redesignated as subdivision (c) when the statute again was amended by Statutes 2007, chapter 399, section 17. The indictment charging Garcia with these offenses was not filed until September 2, 2008, long after this provision was added to Government Code section 8225.

A statute's legislative history and the wider historical circumstances of its enactment may be considered in ascertaining legislative intent and are proper matters for our consideration. (*People v. Peña* (1999) 74 Cal.App.4th 1078, 1082.) Government Code section 8225, according to legislative history, is directed at holding notaries public criminally liable, as a misdemeanor, for failing to perform ministerial acts properly, such as maintaining a sequential journal and properly securing the journal and notarial seal. (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 361 (2005-2006 Reg. Sess.) as amended June 28, 2005, p. 2.) The enrolled bill report for the 2005 amendment noted, "Current law provides appropriate civil penalties and criminal punishment for notaries who fail to fulfill their responsibility fully and faithfully or knowingly commit notarial acts with intent to defraud in relation to real property. This action is treated as a felony crime." (State and Consumer Services Agency, Enrolled Bill Rep. on Assem. Bill No. 361 (2005-2006 Reg. Sess.) Sept. 8, 2005, p. 4.) This statement reflects the Legislature's intent that those offenses committed with intent to defraud and involving real property be prosecuted as felonies. It also reflects the Legislature's belief that this was the state of the law *prior* to adoption of the 2005 amendment.

If Garcia argues the 2005 amendment to Government Code section 8225 cannot be applied to her because the acts charged in counts 16, 20, 21, 22, and 23 occurred in 2005, after enactment of the amendment to the statute, but before the amendment became operative January 1, 2006, we reject her claim of a violation of the *Williamson* rule.

In 2005 Government Code section 8225 prohibited any person from soliciting, coercing, or influencing a notary public to perform an improper notarial act. (Stats. 1977, ch. 1009, § 31, p. 3041.) By contrast, Government Code section 8214.2, as charged in count 16, Penal Code section 115, subdivision (a), as charged in counts 21 through 23, and Penal Code section 470, subdivision (c), as charged in count 20, addressed different specific conduct.

In count 16 Garcia was charged with aiding and abetting a violation of Government Code section 8214.2. This code section applies to notarial acts performed knowingly and willfully with the intent to defraud in relation to deeds of trust for single-family residential property containing not more than four units. Government Code section 8214.2 is the more specific when compared to Government Code section 8225, which applies generally to any person who influences a notary public to perform an improper notarial act. Government Code section 8225 does not require an intent to defraud and applies to a more general range of notarial acts. Government Code section 8214.2 applies to deeds of trust for specific types of property and acts taken with the intent to defraud. The *Williamson* rule, therefore, is inapplicable to this count. (*Murphy, supra*, 52 Cal.4th at p. 86.)

In count 20 Garcia was convicted as an aider and abettor of forgery. Clearly, Government Code section 8225 and Penal Code section 470 contemplate different offenses and address different conduct. Government Code section 8225 does not address forgery; that offense is addressed in Penal Code section 470. Garcia's conduct went beyond soliciting McKay-Garcia to engage in an improper notarial act. She aided and abetted forgery.

In 2005, when amendments to section 470 were being considered by the Legislature, the Senate analysis noted, "This bill *clarifies* that the crime of forgery includes falsifying an acknowledgement of a notary." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 361 (2005-2006 Reg. Sess.) as

amended June 28, 2005, p. 1, italics added.) We view this statement as a clarification of legislative intent that acts constituting forgery, including falsifying an acknowledgement of a notary, were to be prosecuted under section 470 both before and after the 2005 amendments.

Garcia's reliance on *People v. Woods* (1986) 177 Cal.App.3d 327, 332-334 for the proposition the forgery conviction must be reversed is misplaced. In *Woods* the defendant helped his wife cash forged welfare checks and was convicted of aiding and abetting forgery. He argued his conviction had to be set aside because his actions were governed by a specific Welfare and Institutions Code statute prohibiting obtaining aid by means of a false statement or representation or other fraudulent device. The appellate court agreed with the defendant that the more specific Welfare and Institutions Code section applied. (*Woods*, at p. 333.)

Here, Government Code section 8225 does not specifically address forgery. It addresses only the unlawful act of soliciting a notary public to commit an unlawful act. It does not address the criminal conduct that might occur after the initial solicitation of the improper act. The elements of Penal Code section 470 and Government Code section 8225 are distinct and a violation of the Government Code section does not necessarily result in a violation of Penal Code section 470. (Gov. Code, § 8225; Pen. Code, § 470.) Consequently, the *Williamson* rule is inapplicable to this count. (*Mitchell, supra*, 49 Cal.3d at p. 1250, fn. 14.)

The remaining three counts, 21, 22, and 23, are convictions for violating section 115, filing a false or forged instrument. Government Code section 8225 was not intended to address criminal acts that were covered by Penal Code section 115. Government Code section 8225 initially was adopted in 1977. It consisted of what is currently subdivision (a) of that code section. (Stats. 1977, ch. 1009, § 1, p. 3041.) In 1984 section 115 was amended to provide that each act of procuring or of offering a forged or false instrument to be recorded shall be considered a separately punishable offense. (Stats. 1984, ch. 593,

§ 1, pp. 2278-2279; *id.*, ch. 1397, § 8.) This amendment was enacted as part of several statutory provisions directed at strengthening the penalties for fraudulent recording of forged deeds of trust and other title documents affecting residential property and to protect consumers injured by a notary public's wrongdoing. (Assem. Com. on Judiciary, Rep. on Assem. Bill No. 2238 (1983-1984 Reg. Sess.) as amended Apr. 23, 1984, p. 2.)

When ascertaining the intent of the Legislature in enacting a statutory provision, we must consider the provision in the context of the entire statutory scheme. (*In re Jennings* (2004) 34 Cal.4th 254, 263.) The legislative history of section 115 indicates the Legislature intended it to be the vehicle for punishing those who procured or offered for filing forged or fraudulent instruments affecting title to residential real property. And, if there were any question as to whether Penal Code section 115 or Government Code section 8225 was the controlling statute for punishment of the wrongful acts, Penal Code section 115, as the later enacted modified provision, would control under general principles of statutory construction. (*May v. City of Milpitas* (2013) 217 Cal.App.4th 1307, 1337.)

Moreover, Penal Code section 115 requires that a false or forged instrument be offered for filing, which is more culpable conduct than soliciting a notary to perform an improper act as provided in Government Code section 8225. The goal of Penal Code section 115 is to protect the integrity of public records. (*Feinberg, supra*, 51 Cal.App.4th at p. 1579; *Bell, supra*, 45 Cal.App.4th at p. 1061.) Government Code section 8225 prohibits soliciting improper acts by a notary public, but improper acts may have nothing to do with false or forged recordable documents. An improper act may be failure to maintain a sequential journal. Thus, a violation of Government Code section 8225 would not necessarily, or ordinarily, result in a violation of Penal Code section 115. Consequently, the *Williamson* rule does not apply to these counts. (*Murphy, supra*, 52 Cal.4th at pp. 86-87.)

VIII. Counsel's Representation

Garcia makes three challenges to her convictions as a result of the representation she received at trial.

She first maintains the trial court erred in ruling on her *Marsden* motion when it appointed conflict counsel, rather than granting or denying the motion. The People concede this issue and ask that the case be remanded with directions to hold a *Marsden* hearing.

Garcia also argues that conflict counsel rendered ineffective assistance by failing to file a motion for new trial. The People contend this argument is moot because the trial court erred in appointing conflict counsel and the matter should be remanded for a proper *Marsden* hearing.

Lastly, Garcia criticizes defense counsel's performance at sentencing and seeks appointment of new counsel on remand. The People contend this claim also is moot and should be addressed in the trial court through a *Marsden* hearing after remand.

Marsden Motion

Garcia wrote a letter, which was included as part of the probation report, contending she had not received a fair trial because defense counsel was ineffective. In part, Garcia asserted defense counsel did not call numerous witnesses that would have aided the defense, and defense counsel did not understand the intricacies of the case because he did not understand real estate financing. When the trial court questioned Garcia about the letter, she indicated she wanted new counsel before proceeding to sentencing. Defense counsel stated, "That's fine, just as long as I'm totally relieved from this case." The trial court responded, "Not at this point... I'm not making any decisions on that now."

At the start of the next hearing on October 29, 2010, the trial court stated it considered the letter to be a request for a *Marsden* hearing. Instead of ruling on the *Marsden* motion, however, the trial court appointed "separate counsel," also referred to

as conflict counsel, and continued the hearing. At the next hearing in February 2011, conflict counsel informed the trial court there was no basis for filing a motion for new trial, but that Garcia disagreed with this conclusion.

As the People concede, the appointment of conflict counsel to evaluate a claim of ineffective assistance is error. We base this conclusion on our Supreme Court's decisions in *Marsden* and *People v. Sanchez* (2011) 53 Cal.4th 80.

As the court explained in *Sanchez*, "In California, the 'seminal case regarding the appointment of substitute counsel is *Marsden, supra*, 2 Cal.3d 118, which gave birth to the term of art, a "*Marsden* motion'" [Citation.] [¶] ... [¶] We recognized [in *Marsden*] that 'criminal defendants are entitled under the Constitution to the assistance of court-appointed counsel if they are unable to employ private counsel.' [Citation.] We explained that 'the decision whether to permit a defendant to discharge his appointed counsel and substitute another attorney during the trial is within the discretion of the trial court,' that 'a defendant has no absolute right to more than one appointed attorney,' and that a trial court is not bound to accede to a request for substitute counsel unless the defendant makes a "'sufficient showing ... *that the right to the assistance of counsel would be substantially impaired*'" if the original attorney continued to represent the defendant. [Citation.]" (*People v. Sanchez, supra*, 53 Cal.4th at pp. 86-87, italics added.)

In *Sanchez*, at the sentencing hearing, the defendant's deputy public defender told the trial court that the defendant "'wished to have the Public Defender explore having his plea withdrawn.'" (*People v. Sanchez, supra*, 53 Cal.4th at p. 85.) The trial court asked if this was something counsel could do or whether the court had to appoint "'conflict counsel.'" (*Ibid.*) The deputy public defender responded "'conflict counsel cannot be appointed'" until the trial court held a *Marsden* hearing and declared a conflict. (*Sanchez*, at p. 85.) At the next hearing, the trial court appointed "'conflict counsel for the sole purpose of looking into the motion to withdraw [defendant's] plea.'" (*Ibid.*) When conflict counsel reported that he found no basis for such a motion, the trial court

confirmed the public defender's continued representation of the defendant and proceeded with sentencing. (*Id.* at p. 86.)

The Court of Appeal reversed, finding *Marsden* error. (*People v. Sanchez, supra*, 53 Cal.4th at p. 86.) The Supreme Court affirmed the appellate court's judgment. (*Id.* at p. 93.) The court held that the trial court erred in multiple respects, including "by appointing substitute counsel without a sufficient showing that failure to appoint substitute counsel would substantially impair or deny defendant's right to assistance of counsel" (*Id.* at p. 92.) The holding can be stated simply as either there is a conflict and new counsel is appointed for all purposes or there is no conflict and new counsel is not appointed at all.

The trial court here made the same error. The trial court appointed conflict counsel, but there is nothing in the record indicating the trial court did so by determining such appointment was "necessary under the *Marsden* standard," that is, the record does not show that the trial court determined "in the exercise of its discretion ... that [the accused] has shown that a failure to replace the appointed attorney would substantially impair the right to assistance of counsel." (*People v. Sanchez, supra*, 53 Cal.4th at p. 89.) The record here shows the opposite. The trial court declined to hold a full *Marsden* hearing and assess Garcia's claims of ineffective assistance, instead choosing to appoint conflict counsel.

Hence, we will remand the case and direct the trial court to conduct a full *Marsden* hearing.

Moot Issues

We decline to address Garcia's claim that conflict counsel was ineffective for failing to file a motion for new trial. We also decline to address Garcia's contention she received ineffective assistance of counsel at sentencing, and her request that this court direct appointment of new counsel on remand.

There first must be a properly conducted *Marsden* hearing where Garcia's claims of ineffective assistance are fully aired and considered. Until this is done, appointment of new counsel is premature. And, in this opinion, we address sentencing issues she has raised and our conclusions necessitate a modification of the sentence. If, in light of our conclusions, Garcia still wishes to raise issues of ineffective assistance of counsel at sentencing, she may do so at the *Marsden* hearing after remand.

Any other issues Garcia wishes to raise concerning defense counsel's representation during trial and sentencing should be addressed at a *Marsden* hearing on remand.

IX. Sentencing Issues

Garcia contends the trial court's imposition of an 11-year term of probation is an unauthorized sentence. She claims this exceeded the statutory maximum under section 1203.1, subdivision (a) because 11 years is in excess of the maximum possible sentence for her crimes, after application of the principles of section 654.

Garcia argues that all 11 convictions (counts 10, 12, 15, 16, 17, 18, 19, 20, 21, 22, and 23) arising out of the second Foster Drive sale from Rios and Sanchez to Velazquez and Ramirez were based on acts committed as part of a single real estate transaction, thus section 654 applies to stay punishment. But she concedes that section 654 does not operate to stay punishment on counts 21, 22, and 23, even though those counts arise out of the second Foster Drive transaction, because of the provisions of section 115, subdivision (d).

Garcia also contends counts 25 and 26 relate to the same act and section 654 should apply to stay imposition of punishment of one count. She also asks this court to remand her case for resentencing.

The People concede the convictions represented by counts 12, 17, 18, and 19 should be reversed, and, consequently, the case should be remanded for resentencing. The People also concede any punishment imposed for count 26 should be stayed pursuant

to section 654. The People disagree with Garcia as to the application of section 654 to the remaining convictions.

We accept the People's concession as to the application of section 654 to count 26. We also accept Garcia's concession that it does not apply to stay punishment on counts 21, 22, and 23.

Section 654 provides, in pertinent part,

“An act or omission that is punishable in different ways by different provisions of [the Penal Code] shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.”

The case of *Neal v. State of California* (1960) 55 Cal.2d 11 stands for the proposition that “Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.” (*Id.* at p. 19.)

If, however, a defendant harbors multiple criminal objectives, he or she may be punished for the independent violations committed in pursuit of each objective even though they are part of an indivisible course of conduct. (*People v. McGuire* (1993) 14 Cal.App.4th 687, 698.) Furthermore, when a substantive offense is stayed pursuant to section 654, any accompanying enhancement to that offense also must be stayed. (*People v. Bracamonte* (2003) 106 Cal.App.4th 704, 709.) In addition, imposition of a concurrent sentence violates section 654's prohibition against multiple punishments. (*People v. Deloza* (1998) 18 Cal.4th 585, 592.) Finally, when both the conspiracy and the substantive offense are part of an indivisible course of conduct, and the conspiracy has no objective other than the substantive offense, section 654 precludes the imposition of punishment on both counts. (*In re Cruz* (1966) 64 Cal.2d 178, 180-181; *People v. Cavanaugh* (1983) 147 Cal.App.3d 1178, 1181-1183.)

The determination of “whether the facts and circumstances reveal a single intent and objective within the meaning of section 654 is generally a factual matter” (*People v. Perez* (1979) 23 Cal.3d 545, 552, fn. 5.) In light of our conclusion that four convictions must be reversed, the matter will have to be remanded for resentencing. On remand, the trial court shall address and make findings as to the application of section 654 to counts 10, 15, 16, and 20.

X. No Cumulative Prejudice During Trial

We are reversing the convictions for which there was insufficient evidence, remanding for the trial court to conduct a proper *Marsden* hearing and directing that a new sentencing and restitution hearing be held. There is no cumulative prejudice from which we have not otherwise afforded relief. We conclude that the record fails to show cumulative prejudice warranting reversal of all the convictions on appeal. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1344.)

XI. Restitution

Garcia argues that if any of her convictions are reversed, or the judgment is vacated because of *Marsden* error, the restitution order must be vacated as well. The People agree that if any of Garcia’s convictions are reversed or the judgment modified, the matter should be remanded for the trial court to reconsider the restitution order. Because we have determined that counts 12, 17, 18, and 19 must be reversed, and the trial court must conduct a proper *Marsden* hearing, the restitution order will need to be vacated and a new restitution hearing held on remand.

We, however, will address two issues. The first is Garcia’s contention that Velazquez was a coconspirator or otherwise not entitled to restitution. The second is Garcia’s claim that her actions did not proximately cause any harm to Velazquez.

Velazquez as Coconspirator

Garcia claims Velazquez committed “felony mortgage fraud under both federal law and California state law” and therefore is not entitled to restitution. Garcia never

raised this contention in the trial court and it is thus forfeited. (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590.) Regardless, we reject the claim.

Velazquez was not charged as a coconspirator with Garcia and Reyes and we are unaware, and Garcia has not provided evidence, of any charges being brought against Velazquez regarding the transactions. Velazquez was persuaded by Reyes and Garcia to take out a \$440,000 loan to purchase real property, the true value of which was only \$263,500. Velazquez, who did not speak or read English, testified he was unaware the loan applications contained false information and that he had not provided Garcia with the false information in the applications. Garcia and Reyes each received substantial commissions as a result of this transaction and had no liability on the loan. Velazquez received nothing except extensive debt and fraudulently valued real property.

The cases cited by Garcia in support of her contention are inapposite. In *U.S. v. Reifler* (2d Cir. 2006) 446 F.3d 65, Reifler and a codefendant were both convicted of a number of crimes around a scheme to bribe union officials. Reifler was ordered to pay restitution to his codefendant. On appeal, the restitution order was reversed, as the codefendant had been convicted of engaging in the criminal scheme. (*Id.* at pp. 70, 127.) In *United States v. Lazarenko* (9th Cir. 2010) 624 F.3d 1247, a restitution order was overturned because the defendant had been ordered to pay restitution to a primary coconspirator that had been named in the indictment and had willingly and knowingly participated in the conspiracy. (*Id.* at pp. 1251-1252.)

The case of *United States v. Lazar* (D. Mass. 2011) 770 F.Supp.2d 447 also is inapposite. In *Lazar*, victims of a mortgage fraud scheme were not entitled to restitution because they knew the defendant intended to profit by taking a cut of the mortgage proceeds; they knew the defendant had made numerous false statements in order to obtain the mortgage; and they knew the settlement statement falsely stated the proceeds they had received. (*Id.* at pp. 451-452.) Moreover, under the federal statute, restitution was designed to be penal in nature and not compensatory. (*Id.* at p. 450.)

To the extent Garcia is arguing Velazquez suffered loss as a result of his own negligence, the doctrine of comparative negligence is not available to reduce restitution in this case. Where a defendant, such as Garcia, has committed an intentional crime, there is no application of comparative negligence principles to restitution. (*People v. Millard* (2009) 175 Cal.App.4th 7, 41-42.)

There also is no evidence supporting Garcia's contention that Velazquez should be denied restitution under the doctrine of in pari delicto. Velazquez and Garcia were not coconspirators or equally culpable in the wrongdoing and Velazquez testified he did not knowingly participate in any fraud. Velazquez, who did not speak or read English, testified he was unaware the loan applications contained false information and he had not provided Garcia with the false information in the applications. The evidence at trial supported a conclusion Garcia and Reyes took advantage of Velazquez and he was a victim of their fraud.

Causal Relationship

We also reject Garcia's claim that restitution should not be based on any of counts 10, 15, 16, 20, 21, 22, or 23 because none of these offenses bears a causal relationship to Velazquez's damages.

We again note that Garcia has forfeited this contention for failure to raise it in the trial court. We reject it on the merits as well.

Velazquez testified he did not sign the deed of trust for the Foster Drive property. Garcia's convictions were for impersonating a notary, knowingly performing a notarial act on a false or forged deed, forgery, perjury by declaration, and filing a false or forged instrument. All these acts combined contributed to Velazquez's damages. (*People v. Holmberg* (2011) 195 Cal.App.4th 1310, 1322.) But for all these actions by Garcia, the Foster Drive transaction with Velazquez could not have been completed, no deed of trust could have been filed, and the loan could not have been funded.

The amount of restitution and to whom it is payable shall be determined by the trial court in light of Garcia's convictions and the sentence imposed on remand. (*People v. Goulart* (1990) 224 Cal.App.3d 71, 79.)

XII. Reassignment on Remand

Garcia argues the matter should be remanded to the trial court but assigned to another judge, as she contends the trial judge expressed impermissible judicial animus toward her, failed to exercise independent judicial discretion at the sentencing hearing, and failed to afford her adequate due process at a restitution hearing.

Garcia's request is made pursuant to Code of Civil Procedure section 170.1. Such requests are determined by the provisions of Code of Civil Procedure section 170.3, which Garcia did not use. So, for her to be entitled to any relief, we must determine from the record that the trial judge must be disqualified as a matter of law. Essentially, we must find Garcia's due process rights were violated by the actions of the trial judge or that continued participation by the trial judge will damage a reasonable person's perception of impartiality.

Garcia's claims regarding the independent exercise of judicial discretion at sentencing are that the trial judge failed to agree the evidence was insufficient to support the convictions on counts 17, 18, and 19, deferred to the probation officer's recommendation, and erred by appointing conflict counsel and not conducting a *Marsden* hearing. Erroneous rulings, without more, do not justify removal of a trial judge from hearing further proceedings in the case. (*Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 59.)

Garcia also contends the trial judge made inappropriate remarks at sentencing that reflected judicial bias or animus "toward the mortgage financing system of the mid-2000s and its participants." The trial judge made comments, such as, "And that's what was happening, apparently, is everybody was on the take, so to speak, from the real estate agent to the loan officer to everybody was making so much money, nobody wanted this

scam to end” The trial judge also stated that he “vividly remember[ed] the testimony in this case and was shocked ... those people in the real estate industry, the whole thing had gone mad.” The trial judge also stated, “[W]hy was there a need for loan officers,” “[o]ther than making money, and a lot of money,” and “nobody checked how much anybody earned,” followed by “any reasonable person from the outside would have said this is crazy.”

Garcia expresses outrage over these comments by the trial judge. These comments, however, were fair observations on the evidence presented at trial and an accurate description of the real estate market in which Garcia operated and carried out her criminal acts. Expressions of opinion by the trial judge based on the evidence presented at trial and observations of witnesses in the courtroom do not demonstrate a bias toward a defendant. (*People v. Superior Court (Dorsey)* (1996) 50 Cal.App.4th 1216, 1231.)

We also reject Garcia’s contention that the trial judge’s comments undermined her ability to establish mitigation at sentencing. The trial judge noted he had considered the letters submitted by Garcia from her colleagues. But the trial judge was troubled that many of these letters condoned Garcia’s unlawful behavior on the grounds “everybody was doing it.” It was fair for the trial judge to determine, in his discretion, that unlawful behavior by others did not excuse or mitigate Garcia’s criminal conduct. The trial judge otherwise considered the evidence Garcia offered in mitigation.

Garcia has not carried her burden of proving a due process violation, and we see nothing in the record to convince us the trial judge could not be fair and impartial. We will not disqualify the trial judge.

DISPOSITION

Counts 12, 17, 18, and 19 and any enhancements appended thereto are reversed. The judgment is vacated and the matter is remanded to the trial court to conduct a full *Marsden* hearing. If the trial court grants the motion, the matter shall proceed

accordingly. If the motion is denied, the trial court shall conduct a resentencing hearing and a new restitution hearing in conformance with this opinion and enter a new judgment.

CORNELL, Acting P.J.

WE CONCUR:

FRANSON, J.

CHITTICK, J.*

* Judge of the Fresno Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.