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CERTIFIED FOR PARTIAL PUBLICATION*

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. LISA MARIE MITCHELL, Defendant and Appellant.	C052649 (Super. Ct. Nos. 04F9309, 02F9882)

APPEAL from a judgment of the Superior Court of Shasta County, Bradley L. Boeckman, Judge. Reversed with directions.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Charles A. French, Supervising Deputy Attorney General, and Angelo S. Edralin, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of Parts I, II, V, VI, and X through XVI of the Discussion.

Following her three-month employment as a caregiver for Billy C., an elderly and dependent adult, defendant used blank checks, credit cards and identifying information unlawfully taken from Billy to obtain cash, purchase automobiles and acquire other merchandise. She was convicted of 51 offenses, including 22 counts of forgery (Pen. Code, § 470, subd. (d)), four counts of receiving stolen property (*id.,* § 496), three counts of wrongful use of personal identifying information (*id.,* § 530.5), and various drug-related offenses. (Further undesignated section references are to the Penal Code.) Sentenced to an aggregate, unstayed term of 24 years in state prison, defendant appeals, raising 18 separate claims of error, some with subparts. We reject nearly all of these contentions. However, because we agree with a few, we shall reverse her conviction in part.

FACTS AND PROCEEDINGS

For the most part, the facts in this matter are undisputed. In August 2004, William C. hired defendant to work as a caregiver for his father, Billy C., who was 80 years old and not in good health.

At the time, William C. handled his father's financial affairs. Billy C. had two bank accounts: a Cash Maximizer Account, from which money could be withdrawn only a few times each month; and a Senior Checking Account. Payments received by Billy were deposited in his Senior Checking Account. William kept a book of checks for Billy's Senior Checking Account and

paid Billy's expenses using those checks. Other checks for the Senior Checking Account were kept in a box under a desk next to Billy's bed. Also kept in that box were various active credit cards assigned to either Billy or his deceased wife, Barbara C. Billy's wallet with identifying information was kept in a dresser drawer in his bedroom. Various holiday ornaments and decorations were kept in the garage.

Defendant cared for Billy five days a week, living at the home during those days. Another caregiver, Jean M., cared for Billy the other two days. When defendant was not staying at Billy's home, she resided with her sister.

In November 2004, William received a call from Jean M. informing him that defendant was on her way to Billy's home to make the bed. William thought this was unusual because by that time Billy was already in bed asleep. He drove over to Billy's house and found defendant and Jean M. there arguing. William told defendant she was not going to wake Billy up to make his bed and defendant departed.

The next day, defendant called William and asked if she still had her job. William said he would get back to her on it.

On November 28, defendant came into Bailey Motors and selected a 1994 Honda Accord to purchase. However, because the radio did not work, she did not complete the purchase at that time. The same day, defendant went to Attainable Auto and looked at a 1992 Honda Civic.

The next day, November 29, $10,000 was transferred from Billy's Cash Maximizer Account to his Senior Checking Account

via a telephone transaction. According to a bank representative, a person can transfer funds from one account to another over the phone if he or she has the last four digits of the account holder's social security number.

Also on November 29, defendant returned to Attainable Auto and told the dealer her grandparents were giving her $5,000 to buy a car. The dealer told her the exact amount for the car out the door. Later that evening, around 5:30 or 6:00 p.m., defendant returned with a check drawn on Billy's Senior Checking Account and bought the car. The check was already filled out and signed, although defendant may have filled in the name of the dealership on the check after she arrived. The dealer did not try to verify the check with the bank because the bank was closed. The check was eventually dishonored.

Between 6:00 and 7:00 p.m. that evening, defendant returned to Bailey Motors and, because the radio had been fixed, bought the Honda Accord she had looked at the day before. At the time, defendant told the dealer her grandfather was buying the car for her but was too sick to come in himself. Defendant paid for the car with a check written on Billy's Senior Checking Account. The check was eventually dishonored by the bank.

On November 30, $8,000 was transferred by telephone from Billy's Cash Maximizer Account to his Senior Checking Account.

On November 30, between 1:00 and 1:30 p.m., defendant walked into a Bank of America branch and attempted to cash a check for $400 written on Billy's Senior Checking Account. However, the signature on the check did not match what was on

file for the account and the teller called William C. William told her the check was no good and to call the police. When the teller went to speak with her assistant manager, she saw that defendant had left.

Also on November 30, defendant purchased a 2000 Dodge Stratus from All Star Motors. She had earlier asked for the price of the car out the door and arrived with a check on Billy's Senior Checking Account already filled out. Defendant told the dealer her grandmother was buying the car for her. The check was eventually dishonored.

Sometime in December, Robyn G. purchased a 2000 Dodge Stratus from defendant for $3,000. Later, Robyn heard a report that the car had been stolen and turned it over to the police.

On December 9, Mellony S. purchased a 1992 Honda Civic from defendant for $1,500. However, when Mellony tried to register the vehicle at the Department of Motor Vehicles, she was arrested, because the car had been reported stolen.

At 7:20 p.m. on December 9, defendant entered a Mervyn's store and used Barbara C.'s Mervyn's credit card to purchase merchandise. She signed Barbara C.'s name to the charge receipt.

On December 10, defendant used Barbara C.'s J.C. Penney credit card to purchase $750 in gift certificates.

On December 14, defendant purchased a 1996 Mitsubishi Eclipse from R&R Sales for $9,000. Defendant told the dealer at the time that her grandfather was buying the car for her and had

given her a check. Defendant filled in the name of the payee on the check. The check was later dishonored.

On December 17, defendant passed four checks on Billy C.'s Senior Checking Account at Wal-Mart to purchase merchandise. The checks were written in the amounts of $150.02, $200, $203.59 and $248.98 and contained the forged signature of Barbara C.

On the evening of December 20, Christine B. asked defendant for a ride home, and she and her boyfriend, Mike M., got into a 1996 Mitsubishi with defendant. At approximately 11:45 p.m., Sergeant Steve Solus of the Redding Police Department observed the Mitsubishi travelling on Interstate Highway 5 and, because it had been reported stolen, attempted to effect a traffic stop. However, instead of stopping, the Mitsubishi sped away, committing various traffic offenses along the way. Solus gave chase.

Solus eventually found the Mitsubishi stopped in a trailer park with the driver's side door open and the driver's seat empty. He found Christine B. and Mike M. still inside the car. However, the driver was never located. In the car, officers found a pouch containing check exchange cards, Wal-Mart receipts, check carbons for Billy C.'s Senior Checking Account, identification cards in the name of Christena D., a Mervyn's credit card in the name of Barbara C., a J.C. Penney credit card in the name of Billy C., Discover credit cards in the name of Barbara C., Bank of America access cards in the name of either Billy or Barbara C., and an altered driver's license in the name of Barbara C. They also found two hypodermic needles, a glass

device for smoking narcotics, and a clear plastic baggie containing methamphetamine.

Defendant had been the care giver for Christena D. between January and March 2004.

On December 23, defendant called Palo Cedro Motors asking about a Ford Mustang on the lot. Defendant asked how much it would cost out the door and said she would come by later to purchase it.

Defendant arrived at the dealership with a check made out to Palo Cedro Motors with the notation "Xmas gift." She sat down with a salesman, Gregory V., to fill out a credit application. Defendant appeared to the salesman to be in a hurry, asking why she needed to fill out a credit application when she was paying cash. Gregory told her it was the dealership's policy that buyers take a test drive, but defendant said she did not want to do so. Gregory insisted, and they went out on a test drive.

Meanwhile, Edward C., the owner of the dealership, called the bank to verify the funds were available. He then called the owner of the bank account and the woman who answered told him to call the police, which he did.

When Gregory and defendant returned from the test drive and started to get out of the car, a police car pulled in behind them. Defendant got back in the car and pulled away. As she did so, she poked Gregory in the side with something he took for a gun and ordered him out of the car. Shortly after leaving the

lot, Gregory opened the car door and rolled out onto the pavement, injuring himself.

The police chased and eventually found the Mustang, but there was nobody inside. They searched the area for about 10 minutes and found defendant lying in a fetal position under a tree. In a purse defendant had with her, officers found hypodermic needles, a narcotics smoking device, methamphetamine, Vicodin, two blank Bank of America checks with the name Billy C. on them, Honda keys, a Nieman-Marcus credit card, and pages of notes with account information on them. They did not find a gun.

Later that night, police officers found a Honda automobile parked one block from Palo Cedro Motors. The keys taken from defendant matched the Honda. Inside the vehicle, the officers found a J.C. Penney gift card in the name of defendant in the amount of $750 with a letter entitling defendant to a gift from Barbara C., a death certificate for Barbara C., multiple check carbons in the name of Barbara C., credit cards and identifications for Billy and Barbara C., and notepaper with account information and passwords on it.

In late November, defendant had given her sister a key and contract for a storage unit. On December 29, the police opened the storage unit using the key defendant had given her sister. Inside, they found holiday ornaments and decorations belonging to Billy C.

Defendant was charged with the following offenses:

Count 1: Carjacking (§ 215, subd. (a); the Ford Mustang taken from Palo Cedro Motors and Gregory V. on December 23).

Count 2: Unlawful driving or taking a motor vehicle (Veh. Code, § 10851, subd. (a); the Ford Mustang taken from Palo Cedro Motors on December 23).

Count 3: Forgery (§ 470, subd. (d); the check passed to Palo Cedro Motors on December 23).

Count 4: Possession of a forged item (§ 475, subd. (b); a blank Bank of America check with Billy C.'s name on it found on December 23).

Count 5: Possession of a forged item (§ 475, subd. (b); a blank Bank of America check with Billy C.'s name on it found on December 23).

Count 6: Possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a); the methamphetamine found on December 23).

Count 7: Transportation of a controlled substance (Health & Saf. Code, § 11379, subd. (a); the methamphetamine found on December 23).

Count 8: Acquiring or retaining possession of an access card with intent to defraud, a misdemeanor (§ 484e, subd. (c); the Neiman-Marcus credit card found on December 23).

Count 9: Unlawful possession of a hypodermic needle, a misdemeanor (Bus. & Prof. Code, § 4140; found on December 23).

Count 10: Unlawful possession of a smoking device (Health & Saf. Code, § 11364; found on December 23).

Count 11: Unlawful driving or taking a motor vehicle (Veh. Code, § 10851, subd. (a); the Mitsubishi driven on December 20).

Count 12: Forgery (§ 470, subd. (d); the check written to R&R Sales on December 20).

Count 13: Evading a pursuing peace officer (Veh. Code, § 2800.2; the chase of the Mitsubishi on December 20).

Count 14: Possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a); the methamphetamine found on December 20).

Count 15: Transportation of a controlled substance (Health & Saf. Code, § 11379, subd. (a); the methamphetamine found on December 20).

Count 16: Unlawful possession of a hypodermic needle, a misdemeanor (Bus. & Prof. Code, § 4140; found on December 20).

Count 17: Receiving stolen property (§ 496, subd. (a); the book of checks found on December 20).

Count 18: Acquiring or retaining possession of an access card with intent to defraud, a misdemeanor (§ 484e, subd. (c); four Bank of America access cards found on December 20).

Count 19: Unlawful use of personal identifying information, a misdemeanor (§ 530.5, subd. (d); Christena D.'s identifying information found on December 20).

Count 20: Unlawful use of personal identifying information, a misdemeanor (§ 530.5, subd. (a); Barbara C.'s identifying information used at Wal-Mart on December 17).

Count 21: Receiving stolen property (§ 496, subd. (a); Barbara C.'s Discover card found on December 20).

Count 22: Unlawful driving or taking a motor vehicle (Veh. Code, § 10851, subd. (a); the 1994 Honda Accord taken from Bailey Motors on November 28).

Count 23: Forgery (§ 470, subd. (d); the check written to Bailey Motors on November 28).

Count 24: Unlawful driving or taking a motor vehicle (Veh. Code, § 10851, subd. (a); the 1992 Honda Civic taken from Attainable Auto on November 29).

Count 25: Forgery (§ 470, subd. (d); the check written to Attainable Auto on November 29).

Count 26: Theft by a caretaker from an elder or dependent adult (§ 368, subd. (e); theft from Billy C. between August 1 and November 30, 2004).

Count 27: Unlawful driving or taking a motor vehicle (Veh. Code, § 10851, subd. (a); the 2000 Dodge Stratus taken from All Star Motors on November 30).

Count 28: Forgery (§ 470, subd. (d); the check written to All Star Motors on November 30).

Count 29: Forgery (§ 470, subd. (d); check No. 5268 written to defendant for $400 on November 30).

Count 30: Forgery (§ 470, subd. (d); check No. 5251 written to defendant for $200 on November 12).

Count 31: Forgery (§ 470, subd. (d); check No. 5252 written to defendant for $200 on November 13).

Count 32: Forgery (§ 470, subd. (d); check No. 5254 written to defendant for $200 on November 15).

Count 33: Forgery (§ 470, subd. (d); check No. 5263 written to defendant for $170 on November 22).

Count 34: Forgery (§ 470, subd. (d); check No. 5264 written to defendant for $170 on November 22).

Count 35: Receiving stolen property (§ 496, subd. (a); the holiday ornaments).

Count 36: Forgery (§ 470, subd. (d); check No. 5260 written to defendant for $170 on November 23).

Count 37: Forgery (§ 470, subd. (d); check No. 416 for $180 cashed at Bank of America on November 23).

Count 38: Forgery (§ 470, subd. (d); check No. 420 for $200 cashed at Bank of America on November 26).

Count 39: Forgery (§ 470, subd. (d); check No. 421 for $180 cashed at Bank of America on November 26).

Count 40: Forgery (§ 470, subd. (d); check No. 423 for $180 cashed at Bank of America on November 27).

Count 41: Forgery (§ 470, subd. (d); check No. 5261 for $180 cashed on November 29).

Count 42: Forgery (§ 470, subd. (d); check No. 5273 for $150.02 passed to Wal-Mart on December 17).

Count 43: Forgery (§ 470, subd. (d); check No. 5274 for $200 passed to Wal-Mart on December 17).

Count 44: Forgery (§ 470, subd. (d); check No. 5275 for $203.59 passed to Wal-Mart on December 17).

Count 45: Forgery (§ 470, subd. (d); check No. 5279 for $248.98 passed to Wal-Mart on December 17).

Count 46: Receiving stolen property (§ 496, subd. (a); the Mervyn's credit card of Barbara C. used on December 9).

Count 47: Unlawful use of personal identifying information, a misdemeanor (§ 530.5, subd. (a); Barbara C.'s identifying information used at Mervyn's on December 9).

Count 48: Second degree burglary (§ 459; entering Mervyn's on December 9 with intent to steal).

Count 49: Forgery (§ 470, subd. (d); signing Barbara C.'s name to the Mervyn's charge receipt on December 9).

Count 50: Signing another's name to an access card or sales slip, a misdemeanor (§ 484f, subd. (b); signing the Mervyn's receipt on December 9).

Count 51: Fraudulent use of an access card (§ 484g); purchase of the gift card from J.C. Penney on December 10).

Defendant was convicted on all counts and, as mentioned above, was sentenced to an aggregate, unstayed term in state prison of 24 years.

DISCUSSION

I

Counts 4 and 5

On counts 4 and 5, defendant was convicted of forgery within the meaning of section 475, subdivision (b). That subdivision reads: "Every person who possesses any blank or unfinished check, note, bank bill, money order, or traveler's check, whether real or fictitious, with the intention of completing the same or the intention of facilitating the

completion of the same, in order to defraud any person, is guilty of forgery." Counts 4 and 5 were based on defendant's possession at the time of her arrest of two blank checks that had been sent to Billy C. by Bank of America.

Defendant contends her conviction on count 5 must be reversed, because she can only be convicted of one violation of section 475, subdivision (b), under the circumstances of this case. The People concede error.

In *People v. Bowie* (1977) 72 Cal.App.3d 143 (*Bowie*), the defendant was convicted of 11 counts of violating section 475 based on his conduct in selling 11 checks of a defunct business to an undercover agent with the intent that the agent fill in the checks and pass them as genuine. (*Id.* at p. 146.) The Court of Appeal concluded there was only one offense under these circumstances, relying on an earlier Court of Appeal decision finding only one violation of a statute prohibiting possession of a concealable firearm where two firearms were found in the defendant's home on a given day. (See *People v. Puppilo* (1929) 100 Cal.App. 559.) Although the statute in *Puppilo* prohibited the possession of a firearm, in the singular, the court explained the singular includes the plural. (*Id.* at p. 563.)

In *Bowie*, the court likewise concluded the use of the singular in section 475 includes the plural and that possession of multiple instruments at the same time with intent to defraud amounts to one offense. (*Bowie*, *supra*, 72 Cal.App.3d at p. 156.) The *Bowie* court also distinguished cases such as *People v. Neder* (1971) 16 Cal.App.3d 846, where the court concluded a

defendant who forged three separate sales slips could be convicted of three counts of forgery under section 470. (*Id.* at pp. 852-853.) In *Neder*, there were three separate forgeries, whereas in *Bowie*, there was a single possession of multiple instruments. (*Bowie*, at p. 157; see also *People v. Carter* (1977) 75 Cal.App.3d 865, 871 [applying the same reasoning to former section 475a, prohibiting the possession of multiple completed checks].)

Under the facts of the instant case, there was a single possession on December 23, 2004, of two blank checks in the name of Billy C. Hence, defendant could be convicted of one count of forgery under section 475, subdivision (b). Her conviction on count 5 must therefore be reversed.

II

Counts 8 and 18

On counts 8 and 18, defendant was convicted of acquiring or retaining possession of an access card with intent to defraud within the meaning of section 484e, subdivision (c). That subdivision reads: "Every person who, with the intent to defraud, acquires or retains possession of an access card without the cardholder's or issuer's consent, with intent to use, sell, or transfer it to a person other than the cardholder or issuer is guilty of petty theft." On count 8, defendant was charged with violating section 484e, subdivision (c), on December 23, 2004, the day she was arrested. The prosecutor argued to the jury that count 8 was based on a Neiman-Marcus

card found in defendant's possession at that time. On count 18, defendant was charged with violating the same offense three days earlier, on December 20. The prosecutor argued count 18 was based on four Bank of America access cards found in the Mitsubishi.

Defendant contends simultaneous possession of more than one access card with intent to defraud constitutes one offense, and the People failed to prove she did not possess the cards that were the subject of counts 8 and 18 at the same time. Defendant argues there was simultaneous possession, because all the cards must have been taken from Billy C. before defendant was fired and, hence, were in her possession by the end of November. According to defendant, the People failed to prove either that she acquired the cards at different times or that she was not in possession of all the cards on December 20.

Assuming simultaneous possession of multiple access cards amounts to one offense under section 484e, subdivision (c), the evidence at trial demonstrated the subject cards were possessed, at least in part, on separate occasions. Regardless of when defendant acquired the access cards, it is undisputed the cards that were the subject of count 18 were confiscated by the police on December 20 and, hence, were not in defendant's possession on December 23, when she possessed the Neiman-Marcus card.

In *People v. Municipal Court (Marandola)* (1979) 97 Cal.App.3d 444, the defendant delivered a total of 15 obscene films to an undercover police officer, eight on one day and seven on the next. (*Id.* at p. 446.) Relying on *Bowie*, the

Court of Appeal concluded the defendant was properly charged with only two offenses, one for each of the two occasions. (*Marandola,* at p. 447.) However, in so doing, the court recognized separate charges may be filed where possession is on separate occasions, regardless of whether all 15 films may have been in the defendant's possession at the time of the first delivery.

On count 18, the People were required to prove defendant had possession of the Bank of America access cards on December 20 with intent to defraud. They satisfied that burden. On count 8, the People were required to prove defendant had possession of the Neiman-Marcus card on December 23 with intent to defraud. They satisfied that burden as well.

Defendant argues all of the cards must have been in her possession on December 20. However, there is no evidence to this effect. Furthermore, defendant does not explain how her possession of all the cards on one occasion would insulate her from prosecution for possession of less than all of the cards on another occasion. Defendant was properly convicted on counts 8 and 18.

III

Counts 20 and 47

On counts 20 and 47, defendant was convicted of unlawful use or transfer of personal identifying information within the meaning of section 530.5, subdivision (a). That subdivision reads: "Every person who willfully obtains personal identifying information . . . of another person, and uses that information

for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person, is guilty of a public offense . . . ."

In count 20, defendant was charged with violating section 530.5, subdivision (a), on or about December 20, 2004. In count 47, she was charged with violating that provision on or about December 9, 2004. In her arguments to the jury, the prosecutor explained count 20 relates to defendant's use of Barbara C.'s driver's license at Wal-Mart on December 17, while count 47 concerns defendant's use of the driver's license at Mervyn's on December 9.

Defendant contends her conviction on count 47 must be reversed, because there was only one unlawful taking of personal identifying information. According to defendant, "[s]ince there was only a single acquisition of the drivers licenses, and her use thereof was motivated by a single plan to use Barbara's identification when passing stolen checks and credit cards to obtain merchandise, [defendant] only committed a single violation of section 530.5, subdivision (a)."

We disagree. In order to violate section 530.5, subdivision (a), a defendant must both (1) obtain personal identifying information, and (2) use that information for an unlawful purpose. (*People v. Tillotson* (2007) 157 Cal.App.4th 517, 533.) Thus, it is the use of the identifying information for an unlawful purpose that completes the crime and each separate use constitutes a new crime.

Defendant cites two cases, *People v. Bailey* (1961) 55 Cal.2d 514 (*Bailey*) and *People v. Robertson* (1959) 167 Cal.App.2d 571 (*Robertson*), for the proposition that where multiple takings are motivated by a single intention and plan, they constitute a single crime. In *Bailey*, the defendant was charged with a single count of grand theft in connection with her fraudulent receipt of multiple welfare payments which, singularly, were below the threshold for grand theft but, in the aggregate, were sufficient. (*Bailey*, at p. 515-516.) The court concluded it was proper to consider the multiple welfare payments as one offense where they were motivated by a single intent and plan. (*Id.* at p. 519.)

In *Robertson*, the defendant was convicted of three counts of grand theft and one count of petit theft stemming from his conduct in obtaining charge accounts at four stores and making multiple purchases on those charge accounts. (*Robertson*, *supra*, 167 Cal.App.2d at pp. 573, 574, 576.) The court concluded it was proper to aggregate the purchases at each store to determine if the offense was grand or petit theft. According to the court: "'[T]he general test as to whether there are separate offenses or one offense is whether the evidence discloses one general intent or discloses separate and distinct intents. The particular facts . . . of each case determine the question. If there is but one intention, one general impulse, and one plan, even though there is a series of transactions, there is but one offense, and this is so whether the theft is accomplished by

larceny or embezzlement.'" (*Id.* at p. 577, quoting from *People v. Howes* (1950) 99 Cal.App.2d 808, 818-819.)

The foregoing cases are distinguishable. The question in each was whether a defendant will be permitted to avoid a charge of grand theft by breaking up his transactions into a series of petit thefts. A defendant might go into a store and buy a large amount of merchandise on a single occasion or spread those purchases out over several days. However, the end result to the merchant is the same. In *Bailey*, the court explained: "Whether a series of wrongful acts constitutes a single offense or multiple offenses depends upon the facts of each case, and a defendant may be properly convicted upon separate counts charging grand theft from the same person if the evidence shows that the offenses are separate and distinct and were not committed pursuant to one intention, one general impulse, and one plan." (*Bailey*, *supra*, 55 Cal.2d at p. 519.)

In deciding whether a defendant commits a series of thefts pursuant to a single intent or plan, we do not use a single, broad objective of stealing property. A defendant who steals from multiple victims over a lengthy crime spree may have a single objective of obtaining as much money or property as possible. However, he has still committed multiple offenses. (See *People v. Ashley* (1954) 42 Cal.2d 246, 273; *People v. Rabe* (1927) 202 Cal. 409, 413; *People v. Barber* (1959) 166 Cal.App.2d 735, 741-742; *People v. Caldwell* (1942) 55 Cal.App.2d 238, 251; *People v. Ellison* (1938) 26 Cal.App.2d 496, 498-499.) As the California Supreme Court explained in *Rabe*, "[w]here the proof

in a given case is sufficient to show the existence of a fraudulent intent or purpose on the part of an accused to obtain property from another by false or fraudulent representations, the making of the first false representations which moved or induced the person to whom they were made to part with his property does not immune the defrauding person from punishment for subsequently obtaining from said person other property which was parted with under the influence of the fraudulent representations which were still operating upon the mind of the defrauded person at the time he passed his property into the hands of said designing person." (*People v. Rabe*, *supra*, 202 Cal. at p. 413.)

By parity of reasoning, a single theft of personal identifying information and use of that information to obtain property will not immunize the thief from prosecution for subsequent uses of the information to obtain other property.

In *People v. Neder* (1971) 16 Cal.App.3d 846 (*Neder*), the defendants used another's credit card to make three separate purchases from the same store. On each purchase, one of the defendants signed a sales slip for the purchase. They were convicted of three counts of forgery. (*Id.* at pp. 849-850.) On appeal, the appellant argued there was only one offense committed within the meaning of *Bailey*, because there was a single intent and plan associated with the three forgeries. The Court of Appeal disagreed, explaining: "In the instant case it is probably true that the forgeries were motivated by a preconceived plan to obtain merchandise from Sears by use of

[the victim's] credit card and by forging sales slips. However, we do not feel that the *Bailey* doctrine should be extended to forgery. That doctrine was developed for the crime of theft to allow, where there is a common plan, the accumulation of receipts from takings, each less than $200, so that the taker may be prosecuted for grand theft as opposed to several petty thefts. The essential act in all types of theft is taking. If a certain amount of money or property has been taken pursuant to one plan, it is most reasonable to consider the whole plan rather than to differentiate each component part. [Citation.] The real essence of the crime of forgery, however, is not concerned with the end, i.e., what is obtained or taken by the forgery; it has to do with the means, i.e., the act of signing the name of another with intent to defraud and without authority, or of falsely making a document, or of uttering the document with intent to defraud. Theft pursuant to a plan can be viewed as a large total taking accomplished by smaller takings. It is difficult to apply an analogous concept to forgery. The designation of a series of forgeries as one forgery would be a confusing fiction." (*Id.* at pp. 852-853, fn. omitted.)

Section 530.5, subdivision (a), is committed each time an offender *uses* personal identifying information for any unlawful purpose. Contrary to defendant's argument, the first such fraudulent use did not immunize her from punishment for subsequent fraudulent uses. Defendant was therefore properly convicted on both counts 20 and 47.

IV

Counts 49 and 50

Defendant contends she could not be convicted on both counts 49 and 50, because they are both premised on the same act of forging Barbara C.'s signature to the Mervyn's charge receipt. Therefore, defendant argues, her conviction on count 50 must be reversed. The People concede error.

On count 49, defendant was convicted of forgery under section 470, subdivision (d), which reads: "Every person who, with the intent to defraud, falsely makes, alters, forges, or counterfeits, utters, publishes, passes or attempts or offers to pass, as true and genuine, any of the following items, knowing the same to be false, altered, forged, or counterfeited, is guilty of forgery: . . . receipt for money or property . . . ." In her argument to the jury, the prosecutor explained that count 49 is based on defendant signing Barbara C.'s name to the Mervyn's charge receipt.

On count 50, defendant was convicted of misdemeanor forgery of an access card transaction within the meaning of section 484f, subdivision (b). That subdivision reads: "A person other than the cardholder or a person authorized by him or her who, with intent to defraud, signs the name of another or of a fictitious person to an access card, sales slip, sales draft, or instrument for the payment of money which evidences an access card transaction, is guilty of forgery." The prosecutor argued count 50 is based on defendant's fraudulent use of Barbara C.'s

Mervyn's credit card. However, inasmuch as section 484f, subdivision (b), prohibits the act of signing the name of another with intent to defraud, this count is necessarily based on defendant signing Barbara C.'s name to the Mervyn's charge receipt as well.

In support of her argument that she could not be convicted on both counts 49 and 50, defendant relies on *People v. Ryan* (2006) 138 Cal.App.4th 360 (*Ryan*). In *Ryan*, the defendant forged a signature on a check and then passed the forged check in order to obtain merchandise. She was convicted under section 470, subdivision (a), for forging the signature and under section 470, subdivision (d), for passing the forged check. (*Id.* at pp. 362-363.) The Court of Appeal concluded she could not be convicted on both counts, because subdivisions (a) and (d) of section 470 are alternate ways of describing the same offense of forgery. The court pointed out that, as originally enacted, section 470 did not have subdivisions, and courts had consistently held there is one crime of forgery and the various acts proscribed by the statute are simply different means of committing the offense. (*Id.* at pp. 364, 366.) According to the court, "[t]he overhaul of section 470 and related provisions was intended to '"make [the] laws governing financial crimes more 'user friendly'"' and '"to clarify and streamline existing law with regard to forgery and credit card fraud."' It was not intended to 'change the meaning or legal significance of the law,' but '"merely [to] organize[] the relevant code sections

into a cohesive and succinct set of laws that can be readily referred to and understood."'" (*Id.* at p. 366.)

Defendant recognizes that counts 49 and 50 alleged violations of different statutes rather than different subdivisions of the same statute. Nevertheless, she argues the two statutes are just alternate ways of committing the single crime of forgery.

We disagree. In *Ryan*, the court made a point of distinguishing cases where the defendant was accused of violating different statutes. (*Ryan*, *supra*, 138 Cal.App.4th at pp. 368-369.) The court explained: "While each statute may represent a different statement of the same offense, it sets out a separate crime, not just--as in the case of section 470--alternate ways in which the *same crime* can be committed. In the case before us, although appellant arguably committed separate acts--signing the checks and then uttering them--she did not, thereby, violate more than one statute, but simply committed acts contained in separate subdivisions of a single statute, all of which were simply different ways of violating the statute." (*Id.* at p. 369.)

In conceding error in this instance, the People rely primarily on *Neder*. As described above, the defendant in *Neder* was charged with three counts of forgery under section 470 stemming from three credit card purchases. (*Neder*, *supra*, 16 Cal.App.3d at pp. 849-850.) The defendant argued he could not be prosecuted under the general forgery statute (§ 470) but instead must be prosecuted under the more specific statute for

credit card forgeries (§ 484f), relying on a line of cases holding that where a general statute and a specific statute cover the same criminal conduct, the defendant can be convicted only of the specific statute. (See *People v. Ruster* (1976) 16 Cal.3d 690, 698-699, disapproved on other grounds in *People v. Jenkins* (1980) 28 Cal.3d 494, 503, fn. 9 [unemployment insurance fraud must be prosecuted under Unemployment Insurance Code section 2102 rather than Penal Code section 470]; *People v. Gilbert* (1969) 1 Cal.3d 475, 479-481 [welfare fraud must be prosecuted under Welfare and Institutions Code section 11482 rather than the general theft statute, Penal Code section 484]; *In re Williamson* (1954) 43 Cal.2d 651, 654 [“‘It is the general rule that where the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment’”]; *People v. Swann* (1963) 213 Cal.App.2d 447, 449 [credit card fraud must be prosecuted under former Penal Code section 484a rather than the more general forgery statute, Penal Code section 470].)

In *Neder*, the court found the foregoing line of cases inapplicable. Those cases were premised on a determination that, where the Legislature enacts a special statute covering the same conduct as a general statute, it must have intended to create an exception to application of the general statute. (See *People v. Jenkins*, *supra*, 28 Cal.3d at pp. 505-506; *People v. Ruster*, *supra*, 16 Cal.3d at p. 699.) However, in *People v.*

Liberto (1969) 274 Cal.App.2d 460, the court pointed out that 1967 amendments to the special credit card forgery statute (former section 484a) demonstrated a legislative intent that prosecution under the general forgery statute (§ 470) is no longer precluded. (See Stats. 1967, ch. 1395, § 8, p. 3260.)

Relying on *Liberto*, the *Neder* court concluded the defendant was properly prosecuted under section 470, rather than section 484f. (*Neder*, *supra*, 16 Cal.App.3d at p. 855.) The court explained: "We agree with *Liberto* that the 1967 enactment, which repealed section 484a, added section 484f, and provided '[t]his act shall not be construed to preclude the applicability of any other provision of the criminal law,' expressed a legislative intent to overcome the judicial interpretation theretofore placed on credit card prosecutions to the effect that a person charged with an offense involving a credit card could not be prosecuted under the general statutes if the People so chose." (*Neder*, *supra*, 16 Cal.App.3d at p. 855, fn. omitted.)

The People read *Neder* to mean a defendant guilty of credit card forgery can be prosecuted *only* under section 470. However, that is not what the court held. The question presented in *Neder* was whether the defendant was properly convicted under section 470, and the Court of Appeal answered that question in the affirmative. However, because the defendant was not also prosecuted under section 484f, there was no occasion to determine whether he could be prosecuted under both provisions.

An accusatory pleading may charge different statements of the same offense. (§ 954.) As a general rule, "a person may be *convicted* of, although not *punished* for, more than one crime arising out of the same act or course of conduct. 'In California, a single act or course of conduct by a defendant can lead to convictions "of *any number* of the offenses charged." [Citations.]' [Citation.]" (*People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227 (*Reed*).)

"A judicially created exception to the general rule permitting multiple convictions 'prohibits multiple convictions based on necessarily included offenses.' [Citation.] '[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.' [Citation.]" (*Reed, supra,* 38 Cal.4th at p. 1227.)

Two tests have traditionally been applied to determine whether one offense is necessarily included within another: the "elements" test and the "accusatory pleading" test. "Under the elements test if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former. Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former." (*Reed, supra,* 38 Cal.4th at pp. 1227-1228.)

In *Reed*, *supra*, 38 Cal.4th at page 1229, the California Supreme Court concluded only the elements test may be applied in determining whether multiple convictions are permitted.

Thus, the question in the present matter is whether section 484f, subdivision (b), the lesser misdemeanor offense charged in count 50, is a necessarily included offense of section 470, subdivision (d). If so, then defendant could not be convicted of both based on the same act.

As described above, section 484f, subdivision (b), is violated where a person, without authorization, "signs the name of another or of a fictitious person to an access card, sales slip, sales draft, or instrument for the payment of money which evidences an access card transaction." (§ 484f, subd. (b).) The actus reus of this offense is *signing* the name of another. By contrast, section 470, subdivision (d), can be violated where a person "falsely makes, alters, forges, or counterfeits, utters, publishes, passes or attempts or offers to pass, as true and genuine" any of a number of items, including a "receipt for money or property." (§ 470, subd. (d).) It is readily apparent that section 470, subdivision (d), can be violated without also violating section 484f, subdivision (b). Section 470, subdivision (d), may be violated by forging a signature on one of the indicated documents. However, it may also be violated by uttering, publishing or passing the item, whether or not the person also forged a signature on it. In the latter case, there is no violation of section 484f, subdivision (b).

Of course, in the present matter, the People argued both offenses were committed by virtue of the same act, signing Barbara C.'s name to the charge clip. However, as the State Supreme Court determined in *Reed*, *supra*, 38 Cal.4th at page 1229, we cannot look beyond the statutory elements of the offenses to determine if one is a necessarily included offense of the other. In this case, under the elements test, section 484f, subdivision (b), is not a necessarily included offense of section 470, subdivision (d). Therefore, defendant was properly convicted on both counts 49 and 50.

V

Count 50

Defendant contends her conviction on count 50 must nevertheless be reversed, because the jury was instructed the offense could be committed only by a particular act, and there was no evidence she committed that act.

The jury was instructed on count 50 as follows:

"The defendant is charged in Count 50 with forgery committed by signing a false signature on an access card.

"To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant signed someone else's name on an access card;

"2. The defendant was not the cardholder and did not have the authority of the cardholder to sign that name;

“3. The defendant knew that she did not have authority to sign that name;

“AND

“4. When the defendant signed the name, she intended to defraud.

“An *access card* is a card, plate, code, account number, or other means of account access that can be used, alone or with another access card, to obtain money, goods, services, or anything of value, or that can be used to begin a transfer of funds, other than a transfer originated solely by a paper document.

“A credit card is an access card.

“A *cardholder* is someone who has been issued an access card or who has agreed with a card issuer to pay debts arising from the issuance of an access card to someone else.

“A *card issuer* is a company or person that issues an access card to a cardholder.

“Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of money, or goods, or services, or something else of value, or to cause damage to, a legal, financial, or property right.

“For the purpose of this instruction, a *person* includes a business.

“It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant’s acts.

"The People allege that the defendant forged the following document authorizing payment by an access card: a Mervyn's receipt. You may not find the defendant guilty unless you all agree that the People have proved that the defendant forged this document and you all agree on which document she forged."

Defendant points out that the first element of the offense listed in the instruction is that she signed another's name "on an access card." However, according to defendant, there is no evidence she signed someone else's name on the Mervyn's credit card. Rather, the evidence was that she signed Barbara C.'s name to the charge receipt.

Defendant is correct that the instruction misstated the law as applied to this case. The instruction was based on CALCRIM No. 1955, which provides alternate descriptions of the first element as follows: "The defendant signed (someone else's name/ [or] a false name) on [an access card] [or] [a (sales slip[,]/ [or] sales draft[,]/ [or] document for the payment of money) to complete an access card transaction]." The first element of the instruction given here should have said defendant signed someone else's name to the sales slip, sales draft or document for the payment of money to complete an access card transaction.

Nevertheless, "[i]t is well established in California that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Burgener* (1986) 41 Cal.3d 505, 538-539.) In this instance, the jury was informed, in the same instruction, that

the People allege defendant forged a name to the Mervyn's receipt and that defendant cannot be found guilty on count 50 unless the jurors agree that defendant "forged this document."

Furthermore, defendant did not object to the instruction. Failure to object to instructional error forfeits the objection on appeal unless the defendant's substantial rights are affected. (§ 1259; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192-1193; *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7.) "Substantial rights" are equated with errors resulting in a miscarriage of justice under *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Arredondo* (1975) 52 Cal.App.3d 973, 978.)

In this instance, it is undisputed defendant signed the Mervyn's charge receipt. This is sufficient to satisfy the requirements of section 484f, subdivision (b). In her arguments to the jury, defendant did not even discuss count 50. Hence, the faulty instruction did not affect defendant's substantial rights.

VI

Theft and Receiving Stolen Property

Defendant contends her convictions on counts 17, 21, 35 and 46 for receiving stolen property (§ 496) must be reversed, because she was also convicted on count 26 of theft from an elder (§ 368, subd. (e)) of the same property. A principal in the theft of property may not be convicted of both receiving stolen property and theft of the same property. (§ 496, subd. (a).) The People contend there was no error, because there is

no overlap between the property subject to count 26 and that subject to counts 17, 21, 35, and 46. We agree with the People.

In count 17, defendant was charged with receiving stolen property on or about December 20, 2004, to wit, checks belonging to Billy and Barbara C. In count 21, defendant was charged with receiving Barbara C.'s credit card on or about December 20, 2004. The prosecution argued this count related to Barbara's Discover card. On count 35, defendant was charged with receiving miscellaneous personal property belonging to Billy C. on and between November 28, 2004 and December 29, 2004. The prosecution argued this count related to the holiday ornaments and decorations found in the storage unit. Finally, on count 46, defendant was charged with receiving Barbara C.'s Mervyn's credit card on or about December 9, 2004.

Defendant was charged in count 26 with a violation of section 368, subdivision (e), which makes it a crime for "[a]ny caretaker of an elder or a dependent adult" to "violate[] any provision of law proscribing theft, embezzlement, forgery, or fraud" or "violate[] Section 530.5 proscribing identity theft, with respect to the property or personal identifying information of that elder or dependent adult." (§ 368, subd, (e).) In count 26, the People alleged that between August 1, 2004 and December 7, 2004, defendant, "[a]s a caretaker of an elder or dependent adult, did willfully and unlawfully violate a provision of the law prescribing [*sic*] theft or embezzlement with respect to the property of that elder or dependent adult, to wit: BILLY [C.]" In her argument to the jury, the prosecutor

explained count 26 involved both identity theft and property theft.

Defendant argues count 26 alleged the theft of property in general, and the prosecutor failed to "make an election and clearly inform the jury as to what act or acts formed the basis of" count 26. Defendant points out the prosecutor described defendant's use of personal identifying information to obtain other property, and the court failed to give a unanimity instruction on count 26. According to defendant: "It is clear that the theft from an elder offense encompassed not only the transfer of funds from one account to the other, but also all items taken by [defendant] from the [C.] residence."

We are not persuaded. In our view, the prosecutor was clear about her election on count 26. After first explaining that defendant was guilty of both identity theft and property theft, the prosecutor explained how defendant had used the identifying information to steal property *from others*, not from Billy C. She then explained the alternate basis for guilt on count 26--property theft. There she said: "The theft that we're focusing on in this particular charge is the transfer of money from the Cash Maximizer Account to the Senior Account." She went on to explain: "As you will recall, the elements for theft are that the defendant took possession of property owned by someone else; the defendant took possession of the dollars in the [C]ash Maximizer [A]ccount, and transferred them to the Senior Account. [¶] You may recall when Sheila M[.] from the Bank of America testified, she testified you can only write a

certain number of checks on the Cash Maximizer Account. And so the defendant transferred the money to the Senior Account. She took that money so she could continue to write checks."

Because the prosecutor elected the act constituting the property theft in count 26, there was no requirement that the court give a unanimity instruction in this regard. (See *People v. Brown* (1996) 42 Cal.App.4th 1493, 1499.) Based on the prosecutor's election, there was no overlap between count 26 and counts 17, 21, 35, and 46.

VII

Multiple Receiving Stolen Property Counts

Defendant contends her conviction on three of the four receiving stolen property counts mentioned in the preceding section must be reversed, because the prosecution failed to prove the property subject to those counts was received on different occasions. As noted above, in count 17, defendant was charged with receiving checks belonging to Billy C. on or about December 20, 2004; in count 21, she was charged with receiving Barbara C.'s Discover card on or about December 20, 2004; in count 35, she was charged with receiving holiday ornaments and decorations belonging to Billy C. on and between November 28, 2004 and December 29, 2004; and in count 46, she was charged with receiving Barbara C.'s Mervyn's credit card on or about December 9, 2004.

Where a defendant receives multiple articles of stolen property at the same time, this amounts to but one offense of

receiving stolen property. (*People v. Lyons* (1958) 50 Cal.2d 245, 275; *People v. Smith* (1945) 26 Cal.2d 854, 858-859; *People v. Willard* (1891) 92 Cal. 482, 488.) As the California Supreme Court explained in *Smith*, this circumstance is comparable to the crime of larceny, "which authorities hold that the theft of several articles at one and the same time constitutes but one offense although such articles belong to several different owners." (*People v. Smith*, *supra*, 26 Cal.2d at p. 859.)

The People concede that counts 17 and 21 are duplicative, as they concern checks and a credit card that were found in the Mitsubishi on December 20, 2004, and, hence, were possessed by defendant at the same time. However, the People argue conviction on the other counts was proper, because they were committed on different occasions.

Penal Code section 496, subdivision (a), reads in pertinent part: "Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a state prison, or in a county jail for not more than one year. . . ."

Despite its common moniker of receiving stolen property, this offense may be committed in a number of ways, to wit, buying, receiving, concealing, selling, withholding, or aiding in concealing, selling, or withholding stolen property.

The People contend counts 17 and 21 are duplicative because the property subject to those counts was "possessed" by defendant at the same time. However, mere possession is not one of the means by which this offense can be committed. Of course, *possession* may be viewed as another way of saying the property was *withheld* or *concealed* from its rightful owner. Nevertheless, the mere fact the checks and credit card were withheld or concealed from the rightful owner by defendant at the same time, i.e., the day they were found in the Mitsubishi, does not preclude conviction for multiple counts of receiving stolen property. If the evidence showed those items had been received by defendant on different occasions, presumably multiple convictions would be permitted.

It is often the case with theft-related offenses that the People do not have direct evidence of the theft of the victims' property. Although circumstantial evidence of a defendant's opportunity to steal the items and later possession of them would suggest he was the thief, it is a safer bet to prosecute for receiving stolen property.

That appears to be the case here. Circumstantial evidence of defendant's opportunity to steal property while working for Billy C. coupled with her later possession of that property suggests she was the thief. Nevertheless, it is conceivable someone else stole the property and passed it on to defendant. Therefore, with uncontradicted evidence of defendant's possession of the property under circumstances suggesting it had been stolen by someone, the People may have considered

prosecution for receiving stolen property the more prudent course.

As with the lack of direct evidence that defendant stole the property, there is nothing in the record to suggest the People had any evidence as to when defendant came into possession of it. Counts 17 and 21 alleged receipt of stolen property on or about December 20, 2004. This was the day the property was discovered by the police. However, presumably it was received by defendant some time earlier. On the other hand, December 20 would be a day on which defendant withheld or concealed the property from its rightful owner. Count 46 alleged receipt of the Mervyn's credit card on or about December 9, 2004, the day it was used by defendant to purchase merchandise. Count 35 alleged receipt of the holiday ornaments on and between November 28, 2004 and December 29, 2004. Evidence presented at trial established that defendant gave her sister a key to a storage unit toward the end of November 2004 and the holiday ornaments were found in the unit on December 29, 2004.

Defendant was charged in counts 17, 21, 35, and 46 in the alternative with buying, receiving, concealing, selling, withholding, or aiding in concealing or withholding property. No evidence was presented as to defendant buying, receiving, or selling any of the property. Thus, on each count, defendant's guilt turned on when she concealed or withheld the property from its owner. In her argument to the jury, the prosecutor explained these counts were based on defendant's possession of

the property, i.e., her concealing or withholding the property, on the indicated days.

As with counts 8 and 18 discussed above, the People were required to prove defendant concealed or withheld the property subject to counts 17, 21, 35, and 46 at the time alleged. They satisfied that burden. They were not required to prove when defendant received the property, as that was not their theory of liability. Because the evidence showed defendant possessed both the checks of Billy C. (count 17) and the Discover card of Barbara C. (count 21) on or about December 20, 2004, she could not be convicted on both offenses. (*People v. Smith*, *supra*, 26 Cal.2d at pp. 858-859; *People v. Lyons*, *supra* 50 Cal.2d at p. 275; *People v. Willard*, *supra*, 92 Cal. at p. 488.) Her conviction on count 21 must therefore be reversed.

VIII

Unanimity Language of Various Instructions

In connection with counts 17, 21, 35 and 46, the jury was instructed on the offense of receiving stolen property pursuant to a modified version of CALCRIM No. 1750 as follows:

"The defendant is charged in Counts 17, 21, 35, 46 with receiving stolen property.

"To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant received, concealed, or withheld from its owner property that had been stolen;

"AND

"2. When the defendant received, concealed or withheld the property, she knew that the property had been stolen.

"Property is stolen if it was obtained by any type of theft, or by burglary.

"To receive property means to take possession and control of it.

"Mere presence near or access to the property is not enough.

"Two or more people can possess the property at the same time. A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or the right to control it, either personally or through another person.

"*You may not find the defendant guilty unless you all agree that the People have proved the defendant received, concealed or withheld from its owner at least one item of property that had been stolen and you all agree on which item of property had been received, concealed or withheld*." (Italics added.)

Defendant contends the final paragraph of the instruction was inadequate as a unanimity requirement, because "it allowed the jury to convict [her] of all four counts of receiving stolen property even if the jury only unanimously agreed that [she] had received, concealed or withheld from its owner one, rather than four, items of stolen property."

Defendant failed to object to the instruction. As explained above, failure to object to instructional error forfeits the objection on appeal unless the defendant's

substantial rights are affected. (§ 1259; *People v. Rodrigues*, *supra*, 8 Cal.4th at pp. 1192-1193.) "Substantial rights" are equated with errors resulting in a miscarriage of justice under *People v. Watson*, *supra*, 46 Cal.2d 818. (*People v. Arredondo*, *supra*, 52 Cal.App.3d at p. 978.)

The forfeiture rule applies to claims based on statutory violations, as well as claimed violations of fundamental constitutional rights. (*In re Seaton* (2004) 34 Cal.4th 193, 198.) "The reasons for the rule are these: '"In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal."'" (*Ibid.*) "To consider on appeal a defendant's claims of error that were not objected to at trial 'would deprive the People of the opportunity to cure the defect at trial and would "permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal."'" (*Ibid.*)

Defendant contends the last paragraph of the instruction should have been modified to read: "You may not find the defendant guilty of count 17, 21, 35, and/or 46 unless you all agree as to each such count that the People have proved that the

defendant received, concealed or withheld from its owner at least one item of property that had been stolen, and you all agree on which item of property has been received, concealed or withheld as to each count." However, if defendant had brought this to the court's attention, it would have been a simple matter to make the requested modifications if warranted. However, defendant deprived the prosecution and the court an opportunity to do so.

In our view, defendant's substantial rights were not affected by the instruction as given. The jury was instructed with CALCRIM No. 3515 that each count is a separate crime and must be considered separately. In the instruction on receiving stolen property, the jury was told defendant was charged with four counts of receiving stolen property and the instruction proceeded to define the requirements for conviction on one such offense. The language of the final paragraph continued this format. It did not direct the jury to convict on all four counts if the elements for one count are satisfied. Because defendant's substantial rights were not affected, her failure to object forfeited any claim of error.

Defendant raises an identical claim of error as to the instructions given on the offenses of forgery under section 470, subdivision (d), unlawfully acquiring or retaining an access card in violation of section 484e, subdivision (c), and unlawful possession of a hypodermic needle or syringe in violation of Business and Professions Code section 4140. However, as to each instruction, defendant failed to object, and her substantial

rights were not adversely affected thereby. Therefore, for the same reasons stated above, her claim of error is forfeited.

IX

Ineffective Assistance

Defendant contends her counsel's failure to object to the unanimity language in the instructions discussed in the preceding section amounted to ineffective assistance. According to defendant, "[i]f this court agrees with the merits of [defendant's] arguments [in the preceding section], but concludes the issues are waived [*sic*] based on lack of specific objections, then a further conclusion of ineffective assistance of counsel must inexorably follow."

Actually, the only thing that inexorably follows a finding that an argument on appeal has been forfeited by counsel's failure to object is a claim of ineffective assistance. This has increasingly become the favored means by which appellate defense counsel attempt to avoid any and all claims of forfeiture. In effect, if an issue was forfeited, then counsel's representation must have been deficient, and the issue must be considered anyway to determine if the ineffective assistance resulted in prejudice. However, that is not the applicable standard.

Under both the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution, a criminal defendant has a right to the assistance of counsel. (See *Strickland v. Washington* (1984) 466 U.S. 668,

684-685 [80 L.Ed.2d 674, 691-692]; *People v. Pope* (1979) 23 Cal.3d 412, 422.) This right "entitles the defendant not to some bare assistance but rather to *effective* assistance." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) "'[I]n order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was "deficient" because his "representation fell below an objective standard of reasonableness . . . under prevailing professional norms." [Citations.] Second, he must also show prejudice flowing from counsel's performance or lack thereof.'" (*In re Avena* (1996) 12 Cal.4th 694, 721.)

"[T]he mere failure to object rarely rises to a level implicating one's constitutional right to effective legal counsel." (*People v. Boyette* (2002) 29 Cal.4th 381, 433.) If, as here, the record fails to show why counsel failed to object, the claim of ineffective assistance must be rejected on appeal unless counsel was asked for an explanation and failed to provide one or there can be no satisfactory explanation. (*People v. Huggins* (2006) 38 Cal.4th 175, 206.) "A reviewing court will not second-guess trial counsel's reasonable tactical decisions." (*People v. Kelly* (1992) 1 Cal.4th 495, 520.)

In the present matter, after setting forth the basic standard for ineffective assistance, defendant's argument consists of the following: "Since there is a reasonable probability that verdicts more favorable to [defendant] would have resulted if [defendant]'s counsel had acted in a reasonably competent manner by objecting to the erroneous instructions,

this court should consider the instructional arguments raised herein, and reverse [defendant]'s convictions on counts 3, 8, 9, 12, 16, 17, 18, 21, 23, 25, 28-46, 49 and 50. (*In re Sixto* (1989) 48 Cal.3d 1247, 1257; *Strickland v. Washington*, *supra*, 466 U.S. at p. 694.)"

This argument does not even attempt to explain how counsel's failure to object fell below an objective standard of reasonableness or how the failure to object resulted in prejudice. We will not address a claim that defendant has failed to develop. (*People v. Tafoya* (2007) 42 Cal.4th 147, 196, fn. 12; *People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19.) In this instance, defendant's argument merely presumes counsel's failure to object fell below an objective standard of reasonableness and she was prejudiced thereby. Defendant also neglects to argue how there could be no satisfactory explanation for counsel's failure to object. This will not suffice.

X

Count 13

On count 13, defendant was convicted of attempting to evade a peace officer while driving recklessly, within the meaning of Vehicle Code section 2800.2. That section reads:

"(a) If a person flees or attempts to elude a pursuing peace officer in violation of Section 2800.1 and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property, the person driving the vehicle, upon conviction, shall be punished . . . .

"(b) For purposes of this section, a willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count under Section 12810 occur, or damage to property occurs."

Count 13 was based on defendant's flight from Sergeant Solus in the Mitsubishi on December 20. Defendant contends there is insufficient evidence she was the driver of the Mitsubishi at the time, because Sergeant Solus did not see who was driving the vehicle during the chase, the vehicle was found after the chase in a trailer park with the driver's side door open and the driver's seat empty, and the police were not able to find the driver. Defendant acknowledges there was evidence she had purchased the Mitsubishi six days earlier with a forged check, her personal property was found in the car after the chase, and the front-seat passenger of the car, Christine B., identified defendant as the driver. Nevertheless, defendant argues Christine was not a credible witness and the circumstantial evidence was insufficient standing alone.

In reviewing the sufficiency of the evidence supporting a conviction, we determine whether a rational trier of fact could have found the elements of the offense proven beyond a reasonable doubt. (*People v. Davis* (1995) 10 Cal.4th 463, 509.) We 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.) The test on appeal is not whether the evidence proves guilt beyond a reasonable doubt but whether substantial evidence supports the conclusion of the trier of fact in this regard. (*Id.* at p. 576.)

In the present matter, we have eyewitness testimony that defendant was the driver of the Mitsubishi during the high-speed chase. Although defendant attacks the credibility of Christine B. because of inconsistencies between her trial testimony and her statements to the police, issues of credibility are for the jury. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Supporting the testimony of Christine B. was the fact that defendant had purchased the Mitsubishi six days earlier with a forged check and, therefore, had a strong incentive to evade the police. Further supportive was evidence that several items of defendant's personal property and property stolen from the home of Billy C. were found in the Mitsubishi. This evidence was more than sufficient to support the jury's conviction on count 13.

XI

Witness Impeachment With Prior Offense Evidence

Prior to trial, the prosecution sought an order restricting impeachment of prosecution witnesses with prior misdemeanor convictions. Defense counsel represented to the court in opposition that Gregory V., one of the witnesses to the

carjacking alleged in count 1, had two prior misdemeanor convictions, one in 1998 for spousal abuse (§ 273.5) and another in 2003 for battery of a spouse (§ 243, subd. (e)(1)). The trial court exercised its discretion under Evidence Code section 352 to exclude the evidence, finding its probative value slight in comparison to the likelihood its admission would unduly consume time and confuse the jurors. Defendant contends the court abused its discretion and denied her the constitutional right to confront the witnesses against her.

Evidence Code section 787 prohibits the introduction of evidence of specific instances of conduct to attack or support a witness's credibility. However, Evidence Code section 788 permits attacks on the credibility of a witness with evidence that he or she has been convicted of a felony. In *People v. Wheeler* (1992) 4 Cal.4th 284, 292, 295, the California Supreme Court held that article 1, section 28, subdivision (d), of the State Constitution, the right to truth-in-evidence provision, permits attacks on the credibility of witnesses with evidence of prior misdemeanor convictions as well. However, this applies only to misdemeanor convictions that have a "'tendency in reason to prove or disprove' a witness's honesty and veracity." (*Wheeler,* at p. 295.) For non-felony conduct, this means offenses involving moral turpitude. (*Ibid.*)

Defendant contends the offenses defined in sections 273.5 and 243, subdivision (e)(1), necessarily involve moral turpitude. However, even assuming this is true, it does not establish defendant's claim of error.

On questions of the admissibility of evidence, the trial court retains discretion to exclude even relevant evidence under Evidence Code section 352. (*People v. Wheeler*, *supra*, 4 Cal.4th at p. 295.) Evidence Code section 352 permits the exclusion of relevant evidence where "its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) "[T]he latitude [Evidence Code] section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (*Wheeler,* at p. 296.)

In applying Evidence Code section 352 here, the trial court determined the probative value of the impeachment evidence was minimal. Defendant disagrees. She argues that while Gregory V. testified he was forced out of the Mustang by defendant and injured himself, "the defense investigator testified that [Gregory] told him that he had been trying to be a hero and catch [defendant], and that he opened the door and rolled out of the car." Defendant argues that "[w]hether [defendant] had forced [Gregory] out of the car, or whether he voluntarily exited the vehicle was a key issue to be determined by the trier of fact." Defendant further argues she and Gregory were the only percipient witnesses to the carjacking.

Defendant overstates the case. Carjacking is defined in section 215 as "the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear."

A carjacking victim may be either the possessor of the vehicle or a passenger. "[A] completed carjacking occurs whether the perpetrator drives off with the carjacking victim in the car or forcibly removes the victim from the car before driving off." (*People v. Lopez* (2003) 31 Cal.4th 1051, 1062, italics omitted.) And while a carjacking requires the use of force or fear, a vehicle theft can become a carjacking "if the perpetrator, having gained possession of the motor vehicle without use of force or fear, resorts to force or fear while driving off with the vehicle." (*People v. O'Neil* (1997) 56 Cal.App.4th 1126, 1131.)

Defendant suggests a key issue in this case was whether she forced Gregory out of the car or he got out voluntarily. We disagree. Even if defendant originally gained possession of the Mustang without the use of force or fear for the purpose of a test drive, she resorted to force or fear to drive away with it in an attempt to escape. There is no evidence and no suggestion by defendant that Gregory accompanied defendant out of the lot voluntarily. Thus, a carjacking occurred even before Gregory

got out of the car. And even if Gregory later got out of the car voluntarily, this was a natural response to being kidnapped. Thus, whether defendant pulled a gun on Gregory and ordered him out doesn't really matter. If, as defendant's investigator testified, Gregory said he was trying to be a hero and catch defendant, this would not negate that she used force or fear to retain possession of the car in her effort to escape.

Nor is defendant correct that she and Gregory V. were the only percipient witnesses to the carjacking. Both Edward C., the owner of Palo Cedro Motors, and Officer Ronald Icely observed defendant drive off at high speed from the dealership with Gregory in the car and saw Gregory come back with torn clothes and injuries. Gregory may have been the only other witness to whether defendant pulled a gun on him or forced him out of the car but, as indicated, this was not determinative of the carjacking charge.

Defendant nevertheless contends the trial court erred in concluding introduction of the prior offense evidence would cause an undue consumption of time. She asserts it would be a simple matter to question Gregory V. and, if he denied the convictions, to prove them through court records. However, this argument ignores that the prosecution might wish to try and rehabilitate Gregory with other evidence. As noted above, Evidence Code section 352 "empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (*People v. Wheeler*, *supra*, 4 Cal.4th at p. 296.)

A trial court's discretion in ruling on the admissibility of evidence under Evidence Code section 352 is broad. (*People v. Wheeler*, *supra*, 4 Cal.4th at p. 296.) We review a trial court's ruling on such an issue for abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 213.) In this instance, we cannot say the court abused its discretion in concluding the limited probative value of the impeachment evidence was outweighed by the potential for undue delay and confusion of the jury.

XII

Counts 9 and 10

Defendant was convicted on count 9 of possession of a hypodermic needle or syringe on December 23, 2004. On count 10, defendant was convicted of unlawful possession of a smoking device, also on December 23. Following defendant's conviction and the court's discharge of the jury, but before sentencing, the prosecutor brought to the court's attention that two trial exhibits, exhibits 44 and 44a, had inadvertently been left in her trial binder and so had not been available to the jury for deliberations. Exhibit 44 is a photograph of the suspected methamphetamine found in defendant's possession when she was arrested. Exhibit 44a is a photocopy depicting the smoking device, two hypodermic needles, and a baggie of suspected methamphetamine found in defendant's possession when she was arrested. The court indicated at the time of the prosecutor's revelation that the matter would be addressed at sentencing.

However, it was never again raised by the parties or addressed by the court.

Defendant contends the absence of the two exhibits from the jury room during deliberations amounted to a denial of due process as to counts 9 and 10. She points out that, during deliberations, the jury sent out the following inquiry: "Photocopy of Drug Paraphanalia [*sic*] and Methamphetamine--Photocopy Count." The court responded: "You have been provided Ex. 41B, 41C, 41D, and 44. Does this answer your question?" The matter did not come up again.

Exhibits 41B, 41C, and 41D were photographs of a glass smoking pipe, 2 hypodermic needles or syringes and a baggie containing suspect methamphetamine respectively. These items were found in the Mitsubishi on December 20. As noted above, exhibit 44 was a photograph of the suspected methamphetamine found in defendant's possession on December 23.

The jury's question did not specify whether it was interested in evidence of the drugs and paraphernalia found on December 20 or that found on December 23. However, the request did mention a photocopy, and the only photocopy of such evidence was exhibit 44a, which depicted all the drug-related items found in defendant's possession on December 23, including the two items that were the subject of counts 9 and 10.

Defendant does not challenge the trial court's response to the jury's inquiry. This may be because defense counsel did not object to the response and the court's response left the matter open if the exhibits identified by the court did not satisfy the

jury's request. Apparently they did, because the court heard nothing further on it. Thus, defendant's claim is limited to the absence of the two exhibits, and particularly exhibit 44a, from the jury room during deliberations.

Section 1137 permits the jury to take with it during deliberations "all papers (except depositions) which have been received as evidence in the cause." (§ 1137.) In *People v. Lee* (1974) 38 Cal.App.3d 749 (*Lee*), a janitor inadvertently threw away most of the exhibits in a trial after the first day of deliberations. (*Id.* at p. 751.) The court identified the following factors in assessing if a loss of exhibits during trial amounts to a denial of due process: "(1) whether the objects in evidence, if retained and made available to the defendant, 'would have been of value in his defense' [citation]; (2) the stage of the proceeding when the evidence is lost [citations]; (3) whether the loss was intentional or negligent and who was responsible [citations]; and (4) whether it was 'reasonably possible' that the jury would have reached a different conclusion had the evidence been retained for the second day of jury deliberations [citation]." (*Id.* at pp. 757-758.) The court in *Lee* concluded the defendant had not been denied a fair trial, because the defendant was not denied the right to use the evidence at trial, the loss was inadvertent and caused by a third party, and the exhibits were cumulative of trial testimony. (*Id.* at p. 758.)

In the present matter, as in *Lee*, defendant was not denied the right to use the exhibits in her defense. Also as in *Lee*,

the exhibit depicting the drugs and paraphernalia found in defendant's possession on December 23 was cumulative of the witness testimony. However, unlike *Lee*, unavailability of the exhibits for deliberations was caused, albeit inadvertently, by the prosecutor. Further, in *Lee*, the court made a point of mentioning that if there was disagreement about what was in the exhibits, the jury could have asked for a reread of the testimony regarding those exhibits, but it made no such request. (*Lee*, *supra*, 38 Cal.App.3d at p. 758.) Here, we do not know if there was disagreement about what was depicted in exhibit 44a. However, we do know the jury asked for the photocopy depicting the methamphetamine and paraphernalia.

At any rate, assuming error in the absence of exhibit 44a from the jury deliberation room, we must determine whether the error was prejudicial. Under the circumstances of this case, the absence of the exhibits from the jury room may be viewed as a specie of prosecutorial misconduct. As such, the question becomes whether, in the absence of the error, it is reasonably probable a result more favorable to the defendant would have occurred. (*People v. Strickland* (1974) 11 Cal.3d 946, 955; *People v. Kidd* (1961) 56 Cal.2d 759, 769-771.)

Although the jury asked for the photocopy of the drug paraphernalia and methamphetamine and the court directed the jury to other exhibits, the court also asked if this answered the jury's question. The jury did not pursue the matter further. There was substantial oral evidence presented to the jury regarding the nature of the hypodermic needles and the

smoking device of which exhibit 44a was cumulative, and the jury had a chance to see exhibit 44a during trial. Finally, in his argument to the jury, defense counsel did not even mention counts 9 and 10 or otherwise try to convince the jury his client was not guilty of those offenses. Under these circumstances, we conclude it is not reasonably probable the outcome would have been different had exhibit 44a been available to the jury during deliberations.

XIII

Failure to Consider Each Count Individually

Defendant contends she was denied due process, because the jury failed to consider each of the counts against her separately. Defendant points out there were 51 separate counts, 29 witnesses were examined, and many exhibits were presented, yet the jury took less than three hours to deliberate, with some of that time taken up with the rereading of evidence. According to defendant, "it would essentially be impossible for a jury to deliberate, separately consider 51 counts, vote separately on each count, send five communications to the court and receive responses thereto, and receive readback of the testimony of two witnesses in a period of two hours and 56 minutes."

While we sympathize with defendant's concerns, we do not agree the length of deliberations alone demonstrates the jury did not separately deliberate on each count. A defendant's right to trial by jury includes the requirement that jurors deliberate before reaching a verdict. (*People v. Collins* (1976)

17 Cal.3d 687, 693.) However, "formal discussion is not necessarily required to reach a decision or conclusion by deliberation. In a given case to 'deliberate' means 'to ponder or think about with measured careful consideration and often [but not necessarily] with formal discussion before reaching a decision or conclusion.' (Webster's 3d New Internat. Dict. (1986) p. 596.)" (*People v. Bowers* (2001) 87 Cal.App.4th 722, 733.) But "it is not required that jurors deliberate well or skillfully." (*People v. Engelman* (2002) 28 Cal.4th 436, 446.)

In the present matter, the jury was instructed pursuant to CALCRIM No. 3515 that each count is a separate crime and the jury must consider each count separately and return a separate verdict on each. We assume the jury followed the instructions as given by the court. (*People v. Adcox* (1988) 47 Cal.3d 207, 253.) Although there were 51 counts against defendant, defense counsel focused his argument on only two of them, count 13, alleging evasion of a peace officer in connection with the Mitsubishi chase, and count 1, alleging carjacking from Palo Cedro Motors. Furthermore, the evidence as to each count was basically undisputed. Thus, it is not surprising the jury would not have taken long to reach a verdict on most of the counts.

We find no due process violation under the circumstances presented.

XIV

Upper Term Sentence

Defendant was sentenced on the carjacking count to the upper term of nine years. The court found the following nine aggravating factors as identified in the probation report: (1) "The crime involved great violence, great bodily harm, threat of great bodily harm or other acts disclosing a high degree of cruelty, viciousness or callousness." (2) "The victim was particularly vulnerable." (3) "The manner in which the crime was carried out indicates planning, sophistication, or professionalism." (4) "The crime involved an attempted or actual taking or damage of great monetary value." (5) "The defendant took advantage of a position of trust or confidence to commit the offense." (6) "The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness." (7) "The defendant has served a prior prison term." (8) "The defendant was on probation or parole when the crime was committed." (9) "The defendant's prior performance on probation or parole was unsatisfactory." The court found no mitigating factors.

Defendant contends her upper-term sentence on the carjacking count violates *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856] (*Cunningham*). In *Cunningham*, the United States Supreme Court held California's determinate sentencing law violates a defendant's Sixth Amendment right to

trial by jury insofar as it gives the judge, not the jury, the authority to find facts that expose a defendant to an upper term sentence. Defendant contends that, based solely on the facts found by the jury, the court was limited to imposition of the middle term of five years on count 1. Defendant is mistaken.

Following *Cunningham*, the California Supreme Court in *People v. Black* (2007) 41 Cal.4th 799 (*Black*), concluded "imposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions." (*Id.* at p. 816.) Once a single aggravating factor has been established in one of these three ways, thereby rendering the defendant eligible for the upper term, "any additional factfinding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." (*Id.* at p. 812.)

Here, the trial court relied on defendant's numerous prior convictions. This recidivism factor alone sufficed to render her eligible for the upper term. (*Black*, *supra*, 41 Cal.4th at p. 816.) However, the court also relied on the fact defendant served a prior prison term and was on probation or parole at the time the new offenses were committed.

The California Supreme Court and other jurisdictions have interpreted the recidivism "exception to include not only the

fact that a prior conviction occurred, but also other related issues that may be determined by examining the records of the prior convictions." (*Black*, *supra*, 41 Cal.4th at p. 819; see also cases cited in *People v. McGee* (2006) 38 Cal.4th 682, 703-706.) Defendant's probationary or parole status and the fact she served a prior prison term necessarily arise from one or more prior convictions and relate to the fact of those prior convictions. They can be determined by reviewing court records pertaining to the defendant's prior convictions, sentences, and grants of probation or parole. These are the types of determinations more appropriately undertaken by a court than a jury. (*Black*, at p. 820; see *People v. Thomas* (2001) 91 Cal.App.4th 212, 223 [prior prison term allegations]; *United States v. Corchado* (10th Cir. 2005) 427 F.3d 815, 820 [probation status]; *People v. Medrano* (2008) 161 Cal.App.4th 1514 [same].)

Once the court has found at least one recidivism factor rendering a defendant eligible for the upper term, the consideration of other aggravating factors does not implicate *Cunningham*. "The court's factual findings regarding the existence of additional aggravating circumstances may increase the likelihood that it actually will impose the upper term sentence, but these findings do not themselves further raise the authorized sentence beyond the upper term. No matter how many additional aggravating facts are found by the court, the upper term remains the maximum that may be imposed. Accordingly, judicial factfinding on those additional aggravating

circumstances is not unconstitutional." (*Black*, *supra*, 41 Cal.4th at p. 815.)

Under the circumstances presented, imposition of the upper term did not violate defendant's Sixth Amendment rights.

XV

Penal Code Section 654

Defendant contends the trial court was required to stay the sentences imposed on counts 2, 5, 17, 20, 35, 47, and 50. However, inasmuch as we have concluded defendant's conviction on count 5 must be reversed, we need not consider if the sentence on that count should have been stayed.

Section 654, subdivision (a) reads: "An act or omission that is punishable in different ways by different provisions of law 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. . . ." Although section 654 speaks in terms of "an act or omission," it has been judicially interpreted to include situations in which several offenses are committed during a course of conduct deemed indivisible in time. (*People v. Beamon* (1973) 8 Cal.3d 625, 639.) The key inquiry is whether the objective and intent attending more than one crime committed during a continuous course of conduct was the same. (*People v. Brown* (1991) 234 Cal.App.3d 918, 933.) "[I]f all of the offenses were merely incident to, or were the means of accomplishing or facilitating one objective, defendant may be

found to have harbored a single intent and therefore may be punished only once. [Citation.] [¶] If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

The question whether a defendant entertained multiple criminal objectives is one of fact for the trial court. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135-1136.) "A trial court's [actual or] implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence." (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

Counts 1 and 2

Defendant was convicted on count 1 of carjacking with respect to the Ford Mustang taken from Palo Cedro Motors on December 23. She was sentenced to the upper term of nine years. On count 2, defendant was convicted of unlawful driving or taking the same vehicle and sentenced to a concurrent middle term of two years. Defendant argued at sentencing that the term on count 2 should be stayed. The court disagreed, explaining "[t]here's a separation of events and an opportunity after the first not to commit the second, and [defendant] chose not only to commit the carjacking but then ultimately to take the car."

Defendant takes issue with the court's analysis and conclusion that there was a separation of events. According to defendant: "The carjacking was committed simultaneously with the unlawful driving and taking of the vehicle. Clearly [defendant]'s objective in committing the carjacking was to continue her efforts to take ownership of the vehicle." The People disagree, arguing the carjacking was complete when defendant forced Gregory V. out of the car and then defendant made a separate decision to drive the car away.

Defendant has the better argument. We might disagree with defendant's assessment that her intention in carjacking the Mustang and taking or driving it away was to continue her efforts to take ownership of the vehicle. The facts suggest her intention in both instances was to escape. By December 23, defendant had committed a large number of offenses, had obtained four other cars by forgery, and had been involved in a high-speed chase by police. It would appear that when defendant saw the police car pull into the dealership, she attempted to flee by the most convenient means available, i.e., the car she was already in.

Nevertheless, as explained above, the issue on appeal is whether substantial evidence supports the trial court's determination that there was a separation of events and an opportunity after the carjacking for defendant to make an independent determination to take the vehicle. In our view, no such substantial evidence exists. The carjacking and taking occurred simultaneously and were occasioned by a single intent

and objective, whether that was to take ownership of the car or to escape. Both the carjacking and the taking commenced when defendant began to drive the Mustang off the lot after seeing the police car. The carjacking ended when Gregory V. was ejected from the car, while the taking offense continued. Unlike the trial court, we cannot discern a separation between the two offenses or defendant's motivation for purposes of section 654. The term imposed on count 2 must therefore be stayed.

Counts 17 and 35

On count 17, defendant was convicted of receiving stolen property with respect to personal checks stolen from Billy C. and found in defendant's possession on December 20. On count 35, defendant was convicted of receiving stolen property with respect to the holiday ornaments found in the storage unit. The court imposed consecutive eight-month terms on each count.

Defendant contends the terms imposed on counts 17 and 35 must be stayed, because "all of the receiving stolen property counts related to [defendant]'s possession of property stolen from Billy." According to defendant: "Although [she] was found to be in possession of the stolen property on different dates, there was no evidence that she did not constructively possess all of the stolen property on each such occasion."

Defendant's argument is merely a variation of her argument above that she could not be convicted of all four receiving stolen property counts, because the People failed to prove she

did not possess the property subject to those counts on different occasions. However, the question for purposes of section 654 is whether defendant's possession of the various items was pursuant to more than one intent or objective. In this instance, we cannot conceive how defendant's possession of the holiday ornaments was for the same intent and objective as her possession of the blank checks or, for that matter, the credit cards that were the subject of counts 21 and 46. A broad objective of obtaining as much money or property as possible will not suffice for purposes of section 654.

Defendant nevertheless points out that count 17 concerned her possession of a checkbook belonging to Billy C., which checkbook contained a carbon of check No. 5279. Check No. 5279 had been forged and passed to Wal-Mart on December 17 to obtain merchandise, as charged in count 45. Defendant argues her possession of the checkbook obviously included at one time her possession of check No. 5279 and, because she was sentenced to a concurrent term of two years on count 45 for passing that check, she could not be sentenced for possessing the checkbook as well. According to defendant, her intent and purpose in possessing the checks and forging them was the same, to obtain merchandise. The People fail to respond to this argument.

Even if we agreed defendant could not be punished for both receiving check No. 5279 and passing it at Wal-Mart, her conviction on count 17 was for receiving more than just check No. 5279. That count covered a whole book of checks, including Nos. 5277 through 5300. Her possession of those other checks

need not have been for the same intent and objective as her passing of check No. 5279. Again, as explained above, a general intent and objective of passing checks to obtain merchandise is too broad for purposes of section 654.

Counts 20 and 42 through 45

On count 20, defendant was convicted of willfully obtaining and using personal identifying information of Barbara C. for an unlawful purpose (§ 530.5, subd. (a)). She was sentenced to a consecutive term of eight months. On counts 42 through 45, defendant was convicted of forgery of Barbara C.'s signature on checks that she passed to Wal-Mart on December 17. She was sentenced to a consecutive term of eight months on count 42 and concurrent terms of two years on counts 43 through 45.

Defendant contends she could not be punished on both count 20 and counts 42 through 45. She argues her possession of Barbara C.'s identification was strictly for the purpose of using that identification to facilitate passing forged checks. The People disagree, arguing theft of a person's identity for general purposes is a separate and distinct crime from using identifying information to forge and pass checks.

On this point, we agree with defendant. As explained above, in order to violate section 530.5, subdivision (a), a defendant must both (1) obtain personal identifying information, and (2) use that information for an unlawful purpose. (*People v. Tillotson*, *supra*, 157 Cal.App.4th at p. 533.) Thus, theft of personal identifying information alone will not violate this

provision. There must be use of that information. Here, the prosecutor argued to the jury that defendant used Barbara C.'s identification at Wal-Mart. Hence, the act that consummated a violation of section 530.5, subdivision (a), was part of the conduct giving rise to defendant's forgery offenses, as alleged in counts 42 through 45. Furthermore, it is readily apparent defendant had the same intent and objective in obtaining and using the identifying information and forging the Wal-Mart checks. The identifying information had no value to defendant except as it could be used to pass checks or otherwise commit forgeries. Hence, defendant could not be punished for both. Punishment on count 20 must therefore be stayed.

Counts 47, 48, 50

The same goes for counts 47, 48 and 50. As in count 20, defendant was convicted on count 47 of willfully obtaining and using personal identifying information of Barbara C. for an unlawful purpose (§ 530.5, subd. (a)) based on her use of Barbara's identification at Mervyn's on December 9. She was sentenced to a consecutive term of eight months. On count 50, defendant was convicted of misdemeanor forgery of an access card transaction (§ 484f, subd. (b)) based on defendant's fraudulent use of Barbara's Mervyn's credit card. She was sentenced to a concurrent term of six months.

On count 48, defendant was convicted of burglary stemming from her entry of Mervyn's on December 9 with intent to use Barbara C.'s identification and credit card to obtain

merchandise. She was sentenced to a consecutive term of eight months.

It is clear defendant had one intent and objective in entering Mervyn's on December 9 and using Barbara C.'s identification and credit card--to obtain merchandise. Therefore, she could only be punished once, and the terms on counts 47 and 50 must be stayed.

XVI

Abstract of Judgment

Defendant contends the abstract of judgment is in error in a couple of places and must be corrected. The People agree.

On count 47, defendant was convicted of violating section 530.5, subdivision (a). The abstract erroneously lists the offense as section 503.5. This should be corrected.

On count 50, defendant was convicted of fraudulent use of an access card in violation of section 484f, subdivision (b), a misdemeanor. She was sentenced to a concurrent term of six months. On count 51, defendant was convicted of fraudulent use of an access card in violation of section 484g, a felony. She was sentenced to a consecutive one-third middle term of eight months. However, the abstract of judgment states defendant was convicted on count 50 of violating section 484g and sentenced to a consecutive one-third middle term of eight months. It does not mention count 51. This too should be corrected.

DISPOSITION

The judgment is reversed as to counts 5 and 21 and affirmed as to all other counts. The sentences on counts 2, 20, 47 and 50 are stayed pursuant to section 654. The result is an overall reduction of 16 months in defendant's aggregate sentence. The trial court is directed to correct the abstract of judgment to reflect the foregoing and to reflect that defendant was convicted on count 47 of violating section 530.5, subdivision (a), and to reflect the sentence imposed on count 51. The trial court is further directed to forward the corrected abstract to the Department of Corrections and Rehabilitation.

HULL, J.

We concur:

DAVIS, Acting P.J.

CANTIL-SAKAUYE, J.