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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE, Plaintiff and Respondent, v. RICHARD JESUS CUELLAR, Defendant and Appellant.	C056855 (Super. Ct. No. 62053723)

APPEAL from a judgment of the Superior Court of Placer County, Colleen Nichols, Judge. Affirmed as modified.

Randy S. Kravis, 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, Julie A. Hokans, Supervising Deputy Attorney General, for Plaintiff and Respondent.

Defendant Richard Jesus Cuellar appeals from the judgment of conviction after a jury found him guilty of burglary,

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* Pursuant to California Rules of Court, rule 8.110, this opinion is certified for publication with the exception of parts II, III and IV of the Discussion.

uttering a fictitious check, grand theft from the person, four counts of robbery, resisting arrest, unlawfully driving or taking a vehicle, and exhibiting a deadly weapon other than a firearm. In the published part of this opinion, we reject defendant's contention that there was insufficient evidence to support his conviction for grand theft. In the unpublished parts, we address his other contentions and conclude the judgment must be modified to stay, pursuant to Penal Code section 654, the sentence imposed for uttering a fictitious check.

FACTUAL AND PROCEDURAL BACKGROUND

In February 2005, defendant went to a Nordstrom department store where he attempted to purchase some cosmetics. He tried to pay by giving the clerk a previously signed check drawn on John Becker's bank account. The sales clerk, Malalai Razawi, was suspicious of the check and alerted the loss prevention department by intentionally placing the check in the check validating machine the wrong way. She then brought the check to the back office. After a few minutes, defendant came to the back office to retrieve the check. He grabbed the check from Razawi's hand and left. John Becker later confirmed the information on the check matched his own from an old account but that he had not authorized defendant to use it.

The jury also heard evidence that defendant robbed banks in May, June, and July 2005; drove a stolen vehicle and resisted arrest in August 2005; and threatened two men with a shovel in December 2005.

The jury found defendant guilty of the charges previously listed. The trial court sentenced him to a total of 10 years in state prison. Eight months of the total prison term was for the charge of uttering a fictitious check.

DISCUSSION

I

There Was Sufficient Evidence For A Reasonable Jury To Find Defendant Guilty Of Grand Theft From The Person

Defendant argues that his conviction for grand theft from the person (Pen. Code,[1] § 487, subd. (c)), based on taking the "bogus check" from the sales clerk's hand, is not supported by sufficient evidence. He contends that for any conviction of theft to stand, the item taken must have "some intrinsic value." In his view, since the "check had no value beyond the paper on which it was written, [he] could not have been found guilty of theft when he took it from Razawi's hands."

The People argue that unlike petty theft, grand theft from the person does not require that the item taken has some intrinsic value. In the alternative, the People contend that while "slight," the check had sufficient intrinsic value even if defendant is correct in his interpretation of the law.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

A

Grand Theft From The Person Of Another Does Require That The Item Taken Has Some Intrinsic Value

We first consider the legal issue raised by defendant's argument. Defendant was convicted of grand theft under section 487, subdivision (c). The statute provides, "Grand theft is theft committed in any of the following cases: [¶] . . . [¶] (c) When the property is taken from the person of another." (*Ibid.*)

Defendant contends that because petty theft requires that the object taken has some intrinsic value, and the crime of grand theft "'includes the crime' of petty theft," then grand theft "must necessarily include an intrinsic-value requirement." He states that the check did not have any intrinsic value, and therefore there was no substantial evidence to support his conviction of grand theft.

The People cite no case directly on point; however, they assert that case law shows *petty* theft requires proof the property had some intrinsic value. The People argue there are no cases suggesting the same for grand theft. The People contend the lack of a similar requirement in previous case law for grand theft suggests the intrinsic value element is not necessary.

California consolidated its theft statutes in 1927 to include the common law crimes of larceny, embezzlement, false pretenses, and other theft-related crimes. (*Gomez v. Superior Court* (1958) 50 Cal.2d 640, 645-646.) While these crimes have

all been codified into the Penal Code theft statutes, none of the elements changed from the consolidation. (*People v. Myers* (1929) 206 Cal. 480, 483.)

Prior to the codification of the theft statutes, the crime in question would have been charged as larceny. In *People v. Caridis* (1915) 29 Cal.App. 166, the court stated, "It is essential to the commission of the crime of larceny that the property alleged to have been stolen have some value--intrinsic or relative--which, where grand larceny is charged and the property was not taken from the person of another, must exceed the sum of fifty dollars." (*Id.* at p. 168.) This does not suggest that there is no value requirement for grand theft from the person of another, merely that it does not need to be a specific minimum value as required for the other types of grand theft.

This is consistent with how California's theft statutes are structured. Section 484 defines theft generally.[2] Section 486 divides theft into two degrees, "the first of which is termed

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[2] The relevant portion of section 484, subdivision (a) provides, "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft."

grand theft; the second petty theft." Section 487 provides some of the circumstances for grand theft, including: (1) where the property taken has a value exceeding $400; (2) where specific types of property are taken; and (3) where the property is taken from the person of another. Section 488 provides, "Theft in other cases is petty theft."

As petty theft is merely theft that does not qualify as grand theft, and to sustain a charge of petty theft the property taken must have some intrinsic value, it necessarily follows that the same requirement applies to grand theft.

B

Standard Of Review For Sufficiency Of The Evidence

"When the sufficiency of the evidence is challenged on appeal, we apply the familiar substantial evidence rule. We review the whole record in a light most favorable to the judgment to determine whether it contains substantial evidence, i.e., evidence that is credible and of solid value, from which a rational trier of fact could find beyond a reasonable doubt that the accused committed the offense." (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 859.) "An appellate court must accept logical inferences that the jury might have drawn from the circumstantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 396.) "Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the jury." (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.)

C

A Jury Could Reasonably Infer That

The Phony Check Had Intrinsic Value

Defendant argues that the check, by its very nature, is valueless. He argues this under two different theories: (1) a check is merely an order to pay, and unless it is accepted, it has no value; and (2) a forged check is inherently worthless. Defendant further contends that because Razawi suspected the check was forged, it was worthless as a means of purchasing products specifically from Nordstrom.

The People argue that the check has inherent value. The People argue that since the check merely needs to have "*any* intrinsic value," the paper upon which it was printed should be sufficient to sustain a charge of grand theft. They also argue that it has value of an "evidentiary nature."

Defendant is correct that a forged check does not have a value equal to that for which it is written. (*United States Rubber Co. v. Union Bank & Trust Co.* (1961) 194 Cal.App.2d 703, 708-709.) The check's value is "a nullity"; it is merely "an order to pay [citation] and is of no value unless accepted." (*Ibid*.) However, courts have found that there is still inherent value in similar items, even without the cash value the items would theoretically be worth had the initial crime been successful. While neither party addressed it, we find the case of *People v. Caridis, supra,* 29 Cal.App. at page 166 to be instructive.

In *Caridis*, the defendant stole the winning ticket for an illegal lottery. (*People v. Caridis, supra,* 29 Cal.App. at pp. 167-168.) According to the rules of the lottery, the winning ticket was worth $1,250 in gold coin. (*Id.* at p. 167.) The defendant was charged with grand larceny. (*Ibid*.) He demurred, arguing the "subject matter of the alleged larceny had no legitimate value." (*Id.* at pp. 167-168.) The trial court agreed and dismissed the case. (*Id.* at p. 168.)

The appellate court agreed that as a matter of law the lottery ticket was not worth $1,250. (*People v. Caridis, supra,* 29 Cal.App. at p. 168.) The court noted, "It is a well-settled principle that an obligation which exists in defiance of a law which denounces it has, in the eye of the law, neither validity nor value." (*Ibid.*) For this reason, the court affirmed the dismissal of the grand larceny charge. (*Id.* at p. 169.) However, it also stated, "Considered as a mere piece of paper, the lottery ticket in question possessed perhaps some slight intrinsic value, which, however small, would have sufficed to make the wrongful taking of it petit larceny, and if that had been the charge preferred against the defendant, it doubtless would have stood the test of demurrer." (*Ibid.*)

This holding, and several others deriving from it, uphold theft charges for items of minimal intrinsic value. (See *People v. Leyvas* (1946) 73 Cal.App.2d 863, 864 [gasoline rationing stamps]; *People v. Martinez* (2002) 95 Cal.App.4th 581, 583-584 [soap, shampoo, and hot water]; *People v. Franco* (1970) 4 Cal.App.3d 535, 537-538 [an empty cigarette carton].) Here, the

fictitious check, like the illegal lottery ticket in *Caridis*, had slight intrinsic value by virtue of the paper it was printed on. It also had intrinsic value as a negotiable instrument that, if legally drawn, would entitle its holder to payment on demand. Thus, it was sufficient to support defendant's conviction for grand theft from the person of the sales clerk from whom defendant snatched the check.

II

Defendant's Sixth Amendment Right To Counsel Was Not Violated By The Admission Of His Jailhouse Confession

After defendant was arrested in August 2005, he was interviewed in the hospital by Roseville Police Officer David Buelow, who did not read defendant his *Miranda*[3] rights prior to speaking to him. Defendant spoke at length about the robberies.

Later, while in jail awaiting trial, defendant spoke to Placer County Sheriff's Deputy Eric Bakulich. Deputy Bakulich was working at the jail as part of his duties for the sheriff's department. While defendant was cleaning a common area, Deputy Bakulich spoke to him. He asked defendant "what he was in jail for." Defendant replied, "he was in jail for bank robbery" and "he had acquired approximately $170,000."

Defendant contends the trial court erred in allowing his statements to Deputy Bakulich into evidence. Defendant argues that by "stimulating" a conversation after his Sixth Amendment

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[3] *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

right to an attorney had already attached, Deputy Bakulich acted unconstitutionally.

The People argue the issue has been forfeited. They note that the objection at trial related to defendant's *Miranda* rights, not his Sixth Amendment rights. They also argue that even if this court addresses the issue on its merits, there is no evidence that the question was anything other than "a simple inquiry regarding the charges [defendant] faced, and did *not* seek to ascertain whether [defendant] claimed to be innocent of those charges or would admit his guilt."

A

Defendant Forfeited His Argument That Deputy Bakulich Violated His Sixth Amendment Right To Counsel Because He Did Not Object On Those Grounds At Trial

A Sixth Amendment claim is not preserved for appellate review without a timely objection at trial on that ground. (See *People v. Roldan* (2005) 35 Cal.4th 646, 736.)

At trial, defendant objected to the testimony by Officer Buelow. When ruling on that objection, the court defined the question as "what has now become a Miranda issue as opposed to something else." The People asserted that the questioning in the hospital was not subject to *Miranda* as it was not an interrogation and Officer Buelow merely was making "neutral inquiries to clarify statements" and that he had "no bad intentions [and was] just having a discussion . . . not with the intent to use [the information]." Defendant contended Officer Buelow's intentions were irrelevant to whether an interrogation

had occurred, and the end result of the questioning showed that it was an interrogation.

The court suppressed defendant's confession to Officer Buelow. After ruling on that confession, the court then added, "But then if we can just deal on the same issue with [Deputy] Bakulich's situation. It's that case exactly, whether it's just a candid conversation. [Defendant] is in custody. There is no questioning, per se, as I understand it."

Before the People called Deputy Bakulich as a witness, defense counsel addressed whether the testimony should be suppressed. Defense counsel stated, "I see the situation is very similar to the one with Officer Buelow earlier where we have [defendant] in jail in custody and informal conversation taking place which was begun with a question, 'Why are you in jail?' While I'm not questioning the intent of the officer regarding interrogation, the net result is still the same, where a question was asked which would elicit incriminating response and *no Miranda warnings have been given*." (Italics added.)

The court ruled that Deputy Bakulich could testify. In response to defendant's arguments, the court stated, "I appreciate that, but there is a pretty significant distinction between the two. The original arrest with Officer Buelow was just immediately post arrest at the hospital. He had just been detained and arrested. He was asked I believe more pointed questions which were specifically, 'Why did you rob the bank?' et cetera. As I understand the question, Officer Bakulich asked, 'Why are you in jail?' Which is kind of a vague

question. Let's remember there were several different reasons that [defendant] was currently in custody. [¶] I see a fairly significant difference. At this point he had already been to court. His constitutional rights had been read to him. He met with counsel already. There were numerous admonishments to him at that point given by the court during his arraignment process. And also I'm presuming that counsel discussed that with him as well. He had already been to court several times at this point. [¶] . . . [¶] So many, many court appearances . . . . So there were three different arraignment processes during that period of time. Counsel was appointed as early as August 11th. So certainly the court had advised him of his constitutional rights as well as counsel had, so I see this as a very different circumstance because he knew what his rights were. Very distinct circumstances. [¶] Based on that, again, the very narrow questioning, not the pointed questioning that Officer Buelow was engaging in just for his own information. Sounds actually like they had a very pleasant conversation. Certainly that's what Officer Buelow said as to his, that he had a very pleasant conversation, that [defendant] was quite cooperative with him in the previous proceeding. So very different circumstances, and that is the reason why the court sees it differently. In this case Officer Bakulich would be able to testify."

On appeal, defendant contends his Sixth Amendment argument has been preserved. He argues that raising a timely objection "on constitutional grounds," where "the trial court was

explicitly aware that [defendant] had been arraigned and was represented by counsel," preserves the objection on both Fifth Amendment and Sixth Amendment grounds. He further contends, since "it was known or should have been known to the trial court that the substance of [defendant]'s objection concerned the Sixth Amendment, even if [defendant] mistakenly cited an incorrect case," his objection enabled the court to make an informed ruling on the admissibility of his statement to Deputy Bakulich.

Defendant is incorrect. The objection to Deputy Bakulich's testimony was solely tied to the earlier Fifth Amendment objection to Officer Buelow's testimony. As the trial court observed, it was "a Miranda issue as opposed to something else." Officer Buelow's testimony was about events that took place immediately after defendant was arrested, long before his Sixth Amendment right to counsel attached. (*Michigan v. Jackson* (1986) 475 U.S. 625, 632 [89 L.Ed.2d 631, 639] [the Sixth Amendment right attaches after the initiation of formal charges.]) Defendant also argued that the questioning was unconstitutional as "no Miranda warnings ha[d] been given." The *Miranda* rule is based on the Fifth Amendment. None of the arguments at trial suggests the Sixth Amendment had been raised at any point.

As there was no timely objection at trial on Sixth Amendment grounds, the issue was not preserved for appellate review. (*People v. Roldan*, *supra,* 35 Cal.4th at p. 736.)

B

Defendant's Ineffective Assistance Of Counsel Claim Regarding The Failure To Object Under The Sixth Amendment Fails

Defendant argues that even if we find the issue was forfeited, this court should address the Sixth Amendment claim under an ineffective assistance of counsel claim. Defendant contends there is no "satisfactory explanation for why defense counsel objected on Fifth Amendment rather than Sixth Amendment grounds other than that it was a mistake on his part."

The People do not argue that defense counsel made a tactical decision to object only on Fifth Amendment grounds. Instead, they address whether the Sixth Amendment argument prevails on the merits. They contend, "Deputy Bakulich merely asked [defendant], during a casual and friendly conversation in an area where the jail inmates 'eat and hang out,' what he 'was in jail for.' [Citation.] The question was a simple inquiry regarding the charges [he] faced, and did *not* seek to ascertain whether [he] claimed to be innocent of those charges or would admit his guilt."

"A claim of ineffective assistance of counsel based on a trial attorney's failure to make a motion or objection must demonstrate not only the absence of a tactical reason for the omission [citation], but also that the motion or objection would have been meritorious, if the defendant is to bear his burden of demonstrating that it is reasonably probable that absent the

omission a determination more favorable to defendant would have resulted." (*People v. Mattson* (1990) 50 Cal.3d 826, 876.)

We agree with defendant that there is no apparent tactical reason to attempt to suppress under the Fifth Amendment but not the Sixth. Therefore, the first prong of the test is satisfied. However, even if the Sixth Amendment had been properly asserted as a part of defendant's objection at trial, the motion would have failed on the merits. A violation of the Sixth Amendment requires that the government agent take "some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1007.) This does not suggest that all interaction between government agents and suspects is forbidden. (*People v. Huggins* (2006) 38 Cal.4th 175, 244-245.) "'"Clearly, not all conversation between an officer and a suspect constitutes interrogation. The police may speak to a suspect in custody as long as the speech would not reasonably be construed as calling for an incriminating response."'" (*Id.* at p. 244.) "'The Sixth Amendment is violated only by deliberate action, not "whenever--by luck or happenstance--the State obtains incriminating statements from the accused after the right to counsel has attached."'" (*Id.* at p. 245.)

In this case, Deputy Bakulich did initiate the conversation with defendant. However, the question at issue here was "what [defendant] was in jail for." This does not call for an incriminating response. Deputy Bakulich did not ask whether defendant was guilty of the crimes or any details of the crimes.

He merely asked why defendant was in jail, a question facially seeking no more than why defendant had been arrested or charged.

Because the question by Deputy Bakulich could not reasonably be construed to call for an incriminating response, it did not violate defendant's Sixth Amendment rights. (See *People v. Huggins*, *supra*, 38 Cal.4th at pp. 244-245.) Under these circumstances, the failure of defendant's trial counsel to object under the Sixth Amendment was harmless because there is no reasonable probability the trial court would have ruled more favorably had it been presented with a Sixth Amendment objection. For this reason, the ineffective assistance of counsel claim fails.

III

Trial Counsel Was Not Ineffective For Failing To Object To Hearsay Testimony At Trial

At trial, the People called several police officers to corroborate the testimony of previous witnesses. These officers testified to what the witnesses had told them after each of the robberies. None of the nonpolice witnesses had been impeached as evasive or untruthful.

Defendant argues his trial counsel was incompetent in failing to object to the police testimony. He argues that because the "prosecution's entire case is riddled with the testimony of numerous police officers relaying inadmissible out-of-court statements from witnesses[,]" the testimony improperly reinforced the prosecution's case. Defendant also argues that

the testimony by the police officers improperly bolstered the identifications by the nonhearsay witnesses.

The People concede that much of the police testimony at issue could have been excluded. However, they contend the error does not require reversal, as the testimony merely duplicated the testimony presented by other witnesses and therefore did not prejudice defendant.

To establish ineffective assistance of trial counsel on direct appeal, a defendant must show: (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms; and (2) the defendant was prejudiced as a result. (*People v. Lucas* (1995) 12 Cal.4th 415, 436.) "Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" (*Id*. at pp. 436-437.) We reverse a conviction on direct appeal due to ineffectiveness of counsel only where the record of the trial itself, without regard to any other evidence such as declarations or affidavits from trial counsel, "'"affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission."'" (*Id*. at p. 437.)

Here the record shows that counsel could have had at least two reasonable tactical reasons for not objecting to the hearsay evidence from the testifying officers. First, defense counsel may have been using the officers' reiterations of the

identifications to demonstrate the weakness of the nonhearsay witnesses' identifications. During his cross-examination of the witnesses, defense counsel focused his questions on each witness's description of defendant's eyes, as his eyes are of different colors (because one is a glass eye). The majority of the witnesses to the bank robberies had not described their robber as having mismatched eyes. When the police officers were called to corroborate or expand on the witnesses' testimony, defense counsel asked each of them about whether the previous witnesses had said anything about defendant's eyes during their interviews.

During his closing argument, defense counsel discussed the robbery at Placer Sierra Bank in May 2005 and attacked the witnesses' identifications. He noted that Maria Faddis -- a teller from whom defendant took money during that robbery -- testified that the robber was no more than a couple feet from her, but "she included nothing about his eyes in any description to the police officer. Probably [the] most distinctive part of him when you are looking at him, you notice the differences in the eyes. Yet she made no mention of any difference in any eyes." When discussing defendant's identification by Sheila Kern, a customer at the bank, he argued, "Sheila Kern . . . testified that the eyes were dark. Again, nothing about a difference between the two eyes. Simply they were dark eyes. To her they looked to be the same color."

Defense counsel also attacked the witnesses' identification of defendant for the River City Bank robbery in July 2005. He

stated in his closing argument, “So in the River City Bank, the only what I would call approaching strong I.D. was that of Ms. Strutton. I say approaching, but it’s not really there because, again, she caught a glimpse of his eyes when the sunglasses were up. . . . She said she was about four or five feet from him when she caught a glimpse of his eyes, but she identified him to the police officer as having brown eyes. Again, that red flag comes up. The most distinctive part of him when you look at him straight in the face is the fact there are two different colored eyes. Yet we have another witness saying same color brown eyes. That coupled with other witnesses not being able to identify him from the picture at the bank raises at least reasonable doubt as to what happened. Not as to what happened, but as to who the perpetrator was at the River City Bank.”

By allowing the police officers’ hearsay testimony about the witnesses’ prior statements, defense counsel was bolstering the argument that defendant was misidentified. As the witnesses had not mentioned his eyes before, the jury could have concluded that there was reasonable doubt that defendant committed the crimes.

Defense counsel’s second potential tactical reason to allow the hearsay evidence was to use the witnesses’ prior descriptions to the police officers in attacking the subsequent photographic lineup identifications. The lineups took place approximately three months after the first bank robbery. When viewing the lineup, Faddis took approximately 30 seconds to identify defendant. Another teller who was present at the

robbery of Placer Sierra Bank, Myesha Cooper, also identified defendant quickly. Maria Hutchison, a customer service manager who gave defendant money during that robbery, was unable to identify anyone from the lineup.

Defense counsel contrasted Faddis's and Cooper's quick identifications with their statements to the police immediately after the crime. While cross-examining Sergeant Jason Bosworth, the police officer who administered the lineup to Faddis, Cooper, and Hutchison, defense counsel had him reiterate that both Faddis and Cooper stated they had not noticed anything abnormal or unique about the robber when they were interviewed immediately after the bank was robbed.

During his closing argument, defense counsel suggested that the immediate identification during the photo lineup was suspicious. He stated, "There w[ere] some descriptions given on the date of the incident. But it wasn't until three months later that they were picked out of a photo lineup. Why do I have a problem with that? At least two witnesses testified that they didn't think they would be able to identify him. You can check the read back in your own notes to verify. It was Ms. Faddis or Ms. Cooper who said they basically couldn't at the time. They weren't sure at the time. Yet three months later they immediately picked him out of a photo lineup. That in and of itself is suspicious. How somebody 90 days earlier can say I don't really know, and then three months later say that's him. Immediately, according to the officer. How can that be? How

can somebody who was so unsure three months earlier be positive, boom, 90 days later? That has to raise a red flag."

Defense counsel argued the lineup identifications were potentially suggestive, stating "it is entirely possible and, again, I have nothing to base it on other than the fact that these strong identifications were made 90 days when no identification -- after 90 days -- 90 days after no identification could be made. . . . I'm trying to account for the fact that in June they couldn't describe him, but 90 days later they could pick this picture out [of] a photo lineup."

By allowing the hearsay testimony contrasting the identifications at the time of the robbery against the identifications from the photo lineup, defense counsel was suggesting that the photo lineup was "suspicious."

Because trial counsel could have had these tactical reasons for failing to object to the hearsay testimony, defendant's claim of ineffective assistance of counsel fails.

IV

The Trial Court Erred In Failing To Stay Punishment For Count Two Under Section 654

The trial court imposed sentences for both count one (burglary) and count two (uttering a fictitious check). Defendant argues the trial court erred in imposing both sentences, as they were part of a single course of conduct based on a single objective. Instead, defendant argues the sentence on count two should be stayed under section 654. The People concede defendant's argument has merit. We agree.

Defendant argues remanding the case is unnecessary and asks that this court stay the sentence on count two. He contends remanding the case would allow the trial court to "'make up'" the stricken sentence by "resurrecting a sentence on a different count that it previously ordered stayed."

The People argue, however, that the case should be remanded for resentencing so that the trial court can reconsider its entire sentencing scheme, so long as the new sentence does not exceed the original sentence imposed. They contend section 654 does not prevent the trial court from imposing unstayed sentences on counts three and five on remand.

Because the trial court stayed sentence on counts three and five based on section 654, it must have determined that the statute foreclosed punishment for those crimes. Count three was the charge for grand theft discussed above. The court stayed the sentence for the grand theft under section 654 based on the finding that it was indivisible from the burglary charged in count one. The court also stayed the sentence on count five, the robbery from Cooper, finding it was indivisible from count four, the robbery from Faddis. The People offer no basis for allowing the trial court to revisit these factual findings on remand. Therefore, we will modify the judgment to stay the sentence on count two.

DISPOSITION

The judgment is modified to stay, pursuant to section 654, the sentence on count two, uttering a fictitious check. As modified, the judgment is affirmed. The trial court is directed

to amend the abstract of judgment to reflect the modification and to send a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

ROBIE, J.

We concur:

SCOTLAND, P.J.

NICHOLSON, J.