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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. ROBERT JAY MATHERS, Defendant and Appellant.	C060425 (Super. Ct. No. 08F3727)

APPEAL from a judgment of the Superior Court of Shasta County, Wilson Curle, Judge. Reversed in part and affirmed in part.

Roberta Lee Franklin, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, David A. Rhodes and Daniel B. Bernstein, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Robert Jay Mathers of possession of a forged completed check (Pen. Code, § 475, subd. (c) --

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts II and III.

count 1),[1] possession, passing, or attempting to pass a fictitious check (§ 476 -- count 2), second degree burglary (§ 459 -- count 3), writing a check with insufficient funds (§ 476a, subd. (a) -- count 4), and resisting a peace officer (§ 148, subd. (a)(1) -- count 5). In a trial by court, defendant was found to have a prior strike conviction and to have served a prior prison term.

Sentenced to state prison for nine years four months, defendant appeals, contending (1) the evidence is insufficient to support the fictitious check conviction (count 2); (2) the court's instruction on prior uncharged conduct was prejudicial error; (3) the convictions for counts 1, 2, 3, and 4 must be reversed because the court failed to give a unanimity instruction; (4) cumulative instructional error resulted in prejudice; (5) the consecutive sentence imposed on count 2 should have been stayed pursuant to section 654; and (6) the consecutive sentence imposed for count 2 must be reversed because the facts relied upon by the court were not submitted to a jury and found true beyond a reasonable doubt. We agree with defendant that the evidence is insufficient to support his conviction for count 2, a conclusion which renders his fourth and fifth contentions moot. We reject his remaining contentions.

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[1] Hereafter references to undesignated sections are to the Penal Code.

FACTS

In November 2007, defendant opened a business account with North Valley Bank (NVB) in the name of Mathers Remodel and Maintenance. The initial deposit was $50 and no further deposits were made. In December 2007, the account was closed for insufficient funds. In January 2008, five checks, totaling over $1,800 and dated either January 11 or 18 and payable to various individuals, were drawn on the closed account. Pursuant to bank policy, notices were sent to the account holders that the checks were not being honored because of insufficient funds.

On or about April 26, 2008, by means of a computer program, defendant created three checks for his closed NVB account. Each check was numbered 1078. Two of the checks were payroll checks made payable to defendant and the third check was blank.

Although the record is not clear, also on or about April 26, 2008, a woman entered a Food Maxx store in Redding and tried to cash one of the payroll checks drawn on defendant's NVB account in the amount of $482.63. The store's manager informed the woman that the check could not be cashed because it had not been signed by the issuer. The women left but returned moments later with defendant who then signed the check. The manager "ran it in the computer" and the account came up "closed." The manager returned the check to defendant and told him the check could not be cashed because the account was closed. Defendant left the store.

About 9:00 p.m., on April 26, 2008, defendant returned to Food Maxx and attempted to cash the same check he had previously tried to cash. Based upon the manager's prior determination that the account upon which the check was drawn was closed, he told an assistant to call the police and then attempted to delay defendant until the police arrived. After a short time, defendant departed, leaving the check at the store.

Officers responding to Food Maxx saw defendant, who matched the description of the suspect, walking from the store to a vehicle in the parking lot and ordered him to stop. Defendant ran but was caught and taken into custody. A search of defendant disclosed two checks, both bearing the number 1078, one of which was made out to defendant in the sum of $482.63, the same as the check he was attempting to cash at Food Maxx, and the second check was blank.

Defendant explained to the officers he had printed the checks on a computer, that he had made copies of the same check because he was trying to improve their quality, and that he had run because his girlfriend had told him he had "enemies that were looking to assault him." Unfortunately, defendant was unable to provide either an address or phone number for his girlfriend.

DISCUSSION

I

Defendant contends the evidence is insufficient to support his conviction on count 2, passing or possessing a fictitious

check in violation of section 476, because the checks he possessed were not "fictitious." We agree.

Section 476 provides: "Every person who makes, passes, utters, or publishes, with intent to defraud any other person, or who, with the like intent, attempts to pass, utter, or publish, or who has in his or her possession, with like intent to utter, pass, or publish, any fictitious or altered bill, note, or check, purporting to be the bill, note, or check, or other instrument in writing for payment of money or property of any real or fictitious financial institution as defined in Section 186.9 is guilty of forgery."

Although neither party has cited case authority directly on point, nor has our research disclosed any such cases, the matter is appropriately addressed by 2 Witkin and Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, section 150, page 182: "*Fictitious Check and Bad Check*. Issuing a check to defraud (P.C. 476a) is usually distinguishable from making or passing a fictitious or altered check (P.C. 476) in that the 'bad' check is a genuine instrument with the genuine signature of the drawer; it is merely uncollectible because of insufficient funds. [] However, if the defendant seeks to obtain funds by a check with a forged or fictitious drawer, both statutes are violated: The instrument is knowingly fictitious (P.C. 476) and the defendant obviously knows that he or she has no funds for its payment (P.C. 476a)."

Here, the only evidence in dispute was defendant's intent to defraud when he possessed or attempted to pass the checks

found on him which had been completed. The checks were drawn on a bank in existence, the NVB; they were signed by an existing person, the defendant; and defendant had an account at the bank, albeit the account was closed. Had defendant's account not been closed and had the account contained sufficient funds, either of the completed checks was legally negotiable. The closing of the defendant's account did not change the character of these checks, rather it simply rendered them uncollectible. Nor did proof of defendant's fraudulent intent, which the evidence overwhelmingly established, alter the character of the checks, but instead it rendered their possession illegal under sections 475, subdivision (c), and 476a, subdivision (a).

In sum, because the checks were genuine rather than fictitious, their utterance or possession, although prohibited by other statutes, was not prohibited by section 476.

The People's reliance on *People v. Gutkowsky* (1950) 100 Cal.App.2d 635, and *People v. Morelos* (2008) 168 Cal.App.4th 758, for support of their position that the altered check was fictitious is misplaced because these cases are factually distinguishable from the instant circumstances. The checks in *Gutkowsky* were forged and the checks in Mor*elos* were altered. (*People v. Gutkowsky, supra,* at pp. 637-639; *People v. Morelos, supra,* at pp. 765-766.) The checks at issue in the instant case

were neither forged nor altered; hence, neither *Gutkowsky* nor *Morelos* is of any aid to the People.[2]

II

Defendant contends that the court's instruction to the jury regarding the jury's use of the uncharged check offenses reduced the People's burden of proof, thereby denying him due process. We reject the contention.

The challenged instruction is a version modified by the court of CALCRIM No. 375, which states, as follows: "The People presented evidence of other behavior by the defendant that was not charged in this case/that the defendant attempted to pass *other fraudulent checks* on a closed account and defendant has written several checks on a closed account. This includes checks to individuals and attempts at Food Maxx." (Emphasis added.) The instruction went on to state that if the jury found, by a preponderance of the evidence, that the defendant had in fact committed the uncharged offenses or acts, they could use the evidence only to prove he had an intent to defraud or

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[2] Our determination that count 2 must be reversed and dismissed renders it unnecessary to consider defendant's remaining arguments insofar as they relate to count 2. Specifically, defendant's inclusion of count 2 in his arguments relating to his claims that the jury was improperly instructed on uncharged offenses, a unanimity instruction was required but not given, cumulative error resulted in prejudice, section 654 requires staying of the sentence imposed in count 2, and imposing a consecutive term for count 2 violated his constitutional right to have a jury determine factors used to impose this count.

that the evidence showed a common plan or scheme "to commit the offense[s] alleged in this case."[3]

Defendant argues that the use of the emphasized phrase "other fraudulent checks" in the instruction essentially "ended the case by telling the jurors both the charged checks and the prior checks were fraudulent" and that "[t]he instruction had the effect of impermissibly reducing, if not eliminating the

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[3] As given in this case, CALCRIM No. 375 states in full: "The People presented evidence of other behavior by defendant that was not charged in this case/that the defendant attempted to pass other fraudulent checks on a closed account and defendant has written several checks on a closed account. This includes checks to individuals and attempts at Food Maxx. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the (uncharged offense[s]/act[s]). Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the (uncharged offense[s]/act[s]), you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not: [¶] A. Intent [¶] [The defendant acted with the intent to defraud] [¶] B. Common Plan [¶] [The defendant had a plan [or scheme] to commit the offense[s] alleged in this case [¶] [In evaluating this evidence, consider the similarity or lack of similarity between the uncharged (offense[s]/[and] act[s]) and the charged offense[s].] [¶] Do not consider this evidence for any other purpose [except for the limited purpose of determining Defendant's intent or possible scheme. [¶] [Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.] [¶] If you conclude that the defendant committed the (uncharged offense[s]/act[s]), that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Counts 1 through 4. The People must still prove each charge beyond a reasonable doubt."

burden of proving beyond a reasonable doubt the element of intent for Counts 1, 2, 3 and 4 . . . ."[4] While we agree that the instruction should have omitted the word "other" from the phrase "other fraudulent checks," we reject defendant's conclusion that the jury was misled in the manner he argues.

"'In considering a claim of instructional error we must first ascertain what the relevant law provides, and then determine what meaning the instruction given conveys. The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights.' [Citation.] We determine the correctness of the jury instructions from the entire charge of the court, not from considering only parts of an instruction or one particular instruction. [Citation.]" (*People v. Smith* (2008) 168 Cal.App.4th 7, 13.)

As is relevant to defendant's argument, the jury was instructed that defendant was "charged" with having committed the offenses described in counts 1 and 4; that just because defendant had been charged was not "evidence that the charge was true;" and that each charge had to be proven by the People beyond a reasonable doubt. CALCRIM No. 375, as given, directed the jury to consider the uncharged offenses "only if the People have proved by a preponderance of the evidence that the defendant in fact committed the [] uncharged offense[s]." Thus,

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[4] Because we have concluded that count 2 must be reversed and dismissed, we do not consider it in this contention.

when the instructions are considered as a whole, the jury, composed of presumably reasonable and intelligent people (*People v. Adams* (2009) 176 Cal.App.4th 946, 954), would not have been misled into believing that it had already been determined that the checks involved in the uncharged offenses were fraudulent.

III

Defendant contends that reversal of counts 1 (possession of forged check), 3 (burglary), and 4 (insufficient funds) is required because the court failed to instruct the jury that they must unanimously agree on which checks formed the basis for the convictions in these counts. No such instruction was needed.

"[W]here the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed . . . , the jury need not unanimously agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty. [Citation.] The crime of burglary provides a good illustration of the difference between discrete crimes, which require a unanimity instruction, and theories of the case, which do not. Burglary requires an entry with a specified intent. (§ 459.) If the evidence showed two different entries with burglarious intent, for example, one of a house on Elm Street on Tuesday and another of a house on Maple Street on Wednesday, the jury would have to unanimously find the defendant guilty of at least one of those acts. If, however, the evidence showed a single entry, but possible uncertainty as to the exact burglarious intent, that uncertainty would involve only the theory of the case and not require a unanimity instruction. [Citation.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132-1133.)

Here, the possession and/or passing of the multiple checks did not constitute discrete crimes. (See *People v. Bowie* (1977)

72 Cal.App.3d 143, 156-157 [possession of 11 blank checks with intent to defraud constituted but one violation of section 475]; *People v. Carter* (1977) 75 Cal.App.3d 865, 871-872 [possession of completed checks with intent to defraud permits only a single conviction], overruled on a different point in *People v. Todd* (1994) 22 Cal.App.4th 82, 86, fn. 2.) Because each offense -- violations of sections 475, subdivision (c), 459, and 476(a), subdivision (a), involved two identical checks, each constituted a single discrete offense and, therefore, unanimity instructions were not required.[5]

DISPOSITION

The conviction and sentence for count 2, a violation of section 476, is reversed and dismissed. In all other respects the judgment is affirmed.

NICHOLSON, Acting P. J.

We concur:

ROBIE, J.

BUTZ, J.

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[5] Nor is it of any consequence whether the jury unanimously agreed the checks were either possessed or uttered, as such goes only to the theory of the case, a circumstance which does not require unanimous agreement by the jury. (*People v. Morelos* (2006) *supra,* 168 Cal.App.4th at pp. 765-766; see *People v. Ryan* (2006) 138 Cal.App.4th 360, 368.)