Filed 2/29/12

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CHRISTI SCHOENBACHLER, Defendant and Appellant.	H035242 (Monterey County Super. Ct. No. SS062140)

Following a bench trial, the trial court convicted Christi Schoenbachler of grand theft and financial elder abuse, both felonies, and two counts of misdemeanor elder abuse. She claims that there was insufficient evidence for the court to impose the misdemeanor convictions, but that if we disagree then the sentences on those counts must be stayed. As a second alternative, she claims that the trial court erred in convicting her of certain of the crimes as multiple offenses when they constituted but a single offense.

We will order the abstract of judgment modified to stay one sentence, but affirm the judgment as so modified.

PROCEDURAL BACKGROUND

The trial court convicted defendant of financial abuse of an elder (Former Pen. Code, § 368, subd. (e); Stats. 2002, ch. 369, § 2, p. 1424)[1] and grand theft (§ 487,

[1] All statutory references are to the Penal Code except as otherwise indicated.

subd. (a)), both felonies, and two misdemeanor counts of elder abuse (§ 368, subd. (c)). It sentenced her to two years in prison.

FACTS

Defendant and her mother, Lisa Karen MacAdams, are the granddaughter and daughter of the victim, Elsie Brooks, who was in her seventies at the time of the crimes. They drained Brooks's fortune either without her knowledge or by coercion when she lived with or near them in Monterey County from 2002 to 2005, eventually reducing her to near-destitution and, having so reduced her, abandoning her.[2]

Brooks had been living independently and in good mental and physical health in San Luis Obispo County when she moved to Monterey County in 2002 to live with defendant and MacAdams. She had managed her own finances in San Luis Obispo County and had long shared her financial bounty with her family, including defendant, MacAdams, and a son to whom she lent $320,000 (a loan on which he soon defaulted).

When Brooks moved to Monterey County, she had considerable cash on hand. She had sold her prior residence, a mobile home, for a $68,000 profit. She had an annuity worth $90,000, and she owned a collection of jewelry and gold coins worth about $250,000, according to her estimate at trial. She also had social security income of $950 per month.

Brooks gave defendant and MacAdams authority to draw checks on her bank account with the understanding that they would handle her finances in a responsible and fiduciary manner. She wanted them to handle the finances so that she would not have to deal with them. However, on one occasion she asked to see the bank records and defendant and MacAdams put her off, telling her not to concern herself about them.

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[2] According to the People's brief on appeal, MacAdams was convicted of the same charges as defendant but abandoned her appeal.

At one point Brooks checked herself into a care center called Sun Bridge for physical therapy. Brooks liked to consume alcohol and also hoped that the stay at Sun Bridge would cure her of the habit. She was there for about two months. At the same time, defendant and MacAdams, with Brooks's knowledge, vacated the residence they had shared with Brooks. When Brooks emerged, she discovered that defendant and MacAdams had sold some $200,000 to $250,000 of her jewelry and her furniture—acts that she had not authorized.

When Brooks left Sun Bridge, defendant and MacAdams declined to have Brooks live with them, asserting that they could not accommodate her. They moved her to a facility called Tender Loving Care, a facility that was mice-ridden, filthy, and the abode of other residents who suffered from Alzheimer's disease and would scream throughout the night.

Defendant told Brooks that the only way for her to leave the Tender Loving Care facility was for her to authorize the liquidation of her annuity. In desperation, Brooks agreed to the plan. The annuity was redeemed for $87,000. Brooks expected that the money would be used solely to fund her living expenses, but defendant and MacAdams also used it for their own purposes, including payment of rent and business expenses, without Brooks's authorization.

Part of the annuity money was used, however, to rent a condominium for Brooks and another individual in Pacific Grove, with a rent-sharing arrangement. Later, the other tenant moved out and defendant and MacAdams moved in, sharing the condominium with Brooks.

Eventually Brooks confronted defendant with an ultimatum that she would give her family members no more money. Defendant and MacAdams replied that in that case within three days Brooks would be returned to Sun Bridge (which had been renamed the

Monterey Care Center), confined in a hospital, or taken away by the police. Brooks went back to the Monterey Care Center.

On this point, Brooks testified as follows on direct examination:

"[Defendant] had plans to go to Harvard and move back east, and everybody moving right along, and—and it just didn't sit well with me, because of what I just went through for the last year and some, and I said, no, no more money.

"Q. You said that to [defendant]?

"A. I said that to [defendant], yes.

"[¶] . . . [¶]

"Q. Okay. And so what happened when you told her she wasn't going to get this money?

"A. Well, I was told three days, I either was going to be taken away by the police, or I could go to the Peninsula hospital, again, and go into Monterey Care Center, which was [formerly] . . . Sun Bridge.

"[¶] . . . [¶]

"Q. So they gave you three days to get out?

"A. Pack up . . . what I could and get out.

"Q. And so what did you do?

"A. I didn't want to go to the police, and I didn't want to be standing in the street, so I went to the hospital.

"[¶] . . . [¶]

"Q. And . . . when you went to the, to the hospital to check in, what . . . were you able to bring with you . . . ?

"A. Just . . . my suitcase, with a few clothes and my toothbrush, if you will, and that's it."

Some months later, Monterey Care Center staff called Brooks to the facility's front door, informing her "that some members of the family were throwing containers and different things." Brooks saw defendant, MacAdams, and another relative throw boxes of clothing and other items, including her jewelry box, from a van. The lock on the jewelry box was broken and the box was empty. When Brooks gestured to MacAdams to come over and talk with her, MacAdams waved, got into the van, and departed with defendant. Brooks did not see either of her two descendants again until the time of trial.

Brooks's remaining property consisted of the material defendant and the others had discarded onto the sidewalk: three containers of belongings, two boxes of clothing, and the rifled jewelry box. One of the unwanted containers contained "family albums, and [MacAdams's] little baby pictures, which I have, and bronze shoes." Brooks stood on the sidewalk and soon began to cry.

Thereafter Brooks returned to San Luis Obispo County, where she resumed living independently and once again managed her own finances.

DISCUSSION

I. *Sufficiency of the Evidence of the Elder Abuse Misdemeanors*

Defendant claims that the evidence was insufficient to convict her on the two misdemeanor elder abuse counts.

This claim relates to the Tender Loving Care and the Monterey Care Center residential facilities at which Brooks resided while under the influence of defendant and MacAdams. The record shows that the dates on which defendant committed elder abuse under subdivision (c) of section 368 ranged from approximately March to May of 2003, when Brooks was at Tender Loving Care, and July of 2004 to March of 2005, when she was at the Monterey Care Center.

Regarding Tender Loving Care, Brooks testified as follows:

"Q. Did you ever ask them to get you out?

"A. Oh, yes, all the time.

"Q. Okay. What did you say . . . to [MacAdams]?

"A. Well, I want to get out of this place. It's . . . just a nightmare, and they didn't have a place for me to go.

"Q. And . . . what did [MacAdams] say when you asked to get out?

"A. Nothing much, just that they're struggling and trying to keep the business together, and there just wasn't a place for me to go."[3]

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[3] For reasons that will appear in our discussion, it is useful to quote Brooks's entire testimony about Tender Loving Care:

"Q. Okay. All right. So what happened when you were at TLC?

"A. Well, it was an old house, with three Alzheimer's patients . . . and myself.

"Q. Just four residents?

"A. Yes.

"Q. And were you able to have any type of companionship with the people that lived there?

"A. No.

"Q. And why was that?

"A. Well, when you [have] Alzheimer's, it's a very sad condition, and it was a lot of screaming and a lot of upsetment (*sic*), constantly, on these poor people's part.

"Q. And what was it like for you living there?

"A. A nightmare.

"[¶] . . . [¶]

"Q. . . . What was the living conditions like there?

"A. The mice were eating out of the drawers where you kept your clothing . . . . [T]he mice were eating at night, and the dirt and the filth on the side of the bed, it was just—it was an experience I, I never encountered in my life.

"Q. And . . . did [MacAdams] ever come visit you there?

"A. On occasion.

"Q. How long were you there?

"A. I went in, in April, and I left the end of June, beginning July of '03.

"Q. So April, May, June, July, three or four months?

"A. . . . [A] little over two months, I would say.

"Q. Okay. And did [defendant] ever come visit you?

"A. Yes.

"Q. Did you ever ask them to get you out?

(continued)

“A, Oh, yes, all the time.

“Q. Okay. What did you say to, to [MacAdams]?

“A. Well, I want to get out of this place. It’s . . . just a nightmare, and they didn’t have a place for me to go.

“Q. And . . . what did [MacAdams] say when you asked to get out?

“A. Nothing much, just that they’re struggling and trying to keep the business together, and there just wasn’t a place for me to go.

“Q. And what, what did . . . [defendant] say when you asked her to get out?

“A. Well, basically the same thing.

“[¶] . . . [¶]

“Q. . . . Why is it that you felt stuck there, that you couldn’t get out?

“A. Well, without any money, and being in Marina, which I [had] never been there in my whole life, and knowing no one up in the area of Carmel, Monterey, or any of the extra places, I had no one to call or no one to help me.

“[¶] . . . [¶]

“Q. And you can’t drive yourself?

“A. I stopped driving because [MacAdams] said there’s no reason for me to drive, she was driving us, and whatever we needed to do, errands or whatever, we always went together.

“Q. So how was it that you were finally able to get out of TLC?

“A. Well, [defendant] approached me about my annuity and to sell it, and, then, she said that I was losing money, anyway, so you might as well sell it. And being as [I was] desperate to get out . . . I agreed.

“Q. And . . . what was the reason, aside from her telling you that you were losing money on it, what was the reason that she gave for cashing it out?

“A. That was the only way I could get out and that I could leave this TLC place.

“Q. So what was your understanding—or what were you agreeing could be done with that annuity money?

“A. Just to help me get out, and I assumed the rest would be in the bank, deposited.

“Q. Okay. So . . . what was the total of the annuity?

“A. Ninety thousand.

“[¶] . . . [¶]

“Q. . . . And what was your understanding as to what was going to happen to that money?

“A. Well, I assumed it was going to be deposited, and, then, it was going to help me to find a place to live.

“Q. And pay your rent?

“A. And pay the rent and my expenses.

(continued)

Regarding Brooks's second relevant period of institutional care, at the Monterey Care Center, she and the prosecutor had this exchange:

"Q. . . . [H]ow long were you in the Monterey Care Center?

"A. Eight months.

"[¶] . . . [¶]

"Q. During that eight months, did [MacAdams] ever come visit you?

"A. No.

"Q. Did [defendant] ever come visit you?

"A. No.

"Q. Did they ever write you letters?

"A. No.

"Q. Did they ever call?

"A. No.

"Q. Send a birthday card?

"A. No.

"Q. Do you know how the Monterey Care Center was being paid for?

"A. I believe Medicare and my [S]ocial [S]ecurity."

Brooks also testified about defendant and her entourage's discarding of her possessions on the sidewalk outside the Monterey Care Center:

"A. Outside, they have a white fence around the—the gate, and it's a low fence as you come into the care center, and that's where the social worker summoned me to come and see what was going on, which I did.

"[¶] . . . [¶]

"Q. Your living expenses?
"A. Yes."

“Q. And when you got outside, you said you saw [MacAdams] and Jan [Schoenbachler] and [defendant]?

“A. Yes.

“Q. Did they come over and talk to you?

“A. No.

“Q. Do you know if they saw you?

“[¶] . . . [¶]

“[A.] . . . I was standing . . . in the front and [they] couldn’t miss me, as they were jumping into the van, after they threw the stuff at the front door, and [MacAdams] was the last one to enter the vehicle, and I asked her to come and talk to me, . . . and I motioned, [w]ould you come and talk to me, and she waved back, ‘later,’ and jumped in the van, and I never saw any of them again.

“[The prosecutor]: How far away from you was the van?

“A. Like between you and I [*sic*], the distance.

“[¶] . . . [¶]

“Q. Okay. And did they make eye contact with you, did they look at you?

“A. Oh, [MacAdams] saw me, definitely. [Defendant] had a way to look away, she jumped in the vehicle, and Jan [Schoenbachler] jumped in the other side, and [MacAdams] was the last to get into the van.”

The Monterey Care Center social services director, Brenda Lee Lopez stood alongside Brooks at the scene of the dumping of Brooks’s few remaining belongings onto the sidewalk:

“Q. . . . [W]hat was [Brooks] doing when this was going on?

“A. She tried to talk to her daughter [MacAdams], and they totally blew us off.

“Q. And how did she react when they did that?

“A. When I got her back in there, she was crying.

“[¶] . . . [¶]

“Q. And . . . what was she upset about?

“A. Because she wanted to talk to her daughter.”

During closing argument, the prosecutor argued as follows: “Count 3 is the mental suffering for [Brooks’s] stay at TLC. She testified as to the conditions of the place, her isolation, her abandonment, her duress to sign over the annuity. She testified as to the mental suffering she endured while she stayed in TLC, and the . . . [d]efendants clearly ignored her pleas and begs to be removed from the facility. Even after she signed over [$]58,000, they left her there another two months.

“Count 4 is the mental suffering, the Monterey Care Center abandonment. She was left in a facility she did not need to be in; not one visit or call the entire time, from July of ’04 to March of ’05. Both [d]efendants were still in the community, did not make one visit or call, did not return calls, left her with one suitcase. When they did show up, they would not talk to her. They ignored her, left her crying on the sidewalk, with her few boxes of all she had left in the world.”

Earlier, in answering an objection by defense counsel during Brooks’s testimony, the prosecutor had made a similar point: “Your Honor, one of the charges is the . . . misdemeanor elder abuse, causing pain and suffering on an elder. In this case, the . . . victim was left at TLC, a facility that she did not need to be in, but was left there by both . . . her daughter and her granddaughter, who refused to get her out of that facility. And I’m also setting the stage for the embezzlement of the annuity, in that the victim was desperate to get out of this facility, and that was the only reason she agreed to cash out said annuity was to get out of this facility.”

As for the two felony counts, the prosecutor explained, “Count 1, [section] 368(e)—i.e., felony financial abuse of an elder—“is the embezzlement, so Count 1 is as to the annuity, and Count 2, grand theft, is as to the jewelry.”

Under the federal Constitution's due process clause, there is sufficient evidence to support defendant's convictions if, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) This test "does not require a court to 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' [Citation.] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Id.* at pp. 318-319.) "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) "The court does not, however, limit its review to the evidence favorable to the respondent. . . . '[O]ur task . . . is twofold. First, we must resolve the issue in the light of the *whole record*—i.e., the entire picture of the defendant put before the jury—and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements . . . is *substantial;* it is not enough for the respondent simply to point to "some" evidence supporting the finding, for "Not every surface conflict of evidence remains substantial in the light of other facts." ' " (*Id.* at p. 577.)

At the relevant times, two versions of subdivision (c) of section 368 were in effect. They differ little. Beginning in 2005, the statute provided in pertinent part: "Any person who *knows or reasonably should know that a person is an elder or dependent adult and who,* under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or

custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured or willfully causes or permits the elder or dependent adult to be placed in a situation in which his or her person or health may be endangered, is guilty of a misdemeanor." The italicized language reflects the change that became effective on January 1, 2005. (Stats. 2004, ch. 893, § 1, p. 6825.) The change does not affect the strength of defendant's insufficient-evidence claim.[4]

In 2003, when defendant committed financial elder abuse, subdivision (e) of section 368 provided: "Any caretaker of an elder or a dependent adult who violates any provision of law proscribing theft or embezzlement, with respect to the property of that elder or dependent adult, is punishable by imprisonment in a county jail not exceeding one year, or in the state prison for two, three, or four years when the money, labor, or real or personal property taken is of a value exceeding four hundred dollars ($400), and by a fine not exceeding one thousand dollars ($1,000), by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment, when the money, labor, or real or personal property taken is of a value not exceeding four hundred dollars ($400)." (Stats. 2002, ch. 369, § 2, p. 1424.)

Defendant argues that the evidence and prosecutor's closing argument establish her nonfeasance and may also establish a third party's malfeasance, but neither can

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[4] As noted, this was a bench trial, not a trial by jury. In papers filed with the trial court, the prosecution referred the court to a plethora of jury instructions, among them CALCRIM No. 831, "Abuse of Elder or Dependent Adult [(Pen. Code, § 368(c))]." However, we cannot find any indication in the record that the court considered this or any other proffered instruction before convicting defendant. Accordingly, we will not quote the language of the CALCRIM No. 831 pattern instruction here. It is long, and with its many angle- and square-bracketed permutations it is not easy to read—which is not a criticism of the instruction, but a recognition that before it is tailored for a jury's use its editorial insertions, which help trial courts to restate the law in this area, make it challenging to follow when quoted in full.

supply a basis for criminal liability. As she interprets the proceedings, the prosecution showed that Brooks's complaints about living at Tender Loving Care and the Monterey Care Center were that the management at Tender Loving Care was atrocious and that defendant was inattentive to Brooks while Brooks was at the Monterey Care Center. At oral argument, counsel for defendant emphasized this point. Counsel also argued that the coercion regarding the annuity while Brooks was at Tender Loving Care was the basis for the resulting felony elder financial abuse conviction under former subdivision (e) of section 368 and was an embezzlement but not an instance of mental cruelty.

As noted, Brooks's testimony about Tender Loving Care was that it was uninhabitable, but she did not testify that defendant or MacAdams acted affirmatively to make it uninhabitable. Part of her testimony pointed instead to defendant's and MacAdams's indifference to her stay there.

Given this partial description of the evidence, defendant's point is that our Supreme Court has construed a roughly parallel statute to require a prior duty of care, i.e., some sort of special relationship that creates a legal duty before an individual can be punished for neglecting to aid an elderly adult, as opposed to acting to place the adult in danger or discomfort.

In *People v. Heitzman* (1994) 9 Cal.4th 189 (*Heitzman*), the court examined former subdivision (a) of section 368 (Stats. 1986, ch. 769, § 1.2, pp. 2531-2532), which may be loosely described as the felony-liability version of the misdemeanor statute under which the trial court here convicted defendant.

Heitzman, *supra*, 9 Cal.4th 189, restated the rule that nonfeasance generally does not give rise to criminal liability. "[W]hen an individual's criminal liability is based on the *failure* to act, it is well established that he or she must first be under an existing legal duty to take positive action." (*Id*. at p. 197.) The legal consequence of " '[t]he non-action of one who has no legal duty to act is nothing.' " (*Id*. at p. 198.) This rule applies

to adult children and their parents. Prefatorily, "there is no . . . common law obligation on adult children to protect and care for their aging parents." (*Id*. at p. 212, fn. omitted.) With regard to any further requirements of statutory law, "in order for criminal liability to arise for *permitting* an elder to suffer unjustifiable pain or suffering, a defendant must stand in a special relationship to the individual inflicting the abuse on the elder such that the defendant is under an existing duty to supervise and control that individual's conduct." (*Ibid*.) A fortiori, under *Heitzman* an adult child can also be liable if the child was the caretaker: In other words, *Heitzman* applies to "a person with actual custody and control over the dependent[ ] or . . . with the *legal duty* to control the person with custody or control" (*Quigley v. First Church of Christ, Scientist* (1998) 65 Cal.App.4th 1027, 1038 (lead opn. of Bedsworth, J.); a defendant cannot be guilty of elder abuse "based on [a] failure to prevent abuse, unless [the] defendant had either care and custody of [the] victim or [a] duty to control [the] conduct of [the] perpetrator." (*People v. Culuko* (2000) 78 Cal.App.4th 307, 334.)

In *Heitzman*, *supra*, 9 Cal.4th 189, the defendant was a daughter who, when visiting her father, would witness his deteriorating condition amid noisome squalor but failed to help him. Her nonfeasance did not make her criminally liable. (*Id*. at pp. 194-195.) As stated, *Heitzman* considered a statutory provision that roughly parallels the misdemeanor elder abuse provision at issue here. Defendant argues that she is in essentially the same factual position regarding the conditions at Tender Loving Care: as a moral matter she might have done better to take action to improve Brooks's situation, but, not having a duty of care toward Brooks, her failure to act does not lead to criminal liability.

This case, however, differs from *Heitzman*, *supra*, 9 Cal.4th 189. Unlike the defendant in *Heitzman*, defendant did not simply observe someone else's abuse of an elder and take no action. She injected herself into Brooks's miserable living conditions

and exploited the situation. She leveraged Brooks's unhappiness by telling her that the price Brooks must pay for escaping from Tender Loving Care was the liquidation of her annuity, and by that point Brooks had reason to know that defendant would take full advantage of the funds that became available. Brooks's annuity was, inescapably, a source of solace to her—she was not a woman of vast financial resources—and forcing her to relinquish it on pain of continued suffering at Tender Loving Care was an affirmative act to cause despair and benefit from its fruits. Defendant is correct that her action constituted an embezzlement, but is incorrect that it was only an embezzlement. Former subdivision (e) of section 368 (Stats. 2002, ch. 369, § 2, p. 1424) could, obviously, be violated without the intention to inflict any kind of distress to achieve the goal of theft. In *People v. Catley* (2007) 148 Cal.App.4th 500, for example, the perpetrator took advantage of the victim's cognitive deficits to defraud him surreptitiously, without employing goal-directed cruelties. (*Id.* at p. 503.) Defendant committed embezzlement, but also acted to "willfully cause[ ] or permit[ ] any elder or dependent adult to suffer, or inflict[ ] thereon unjustifiable physical pain or mental suffering . . . ." (§ 368, subd. (c).) The latter constituted misdemeanor elder abuse.

If nonfeasance were all there was to the episode, *Heitzman* might compel reversal of one of the counts. We recognize that the prosecution's arguments and statements focused on nonfeasance, i.e., defendant's failure to act to extract Brooks from Tender Loving Care. However, the trial court's statement at the time it found defendant guilty was nebulous about the bases for the convictions it handed down, neither affirming nor rejecting the prosecution's nonfeasance theory. The court stated that "there's no doubt in the Court's mind that these [d]efendants are guilty of what they're accused of. They used this lady's money, without her consent, or if she gave consent, it was, in many cases, manipulated, such as the situation with the annuity. And they both participated. They both took her money, without authorization, used it, without her authorization, and

whatever they did with it, they had no right to do it. So the Court finds each of them guilty as to each count."

In such circumstances, in which the court made no statement that it was relying on an erroneous theory and did not display that it misunderstood the law, we assume that the court applied applicable law to the evidence and did not rely on a flawed argument. *People v. Raley* (1992) 2 Cal.4th 870 also weighed a sufficiency-of-the-evidence claim resting in part on the prosecution's statement to the jury of its theory of the case. *Raley* stated that the prosecution's argument was beside the point. (*Id*. at p. 902.) A trier of fact, whether judge or jury, is "not bound to accept the prosecutor's argument . . . ." (*Ibid.*; see also *People v. Howard* (1992) 1 Cal.4th 1132, 1189 [likewise stating that "the jury was not bound in any event to accept the prosecutor's argument"].) Rather, the trier of fact is bound to consider the evidence and the law.[5] The question is whether any rational trier of fact, having heard the evidence and been properly instructed in the law, could find defendant guilty, regardless of what the prosecution argues. A rational trier of

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[5] In support of her second claim, *post*, i.e., that the trial court should have stayed her misdemeanor elder abuse sentences under section 654, defendant asserts that "the government should not be permitted to espouse for the first time on appeal the theory that taking Brooks's jewelry and annuity money, combined with placing her in a facility against her preference, constituted the mental cruelty." She notes that *McCormick v. United States* (1991) 500 U.S. 257 stated, "Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury." (*Id*. at p. 270, fn. 8.) However, *McCormick* was at pains to disavow the affirmance of "conviction[s] on legal and factual theories never tried before the jury" (*ibid.*), and it prefaced its comment about the limits on appellate courts by explaining that "[t]his Court has never held that the right to a jury trial is satisfied when an appellate court retries a case on appeal under different instructions and on a different theory than was ever presented to the jury." (*Ibid.*) *McCormick* is inapplicable here, because from all that appears in the record the trial court properly informed itself about the same body of law that we address on appeal and properly considered the evidence adduced at trial.

fact could find defendant guilty of both elder abuse offenses in light of the state of the law and the evidence presented.

In sum, the evidence most favorable to the prosecution showed that in the two episodes that led to the charges in counts 3 and 4, defendant "willfully cause[d] or permit[ted] any elder or dependent adult to suffer, or inflict[ed] thereon unjustifiable physical pain or mental suffering . . . ." (§ 368, subd. (c).) The evidence was substantial, i.e., reasonable, credible, and of solid value, and hence sufficient (*People v. Johnson*, *supra*, 26 Cal.3d at p. 578) for purposes of this inquiry. We reject defendant's claim.

II. *Staying Sentence on the Elder Abuse Misdemeanors*

Defendant claims that the trial court should have stayed her misdemeanor elder abuse sentences under section 654 "to the extent that they are based on the embezzlement of the annuity cash out and the theft of the jewelry."

Section 654, subdivision (a), provides in pertinent part: "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."

> "The test for determining whether section 654 prohibits multiple punishment has long been established: 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' " (*People v. Britt* (2004) 32 Cal.4th 944, 951-952.)

"Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence. [Citation.]" (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

Despite the deference described in *People v. Jones*, *supra*, 103 Cal.App.4th 1139, defendant is correct that she had only one criminal intent and objective when visiting Brooks at Tender Loving Care: she wanted to gain control of Brooks's annuity. "Where a trial court erroneously fails to stay terms subject to section 654, the appellate court must stay sentence on the lesser offenses while permitting execution of the greater offense consistent with the intent of the sentencing court." (*People v. Pena* (1992) 7 Cal.App.4th 1294, 1312.) Therefore, punishment must be stayed on the misdemeanor elder abuse conviction resting on Brooks's stay at Tender Loving Care. We will order the abstract of judgment modified accordingly.[6]

The foregoing is not true of the other misdemeanor elder abuse conviction, however. To repeat, we must "presume the existence of every fact the trial court could reasonably deduce from the evidence." (*People v. Jones*, *supra*, 103 Cal.App.4th at p. 1143.) The trial court could reasonably deduce from the evidence that defendant had two intents: to steal Brooks's jewelry and, for whatever reason, to put on a vivid,

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[6] Because we reach this result, we need not address defendant's alternative contention that if we affirm the elder abuse convictions without relying on the financial-gain bases for them, we must stay the sentence on one of the convictions because all of defendant's acts of cruelty constituting elder abuse were common to the objective to "remove Brooks from the family (rather than to steal her money)."

humiliating, and distressing display of her status as the object of defendant's rejection. There was evidence of more than one criminal objective, so section 654 does not benefit defendant with regard to the second misdemeanor elder abuse conviction.

III. *Intent, Plan, and Objective in Absconding with Jewelry and Cash*

Defendant claims that the embezzlement and grand theft convictions constituted multiple convictions for a single offense and the court could not properly return both convictions. She maintains that the so-called *Bailey* doctrine (*People v. Bailey* (1961) 55 Cal.2d 514) applies to compel the conclusion that she is guilty of a single offense only.

Bailey committed multiple petty thefts. Aggregated, the loss was more than $3,064, more than the $200 grand theft threshold then in effect. (*Bailey*, *supra*, 55 Cal.2d 514, 518, fn. 3.) The trial court instructed the jury that "if several acts of taking are done pursuant to an initial design to obtain from the owner property having a value exceeding $200, and if the value of the property so taken does exceed $200, there is one crime of grand theft, but . . . if there is no such initial design, the taking of any property having a value not exceeding $200 is petty theft." (*Id*. at p. 518.) Bailey was convicted of a single count of grand theft. (See *ibid.*)

Bailey held that "[t]he test applied . . . in determining if there were separate offenses or one offense is whether the evidence discloses one general intent or separate and distinct intents. . . . [W]here a number of takings, each less than $200 but aggregating more than that sum, are all motivated by one intention, one general impulse, and one plan, the offense is grand theft." (*Bailey*, *supra*, 55 Cal.2d 514, 519.) In addition, it was, under the circumstances before the court, only one such offense. In that regard, *Bailey* announced as a general rule: "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." (*Id*. at p. 519.)

As defendant observes, *Bailey* has been extended to prevent a defendant from being convicted of more than one grand theft when the takings were committed against a single victim with one intention, one general impulse, and one plan. She relies on *People v. Kronemyer* (1987) 189 Cal.App.3d 314. Kronemyer, a conservator, plundered the victim's financial assets in a series of transactions. (*Id*. at pp. 327-328.) He was convicted of four counts of grand theft from the victim's savings accounts. (*Id*. at pp. 363-364.) The court held that Kronemyer could be convicted of only one because the *Bailey* doctrine applied even though stealing from the "physically separated funds" (*id*. at p. 364) that the victim owned "required four transactions" (*ibid.*).

The question of whether multiple takings are committed pursuant to one intention, general impulse, and plan is a question of fact for the trier of fact based on the particular circumstances of each case. On appeal, we review the implicit or explicit determination that there were separate criminal intents for substantial evidence. (*People v. Tabb* (2009) 170 Cal.App.4th 1142, 1149-1150.)

There was substantial evidence that defendant had separate criminal intents. Of course she wanted to extract as much from Brooks as she could over time, but that is not the test for determining whether she had separate intents. "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." (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 455; see *People v. Stanford* (1940) 16 Cal.2d 247, 251 (*per curiam*) [jury may convict of multiple thefts when there are separate and distinct transactions that occurred on different dates and involved the taking of different sums of money].) At closing argument, the prosecutor stated, "Count 1 . . . is the embezzlement . . . as to the annuity, and Count 2, grand theft, is as to the jewelry." She argued that count 1 involved taking

money “to be used for [Brooks’s] benefit only” and using it for defendant’s selfish purposes and that count 2 involved evidence of “flat out selling the jewelry without consent.” The trial court, sitting as trier of fact, accepted this interpretation, and it is supported by substantial evidence. We reject defendant’s claim.

DISPOSITION

The abstract of judgment is ordered modified to stay the misdemeanor elder abuse sentence that was based on the victim’s experiences at the Tender Loving Care residential facility. As so modified, the judgment is affirmed.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.

Trial Court:	Monterey County Superior Court No.: SS062140
Trial Judge:	The Honorable Terrance R. Duncan
Attorney for Defendant and Appellant Christi Schoenbachler:	Elisa Nadeau J. Grossman under appointment by the Court of Appeal for Appellant
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