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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. KATHLEEN MARIE WARNES, Defendant and Appellant.	F050089 (Super. Ct. No. MCR022946) **OPINION**

APPEAL from a judgment of the Superior Court of Madera County. John W. DeGroot, Judge.

Kathryn G. Streem, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Mathew Chan, Deputy Attorneys General, for Plaintiff and Respondent.

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Following a jury trial, Kathleen Marie Warnes, appellant, was found guilty in count 1 of possessing or receiving counterfeit money with the intent to defraud (Pen.

Code, § 475, subd. (a))[1] and in count 2 of passing or attempting to pass counterfeit money with the intent to defraud (§ 470, subd. (d)). Appellant admitted two prior prison term allegations (§ 667.5, subd. (b)). The trial court sentenced appellant to a total of five years in state prison: the upper term of three years on count 1; a concurrent upper term of three years on count 2; and 2 one-year enhancements for the prior prison terms.

Appellant contends that her felony convictions should be reduced to misdemeanors because the "special over general" statutory doctrine precluded prosecution under the forgery statutes charged in this case. She also contends that the trial court erred when it imposed a concurrent sentence on count 2, instead of staying sentence on that count pursuant to section 654, and that the court erred under various theories in imposing the upper term. We disagree and affirm.

FACTS

On the afternoon of October 12, 2005, appellant was in Harry's Liquor in Madera. Also in the store at the same time was Darin Batty, an investigator with the Madera County District Attorney's Office. Batty was a frequent customer and was wearing his badge. Batty sensed that "something wasn't right" when he observed appellant approach the counter and then retreat when customers entered the store. Finally, appellant put some items on the counter and handed the clerk, Daler (Danny) Singh, a $20 bill. From the look and feel of the bill, Singh immediately recognized it as counterfeit. Singh called over to Batty, who was in the customer line, and told him appellant was trying to pay with "a $20 fake bill."

Singh recognized appellant as someone who had previously been in the store, but she had never tried to hand him counterfeit money before. Singh did not have a joking relationship with appellant or any other customer.

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

Batty asked appellant where she got the counterfeit $20 bill. She first told Batty she got it from a bank, but she did not recall which bank. She then said she got it from "Vicky," whom appellant described as a "tweaker." Appellant then claimed she was just playing a joke on Singh, but Batty did not see either appellant or Singh laughing. Singh called the police.

Police Officer John Palazzola arrived at the scene and informed appellant of her *Miranda*[2] rights. Appellant agreed to speak to the officer and told him she first tried to use the $20 bill at a taco shop, but a clerk there told her it was fake. She then went to Harry's Liquor to buy some vodka. Appellant claimed that she joked with Singh, asking him "will you take this $20 bill."

A patdown search of appellant at the jail revealed another counterfeit $20 bill. Appellant also handed over a third counterfeit $20 bill. All three counterfeit bills had the same serial number. Appellant had approximately $2.60 of real money on her.

Defense

Appellant testified in her own defense. She claimed that, when she was in the liquor store, she first dealt with Nick Singh. She gave him 60 cents for a soda. She then asked to purchase a bottle of vodka for $2.35, which Nick Singh placed on the counter. According to appellant, she had already put the money for the vodka on the counter when Nick Singh left the store and his brother, Danny Singh, took over. Appellant then held up the counterfeit $20 bill and jokingly asked Danny Singh, "[Y]ou won't take this 20?" Appellant never intended Singh to accept the bill as genuine.

Appellant stated that she lied to the police about getting the bill from the bank because she felt threatened and was afraid. She denied telling the officer that she had tried to use the fake bill at a taco shop. Instead, she told him she brought out the bill at the taco shop and an employee there told her it was counterfeit.

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

Appellant admitted that she had been convicted of two felonies involving moral turpitude.

A defense investigator testified that Danny Singh told her he joked with all of his customers.

Rebuttal

Batty testified that, while he was in the store, he saw appellant count out approximately $2 in change and then put that money back into her pocket. He did not see her place any money on the counter for her purchase.

DISCUSSION

1. Specific and General Offenses

Invoking the special statute doctrine, appellant argues it was improper to charge her with a violation of section 475, subdivision (a) (possession of counterfeit items with the intent to pass) and a violation of section 470, subdivision (d) (forgery), since a more specific statute, section 648 (making, issuing or circulating unauthorized money) existed to cover the conduct alleged. We disagree.

> "The general rule is that where a specific or special statute covers much of the same ground as a more general statute so that a violation of the specific statute will necessarily result in a violation of the more general statute, prosecution under the general statute will be precluded. [Citations.] It is only when each element of the 'general' statute corresponds to an element on the face of the 'special' statute or when it appears from the context a violation of the 'special' statute will necessarily or commonly result in a violation of the 'general' statute, that a prosecution under the 'general' statute is precluded." (*People v. Glenos* (1992) 7 Cal.App.4th 1201, 1209.)

Section 475, subdivision (a), makes it a crime to "possess[] or receive[], with the intent to pass or facilitate the passage or utterance of any forged, altered, or counterfeit items, or completed items contained in subdivision (d) of Section 470 with intent to defraud, knowing the same to be forged, altered, or counterfeit."

Section 470, subdivision (d) broadly outlaws forgery and provides, in pertinent part, that a person is guilty of forgery if that person "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 …." The statute encompasses a lengthy and wide range of documents, from checks, bonds and bank bills to lottery tickets and certificates of shares of stock or annuities.

Section 648 makes it a crime to "make[], issue[], or put[] in circulation any bill, check, ticket, certificate, promissory note, or the paper of any bank, to circulate as money, except as authorized by the law[]." Section 648 provides further that a first offense is a misdemeanor, and each subsequent offense is a felony.

We find the "specific over general" rule not applicable here.

We first analyze the elements of a section 475, subdivision (a) offense to determine if it corresponds with that of a section 648 offense, and find that it does not. A violation of section 475, subdivision (a) requires that: (1) the defendant possessed a counterfeit item; (2) the defendant knew the item was counterfeit; (3) the defendant intended to pass or use or aid the passage or use of the counterfeit item as genuine; and (4) when the defendant possessed the counterfeit item, he or she intended to defraud. The prosecutor argued to the jury that a violation of this section occurred when the two counterfeit $20 bills were found on appellant's person at booking. Section 648, in contrast, applies more narrowly to creating and circulating a counterfeit item, and the intent to defraud does not appear on the face of section 648. The statutes do not cover the same ground, and a violation of the "special" statute would not necessarily or commonly result in a violation of the "general" statute. (*People v. Glenos, supra*, 7 Cal.App.4th at p. 1209.) The prosecution was therefore not foreclosed from charging appellant with section 475, subdivision (a).

Neither does section 470, subdivision (d) cover the same ground as does section 648. A violation of section 470, subdivision (d) requires that: (1) the defendant passed, used, or attempted to use a counterfeit item; (2) the defendant knew the item was counterfeit; and (3) when the defendant passed, used, or attempted to use the counterfeit item, the defendant intended that it be accepted as genuine and intended to defraud. Section 648, as stated above, applies more narrowly only to creating or circulating counterfeit money, and intent to defraud is not an element of a section 648 violation. "It is only when each element of the 'general' statute corresponds to an element on the face of the 'special' statute or when it appears from the context a violation of the 'special' statute will necessarily or commonly result in a violation of the 'general' statute, that a prosecution under the 'general' statute is precluded." (*People v. Glenos*, *supra*, 7 Cal.App.4th at p. 1209.) Prosecution under section 470, subdivision (d) was therefore not barred by the "specific over general" rule.

2. Applicability of Section 654

Appellant argues that the trial court erred by imposing concurrent sentences on counts 1 and 2. Appellant contends that section 654 bars punishment for both the forgery and possession with the intent to pass convictions as they are part of an indivisible course of conduct with a single intent. We disagree.

Subdivision (a) of section 654 provides, in relevant 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."

Section 654 applies not only to the same criminal act, but also to an indivisible course of conduct committed pursuant to the same criminal intent or objective. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1207-1209, citing *Neal v. State of California* (1960) 55 Cal.2d 11; see also *People v. Perez* (1979) 23 Cal.3d 545, 551.)

> "On the other hand, section 654 does not apply when the evidence discloses that a defendant entertained multiple criminal objectives independent of each other. In that case, 'the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. [Citations.]…' [Citation.]" (*In re Jose P.* (2003) 106 Cal.App.4th 458, 469.)

"The divisibility of a course of conduct depends upon the intent and objective of the defendant." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.)

> "[I]f all of the offenses were merely incidental 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.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

> "'The question of whether the acts of which defendant has been convicted constitute an indivisible course of conduct is primarily a factual determination, made by the trial court on the basis of its findings concerning the defendant's intent and objective in committing the acts.'" (*People v. Nichols* (1994) 29 Cal.App.4th 1651, 1657.)

Here, the question is whether appellant had separate objectives for her acts of attempting to pass a counterfeit bill and having in her possession two more counterfeit bills which she intended to pass.

Appellant contends that the trial court found that the counts were part of the same course of conduct, as evidenced by statements made at sentencing. We disagree. At sentencing, the trial court did not specifically address the applicability of section 654. Instead, when it chose to impose a concurrent sentence on count 2, it stated, "even though Count 1 and 2 could be run consecutive to each other, it seems like one course of conduct and therefore, concurrent sentences would appear to the Court to be appropriate."

But, "the question of whether sentences should be concurrent or consecutive is separate from the question of whether section 654 prohibits multiple punishment." (*People v. Deloza* (1998) 18 Cal.4th 585, 594.) Section 654 prohibits multiple punishment; imposition of a concurrent or consecutive sentence is an act of sentencing

discretion. (*People v. Norrell* (1996) 13 Cal.4th 1, 14 (conc. and dis. opn. of Arabian, J.).)

In *People v. Flores* (1982) 128 Cal.App.3d 512, the court upheld a concurrent sentence against a contention that section 654 precluded punishment for both selling heroin and possession of heroin for sale. Heroin was purchased during a controlled buy. During the buy, the defendant twice went outside to a pile of lumber where two baggies of heroin were later found. (*Flores*, at pp. 518-519.) On appeal, the defendant argued his consecutive sentence for possession of heroin for sale violated section 654. The court disagreed, finding that the heroin found in the lumber pile which the defendant visited during the sale transaction was kept there for another purpose. (*Flores*, at p. 526.) "Accordingly, the separate offenses, each imbued with an independent intent and objective, support the consecutive sentencing as not violating … section 654 [citations]." (*Id.* at p. 527.)

So too, here, implicit in the trial court's imposition of concurrent sentences for the attempt to pass a counterfeit bill and the possession of a counterfeit bill with the intent to defraud convictions is a finding that the two constitute separate and distinct offenses. The evidence was sufficient to allow the inference that appellant's attempt to pass the counterfeit $20 bill was separate from her intent to possess the other two $20 bills to use on another occasion.

We reject appellant's claim that section 654 is applicable here.

3. Selection of the Upper Term

The trial court selected the upper term of three years on both counts. In sentencing appellant, the trial court stated that it had read and considered the report and recommendation of the probation officer. It then stated:

> "With regard to circumstances in aggravation and mitigation, [appellant]'s prior convictions are numerous. Even without the two prison priors [appellant]'s prior performance on probation and parole was unsatisfactory as evidenced by new law violations that occurred while serving grants of

> probation and parole and violations of probation and parole. [¶] With regard to mitigating, there's no loss to the victim in this case. I readily acknowledge that. And [appellant] appears to have successfully completed the grants of bench probation in 1987 and 1996. However, the prior convictions are numerous, outweighs anything by way of mitigation. And, therefore, the Court will select the aggravated term."

Appellant first asserts that imposition of the upper term and the enhancements, both based on her prior record, resulted in a punishment that "seems extremely harsh." We disagree.

Although not specifically articulated by appellant, we first address whether the imposed sentence violated the statutory prohibition against dual use of facts. Section 1170, subdivision (b) and California Rules of Court, rule 4.420(c) prohibit the trial court from using any fact both as a basis for sentence enhancement and as a basis for imposing the aggravated term. (*People v. Jackson* (1987) 196 Cal.App.3d 380, 388, disapproved on other grounds in *People v. Rodriguez* (1990) 51 Cal.3d 437, 444-445, fn. 3.) The trial court was therefore prohibited from using appellant's prior prison terms that were the basis for her two sentence enhancements as an aggravating factor in selecting the upper term.

Here, the trial court was obviously aware of this prohibition when, in discussing the aggravating factors, it stated that "[e]ven without the two prison priors," appellant's prior convictions were "numerous" and her performance on probation and parole unsatisfactory. And even if the trial court erred in using appellant's prison priors to support the aggravating factors in imposing the upper term, it was harmless. "[A] single valid factor in aggravation is sufficient to justify an upper term." (*People v. Forster* (1994) 29 Cal.App.4th 1746, 1759; see also *People v. Osband* (1996) 13 Cal.4th 622, 730.) Appellant's probation report shows that, in addition to her present felony convictions, she has eight prior convictions, starting in 1986, and that four of the last five convictions were for felonies. The report also shows that appellant violated probation on one occasion and violated parole three times. No prohibited dual use of facts occurred.

Nor do we agree with appellant's somewhat generalized assertion that her sentence was somehow unfair. When a statute specifies three possible terms, the court "shall" impose the middle term, unless there are circumstances in aggravation or mitigation of the crime that justify the imposition of the lower or upper term. (§ 1170, subd. (b).) Here, the trial court specifically noted the factors in aggravation and mitigation and found that the factors in aggravation "outweigh[ed] anything by way of mitigation."

> "'The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.]" (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977-978.)

We find no abuse of discretion. At sentencing, defense counsel argued, in mitigation, that the amount taken by appellant was very small, no damage was actually suffered by the victim, and that appellant was not on parole at the time of the current offense. The record is clear that the trial court considered the matters in mitigation suggested by defense counsel. Appellant's extensive and continuing criminal background, however, easily rendered the aggravated sentence within the bounds of reasons. The valid, aggravating factors found by the trial court are sufficient to justify imposition of the upper term. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 581.)

Finally, appellant contends that the trial court's imposition of an aggravated sentence, based on its own judicial fact finding, violated her constitutional rights to due process and a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution, and parallel California constitutional provisions. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *Blakely v. Washington* (2004) 542 U.S. 296.) Because appellant has raised this issue challenging the imposition of the upper term in reliance on *Blakely* and *Apprendi*, we deem that appellant is also relying on *Cunningham v.*

California (2007) 549 U.S. __ [127 S.Ct. 856], pursuant to this court's order of January 31, 2007.

To impose the upper term on both counts, the sentencing court relied on appellant's "numerous" prior convictions and the fact that her "prior performance on probation and parole was unsatisfactory." There is no requirement under the Sixth and Fourteenth Amendments that the fact of a prior conviction be admitted or found true by a jury for this factor to be used in sentencing. (*Cunningham v. California*, *supra*, 549 U.S. at p. __ [127 S.Ct. at p. 868]; *Blakely v. Washington*, *supra,* 542 U.S. at p. 301; *Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 488, 490; *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 243.) The controlling principle was announced by the United States Supreme Court in *Apprendi*: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490.) Appellant argues that the trial court erred, "[i]nsofar as the trial court relied on factors other than the fact of prior convictions[,] i.e., appellant's prior performance on probation and parole was unsatisfactory," when it sentenced her to the upper term. We disagree.

While the prior conviction exception to the *Apprendi* rule has been construed broadly, to apply not just to the fact of the prior conviction but to other issues relating to a defendant's recidivism as well (see, e.g., *People v. Thomas* (2001) 91 Cal.App.4th 212, 216-223), the law in this area is not settled. We need not, and thus do not, decide here the extent to which extrinsic facts relating to a recidivist aggravating circumstance implicate *Apprendi.*

All that is required by *Blakely* and *Cunningham* is that the upper term be authorized by one or more of three types of fact: (1) facts found by the jury or reflected in its verdict, (2) facts admitted by the defendant, or (3) the fact of prior convictions. (*Blakely v. Washington*, *supra*, 542 U.S. at pp. 301-302.) Under well-settled California law, only a single aggravating factor is required to impose the upper term. (*People v.*

Osband, *supra*, 13 Cal.4th at pp. 728-729.) Consistent with these requirements, the trial court imposed the upper term based upon the fact of appellant's "numerous" prior convictions. Thus, no error occurred. Even were we to assume error occurred in relying on other factors as well, on the record here, the error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24, and there was no abuse of discretion under *People v. Watson* (1956) 46 Cal.2d 818, 836.

DISPOSITION

The judgment is affirmed.

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DAWSON, J.

WE CONCUR:

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CORNELL, Acting P.J.

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HILL, J.