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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FARNAVAZ KASRA, Defendant and Appellant.	G039709 (Super. Ct. No. 06HF1169) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Craig E. Robison, Judge. Affirmed in part and reversed in part.

Jennifer L. Peabody, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch, Deputy Attorney General, for Plaintiff and Respondent.

* * *

Defendant was convicted of two counts of grand theft and two counts of identity theft relating to the theft of a credit card from his former workplace. Defendant claims that evidence that he was offered the opportunity to take a polygraph test requires reversal of his conviction, despite a prompt admonition from the court. He also claims that sentence on two of the counts should have been stayed pursuant to Penal Code section 654. While his evidentiary claim is without merit, his sentencing argument is well taken, and we shall order the abstract of judgment amended accordingly.

I

FACTS

In 2004 and 2005, Aktay Aydin was president of Home America Lending, a mortgage company. At the request of a friend, Aydin interviewed defendant. Defendant told Aydin he had experience in the mortgage industry, but that his broker's license had been suspended. He was trying to find work as an independent contractor, because he had clients for whom he needed to process loans. Because Aydin operated under the Department of Corporations, rather than the Department of Real Estate, defendant could process loans without his broker's license. In exchange for splitting commissions, Aydin agreed to allow defendant to process his loans through Home America Lending.

After a few days, defendant asked Aydin if he had any loans that defendant could work on. Aydin agreed to let defendant work on a couple of retail loans. Defendant thereafter asked Aydin if he could do some marketing to generate prospects for new loans. Aydin purchased a list of names from a firm that sold mortgage leads, sending his credit card information by fax. He placed both the form with his credit card information and the list of leads into a file on his desk. Aydin had postcards printed and sent to the list of leads, but when he asked defendant how it was going, he replied that they were not getting much of a response and that he should buy more leads.

Thereafter, Aydin left on a business trip. When he returned, he learned that defendant had approached others who worked in the office and told them that he had

known Aydin since childhood and was a very close friend. He asked to borrow $10,000, and said he would return the money in a week or so with a huge return. Agents in the office had loaned defendant the money, but it had not been returned. When Aydin learned of this, he called defendant, who said he would come into the office, but he did not do so.

A day or two later, Aydin was contacted by someone who said he was working on a loan with defendant. Aydin was unaware of this, and searched the area where defendant had worked, finding several borrowers' files. Some of the clients had been obtained through the leads Aydin had purchased. Aydin discovered, that to avoid splitting the commission, defendant was processing the loans through another company. Aydin again contacted defendant and asked him to explain the situation.

The next day, all of the files, including the one with the leads and Aydin's credit card information, were missing. Aydin again attempted to contact defendant. Eventually, defendant sent an e-mail stating that the files were his, he did not owe Aydin any money, and he was not going to talk with him.

Some time later, when Aydin was organizing his records, he noticed a number of fraudulent charges on the same credit card he had used to purchase the mortgage leads. Aydin's wife, who paid the bills, had paid them without realizing some of the charges were fraudulent. Among the charges were a hotel (Extended Stay of America), a self-storage facility (Public Storage), and several pornographic Web sites. Aydin reported the theft to the Newport Beach Police Department, identifying over $5,000 in fraudulent charges. Upon doing some research, he learned that the registered user to one of the pornographic Web sites had the same e-mail address that defendant had used in the past. He also contacted the hotel and learned that defendant had been using the card to stay at the hotel.

Defendant was subsequently charged with two counts of grand theft (Pen. Code, § 487, subdivision (a), counts one and four),[1] two counts of identity theft (§ 530.5, subd. (a), counts three and six), and two counts of false personation (§ 529, subd. (3), counts two and five). The false personation counts were subsequently dismissed pursuant to § 1118.1. After a jury trial, defendant was found guilty on all remaining counts and sentenced to a term of 16 months in state prison, as well as restitution. Defendant was sentenced to 16 months on the first count of grand theft. The court imposed concurrent terms of 16 months on each remaining count. Defendant now appeals.

II

DISCUSSION

Polygraph Evidence

During defendant's cross-examination of Officer David White, who investigated this matter, the following exchange took place:[2]

"Q: And do you remember the time span between the first and second interview?

"A: Well, I did speak to you I believe it was May 31st, if my memory serves me correct, and that's when you pretty much gave your statement to me and due to the numerous contradictions in your statement and the statement of the victim, witnesses and so forth, I offered you an opportunity to take a polygraph lie detector test.

"[Defendant]: Your Honor.

"The Court: Ladies and gentlemen, you are admonished to disregard any evidence or information with respect to polygraph information. They are not admissible in court and evidence that somebody didn't want to take one is similarly inadmissible. You may not consider it for any purpose."

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[1] Subsequent statutory references are to the Penal Code.

[2] Defendant represented himself at trial.

Defendant argues that this exchange violated his Fifth, Sixth, and Fourteenth Amendment rights to a fair trial and due process. He also hints that the prosecutor's alleged failure to direct the officer not to mention the polygraph test constituted prosecutorial misconduct.

Defendant unnecessarily argues that the mention of the polygraph test was improper and inadmissible — this is without question. (Evid. Code, § 351.1.) It is well-established, however, that a prompt admonition is sufficient to cure the error. (*People v. Cox* (2003) 30 Cal.4th 916, 953, overruled in part on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn.22.) The jury is presumed to have complied with the trial court's admonition. (*People v. Sapp* (2003) 31 Cal.4th 240, 300.) Here, the mention of the polygraph was brief, no results were suggested, and the testimony was followed by a swift admonition. Any prejudice was therefore cured.

Defendant also suggests that the trial court actually caused additional prejudice by "offer[ing] the additional fact that appellant did not want to take the lie detector test." This goes far beyond what the court actually said, which was merely that "evidence that somebody didn't want to take one is similarly inadmissible." This falls far short of defendant's suggestion that the jury would thereafter know that defendant had refused a polygraph test — indeed, it was a logical part of the admonition, designed to insure that the jury did not consider any polygraph evidence at all.

We also reject defendant's tacit claim of prosecutorial misconduct. First, this claim is waived for failure to object at trial. (*People v. Hayes* (2006) 137 Cal.App.4th 34, 52.) Even if the argument had been preserved, it lacks merit. Citing cases in which the *prosecutor* elicited inadmissible testimony, defendant suggests that the prosecutor's duty is to be psychic, and guard against a witness uttering any possible inadmissible statement. A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. (*Donnelley v. DeChristoforo* (1974) 416 U.S. 637,

642-643; *People v. Hill* (1998) 17 Cal.4th 800, 819.) The failure to anticipate and prevent any potentially inadmissible testimony, particularly when elicited on cross-examination, does not meet this standard. We find no prosecutorial misconduct.

In sum, although the testimony regarding the polygraph was inadmissible, we find that the court's prompt admonition cured any prejudice. Thus, reversal is not required.

Sentencing

Defendant next contends that the trial court erred by failing to stay the concurrent sentences for the two counts of identity theft. He argues, essentially, that the identity theft counts were "indivisible" from the two counts of grand theft, and therefore subject to section 654.

Section 654 requires that an act or omission that is made punishable in different ways by different provisions of the Penal Code may be punished under either of such provisions, "but in no case shall [it] be punished under more than one . . . ." This provision bars multiple punishment when a defendant is convicted of two or more offenses that are incident to one objective. (*Neal v. State of California* (1960) 55 Cal.2d 11; *People v. Latimer* (1993) 5 Cal.4th 1203 [reaffirming *Neal*].) "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." (*Neal v. State of California, supra*, 55 Cal.2d at p. 19, italics added.) A defendant cannot, however, avoid multiple punishment by simply claiming that several separate criminal acts were committed pursuant to a broad objective, such as obtaining money. (*People v. Lochmiller* (1986) 187 Cal.App.3d 151, 153.)

"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.)

In count one, defendant was charged with grand theft from Extended Stay of America on September 21, 2005. In count four, he was charged with grand theft from Public Storage on September 7, 2005. Count three alleged that on September 21, 2005, defendant unlawfully used Aydin's personal information to obtain "credit, goods, services and medical information" in Aydin's name and without his consent, constituting identity theft. Count six alleged that the same crime happened on September 7, 2005.

Defendant argues that the identity theft alleged in counts three and six must be stayed because the stolen identity was used with the same objective as the respective grand theft.[3] Respondent concedes that the victims of the respective crimes were identical. We agree with defendant that given the time, place, and circumstances, the grand thefts were indivisible from the respective identity thefts. Therefore, the two counts of identity theft should have been stayed pursuant to section 654, rather than sentenced concurrently. We shall direct the clerk of the trial court to amend the abstract of judgment accordingly.

III

DISPOSITION

The judgment is reversed with respect to the sentence on counts three and six, and remanded with directions to the clerk of the trial court to amend the abstract of

[3] Respondent, unfortunately, misapprehends defendant's argument, apparently believing that defendant is claiming that both grand thefts occurred pursuant to a single objective.

judgment to reflect a stay pursuant to section 654 on counts three and six. A copy of the amended abstract shall be forwarded forthwith to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.