S224546

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JUANITA VIDANA,

Defendant and Appellant.

Fourth Appellate District, Division Three, No. G050399
Riverside County Superior Court No. RIF1105527
The Honorable Edward D. Webster, Judge

PETITION FOR REVIEW

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By Appointment of the Court of Appeal under the Appellate Defenders, Inc. independent case system.

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JUANITA VIDANA, Defendant and Appellant.

PETITION FOR REVIEW

TO THE HONORABLE TANI CANTI-SAKAUYE, PRESIDING JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to Rules 8.500 and 8.504 of the California Rules of Court, appellant Juanita Vidana respectfully requests that this Honorable Court the decision of the Court of Appeal, Fourth Appellate District, Division Three, which affirmed as modified the judgment of the superior court. A copy of the opinion filed on January 23, 2015, is attached hereto as Appendix "A."

MEMORANDUM IN SUPPORT OF THE PETITION

STATEMENT OF THE ISSUES

1. Is a defendant's state and federal constitutional right to due process violated when she is convicted of embezzlement and the evidence demonstrates that numerous people had access to the missing money and it fails to establish that the defendant was the individual who embezzled the money?

2. In an embezzlement case, does a trial court abuse its discretion by ordering the defendant to pay $58,273.02 in victim restitution when multiple individuals had access to the cash payments of their employer and the evidence fails to establishes the defendant was responsible for the entire amount ($58,273.02) of missing cash?

3. Does a trial court abuse its discretion by imposing a restitution order in an amount that it realizes the defendant will not be able to fully or substantially pay, the defendant has four very young children to support, her felony conviction makes it difficult for her to find employment, and the evidence fails to establish that the defendant was responsible for the loss of entire amount of the restitution order?

STATEMENT OF THE CASE

Following a jury trial, appellant was found guilty of two felonies: embezzlement (Count 1 - Pen. Code § 503)[1]; and Count 2 - grand theft (Count 2 - § 487, subd. (a)). (1CT 105, 149-150.) On May 10, 2013, appellant was placed on formal probation for a period of 36 months, and committed to the custody of the Riverside County Sheriff for 240 days. (1CT 151-153; 2RT 501-503.)

Appellant filed a timely notice of appeal. (1CT 175.) On January 23, 2015, in an opinion certified for partial publication, the Court of Appeal found that larceny and embezzlement constitute two different ways of committing the single offense of theft. (Slip opn. p. 11.) It struck appellant's conviction for grand theft, and it affirmed, as modified, the judgment. (Slip opn. p. 17.) Appellant did not file a petition for rehearing.

STATEMENT OF FACTS

For purposes of this Petition for Review, appellant adopts the facts set forth in the "Facts" section of the opinion. (Slip opn. pp. 2-5.) Additional facts, when relevant, are included in the arguments that follow.

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

NECESSITY FOR REVIEW

Review of this case is necessary to address two important and recurring questions of law. This petition is also necessary to exhaust appellant's state remedies before seeking federal review. (See e.g. *O'Sullivan v. Boerckeli* (1999) 526 U.S. 838 [144 L.Ed.2d 1, 119 S.Ct. 1728].)

The first question presented addresses the threshold of evidence necessary to support a defendant's conviction for embezzlement. It is appellant's position that her conviction violates her federal constitutional right to due process because there was evidence that multiple people had access to the cash payments that were embezzled and the prosecution failed to establish that she was the individual who embezzled the money that was missing from her employer. The Court of Appeal disagreed, and found that because the receipts from the missing payments were in appellant's receipt book, and an employee testified appellant's handwriting was on the envelopes of those payments, substantial evidence support's appellant's conviction. (Slip opn. pp. 11-14.) This court should grant review and determine whether the Court of Appeal properly analyzed the issue and correctly rejected appellant's position.

The second question involves the scope of the trial court's discretion in ordering restitution as a condition of probation. On appeal appellant argued that the trial court abused its discretion by imposing a $58,273.02 victim

restitution order because the order is not reasonably related to the crime for which she was convicted or to the purposes of probation. Appellant argued that at most a victim restitution order of $10,976.00 would be appropriate, because that was the amount missing from the four envelopes with partial payments. She also argued that the restitution order was inconsistent with the purposes of probation because her felony conviction limits her ability to obtain gainful employment, she has four very young children to support, the court indicated it did not expect appellant to be able to pay the total amount imposed, and the huge financial burden would interfere with her rehabilitation.

The Court of Appeal rejected appellant's argument in its entirety. (Slip opn. pp. 15-16.) It found there was circumstantial evidence that appellant had taken $58,273.02 from her employer, "And having credited that evidence, the trial court was required to award full restitution unless clear and compelling reasons dictated otherwise." (Slip opn. p. 16.) The court held that even though appellant would have difficulty paying the restitution that "is not a sufficient reason to depart from the constitutional mandate of full victim restitution." (*Ibid.*) Review should be granted to determine if the Court of Appeal reached the proper conclusion or whether the $58,273.02 victim restitution order exceeds the bounds of reason and/or is not reasonably related to a purpose of probation.

ARGUMENT

I.

APPELLANT'S CONVICTION FOR EMBEZZLEMENT MUST BE REVERSED BECAUSE THERE WAS AN ABSENCE OF EVIDENCE TO ESTABLISH THAT SHE TOOK OR CONVERTED MONEY BELONGING TO HER EMPLOYER

A. Introduction

Appellant was convicted of one count of embezzlement and one count of grand theft. The prosecution's theory of the case was that from June 24, 2010, through June 23, 2011, appellant, while working at Robertson's as a credit agent, misappropriated and took $58,273.02 from cash payments that she accepted from customers on behalf of Robertson's. As illustrated below, there is an absence of substantial evidence to support appellant's conviction because there were a number of individuals who handled the cash payments, and the prosecution failed to establish that the cash losses occurred during times when appellant handled the payments and that she was the individual who took the money from her employer.

B. Standard of Review

The due process clause of the Federal Constitution prohibits the criminal conviction of any person except upon proof beyond a reasonable doubt. (U.S. Const., 14th Amend.; *Jackson v. Virginia* (1979) 443 U.S. 307, 319 [61 L.Ed.2d 560; 99 S.Ct. 2781]; *In re Winship* (1970) 397 U.S. 358, 364

[25 L.Ed.2d 368, 90 S.Ct. 1068].) There must be substantial evidence to support a conviction, such that a reasonable jury could find guilt beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.) Substantial evidence consists of evidence that reasonably inspires confidence and is of solid value. (*People v. Marshall* (1997) 15 Cal.4th 1, 34.)

C. There Is an Absence of Substantial Evidence to Support Appellant's Conviction Because the Prosecution Failed to Establish That Appellant Converted and/or Took Money From Her Employer

It cannot be disputed that the accounts receivable and accounting practices and procedures in use at Robertson's during 2010 and 2011 were rudimentary and outdated, especially considering the large amount of cash received at the company's offices. The evidence established that a customer would come into Robertson's offices to make a cash payment. When a customer's payment included cash, the customer would go to the desk of a credit agent, hand the agent the cash, and the agent would use their own receipt book and write a receipt for the customer. The credit agent would thereafter usually take out an envelope, and write on the outside of it information regarding the payment - the identity of the customer, and the amount of cash received. Subsequently the agent would take the envelope with the cash to a designated employee. (1RT 90-91, 167-168, 224-225, 238-239, 273.)

In 2010 and 2011, the credit agents were directed to take cash payments to Levato, and if she was not available, they were to take them to Therese Bernstein. Megan Levato or Bernstein would count the cash in the presence of the credit agent, verify it matched the amount written on the envelope, and initial the envelope. (1RT 90-91, 226, 240.) Sometimes they would make a copy of the envelope and provide it to the agent, who then returned to their own desk. (1RT 191, 238-239, 249.) If Bernstein received the money in Levato's absence, she would place it in her desk drawer until Levato returned. (1RT 231, 245.) Although Bernstein claimed that she would lock the money in her desk drawer, Lori Lanni testified that she never saw Bernstein lock or unlock her drawer and that she did not know if Bernstein kept her drawer locked. (1RT 245; 2RT 281.)

Levato testified that after she received a cash payment, she would lock it in her desk drawer until she made a bank deposit at the end of the day, and that procedure was confirmed by Bernstein. (1RT 224-225, 229-230.) Levato further testified that she would wait until the end of the day to make a deposit, regardless of whether she had collected a large amount of cash. (1RT 229.) Her testimony clearly contradicted that of Kaye Bennett, who stated that upon receipt of a large amount of cash, it would be immediately deposited, Levato would go to the bank as often as needed, and that Levato would only keep up

to $5,000.00 in her desk before making a deposit.[2] (1RT 169-170.)

According to Bennett, Levato, and Bernstein, in 2010 and 2011, the only people who were handled cash payments between the time of the payment and the deposit were the credit agents, Bernstein, and Levato. (1RT 89-90, 226, 240.) While they may have been the only designated persons to regularly handle the cash, in reality numerous other individuals handled cash at various times. The evidence established that Rosa Villanueva was the back-up person for making cash deposits. (1RT 168.) Levato testified that when she received a large amount of money from a credit agent, or when she received cash after the bank was closed, she gave it to Bennett to put in the safe. (1RT 230, 232.) When Bernstein received a cash deposit after 5:00 p.m., she gave it to Bennett to lock it in the safe, and if Bennett was not there, she gave it to the controller. (1RT 168, 246.) According to Bennett, if a cash deposit came in late and she was not in the office, it could be given to the operations manager. She testified that besides herself, only the president of the company and the operations manager knew the combination to the safe. (1RT 168-169, 179.) Bennett also testified that if those individuals were absent, the money could be given to the controller. (1RT 180.) Thus there was evidence that at various times, there were at least seven individuals who

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[2] Bennett also testified that sometimes with a large cash payment, such as one over $10,000, the credit agent would ask the customer to meet them at the bank to make the deposit. (1RT 208, 218.)

could handle the cash that had been turned over by a credit agent.

Once the credit agent had turned over a cash payment to another employee, there was ample opportunity for that individual to misappropriate some or all of that payment. After Levato received a cash payment, she would provide the relevant information to accounting clerk Villanueva, who entered it into the data base. (1RT 225-226.) Levato could have provided erroneous information to Villanueva - either intentionally or unintentionally - at any time. If Bernstein or Levato or anyone else had received money from a credit agent, and failed to have it entered into the database, the credit agent would have nothing to apply to the computer invoice, and the payment would appear missing. (1RT 93.)

Lanni testified that throughout the day, runners from different plants would bring Levato cash bags from C.O.D.s, and Levato kept the money in her desk. When customers at Robertson's needed change to make a cash payment, Levato would sometimes have to start opening envelopes received from other plants to make change. (2RT 279.) The fact that Levato received cash throughout the day and kept most of the cash in her desk, provided her with ample opportunity to steal cash from her employer, especially since the surveillance cameras did not point to her desk. (1RT 219.)

Money that was had been placed in the safe at the end of the day would not be entered into Robertson's database until the following day. (1RT 169,

184.) There was evidence that sometimes incidents occurred where money was not entered into the database and deposited for a significant period of time. Bennett recalled one occasion when she returned from vacation and learned that Bernstein had collected cash one day that did not appear in the deposit, and it was later found in her desk. Bernstein said she had forgotten to turn it in. The credit agent for that customer had noticed the discrepancy. (1RT 196.) Lanni testified about an incident where it took three weeks for a $400.00 deposit to be made and posted. A statement had gone out showing the customer they still owed the money, and Lanni received a call from the customer saying they had already paid. Lanni went to Bennett, who opened the safe, took out the money, and brought it to Levato. (2RT 270-271.)

There were also between six and eight credit agents working in Robertson's offices during the relevant time period, and they worked as a team and covered for each other. (1RT 161, 162; 2RT 264-265.) Although cash payments were typically made to the customer's assigned credit agent, one agent would accept payment from the customer of another agent if the assigned agent was at lunch, sick, or otherwise out of the office. (1RT 164, 89, 167.) Accounts were reassigned whenever an agent left their employment or went out on maternity leave. (1RT 162; 2RT 287.) Each credit agent had their own receipt book that they were to keep in their desk. (1RT 163-164.) Although each agent was supposed to use their own receipt book, there would

be times when they would not do so, such as when they ran out of receipts in their book, or when they had locked their receipt book in their desk and did not have immediate access to their desk key. (1RT 165.) In fact there was evidence at that another agent had used appellant's receipt book. A receipt from appellant's receipt book dated 1-26-11 to Christian Failey for a credit card payment was signed by someone other than appellant. (Exh. 1C; 1RT 165.)

According to Bennett, appellant's signature appeared on all of the receipts related to the payments where some or all of the cash portion thereof was subsequently missing. (1RT 187.) Bennett, however, is not a handwriting expert, and the prosecution did not call any expert to establish that any of the purported signatures or writing on the receipts belonged to appellant. Discernable differences in the handwriting on the signatures is apparent merely by viewing the signatures on various receipts introduced into evidence by the prosecution. (See Exhs. 1A-1H; 2A-2C; 3A-3D; 4A, 5A 6A-6B, 7A-7B, 8A, 9B, 10A, 11A, 12A.)

There was evidence that errors occurred in various stages of the accounts receivable process. (1RT 137; 2RT 389.) For example, receipt #219681 reflects a $7662.00 check payment Ricardo Gonzalez made on May

17, 2011.[3] (Exh. 1F; 1RT 31.) A Payment Hitlist shows that the entire payment was posted, but it was entered as a cash payment, rather than as a check payment. (Exh. 1L; 1RT 111-112.) There was also a "99999" account where payments were posted when money was received that could not be attributed to any particular customer. (2RT 377-378.)

There was conflicting testimony about the ability of various employees to go into the database and transfer money between accounts. Bennett testified that unlike accounts receivable clerks, credit agents can transfer money from one account to another, although they are supposed to come to her and ask her to do so. (1RT 171-172.) She also testified that credit agents had complete access to get into every account, and that they could switch around credits from cash to check, and post and not post in someone's account. (1RT 167.) Bennett's testimony on this subject was not corroborated by any other witness. Appellant testified that only Bennett could move or transfer money. (2RT 330.) Lanni testified that if a customer had paid, and it had been applied to the wrong job, she would have to request Bennett to move the money to a different job number. (2RT 284.) Lanni also testified that all agents other than Maria were blocked from moving money from one account to another. (2RT 275.) Levato, who had become a credit

[3] The reporter's transcript erroneously indicates that the payment was in the amount of $76.62. (1RT 31.)

agent three weeks before trial, was not aware if credit agents had the ability to credit accounts or move things around from one customer to another. (1RT 233.)

Another problem in the accounting system was the manner in which discounts and deductions were taken by customers and applied to their accounts. Customers came in to pay their accounts and took various deductions that they claimed they were entitled to take. The credit agent would sometimes not learn until later, whether the sales representative had authorized all or part of the deductions. This matter was complicated further when a credit agent took such a payment from a customer who was assigned to a different credit agent. (2RT 267-269, 304, 329-330.)

The Payment Hitlists introduced into evidence by the prosecution contained zero checks and zero amounts, and the details of such transactions cannot be ascertained from the lists. (Exhs. 1I, 1J, 1K, 1L, 2D, 3E, 4B, 5B, 6C, 7C, 8B, 9A, 10B, 11B, 12B.) Some of the zero checks occurred at the end of the month, which may have been the result of reconciling done by the accounting department at the end of each month. (1RT 170-171.)

Based on the fact that the accounting department reconciles on a monthly basis, they would have known at that time whether all of the money collected during the previous month had been deposited. (1RT 170-171.) Although Robertson's contended that appellant had been taking money for a

one year period beginning in June of 2010, they were not aware of any cash payments missing from her customers' accounts until after she went on maternity leave in late June of 2011. (1RT 138, 178.) Neither Bernstein nor Levato ever came to Bennett indicating there were any issues with appellant, or stating that the cash in an envelope she provided did not match the amount written thereon. (1RT 179, 182.) No customers came to Bennett complaining that payments they made were missing from their statements. (1RT 179.)

It is significant that there was no evidence that any anyone complained about appellant's work, or that appellant's customers had claimed that their cash payments had not been fully credited to their accounts. (2RT 333.) In fact appellant's supervisor testified that appellant had been an exceptional employee. (1RT 136-137.) Levato testified that she had no problems with appellant or appellant's work during 2010 and 2011. (1RT 233.) Since appellant was missing a lot of work during her last pregnancy and other agents covered for her, and it was known that appellant was going to be taking a maternity leave, other credit agents would have had the opportunity to take or misappropriate cash from payments made by appellant's customers, and in the process, they may have framed her. (2RT 317.)

Evidence was presented that a $2,000.00 check that VSP Concrete sent to Robertson's in April of 2011, was deposited and coded to be posted to their account, but it was not applied in the way it was intended. Two invoices were

paid, and the balance of $1,011.32 was put on the account as an open credit to be used, but it was then transferred to the Unique Concrete Dimension account and used to pay one of their invoices that had previously been paid with cash. (1RT 152.) The prosecutor contended that the transfer occurred to cover up a theft of a $1,000 cash payment made by Unique Concrete Dimension in January. (2RT 419.) The evidence, however, failed to establish that appellant even had the ability to make such a transfer. Further, there was no evidence presented to establish, either from coding in the computer system itself, or from anyone else, that appellant had posted the payments to the accounts and/or made the transfer between the accounts.

The Payment Hitlist for Long Horn has a 0.00 posting for June 26, 2011, a Sunday, which was 27 days after the $13,900.00 cash payment was made, from which $900.00 was missing. The 0.00 posting represents that someone had gone into the system that day and posted some type of money. (Exh. 1L; 2RT 318-320.) It seems strange that an entry had been made on a Sunday, which was not a normal working day at Robertson's. (2RT 320.) The prosecution offered no explanation for the entry or the fact that it was made on a Sunday.

Perhaps the strongest evidence in the prosecution's case consisted of the four envelopes that had contained cash payments (Exhs. 28-31), because the amount of cash designated on each one, which had allegedly been written

by appellant, was significantly less than that contained on the corresponding receipts found in appellant's receipt book. (Exhs. 1-D, 1-E, 1-G, 7-A.) There was a total of $10,976.00 missing from those four payments. (See Exh. 33.) Bernstein testified that the customer number and amount of cash appearing on the envelopes had been written by the credit agent, except for the corrected amount of $9,000 on one of them (Exh. 30). (1RT 244.) Bennett testified that she recognized that the customer numbers and amounts of cash were in appellant's handwriting. (1RT 156-159.) A major flaw in the prosecutions' case is that neither Bennett nor Bernstein are handwriting experts, and their testimony failed to establish that appellant's handwriting is actually on any of the four envelopes.

The prosecution did not introduce any evidence to establish that appellant took or misappropriated the missing cash and used it for her own benefit. Not only were no bank account records of appellant or other financial documents introduced into evidence, there was also an absence of evidence that appellant had made any unusual or expensive purchases in 2010 or 2011. Bennett testified that appellant never spoke about being independently wealthy or not having to depend on her paycheck. In fact appellant told Bennett that, "pretty much she was always out of money." (1RT 140.)

There were simply two many holes in Robertson's accounts receivable and accounting systems, and too many people handling the cash without it

necessarily being documented and tracked, to establish that appellant was the individual responsible for the missing money. Accordingly, her convictions violate her constitutional right to due process, and they must be reversed. (U.S. Const., 14th Amend.; *Jackson v. Virginia, supra*, 443 U.S. at p. 319; *In re Winship, supra*, 397 U.S. at p. 364.)

II.

THE TRIAL COURT ABUSED ITS DISCRETION BY ORDERING APPELLANT TO PAY VICTIM RESTITUTION IN THE AMOUNT OF $58,273.02 BECAUSE THE ORDER EXCEEDS THE BOUNDS OF REASON UNDER THE CIRCUMSTANCES IN THAT THE EVIDENCE DID NOT ESTABLISH THAT APPELLANT WAS RESPONSIBLE FOR TAKING THE ENTIRE AMOUNT OF MONEY THAT WAS MISSING AND THE RESTITUTION ORDER IS CONTRARY TO THE PROBATION PURPOSE OF REFORMATION AND REHABILITATION

A. Introduction & Relevant Procedural History

The court ordered appellant to pay $58,273.02 in victim restitution pursuant to section 1203.1, subdivision (a)(3). The prosecutor contended that $58,273.02 was the appropriate amount of restitution because it was "the total amount that was proven up at trial." (2RT 497.) Defense counsel did not dispute that "the amount that was testified to was $58,273.02," and the court thereafter ordered appellant to pay victim restitution in that amount, with interest at the rate of 10 percent per annum. (1CT 151; 2RT 497, 502.)

As illustrated below, this court should find that the trial court abused its discretion by imposing victim restitution in the amount of $58,273.02 because: the evidence failed to establish that appellant was the person responsible for taking all of the missing money; the jury's verdict only established that it found that appellant had taken more than $950.00; and requiring appellant to pay such a substantial amount of restitution is

inconsistent with the reformation and rehabilitative purposes of probation and therefore the restitution order exceeds the bounds of reason. Appellant requests that the victim restitution order be reduced to $10,976.00, because the evidence failed to support a finding that appellant was responsible for any greater loss to Robertson's, and such an order would promote the reformation and rehabilitative purposes of probation.

B. Victim Restitution Imposed Pursuant to Section 1203.1, Subdivision (a) Must Be Reasonably Related to the Crime of Which the Defendant Was Convicted or to Future Criminality

The victim restitution order was imposed pursuant to section 1203.1, subdivision (a)(3). This statute provides:

> The court shall provide for restitution in proper cases. The restitution order shall be fully enforceable as a civil judgment forthwith and in accordance with Section 1202.4 of the Penal Code.

Victim restitution is mandated by section 1202.4, subdivision (f). Said section provides in pertinent part:

> . . . in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court. The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so and states them on

the record.

The dollar amount of the restitution must be "sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant's criminal conduct . . . ." (§ 1202.4, subd. (f)(3).) Such losses include, but are not limited to:

> (E) Wages or profits lost by the victim, . . .
>
> * * *
>
> (G) Interest, at the rate of 10 percent per annum, that accrues as of the date of sentencing or loss, as determined by the court.

When a trial court orders restitution pursuant to section 1203.1, subdivision (a)(3) as a condition of probation, the discretion of the court is only restricted by the purposes of probation. A restitution order imposed pursuant to section 1203.1, subd. (a)(3), as a condition of probation must be "reasonably related either to the crime of which the defendant is convicted or to the goal of deterring future criminality." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121; see also *People v. Rugamas* (2001) 93 Cal.App.4th 518, 521.)

In *People v. Moser* (1996) 50 Cal.App.4th 130, the court explained:

> Restitution "is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused. Such a penalty will affect the defendant differently than a traditional fine, paid to the State as an abstract and impersonal entity, and often calculated without regard to the harm the defendant has caused. Similarly, the direct relation

> between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine."

(*Id.* at p. 135-136, citing *Kelly v. Robinson* (1986) 479 U.S. 36, 49, fn. 10 [93 L.Ed.2d 216; 107 S.Ct. 353].)

In *People v. Carbajal, supra*, 10 Cal.4th 1114, the California Supreme Court noted that there is no requirement limiting the restitution order to the exact amount of the loss for which a defendant is found culpable, and the order need not reflect the amount of damages that could be recovered in a civil action. (*Id.* at p. 1121.) It also rejected the defendant's argument that the restitution order must be limited to losses that are caused by the crime for which the defendant was convicted. (*Id.* at p. 1122.) The court held that when the trial court orders victim restitution as a probation condition, even where the victim's loss did not result from the crime for which the defendant was convicted, the restitution order is proper as long as the trial court finds that it will serve one of the purposes of probation set forth in section 1203.1, subdivision (j). (*Ibid.*)

Section 1203.1, subdivision (j) provides in relevant part:

> The court may impose and require any or all of the above-mentioned terms of imprisonment, fine, and conditions, and other reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer, . . .

The *Carbajal* court explained the scope of the trial court's discretion to order restitution as a condition of probation:

> The trial court's discretion, although broad, nevertheless is not without limits: a condition of probation must serve a purpose specified in the statute. In addition, we have interpreted Penal Code section 1203.1 to require that probation conditions which regulate conduct "not itself criminal" be "reasonably related to the crime of which the defendant was convicted or to future criminality." (*People v. Lent, supra*,[(1975)] 15 Cal. 3d 481, 486.) As with any exercise of discretion, the sentencing court violates this standard when its determination is arbitrary or capricious or """exceeds the bounds of reason, all of the circumstances being considered."" [Citations.]" (*People v. Welch, supra*, [(1993)] 5 Cal.4th [228] at p. 233.)

(*Carbajal, supra*, 10 Cal.4th at p. 1121.)

C. The Trial Court Abused Its Discretion By Imposing Victim Restitution in the Amount of $58,273.02 Because It Is Not Reasonably Related to the Offenses of Which Appellant Was Convicted or to the Purposes of Probation

Here the $58,273.02 victim restitution order is not reasonably related to the crimes for which appellant was convicted, or to the purposes of probation. In Argument I, *ante*, appellant presented her argument that there was insufficient evidence to support her convictions. If this court disagrees and affirms her convictions, it should recognize and consider that the evidence failed to establish that appellant was in fact responsible for the theft of the entire $58,273.02 that was missing from Robertson's. At best, the strongest

evidence in the case only suggested that appellant may have been responsible for $10,976.00 of the missing money - the amount missing from the cash payments that had been turned into accounts receivable in the four envelopes admitted into evidence as Exhibits 28, 29, 30 and 31.

Written on each of the four envelopes was the amount of cash contained therein and the customer's number, and these notations were allegedly written by appellant. The cash in the four envelopes turned over to the accounts receivable department was significantly less than the amount of the cash payments as reflected in the corresponding receipts found in appellant's receipt book, that were also purportedly written by appellant. With regard to the other missing payments, no portion of the cash payments had been turned into accounts receivable, but there is a lack of substantial evidence to establish that appellant had taken that portion of the missing money. No handwriting expert verified the writing on the receipts for any of the payments in question, and there was no surveillance video showing appellant accepting any of the payments, doing anything unusual with the cash payments, or taking the money for her own personal use. Although the prosecution contended that appellant misappropriated and took $58,273.02 from the various cash payments that she received, the jury's verdict, finding appellant guilty of grand theft, reflects only that it found that appellant had taken more $950.00. As such, the restitution order imposed was not

reasonably related to the offenses for which appellant stands convicted. Appellant contends that an $10,976.00 would be the appropriate victim restitution order, because that is the amount of cash missing from the four payments that were submitted in the envelopes introduced into evidence.

The $58,273.02 restitution order is not reasonably related to the reformation and rehabilitative goals of probation. During the probation and sentencing hearing, defense counted pointed out that with ten percent interest per annum on a restitution order of $58,273.02, appellant would need to pay more than $500.00 a month "to even get ahead, to even make a dent in the amount of restitution." (2RT 494.) The court made a statement indicating that it did not expect that appellant would be able to pay the entire amount of restitution, and that it would even be surprised if she paid back a substantial portion of it. (2RT 494.) Subsequently the court reiterated its belief that it would be unlikely that appellant would be able to pay the full amount of restitution. (2RT 499.)

The court also acknowledged that it would be difficult for appellant to get a job in light of her convictions. (2RT 501.) When imposing fines and fees, the court found that appellant lacked the ability to pay the booking fee, the cost of the presentence report investigation, and attorney's fees. It stated, "Everything that I can find related to her ability to pay I'm going to find that she does not have the ability to pay." (2RT 497.)

One of the purposes of probation is "the reformation and rehabilitation of the probationer." (§ 1203.1, subd. (j).) Imposition of the $58,273.02 restitution order in appellant's case does not promote this purpose, and it could likely be detrimental to accomplishing this purpose. The record established that at the time of the probation and sentencing hearing, appellant had three children under the age of four, and that she was also caring for her one-year old nephew, and trying to obtain permanent custody of him. (1CT 155; 2RT 499.) By placing such an onerous financial burden on appellant it will be difficult for appellant to become rehabilitated, because she will already be facing substantial difficulty finding a decent paying job in light of her convictions, and the fact she and her husband have the financial responsibility of raising four very young children.

In light of the all of the relevant circumstances, including the absence of evidence to establish that appellant had taken the entire sum of the missing cash payments, and because the victim restitution order is not consistent with the purposes of probation, this court should find that the $58,273.02 victim restitution order exceeds the bounds of reason, and that the trial court abused its discretion by imposing it as a condition of probation. For the reasons discussed hereinabove, the victim restitution order should be modified by reducing it to $10,976.00.

CONCLUSION

Based on all of the foregoing reasons, appellant respectfully requests this Honorable Court to grant review in this matter.

DATED: February 18, 2015

Respectfully Submitted;

Valerie G. Wass
Attorney for Appellant
JUANITA VIDANA

CERTIFICATE OF APPELLATE COUNSEL PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.504 (d)(1)

I, Valerie G. Wass, hereby certify, pursuant to California Rules of Court, rule 8.504 (d)(1), that I prepared the foregoing Petition for Review, and the computer-generated word count for this brief is 5,872, which does not include the cover, tables, appendix or this certificate.

Dated: February 18, 2015

_____

Valerie G. Wass

APPENDIX "A"

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JUANITA VIDANA, Defendant and Appellant.	G050399 (Super. Ct. No. RIF1105527) O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Edward D. Webster, Judge. Affirmed as modified.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Michael Pulos, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II, III and IV of the discussion section.

A jury found defendant Juanita Vidana guilty of one count of grand theft by larceny (Pen. Code, § 487, subd. (a))[1] and one count of grand theft by embezzlement (§ 503). The trial court suspended imposition of sentence and granted defendant 36 months of formal probation. She was ordered to serve 240 days in jail: 30 straight days, and the remainder to be served on weekends. In addition to the usual fines and fees, defendant was ordered to pay $58,273.02 in victim restitution. (§ 1203.1, subd. (a)(3).)

Defendant raises four issues on appeal. First, she contends the two counts, larceny and embezzlement, are not separate offenses, but two ways of committing a single offense: theft. Second, she contends substantial evidence does not support the verdict. Third, she contends the court abused its discretion in denying her motion to reduce the charges to misdemeanors (§ 17, subd. (b)). Fourth, she contends the court abused its discretion in setting the amount of restitution at $58,273.02. In the published portion of this opinion, we agree with her first contention and strike her conviction under count 2 (grand theft). In the unpublished portion of this opinion, we reject her remaining contentions and affirm the remainder of the judgment.

FACTS

Defendant worked for Robertson's Ready Mix (Robertson's), a company that sells concrete, from 2005 to 2011 as a credit agent. Her duties included ensuring invoices were paid, and providing a material release once an account was paid (most of Robertson's customers would not have to pay for the concrete until the customer was paid on the particular job). Robertson's recourse if it did not get paid was to file a lien. The credit agents were responsible for tracking the relevant time periods to ensure that, if

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

necessary, a lien was timely filed. Each credit agent was assigned particular customers, up to as many as 400.

When a customer came into Robertson's to pay an invoice with cash, the customer would tender payment to the assigned credit agent. The credit agent would then write a receipt for the customer. Next, the credit agent would write the customer number and amount of cash on an envelope, put the cash in the envelope, and take the cash to either Teri Bernstein or Megan Levato. If neither of them were available, the cash would go to a backup employee, Rosa. Bernstein or Levato would then count the cash and double check that the amount written on the envelope was accurate. Once the amount was verified, Levato would lock the money in her desk to be deposited in the bank. If the money came in too late to be deposited that day, Levato would put it into a safe. If Levato were not there, the money could be given to Kaye Bennett (defendant's supervisor), the president of the company, or the operations manager, all of whom knew the combination to the safe. After the money was received and verified, Levato would instruct another employee to update the company's computer database with the amounts received from that particular customer. The credit agent assigned to that particular customer would then access the customer's account within the database and apply the money received to the appropriate invoice.

Every one to two weeks, each credit agent was required to pull up an aging report, which showed unpaid invoices, to ensure his or her customers were making timely payments. This was essential to ensure liens were timely filed. If unpaid invoices were approaching the deadline to file a lien, the credit agent's job was to call the customer to inquire about receiving payment.

In June 2011 defendant went on maternity leave and another credit agent, Tina Hawkins, took over defendant's customer account for Longhorn Pumping. Hawkins immediately noticed that the account was delinquent. Hawkins called Longhorn Pumping to inquire about the delinquency. She informed the owner of Longhorn Pumping that his account was being placed on hold until the payment was made. The owner disagreed, insisting he had paid cash the day before. He brought in his receipts to prove that he had paid. The receipts were consistent with defendant's handwriting. But there was no record of the money received in the database. Bennett spoke with defendant on the phone and asked her about the customer's payment. Defendant stated she had given the cash to either Bernstein or Levato, pursuant to company policy.

This incident prompted Bennett to review other receipts in defendant's receipt book. She discovered a total of $58,273.02 in cash payments reflected on defendant's receipts that were missing from the database. The receipts with missing cash entries span from June 2010 to May 2011 and involve 12 different customers. In some instances, the entirety of the cash payment reflected on a particular receipt is missing from the database. In other instances, the database reflected only part of a cash payment reflected on defendant's receipt. With respect to those instances, at trial the People presented four envelopes submitted by defendant on which she wrote an amount less than what was reflected on the corresponding receipt she had issued. The total amount missing from those four envelopes was $10,976.00.

Bennett testified that, based on how Robertson's system works, "a credit agent in defendant's position [would] know that money is missing," and that it would be impossible for a credit agent to be unaware because the unpaid invoice would show up on the agent's aging report, which the agent must check regularly. Indeed, defendant, who testified, admitted she checked to see if payments had posted approximately once per week. Over the period of the missing cash entries, however, defendant never approached Bennett about any missing cash payments.

Defendant denied taking any money. She could not explain what happened to the missing money other than that it may have been applied to the wrong account. She also testified, however, that she checked her aging reports on a weekly basis. She testified that an accurate aging report was important to her. She also could not explain the envelopes that had cash amounts less than what was reflected on the receipt.

DISCUSSION

I. Defendant was Improperly Convicted of Both Larceny and Embezzlement

First, defendant contends that she could not have been convicted of both larceny and embezzlement because they are not separate offenses; they are two ways of committing theft. We agree.

Our high court recently described the historical underpinnings of the various types of theft in *People v. Williams* (2013) 57 Cal.4th 776 (*Williams*), from which we quote at length:

"Britain's 18th-century division of theft into the three separate crimes of larceny, false pretenses, and embezzlement made its way into the early criminal laws of the American states. That import has been widely criticized in this nation's legal community because of the seemingly arbitrary distinctions between the three offenses and the burden these distinctions have posed for prosecutors. [Citations.] [¶] For instance, it was difficult at times to determine whether a defendant had acquired title to the property, or merely possession, a distinction separating theft by false pretenses from larceny by trick. [Citations.] It was similarly difficult at times to determine whether a defendant, clearly guilty of some theft offense, had committed embezzlement or larceny . . . ." (*Williams*, *supra*, 57 Cal.4th at pp. 784-785.)

"In the early 20th century, many state legislatures, recognizing the burdens imposed on prosecutors by the separation of the three crimes of larceny, false pretenses,

and embezzlement, consolidated those offenses into *a single crime*, usually called 'theft.' [Citations.] The California Legislature did so in 1927, by statutory amendment. [Citations.] In a 1954 decision, this court explained: 'The purpose of the consolidation was to remove the technicalities that existed in the pleading and proof of these crimes at common law. Indictments and informations charging the crime of 'theft' can now simply allege an "unlawful taking." [Citation.] Juries need no longer be concerned with the technical differences between the several types of theft, and can return a general verdict of guilty if they find that an "unlawful taking" has been proved.'" (*Williams, supra*, 57 Cal.4th at pp. 785-786, fn. omitted, italic added; § 484, subd. (a) as amended by Stats. 1927, ch. 619, § 1, p. 1046.)

Section 484, subdivision (a), currently states: "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another [i.e., larceny], or who shall fraudulently appropriate property which has been entrusted to him or her [i.e., embezzlement], 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 [i.e. false pretenses], is guilty of theft."

"'In an effort to further clarify its intent to bring all of the theft crimes under one umbrella,' section 490a was also enacted in 1927 . . . ." (*People v. Nazary* (2010) 191 Cal.App.4th 727, 740 (*Nazary*).) Section 490a provides, "Wherever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor."

"When the formerly distinct offenses of larceny, embezzlement, and obtaining property by false pretenses were consolidated in 1927 into the *single crime of 'theft' defined by . . . section 484*, most of the procedural distinctions between those offenses were abolished. But their substantive distinctions were not: 'The elements of the several types of theft included within section 484 have not been changed, however,

and a judgment of conviction of theft, based on a general verdict of guilty, can be sustained only if the evidence discloses the elements of one of the consolidated offenses.'" (*People v. Davis* (1998) 19 Cal.4th 301, 304-305, italics added.)

Defendant contends that this statutory history demonstrates that the different theft offenses have been merged into a single offense, and thus she could not be convicted of both larceny and embezzlement. This exact argument was made in *Nazary*, and the court rejected it, concluding the argument was "meritless because the elements of embezzlement and grand theft by an employee, and the distinction between them, continue to exist." (*Nazary*, *supra*, 191 Cal.App.4th at p. 741.)

Defendant contends *Nazary* was wrongly decided and instead relies on *People v. Fenderson* (2010) 188 Cal.App.4th 625 (*Fenderson*). In *Fenderson* the defendant was convicted of larceny for taking money belonging to the estate of a decedent for whom the defendant had been the caretaker. (*Id.* at p. 628.) The defendant argued the evidence showed, at most, embezzlement, but that the jury was only instructed on larceny. (*Id.*at pp. 635-637.) Although the court affirmed the larceny conviction, it held, in the alternative, that the conviction could also be sustained under a theory of embezzlement, even though the jury was never instructed on embezzlement. (*Id.* at p. 637.) The court noted a conflict in the appellate courts regarding whether a theft conviction may be upheld on a theory not presented to the jury. (*Id.* at pp. 640-641.) Nonetheless, the court held it was appropriate because, as it viewed the two, theft by larceny was an "'increased . . . evidentiary burden'" (*id.* at p. 641) over embezzlement, and since the People proved larceny, it would make little sense to require a jury to pass on embezzlement. The court also reasoned that "'[i]t would obviously be very hard to explain why a theft conviction should be reversed on the grounds that the evidence showed the defendant was indeed guilty of theft, but would have been guilty of a differently denominated type of theft under a common law system which has been repealed by statute.'" (*Id.* at pp. 641-642.)

The issue confronted by the *Fenderson* court however, is not before us. Here, the jury was instructed on both larceny and embezzlement.

Instead, we must decide whether larceny and embezzlement are different offenses, or merely different ways of committing the single offense of theft. On that issue, we are guided by our high court's recent decision in *People v. Gonzalez* (2014) 60 Cal.4th 533 (*Gonzalez*). There, the court was confronted with the question of "whether a defendant may, consistently with . . . section 954, be convicted of both oral copulation of an unconscious person [citation] and oral copulation of an intoxicated person [citation] based on the same act." (*Id.* at p. 535, fn. omitted.)[2] The court began its analysis by observing, "We have repeatedly held that the same act can support multiple charges and multiple convictions. 'Unless one offense is necessarily included in the other [citation], multiple convictions can be based upon a single criminal act or an indivisible course of criminal conduct (§ 954).'" (*Gonzalez*, at p. 537.) The court treated the issue as one of statutory interpretation: "[T]he determination whether subdivisions (f) and (i) of section 288a define different offenses or merely describe different ways of committing the same offense properly turns on the Legislature's intent in enacting these provisions, and if the Legislature meant to define only one offense, we may not turn it into two." (*Ibid.*)

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[2] Section 954 states, "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. An acquittal of one or more counts shall not be deemed an acquittal of any other count."

Although oral copulation of an unconscious person and oral copulation of an intoxicated person are reflected in subdivisions of a single statute, the court held they are separate offenses. It reasoned, "Section 288a is textually and structurally different from former section 261 [i.e., rape]. Subdivision (a) of section 288a defines what conduct constitutes the act of oral copulation. Thereafter, subdivisions (b) through (k) define various ways the act may be criminal. Each subdivision sets forth all the elements of a crime, and each prescribes a specific punishment. Not all of these punishments are the same. That each subdivision of section 288a was drafted to be self-contained supports the view that each describes an independent offense, and therefore section 954 is no impediment to a defendant's conviction under more than one such subdivision for a single act." (*Gonzalez, supra*, 60 Cal.4th at p. 539.)

Following the lead of *Gonzalez*, we view the issue before us as one of statutory interpretation. However, we confront a much different statutory scheme to that addressed in *Gonzalez*. Here, we have two explicit legislative pronouncements. Section 484 defines "tak[ing] away the personal property of another" (i.e., larceny) and "fraudulently appropriat[ing] property which has been entrusted" (i.e., embezzlement) as "theft." Section 490a eliminates any remaining uncertainty by literally excising the words "larceny" and "embezzlement" from the legislative dictionary: "Wherever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor." (*Ibid.*) Taken at face value, these legislative amendments plainly eliminated the distinctions between the various theft offenses. This interpretation is not only the plain reading, but is consistent with the contemporaneous criticisms of the concept of having three separate offenses, all of which seek to punish unlawful takings of money or personal property. (See *Williams, supra*, 57 Cal.4th at pp. 784-785 [collecting the contemporaneous criticisms of various commentators].)

Despite these legislative pronouncements, *Nazary* held larceny and embezzlement to be separate offenses on the sole ground that they require different elements. In our view, that is insufficient because an offense that can be committed in multiple ways will naturally have varying elements. For example the crime of rape. Section 261, subdivision (a), defines rape as follows: "Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances . . . ." The statute then lists several quite different ways of committing rape; for example, where, by reason of a mental disorder, the victim is incapable of giving consent; by force, violence, duress, menace, or fear; against an intoxicated person; against an unconscious person; etc. (*Id.*, subds. (a)(1)-(a)(7).) Each of these subdivisions plainly involves different elements, and if that were the only test, they should be different crimes. However, they are not, they are all merely different ways of committing a single offense of rape. (*People v. Collins* (1960) 54 Cal.2d 57, 59 superseded by statute on other grounds in *People v. Lohbauer* (1981) 29 Cal.3d 364, 372 ["The subdivisions of section 261 do not state different offenses but merely define the different circumstances under which an act of intercourse constitutes the crime of rape"].) The same can be said of forgery, which likewise sets forth multiple ways of committing the offense (i.e. misrepresenting a name, falsifying a will, forging a seal or signature, etc.). (§ 470.) Yet "the commission of any one or more of the acts enumerated in section 470, in reference to the same instrument, constitutes but one offense of forgery . . . ." (*People v. Ryan* (2006) 138 Cal.App.4th 360, 371.)

Statutory construction cannot consist in merely counting elements. Given the explicit statutory pronouncements combining the various types of theft into a single offense, the mere fact that the different theories of theft entail different elements is not controlling. Rather, we must give effect to the Legislature's explicit intent. The potential countervailing statutory considerations are that embezzlement is defined in a separate statute (§ 503), and where the embezzlement is of government funds, the punishment is

harsher (otherwise the punishment is the same as theft) (§ 514). Section 503, however, predates the 1927 amendments. And the fact that embezzlement carries a harsher punishment in a very specific situation is not sufficiently indicative of the Legislature's intent as to overcome the otherwise explicit indications of its intent embodied in sections 484 and 490a. Accordingly, we conclude larceny and embezzlement are merely two ways of committing the single offense of theft. Therefore, we will strike defendant's conviction under count 2 for grand theft (larceny).[3]

II. Substantial Evidence Supports the Verdict

Next, defendant contends the verdict is not supported by substantial evidence. We disagree.

"To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128.) "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.) "'A reasonable inference, however, "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from

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[3] We note that, were the events of this case to repeat themselves today, after our high court's decision in *People v. Whitmer* (2014) 59 Cal.4th 733, the prosecutor could charge each of defendant's takings as a separate theft offense. (*Id.* at p. 741.) The rule announced in *Whitmer*, however, does not apply retroactively. (*Id.* at p. 742.) And since the events of this case pre-date *Whitmer*, defendant's actions would likely be interpreted as a single plan or scheme giving rise to only a single court of theft (*Id.* at p. 739.), which is how the prosecutor charged and tried this case.

evidence rather than . . . a mere speculation as to probabilities without evidence.'"" (*People v. Raley* (1992) 2 Cal.4th 870, 891.)

"The elements of theft by larceny are well settled: the offense is committed by every person who (1) takes possession (2) of personal property (3) owned or possessed by another, (4) by means of trespass and (5) with intent to steal the property, and (6) carries the property away." (*People v. Davis*, *supra*, 19 Cal.4th at p. 305.)

"The elements of embezzlement are '1. An owner entrusted his/her property to the defendant; 2. The owner did so because he/she trusted the defendant; 3. The defendant fraudulently converted that property for his/her own benefit; [and] 4. When the defendant converted the property, he/she intended to deprive the owner of its use.'" (*Fenderson*, *supra*, 188 Cal.App.4th at p. 636.) Both the larceny and embezzlement counts were tried as grand theft, and thus the amount stolen had to exceed $950. (§ 487, subd. (a).)

The focus of defendant's argument, which applies to both counts, is that there was no substantial evidence that she took any money from Robertson's. Defendant notes there were multiple people at Robertson's who could have handled the cash she received. Although company policy was that Bernstein and Levato would take the money from credit agents, in their absence, as many as three other people could fill that role. Defendant claims any of those individuals could have stolen the money. Additionally, credit agents would often cover for one another if someone was out of the office. Defendant also notes that for the year she was accused of stealing money, none of her customers had complained that payments were missing from their statements.

None of this evidence undercuts the judgment. The receipts issued to the customers at issue were from defendant's receipt book. Perhaps the most damning evidence at trial was the four envelopes on which defendant wrote cash amounts that were less than the corresponding amount she had written on the receipt. Defendant was the only one to handle the cash received from the customer and to place it in the envelope

with the amount written on the outside, and thus she was the only one who could have taken the difference. Defendant's only response was that the prosecution failed to call a handwriting expert as a witness to prove the writing on the envelope was hers. But no expert was needed. (Evid. Code, §§ 1416 ["A witness who is not otherwise qualified to testify as an expert may state his opinion whether a writing is in the handwriting of a supposed writer if the court finds that he has personal knowledge of the handwriting of the supposed writer"], 1417 ["The genuineness of handwriting, or the lack thereof, may be proved by a comparison made by the trier of fact with handwriting (a) which the court finds was admitted or treated as genuine by the party against whom the evidence is offered or (b) otherwise proved to be genuine to the satisfaction of the court"].) Bennett testified that the handwriting on the envelopes was defendant's handwriting. Bennett had worked with defendant for six years. And the jury was free to compare the handwriting to uncontested examples of defendant's handwriting, from, for example, defendant's receipt book, to make its own determination. Moreover, with respect to one of the envelopes in question, defendant admitted it was her handwriting on it.

The envelopes are evidence that defendant stole at least $10,976.00 — an amount that easily exceeds the $950 threshold for grand theft. Accordingly, this evidence alone supports the verdict.

III. Refusing to Reduce the Charges to Misdemeanors Was Not an Abuse of Discretion

Next defendant contends the court abused its discretion by refusing to reduce the theft offenses to misdemeanors. "Under the governing statutes, grand theft is a so-called 'wobbler' — i.e., an offense which may be charged and punished as either a felony or a misdemeanor [citation] . . . ." (*Davis v. Municipal Court* (1988) 46 Cal.3d 64, 70.) Here the district attorney charged the grand theft count as a felony. At the sentencing hearing, defendant brought an oral motion under section 17, subdivision (b), to reduce the offenses to misdemeanors. The court denied the motion, stating, "There are

at least 24 separate acts of theft, some in the amount of over $6,000. When you take advantage of a position of trust, I think it would be an abuse of discretion to reduce the matter to a misdemeanor. This is not misdemeanor conduct, so I'd deny that request."

Whether to reduce a charge to a misdemeanor under section 17, subdivision (b), "rests . . . solely 'in the discretion of the court.'" (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977.) The factors the court should consider include "'the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.' [Citations.] When appropriate, judges should also consider the general objectives of sentencing such as those set forth in California Rules of Court, rule 410. The corollary is that even under the broad authority conferred by section 17(b), a determination made outside the perimeters drawn by individualized consideration of the offense, the offender, and the public interest 'exceeds the bounds of reason.'" (*Id.* at p. 978, fn. omitted.)[4] Our high court described this as an "extremely deferential and restrained standard by which appellate courts are bound . . . ." (*Id.* at p. 981.)

Defendant does not contend the court acted capriciously, but instead contends the general objectives of sentencing set forth in California Rules of Court, rule 4.410 counsel a different result. Those objectives include, "(1) Protecting society; [¶] (2) Punishing the defendant; [¶] (3) Encouraging the defendant to lead a law-abiding life in the future and deterring him or her from future offenses; [¶] (4) Deterring others from criminal conduct by demonstrating its consequences; [¶] (5) Preventing the defendant from committing new crimes by isolating him or her for the period of incarceration; [¶] (6) Securing restitution for the victims of crime; and [¶] (7) Achieving uniformity in sentencing." Defendant notes that she has no prior criminal record, has a family to support, would suffer a similar punishment if reduced to a misdemeanor, and that it

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[4] Those standards are now set forth in California Rules of Court, rule 4.410.

would be easier for defendant to pay the restitution if her crime were a misdemeanor because it would be easier to get a job.

This all may be true, and potentially it would have been within the court's discretion to reduce the charges, but defendant has not suggested any consideration upon which we could conclude the court abused its discretion. The court determined that based on the severity of the crime, the number of incidents, and the duration of the conduct, a felony charge was appropriate. These were proper considerations for the court to weigh. We find no abuse of discretion.

IV. The Restitution Order Was Not an Abuse of Discretion

Next defendant claims the court abused its discretion by awarding $58,273.02 in victim restitution. Defendant contends the evidence supports a restitution award of at most $10,976.00 — the amount missing from the envelopes with partial payments. We disagree.[5]

"Victim restitution is mandated by the California Constitution, which provides in relevant part that '[r]estitution shall be ordered from the convicted persons in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary.'" (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1225 [citing Cal. Const., art. I, § 28, subd. (b)].) "The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so and states them on the record." (§ 1202.4, subd. (f).) "[T]he trial court has really very little discretion under section 1202.4 in this regard. The statute requires the award be set in an amount which will fully reimburse the victim

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[5] Defendant did not object to the amount of restitution at trial. The People contend this resulted in a forfeiture of the issue. Defendant argues it was ineffective assistance of counsel. In the interests of efficiency, we bypass the forfeiture question and address the merits.

for his or her losses unless there are clear and compelling reasons not to do so." (*People v. Rowland* (1997) 51 Cal.App.4th 1745, 1754.)

Although there was no direct evidence at trial that defendant took the entire $58,273.02, there was circumstantial evidence. To begin with, defendant wrote receipts for the entire $58,273.02, none of which ended up in the Robertson's database. With the exception of the $10,976.00 on the envelopes, defendant contends there are multiple people who could have taken the money. While that is true in theory, defendant's argument is belied by Bennett's testimony that if someone else had taken that money, defendant, as the credit agent for those customers, would have noticed delinquencies on the aging report. This testimony is corroborated by the fact that, when defendant went out on maternity leave, the credit agent that took over her accounts noticed a delinquency within one or two days, leading to an investigation that quickly revealed the full extent of the problem. The trial court was entitled to rely on this evidence in setting the amount of restitution. And having credited that evidence, the trial court was required to award full restitution unless clear and compelling reasons dictated otherwise.

Defendant argues that the restitution award conflicts with the rehabilitative purposes of probation. She argues that, with interest tacking on, she would have to pay $500 per month just to get ahead, and that with the conviction limiting her ability to get a job, it is unlikely she will be able to pay the amount back, particularly since she has four young children.

The fact of the matter, however, is that defendant took $58,273.02. That she would have difficulty paying it back is not a sufficient reason to depart from the constitutional mandate of full victim restitution. We review the court's judgment for abuse of discretion. No such abuse has been shown.

DISPOSITION

Defendant's conviction under count 2 for grand theft is stricken. In all other respects, the judgment is affirmed.

IKOLA, J.

WE CONCUR:

FYBEL, ACTING P. J.

THOMPSON, J.

DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case: *People v. Juanita Vidana*, Court of Appeal Case No. G050399

I, Valerie G. Wass, certify:

I am an active member of the State Bar of California and am not a party to this cause. My business address is 556 S. Fair Oaks Ave., Suite 9, Pasadena, California 91105. On February 18, 2015, I deposited in a mailbox regularly maintained by the United States Postal Service at Pasadena, California, a copy of the attached PETITION FOR REVIEW, in a sealed envelope with postage fully prepaid, addressed to each of the following:

Alexander Kuznetsov
Deputy District Attorney
3960 Orange Street
Riverside, CA 92501

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Clerk, Superior Court
(Honorable Edward D. Webster)
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Juanita Vidana
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My electronic service address is wass100445@gmail.com. On February 18, 2015, I transmitted a PDF version of the same document described above by electronic mail to the parties identified below using the e-mail service addresses indicated:

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Additionally, on this date I electronically filed a PDF version of the same document described above to the Court of Appeal, Fourth Appellate District, Division Three, on its website *http://www.courts.ca.gov/4dca-efile.htm,* in compliance with the court's Terms of Use.

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed this 18th day of February, 2015, at Pasadena, California.

VALERIE G. WASS