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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

NUSRAT JAVED,

Defendant and Appellant.

C064881

(Super. Ct. No. 08F00715)

A jury convicted defendant Nusrat Javed of one count of general insurance fraud (Pen. Code, § 550, subd. (a)(1)—count one) and three counts of workers’ compensation fraud (Ins. Code, § 1871.4, subd. (a)(1)—counts three, four and seven). Defendant contends: (1) the trial court erred in failing to give a unanimity instruction as to count one, and (2) the court erred regarding the amount of restitution owed by defendant. We agree the court erred in failing to give the unanimity instruction, but find the error harmless and shall affirm on count one. We

reverse the restitution order and remand the matter for the trial court to reconsider the amount of the restitution fine.

FACTUAL AND PROCEDURAL BACKGROUND

On September 21, 2006, defendant tripped over a cord and fell during her shift at work. Defendant struck her forehead on a tile floor and was taken to a hospital emergency room. She had a hematoma above her left eye, but reacted normally to the light, had full range of motion in her extremities, and her CT scan was normal. The diagnosis was a closed head injury. The doctor prescribed pain medication and recommended defendant take four days off of work.

Defendant had various follow-up appointments from September 25, 2006, to February 5, 2007. Defendant claimed her condition was not improving, and she complained of blurred vision, dizziness, and back pain—all symptoms she did not mention on the day she was injured. Among her chief complaints, defendant claimed the dizziness prevented her from driving to work. Additionally, on September 25, 2006, defendant represented on her medical history form that she did not have a history of dizziness. During various appointments, she tested positive for malingering.

The workers' compensation insurance company hired an investigator to videotape defendant. The video showed defendant driving her car and doing yard work.

It was later discovered that defendant took a trip to Pakistan from November 16 through December 24, 2006. At her

medical appointments following this trip, defendant claimed she continued to experience dizziness especially when she drove, but that she did not experience any dizziness when she flew.

Defendant was charged with one count of insurance fraud and six counts of workers' compensation fraud. Defendant's charges encompassed: submitting a false or fraudulent claim for the payment of workers' compensation insurance benefits (count one); falsely denying her prior history of dizziness to her doctor on September 25, 2006 (count two); falsely representing her ability to drive on October 16, 2006 (count three); misrepresenting her ability to drive and work on October 23, 2006 (count four); falsely representing on October 27, 2006, that she was too dizzy to drive to her medical appointment (count five); falsely representing that she did not have a prior history of dizziness to her doctor on October 30, 2006 (count six); and falsely representing on January 11, 2007, that she could not drive during the previous four months (count seven).

The jury found defendant guilty of counts one, three, four, and seven, and not guilty of counts two, five, and six. The trial court suspended imposition of sentence and placed defendant on four years of felony probation, including, as a probation condition, five months in county jail. Additionally, defendant was ordered to pay restitution of \$2,631.01 in temporary total disability payments, \$11,569.07 in medical costs, and \$7,465.47 for investigative costs, for a total of \$21,665.55.

DISCUSSION

I. The Trial Court's Failure to Give a Unanimity Instruction Was Not Prejudicial Error

Defendant first contends the trial court erred in failing to give a unanimity instruction as to count one—general insurance fraud, Penal Code section 550, subdivision (a)(1)—submitting a false claim for the payment of a loss or injury between September 25, 2006, and January 11, 2007.

In a criminal case, a jury verdict must be unanimous. (*People v. Collins* (1976) 17 Cal.3d 687, 693, disapproved on a different ground in *People v. Boyette* (2002) 29 Cal.4th 381, 462, fn. 19.) Additionally, the jury must agree unanimously the defendant is guilty of a specific crime. (*People v. Diedrich* (1982) 31 Cal.3d 263, 281.) Therefore, cases have long held that, when the evidence suggests that more than one criminal act supports a particular charge, either the prosecution must elect to try only one of the acts or the court must instruct the jury to agree on the same criminal act. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) The unanimity instruction "is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed." (*People v. Sutherland* (1993) 17 Cal.App.4th 602, 612.)

Here, there were multiple discrete acts by defendant that could have formed the basis of the count one conviction for submitting a false claim for the payment of a loss or injury: presenting the claim for loss, misrepresenting her ability to

drive, misrepresenting her dizziness, or attempting to get certain benefits backdated, which defendant inquired about when she returned from her trip to Pakistan. The charge in count one encompassed all of defendant's conduct between September 25, 2006, and January 11, 2007, as the prosecutor admitted. Defendant had a total of 11 doctor's visits within that period and any of her conduct during those visits could have formed the basis for count one.

Since the prosecutor did not elect between the multiple acts that could have formed the basis for the count one charge, "the trial court was required to instruct the jury sua sponte that it must unanimously agree on the criminal conduct supporting the conviction." (*People v. Norman* (2007) 157 Cal.App.4th 460, 466.) The failure to so instruct was error.

Failure to give a unanimity instruction is governed by the harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711]—i.e., whether the error was harmless beyond a reasonable doubt. (*People v. Thompson* (1995) 36 Cal.App.4th 843, 853.) The failure to give a unanimity instruction is harmless if there is no reasonable possibility of a disagreement among the jurors regarding the specific acts that could support the charged offense. (*People v. Napoles* (2002) 104 Cal.App.4th 108, 119; *People v. Burns* (1987) 196 Cal.App.3d 1440, 1458.) This is such a case.

Defendant argues the error was prejudicial because, from the verdicts, it is impossible to determine which act the jury found defendant committed in order to convict on count one. We disagree. Although defendant argues that different jurors could have found that defendant made misrepresentations on different occasions, defendant was found guilty of workers' compensation insurance fraud on three specific occasions—counts three, four, and seven. The jury unanimously agreed that on these three specific and discrete occasions defendant misrepresented her condition for the purpose of obtaining workers' compensation benefits. The workers' compensation fraud by defendant comprised the basis of the count one charge—submitting a false insurance claim. Since the conduct in counts three, four and seven supports the conviction in count one, the jury's unanimous verdicts on counts three, four, and seven render the failure to give the unanimity instruction on count one harmless beyond a reasonable doubt.

Defendant counters that the unanimity instruction was still necessary because, although the jury may have unanimously agreed that defendant was guilty of count one, individual jurors may have done so on these three different bases. Defendant notes that some jurors may have based the guilty verdict in count one on one incident while other jurors may have based the verdict on a different incident. However, the trial judge properly instructed the jury that the verdict in each count must be unanimous. Not only were the jurors instructed that each count

had to be unanimous, they were also told that each count needed to be considered separately, and that they had to return a separate verdict for each one. These instructions further ensured that the error was harmless beyond a reasonable doubt.

II. Amount of Restitution Owed

Defendant contends the trial court erred regarding the amount of restitution owed by defendant. Specifically, defendant claims she should be required to repay only benefits that were a direct result of her criminal actions and not the total benefits she received. We find the trial court erred regarding the restitution amount because not all the money defendant received through workers' compensation was fraudulently obtained.

Insurance Code section 1871.5 states, "Any person convicted of workers' compensation fraud pursuant to [Insurance Code] Section 1871.4 or Section 550 of the Penal Code shall be ineligible to receive or retain any compensation . . . where that compensation was owed or received as a result of a violation of Section 1871.4 or Section 550 of the Penal Code for which the recipient of the compensation was convicted." (Ins. Code, § 1871.5.)

The seminal decision interpreting Insurance Code section 1871.5 is *Tensfeldt v. Workers' Comp. Appeals Bd.* (1998) 66 Cal.App.4th 116 (*Tensfeldt*). There, a city employee falsely claimed he injured his knee when he got out of a city truck; he actually injured his knee while playing basketball. (*Id.* at

p. 119.) Tensfeldt was convicted of workers' compensation insurance fraud. (*Ibid.*) While the criminal matter was pending, Tensfeldt filed a second workers' compensation claim, alleging the true circumstances of the knee injury, that was the subject of his false claim. (*Tensfeldt*, at p. 120.)

Tensfeldt rejected the notion that Insurance Code section 1871.5 should be interpreted to completely bar workers convicted of workers' compensation insurance fraud (Ins. Code, § 1871.4) "from forever receiving or retaining any workers' compensation benefits connected with a claim for an otherwise legitimate industrial injury, without regard for the specific facts of the case." (*Tensfeldt, supra*, 66 Cal.App.4th at p. 124.)

Nonetheless, the court held employee Tensfeldt was barred from receiving any benefits because he lied about the very fact of compensability. (*Id.* at pp. 124, 126.)

Tensfeldt set forth a three-prong test for determining whether a worker is entitled to receive or retain workers' compensation benefits after a workers' compensation insurance fraud conviction. (*Tensfeldt, supra*, 66 Cal.App.4th at pp. 125-126.) An individual may retain or receive compensation benefits after a fraud conviction if there is "(1) an actual, otherwise compensable, industrial injury; (2) substantial medical evidence supporting an award of compensation not stemming from the fraudulent misrepresentation for which the claimant was convicted; and (3) that claimant's credibility is not so

destroyed as to make claimant unbelievable concerning any disputed issue in the underlying compensation case." (*Ibid.*)

In this case, defendant meets the three-prong test from *Tensfeldt*. It is undisputed that defendant suffered an actual, compensable, industrial injury. Defendant tripped over a cord at work and suffered a head injury above her left eye. With respect to the second prong of *Tensfeldt*, once defendant was injured at work, she was transported to the hospital where the doctor examined her and noticed a visible hematoma on her forehead, above her left eye. Finally, although defendant lied about her dizziness and ability to drive, her credibility is not so destroyed because, unlike employee *Tensfeldt*, she did not lie about the very fact of compensability. The jury's acquittal on counts two, five, and six supports an inference that defendant's credibility is not so destroyed as to make defendant entirely unbelievable.

As noted, it is undisputed here that defendant sustained an industrial injury. Under the language of Insurance Code section 1871.5, explained *Tensfeldt*, an injured worker is required to "return only 'that compensation' obtained by fraud, and may not receive further compensation stemming from the fraud."

(*Tensfeldt, supra*, 66 Cal.App.4th at p. 123.) In fact, the *Tensfeldt* court specifically held that an individual is "barred from retaining or receiving any compensation . . . which stems directly from the fraudulent misrepresentation." (*Tensfeldt*, at p. 124, italics added.) Applying *Tensfeldt* here, defendant

would have to repay only the amounts related to the fraud, and her initial expenses are not a part of that fraud because her injury is undisputed.

The facts of this case are much more analogous to *Farmers Ins. Group of Companies v. Workers' Comp. Appeals Bd.* (2002) 104 Cal.App.4th 684. In *Farmers*, the defendant was injured during the course of his employment. (*Id.* at p. 687.) He was awarded permanent disability benefits and received a weekly pension for life. (*Ibid.*) He was also entitled to reimbursements for special footwear he needed as a result of his injuries. (*Ibid.*) In the course of three years, the defendant stole and forged purchase slips from a defunct shoe store and submitted them for reimbursement, pocketing over \$84,000 from the fraud. (*Ibid.*) The court held that the defendant was entitled to retain and receive the benefits that were not part of the shoe fraud, and although future reimbursement of shoes was barred, other reasonably necessary treatment would continue. (*Id.* at p. 691.)

In this case, defendant suffered a real, compensable injury at work. Unlike in *Tensfeldt*, defendant did not lie from the outset and should not be required to repay the total medical benefits. Even the amended information only charged defendant with workers' compensation fraud pursuant to Penal Code section 550 for the period between September 25, 2006, and January 11, 2007 (the injury and initial treatment occurred on September 21, 2006). At the very least, the expenses associated with the

initial injury should not be included as part of the restitution because those expenses were not a result of fraud, but the exact amount should be determined by the trial court. Therefore, we will remand this case to the trial court to determine the proper amount of restitution.

DISPOSITION

The judgment is reversed concerning the restitution amount owed by defendant, and that issue is remanded for the trial court to determine the appropriate amount consistent with the views expressed in this opinion. In all other respects, the judgment is affirmed.

_____ BUTZ _____, J.

We concur:

_____ NICHOLSON _____, Acting P. J.

_____ DUARTE _____, J.