Filed 1/11/18 P. v. Hernandez CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. LUIS HERNANDEZ, Defendant and Appellant.	B279922 (Los Angeles County Super. Ct. No. BA435685)

APPEAL from a judgment of the Superior Court of the County of Los Angeles. Drew E. Edwards, Judge. Affirmed and remanded with instructions.

Carlos Ramirez, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and Rene Judkiewicz, Deputy Attorney General, for Plaintiff and Respondent.

A jury found defendant Luis Hernandez guilty of insurance fraud and attempted perjury. Defendant challenges the trial court's instruction on attempted perjury and contends the trial court imposed an unauthorized sentence on the insurance fraud conviction. Because defendant was convicted of two offenses, the Attorney General asserts defendant's sentence must be modified to add a second court security fee and conviction assessment (Pen. Code, § 1465.8[1]; Gov. Code, § 70373) and the clerical error in the abstract of judgment, which indicates defendant's convictions were the result of a plea instead of a jury's verdict, should be corrected.

The attempted perjury jury instructions set forth all elements of that offense, and the trial court did not have a sua sponte duty to give CALCRIM No. 460. Defendant's midterm sentence on the insurance fraud conviction was authorized. Accordingly, we affirm the judgment and remand to the trial court with directions to modify defendant's sentence by imposing a second court security fee and conviction assessment and correct the clerical error in the abstract of judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant worked for Farmer John in the sanitation department. In 2009, he met with Ana Carrillo, Farmer John's workers' compensation benefits manager, to report an on-the-job injury after toxic liquid "splashed into his eye." Carrillo referred defendant to an ophthalmologist, Dr. Dos, who treated him for an extended period of time.

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1 All undesignated statutory references are to the Penal Code.

According to Carrillo, she told defendant in April 2013 that Dr. Dos and Dr. Parks, a workers' compensation qualified medical evaluator, both determined defendant's eye injury was resolved without any permanent disability and "any additional treatment [would be] on a non-industrial basis." Defendant was not happy with this news.

On June 26, 2013, Carrillo received a "notice of representation" from a workers' compensation attorney who claimed defendant sustained work-related injuries to his "cervical spine, thoracic [spine], lumbar [spine], arms, wrists, hands, respiratory system, [and] toes. . . ." Defendant also claimed he suffered from a work-related sleep disorder and headaches. Defendant himself had not reported any of these injuries to Farmer John, as required by company policy.

Defendant was suspended for three days for failing to report this series of work-related injuries. Within a month or two, defendant's primary physician placed him on "total temporary disability."[2] Defendant initiated a worker's compensation proceeding against Farmer John.

Isabel Torres was a licensed vocational nurse who worked on a contract basis for Farmer John. In early 2014, she was called to the company's security shack to meet defendant, who was dropping off benefits paperwork. Torres took the paperwork and saw defendant walk away with a cane, "a little hunched over." She then watched on the security monitor as defendant crossed the street. He started "to straighten up as he was

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[2] Workers placed on total temporary disability by their primary physicians are paid by Farmer John at 67 percent of their average weekly wage every two weeks on a tax free basis.

walking through the crosswalk. By the time he made it to the end of the street, the cane wasn't even touching the ground."

Torres reported her observations to Carrillo. Based on those and defendant's failure to report the numerous work injuries when they allegedly occurred, Carrillo hired Henry Escoto, a private investigator, to engage in subrosa surveillance of defendant.

Escoto videotaped defendant for approximately 13 days over a four-month period between February and May 2014, plus an additional day in July 2014.

Desmond Nakamoto, Farmer John's workers' compensation attorney, reviewed the early surveillance videos. He did not share with defendant or his attorney that he had subrosa videos. On April 16, 2014, Nakamoto deposed defendant in the worker's compensation case. Under oath, defendant testified he had used his cane "100 percent of the time, 7 days a week for the past three months." He also used "the cane all the time in 2013 as well." After conferring with counsel, defendant reiterated that he "used [the cane] all the time," "every waking moment, 7 days a week." He used it because of the pain in his knee. According to defendant, he needed the "cane every single time [he] tried to get up" from a sitting position. He further asserted that he never forgot to use his cane.

Defendant's counsel stipulated he would obtain defendant's signature on the deposition transcript within an agreed-upon time. The stipulation added, however, that "a certified copy [of the unsigned transcript] may be used for all purposes." Defendant never made any changes to, or signed, the original deposition transcript.

Carrillo met with defendant on July 25, 2014, to discuss whether he could return to work in a modified or light duty position. When defendant arrived for the meeting, he was "walking very slow[ly] and utilizing a cane." He sat down "very slowly, making faces like he was in pain." Fifteen months earlier, at defendant's April 24, 2013, meeting with Carrillo, defendant did not use a cane, walk slowly, limp, or grimace when he sat down. Carrillo offered defendant a "reasonable accommodation" upon his return to work, but defendant informed her he was "not able to return to work at [that] time because he was not able to bend his knee. He was not able to lift."

The information charging defendant with workers' compensation insurance fraud and attempted perjury was filed February 29, 2016. A five-day trial followed toward the end of the year. A certified copy of defendant's deposition transcript was admitted into evidence. Trial counsel stipulated defendant did not sign the original. An edited subrosa video was played for the jury. As defendant's appellate counsel acknowledges, the video "showed [defendant] performing tasks and engaging in activities without using a cane. These activities were ones that [defendant] testified [in his deposition] he could not perform under any circumstances with or without a cane."

The jury convicted defendant of both counts. The trial judge sentenced defendant to "the low term of three years" for insurance fraud and a consecutive six months—one-third the midterm—for attempted perjury. The aggregate sentence of three years, six months was ordered to be served concurrently

with the 40-years-to-life sentence defendant was already serving on an unrelated matter.[3]

DISCUSSION

A. Jury Instruction on Attempted Perjury

As this court has held, the deponent in a workers' compensation proceeding who testifies falsely under oath, but fails to sign the deposition transcript, commits the crime of attempted perjury (§§ 118, 664, subd. (a)). (*People v. Post* (2001) 94 Cal.App.4th 467, 483.)

At the close of evidence, the trial judge and counsel engaged in an unreported discussion concerning jury instructions. The on-the-record recap, insofar as the crime of attempted perjury was concerned, included the following: "[F]or the record, I am not going to give CALCRIM [No.] 460. [¶] The court will give CALCRIM . . . [No.] 2640 as modified. That will be over the objection of the defense." The trial judge then inquired of defense counsel, ". . . on behalf of [defendant], other than the objection [to] the modification of 2640, over the objection of the defense, do you stipulate those would be the appropriate instructions?" Defense counsel responded, "Yes, your Honor. Thank you."

On appeal, defendant argues the trial court had a sua sponte obligation to give CALCRIM No. 460 because the modified version of CALCRIM No. 2640 did not expressly advise the jury

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[3] Defendant was convicted of multiple sex offenses involving his stepdaughter. His appellate counsel in that matter filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436. This court affirmed the judgment in an unpublished opinion. (*People v.* (*Hernandez*) *Amaya* (May 18, 2017, B278794.)

that defendant must have (1) acted with the specific intent to commit perjury and (2) taken at least one direct step toward committing perjury.[4] He also challenges the last sentence of the modified instruction, asserting it created an impermissible presumption defendant could be found guilty of attempted perjury by merely failing to sign his deposition transcript.[5] We disagree.

The trial court has a sua sponte duty "to instruct on 'the general principles of law relevant to and governing the case,'" including the elements of all charged offenses. (*People v. Rubalcava* (2000) 23 Cal.4th 322, 333-334.) For instructions that are given, we review a claim of instructional error de novo (*People v. Waidla* (2000) 22 Cal.4th 690, 733), examining the instructions as a whole, as well as the trial record, to determine "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." (*People v. Jablonski* (2006) 37 Cal.4th 774, 831, internal quotation marks omitted.) We also "consider the arguments of

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[4] CALCRIM No. 460 provides in part that the prosecution must prove a defendant charged with an attempt to commit a crime "took a direct but ineffective step toward committing [attempted perjury]" and "intended to commit [attempted perjury]." The instruction ends by advising jurors "To decide whether the defendant intended to commit [the charged offense], please refer to the separate instructions that I (will give/have given) you on that crime."

[5] The last sentence of the modified instruction read: "If the deposition was not signed by the defendant, the defendant is [in] violation [of] Penal Code section[s] 664/118[, subdivision] (a), attempt to commit perjury, a crime."

counsel in assessing the probable impact of the instruction on the jury." (*People v. Young* (2005) 34 Cal.4th 1149, 1202.) Finally, when evaluating a claim of instructional error, we assume jurors are intelligent persons capable of understanding and correlating all jury instructions given. (*People v. Landry* (2016) 2 Cal.5th 52, 95.)

Both workers' compensation insurance fraud and attempted perjury are specific intent crimes. The trial court read CALCRIM No. 251, which advised in part that for defendant to be guilty of either insurance fraud or attempted perjury, he "must not only intentionally commit the prohibited act, but must do so with a specific intent. The act and the specific intent required are explained in the instruction for each crime."

The instruction for attempted perjury was the modified version of CALCRIM. No. 2640 and provided in pertinent part:

> The defendant is charged in Count Two with attempted perjury in violation of Penal Code section 118.
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> To prove that the defendant is guilty of the crime of perjury, the People must prove that:
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> 1. The defendant was deposed under penalty of perjury under circumstances in which such deposition was permitted by law;
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> 2. When the defendant was deposed he willfully stated that the information was true even though he knew it was false;
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> 3. The information was material;
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> 4. The defendant knew he was making the statement under penalty of perjury;

5. When the defendant made the false statement, he intended to be deposed falsely while under penalty of perjury;

AND

6. The defendant signed and delivered his deposition to someone else intending that it be circulated or published as true.

Someone commits an act willfully when he or she does it willingly or on purpose. Information is material if it is probable that the information would influence the outcome of the proceedings, but it does not need to actually have an influence on the proceedings.

The People do not need to prove that the defendant knew that the information in his statement was material.

If the defendant actually believed that the statement was true, the defendant is not guilty of this crime even if the defendant's belief was mistaken.

. . .

The making of a deposition is deemed complete from the time when it is signed [by] the defendant and delivered by the defendant to any other person, with the intent that it be uttered or published as rue. Thus the crime of perjury cannot be committed until the deposition was signed by the defendant for the purpose contemplated by statute . . . . If the deposition was not signed by the defendant, then the defendant is in violation of

> Penal Code Section 664/118[, subdivision] (a), attempt to commit perjury, a crime.

Following the trial court's reading of the jury instructions, both counsel addressed the specific intent element in their closing arguments. The prosecutor told the jurors, "In order to convict the defendant, I have to have proved by the evidence presented that the defendant had the specific intent to commit fraud. The defendant has to have specifically lied. In other words, he has to have known the statement was false, not just an innocent exaggeration." Defense counsel's argument concerning specific intent was similar: "Also, a person must have made a false or fraudulent statement about his condition as opposed to innocently exaggerating or magnifying his symptoms."

CALCRIM No. 2460, as modified and read to the jurors, advised the prosecution had the burden to prove defendant (1) knew he was testifying under penalty of perjury, "willfully" provided information that he knew was false, and "intended to be deposed falsely while under penalty of perjury." CALCRIM No. 251 further advised the defendant must have acted both intentionally and with specific intent. No more was required. The overall charge to the jury adequately instructed on the element of specific intent. Nothing in the closing arguments of trial counsel clouded the issue, and there is no reasonable likelihood the jury applied the instruction in the manner claimed by defendant.

Further, CALCRIM No. 2460 by itself adequately informed the jury that the predicate act for attempted perjury in the civil deposition context was defendant's knowingly false statement while under oath. The concluding sentence in the modified

CALCRIM No. 2640 told the jurors why the offense could not be perjury; it did not suggest the jurors could presume guilt merely upon finding defendant failed to sign his deposition transcript.[6]

Because the modified CALCRIM No. 2640 and other instructions adequately presented the elements of attempted perjury, the trial court did not have a sua sponte duty to instruct with CALCRIM No. 460.

B. Sentencing Error

During sentencing, the trial court stated it was imposing "the *low term* of three years" for insurance fraud. (Italics added.) Three years is the midterm sentence for workers' compensation insurance fraud, however. (Ins. Code, § 1871.4, subd. (a)(1).) Defense counsel remained silent on this point, although the attorney did correct the trial court on the sentence initially pronounced for attempted perjury. Defendant contends the trial court's miscue must be construed as an unauthorized sentence because the low term for the offense is two years and we are required to reduce the fraud sentence to the low term.

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[6] Defendant also complains "the trial court's instructional error was compounded and shown to be unequivocally prejudicial during jury deliberations when the jury confused by the lack of clarity in the instructions specifically requested clarifications on the relevancy of [defendant's] unsigned deposition to the charge of attempted perjury . . . ." The record reflects the question and the trial court's response, but no objection by defense counsel. "When a trial court decides to respond to a jury's note, counsel's silence waives any objection under section 1138." (*People v. Roldan* (2005) 35 Cal.4th 646, 729, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Defendant forfeited this claim on appeal.

We may correct an unauthorized sentence despite a defendant's failure to object below. (*People v. Scott* (1994) 9 Cal.4th 331, 354.) But a defendant's failure to object in the trial court to an authorized sentence forfeits the claim of error on appeal. (*People v. Smith* (2001) 24 Cal.4th 849, 852 ["As a general rule, only 'claims properly raised and preserved by the parties are reviewable on appeal'"].)

Defendant's three-year sentence is expressly authorized under the Insurance Code. (Ins. Code, § 1871.4, subd. (b) ["Every person who violates subdivision (a) shall be punished by imprisonment in a county jail for one year, or pursuant to subdivision (h) of Section 1170 of the Penal Code, for two, three, or five years, . . ."].) Counsel's failure to resolve the ambiguity with the trial judge precludes our consideration of the issue on appeal.

C. Directions on Remand

In a footnote, the Attorney General notes the trial court did not impose the $40 court security fee under section 1465.8 and the $30 conviction assessment under Government Code section 70373 on both counts. The fee and assessment must be imposed on every qualifying conviction. (*People v. Robinson* (2012) 209 Cal.App.4th 401, 405.) Both convictions here qualify. The Attorney General also points out that the abstract of judgment incorrectly states the convictions were based on a plea, not on a jury verdict. We agree with the Attorney General it is appropriate for us to remand the matter for correction of these oversights.

DISPOSITION

The judgment of conviction is affirmed and the matter is remanded to the trial court with instructions to correct defendant's sentence by imposing a $40 court security fee and a $30 conviction assessment on each of the two counts on which defendant was convicted. The trial court is further instructed to ensure the abstract of judgment is corrected to reflect that defendant's judgment of conviction was based on the jury's guilty verdicts on both counts.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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* Judge of the Orange Superior Court appointed by the Chief Justice pursuant to article VI, section 6, of the California Constitution.