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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

SIALE FANGUPO,

Defendant and Appellant.

A132629

(City & County of San Francisco
Super. Ct. No. 213217)

Defendant Siale Fangupo appeals from a judgment convicting her of the fraudulent use of an incorrect contractor's license number, false personation and contracting without a license. She contends the court made a series of errors that interfered with her ability to present a defense based on the statute of limitations. She argues that the court erred in failing to require an election by the prosecution of the acts on which the charges were based and by answering a question from the jury in a manner that suggested the offenses could be based on a continuous course of conduct. She also argues that the court erred in mistakenly failing to read to the jury the full instruction on the statute of limitations.

We conclude that the offenses for which defendant was convicted were properly based on a continuous course of conduct so that an election was not required and the court's answer to the jury's question was correct. We further conclude that the apparent omission in reading the instructions to the jury was harmless in light of the correct written instructions provided to the jury and the parties' extensive closing arguments on the subject. Accordingly, we shall affirm.

Factual and Procedural History

On September 13, 2010, defendant was charged by information with two counts of fraudulent use of a contractor's license number (Bus. & Prof. Code, § 7027.3), one count of theft by false pretenses (Pen. Code, §§ 487, subd. (a), 532, subd. (a)), one count of false personation (Pen. Code, § 529) and one count of contracting without a license (Bus. & Prof. Code, § 7028, subd. (a)). The information contained allegations that four of the counts involved a taking or loss in excess of \$200,000 (Pen. Code, § 12022.6) and that defendant had suffered a prior misdemeanor conviction for posing as a contractor without a license within the meaning of Business and Professions Code section 7028, subdivision (c).

The following evidence was presented at trial:

In 2006, Standish Sibley began a construction project on his home. To find a contractor, Sibley placed an advertisement on an online contractor website. Defendant responded to the advertisement and on April 12, 2006, Sibley and defendant met to discuss the project. At that meeting, defendant told Sibley her name was "Siale" and provided a passport that identified her as "Siale Eteaki."¹ Defendant stated she was co-owner of a concrete contracting company, A & L Concrete, and co-owner of Sharp Construction in Long Beach. She presented Sibley with a business card for DSI Concrete with a license number of 845438. Defendant also wrote on the card the license number for Sharp Construction, which was 844957. She explained that she had two license numbers because a contractor may only have one trade per license.

Following their meeting, Sibley checked the Contractor License Board website to verify defendant's contractor status. When Sibley entered in the printed license number on the "DSI Concrete" card, the associated company listed was A & L Concrete. The second license number provided by defendant was associated with Sharp Construction in Long Beach, but was not an active license. The individuals listed along with Sharp

¹ During the course of the project, defendant was married and became known as Siale Fangupo.

Construction were Sione Hettic Eteaki and Mele Eteaki. Sibley also searched for the company DSI Concrete and found none listed.

When Sibley told defendant what he had found on the website, she explained that A & L Concrete was a business partner and that Sharp Construction would be relocating to the Bay Area. Defendant stated she co-owned Sharp Construction with her sister Mele. Defendant also explained that while her actual name was Siale, she was known as Sione. When Sibley stated he was unable to find a listing for DSI Concrete, defendant stated DSI Concrete was a subsidiary of Sharp Construction.

At a third meeting, Sibley entered into a contract with defendant for the work on his home. On the contract, Sibley insisted that defendant's company be listed as "DSI Construction, a subsidiary of Sharp Construction" because of insurance issues. Sibley believed Sharp Construction was bonded. Sibley believed that defendant was a licensed contractor and would not have hired her if he did not believe this to be true.

Defendant's company commenced work on Sibley's home on April 17, 2006. Defendant was in charge of the team working on the project and occasionally stopped by the site; she did not herself perform any of the work on site. Between April and October 2006, Sibley paid defendant \$340,000 for work performed, primarily by personal check written to "DSI/Sharp Construction." Some checks were written to "Siale Fangupo."

Approximately three weeks into the project, Sibley asked defendant to provide proof of insurance for her company. On May 25, 2006, Sibley received a certificate of insurance from Tasman Insurance and Financial Services affirming defendant's insurance coverage. Peter Cross, a commercial insurance agent for Tasman Insurance, testified that in early May 2006, a woman identifying herself as "Sione Eteaki" and claiming to be a licensed contractor contacted him by phone to obtain an insurance policy. He issued the policy and provided proof of insurance to Sibley, but the policy was cancelled a few months later for lack of payment.

On September 1, 2006, Sibley searched the Contractors State License Board website and discovered that defendant's purported contractor's license had been suspended. On November 1, 2006, after stopping work a number of times to deal with the

suspended license, Sibley ultimately refused to make additional payments to defendant and terminated the construction contract. Approximately one-third of the work originally contemplated remained to be performed. Sibley hired another company and paid it approximately \$265,000 to complete the job. Sibley brought a civil suit against defendant and obtained a default judgment.

David Shue, a supervising investigator for the California State Contractors License Board, testified that when he searched the website for the names Siale Fangupo and Siale Eteaki, he found no record of these names as a licensed contractor. He found that the license number defendant provided for DSI Concrete belongs to defendant's sister, Lamona Eteaki. Lamona testified that in 2006 defendant did not discuss working with her on Sibley's house and she did not give her sister permission to use her contractor license number. Shue testified that the second license number defendant provided for Sharp Construction belongs to defendant's uncle, Sione Eteaki.

The jury convicted defendant of one count of fraudulently using her uncle's license number, one count of falsely impersonating her uncle and one count of contracting without a license. The jury acquitted defendant of fraudulently using her sister's license number and was unable to reach a verdict on the theft charge. The jury found true the excessive taking allegation and following a bench trial, the court found the prior conviction allegation true. The trial court suspended imposition of sentence and placed defendant on probation. The court entered an order requiring her to make restitution to Sibley in the amount of \$355,362.18. Defendant filed a timely notice of appeal.

Discussion

On appeal, defendant does not challenge the sufficiency of the evidence to support her convictions. She contends that the court made a series of errors that denied her the ability to present a "focused, coherent defense based on the statute of limitations." We disagree.

In their closing arguments both parties focused on the statute of limitations. The prosecutor, quoting from the jury instruction, acknowledged that he must " "file [his]

action' or 'commence [his] action' is the word that [the instruction] uses 'within four years after the discovery of the offense or the completion of the offense, whichever [is] later.' ” He argued that although the crimes commenced in April 2006 with the negotiation of the contract, they were not completed for purposes of the statute of limitations until October or November 2006 when the contract was terminated. He argued that this “is when the defendant stopped using these license numbers with the intent to defraud.” With respect to when the victim or law enforcement discovered or reasonably should have discovered the offenses, the prosecutor argued that discovery could have occurred at the earliest in December 2006 when Sibley filed a complaint with the State Contractors License Board. The prosecutor noted that although Sibley’s complaint concerned the quality of defendant’s work rather than her use of a fraudulent license number, with due diligence law enforcement should have discovered the offenses shortly thereafter.

In his closing argument, defense counsel emphasized the importance of the statute of limitations in protecting the defendant’s “constitutional right[] to have a case brought against you in a reasonable amount of time.” Counsel reiterated that “the statute of limitations says [defendant] may not be convicted of a fraudulent use of the contractor’s license number unless the prosecution began within four years after the discovery of the commission of the offense or within four years after the completion of the offense whichever is later.” With respect to the date the offenses were completed, counsel argued that the crimes were committed and completed with each act, i.e., when the contract was negotiated, when the contract was signed, and when the work began. With respect to discovery, counsel argued that Sibley should have discovered the offenses earlier. “[T]his is where we got so much argument about Standish Sibley, what he knew, did he know that she was unlicensed prior to contracting? Certainly he says he had a computer in his kitchen and he was handy with the [State Contractors License Board website]. This is somebody who could have discovered this crime very early on, this is somebody with all of his experience and with all of the resources he had at his fingertips. This crime should have been discovered.” Finally, defense counsel argued, “[I]f you believe that [the statute

of limitations started to run] as I argue either when that contract was negotiated in late March of 2010 or early April or by the very latest when the contract was actually signed, any time before June 29th, 2006 when the work was performed, anything like that, they have not met their burden.”

The jury was instructed with respect the statute of limitations in relevant part as follows: “A defendant may not be convicted of fraudulent use of a contractor’s license number (counts 1 and 2), theft by false pretense (count 3), or false personation (count 4) unless the prosecution began within four years after the discovery of the commission of the offense or within four years after the completion of the offense, whichever is later. [¶] ‘Discovery’ means when a crime was actually discovered or should have been discovered, whichever is earlier. A crime should have been discovered when the victim or law enforcement officer was aware of facts that would have alerted a reasonably diligent person or law enforcement officer in the same circumstances to the facts that a crime may have been committed. [¶] . . . [¶] The present prosecution for counts 1, 2, 3 and 4, began on June 29, 2010. [¶] . . . [¶] The People have the burden of proving by a preponderance of the evidence that prosecution of the case began within the required time. . . . As to each count, if the People have not met this burden, you must find the defendant not guilty of the counts for which you find the burden has not been met.”

Although the court failed to read the first paragraph of these instructions, apparently inadvertently, the jury was provided with a full and complete written copy of the instructions. Moreover, as set forth above, counsel for both parties clearly emphasized how the statute of limitations applied to the case. There is no likelihood that the jury misunderstood the law or was confused by the omission from the oral instructions. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1132 [“when erroneous oral instructions are supplemented by correct written ones, we assume the jury followed the written instructions”]; *People v. Kelly* (1992) 1 Cal.4th 495, 527 [court may consider argument of counsel in determining whether it is “reasonably likely the jury misunderstood the [relevant] law”].) The omission undoubtedly was harmless under any standard.

Defendant argues that the court erred in denying her request to compel the prosecution to make an election as to the specific acts it claimed constituted the charged felonies. She asserts that the error prejudicially interfered with her ability to present her statute of limitations defense. In the trial court, she argued that she was entitled to an election because the “election of specific acts supporting each of the alleged violations is entirely possible and the charges do not fall within the exception for continuous conduct.” The prosecution disagreed, arguing that the continuing course of conduct exception applied and that it was entitled to prove the use of the fraudulent license number “by a collection of acts. Those acts add up to the use of the license number.” The court denied the request for an election but agreed to give a unanimity instruction. The court explained, “I will give the unanimity instruction . . . , but I think here that’s what’s being discussed in each of these counts is more in the nature of a continuous course of conduct from dates certain that are described in the information. These are the fraud. The reliance was an ongoing event, not just simply one date when a business card was shown or one date when a particular statement might have been made.” On appeal defendant argues, “Some of the acts upon which the prosecution sought to predicate convictions on these two counts [fraudulent use of an incorrect contractor’s license number and false personation] took place more than four years before the prosecution commenced. Some of the acts did not. However, because the prosecution was not forced to make proper elections as to counts 1 and 4, [defendant’s] right to assert a defense based on the statute of limitations, as to acts outside the limitation period, was thwarted.”

“ ‘[W]here violation of a criminal statute is charged and the evidence establishes several acts, any one of which could constitute the crime charged,’ either the state must ‘ ‘select the particular act upon which it relied to make good the allegation of the information’ ’ ’ or the jury must be instructed ‘that they must agree unanimously on which act they based their guilty verdict.’ [Citation.] ‘Neither instruction nor election are required, however, if the case falls within the continuous course of conduct exception,’ which arises ‘when the acts are so closely connected that they form part of one and the same transaction, and thus one offense’ or ‘when . . . the statute contemplates a

continuous course of conduct [or] a series of acts over a period of time.’ ” (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1427; see also *People v. Whitham* (1995) 38 Cal.App.4th 1282, 1295 [a continuous course of conduct arises in two contexts: (1) “ “when the acts are so closely connected that they form part of the same transaction and thus one offense,” ’ ” and (2) “ “when the statute contemplates a continuous course of conduct of a series of acts over a period of time” ’ ”].)

In this case, the prosecution charged defendant with one count of fraudulent use of her uncle’s contractor’s license number between March 1 and November 1, 2006 and one count of fraudulent use of her sister’s contractor’s license number between March 1 and November 1, 2006. With respect to the false personation count, the prosecution made an election to rely on defendant’s false representation to Sibley that she was Sione Eteaki, rather than on representations she made to the insurance agent. No election was required as to any of the other offenses because they all involved a continuous course of conduct.²

“ ‘Decisions on the continuous course of conduct exception have focused on the statutory language in an attempt to determine whether the Legislature intended to punish individual acts or entire wrongful courses of conduct.’ ” [Citation.] ‘[C]ertain verbs in the English language denote conduct which occurs instantaneously, while other verbs denote conduct which can occur either in an instant or over a period of time.’ [Citation.] In the latter situation, where the statute ‘may be violated by a single act’ or ‘repetitive or continuous conduct,’ and the charging instrument ‘allege[s] a course of conduct in statutory terms which . . . occurred between two designated dates,’ ‘[t]he issue before the jury [i]s whether the accused [is] guilty of a course of conduct, not whether . . . he committed a particular act on a particular day.’ ” (*People v. Hamlin, supra*, 170 Cal.App.4th at pp. 1427-1428.)

Under Business and Professions Code section 7027.3, a defendant may be found guilty of the fraudulent use of an incorrect license number if he or she “willfully and intentionally uses, with intent to defraud, a contractor’s license number that does not

² For this reason, no unanimity instruction was required, although given by the court.

correspond to the number on a currently valid contractor's license held by that person."³ Under Penal Code section 529, a defendant may be found guilty of false personation if he or she "falsely personates another in either his or her private or official capacity" and while doing so, "does any other act whereby, if done by the person falsely personated, he might, in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture, or penalty, or whereby any benefit might accrue to the party personating."⁴ Contrary to defendant's argument, these statutes can be violated by a single act or by a continuous course of conduct.

People v. Brown (1991) 234 Cal.App.3d 918 is instructive in this regard. In that case the court held that the failure to give a unanimity instruction was not error where the defendant was convicted of three counts of practicing medicine without a license. The court recognized that "[t]he crime of practicing medicine without a license is an offense which may be continuous in nature and therefore this exception to the unanimity rule may apply on occasion."⁵ (*Id.* at p. 935.) Then, turning to the facts of the case, the court held

³ Section 7027.3 reads in full: "Any person, licensed or unlicensed, who willfully and intentionally uses, with intent to defraud, a contractor's license number that does not correspond to the number on a currently valid contractor's license held by that person, is punishable by a fine not exceeding ten thousand dollars (\$10,000), or by imprisonment in state prison, or in county jail for not more than one year, or by both that fine and imprisonment. The penalty provided by this section is cumulative to the penalties available under all other laws of this state. If, upon investigation, the registrar has probable cause to believe that an unlicensed individual is in violation of this section, the registrar may issue a citation pursuant to Section 7028.7."

⁴ Section 529, subdivision (a) provides in relevant part: "Every person who falsely personates another in either his or her private or official capacity, and in that assumed character does any of the following, is punishable pursuant to subdivision (b): [¶] . . . [¶] (3) Does any other act whereby, if done by the person falsely personated, he might, in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture, or penalty, or whereby any benefit might accrue to the party personating, or to any other person."

⁵ Under former Business and Professions Code section 2053, a defendant could be found guilty of the unlawful practice of medicine if he or she "willfully, under circumstances or conditions which cause or create risk of great bodily harm, serious physical or mental illness, or death, practices . . . any system or mode of treating the sick or afflicted in this

that no unanimity instruction was required and defendant was properly convicted of three separate counts, each involving a course of treatment within a specific period of weeks following a specific medical procedure. (*Id.* at p. 936; see also *People v. Daniel* (1983) 145 Cal.App.3d 168, 175 [failure to give unanimity instruction was not error where evidence established that defendant committed grand theft by embezzlement over a five-month period].)

People v. Thompson (1995) 36 Cal.App.4th 843, cited by defendant, is distinguishable. In that case, the court held that the defendant, who was charged with diversion of construction funds, was entitled to a unanimity instruction because the prosecutor had distinguished between the various methods defendant allegedly used to divert money: overbilling and applying the excess to other accounts; accepting money and not purchasing the promised items; and taking money for personal use. The defendant had offered different defenses as to each possibility. (36 Cal.App.4th at p. 852.) The court found that because of the different defenses, “[a]bsent a unanimity instruction, the jurors could have unanimously convicted defendant of diversion without agreeing on what he did.” (*Ibid.*; see also *People v. Laport* (1987) 189 Cal.App.3d 281, 282-284 [continuous course of conduct exception did not apply in prosecution for grand theft where prosecution presented evidence that defendant both embezzled checks and stole paintings and defendant offered different defenses to different acts].)

In the present case, defendant did not present different defenses to the acts that occurred before or after any particular date. She argued that there was no fraud at any time because Sibley knew she was unlicensed from the beginning and that the prosecution of all felony counts was barred by the statute of limitations. Defendant offered no defense that *applied* to the post-June 2006 acts — primarily the receipt of

state, or diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other physical or mental condition of any person, without having at the time of so doing a valid, unrevoked and unsuspended certificate as provided in this chapter, or without being authorized to perform that act pursuant to a certificate obtained in accordance with some other provision of law.” (Stats. 1987, ch. 1336, § 2, eff. Sept. 29, 1987.)

payments — that was not equally applicable to the prior acts. Accordingly, all of defendant’s acts were properly considered part of a continuous course of conduct.

Having concluded that defendant was properly charged and convicted of false personation based on a continuous course of conduct, we reject defendant’s claimed error with regard to the response given by the court to the jury’s question during its deliberations. The jury asked, “If we find that the defendant falsely personated by signing a contract in which she is represented as Sione Eteaki, does the false personation continue for the duration of the contract or does a false personation start and stop with each false representation of a defendant’s identity?” The court answered, “A false personation continues for as long as [(a)] the defendant permits the false personation to continue in a manner that is purposeful or [(b)] the defendant engages in acts in the assumed character that expose the impersonated individual to liability, benefit the defendant, or benefit another.” The trial court’s answer is consistent with Penal Code section 529. Substantial evidence undoubtedly supports the jury’s finding that defendant continued to benefit from her false personation of her uncle until the contract was terminated in November 2006.

Disposition

The judgment is affirmed.

Pollak, Acting P.J.

We concur:

Siggins, J.

Jenkins, J.