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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOANNE ROSE FAWCETT et al.,

Defendant and Appellant.

C067575

(Super. Ct. No.
09F09147)

The evidence at trial showed defendant Joanne Rose Fawcett faked a knee injury to obtain an insurance settlement, and her husband, defendant Steven Gerald Fawcett, lied about her physical abilities.¹ The jury convicted Joanne of two counts of submitting a knowingly false insurance claim and one count of presenting a false statement as part of an insurance claim, and convicted Steven of one count of presenting a knowingly false statement. (Pen. Code, § 550, subds. (a)(5) & (b)(1).) The

¹ Because the two defendants share the same last name, we will use their respective first names for ease of reference.

trial court sentenced Joanne to two years in prison, but suspended execution of sentence for Steven and placed him on probation. Both defendants timely appealed.

On appeal, Steven first contends the trial court should have instructed the jury on aider liability, and second that no substantial evidence supports the conviction. As we shall explain, we reject these claims as the People's theory was that Steven *personally* made knowingly false statements on a particular date, and substantial evidence supported the resulting verdict.

Joanne's attorney has filed a brief raising no issues. (See *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).) Joanne has filed a supplemental brief raising a number of issues, but, as we shall explain, each lacks merit.

Accordingly, we shall affirm the judgments.

FACTS

People's Case

Dr. Jason London, a trauma surgeon, testified that on April 3, 2007, he drove to a gym in his sedan. As he backed up slowly to park, he "felt a slap on the back of the car" and saw someone sitting on the trunk. A woman told him her leg had been hit by his car. She did not seem to be injured and "was pleasant, but forceful." Both went inside the gym, but about 20 minutes later, the woman told him her leg hurt too much to exercise, and she left. Several months later, after the woman contacted him and said her knee was hurting and she had seen doctors,

Dr. London referred her claim to USAA (United Services Automobile Association), his insurance company.

Dr. Peter Sfakianos, an orthopedic surgeon with extensive experience, testified that he examined Joanne on January 20, 2010, at the request of USAA's legal counsel, and had reviewed her medical records dating back to 1986. He focused on her left knee, although she mentioned other issues. She reported that knee was swollen and painful, and she had fallen during "collapsing episodes" as recently as two weeks before the examination. She reported that at the time of the "subject accident" she had been disabled due to "her back condition, her hand conditions, and her right elbow condition" and remained disabled since the subject accident. He reviewed pre- and post-accident MRIs of her left knee, and found no evidence of trauma, only "normal wear and tear" and "chondral calcinosis"--also known as "pseudo gout"--which is not caused by trauma. He opined it was unlikely her knee was altered by the alleged incident.

Paulette Rhyne had been an assistant manager for Homepointe, a property management company. For about six or seven months, Joanne and her husband contracted to clean apartments and do "hauling" for Homepointe, via a company called "Craftsman For U." Joanne never complained of any knee problems, and Rhyne never saw her limping or using a cane. In February 2008, Joanne cleaned Rhyne's own unit at 9032 El Cahon Way; Rhyne saw her there, scrubbing a window sill *on her knees*,

and saw that some items to be hauled had already been moved onto a truck.²

Eileen Stearman, a division manager associated with Homepointe, knew both defendants, and testified that company records showed they did 17 cleaning jobs for Homepointe between February 29, 2008 and May 14, 2008. Joanne never mentioned any left knee problem.

Daisha Jackson was an accountant at Burmaster Real Estate, also a property management company. Joanne and her husband worked with Burmaster to clean properties, and company invoices reflected that they did 23 jobs for Burmaster between November 2007 and March 2008. Joanne never said she had a problem with her left knee.

Maureen Metcalf, the property manager for Burmaster, saw Joanne about 16 to 20 times, and Joanne claimed her husband "ran the accounting . . . and she did the work." Joanne was "adamant" that no payments be recorded under her name. Once Metcalf saw Joanne at a property, alone, carrying a cleaning bucket *after* climbing stairs, and Joanne said it would take a couple of hours to finish the job. Joanne never mentioned any left knee problem, and Metcalf never saw her limping or using a cane.

Jeremy Essex, an investigator for USAA, testified Joanne asked for the policy limits of \$100,000 to settle her claim.

² Rhyne had suffered two theft-related convictions, a 1998 second-degree burglary conviction, and a 2002 grand theft conviction.

When she returned a release for USAA to access her medical records, she modified it to limit the release to records pertaining to being hit by a car on April 3, 2007. Essex interviewed Joanne on April 1, 2008, at her home, and Steven was present. Joanne claimed "constant severe pain" in her knee, which caused her to limp, prevented her from mounting stairs without Steven's help, and made it hard to enter and exit her van. She had not worked in "a few" years and had been on disability; because of the accident she could never work.

On July 3, 2008, Essex conducted a telephone interview of Steven, during which Steven stated Joanne had not worked outside the home for "probably" more than a year, that she had trouble entering and exiting the van, needed help mounting stairs, and had trouble doing housework.

James Papastathis, a private investigator, watched Joanne on seven dates in February and March 2008, and videorecorded her activities. These recordings showed her loading and unloading her van and moving a ladder and cleaning supplies. (RT 241-244) He did not see her limping or having trouble entering or exiting her van.³

Defense Case

Dr. Timothy Mar, an orthopedic surgeon, testified Joanne was referred to him in June 2007, and he thought her symptoms were "consistent with having an internal derangement in the knee

³ The parties have not had the exhibits transmitted to this court, but the recordings were described at trial.

joint and probably a crack or defect into the cartilage on the bone itself." He performed arthroscopic surgery on her knee, which revealed some problems due to aging, but also showed an injury to the cartilage that "appeared to have been impacted by some event." She was in her early 60's and would eventually need knee replacement surgery. However, Dr. Mar had not reviewed any of Joanne's prior medical records, including an X-ray report from 2002 that showed a "fibular fracture[,]" and he conceded the MRI taken the month of the alleged accident did not show any evidence of a severe impact to the knee.

James Wagoner, a private investigator, identified photographs of Joanne while wearing a knee brace.

Neither defendant testified.

Election and Argument

As to Joanne, the prosecutor elected two letters she sent to USAA to support the two counts of submitting a fraudulent insurance claim, and elected her statements to Essex on April 1, 2008, to support the count of presenting a knowingly false statement in support of an insurance claim. The prosecutor elected Steven's statements to Essex on July 3, 2008, to support the single charge of presenting a knowingly false statement in support of a claim.

Joanne's counsel argued to the jury that the medical evidence about whether she had been injured in the subject accident was in conflict, and emphasized the People's high burden of proof. Steven's counsel argued that his statements to Essex did not clearly show that Steven had the required intent

to defraud, in part because of the leading way Essex asked him questions.

As indicated, the jury convicted both defendants as charged.

DISCUSSION

I

Steven's Appeal

A. Aiding Instruction

Steven argues the trial court had a duty to instruct the jury on aiding liability. We disagree.

As defendant acknowledges, a sua sponte duty to instruct on aider liability arises only when the prosecution has elected to rely on that theory. (See *People v. Prettyman* (1996) 14 Cal.4th 248, 259, 269-270 (*Prettyman*); *People v. Beeman* (1984) 35 Cal.3d 547, 560-561.) That did not happen here.

The statute under which Steven stands convicted states:

"It is unlawful to do, or to knowingly assist or conspire with any person to do, any of the following:

"(1) Present or cause to be presented any written or oral statement as part of, or in support of or opposition to, a claim for payment or other benefit pursuant to an insurance policy, knowing that the statement contains any false or misleading information concerning any material fact." (Pen. Code, § 550, subd. (b)(1).)

We observe that the charging document generated some confusion. Instead of separating each defendant's statements in separate counts, count three conflated two offenses, alleging in part that, "On or about and between April 01, 2008, and July 03, 2008 . . . defendant(s) [Joanne and Steven] did commit a felony

namely: a violation of Section 550(b)(1) . . . in that said defendant assisted, conspired with another to and presented and caused to be presented a written and oral statement as part of . . . a claim for payment and other benefit to an insurance policy, knowing that the statement contained false and misleading information concerning a material fact."

However, as we have noted *ante*, at trial the prosecutor explicitly elected the false statements made by *each* defendant in their temporally *separate* statements to Essex. Thus, there was no basis for any instruction on aiding liability because the parties proceeded on the theory that Steven's liability, if any, was direct, based on statements he personally made to Essex.⁴

Even if we were to assume error, it would be harmless error, because the parties did not address aider liability in argument and there could have been no jury confusion about the People's theory of direct liability. (See *Prettyman, supra*, 14 Cal.4th at p. 272-274; *People v. Sakarias* (2000) 22 Cal.4th 596, 628.)

People v. Sarkis (1990) 222 Cal.App.3d 23, relied on by defendant, is distinguishable. Sarkis was convicted of arson and insurance fraud, and the prosecutor argued he could be liable for the arson *either* if he set the fire or if he aided someone to set the fire. (*Sarkis, supra*, 222 Cal.App.3d at pp.

⁴ Consistent with this view, defense counsel did not object to the absence of aiding instructions.

26-28.) In contrast, in this case the prosecutor made no argument about aider liability.

Steven's counsel contends that because Steven had not filed any claim of his own, "his culpability, if any, had to have been based on the theory that he assisted or supported his wife's claim during his telephone conversation with Essex." Steven's counsel also contends the "jury had to find that appellant knew of his wife's unlawful purpose and specifically intended to aid, facilitate, promote, encourage, or instigate the commission of insurance fraud." This contention fails.

Contrary to counsel's view, the statute, quoted *ante*, does not require that the actor make a false statement in support of his or her own claim, nor does it require that the insurance claim itself be filed with fraudulent intent. It is enough that the actor presents a knowingly false statement of material fact about any insurance claim. Although the statute *may* be based on a person's acts of assisting another person to make a false statement, as explained above, Steven's liability was predicated on his knowingly false statements to Essex about his wife's condition, not based on aiding Joanne's false statements.

B. Sufficiency of the Evidence

Steven contends no substantial evidence supports his conviction. We disagree.

Steven first argues there is insufficient evidence that he aided Joanne in making a false statement. However, as explained *ante*, Steven stands convicted as a direct perpetrator, not as an aider of anything Joanne did.

Steven next argues that no substantial evidence shows he knowingly made false statements. He claims Essex's questions were "vague, general and non-specific" and that his answers were "direct and accurate . . . based on the questions asked." We reject Steven's contention, which amounts to an invitation for us to reweigh the evidence.

"On appeal we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Abilez* (2007) 41 Cal.4th 472, 504.)

The transcript shows Steven gave many explicit answers that were contradicted by other evidence presented to the jury and reasonable inferences from that evidence. When Essex asked if Joanne needed help mounting stairs, Steven said, "Uh, I can't remember, I don't, I know if I take her to doctors office[s]. *I know I know she has, she can't walk up stairs and ya know at all.*" (Italics added.) Steven confirmed that sometimes he had to help Joanne climb stairs. When Essex asked how long it had been since Joanne "tried working or was able to work regularly" Steven first said he did not remember, but when asked if it had been more than a year he answered, "Uh, probably, yes." When asked if Joanne had trouble with housework, Steven said, "No, uh, I I help her out an awful lot on the housework, she can't do it." When asked about any trouble Joanne had with the van,

Steven answered "It's awful hard for her to get in and outta that van I know that, a lot of times I have to help her."

Based on the evidence that Steven and Joanne jointly operated an apartment cleaning business and worked together after the accident, and evidence that she entered the van and climbed stairs with no apparent difficulty, the jury could rationally infer that Steven knew his answers were false.

II

Joanne's Appeal

A. Wende Brief

Joanne's counsel filed an opening brief that sets forth the facts of the case and asks us to determine whether there are any arguable issues on appeal. (*Wende, supra*, 25 Cal.3d 436.) We have undertaken an examination of the entire record and find no arguable error that would result in a disposition more favorable to defendant. Counsel advised Joanne of her right to file a supplemental brief, and Joanne has done so.

Joanne points to a number of errors or purported errors in the *Wende* brief filed by appointed counsel. These errors do not establish that counsel failed to diligently review the record and ascertain whether any arguable issues exist.

B. Joanne's Supplemental Brief

Joanne contends her trial counsel was incompetent, for failing to advise her of her right to testify, and telling her there was an agreement with the prosecutor that Joanne would not testify. The record does not support this claim.

First, neither defendant indicated on the record any desire to testify. "While the defendant has the right to testify over his attorney's objection, such right is subject to one significant condition: The defendant must timely and adequately assert his right to testify. [Citation.] Without such an assertion, '. . . a trial judge may safely assume that a defendant who is ably represented and who does not testify is merely exercising his Fifth Amendment privilege against self-incrimination and is abiding by his counsel's trial strategy.' [Citations.] When the record fails to show such a demand, a defendant may not await the outcome of the trial and then seek reversal based on his claim that despite expressing to his counsel his desire to testify, he was deprived of that opportunity." (*People v. Hayes* (1991) 229 Cal.App.3d 1226, 1231-1232; see *People v. Enraca* (2012) 53 Cal.4th 735, 762-763.)

Second, Joanne had moved in limine to exclude evidence of *23 prior insurance claims* dating back to 1993. The People disclaimed any intent to introduce such evidence except for impeachment purposes *if Joanne testified*. The trial court appears to have ruled the prior claims would be admissible to impeach Joanne if she chose to testify.⁵ In denying a new trial

⁵ The trial court's ruling is not in the record. The People's opposition to the new trial motion stated the trial court had ruled the prior claims "would be admissible." At the hearing on the new trial motion, the trial court first stated it had ruled "most likely they would be." But the trial court then described the prior claims, and stated they "would have been daunting to the defense" and "the cross-examination would have been devastating[.]"

motion, the trial court summarized multiple slip-and-fall claims, automobile accident claims, a spilled coffee claim, and other claims Joanne had made.

First, the discussion of priors and the court's ruling make it clear that there was no "agreement with the prosecutor" that defendant would not testify--the People contemplated her testimony and litigated the admissibility of impeachment material in the event that she chose to testify. Second, admission of the prior claims--whether shown to be fraudulent or not--was fully consistent with precedent, in part because they would have shown Joanne's knowledge of claims practices, and be relevant to motive. (See, e.g., *People v. Singh* (1995) 37 Cal.App.4th 1343, 1380-1381 ["Even if innocent, although remarkably unlucky given their number, the uncharged collisions could have provided the experience upon which Singh later relied to construct and enact his fraudulent scheme"]; *People v. Furgerson* (1962) 209 Cal.App.2d 387, 389-391.) Such evidence would have eviscerated Joanne's testimony. Thus, defense counsel's advice not to testify appears sound.

Joanne further contends a particular letter sent to her by her trial counsel contained errors, and that counsel did not properly advise her about the charges. The record on appeal does not support the contention of incompetence of trial counsel. (See *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.)

Joanne also presents a number of arguments under a heading regarding the transcript, but these claims are restatements of other contentions (such as her failure to testify), refer to

matters outside the record (such as documentary evidence that not introduced at trial) or are unintelligible. We need not address undeveloped arguments or arguments made without record references. (See *People v. Freeman* (1994) 8 Cal.4th 450, 482, fn. 2; *In re S.C.* (2008) 138 Cal.App.4th 396, 408.)

Joanne contends the prosecutor "left out" exculpatory evidence. It appears she is referring to evidence disclosed to defense counsel but not introduced by either side at trial. She fails to provide record references or coherent argument. She also contends Dr. London's recorded statement was omitted from trial. This point, too, lacks record references or coherent argument.

Joanne argues there was jury bias based on an incident during voir dire. She appears to be arguing there was undue media coverage, and possibly is arguing that a reference to such coverage was made during voir dire. The point lacks record references or coherent argument.

Joanne further claims the surveillance video was taken in violation of her rights. However, it does not appear that any trial objection was interposed, therefore this contention is forfeited. (Evid. Code, § 353, subd. (a); see *People v. Catlin* (2001) 26 Cal.4th 81, 138, fn. 14.) Further, there was no evidence the USAA investigator was acting as a government agent when he conducted surveillance, and therefore Fourth Amendment principles do not apply to his conduct. (*People v. De Juan* (1985) 171 Cal.App.3d 1110, 1120-1123; *People v. Mangiefico* (1972) 25 Cal.App.3d 1041.) Finally, it is generally lawful to

videorecord a person in a public place. (*U.S. v. Gonzalez* (9th Cir. 2003) 328 F.3d 543, 546-548).

Joanne claims judicial bias, in particular based on the trial court's act of obtaining "personal and confidential" medical information from Joanne's treating neurologist. Before sentencing, defense counsel expressed a doubt about Joanne's competence, the court suspended proceedings pursuant to Penal Code section 1368, and--at defense counsel's explicit request--appointed Joanne's *existing* treating neurologist to assess possible organic brain damage. Therefore, the claim that the trial court showed bias by invading Joanne's medical privacy is patently frivolous.

Joanne also faults the trial court for considering her prior insurance claims, but as we have already explained, precedent supports the court's ruling.

Lastly,⁶ Joanne contends the sentence is unduly harsh, arguing she had a clean record, was 64 years old, and had submitted letters in support of leniency. All of this information was before the trial court at sentencing. The trial court denied probation and imposed the *low* term--two years in prison. (Pen. Code, § 550, subds. (a)(5) & (c)(1) [establishing a sentencing triad of "two, three or five years" for making a knowingly false insurance claim].) Given Joanne's premeditated

⁶ To the extent Joanne intended to raise other claims based on stray comments strewn throughout her supplemental brief, they are forfeited for lack of coherent argument, lack of argument headings, and lack of references to the record.

and protracted efforts to obtain \$100,000 based on her fraudulent scheme, we cannot say the trial court abused its broad sentencing discretion by denying probation. (See 3 Witkin & Epstein, Cal. Crim. Law (3d ed. 2000) Punishment, § 532, pp. 718-719.)

DISPOSITION

The judgments are affirmed.

DUARTE, J.

We concur:

RAYE, P. J.

BLEASE, J.