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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RONDA LEE PAPA,

Defendant and Appellant.

D058654

(Super. Ct. No. SCD226553)

APPEAL from a judgment of the Superior Court of San Diego County, Francis M. Devaney, Judge. Affirmed.

A jury convicted Ronda Lee Papa and her codefendant, Darrell Kehl, of filing a false motor vehicle insurance claim. Papa appeals, contending: (1) her counsel provided ineffective assistance by failing to make a Sixth Amendment Confrontation Clause objection to testimony from an insurance investigator that was based on a claim activity log; and (2) a new trial is warranted because she was not present when the jury rendered its verdict. We reject Papa's arguments and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Papa and Kehl lived together. Papa had a liability only insurance policy on a Mazda vehicle, effective July 6, 2009. (All further date references are to the year 2009.) On July 24, Papa added comprehensive and collision coverage, and the next day, added Kehl as an additional driver on the policy.

On July 31, Officer Stephen Imel from the Sycuan Tribal Police Department received information that a vehicle was found at the bottom of a cliff near Sloane Canyon. After arriving at the scene, Officer Imel received a call that a Mazda vehicle was reported stolen from a casino parking garage. The description of the Mazda matched the vehicle at the bottom of the cliff.

Surveillance videos showed Kehl leaving the casino with codefendant James Ciani. The two men walked across the parking lot together. A few minutes later, Ciani entered the parking garage and walked towards a Mazda. The video then showed the Mazda leaving the garage.

Papa had reported her car stolen at the casino. Officer Erik Duesler drove Papa to the scene where the car went over the cliff. Papa showed no emotion and identified the car. Officer Duesler later asked Papa if she knew who had taken her car and she responded that she did not. After Officer Duesler drove Papa back to the casino, Papa met with Kehl.

That same day, Kehl called the insurance company to make a claim for loss of the vehicle. Papa called the insurance company a few minutes later. A theft examiner conducted a recorded telephone interview with Papa. During that interview, Papa said

that she drove to the casino and left her car in the parking structure with the key still inside. When she returned a few hours later, the car was missing.

Papa's claim was assigned to David McCauley, Jr., in the insurance company's Special Investigations Unit. McCauley asked Papa to meet with him at the casino for an interview. Papa agreed to the meeting, but did not show up. McCauley also told Papa to contact Officer Duesler regarding a police report. Papa never filed the required police report. Similarly, Papa failed to submit a completed theft questionnaire, which was required by the insurance company. The insurance company terminated Papa's claim and made no payment for the loss.

DISCUSSION

I. *Alleged Ineffective Assistance at Trial*

A. Background

McCauley testified in part based on an activity log, which he described as "documentation that tracks the claim from start to finish for documentation purposes, . . . evidence and also in the event it's ever needed to be produced." He explained that the activity log starts when an insured initiates a claim and includes entries from persons within the insurance company that take part in handling the claim.

McCauley testified that the activity log indicated that Papa's original check to the insurance company for payment was returned to Papa because the account it was written on could not be located. When Kehl's counsel inquired as to the status of the policy, McCauley responded that counsel "would have to ask the revenue department" because he was not "privy" to that information. McCauley described the policy as "in limbo

because there [we]re instances where [the insurance company] d[id] give the insured multiple chances to submit payment."

During cross-examination by Ciani's counsel, McCauley stated that during a break in the proceedings, he learned from the activity log that the policy was in force because the insurance company eventually received a MoneyGram payment on August 4. He further explained that "once the payment was received and reviewed by underwriting, then they confirmed that the coverage taken out initially from the date of the first day of the policy was not affected, therefore, in force."

B. Analysis

A criminal defendant has a constitutional right to effective counsel. (*Gideon v. Wainwright* (1963) 372 U. S. 335.) To demonstrate ineffective assistance, a defendant must show, based on the record, that counsel's performance was below an objective standard of reasonableness and there is a reasonable probability that the result would have been different in the absence of counsel's deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-694.)

Here, Papa contends her trial counsel was ineffective because he did not make a confrontation clause objection to McCauley's testimony based on the activity log that an insurance contract was in force. Specifically, she claims the admission of the evidence violated her right to confrontation as defined by the United States Supreme Court in *Crawford v. Washington* (2004) 541 U.S. 36 and its progeny, including *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305. We need not resolve whether admission of the evidence violated Papa's Sixth Amendment rights because even assuming without

deciding that counsel's failures were constitutionally deficient, Papa has not established prejudice sufficient to create a reasonable probability that a different result would have occurred in the absence of the claimed error.

Papa was convicted of "[k]nowingly present[ing] a false or fraudulent claim for the payments of a loss for theft, destruction, damage, or conversion of a motor vehicle, a motor vehicle part, or contents of a motor vehicle" in violation of Penal Code section 550, subdivision (a)(4). (Undesignated statutory references are to the Penal Code.) Pointing to CALCRIM No. 2000, which states, "[a] person *claims, makes, or presents a claim for payment* by requesting payment *under a contract of insurance* for [a loss]," (second italics added) Papa argues that without McCauley's testimony that an insurance contract was in effect, the jury would have reached a different result because an "in force" insurance contract was a necessary element of the crime.

Contrary to Papa's contention, an "in force" insurance contract is not a necessary element of section 550, subdivision (a)(4), crime. First, the statute does not require an "in force" contract and does not make any reference to the status of an insurance policy. Further, courts have held a contractual relationship is not required for the crime of submitting a false insurance claim (*People v. Benson* (1962) 206 Cal.App.2d 519, 533 [referring to former Insurance Code section 556], disapproved on other grounds in *People v. Perez* (1965) 62 Cal.2d 769, 776) and that an insurance company's payment of a claim is not determinative of whether a claim is false or fraudulent (*People v. Loomis* (1962) 207 Cal.App.2d 229, 245). Rather, "the gravamen of the substantive offense is the defendant's intent to defraud." (*Benson*, at p. 533.)

Papa's offense did not depend on whether her insurance policy was "in force" or "in limbo" as described by McCauley. The crucial issue was Papa's intent to defraud, which did not turn on the status of the policy. Our review of the evidence reveals that Papa submitted a false or fraudulent claim believing the policy was in effect. This was sufficient to prove the gravamen of the offense. We fail to see how Papa could have achieved a more favorable result absent McCauley's testimony regarding the status of the policy. Accordingly, we reject Papa's ineffective assistance claim.

II. *Absence When Jury's Verdict Returned*

Before the jury read its verdict, Papa's counsel informed the court that Papa was in the hospital, and the trial court excused her presence due to illness. Papa contends that her absence when the verdict was returned warrants a new trial. We disagree.

Section 1148 provides: "If charged with a felony the defendant must, before the verdict is received, appear in person, unless, after the exercise of reasonable diligence to procure the presence of the defendant, the court shall find that it will be in the interest of justice that the verdict be received in his absence." Error arising out of defendant's absence from a portion of the proceedings does not require reversal unless prejudice is shown. (*People v. Daniels* (1948) 85 Cal.App.2d 182, 194.)

Here, Papa claims that her presence could have had a psychological impact on the jury and that she was deprived of the ability to assist her counsel. However, we do not find that Papa was prejudiced in either of these respects because her counsel and other defendants and their counsel were present when the jury returned its verdict. (See *United States v. Friedman* (9th Cir. 1979) 593 F.2d 109 [finding no prejudice where "[o]ther

defendants and their counsel were present to guard against irregularities"'].) In light of Papa's absence, her counsel requested to poll the jury and all jurors confirmed their verdict. Further, Papa was present during all other stages of the trial and did not object below or seek a new trial. (*People v. Jung Qung Sing* (1886) 70 Cal. 469, 472.) Under these circumstances, we find no prejudice resulted from Papa's absence.

DISPOSITION

The judgment is affirmed.

McINTYRE, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.