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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. SARA CHARIS SNOW, Defendant and Appellant.	D070425 (Super. Ct. No. SCD260150)

APPEAL from a judgment of the Superior Court of San Diego County, Runston G. Maino, Judge. Affirmed.

Jared G. Coleman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Felicity Senoski and Mary Strickland, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Sara Charis Snow of three counts of workers' compensation fraud (Ins. Code, § 1871.4, subd. (a)(1)) and two counts of attempted perjury under oath (Pen.

Code,[1] §§ 118, subd. (a); 664). The two attempted perjury counts (counts 3 and 4) were based on statements Snow made during a deposition relating to her ability to lift and carry a paddleboard. On appeal, Snow contends that her convictions on counts 3 and 4 should be consolidated into a single conviction for perjury under section 954 because the statements underlying each count involved the same "material matter" for purposes of section 118. She further contends that conviction of the two counts constitutes multiple convictions for the same offense, in violation of the constitutional prohibition against double jeopardy. (U.S. Const., 5th Amend.) We conclude that the false statements and material matters associated with each attempted perjury count were sufficiently distinct to support two separate counts under California law. As a result, Snow's convictions on the two counts do not constitute multiple convictions of "same offense" for purposes of double jeopardy. We therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Snow worked part-time at Trader Joe's as a "crew member," a position that required her to stock shelves, gather shopping carts from the store parking lot, provide customer service and perform other miscellaneous tasks. In January 2011, Snow made a claim for workers' compensation benefits alleging that her right wrist hurt and that she believed the pain was caused by repetitive movements associated with her job. Trader Joe's insurance administrator approved Snow's claim and awarded Snow temporary disability benefits for a three-month period.

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1 Further statutory references are to the Penal Code unless otherwise stated.

Snow received medical treatment for her wrist injury at a local urgent care clinic. Dr. Kenneth Anderson, a doctor at the clinic, authorized Snow to return to work in late January 2011, on "transitional duty," but she did not go back to work. Instead, Snow informed Dr. Anderson that she was experiencing pain throughout her entire body. He rescinded Snow's authorization to work and referred her to a specialist. The specialist, an orthopedic surgeon, diagnosed Snow with mild carpel tunnel syndrome in her right wrist. In April 2011, Snow's doctor cleared her to return to work on a modified work schedule, but Snow requested additional time. Her doctor extended her authorized return to May 17, 2011. Snow reported to work on May 24, 2011.

On her first day back at work, Snow initiated a second workers' compensation claim alleging that she had injured her back while collecting three shopping carts from the parking lot that day. Snow returned to the urgent care clinic for treatment. In June 2011, Dr. Anderson authorized Snow to return to work on "transitional duty," with the following restrictions: "[n]o lifting more than 25 pounds and no prolonged lifting more than ten pounds." Snow did not return to work.

Later that month, Snow sought treatment from Glenn Nusbaum, D.C., who became her primary treating doctor. Snow filled out a patient intake form for Dr. Nusbaum stating that she suffered pain when doing "laundry, putting away dishes, [and] driving." Snow also reported headaches, neck pain, back pain and pain throughout her arms and legs, knees and ankles. Dr. Nusbaum certified Snow to remain out of work.

Wesley Van Fossan, a supervisory level claims adjustor for Trader Joe's insurance claims' administrator, handled both of Snow's workers' compensation claims. Van

Fossan delayed approval of Snow's second claim to allow for further investigation, and ultimately denied the claim. During the course of his investigation, Van Fossan worked with Trader Joe's workers' compensation counsel, Bridget Young. Young took Snow's deposition in November 2011. During the deposition, Snow testified that performing household chores, such as laundry, washing dishes and sweeping and vacuuming hurt her back. When questioned about how she spent her time, Snow described participating in church activities, walking her dog on the beach, lying on the beach, going to the library and attending concerts and films. Snow also stated that she used a hula hoop, participated in yoga classes, and enjoyed cooking and shopping at the farmer's market.

In December 2011, an investigator hired by Van Fossan surreptitiously recorded a video of Snow at a San Diego beach. In the video, Snow can be seen standing on the running board of a Toyota 4Runner and removing a 12-foot paddleboard from the roof of the vehicle, carrying it approximately 150 feet down the sandy beach into the water, bending over to place the board in the water, climbing on the board and then paddling in a standing position until the investigator could no longer see her. Snow is later seen paddling back to the beach, removing the board from the water, carrying it back up the hill to the vehicle with her right hand, standing "on her tippy[ ]toes on the running board of the vehicle," lifting the board over her head and securing it to a rack on the roof of the vehicle. Snow was on the paddleboard for approximately 45 minutes. The investigator did not observe any signs of restrictions or limitations in Snow's movements.

In January 2012, Snow informed Dr. Nusbaum that she continued to suffer constant neck and back pain and that her symptoms were not improving. He certified her to remain out of work, stating on the medical certification form that she could not "lift or do any over-shoulder work" or "do prolonged standing." That same month, William Previte, M.D., whom Snow and Trader Joe's had jointly selected to be their "agreed medical examiner" or "AME," conducted an evaluation of Snow. An AME assists with disputed workers' compensation claims by determining all issues, including a claimant's extent of permanent disability, future medical requirements, and ability to return to work. If the AME determines that a claimant has a permanent disability, the AME apportions the percentage of the claimant's whole person impairment (WPI) that is work-related for purposes of determining a workers' compensation award.

During his AME assessment of Snow, Dr. Previte questioned her regarding her "domestic functioning." Snow informed him that she was unable to do laundry, unload a dishwasher or do any lifting or carrying without pain. Snow also reported "constant" head and neck aches, stabbing low back pain and tingling feelings in her shoulder and right arm. Based on his examination of Snow, her statements and his review of her medical records, Dr. Previte completed an AME report in which he assessed her as having permanent impairment, including a three percent WPI of her right arm, a zero percent WPI of her low back and a 15 percent WPI of her cervical spine. Dr. Previte recommended work restrictions for Snow, including that she refrain from "fixed head positioning," extreme neck movements, "very forceful pushing and pulling" with her right arm and "very prolonged gripping and grasping with her right hand." The work

restrictions would potentially entitle Snow to a supplemental job displacement voucher for retraining. Dr. Previte further concluded that Snow would likely require future medical care for her injuries.

In March 2012, Van Fossan's investigator surreptitiously recorded a video of Snow shopping in an outdoor market and squatting and bending to examine merchandise contained in boxes on the ground. Later that month, he recorded another video of Snow visiting a street vendor, in which she is seen bending over, picking up a "pretty large" clay flower pot and carrying it back to her vehicle. In April 2012, Dr. Nusbaum certified Snow to remain out of work because she could not "lift or do any over-shoulder work" or "do any prolonged standing." Dr. Nusbaum cleared Snow to return to work in May 2012, on light duties "with no lifting more than 25 pounds, no lifting or carrying more than 25 pounds, and no repetitive pushing or pulling." That same month, Snow began working part-time at a swimsuit shop.

In August 2012, Young took Snow's deposition for a second time to question her about the activities she is seen performing on the surveillance videos. During her deposition, Snow testified under oath that she started paddleboarding in September 2011 when she began feeling better, but claimed that although she could carry her 30-pound paddleboard, it hurt her back, so she had other people carry it for her. In addition, Snow testified that she surfed, and could load and unload her 15-pound surfboard without assistance through the back window of her Toyota 4Runner, which is at chest-level. She further testified that she transported her paddleboard to the bay "the same way" but said that other people helped her lift it out and carry it for her. Following her deposition,

Snow made corrections to the deposition transcript on a signed errata sheet, but did not execute the signature page.

Young provided copies of the surveillance videos and Snow's second deposition transcript to Dr. Previte. In April 2013, following his review of these materials, Dr. Previte wrote a supplemental report. Dr. Previte opined in the supplemental report that Snow's ability level, as reflected in the paddleboarding video, was inconsistent with her statements that she could not "load a dishwasher or do any lifting and carrying," because it would take more physical effort to paddleboard and would require more heavy lifting to load and unload a paddleboard. Dr. Previte concluded that Snow's "[veracity] must [be] questioned" and that the video diminished the credibility of the information that he had relied on in preparing his original report.

At Snow's trial, Dr. Previte testified that he had described Snow's impairments in his report based on the fifth edition of The American Medical Association Guides for Rating Permanent Impairment (AMA Guides), which is the California standard. Dr. Previte explained that a person's disability, now referred to as "impairment," is measured by a person's "inability to function in activities of daily living," which is why he asked Snow about her ability to perform household tasks during the evaluation. Regarding the sub rosa paddleboarding video, Dr. Previte confirmed that comparing "the forces involved in loading a dishwasher versus paddleboarding" was relevant to his analysis and noted that Snow's body positioning seen in the video was at odds with her subjective complaints of neck and back pain.

Van Fossan also testified, explaining that the workers' compensation process for assessing permanent disability involves an incremental system, established by the AMA Guides, addressing injuries to various body parts, each of which has separate categories based on percentage of disability of the affected part. A claimant's percentage of disability correlates with a specific monetary amount determined by the state. Thus, "in a workers' compensation case claim the greater the injury the greater the potential benefit or payout to a claimant is."

Based on Dr. Previte's January 2012 report, Van Fossan determined that the settlement value of Snow's workers' compensation claim was approximately $23,000, including $15,000 in future medical expenses; $5,520 for permanent disability; and $2000 to $3,000 to replace Snow's job voucher rights. Because the extent of Snow's disability in Dr. Previte's original assessment was based on AMA Guides and the scope of her work restrictions, and the sub rosa video severely undermined the work restrictions, Van Fossan opined that the video "basically wiped out her permanent disability." Trader Joe's thereafter settled Snow's claim for a "nuisance" value of $500.

Snow was subsequently charged with insurance fraud and perjury based on false statements she made during her August 2012 deposition relating to her second workers' compensation claim. Following her trial, the jury convicted Snow of one count of attempted perjury (§§ 118, subd. (a); 664) for lying at her deposition about her ability to carry her paddleboard, and another count of attempted perjury for lying at her deposition

about her ability to lift her paddleboard onto her vehicle.[2] Based on these and other statements, the jury also convicted Snow of three counts of making false or fraudulent statements to obtain workers' compensation benefits. (Ins. Code, § 1871.4, subd. (a)(1).) The trial court sentenced Snow to a three-year term for each count, to be served concurrently, and "split" the sentence into a two-year term in county jail followed by one year of mandatory supervision. (§ 1170, subd. (h)(5)(B).)

DISCUSSION

Snow contends that her two convictions for attempted perjury (counts 3 and 4) should be consolidated into a single conviction because they are based upon the same "material matter." Alternatively, she contends that her convictions on the two counts represent multiple convictions for the same offense in violation of the double jeopardy clause of the Fifth Amendment. We are not persuaded.

A. *Governing Law*

"The elements of perjury are: 'a willful statement, under oath, of any material matter which the witness knows to be false.' " (*People v. Garcia* (2006) 39 Cal.4th 1070,

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2 Although Snow was originally charged with two counts of perjury, the jury convicted her of the lesser included offense of attempted perjury on each count. A defendant who has not executed his or her deposition transcript may not be convicted of perjury, but may be convicted of attempted perjury. (*People v. Post* (2001) 94 Cal.App.4th 467, 476.)

1091 (*Garcia*); § 118, subd. (a).)[3] All elements of the charge of perjury must be determined by the jury, including materiality. (*People v. Kobrin* (1995) 11 Cal.4th 416, 427-428 (*Korbin*).) The test for materiality under section 118 "is whether the statement could probably have influenced the outcome of the proceedings." (*People v. Pierce* (1967) 66 Cal.2d 53, 61 (*Pierce*).) A defendant who makes two separate false statements under the same oath may be convicted of two counts of perjury under section 118, subdivision (a). (*People v. Jimenez* (1992) 11 Cal.App.4th 1611, 1623-1624 (*Jimenez*) [defendant accused of vehicle-related crimes was properly convicted of two counts of perjury for testifying at trial that (1) he had never driven a brown station wagon; and (2) he had been in Mexico when the collision occurred], disapproved on another ground by *Kobrin*, at p. 419.) Multiple perjury convictions based on multiple separate statements are proper because the actus reus (or gravamen) of section 118 is the making of a false statement and it has been committed more than once. (*Jimenez*, at p. 1623, citing *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 349.)

B. *Standard of Review*

An appeal based on the contention that two counts constitute the same offense does not challenge the sufficiency of the evidence to support each count. (*In re Z.A.*

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[3] Section 118, subdivision (a), provides in pertinent part: "Every person who, having taken an oath that he or she will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which the oath may by law of the State of California be administered, willfully and contrary to the oath, states as true any material matter which he or she knows to be false, and every person who testifies, declares, deposes, or certifies under penalty of perjury in any of the cases in which testimony, declarations, depositions, or certification is permitted by law of the State of California under penalty of perjury and willfully states as true any material matter which he or she knows to be false, is guilty of perjury."

(2012) 207 Cal.App.4th 1401, 1426.) Rather, the analysis involves the proper interpretation of a statute and application of the statute to the facts. Where, as here, the facts are undisputed, both are questions of law subject to de novo review. (*People v. Salcido* (2008) 166 Cal.App.4th 1303, 1311; see *U.S. v. Stewart* (9th Cir. 2005) 420 F.3d 1007, 1012 ["The claim that an indictment has resulted in multiplicitous convictions is reviewed *de novo.*"].)

C. *Analysis*

Separate false statements given under a single oath may give rise to separate perjury charges under section 118, subdivision (a). (*Jimenez, supra*, 11 Cal.App.4th at pp. 1623-1624.) We therefore first examine the statements at issue to determine whether they are sufficiently distinct. Snow made all of the statements during her August 2012 deposition. They were identified in the verdict forms as follows:

Count 3

"Q: How much does your paddleboard weigh?

"A: Probably 30 pounds. I have people carry that for me.

"Q: Why do you have people carry it for you?

"A: It is heavy.

"Q: You can't carry it?

"A: I can. But it hurts.

"Q: So if you're with someone, you ask for help?

"A: I always bring someone with me.

"Q: Okay. So do you always ask for help?

"A: Yes. They volunteer.

"[¶] . . . [¶]

"Q: Who helps you carry your board when you're paddleboarding?

"A: The people who go out with me."

Count 4

"Q: How do you get your paddleboard to the bay?

"A: Same. It goes into the–my car the same way. And people lift it out and carry it there for me."

The above-referenced statements are similar in that they relate to Snow's paddleboarding activities. Count 3 is based on Snow's statements describing her paddleboard and indicating that she obtained help from other people to carry it. The statements serving as a basis for count 4 also refer to other people helping Snow *carry* her paddleboard, but further contain two additional factual assertions: (1) that Snow *loaded* her paddleboard into her car "the same way" that she loaded her surfboard (i.e., at chest level through the back window); and (2) that other people *unload* Snow's paddleboard for her. These additional factual assertions were demonstrated to be false by video footage showing that Snow unloaded the paddleboard not through the back window but from the roof of the car. Although there is significant overlap between the statements that serve as the bases for each count, the statements are factually distinct.

We further consider whether the statements underlying each count are distinctly material, because each false statement must be of a "material matter" to support a perjury conviction. (§ 118, subd. (a).) At trial, Van Fossan testified that the value of a workers'

compensation claim is directly tied to the scope of the claimant's injuries. In determining the scope of Snow's work-related injuries, Dr. Previte relied, at least in part, on Snow's subjective descriptions of her inability to perform routine activities. Dr. Previte testified that Snow's paddleboarding was relevant to his WPI analysis because it contradicted her subjective complaints of neck and back pain. Conversely, Snow's statements indicating her inability to perform all of the functions associated with paddleboarding were material because they supported her subjective complaints.

Although Snow's statements about her lifting and carrying abilities are closely related, the record establishes that each ability is separately material for purposes of determining the amount of a workers' compensation award.[4] For example, Dr. Previte assessed Snow as having restricted ability to perform prolonged "gripping and grasping with her right hand," a function that she would need in order to carry her paddleboard. In contrast, Snow's ability to unload a paddleboard "over her head" from the roof of a Toyota 4Runner would appear to require "extreme neck movements" and very forceful "pulling" motions, contrary to Dr. Previte's recommended restrictions. In addition, Dr. Nusbaum had previously certified Snow as unable to return to work in part because she could not "lift or do any over-shoulder work." The specific limitation on over-

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4 On page 21 of the Respondent's Brief, respondent asserts, without any citation to the record or to any authority, "[Snow's] false deposition statements that she was unable to carry her 30-pound paddleboard or unload it from her vehicle without assistance described separate limitations and were separate material matters that had the potential to influence the outcome of the proceedings by maximizing her disability settlement amount." Since the issue that we must decide in this case is whether the two statements in fact are separately material, respondent's failure to provide any authority for this assertion is entirely unhelpful.

shoulder work implies a distinction between general lifting, such as lifting to waist or chest level as required to carry an object, and that requiring movement above the shoulder, such as lifting a paddleboard onto a vehicle's roof. Accordingly, because the false statements associated with each count implicate distinct material physical abilities potentially impacting the amount of her workers' compensation award, they are not identical statements regarding the "same material matter," as Snow contends, and thus may properly serve as the bases for two separate perjury counts.[5]

For the same reason, we reject Snow's contention that her conviction of two counts of perjury violates federal double jeopardy protection. The double jeopardy clause, applied to the states through the Fourteenth Amendment, guarantees "that a person may not be placed twice 'in jeopardy' for the 'same offense.' " (*People v. Seel* (2004) 34 Cal.4th 535, 541-542.) The double jeopardy bar thus protects a defendant from being prosecuted a second time for the same offense following an acquittal or conviction, and from being punished for the same offense multiple times. (*Id.* at p. 542.) As explained by the United States Supreme Court, "the legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted

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5 This appeal presents a close call because the statements relied upon for the two perjury counts, and the questions that elicited the statements, were substantially intertwined. Federal courts that have considered the issue of repetitious perjury counts have opined that it is improper for "the government [to] bludgeon a witness who is lying by repeating and rephrasing the same question, thus creating more possible perjury counts," and a "[s]ingle punishment for a single lie should suffice." (*Gebhard v. United States* (9th Cir. 1970) 422 F.2d 281, 289-290 (*Gebhard*); see *United States v. De La Torre* (5th Cir. 1981) 634 F.2d 792, 795 [favorably citing *Gebhard*]; *United States v. Williams* (8th Cir. 1977) 552 F.2d 226 [same]). California courts have not addressed the propriety of multiple perjury counts based on substantially similar statements.

courts may not impose more than one punishment for the same offense." (*Brown v. Ohio* (1977) 432 U.S. 161, 165.) As discussed above, because California has defined the actus reus for perjury in section 118, subdivision (a), as the making of a false statement, the section allows for the conviction of two counts of perjury for making two separate false statements. (§ 118, subd. (a); *Jimenez, supra,* 11 Cal.App.4th at pp. 1623-1624.) Because Snow made two separate false statements, she was not placed in jeopardy twice for the "same offense," and her conviction of both attempted perjury counts did not violate the double jeopardy clause.

DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

DATO, J.