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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MOHAMMED ZARIN KHAN, Defendant and Appellant.	A108796 (San Mateo County Super. Ct. No. SC056756A)

Defendant Mohammed Zarin Khan appeals a judgment entered upon a jury verdict finding him guilty of insurance fraud (Ins. Code, § 1871.4, subd. (a)(1) (section 1871.4)); grand theft (Pen. Code, § 487, subd. (a)); perjury (Pen. Code, § 118); and attempted perjury (Pen. Code, §§ 118, 664). The court found true two prior conviction allegations. (Pen. Code, § 1203, subd. (e)(4); Ins. Code, § 1871.4, subd. (c).)

The trial court sentenced defendant to five years in state prison for count 1, and imposed a concurrent sentence of five years for count 2. The sentences on the remaining counts were stayed, as was the prior insurance fraud conviction enhancement allegation. (§ 1871.4, subd. (c).)

We conclude the trial court erred in finding true the prior insurance fraud conviction enhancement allegation. We also conclude the sentence on count 2 should have been stayed. Finally, we will order the abstract of judgment amended to reflect the jury's verdict of not guilty on count 8. As modified, we affirm the judgment.

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I. BACKGROUND

Defendant worked at Lithotype Company, a printing business in South San Francisco. On November 20, 2000, appellant reported to his supervisor that he had fallen and injured his right hip and lower back. He filled out a workers' compensation claim form. Two days later, defendant visited a workers' compensation physician, Dr. Bernard McDermott, and told him he had hurt his back, thumb, and finger at work. Dr. McDermott recommended that defendant stay off work pending a second visit. At a visit five days later, the doctor approved modified duty at work. Defendant visited Dr. McDermott again on December 11, 2000, and complained that his back was getting worse. Dr. McDermott recommended defendant see a specialist.

Defendant did not return to work at Lithotype after November 21, 2000. Several days after the injury, Lithotype tried to contact defendant to tell him it had modified work available, but was unable to reach him by telephone. Defendant stopped seeing Dr. McDermott and began seeing a new doctor, Dr. Chattha.

At a physical therapy appointment in December 2000, defendant indicated he had severe pain over most of the right side of his body, and limited motion. He failed to keep five physical therapy appointments in the next three weeks, and was discharged for noncompliance. In February 2001, Lithotype sent defendant a certified letter. Shortly after that, Dr. Chattha's office informed Lithotype that defendant was being placed on full-time disability for several more weeks.

In January 2001, an investigator for Safeco Insurance Company (Safeco), Lithotype's workers' compensation carrier, decided to refer the case out for surveillance. The investigators who carried out sub-rosa surveillance of defendant did not see any expressions of pain, restricted movements, or guarded movements. A surveillance videotape taken in June 2001 showed defendant working on a residence across the street from his own home, going to a landfill, coming back, and spending more than two hours working on the residence. Other videotapes showed defendant doing such activities as walking; driving; climbing in and out of a large van; bending forward while reaching into a vehicle; sitting and standing for periods of time; bending forward while scrubbing with

a push broom; bending forward while sweeping mud, dirt and water down a gutter; and squatting on his heels.

The house at which defendant was videotaped working belonged to Myrle Sonobe. In approximately January 2001, Sonobe had told defendant she was thinking about having her house painted and gutters put in. He told her he did construction work, and wrote up a contract for her. Under the contract, dated January 29, 2001, she would pay $7,600 for the labor and materials. The work began in June 2001, and Sonobe gave defendant his last payment in July 2001.[1]

Defendant saw a neurosurgeon, Dr. Theodore Baiz, in November 2001. He told Dr. Baiz he had back pain and could not bend without pain radiating down his right leg; he had numbness in his right leg; and he could not walk any distance without pain. He also indicated he had not worked for a year. After reviewing surveillance videotapes, Dr. Baiz concluded defendant had "no limitations consistent with his history" and he should return to gainful employment.[2]

Defendant saw another doctor, James Stark, on December 3, 2001, for a medical legal examination. Defendant told Dr. Stark he had limited ability of travel because of spine pain. He complained of neck pain radiating to his right arm, lower back pain radiating to his right leg, and numbness in his right arm and leg. His symptoms had been the same since the date of the injury. After reviewing the surveillance videos, Dr. Stark concluded defendant was not as limited by pain as he wished Dr. Stark to believe. In particular, he concluded that defendant was able to bend, stand, and climb without any indication that he was limited by pain. He prepared a report on December 19, 2001. After reviewing Dr. Stark's report, Safeco discontinued defendant's benefits, which had been $490 a week.

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[1] If the workers' compensation carrier had known defendant received income from his outside work, it would have taken that income into consideration in calculating his benefits.

[2] That review took place in August 2003.

Steven Bobus, an attorney for Safeco, took defendant's deposition in July 2001. Defendant testified at the deposition that he had not done any paid or volunteer work and had not received income apart from his disability checks since he stopped working at Lithotype. He claimed continuing leg, back, arm, and neck pain. According to the testimony, defendant experienced pain when bending, when sitting for more than 20 minutes, and when standing for 20 minutes to half an hour. He avoided twisting and bending. He testified that aside from limited activities in remodeling his own patio, he had not helped out with remodeling activities at any other location. According to defendant, Dr. Chattha had told him that because of the pain, he was unable to do even modified work.

The matter went to trial before the workers' compensation appeals board. Defendant testified that after the accident and during 2001, he and some friends helped a neighbor put siding on her house, but were not paid for their work, and that he had done some work around his house.[3] Defendant testified inaccurately that a coworker, Dan Walther, had witnessed the injury, had seen him on the floor, and had seen blood on a machine. He also testified that he avoided bending, and that sitting in a car and standing for a long period of time gave him back pain.

After defendant testified in the workers' compensation appeals board trial, while the case was under submission, an investigator obtained from Sonobe the contract for the payment of Khan's services and two cancelled checks to Khan. Bobus told the workers' compensation judge he wished to present additional information, and the judge set aside the submission order and reopened the record. The matter was set for a conference on April 28, 2003, in order to go over the new documentation and allow defendant to explain it. Although his attorney appeared at the conference, defendant failed to do so. The workers' compensation judge then set an additional trial date of August 5, 2003, to allow defendant to testify and explain the documentation. Defendant again failed to appear, although his attorney appeared. The contract and checks were received into evidence,

[3] In the interval between the deposition and the May 2002 trial, Bobus had sent defendant's attorney a copy of the videotape showing defendant's activities.

and the record was again closed. The worker's compensation judge issued a decision in Safeco's favor on December 2, 2003.

In the present case, a jury convicted defendant of misrepresenting his level of disability in violation of section 1871.4, subdivision (a)(1) (count 1); denying receiving income while accepting total disability payments (section 1871.4, subd. (a)(1)) (count 2); grand theft (Pen. Code, § 487, subd. (a)) (count 3); perjury at the workers' compensation trial (Pen. Code, § 118) (counts 4 & 5); and attempted perjury at his deposition (Pen. Code, §§ 118, 664) (counts 7 & 9).

II. DISCUSSION

A. Prior Conviction Enhancement

The trial court found true an enhancement under section 1871.4, subdivision (c) alleging that defendant had been convicted of insurance fraud (Pen. Code, § 550, subd. (a)(1)) on or about September 17, 2003. This conviction appears to arise from an unrelated incident involving automobile insurance fraud. Section 1871.4, subdivision (c) provides: "A person who violates subdivision (a) and who has a prior felony conviction of that subdivision, of former Section 556, of former Section 1871.1, or of Section 548 or 550 of the Penal Code, shall receive a two-year enhancement for each prior conviction in addition to the sentence provided in subdivision (b)." It is undisputed that defendant made the statements underlying his convictions in the present case *before* he suffered his September 17, 2003, conviction. Defendant contends that as a result, his September 17, 2003, conviction did not qualify as a prior felony conviction.

The People do not dispute that defendant may not receive an enhancement under section 1871.4, subdivision (c) unless his *conviction*, rather than the conduct underlying the conviction, preceded the present felony. (See *People v. Flood* (2003) 108 Cal.App.4th 504, 507 [construing similar provision of three strikes law, Pen. Code, § 667, subd. (b), to mean the present felony must be committed *after* the serious or violent felony conviction]; see also *People v. Williams* (1996) 49 Cal.App.4th 1632, 1638 [when guilt is established by either plea or verdict, the defendant stands convicted and has a prior conviction].) They argue, however, that defendant's crimes were continuing

offenses that ended only when he ceased to assert his workers' compensation claim. Thus, the People's position is that although there is no evidence that defendant did anything in connection with his workers' compensation claim after his conviction under Penal Code section 550 except await the workers' compensation court's ruling, his failure to withdraw his claim for further benefits constituted a continuing misrepresentation.

Our Supreme Court discussed the concept of a continuing offense in *Wright v. Superior Court* (1997) 15 Cal.4th 521, 525-526 (*Wright*): "Most crimes are instantaneous since they are committed as soon as every element is satisfied. Some crimes, however, are not terminated by a single act or circumstance but are committed as long as the proscribed conduct continues. Each day brings 'a renewal of the original crime or the repeated commission of new offenses.' [Citation.] . . . [¶] The concept of a continuing offense is well established. For present purposes, it may be formulated in the following terms: 'Ordinarily, a continuing offense is marked by a continuing duty in the defendant to do an act which he fails to do. The offense continues as long as the duty persists, and there is a failure to perform that duty.' [Citations.] Thus, when the law imposes an affirmative obligation to act, the violation is *complete* at the first instance the elements are met. It is nevertheless not *completed* as long as the obligation remains unfulfilled. . . . [¶] Determining if a particular violation of law constitutes a continuing offense is primarily a question of statutory interpretation. [Citations.] The answer, however, does not depend solely on the express language of the statute. Equally important is whether 'the nature of the crime involved is such that [the Legislature] must assuredly have intended that it be treated as a continuing one.' [Citations.] [Fn. omitted.]" The doctrine of continuing offenses is applied only in limited circumstances. (*Id*. at p. 528.) Those circumstances include failure to register as a sex offender, which is a violation of a continuing duty. (*Ibid.*) As explained in *Wright*, other examples of continuing offenses include drug possession, carrying a concealed weapon, cultivation of marijuana, unauthorized possession of food stamps, concealing stolen property, pimping, contempt of court for failure to pay child support, failure to provide for minor children, driving while intoxicated, maintaining a nuisance, and kidnapping. (*Id*. at p. 525, fn. 1.)

We see nothing in the language or context of section 1871.4 to suggest that violation of the statute is one of the limited category of continuing offenses. As applicable here, the statute makes it unlawful to make or cause to be made a knowingly false or fraudulent material statement or material representation for the purpose of obtaining compensation. (§ 1871.4, subd. (a)(1).) The statute does not impose on a defendant the responsibility to perform a specific act, such as register as a sex offender or pay child support; thus violation of section 1871.4 does not constitute a continuing omission. Nor is a misrepresentation the kind of activity that by its nature continues until steps are taken to end it, as is the case with carrying a concealed weapon, cultivation of marijuana, or kidnapping. (See *Wright*, *supra*, 15 Cal.4th at p. 525, fn. 1, and cases cited therein.) Nothing in section 1871.4 takes it outside the normal category of instantaneous crimes. (See *Wright*, at p. 525.) We conclude that passively awaiting a ruling after having made misrepresentations does not constitute a continuing violation of section 1871.4.[4] Thus, defendant's September 17, 2003, conviction was not a prior conviction for purposes of section 1871.4, subdivision (c), and the enhancement should be stricken.

B. Concurrent Sentences

Defendant contends that Penal Code section 654 required the trial court to stay the sentence for one of his insurance fraud convictions, rather than imposing concurrent sentences.

Penal Code section 654, subdivision (a) provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one

[4] In concluding that failure to register as a sex offender is a continuing offense, the court in *Wright* noted that such a construction avoided statute of limitations problems. (*Wright*, *supra*, 15 Cal.4th at p. 528, citing *In re Parks* (1986) 184 Cal.App.3d 476.) As noted in *Parks*, finding failure to register an instantaneous offense would allow sex offenders who move to "remain silent and sit out the applicable statute of limitation." (*In re Parks*, *supra*, 184 Cal.App.3d at p. 481.) No such concern exists here. The statute of limitations for a violation of section 1871.4 does not begin to run until *discovery* of the offense. (Pen. Code, § 803, subd. (c)(6); see also Pen. Code, § 801.5.)

provision." In *Neal v. State of California* (1960) 55 Cal.2d 11, 18, our Supreme Court interpreted section 654 to prohibit "[p]unishment for two offenses arising from the same act . . . ." The test to determine whether punishment for more than one offense violates section 654 is as follows: "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal*, at p. 19; see also *People v. Wiley* (1994) 25 Cal.App.4th 159, 163.) "[A] course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment." (*People v. Beamon* (1973) 8 Cal.3d 625, 639, fn. 11.) However, " '[t]he fact that one crime is technically complete before the other commenced does not permit multiple punishment where there is a course of conduct comprising an indivisible transaction.' [Citation] ' ". . . [T]here must be evidence to support a finding the defendant formed a separate intent and objective for each offense for which he was sentenced." ' " (*People v. Jimenez* (1992) 11 Cal.App.4th 1611, 1624, disapproved on other grounds in *People v. Kobrin* (1995) 11 Cal.4th 416, 419-420.) Whether a course of conduct is incident to a single objective or multiple objectives is primarily a question of fact that is determined from all the circumstances. The trial court's findings are reviewed for substantial evidence. (*People v. Braz* (1997) 57 Cal.App.4th 1, 10.)

The Supreme Court reaffirmed the rule of *Neal* in *People v. Latimer* (1993) 5 Cal.4th 1203, 1216. In doing so, it reviewed the circumstances in which courts have held the rule of *Neal* to be applicable. Those included cases in which the defendant had similar but consecutive objectives permitting multiple punishment, such as multiple sex crimes with the separate objective of achieving additional sexual gratification or multiple shots fired at the same victim with a separate intent to do violence. They also included cases evincing a separate, although sometimes simultaneous objectives. For instance, an assault on a robbery victim could have a separate objective from the robbery; a defendant could have dual objectives of rape and theft when entering a residence; and a defendant

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could have separate objectives when initially robbing a victim and later kidnapping the victim for a later, additional robbery. (*Latimer*, at pp. 1211-1212.)

The evidence does not support the conclusions that there was a dual objective here. Defendant was convicted in count 1 of misrepresenting his level of disability between June 19, 2001, and December 26, 2003. In count 2, he was convicted of denying that he had received income during the time he was accepting total temporary disability payments. The time period for count 2 was the same as for count 1. In each case, defendant's objective was the same—to obtain total disability payments during the same time period, as a result of the same claimed injury. In order to do so, he lied about his physical state and his income. He denied having received additional income at his deposition and workers' compensation trial—proceedings in which he also reiterated his misrepresentations about the extent of his injuries. We conclude this course of conduct falls within the rule of *Neal*. Thus, the trial court erred in imposing concurrent terms for counts 1 and 2. We will direct the court to stay the term imposed on count 2.

C. Acquittal on Count 8

The jury found defendant not guilty of count 8, in which defendant was charged with attempted perjury. The minute orders, abstract of judgment, and amended abstracted of judgment incorrectly reflect a verdict of guilty on count 8. Defendant contends, and the Attorney General agrees, that the minute orders and abstract of judgment should not reflect a conviction in count 8. We will direct the trial court to amend the abstract of judgment and minute orders to delete the references to a conviction on count 8.

III. DISPOSITION

The trial court is directed to stay the sentence on count 2; to strike the true finding on the enhancement allegation pursuant to section 1871.4, subdivision (c); to amend the minute orders to reflect a not guilty verdict on count 8; and to amend the abstract of

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judgment to reflect those changes. The court is further directed to forward the amended abstract of judgment to the Department of Corrections. As modified, the judgment is affirmed.

_____
RIVERA, J.

We concur:

_____
REARDON, Acting P. J.

_____
MUNTER, J.*

* Judge of the Superior Court of San Francisco County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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