

72234-4

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NO. 72234-4-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ANDRE ZAMORA SARMIENTO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Chad Allred, Judge

2016 JAN 20 PM 4:03
COURT OF APPEALS
STATE OF WASHINGTON
[Signature]

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied his right to a unanimous jury verdict.

Issue Pertaining to Assignment of Error

Where the state presented evidence of four acts the jury potentially could have relied upon to convict appellante of insurance fraud, and there was no election by the prosecutor or instruction to the jury it must be unanimous as to the act relied upon, was appellant denied his right to a unanimous jury verdict?

B. STATEMENT OF THE CASE¹

Appellant Andre Zamora Sarmiento is appealing his conviction for insurance fraud, following a jury trial. CP 70-78. The charge arose following a two-car accident in Tacoma on November 2, 2011, involving Zamora² and Michele Meoli. CP 3.

¹ This brief refers to the verbatim report of proceedings as follows: RP – trial on July 2, 7, 8 and 9, 2014; and 1RP – sentencing on July 25, 2014.

² Because appellant testified his full last name is Zamora, this brief refers to him as such. RP 218; see also RP 164.

It was undisputed Zamora was travelling westbound on Portland Avenue approaching the intersection at East 28th Street, when Meoli – who was travelling eastbound – turned left in front of Zamora onto East 28th Street, thereby causing the accident. CP 3; RP 89-90, 93. Meoli's insurer USAA Insurance agreed to pay Zamora \$700.00 for pain and suffering, \$2,543.01 for damage to his vehicle and for any medical bills arising from the accident. RP 97, 99, 168, 256.

At trial, the state presented evidence that Zamora submitted to USAA three medical bills for which he sought reimbursement and an itemized list of services and supplies, such as MRI testing and crutches, corresponding to the third bill. The first bill was from Valley Medical Center for \$2,139.15. RP 95, 194, 257. The second bill was from Valley Radiology for \$3,358.80. RP 97, 263. The third bill was from the Associated Emergency Physicians for \$9,360.00. RP 264. USAA paid the first two bills, but sought further information on the third. In support of the third bill, Zamora sent USAA a list purportedly from the emergency room (Ex 7) describing the services and supplies comprising the \$9,360.00. RP 181, 183-84, 265-67.

At trial, the state also presented evidence that, if believed, tended to show the bills Zamora submitted had been altered. Specifically, the state's evidence suggested the bill from Valley Medical Center was for \$1,228.30 (RP 68-69, 195), the bill from Valley Radiology was for \$33.50 (RP 73, 191) and the bill from the emergency room was for \$360.00. RP 185, 298. A records custodian for the Associated Emergency Physicians testified the tests and supplies listed in Ex 7, such as the MRI and crutches, are not tests or supplies an individual would receive at the emergency room. RP 183, 274-75.

Zamora testified he did not alter any of the medical bills he submitted for reimbursement. RP 230; see also RP 209. At the time, he was living with his mother at her house in Renton. RP 227. Unfortunately, so were some unsavory people. RP 229-30. Zamora testified his mother had a drug problem. RP 226, 230.

But Zamora was also a self-described "mama's boy." RP 231. In that respect, it was his mother who got the mail each day and went through it, including his mail, and told him if there was anything important. RP 229, 231. The bills Zamora sent to USAA had already been opened by the time he saw them (RP 233), and

he merely sent them in, as is. RP 189. Zamora's mother and father told him they had paid those bills. RP 172, 179-80, 260.

Sadly, Zamora's mother suffered an aneurysm on April 1, 2012, and was taken by ambulance to Harborview. RP 102, 236-37, 268. Although her condition temporarily improved, she suffered a second aneurysm, and the family made the decision to remove her from life support. RP 238. She passed away on April 18, 2012. RP 102, 235.

The state's evidence showed the second bill was submitted during the period of time Zamora's mother was in the hospital. The third bill was submitted after she passed. However, the first bill was submitted in December 2011, well before Zamora's mother fell ill.

In closing, the state argued Zamora inflated and falsified each of the three medical bills he submitted to USAA:

He submitted the bills. He cashed the checks. He pocketed the money. He tried to get an additional \$9,000.

Ladies and gentlemen, he had to know he wasn't entitled to that money.

RP 302; see also RP 297 (three bills), 299-301 (two checks cashed).

The prosecutor also argued Ex 7 constituted insurance fraud:

Now, with the supplemental statement that was sent by Mr. Zamora in request to an itemized billing statement – this is contained in Exhibit 7. You heard Ms. Patterson talk about this – this alone, this document alone, is sufficient to violate the statute.

RP 302.

But the prosecutor conceded Zamora's mother could have been involved in the fraud concerning the first bill:

The third bill, which we like to call the big bill, the \$9,360, he sent that on April 26th of 2012. This is more than a week after she died, and this is the one that's been padded by \$9,000. So you can't blame mom.

Now, maybe she had a hand in this at the start. Who's to say?

RP 301. Indeed, the detective who looked over the claim file for USAA testified it appeared to contain "faxed documentation from Mrs. Zamora." RP 89.

C. ARGUMENT

ZAMORA WAS DENIED HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT.

According to the state's theory, Zamora presented three fraudulent claims for reimbursement to USAA and one itemized list as proof in support of the third claim (Ex 7), any one of which constituted insurance fraud. The prosecutor did not elect any specific act for the jury to rely upon. RP 296-304, 319-324. Nor did

the court instruct the jury it must be unanimous as to the act relied upon. CP 42-60. As a result, not all jurors may have relied on the same act to convict. This is particularly true since there was evidence Zamora's mother could have been responsible for the first allegedly fraudulent claim. These circumstances denied Zamora of his right to a unanimous jury verdict.

An accused person has the constitutional right to a unanimous jury verdict. Const. art. 1, § 22; U.S. Const. amend. 6; State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), overruled in part on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988). When evidence is presented of multiple acts, any one of which could constitute the charged crime, the court must ensure the jury is unanimous as to which of the acts was committed. Petrich, 101 Wn.2d. at 572; State v. Furseth, 156 Wn. App. 516, 517-18, 233 P.3d 902 (2010). Jury unanimity may be preserved either by instructing the jury it must unanimously agree which act has been proved or by the prosecutor clearly electing one of the acts to rely on. Petrich, 101 Wn.2d at 572; 11 Washington Practice: Washington Pattern Jury Instructions Criminal, WPIC 4.25 (3d Ed. 2011).

A unanimity instruction is required whenever the case is a multiple acts case. Furseth, 156 Wn. App. at 520 (citing State v. Bobenhouse, 166 Wn.2d 881, 892, 214 P.3d 907 (2009)). A multiple acts prosecution occurs when several acts are alleged and any one of them could constitute the crime charged. Furseth, 156 Wn. App. at 520 (quoting Kitchen, 110 Wn.2d at 411).

Under RCW 48.30.230 :

(1) It is unlawful for any person, knowing it to be such, to:

- (a) Present, or cause to be presented, a false or fraudulent claim, or any proof in support of such a claim, for the payment of a loss under a contract of insurance; or
- (b) Prepare, make, or subscribe any false or fraudulent account, certificate, affidavit, or proof of loss, or other document or writing, with intent that it be presented or used in support of such a claim.

Emphasis added.

The Legislature's use of the word "it" and "a" false or fraudulent claim, followed by proof of "a" claim indicates the Legislature intended to criminalize each claim presented. See e.g. State v. Ose, 156 Wn.2d 140, 146, 124 P.3d 635 (2005) (by using the indefinite article "a" in the clause "a stolen access device," the Legislature unambiguously defines the unit of prosecution in RCW

9A.56.160(1) as one count per access device). Indeed, the prosecutor argued the jury could find Zamora guilty based on Ex 7 alone. RP 302.

Not only did the state present Ex 7 as an act for the jury to rely on to convict, but it presented the three bills Zamora submitted on separate dates as separate acts upon which the jury could also rely. Thus, the prosecutor presented four separate acts upon which the jury could have relied to convict. The prosecutor made no election in closing argument and no unanimity instruction was given. This was error and failed to ensure a unanimous jury verdict.

The error in failing to require unanimity in a multiple acts case stems from the possibility that some jurors may have relied on one act or incident and some jurors may have relied on a different act, resulting in a lack of unanimity on all of the elements necessary for a valid conviction. Bobenhouse, 166 Wn.2d at 893. The failure to ensure jury unanimity is constitutional error, and reversal is required unless the state proves beyond a reasonable doubt that the error was not prejudicial. State v. Vander Houwen, 163 Wn.2d 25, 39, 177 P.3d 93 (2008).

The error is prejudicial unless the evidence offers no basis for the jury to rationally discriminate between the multiple acts. Bobenhouse, 166 Wn. 2d at 894-95 (discussing State v. Camarillo, 115 Wn.2d 60, 63, 794 P.2d 850 (1990)). Here, there was a basis for the jury to discriminate between the first bill and the second and third bills and itemized list. Zamora testified his mother was responsible for the mail, opened it and informed him of anything important. He testified that by the time he saw the bills, they were already opened, and he merely sent them in, as is. At the time the first bill was sent to USAA in December 2011, Zamora's mother did not suffer from ill health and was still at home, presumably taking care of the mail. Indeed, the detective testified it appeared one of the faxes to USAA was from Mrs. Zamora. And the prosecutor conceded in closing argument that Zamora's mother could have been involved in the fraud in the beginning. Under these circumstances, some jurors may have had a reason to doubt Zamora knew the first bill he sent had been falsified.

The State cannot meet its burden to prove that error in failing to ensure a unanimous jury verdict was harmless beyond a reasonable doubt. This Court should therefore reverse Zamora's conviction.

D. CONCLUSION

Zamora's right to a unanimous jury was violated. This Court should reverse his conviction.

Dated this 20th day of January, 2014

Respectfully submitted

NIELSEN, BROMAN & KOCH

A handwritten signature in cursive script, reading "Dana M. Nelson", written in black ink. The signature is positioned above a horizontal line.

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DIVISION ONE

STATE OF WASHINGTON)	
)	
Respondent,)	
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vs.)	COA NO. 72234-4-1
)	
ANDRE ZAMORA-SARMIENTO,)	
)	
Appellant.)	

CORRECTED DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20TH DAY OF JANUARY 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR EMAIL.

[X] ANDRE ZAMORA-SARMIENTO
8434 EAST E. STREET
TACOMA, WA 98445

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF JANUARY 2015.

X *Patrick Mayovsky*