72234-4

FILED
Mar 23, 2015
Court of Appeals
Division I
State of Washington

NO. 72234-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ANDRE ZAMORA-SARMIENTO,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHAD A. ALLRED

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ANDREW R. HAMILTON
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

TABLE OF CONTENTS

Page

A. ISSUES PRESENTED 1

B. STATEMENT OF THE CASE 1

1. PROCEDURAL FACTS 1

2. SUBSTANTIVE FACTS 1

C. ARGUMENT 5

1. THE STATE WAS NOT REQUIRED TO REQUEST A UNANIMITY INSTRUCTION BECAUSE ZAMORA'S ACTIONS CONSTITUTED A CONTINUOUS COURSE OF CONDUCT 5

2. ANY ERROR IN NOT SUBMITTING A UNANIMITY INSTRUCTION TO THE JURY WAS HARMLESS 9

D. CONCLUSION 13

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Barrington, 52 Wn. App. 478,
761 P.2d 632 (1998) 7

State v. Fiallo-Lopez, 78 Wn. App. 717,
899 P.2d 1294 (1995) 6

State v. Handran, 113 Wn.2d 11,
775P.2d 453 (1989) 6

State v. Kitchen, 110 Wn.2d 403,
756 P.2d 105 (1988) 9

State v. Knutz, 161 Wn. App. 395,
253 P.3d 437 (2011) 7, 8

State v. Loehner, 42 Wn. App. 408,
711 P.2d 377 (1985) 9

State v. Monaghan, 116 Wn. App. 521,
270 P.3d 616 (2012) 6

State v. Petrich, 101 Wn.2d 566,
683 P.2d 173 (1984) 6

Statutes

Washington State:

RCW 48.30.230 1

A. ISSUES PRESENTED

1. Was the defendant deprived of his constitutional right to a unanimous jury verdict?

2. Was the evidence sufficient to establish that a rational trier of fact would have found each incident proven beyond a reasonable doubt?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged Andre Zamora-Sarmiento by way of amended information with one count of filing a fraudulent insurance claim in violation of RCW 48.30.230(1), and (2). CP 1. The amended information described a course of conduct occurring from December 14, 2011, to May 24, 2012, by the defendant to defraud USAA Insurance Company. CP 1. The jury found Zamora guilty as charged. RP 343.

2. SUBSTANTIVE FACTS.

On November 3, 2011, Zamora was involved in a traffic accident in Tacoma, Washington. RP 89. There is no question that the driver at fault in this accident was the other driver. RP 89. The accident caused damage to the front right headlight and scratches and scrapes on the front bumper area of Zamora's vehicle.

RP 101. The accident was determined to be very minor in nature, and was the type of accident that is called a "fender-bender." RP 101. Zamora filed an insurance claim against the insurance company of the other driver, USAA Insurance. RP 97. After negotiations, Zamora and USAA reached an agreement in which Zamora would be paid $700 for pain and suffering, $2,543.01 for damage to his car, and coverage for any medical bills arising from the accident. RP 97.

Zamora was asked by USAA personnel on numerous occasions to sign a medical authorization form which would enable USAA to obtain his medical bills directly from his medical providers, but Zamora refused to sign such a document. RP 207-10. Zamora stated he was protective of his medical records and did not "want people going into my privacy." RP 233-34. During an interview with a USAA investigator, Zamora was asked four separate times to sign the authorization form. He refused each request. RP 207-10. He even refused to handle a blank authorization form from the USAA investigator, stating, "I don't like things touching my hands." RP 206.

Zamora sent a total of three bills to USAA at their headquarters in San Antonio, Texas; the first document was a

purported bill from Valley Medical Center in the amount of $2,139.50. RP 257. The bill had a handwritten message on it that said: "This is a copy of emergency room bill that I am requesting reimbursement for as the bill was paid by my father. Please make check out to A. Zamora at 8424 East E Street in Tacoma, Washington 98445." RP 95. On this document, the account number appeared to have been "whited" out. RP 118. Zamora stated to a USAA investigator that his father actually faxed the bill to USAA, but Zamora saw the bill before it was faxed. RP 181. USAA paid this amount, $2,139.50, in a check mailed to Zamora. The actual bill from Valley Medical Center, however, was only $1,228.30. The bill sent to USAA had been altered by more than $900. RP 69. Ex 5. In addition, this actual bill has never been paid to Valley Medical Center. RP 69. USAA sent Zamora a check in the requested amount of $2,139.50. RP 257. Zamora endorsed this check, cashed it at a Moneytree facility, and retained the money. RP 262.

Zamora sent a second bill to USAA purportedly from Valley Radiation. According to this bill, the amount Zamora was requesting was $3,358.80. RP 263. Ex 6. On the face of the bill was a handwritten statement: "This is a copy of the medical bill that

I am requesting reimbursement for that my father paid, so please send check to 2008 Southeast 22nd in Renton, Washington." RP 96. Ex 6. The actual bill from Valley Radiation, however, was only $33.50. The bill sent to USAA had been altered to reflect an increase of more than $3,000. RP 73. Ex 6. Valley Radiation has never been paid. RP 73. Zamora admitted to the USAA investigator that he was the person who received and sent the bill to USAA. RP 179. USAA sent a check to Zamora in the amount of $3,358.80. Zamora endorsed this check, cashed it at a Moneytree facility, and retained the money. RP 262.

Zamora sent a third bill to USAA, purportedly from Associated Emergency Physicians, in the amount of $9,360.00. The actual bill from Associated Emergency Physicians was only $360.00. The bill sent to USAA Insurance had been altered to reflect an increase of $9,000. RP 78. Ex 7. On the face of this bill was the following statement: "This is a copy of the itemized billing statement that you requested for the medical bill that I sent you 4/25/12." RP 182. This document had a number of handwritten services and supplies on it, including ace bandages, crutches, x-rays, diagnostic MRIs, Spinal CT scan and chiropractor specialist. RP 183. Associated Emergency Physicians has never been paid.

RP 79. USAA did not reimburse Zamora for this amount, but instead began an investigation of Zamora's actions surrounding this bill.

When asked by the USAA investigator if he actually received these services and supplies from Associated Emergency Physicians, Zamora insisted he had. RP 183. He also testified at trial under oath that he had received these supplies and services. RP 268. According to the custodian of records for Associated Emergency Physicians, however, none of these services were ever performed and none of these supplies were ever provided to patients by Associated Emergency Physicians. RP 275. The defendant admitted to the USAA investigator that the handwriting that listed these services and supplies had been written by him, that he had signed this purported bill, and that he faxed this itemized statement to USAA. RP 182-83.

C. ARGUMENT

1. THE STATE WAS NOT REQUIRED TO REQUEST A UNANIMITY INSTRUCTION BECAUSE ZAMORA'S ACTIONS CONSTITUTED A CONTINUOUS COURSE OF CONDUCT.

When the prosecution presents evidence of several acts that could form the basis of one charged count, either the State must tell

the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act. State v. Petrich, 101 Wn.2d 566, 570, 683 P.2d 173 (1984). The exception to this rule is when the defendant is engaged in a continuous course of conduct. In such a case, the absence of a unanimity instruction does not constitute an error. State v. Handran, 113 Wn.2d 11, 17, 775P.2d 453 (1989). A continuing course of conduct requires an ongoing enterprise with a single objective. State v. Monaghan, 116 Wn. App. 521, 537, 270 P.3d 616 (2012). Common sense must be utilized to determine whether multiple acts constitute a continuing course of conduct. Handran, 113 Wn.2d at 17. Evidence that a defendant engaged in a series of actions intended to secure the same objective supports the characterization of those actions as a continuing course of conduct rather than several distinct acts. State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995). In addition, when all the acts occurred at the same place, within a short period of time, involved the same victim and promoted the same objective, they are part of a continuing course of conduct. Handran, 113 Wn.2d at 17.

Single economic schemes are viewed as a continuing course of conduct. Two cases illustrate this point. In

State v. Barrington, 52 Wn. App. 478, 761 P.2d 632 (1998), the evidence presented at trial showed the promotion of a prostitution enterprise that extended over a three-month period in which Barrington received the profits from a young prostitute. Testimony at trial set forth multiple acts of prostitution and multiple instances where the prostitute gave the proceeds of her prostitution to Barrington. One of the issues on appeal was Barrington's claim that his right to a unanimous verdict was violated because the jury had not been required to be unanimous as to specific acts of prostitution or payments of money. The Court of Appeals disagreed and held that Barrington had used the prostitute in order to promote an enterprise with the single objective of making money. Barrington, 52 Wn. App. at 482. Because Barrington's actions constituted a continuous course of conduct, a unanimity instruction was not required. Barrington, 52 Wn. App. at 481.

In State v. Knutz, 161 Wn. App. 395, 253 P.3d 437 (2011), Knutz was convicted of theft in the first degree for committing fraud on a senior citizen. The evidence at trial showed numerous acts in which Knutz persuaded the victim to give her cash payments. These payments totaled $347,000, and occurred over a 29-month period of time. Knutz, 161 Wn. App. at 399. Knutz contended on

appeal that her right to a unanimous jury verdict was violated because the trial court did not give a unanimity instruction concerning the specific acts of fraud.

The Court of Appeals disagreed, finding that Knutz had been involved in an economic scheme that constituted a continuous course of conduct. Knutz, 161 Wn. App. at 409. In deciding whether Knutz's conduct was a continuous course of conduct, the court determined the defendant's activities shared a common purpose of promoting a criminal enterprise. Knutz, 161 Wn. App. at 408. The court concluded that Knutz had used her victim to promote a single objective – "to obtain money through deceit." Knutz, 161 Wn. App. at 409.

Similarly, in the instant case, Zamora was involved in a single economic scheme that was a continuous course of conduct to promote a single objective: to obtain money from USAA through fraud and deceit. The acts of his scheme occurred over a five-month period, from December 14, 2011 through May 24, 2012, a short period of time when compared to the 29-month period of criminal activity condemned in Knutz. Each of Zamora's false claims involved the same victim, USAA Insurance, and each stemmed from the same incident, the November 3, 2011 car

accident. Zamora's actions were also the same in each incident, sending altered bills to USAA from his medical providers that greatly inflated the actual charges. Zamora was involved in a continuous course of conduct and the trial court did not commit error by not giving a unanimity instruction to the jury.

2. ANY ERROR IN NOT SUBMITTING A UNANIMITY INSTRUCTION TO THE JURY WAS HARMLESS.

In a "multiple acts" case where several acts are alleged and any one of them could constitute the crime charged, the error in not submitting a unanimity instruction is harmless if no rational trier of fact could have entertained a reasonable doubt that each incident of the crime was established beyond a reasonable doubt. State v. Loehner, 42 Wn. App. 408, 411-12, 711 P.2d 377 (1985). This harmless error rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988).

The evidence at Zamora's trial was overwhelming on the issue of fraud on his part for each of the three instances where Zamora sent bills to USAA. Thus, no rational juror could have had a reasonable doubt as to any of the three acts. The first bill was a

request for reimbursement for payment he claimed had already been made to Valley Medical Center in the amount of $2,139.50. Zamora stated to the USAA investigator that his father faxed the bill because he did not know how to use a fax machine. RP 181. Zamora also stated to the investigator that he saw the bill before it was faxed to USAA. RP 181. In addition, Zamora stated he went to Valley Medical to obtain an actual copy of this bill. RP 200. The actual bill was for the amount of $1,228.30. RP 258. Despite seeing the true amount on the bill, Zamora never tried to correct his claim with USAA.

Similarly, Zamora sent a second bill to USAA for reimbursement in the amount of $3,358.80 which he claimed had already been paid to Valley Radiology. Zamora identified this bill to the USAA investigator and stated he was the one who sent it to USAA. RP 179. As previously pointed out, the actual bill from Valley Radiology was only in the amount of $33.50. RP 73. Finally, Zamora sent a third bill to USAA for reimbursement in the amount of $9,360 that he claimed had already been paid to Associated Emergency Physicians. RP 78. The actual bill was only in the amount of $360. RP 78. Zamora acknowledged it was his handwriting on the bill and that he had faxed it to USAA.

RP 182-83. Zamora claimed to the USAA investigator that "all I do is I get the bills and I just send them [USAA] anything that has the 3rd [November 3, 2011] on it." RP 187, 194. Zamora continued to claim that he had not altered the amounts on these bills. RP 209.

Zamora's testimony at trial was marked with a number of falsities. For example, to USAA and the jury, he claimed that the amounts on the bills he sent to USAA had been previously paid by his parents. In actuality, he was annoyed because a couple of the bills had gone to collections. RP 207. If these bills were in collections, Zamora had to know that his parents had never paid them. In addition, he heard the testimony of the two custodians of record who testified that the bills from Valley Medical Center and Valley Radiologists had never been paid. Zamora was obviously not truthful when he continued to testify that his parents had paid these bills. RP 260.

Zamora claimed to the investigator that he went to Overlake Hospital on the evening of November 3, 2011, to get "a second opinion." RP 169-70. The investigating detective served a search warrant upon Overlake Hospital for records of that visit, and no such records existed. RP 278. Similarly, Zamora claimed that at the time of the accident, he was insured by AAA Insurance.

RP 175. The investigating detective served a search warrant upon AAA Insurance for records of insurance coverage, and no such records existed. RP 277.

The evidence at trial clearly established that on numerous occasions, Zamora refused to sign a medical authorization form which would have enabled USAA to directly receive the actual bills for medical treatment from his medical providers. Instead, Zamora submitted altered bills to USAA. On the two occasions when he was paid for these bills by USAA, he cashed the checks himself and pocketed the cash. On the third claimed bill from Associated Emergency Physicians, he admitted filling out the itemized statement of services and supplies received, and continued to claim that he had received these services and supplies. The actual bill from Associated Emergency Physicians was for only $360.00, and Associated Emergency Physicians never performed the services or administered the supplies claimed by Zamora.

The State did not charge, and was not required to prove, that it was Zamora who physically altered each bill. The State was only required to prove that Zamora knowingly presented or caused to be presented the false claims to USAA. The evidence at trial was sufficient to convince any rational trier of fact beyond a reasonable

doubt that on all three occasions, Zamora knowingly did this. The failure to give a unanimity instruction at trial was harmless error.

D. CONCLUSION

Zamora's right to a unanimous jury was not violated because he had been involved in a continuous course of action, one in which a unanimity instruction was not required. Any error in not giving such an instruction was harmless because no rational trier of fact could have entertained a reasonable doubt that each incident of the crime was established beyond a reasonable doubt. For these reasons, Zamora's motion for a reversal of his conviction should be denied.

DATED this 19th day of March, 2015.

Respectfully submitted,

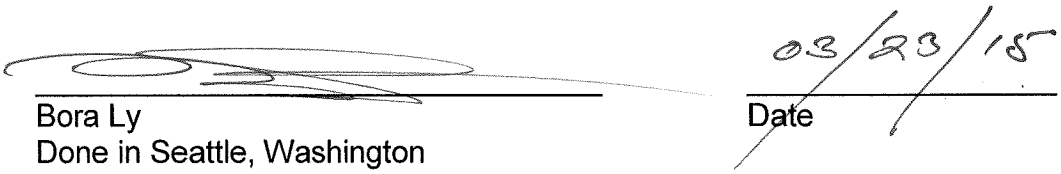
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: Andrew R. Hamilton
ANDREW R. HAMILTON, WSBA #8312
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Dana M. Nelson, containing a copy of the Brief of Respondent, in STATE v ANDRE ZAMORA-SARMIENTO, Cause No. 72234-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Bora Ly
Done in Seattle, Washington

03/23/15
Date