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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. CRYSTAL CALDWELL, Defendant and Appellant.	B222055 (Los Angeles County Super. Ct. No. BA354793)

APPEAL from a judgment of the Superior Court for Los Angeles County, Barbara R. Johnson, Judge. Affirmed.

James Koester, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and Linda C. Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Crystal Caldwell was found guilty of two felonies -- workers' compensation insurance fraud (Ins. Code, § 1871.4, subd. (a)(1)), and attempted perjury (Pen. Code, § 664/118, subd. (a)) -- following a jury trial. Imposition of sentence was suspended, and she was placed on formal probation for three years. She appeals, contending that substantial evidence does not support the materiality element of the insurance fraud count or the false statement element of the attempted perjury count, and that the trial court erred by failing to instruct on the lesser included offense of attempted workers' compensation insurance fraud. We affirm the judgment.

BACKGROUND

In June 2008, Caldwell was employed by Los Angeles Community College District as a secretary at Los Angeles Mission College. On or around June 6, she suffered an injury to her back and her right hand while she was assisting in the relocation of her department to another building. She saw her doctor that afternoon (which was a Friday) to get an anti-inflammatory, but did not report the injury to her employer because she did not think it was serious. By Monday, the pain was worse, so she reported the injury to her employer. She was sent to Holy Cross emergency room for treatment, and was given Vicodin for her back pain. She was referred to U.S. Healthworks (a workers' compensation clinic) the following day, where she was prescribed various medications and physical therapy, and was told to stay off of work for two days.

Two days later, on June 12, 2008, a doctor at U.S. Healthworks placed certain work restrictions on Caldwell; he ordered no stooping or bending, and limited lifting, pulling, and pushing (up to 10 pounds). Two weeks later, the work restrictions were eased, to allow limited stooping or bending. A week after that, all restrictions on stooping or bending were removed.

Caldwell's workers' compensation claim was assigned to Christina Zwick, a claims examiner for Southern California Risk Management, the third-party claims administrator for Los Angeles Community College. Although Caldwell's claim was accepted when it was reported, Zwick had some concerns about it. According to Zwick, there were several "red flags" that caused her to question the validity of the claim: (1) Caldwell's delay in reporting the injury (the injury occurred on Friday, but was not reported until Monday); (2) Caldwell retained an attorney within days after the initial report,[1] even though the claim had been accepted and she was receiving medical treatment, and she filed a second claim form after she retained the attorney; and (3) Caldwell changed doctors to "an applicant oriented doctor" who added to her claim an injury to her right hand and imposed work restrictions that were not indicated in the original medical reports.[2] In light of her concerns, Zwick hired an investigator to conduct two days of surveillance of Caldwell, to determine whether she had any limitations in her movement.

Mark Shoup conducted the surveillance and made a video recording of Caldwell on two Saturdays, July 19 and 26, 2008. The recording shows Caldwell bending over several times, without hesitation, to pick items up off the ground, to tie her shoe, and to retrieve something from the back seat of her car.[3] The video recording was provided to Zwick, who reviewed it and observed that there did not

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[1] Zwick first learned that Caldwell had retained an attorney on June 24, 2008, 18 days after the injury.

[2] Actually, the work restrictions were imposed within days after the injury, by the doctor at U.S. Healthworks, the clinic Caldwell was sent to by her employer.

[3] In some parts of the recording, Caldwell is partially obscured by cars or other objects, so her legs are not fully visible. But throughout the recording, it appears she does not hesitate to bend down, and in those parts of the recording in which at least one of her legs is visible, her knees are slightly bent.

appear to be any limitations in Caldwell's movement. Zwick gave the recording to her company's defense counsel, and asked him to schedule a deposition to question Caldwell about the kinds of movements she made on the recording.

The deposition took place on August 15, 2008. During the deposition, Caldwell was asked whether she could bend at the waist. She answered, "I can bend a little bit at the waist. But I can't put the paper in the paper tray in the photocopier in the bottom." She was then asked, "If a paper drops on the floor, if there is paper on a floor, from a standing position, can you bend to pick it up?" She responded, "No. That is one of the biggest problems that I have is dropping things. Because it's very difficult to recover them. I have to brace myself. I have to go sideways. I have to go down very slowly. I have to go down on my knees." Following up, the attorney asked, "So since June 6 of '08, you haven't or you cannot from a standing position just go straight down to pick up something from the floor?" She answered, "I don't think so. I didn't try it. I can't do it now, I know that." The attorney then asked, "Have you tried to reach anything from the floor from a standing position?" Caldwell responded, "No. Because I cannot. . . . I can't just bend over and pick up something that drops. Dropping is a big problem."[4]

The attorney also questioned Caldwell about bending to reach into the back seat of her car or to lace her shoes. Caldwell said that she did not know if she could reach down to retrieve an item from the back seat of her car from a standing position, and said that she had not tried it. She also testified that she could not "bend down from a standing position to lace [her] shoe," and had not done so since

[4] Shortly after she gave this answer, the attorney again asked if she has "tried to reach down from a standing position," and she said that she had tried but was unable to do it. The attorney asked whether she had tried but had "to stop in the midstream while trying to reach down," to which Caldwell responded, "Yes."

June of 2008. The attorney ended his questioning by again asking, "Have you bent at the waist since June of '06 to pick something down from the ground?" Caldwell answered, "If I have to pick up something from the ground, I have to bend at the knees." When asked, "Bend at the knees?" Caldwell responded, "I can bend over some, but not all the way to the ground."

After Caldwell's deposition, the claims administrator had a file prepared on the matter and forwarded it to the District Attorney. Caldwell was charged by information with two counts of workers' compensation fraud -- one count based upon statements she reportedly made to one of her doctors (count 1), and the other based upon her deposition testimony (count 2) -- and one count of attempted perjury based upon her deposition testimony "that she could not bend at the waist to pick something up from the floor (Deposition pages 82-85, page 115, page 122)."

At trial, the jury heard testimony by Zwick, the investigator, and Caldwell's supervisor, watched the video recording of the investigator's surveillance, and were read portions of Caldwell's deposition testimony. The jury found Caldwell not guilty of count 1, and guilty of counts 2 and 3. Caldwell moved to reduce the insurance fraud count to a misdemeanor. The trial court denied the motion, but agreed to take the matter up again in a year if she complies with the court's order after a restitution hearing.[5] The court suspended imposition of sentence and ordered Caldwell placed on three years of formal probation, with terms and conditions. Caldwell timely filed a notice of appeal from the judgment.

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[5] Zwick testified that approximately $32,000 was spent on Caldwell's claim; about half on medical costs, and the remainder on the investigation. At the sentencing and probation hearing, Caldwell asked for a restitution hearing to determine exactly what was spent on medical treatment, in light of the People's concession that Caldwell did suffer an injury. The trial court granted that request, and set a hearing. The record does not include any information related to that restitution hearing.

DISCUSSION

Caldwell raises three issues on appeal. First, she contends there was insufficient evidence to support the guilty verdict on the workers' compensation insurance fraud count because there was no evidence that Caldwell's deposition testimony influenced the workers' compensation evaluator's determination of her claim, and therefore there was no showing that the false representations she made in her deposition were material. Second, she argues that the trial court erred by failing to instruct the jury on the lesser included offense of attempted workers' compensation insurance fraud because the jury reasonably could have concluded that, although Caldwell intended to defraud by overstating her disabilities, her misrepresentations were not material because Zwick had already viewed the video recording before Caldwell was deposed and therefore did not rely upon the deposition testimony when evaluating her claim. Finally, she contends there was insufficient evidence to support her conviction for attempted perjury because she never testified specifically that she could not bend from the waist to pick something up from the floor, and it is objectively unreasonable to conclude, based upon her actual testimony, that she literally meant to say that she could not pick something up from the floor. We are not persuaded.

A. *Sufficiency of the Evidence of Workers' Compensation Insurance Fraud*

Insurance Code section 1871.4 provides, in relevant part, that it is unlawful to "[m]ake or cause to be made a knowingly false or fraudulent material statement or material representation for the purpose of obtaining or denying any compensation, as defined in Section 3207 of the Labor Code." (Ins. Code, § 1871.4, subd. (a)(1).) Caldwell argues that, to establish that a representation was material, the prosecution must show that the representation could probably have

influenced the determination of her entitlement to workers' compensation benefits. Since Zwick did not testify that workers' compensation evaluators customarily rely upon a claimant's deposition testimony in making that determination, and instead testified that the purpose of Caldwell's deposition was to impeach or discredit her, Caldwell contends the prosecution failed to establish that her deposition testimony was material. We disagree.

The court in *People v. Gillard* (1997) 57 Cal.App.4th 136 (*Gillard*) examined the materiality element of a workers' compensation insurance fraud offense. In that case, the appellate court approved a jury instruction that stated, "'A statement or representation is material if it concerns a subject reasonably relevant to the . . . investigation [of the insured], and if a reasonable insurer would attach importance to the fact represented.'" (*Id.* at p. 151.) The court noted that the instruction was based upon *Cummings v. Farmers Ins. Exchange* (1988) 202 Cal.App.3d 1407 (*Cummings*) (involving a casualty policy), which relied upon the analysis in *Claflin v. Commonwealth Ins. Co. of Boston, Mass.* (1884) 110 U.S. 81. As the *Gillard* court explained, the court in *Cummings* "concluded the materiality of a statement is not determined by the actual effect the statement had on the outcome of the investigation: 'Rather, a question and [an] answer are material when they relate to the insured's duty to give to the insurer all the information he has as well as other sources of information so that the insurer can make a determination of its obligations. Thus, materiality is determined by its prospective reasonable relevance to the insurer's inquiry. . . . [*I*]*f the misrepresentation concerns a subject reasonably relevant to the insure*[*r*]*'s investigation, and if a reasonable insurer would attach importance to the fact misrepresented, then it is material*.'" (*Gillard*, *supra*, 57 Cal.App.4th at p. 151, quoting *Cummings*, *supra*, 202 Cal.App.3d at pp. 1416-1417.)

Applying this analysis to the present case, it is clear that the prosecution was not required to show that the representation could probably have influenced the determination of Caldwell's entitlement to workers' compensation benefits, as she contends. The representation "is material if it *can* influence the determination, even though it does not." (*Gillard*, *supra*, 57 Cal.App.4th at p. 158, italics added.) The key, as the court in *Cummings* noted, is the fact that is misrepresented: if it is a fact that a reasonable insurer would deem important when determining entitlement to benefits, then it is material. (*Cummings*, *supra*, 202 Cal.App.3d at p. 1417.) Here, the representations at issue were that, since her injury, Caldwell could not bend over to pick something up from the ground, or to lace her shoe, and that she did not know if she could bend down to reach something in the back seat of her car and had not tried to do so since her injury. There can be no question that facts relating to the effect an injury has on a claimant's ability to move freely are facts a reasonable insurer would deem important when determining the extent of a claimant's injury and her entitlement to benefits. Indeed, Zwick testified that a claimant's statements about the severity of her injury are used to make determinations about paying benefits. Although Zwick was referring to statements a claimant makes to her doctor (which are reflected in medical reports provided to the workers' compensation evaluator), rather than statements made in a deposition, that testimony nevertheless is relevant here. The issue relevant to materiality is whether the facts expressed in those statements are ones that a reasonable insurer would deem important when determining entitlement to benefits. Zwick's testimony confirms that they are, and thus constitutes substantial evidence that Caldwell's statements were material.

B. *Lesser Included Offense Instruction*

Based upon her assertion that the prosecution failed to establish that her misrepresentations were material, Caldwell argues that the trial erred by failing to instruct on the lesser included offense of attempted workers' compensation fraud.[6] She argues that, because there was evidence that Zwick did not rely upon Caldwell's deposition testimony to determine her entitlement to benefits, but instead relied upon medical reports, "there was substantial evidence upon which the jury may have reasonably found [Caldwell] guilty of the lesser [i.e., attempted workers' compensation fraud] rather than the greater offense." She is mistaken.

The Supreme Court has instructed that "a trial court must, sua sponte, or on its own initiative, instruct the jury on lesser included offenses 'when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged.' [Citation.]" (*People v. Barton* (1995) 12 Cal.4th 186, 194-195.) As we discussed in section A, *ante*, for the purposes of workers' compensation fraud, a representation "is material if it *can* influence the determination, even though it does not." (*Gillard*, *supra*, 57 Cal.App.4th at p. 158, italics added.) Thus, the fact that Zwick did not rely upon Caldwell's deposition testimony in determining benefits is irrelevant to the issue of materiality. There simply was no evidence that Caldwell was guilty of an offense less than that charged.

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[6] Caldwell notes that she is not aware of any published case that has determined there is an offense of attempted workers' compensation fraud. She asserts, however, that there are cases in which courts "have recognized lesser-included attempt offenses under other theories of theft by fraud," and that the broad language of Penal Code section 664 suggests that "a defendant may be charged and convicted of an attempt to commit almost any crime." We need not resolve this issue.

C. *Sufficiency of the Evidence of Attempted Perjury*

To support a perjury conviction, there must be evidence of "a 'willful statement, under oath, of any material matter which the witness knows to be false. [Citation.]' [Citation.]" (*Cabe v. Superior Court* (1998) 63 Cal.App.4th 732, 735.) When the statement at issue is made at a deposition but the witness does not sign the deposition transcript (as in this case), the witness cannot be convicted of perjury, but may be convicted of attempted perjury. (*People v. Post* (2001) 94 Cal.App.4th 467, 480-483.) In the present case, Caldwell challenges her attempted perjury conviction, arguing there was insufficient evidence to support the jury's finding that she falsely testified "that she could not bend at the waist to pick something up from the floor."

Relying upon *Bronston v. United States* (1973) 409 U.S. 352 (*Bronston*), Caldwell argues that determining whether a statement is perjurious requires an examination of the context in which the statement was made, i.e., the precision of the questions asked and the totality of the answers given. She contends she never specifically testified that she "could not bend at the waist to pick something up from the floor," and to the extent it could be inferred from her statements that she said she could not bend over to pick something up from the floor, those statements were qualified and therefore not literally false.

Bronston does not assist Caldwell. The Supreme Court in that case determined "whether a witness may be convicted of perjury for an answer, under oath, that is literally true but not responsive to the question asked and arguably misleading by negative implication." (*Bronston*, *supra*, 409 U.S. at pp. 352-353.) The witness was asked whether he had any bank accounts in Swiss banks, and truthfully answered that he did not. The attorney then asked, "Have you ever?" The witness gave a non-responsive answer: "The company had an account there for about six months, in Zurich." The witness was then asked if he had any

nominees who have bank accounts in Swiss banks, and if he had ever had such nominees, and he truthfully answered both questions, saying that he did not. The witness was charged with perjury based on undisputed evidence that, for a five-year period that ended before he gave that testimony, he had a personal bank account in a Swiss bank. (*Id.* at p. 354.)

Bronston was prosecuted for perjury "on the theory that in order to mislead his questioner, petitioner answered the second question with literal truthfulness but unresponsively addressed his answer to the company's assets and not to his own -- thereby implying that he had no personal Swiss bank account at the relevant time." (*Bronston, supra*, 409 U.S. at p. 355.) The Supreme Court reversed his conviction. The court observed: "Beyond question, petitioner's answer to the crucial question was not responsive if we assume, as we do, that the first question was directed at personal bank accounts. There is, indeed, an implication in the answer to the second question that there was never a personal bank account; in casual conversation this interpretation might reasonably be drawn. But we are not dealing with casual conversation and the statute does not make it a criminal act for a witness to willfully state any material matter that *implies* any material matter that he does not believe to be true. . . . [¶] [T]estimonial interrogation, and cross-examination in particular, is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination. . . . [¶] [T]he perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the questioner -- so long as the witness speaks the literal truth. The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry." (*Id.* at pp. 357-360.)

In the present case, we are not presented with testimony "that is literally true but not responsive to the question asked and arguably misleading by negative implication." (*Bronston*, *supra*, 409 U.S. at p. 353.) Rather, Caldwell was asked several times if she could bend from a standing position to pick something up, or if she had tried to do so since her injury. The first time, she answered that she could not unless she braced herself, went sideways, very slowly, or went down on her knees. The second time, she said she had not tried because she could not "just bend over and pick up something that drops." She later testified that she had tried to reach down from a standing position but was not able to do it and had to stop midstream. Still later, she testified that she can bend over some, but not all the way to the ground, and has to bend her knees to pick something up. The video recording played for the jury, however, showed several instances in which Caldwell bent over to pick something up from the ground. Although her legs were not visible in each instance, when they were visible, it appeared that they were only slightly bent. In no instance did she appear to brace herself, go slowly, or go sideways. Based upon this evidence, the jury reasonably could conclude that Caldwell gave testimony about her inability to bend to pick something up from the ground that she knew to be false.

DISPOSITION

The judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.