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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RYAN PATRICK NATIVIDAD,

Defendant and Appellant.

G055248

(Super. Ct. No. 15CF1637)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Margaret R. Anderson, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Ferrentino & Associates, Correen Ferrentino for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Eric A. Swenson and Christine Y. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

Ryan Patrick Natividad, a police officer, appeals from a judgment after a jury convicted him of insurance fraud and making a fraudulent statement after he claimed to have injured his right hand while escorting an arrestee. Natividad argues the following: insufficient evidence supports his convictions; the trial court erred in instructing the jury; the court erred by admitting other acts evidence; and the court erred by denying his motion for new trial based on ineffective assistance of counsel.

As we explain below, we agree the court erred by admitting other acts evidence, but he was not prejudiced by this error. Natividad's ineffective assistance of counsel claim is better addressed by a petition for writ of habeas corpus. His other contentions have no merit, and we affirm the judgment.

FACTS

An information charged Natividad with insurance fraud (Pen. Code, § 550, subd. (a)(1), all further statutory references are to the Penal Code, unless otherwise indicated) (count 1), and making a fraudulent statement (Ins. Code, § 1871.4, subd. (a)(1)) (count 2) concerning a 2014 workers' compensation claim for a right hand injury (2014 claim). Before trial, the prosecution filed a motion in limine to admit evidence of Natividad's 2009 workers' compensation claim for a right hand injury (2009 claim) while booking an arrestee (Evid. Code, § 1101, subd. (b)(1)). The prosecutor argued that because of the similarities, evidence of the 2009 claim was admissible to prove knowledge, common plan, and absence of mistake in the 2014 claim even though the insurance provider did not contest the 2009 claim (although it suspected fraud).

At the hearing on the motion in limine, the prosecutor argued she should be permitted to discuss the 2009 claim, play a video of the 2009 incident, and argue that even though the claim was accepted, it was doubtful Natividad had a legitimate injury. Natividad's trial counsel argued the evidence, including the video, would be more prejudicial than probative and would involve an undue consumption of time to relitigate the 2009 claim and would confuse the jury. The court ruled the prosecutor would be

allowed to put on evidence of the 2009 claim, including the video, to establish intent, common plan, or knowledge, but she had to inform the jury the claim was paid. The court, however, ruled the prosecutor could not argue there was fraud in the 2009 claim.

I. Prosecution Evidence

Natividad, a city police officer, started his shift at 4:00 p.m. Around 5:20 p.m., Natividad arrived at the jail sally port with B.L. (Arrestee), who was suspected of being under the influence. Alexander Busby, Jr., worked as a custody officer at the city jail assisting officers with processing arrestees. Natividad came to the jail door from the sally port, and Busby buzzed him into the jail. Natividad asked Busby for assistance with the Arrestee. After Busby secured another arrestee, he went out the jail door to the sally port, leaving the jail door open.

Natividad opened the car door, got the Arrestee out, and escorted him into the jail. Busby inspected the car's backseat. Busby did not help Natividad escort the Arrestee into the jail. Busby heard Natividad say something like "Stand up, man," but he did not see anything unusual. Because of what he heard, he thought there "might have been a slight stumble," but "nobody hit the wall or nobody fell."

A compact disc of the incident was played for the jury. Natividad drove his patrol car into the sally port and parked to the right of another patrol car. Natividad got out of his car, walked to the jail door, and knocked on the door with his left hand. Busby walked into the sally port, and Natividad got the Arrestee out of the car. Natividad escorted the Arrestee next to the sally port wall and then proceeded toward the jail. They were momentarily out of the sally port camera's view when they walked underneath it. However, because the jail door was open, a camera from within the jail captured video of Natividad walking the Arrestee through the sally port into the jail. Natividad and the Arrestee walked next to the sally port wall and into the jail without incident. The Arrestee was unsteady as he veered right to walk into the jail, but he did not fall.

Natividad's right hand never made contact with the wall. Natividad completed the arrest process and left the jail.

Around 5:30 or 6:00 p.m., Natividad brought arrest paperwork to Sergeant Matt Grimmond to approve. Natividad was shaking his hand. Grimmond asked what was wrong and whether he needed to document an injury. Natividad said, "No."

Around 5:45 or 6:00 p.m. Busby was in the booking cage with Monique Lopez, another custody officer. Natividad returned and told Busby and Lopez he hurt his hand. His right hand was swollen and scraped. Lopez and Busby were shocked. Lopez asked him if it was the same hand he previously broke, and he said, "Yes." Natividad stated he hit the wall bringing the Arrestee into the jail to keep him "from falling." Natividad left.

Around 7:30 or 8:00 p.m., Grimmond was walking to his patrol car when Natividad, who had his hand elevated and indicated he had been icing it, told him that he wanted to document the injury. Grimmond said he was busy and asked Natividad to return later.

The exact timing of the following events is unclear. Natividad called Busby and told him that Grimmond would call him to discuss the injury. When Grimmond called, Busby told him that he did not see what happened. Busby went to Grimmond's office, asked him to watch the surveillance footage of the sally port, and gave him the time stamps to watch. Grimmond did not remember watching the surveillance footage. Lopez and Busby watched the surveillance footage.

Around 10:00 p.m., Natividad went to Grimmond's office. Natividad told Grimmond that while he was escorting the Arrestee into the jail, the Arrestee fell, he tried to stop him, he lost his balance, and he hit his hand on the wall. Natividad said he wanted to document the injury but not go to the doctor. Grimmond looked at his hand, which was scraped and swollen. Grimmond told Natividad that he had a boxer's break and needed to go to the hospital. They filled out workers' compensation forms.

On the Workers' Compensation Claim Form, Natividad wrote, "walking arrestee into jail, arrestee stumbled toward wall, my fist hit wall stopping arrestee." On the Acknowledgment of Receipt of Claim Form, Natividad described his injuries as follows: "While walking an arrestee from my vehicle to jail, the arrestee stumbled toward the sally port wall. I grabbed the arrestee's arm and my right fist struck the wall. My hand went numb." On the Employee's Report of Occupational Injury/Illness form, Natividad wrote: "While walking an arrestee from my vehicle to the jail, the arrestee stumbled toward the sally port wall. I grabbed the arrestee's arm and my right fist struck the wall."

Natividad went to the emergency room. When he returned to work, he was in a soft cast. The doctor told him that he would be out of work for four to six weeks.

Officer Anthony Reitz assisted Natividad with arresting the Arrestee. Reitz did not see the Arrestee fall onto the patrol car trunk, or Natividad suffer an injury preventing him from falling onto the trunk. Reitz saw Natividad at the preshift briefing and during a previous call and did not see any injury to his hand.

Lieutenant Paul Beckman worked in the Professional Standards Unit (PSU) and served as the liaison for workers' compensation claims. The PSU does not process or investigate workers' compensation claims—it forwards workers' compensation claims to human resources. Beckman received Natividad's workers' compensation packet. On top of the packet was a note listing time stamps and a camera angle. Beckman viewed the video and interviewed several employees because he believed Natividad's report of the injury and the video were inconsistent. While watching the video, Beckman saw Natividad putting on gloves while walking from the jail to the sally port and it took him an unusually long time, like he was favoring one of his hands. Beckman reviewed Natividad's arrest report for the Arrestee. The report did not state the Arrestee stumbled onto the patrol car's trunk. Beckman was aware of the 2009 claim. Beckman watched surveillance footage of the 2009 incident, and it was played for the jury. The video

showed Natividad, Busby, and another officer. Beckman testified generally about three forms relating to the 2009 claim.

Janna Bradley was a workers' compensation adjustor for Adminsire, the city's third party benefit administrator. Adminsire used R.J.N. Investigations (RJN) to investigate potentially fraudulent claims. After Bradley reviewed Natividad's workers' compensation paperwork, she learned there was surveillance footage that contradicted his story. Another "red flag" was the fact the injury occurred one hour into his shift, which meant it could have occurred before the shift. Bradley was aware of the 2009 claim and that another company accepted and settled the claim. Bradley and Ty Montoya, a RJN investigator, met with a city human resources representative to review the surveillance footage. Bradley concluded the injury was inconsistent with what Natividad reported. On cross-examination, Bradley testified a claim for Natividad's wife (Wife), who was a city police officer, was initially denied but ultimately settled favorably to Wife. On recross-examination, Natividad's trial counsel asked Bradley whether she was biased against Natividad because of her experience with Wife.

Montoya interviewed Natividad, Busby, Grimmond, and Lopez. During Natividad's recorded interview, which was played for the jury, Natividad explained he responded to a restaurant where a man, the Arrestee, was under the influence. He stated the Arrestee was in and out of consciousness, he performed a field sobriety test, and he arrested him. As Natividad escorted the Arrestee to his patrol car, the Arrestee fell asleep "and fell into the trunk." Natividad denied he hurt his hand during this time. He put his weapons in the trunk, went into the jail to get Busby, put on gloves, and went outside to get the Arrestee. As he was walking the Arrestee into the jail, he stumbled forward towards the wall. Natividad grabbed his shoulder to pull him back, and his hand hit the wall. Natividad stated Busby asked if he was okay.

After Montoya completed the interviews, Adminsire denied the 2014 claim. Bradley never saw any information indicating Natividad's injury occurred when

his hand struck a patrol car during the Arrestee's arrest. In accordance with mandated requirements, Montoya notified the California Department of Insurance and the Orange County District Attorney's Office that Natividad's claim involved an articulable suspicion of fraud. Natividad's trial counsel did not make a motion to dismiss pursuant to section 1118.1.

II. Defense Evidence

Doctor Paul Casey was a hand surgeon with over 27 years of experience. He was also a qualified medical examiner for workers' compensation cases. He examined Natividad in 2009 and in 2014 for injuries to his right hand. During the 2014 examination, Natividad told Casey that he was in an altercation with a heroin addict and had struck his hand forcefully against the wall when they fell. This was the same thing Natividad told Casey in 2009. Natividad told Casey he wanted to return to work as soon as possible. Casey determined the 2009 injury had no connection to the 2014 injury. Casey said the injury was consistent with Natividad's account and that nothing about the injury led him to believe this injury occurred somewhere else or in another fashion. Casey concluded the injury was industrial. Casey performed two surgical procedures on Natividad's right hand to repair the fifth metacarpal—one to put the bone back in place and pin it, and another to take the pins out. The force of the injury moved the bone out of position, and without surgery the bone would heal displaced. Natividad's recovery was fast, and Casey cleared him to work in two months. He never believed Natividad was "gaming the system," and Adminsure never contacted him. Casey explained the inflammatory process starts slowly and builds with time, peaking around 24 to 48 hours.

Natividad testified on his own behalf. Natividad explained how he injured his hand. As Natividad escorted the Arrestee to the patrol car, the Arrestee stumbled towards the trunk and Natividad put his hand in front of the Arrestee's head. His hand struck the side or trunk of the car, but he did not feel any pain. As Natividad escorted the Arrestee from the sally port to the jail, the Arrestee stumbled a few times. At one point,

the Arrestee stumbled toward the sally port wall and Natividad pulled him back so he would not strike the wall. Natividad felt a pop in his hand, and it went numb. Natividad “assumed” his hand hit the wall. His hand was in perfect condition when he reported to work that day. Natividad explained his encounters with Grimmond and discussions with Casey. He explained how he was paid while out on disability and acknowledged disability payments were a percentage of his salary, not 100 percent like workers’ compensation payments.

On cross-examination, the prosecutor questioned Natividad concerning the Arrestee falling onto the patrol car trunk. He had no pain when his hand hit the patrol car. The prosecutor showed Natividad surveillance footage of him escorting the Arrestee from his patrol car to the jail. Although he acknowledged the video did not show his hand striking the sally port wall, Natividad stated the Arrestee stumbled, he pulled him back, he heard a “pop,” and his hand went numb. He added, “I did not lie. That is exactly where the injury occurred.” He insisted his hand was “caught between [the Arrestee] and the wall.” Later, he stated the following, “The injury did occur in the sally port. That’s when my hand went numb, and that’s when my hand popped. I don’t know if that was exacerbated because of him falling into the trunk or not.” Natividad insisted the injury occurred while he was on duty that day. The prosecutor showed Natividad surveillance footage of him arriving at work before his shift and using his left hand to open a door that opened to the right. He explained he was trained to use his non-gun hand to do things so his gun hand would be available to draw a weapon.

Officer George Maridakis testified he saw Natividad at the preshift briefing and did not notice anything unusual about his hand. Officer Jared Shurley was also present when Natividad arrested the Arrestee. He had no recollection of the call. Detective Robert Dimel testified concerning police procedure and employee benefits. Natividad offered several witnesses to testify as to his good character and integrity.

III. Rebuttal Evidence

Reitz testified he was present when Natividad arrested the Arrestee. A rear-facing camera in Reitz's patrol car captured Natividad escorting the Arrestee to his patrol car. The video showed the Arrestee stumbled forward at one point, but he did not fall on the car. Beckman testified he was trained to avoid occupying his gun hand so his hand would be free to quickly access his weapon, but that did not include avoiding using his gun hand for daily activities.

IV. Jury Instructions, Closing Argument, Verdicts & Sentence

At a hearing on the jury instructions, the trial court noted Natividad requested it instruct the jury with CALCRIM No. 3406, "Mistake of Fact." The court refused to give that instruction because it did not "appl[y] in this case."

As relevant here, the trial court instructed the jury with CALCRIM No. 375 in part as follows: "If you decide that the defendant committed the act, you may, but are not required to, consider that evidence for the limited purpose of deciding whether: [¶] The defendant acted with the intent to obtain workers' compensation benefits based on his statements; or [¶] The defendant had a motive to commit the offenses alleged in this case; or [¶] The defendant knew how workers' compensation claims were handled for injuries occurring at the jail when he allegedly acted in this case; or [¶] The defendant's alleged actions were not the result of mistake or accident; or [¶] The defendant had a plan to commit the offenses alleged in this case."

During closing argument, Natividad's trial counsel stated the video footage from the rear-facing camera in Reitz's patrol car had not been produced to the defense before trial. During a break out of the jury's presence, the prosecutor informed the trial court it produced the video before trial. When proceedings resumed, the court informed the jury the prosecution complied with its discovery obligations.

During deliberations, the jury sent the trial court the following request: "Guidance from judge as deliberations after [three] hours still leading to a non-decision."

After consulting with counsel, the court instructed the jury with CALCRIM No. 3551, “Further Instruction About Deliberations.” The jury foreperson asked the court for additional guidance on the beyond a reasonable doubt standard. The court explained the standard. The jury foreperson stated the jury could not consider the penalty, and the court instructed the jury it could not. Deliberations resumed, and the jury convicted Natividad on both counts.

After Natividad retained new counsel, he filed a statutory and nonstatutory motion for new trial, arguing insufficient evidence supported his convictions and he received ineffective assistance of counsel (IAC). As to the IAC claim, he argued the following: his counsel failed to file a section 1118.1 motion; counsel offered evidence Wife filed a workers’ compensation claim that was denied; counsel failed to review the prosecution’s discovery; and counsel failed to conduct a pretrial investigation. The motion was supported by declarations from his new counsel, Correen Ferrentino, an associate in her firm, Anastasia Zykanova, and Shurley. Ferrentino stated she questioned trial counsel about the Reitz video and he never viewed it because he was focused on the sally port videos. Shurley stated trial counsel never interviewed him. Zykanova stated she e-mailed trial counsel a list of 12 questions concerning his representation of Natividad, but he did not respond. The prosecutor filed an opposition.

At a hearing, the trial court denied the new trial motion. The court stated trial counsel did not make a section 1118.1 motion, “but there was ample evidence” and the court did not think it would have granted that motion. The court opined Ferrentino made a good record on appeal and “you may have some very good appeal rights on this.”

The trial court suspended imposition of sentence and placed Natividad on supervised probation for three years. The court ordered him to serve 180 days in jail on electronic supervision.

DISCUSSION

I. Sufficiency of the Evidence

Natividad argues there was insufficient evidence he had the specific intent to defraud. We disagree.

Section 550, subdivision (a)(1), makes it unlawful to “[k]nowingly present or cause to be presented any false or fraudulent claim for the payment of a loss or injury, including payment of a loss or injury under a contract of insurance.” Insurance Code section 1871.4, subdivision (a)(1), makes it 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 [s]ection 3207 of the Labor Code.” Both section 550, subdivision (a)(1), and Insurance Code section 1871.4, subdivision (a)(1), require proof of a specific intent to defraud. (*People v. Blick* (2007) 153 Cal.App.4th 759, 772-774; *People v. Dieguez* (2001) 89 Cal.App.4th 266, 278-279 (*Dieguez*)). Specific intent to defraud is generally proved by circumstantial evidence, and thus is usually inferred from all the circumstances of the case. (*Perry v. Superior Court* (1962) 57 Cal.2d 276, 285; *People v. Bollaert* (2016) 248 Cal.App.4th 699, 715.)

“The principles governing sufficiency of the evidence claims are ‘clear and well settled.’ [Citation.] ““The proper test . . . is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” [Citations.] “““Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt.””” [Citation.] ‘If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.’ [Citation.] We may reverse for lack of substantial evidence only if ““upon no hypothesis whatever is there sufficient

substantial evidence to support” the jury’s verdict.’ [Citation.]” (*People v. Bollaert* (2016) 248 Cal.App.4th 699, 708.)

Here, there was no dispute Natividad injured his hand sometime before he showed his hand to Busby and Lopez around 6:00 p.m. The only issue was whether he injured it before or after he started his shift at 4:00 p.m. Natividad testified as to two incidents where he could have injured his hand, but he insisted it was the second incident, when he escorted the Arrestee from the sally port into the jail and not the first incident, when he escorted the Arrestee from the restaurant to his patrol car. Reitz, who was present at the restaurant, testified surveillance footage from his patrol car showed the Arrestee stumbled, but he did not fall on the patrol car. That surveillance footage is not part of the record on appeal, but that is of no consequence as Natividad denies he injured his hand during the arrest.

We have watched the surveillance footage of Natividad escorting the Arrestee from his patrol car to inside the jail. Contrary to Natividad’s claim, it conclusively established he did not injure his hand in the manner he claimed. The surveillance footage of the sally port and the jail established Natividad’s hand never struck the wall.

Exhibit No. 12 has five camera views, the following three that are relevant here: sally west, sally east, and back door in (a camera in the jail pointing out into the sally port, which we refer to as the jail camera). The sally east camera shows Natividad assisting the Arrestee out of the patrol car at 17:23:26. Two seconds later, Natividad and the Arrestee are out of camera view, and three seconds later Busby inspects the patrol car’s rear seat. At 17:23:33, the sally west camera shows Natividad escorting the Arrestee towards the sally port wall, after passing behind another patrol car. But the better angle of what occurred is the jail camera because the door from the sally port into the jail was left open. At the same time, 17:23:33, the jail camera shows Natividad and the Arrestee come into view. Natividad escorts the Arrestee towards the sally port wall.

At 17:23:34, they veer right towards the jail door, and the Arrestee appears unsteady. At no point did Natividad or the Arrestee run into or strike the sally port wall. Contrary to Natividad's claim, the jail camera definitively establishes "the stumble into the wall was impossible [and] never happened." The jail camera contradicts Natividad's statements on the workers' compensation forms of how he injured his hand. "One who willfully submits a claim, knowing it to be false, necessarily does so with intent to defraud." [Citation.]" (*Dieguez, supra*, 89 Cal.App.4th at p. 279.)

The prosecution did not have to prove Natividad injured his hand off-duty. It only had to prove beyond a reasonable doubt Natividad knowingly made a false claim/material false statement with the specific intent to defraud to obtain a benefit. The prosecution did that through the surveillance footage, which amounted to more than speculation and assumption, as Natividad repeats throughout his briefs. Additionally, the prosecution offered circumstantial evidence Natividad injured his right hand before he started his shift. Surveillance footage showed that when Natividad arrived to work that day, he used his left hand to open a door that opened to the right. Surveillance footage also showed that when Natividad knocked on the jail door to get Busby's assistance, he knocked with his left hand.

Natividad spends much time discussing Busby's testimony. Assuming Busby saw the Arrestee stumble (he also testified he thought he did because he heard Natividad tell him to stand up), Busby testified he did not see Natividad hit the wall. Busby's "visual and auditory observations" neither "contradict the video" nor "support the veracity of Natividad's insurance claim."

Natividad also focuses on the fact various officers testified they did not notice he had an injured hand in the roughly 90 minutes before he arrested the Arrestee. True, but Casey testified the inflammatory process starts slowly and builds with time, tending to hit its peak around 24 to 48 hours after the injury.

Natividad asserts he had no motive to lie because he would have received disability payments. True, but he acknowledged disability payments were a percentage of his salary, not 100 percent like workers' compensation payments.

Finally, Natividad contends the jury's questions demonstrate insufficient evidence supported his convictions. They do not. This reflects the jury's diligence, not confusion, and lends no supports to his insufficiency of evidence claim.

Viewing the evidence in the light most favorable to the prosecution, there was ample evidence of Natividad's specific intent to defraud, and thus substantial evidence supported his convictions under both the federal and state constitutional due process clauses. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Johnson* (1980) 26 Cal.3d 557, 576-577.)

II. CALCRIM No. 3406

Natividad contends the trial court erred by failing to instruct the jury with CALCRIM No. 3406, on mistake of fact. Not so.

““It is settled that in criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence”” and ““necessary for the jury's understanding of the case.”” [Citations.] It is also well settled that this duty to instruct extends to defenses ‘if it appears . . . the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.’ [Citations.]” (*People v. Brooks* (2017) 3 Cal.5th 1, 73.)

A mistake of fact defense disproves criminal intent and thus negates an element of the charged offense. (*People v. Givan* (2015) 233 Cal.App.4th 335, 345.) “A mistake of fact defense ‘requires, at a minimum, an actual belief “in the existence of circumstances, which, if true, would make the act with which the person is charged an innocent act”’ [Citations.]” (*Id.* at p. 343.) Our review is de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

CALCRIM No. 3406 provided as follows: “The defendant is not guilty of: [i]nsurance [f]raud; . . . [s]ection 550[, subdivision](a)(1); and [m]aking [f]alse [s]tatements; Insurance Code [s]ection 1871.4[, subdivision] (a)(1)[,] if he did not have the intent or mental state required to commit the crime because he did not know a fact or mistakenly believed a fact. [¶] If the defendant’s conduct would have been lawful under the facts as he believed them to be, he did not commit [i]nsurance [f]raud; . . . [s]ection 550[, subdivision] (a)(1); and [m]aking [f]alse [s]tatements; Insurance Code [s]ection 1871.4[, subdivision] (a)(1). [¶] If you find that the defendant believed that his hand went numb and tingled from striking the wall when he prevented the arrestee from coming into contact with the wall, he did not have the specific intent or mental state required for [i]nsurance [f]raud; . . . [s]ection 550[, subdivision] (a)(1); and [m]aking [f]alse [s]tatements; Insurance Code [s]ection 1871.4[, subdivision] (a)(1). [¶] If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for [i]nsurance [f]raud; . . . [s]ection 550, subdivision] (a)(1); and [m]aking [f]alse [s]tatements; Insurance Code [s]ection 1871.4[, subdivision] (a)(1), you must find him not guilty of those crimes.”

Here, Natividad’s theory of the case was he injured his right hand while on duty on the day in question. He testified that when he arrived at work, his right hand was not injured and was functioning perfectly. He insisted the injury occurred while he was on duty that day. Specifically, he claimed that while he was escorting the Arrestee from the sally port to the jail, he injured his hand whether by striking his hand against the sally port wall or supporting his weight. Natividad offered no evidence he mistakenly believed he was injured at work when he had really been injured off duty. On appeal, he cites to no evidence that supports instructing the jury on mistake of fact. Because there was no evidence Natividad mistakenly believed he injured his right hand while at work, the trial court did not err by refusing to instruct the jury with CALCRIM No. 3406.

III. Admission of Evidence

Natividad asserts the trial court erred by admitting evidence of his 2009 claim pursuant to Evidence Code section 1101, subdivision (b). We agree but conclude the error was harmless.

Evidence of uncharged acts is generally inadmissible to prove criminal disposition. (Evid. Code, § 1101, subd. (a); *People v. Kipp* (1998) 18 Cal.4th 349, 369.) However, Evidence Code section 1101, subdivision (b), allows the trial court to admit “evidence that a person committed a crime . . . or other act when relevant to prove some fact (such as motive, . . . intent, . . . plan, knowledge, . . . absence of mistake or accident . . .) other than his or her disposition to commit such an act.”

“[T]he admissibility of uncharged crimes depends upon three factors: (1) the materiality of the facts sought to be proved; (2) the tendency of the uncharged crimes to prove or disprove the material fact [i.e., probative value]; and (3) the existence of any rule or policy requiring the exclusion of relevant evidence (i.e., prejudicial effect or other [Evidence Code section] 352 concern). [Citations.]” (*People v. Hendrix* (2013) 214 Cal.App.4th 216, 238 (*Hendrix*)). We review a trial court’s evidentiary rulings for an abuse of discretion. (*People v. Valdez* (2004) 32 Cal.4th 73, 108.)

To satisfy the materiality requirement, “the fact sought to be proved or disproved must be either an ultimate fact or an intermediate fact from which such ultimate fact may be inferred. [Citation.]” (*Hendrix, supra*, 214 Cal.App.4th at p. 239.) Ultimate facts include elements of the offenses. (*Ibid.*)

When Natividad pleaded not guilty, he placed all the elements of the crimes in dispute, including his knowledge and intent. (*Hendrix, supra*, 214 Cal.App.4th at pp. 239-240.) The trial court admitted evidence of the 2009 claim to prove intent, knowledge, motive, absence of mistake, and common plan. Natividad disputed he had the specific intent to defraud. For these reasons, both intent and knowledge were material issues in the case.

It is well settled various degrees of similarity are required for a trial court to admit evidence pursuant to Evidence Code section 1101. (*Hendrix, supra*, 214 Cal.App.4th at p. 239.) The least degree of similarity is required to prove intent, knowledge, and absence of mistake, and a greater degree to prove the existence of a common plan or scheme. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403.)

The trial court instructed the jury it could consider evidence of the 2009 claim to establish Natividad intended to obtain workers' compensation benefits, had a motive to commit the offenses, knew how workers' compensation claims were processed, had a plan to commit the offenses, and did not act by mistake. The Attorney General asserts evidence of the 2009 claim was relevant for these purposes.

The similarities between the 2009 and 2014 claims were Natividad injured his right hand in the jail while booking an arrestee. But they differ in one important respect. In 2009, the insurance company processed and settled his claim while in 2014 the insurance company denied his claim. The admission of Natividad's prior legitimate 2009 workers compensation claim had little probative value. At most it indicated he knew how to file a claim. It's prejudicial value, on the other hand, was significant. Even valid claims of workplace injuries are viewed with suspicion. Here, the 2009 claim unfairly suggested a pattern despite the fact there was no indication there was anything improper about the that claim. A negative stigma attaches generally to workers compensation claims, and subsequent claims give rise to even greater doubts and misgivings. Repeat claimants can easily be perceived as not wanting to work and as using such an injury as an excuse to get out of work. "Evidence is prejudicial within the meaning of Evidence Code section 352 if it "uniquely tends to evoke an emotional bias against a party as an individual" [citation] or if it would cause the jury to "prejudg[e]" a person or cause on the basis of extraneous factors" [citation].' [Citation.]" (*People v. Foster* (2010) 50 Cal.4th 1301, 1331.) The admission of Natividad's prior legitimate

claim was error because its probative value was substantially outweighed by its prejudicial value.

In any event, the trial court's admission of evidence of the 2009 claim was harmless pursuant to *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*People v. Welch* (1999) 20 Cal.4th 701, 749-750 [erroneous admission of Evidence Code section 1101, subdivision (b), evidence tested against *Watson* standard].) As we explain above, there was substantial evidence in the form of surveillance footage that demonstrated Natividad did not injure his right hand in the manner he claimed and he had the specific intent to defraud by submitting a knowingly false claim. It was not reasonably probable that had the trial court excluded evidence of the 2009 claim the result of the proceeding would have been different. Thus, Natividad was not prejudiced by admission of evidence of the 2009 claim.

IV. Motion for New Trial—Ineffective Assistance of Counsel

Natividad argues the trial court erred by denying his motion for new trial based on ineffective assistance of counsel. Specifically, he asserts his trial counsel was ineffective for the following reasons: counsel failed to move to dismiss counts 1 and 2 at the conclusion of the prosecutor's case-in-chief (§ 1118.1); counsel offered evidence of Wife's workers' compensation claim; counsel failed to review the video from Reitz's patrol car; and counsel failed to conduct pretrial interviews with two defense witnesses.

To establish IAC, a defendant must demonstrate counsel's performance was deficient and he was prejudiced. (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) In IAC claims, our review is limited to the appellate record, and we presume defense counsel acted within the wide range of reasonable professional assistance when making a tactical decision. (*Ibid.*) Because rebutting this presumption generally requires evidence outside the record, IAC claims are generally raised in habeas corpus proceedings. (*People v. Carrasco* (2014) 59 Cal.4th 924, 980-981.) Consequently, appellate courts commonly decline to decide an IAC claim. If, however, a defendant possesses or can obtain

evidence that is not in the appellate record, he may present the claim by way of a petition for writ of habeas corpus. (*People v. Williams* (2013) 56 Cal.4th 630, 691.)

Here, we decline to address the merits of Natividad's IAC claim. His contentions are better addressed in a habeas corpus petition because they require consideration of evidence outside the record to properly determine whether his trial counsel lacked tactical reason for the alleged deficiencies and whether he was prejudiced.

V. Cumulative Error

Natividad contends the cumulative effect of the errors was prejudicial. As we have either rejected the merits of defendant's claims of error or have found any asserted errors to be nonprejudicial, we reject his contention that the judgment must be reversed due to the cumulative effect of alleged errors. (*People v. Cole* (2004) 33 Cal.4th 1158, 1235-1236.)

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

ARONSON, J.

GOETHALS, J.