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THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,
Plaintiff and Respondent,
v.
KENNETH RAE KINSTLEY,
Defendant and Appellant.

A130102
(City & County of San Francisco
Super. Ct. No. 199621-01)

Kenneth Rae Kinstley appeals from a judgment upon a jury verdict finding him guilty of embezzlement (Pen. Code,¹ 504 (count 1)); grand theft (§ 487, subd. (a) (count 2)); accessing a computer system, and without permission, altering data in order to devise or execute a scheme or artifice to defraud, deceive, or extort (§ 502, subd. (c)(1)(A) (count 3)); accessing a computer system, and without permission, altering or deleting data in order to wrongfully control or obtain money (§ 502, subd. (c)(1)(B) (count 4)); accessing a computer system, and without permission, adding, altering, damaging, deleting, or destroying data (§ 502, subd. (c)(4) (count 5)); and three counts each of filing a false tax return and tax evasion (Rev. & Tax. Code, §§ 19705, subd. (a); 19706) (counts 6 to 11)).² The jury also found true the allegation that defendant took more than \$150,000 in his commission of the embezzlement and grand theft counts (§ 12022.6,

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

² Defendant’s wife was also charged with three counts each of violating Revenue and Taxation Code sections 19705, subdivision (a) and 19706. She moved for acquittal following the presentation of the prosecution’s case. The court granted the motion on the ground that there was insufficient evidence to support the case against defendant’s wife.

subd. (a)(2)), and that he took in excess of \$100,000 during the commission of counts 1 through 4 (§ 1203.048.) Defendant contends that the trial court: (1) erred in denying his request to sever the counts relating to embezzlement (counts 1 through 5) from those pertaining to tax fraud (counts 6 through 11); (2) committed evidentiary error in excluding evidence of a witness's misdemeanor conviction; (3) committed cumulative error; and (4) erroneously convicted him of both counts 3 and 4 which were based on the same conduct. We affirm.

FACTUAL BACKGROUND

In January 2004, Loews Cineplex Entertainment (Loews) operated a movie theatre complex at the Metreon shopping center. Defendant was the house manager at the complex. His duties included training the managers in the day-to-day operations including concessions and the box office, and overseeing the operation under the direction of the managing director. His salary was approximately \$55,000.

Loews had a number of policies and procedures in place to handle cash transactions. In particular, managers were assigned a specific function to handle, e.g., the box office or concessions. Hence, if a manager was assigned to handle concessions, he or she would be the only one responsible for preparing deposits for that area for his or her shift.

At the box office, ticket sales were immediately recorded into the computer database. Cashiers were required to place any \$50 or \$100 dollar bills received into a locked box compartment called a "Vegas box." In addition, as the cashier accumulated large amounts of five, ten, or twenty dollar bills, the cashier was required to band those bills in like denominations, and place them into the Vegas box. The money in the Vegas box was not accessible to the cashier; only the manager had access. A manager was required to make a pickup of the cash in the Vegas box a minimum of once during each show time, with the money being counted and the amount recorded on the computer before the manager left the cashier's station. The manager then returned to his or her office and prepared a bank deposit slip. If there was a discrepancy between the manager's final count, the manager would return to the cashier and explain the shortage.

The manager was responsible for recording the deposit slip number in the cash management system and placing the money in the courier safe. Management did not have access to the safe once the deposit was prepared.

A manager, however, had the capacity to cancel a deposit for legitimate reasons. For example, if a manager forgot to place cash into the deposit bag before sealing it, he could cancel the transaction and record and obtain a new bank deposit slip.

In addition, cashiers could issue refunds or void tickets for various reasons. Voided tickets were placed into the Vegas box with the cash. Cashiers were required to account for all voided or refunded tickets. At the end of a cashier's shift, he or she would bring the cash remaining at the station together with the void tickets and refunds to the manager's office to balance his or her account and checkout for the day. A cashier might experience discrepancies in his or her account for the shift due to mistakes, overcharges, or not giving the correct amount of change. Only a manager had the authority to actually reduce the revenue to adjust it for voids or refunds. The Metreon could have 100 to 200 voids per day.

On December 15, 2003, Loews conducted an audit of the Metreon's records. The auditor discovered that there was a significant difference between the number of voids and refunds that were recorded and the quantity of actual void and refund tickets. He determined that 300 transactions were not supported by tickets. Loews thereafter initiated a forensic audit. He reviewed all documentation of void and refund transactions and compared that information to that recorded on the daily reports and reviewed transactions that were ongoing to determine if additional losses were occurring. It was determined that losses occurred on December 18, 2003, and again on January 9, 2004 due to irregularities between the reported voids and refunds and the physical documentation provided to substantiate them. The audit showed that between October 12 through December 19, 2003, Loews' losses amounted to over \$100,000 due to falsified voids and refunds.

Loews suspected employee theft and investigated the loss. In reviewing video surveillance footage of the theater box office from December 12 and 19, 2003, and

January 9, 2004, defendant was observed to be at the box office when the unsubstantiated voids and refunds were entered. Records of the audited transactions also showed that defendant was the manager who was logged in when the entries concerning the fictitious voids were entered and that he was the manager on duty at the time that the canceled deposits were made. Audit logs also showed that the quantity of the voids and refunds made by defendant during the period from October 12, 2003 through December 19, 2003, demonstrated a loss to Loews of approximately \$72,000. Robert Cohen, Loews' vice president of auditing, estimated that that the loss was in excess of \$100,000 after researching the voids and refunds for the period from May 2003 through July 2003.

On January 14, 2004, Cohen and Gerard Cieremans, Loews' vice president of security and safety, traveled from New York to San Francisco to investigate what they believed to be an employee theft case. They reviewed videotapes from the past 30 days to determine who was at the terminal when the fictitious entries were made. The times on the videotapes "very closely matched" and were "maybe some seconds off" the audit logs that had been completed of the fictitious transactions. Based on the evidence, they arranged to interview defendant the following day.

Defendant met with Cohen and Cieremans at the Metreon theater. They explained to him that there was a discrepancy on December 18, 2003 between the number of voids and refunds recorded and the number of tickets and stubs reflecting those transactions, and that money was missing. They told him that they had records showing he was the manager on duty that day and that they had a videotape. They asked him if he had any knowledge about what happened. Defendant first said he was unaware of a problem and then asked to make a phone call before continuing with the interview.

Cohen and Cieremans left the room and allowed defendant to make a phone call. About five minutes later, defendant called Cohen and Cieremans back into the interview room. Defendant then explained that he had falsified the voids and refunds and taken money that represented the fictitious entries. He was uncertain of the exact amount he had taken over the period from October 12 through December 19, 2003, but

acknowledged that it could be \$100,000. He admitted that the last time he took money was on January 9, 2004.

Defendant further explained the process he used to take the money. He would pick a busy night and would make pickups throughout the evening. He would take a deposit bag and set it aside rather than placing it in the courier safe and would later determine how many voids he could do. After closing out the cashier, he would return to the cashier's terminal and enter fictitious voids and refunds to reduce revenue in the same amount as that in the deposit bag he had set aside. For example, he would void the tickets as if that sale never occurred or would do a refund as if a refund was given.

Cieremans wrote a statement summarizing the interview with defendant, and read the document to defendant. He then handed it to defendant and asked him to read it thoroughly and make any changes if statements were not true. Defendant signed the statement and made some changes. In particular, he made changes to the last paragraph which reads in pertinent part: "I have been informed that the records indicate I have taken over \$100,000 [one hundred thousand dollars] since May of 2003. Although I don't know the exact amount I've taken, I don't dispute this figure" was changed to "*I am not certain of this figure.*" Defendant inserted the italicized language in place of the statement, "I don't dispute this figure."³

The interview with defendant lasted about an hour. Cohen subsequently conducted a more extensive audit of the period between September 22, 2001 through January 9, 2004 and determined that defendant had taken a total of \$312,690.63 during that period.

Charles Betzler, a special agent for the Franchise Tax Board, learned of the investigation into defendant's alleged embezzlement and investigated the case to determine whether defendant had committed any criminal violations of the tax code. Based on the information provided by the district attorney's office, he concluded that defendant failed to report income of \$21,514 in 2001, \$93,759 in 2002, and \$193,169 in

³ Cieremans could not recall how the word, "informed" came to be underlined. Defendant testified that he underlined the word.

2003. Defendant was required to report that income to the Franchise Tax Board regardless of whether it was stolen or embezzled.

In defense, defendant testified and denied that he stole any money from Loews or that he had falsified voids and refunds in order to conceal the theft. He said that when he met with Cohen and Cieremans on January 15, 2004, they accused him of embezzlement, refused his request to leave the room and told him to cooperate or he would be handcuffed and paraded through the Metreon complex. Defendant denied that he admitted any wrongdoing, and testified that he signed the statement that Cieremans prepared because he was told that if he did not sign it, the police were standing outside the room and would take him to jail. Cohen and Cieremans also promised to continue the investigation, and told him that he would only be suspended from work for two weeks. On cross-examination, he admitted that he signed the statement and made changes on it, but only because he panicked and felt he had no choice. In hindsight, he would have changed everything in the statement.

Richard Leo, a criminal law professor, testified as an expert witness in interrogation techniques, false and coerced confessions, and false compliance. Leo testified that false confessions can arise where interrogation techniques are applied to an innocent person who becomes convinced that evidence exists indicating guilt, that it is futile to deny the crime, and that the only opportunity to improve his or her situation is to make an admission. Leo acknowledged that the more lengthy the interrogation, the more likely it is that it would be coercive. False confessions tend to occur after lengthy interrogations—six hours or more in duration.

Joy Urquhart, a forensic certified public accountant, testified that the documents provided by Loews to substantiate its claims were hand-selected so that it was impossible to determine without looking at the totality of the records whether certain voids or refunds were accurate or whether they might have been corrected on a different date. Since the records provided only included a limited amount of the daily logs, she was limited in her ability to determine whether there were any false voids and refunds. She

opined that the records were incomplete, but did not speak with Cohen, Cieremans, or defendant to obtain clarification.

DISCUSSION

1. Severance motion

Defendant contends that the trial court erred in denying his motion to sever the embezzlement charges from the tax fraud charges. He argued that the tax charges would likely inflame the jury and render it impossible for him to receive a fair trial on the embezzlement charges.

Section 954 permits the joinder of offenses of the same class of crimes, under separate counts. (§ 954.) The trial court, however, retains discretion, “in the interests of justice and for good cause shown,” to sever statutorily joinable offenses. (*Ibid.*) This provision recognizes that severance may be necessary to satisfy due process and fair trial guarantees. (*People v. Bean* (1988) 46 Cal.3d 919, 935.)

“ ‘Where the statutory requirements for joinder are met, the defendant must make a clear showing of prejudice to demonstrate that the trial court abused its discretion.’ [Citation.]” (*People v. Lynch* (2010) 50 Cal.4th 693, 735.) The denial of a motion for severance amounts to a prejudicial abuse of discretion only if the lower court’s ruling lies outside the bounds of reason. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220.)

In deciding if the trial court abused its discretion under section 954 by declining to sever properly joined causes, we consider the record before the court at the time of its ruling. (*People v. Soper* (2009) 45 Cal.4th 759, 774.) The pertinent factors are whether (1) the evidence would be cross-admissible in independent trials; (2) certain charges are unusually likely to inflame jurors against the defendant; (3) a weak case is joined with a strong case or another weak case, such that the aggregate evidence might unfairly alter the outcome on some or all charges; and (4) one charge is a capital offense, or joinder of the charges would convert the matter into a capital case. (*People v. Lynch, supra*, 50 Cal.4th at p. 736.) Where evidence underlying the offenses at issue would be cross-admissible in independent trials of other charges, that factor normally is sufficient, by

itself, to dispel any prejudice and validate the trial court's refusal to sever the charged offenses. (*People v. Soper, supra*, 45 Cal.4th at pp. 774-775.)

Defendant acknowledges that the embezzlement charges were arguably admissible to prove the tax fraud counts but argues that he was prejudiced by the "spill-over" effect of the tax fraud charges and that those charges were particularly inflammatory.⁴ The trial court rejected defendant's argument that the offenses were particularly inflammatory, reasoning that the charges were simply two different types of fraud. The court also found that the case was not one where defendant was prejudiced by a large discrepancy between a weak case and a strong one. Rather, the court noted that the evidence of the embezzlement charges required more documentary evidence while the tax fraud case required less documentary support. In addition, the court observed that the prosecution would be required to prove the embezzlement before proving the tax fraud, and hence that judicial economy was served by denying severance.

We agree with the trial court's reasoning. The evidence of the embezzlement charges was not only cross-admissible but necessary to prove the tax fraud counts. This factor alone is normally sufficient to dispel any inference of prejudice. (*People v. Soper, supra*, 45 Cal.4th at p. 775.) Moreover, here there was no indication that a particularly strong case was being used to bolster an otherwise weak case. Rather, the evidence in both cases was strong. Nor were the charges likely to inflame the jury against defendant. Finally, inasmuch as evidence of the embezzlement charges was essential to prove the tax fraud charges, it would have been a waste of judicial resources to grant severance. Accordingly, the trial court did not abuse its discretion in denying severance.

2. Exclusion of impeachment evidence

Defendant next contends that the trial court abused its discretion in excluding evidence that Cieremans suffered a misdemeanor disorderly conduct offense in 2003. He argues that the evidence of the offense was equivalent to an indecent exposure offense within the meaning of section 314 and thus constituted a crime of moral turpitude.

⁴ Defense counsel below conceded that the charges were cross-admissible in that in order to prove the tax fraud, the prosecutor was required to prove embezzlement.

A. Background

During the trial, the prosecutor learned that Cieremans was convicted of misdemeanor disorderly conduct in Texas in 2003. The offense occurred at an adult bookstore and theater in Houston, Texas. Cieremans was one of four people who were arrested and he was charged with disorderly conduct. Cieremans “ ‘was observed sitting with his jeans pulled down to his knees and his erect penis in his hand. He was masturbating to a pornographic video displayed on the main screen. He was seated in the front of a theater on a soiled sofa near the south wall.’ ” Defendant argued that he should be permitted to impeach Cieremans with the offense because it was a crime of moral turpitude. The court ruled that the conviction could not be used to impeach Cieremans. Relying on *People v. Ballard* (1993) 13 Cal.App.4th 687 (*Ballard*), the court found that Cieremans’ conduct did not meet the lewdness requirement of a conviction for indecent exposure in California and did not rise to the level of moral turpitude.

B. Analysis

“[T]he admissibility of any past misconduct for impeachment is limited at the outset by the relevance requirement of moral turpitude.” (*People v. Wheeler* (1992) 4 Cal.4th 284, 296, fn. omitted.) In California, the crime of felony indecent exposure requires that the defendant “ ‘*willfully and lewdly*’ exposed his genitals in a public place or where there were other persons present to be offended. (Pen. Code, § 314, subd. 1, italics added.)[] A conviction, thus, requires proof that a defendant *intentionally* exposed himself *in a public place*, or offended or annoyed *others*, in order to bring about sexual arousal in himself or others. [Citation.]” (*Ballard, supra*, 13 Cal.App.4th at p. 696, fn. omitted.) In addition, the crime of indecent exposure becomes a felony only if the defendant has previously been convicted of the same or a similar sexual offense.⁵ (§ 314.) The crime of felony indecent exposure “necessarily involves moral turpitude.” (*Ballard, supra*, 13 Cal.App.4th at pp. 696-697 [“a person who intentionally and lewdly affronts strangers and members of the general public with unwelcome and offensive

⁵ There is no evidence in this case that Cieremans had previously been convicted of indecent exposure.

sexual displays of his genitals, is a person of ‘moral depravity’ and ‘ “bad character” ’ with a ‘ “readiness to do evil” ’ ”].)

Here, defendant was convicted of misdemeanor disorderly conduct in Texas. Texas Penal Code section 42.01, subdivision (a) provides that a person commits disorderly conduct “if he intentionally or knowingly: . . . (12) exposes his anus or genitals in a public place and is reckless about whether another may be present who will be offended or alarmed by his act” The Texas courts have held that the offense is to be distinguished from indecent exposure, which requires the element that the person intends to arouse or gratify the sexual desire of any person. (See *Polk v. State* (Tex. Ct. App. 1993) 865 S.W.2d 627, 630 and fn. 2.) Thus, the crime of disorderly conduct in Texas is not a crime that involves moral turpitude and was not admissible for impeachment. The court did not abuse its discretion in excluding the evidence of Cieremans’ misdemeanor conviction.⁶

3. Counts 3 and 4

Counts 3 and 4 of the information alleged violations of section 502, subdivisions (c)(1)(A) and (c)(1)(B), respectively. Count 3 alleged that defendant violated subdivision (c)(1)(A) of section 502 by knowingly accessing, and without permission, altering, damaging, deleting, destroying or otherwise using data in a computer, computer system, or computer network in order to devise or execute a scheme or artifice to defraud, deceive, or extort. Count 4 alleged that defendant violated subdivision (c)(1)(B) of section 502 by knowingly accessing, and without permission, altering, damaging, deleting, destroying, or otherwise using data in a computer, computer system, or computer network in order to wrongfully control or obtain money, property, or data. Defendant argues that his conduct amounted to only one violation of section 502, subdivision (c)(1), and thus one of the counts must be reversed.

⁶ Since we conclude that neither defendant’s first or second contention has merit, his third contention that the cumulative effect of the errors alleged in those arguments denied him due process necessarily fails.

The offenses charged in counts 3 and 4 related to two different acts. Count 3 required the jury to find that defendant accessed the computer or computer system to devise or execute a scheme to defraud, deceive, or extort, while count 4 required a finding that defendant accessed the computer system to wrongfully control or obtain money. As the trial court found, the charges described two different crimes with different elements. The jury verdicts on the two counts were therefore proper.⁷

DISPOSITION

The judgment is affirmed.

RIVERA, J.

We concur:

REARDON, ACTING P. J.

SEPULVEDA, J.*

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

⁷ The trial court, in sentencing defendant on the two counts, properly stayed count 4 pursuant to section 654. (See *People v. Palmore* (2000) 79 Cal.App.4th 1290, 1297 [section 654 precludes multiple punishment where offenses are merely incidental to or the means of accomplishing one objective].)