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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

A144796

Plaintiff and Respondent,

**(Contra Costa County
Super. Ct. No. 051206937)**

v.

THOMAS GREGORY DAVIS,

Defendant and Appellant.

A jury convicted Thomas Gregory Davis of perjury (Pen. Code, § 118),¹ concluding he lied under oath about an incident involving an off-duty police officer in a JC Penny department store. The trial court placed Davis on probation.

Davis appeals. He contends: (1) insufficient evidence supports the conviction; (2) the court erred by excluding evidence regarding the store’s fitting room doors; and

¹ Unless noted, all further statutory references are to the Penal Code. Section 118 provides in relevant part: “Every person who, having taken an oath that he . . . will testify . . . truly before any competent tribunal . . . in any of the cases in which the oath may by law of the State of California be administered, willfully and contrary to the oath, states as true any material matter which he . . . knows to be false, and every person who testifies . . . under penalty of perjury in any of the cases in which the testimony . . . is permitted by law of the State of California under penalty of perjury and willfully states as true any material matter which he . . . knows to be false, is guilty of perjury.”

(3) the prosecutor committed misconduct by appealing to jurors' sympathy and offering his personal opinion.

We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The prosecution charged Davis with perjury (§ 118) arising out of testimony he gave in *People v. Erika Johnson* (Contra Costa County Super. Ct. No. 4-161235-7 (*Johnson* or *Johnson* case)). The information alleged Davis committed perjury in *Johnson* by “willfully, unlawfully, and contrary to the oath stat[ing] as true that (1) Donald Pearman slid a camera phone [under] women’s stalls in the Juniors Department of JC Penny at the Sunvalley Mall while women were in the stall; and (2) Donald Pearman took pictures with his camera phone while placing it under stall doors . . . and walked the length of the dressing rooms while holding said camera phone under the stall doors taking pictures of women” occupying the stalls.

Prosecution Evidence in Davis’s Perjury Prosecution

A. The JC Penny Incident

Pittsburg Police Officer Donald Pearman also worked as a loss prevention officer at a JC Penny store at the Sunvalley Mall in Concord. One May 2008 afternoon, Pearman and Georgina Zelidon were in a camera room, watching the store’s security cameras, when they saw a potential shoplifter in the junior girls department. The woman was “quickly selecting merchandise[,]” which Pearman and Zelidon considered suspicious. Pearman and Zelidon — who were wearing casual clothes to blend in with customers — left the camera room and went upstairs to the juniors area to monitor the suspected shoplifter. Pearman went to the fitting room waiting area, where “typically a husband waits for [his] wife to come out.”

Zelidon waited outside the fitting room area, behind a clothes rack. She could see Pearman in the waiting area, pretending to watch videos of his baby on his phone. Zelidon saw Pearman the entire time he was in the waiting room area; Pearman “never went down in the actual fitting rooms[.]” After about five minutes, the suspected

shoplifter left the changing room and Zelidon and Pearman determined she was not shoplifting.

Shortly thereafter, a man — later identified as Davis — approached store supervisor Kathryn Zuniga. His wife accompanied him. Davis was “very upset.” He said Pearman “was taking pictures of girls” as they came out of the fitting room. Davis did not complain Pearman placed his camera phone under the fitting room doors. Zuniga told Davis she would “write up a report and submit it to [the] store manager,” but Davis “wanted . . . to see somebody else” so Zuniga took him to the assistant store manager, Layne Phillips.

Zuniga related Davis’s complaint to Phillips; she explained Davis was upset because a loss prevention officer was “taking pictures outside the juniors fitting rooms.” Phillips then spoke with Davis, who seemed upset and frustrated. Davis said Pearman was “taking pictures of female customers” as they were “[c]oming out of the fitting rooms.” Davis did not say Pearman was “putting his phone underneath the fitting room doors.”² Phillips promised to investigate Davis’s complaint; Davis and his wife left.

Zuniga found Pearman on the second floor and told him a customer complained he was “taking pictures of girls coming out of the fitting room.” Pearman thought the complaint was “ridiculous” and showed Zuniga his phone, which had pictures of his child, not photographs of women in the fitting room area. Zuniga said, ““Okay, sorry about that”” and left.

As Pearman returned to the camera room, he encountered Davis and his wife on the escalator. Davis — who appeared mad — asked Pearman, ““Did you take those pictures off of your phone?”” In response, Pearman said he had worked at JC Penny for 12 years and did not “do things like that.” Davis replied, ““this [will] . . . be your last day of work”” and told Pearman “he was going to make a complaint.” Davis “wrote out what

² Initially, Phillips testified Davis said Pearman took photographs underneath the fitting room doors. After referring to notes he made after the incident, Phillips testified Davis did *not* complain Pearman was photographing women under the fitting room doors. Phillips also testified he told an investigating police officer that Davis’s only complaint was Pearman photographed women as they exited the fitting room.

he observed” on a JC Penny complaint form, signed it, and submitted it. In the complaint, Davis stated he “[o]bserved security guard taking pictures of girls’ breasts with camera phone. Reported to manager. Security guard runs to — follow me and my wife down escalator. . . . saying, ‘I was looking at baby pictures.’”

When Pearman told Zelidon about the complaint, he “seemed very confused.” Zelidon was also confused because she “was there the whole time while Mr. Pearman was sitting in the waiting area and . . . had eyes on him the whole time. [She] knew that he was looking [at] his phone because he was playing videos of his baby and [she] could hear the video.” Pearman collected the surveillance videos and gave them to Phillips. Phillips watched the videos and determined Pearman did not do anything seeming “to fit the customer’s complaint.” Davis left a message for Phillips, but Phillips did not return the call, because after looking at Pearman’s phone and the surveillance videos, it appeared Pearman “hadn’t done anything wrong.”³

B. Davis’s False Testimony in *Johnson*

The *Johnson* prosecutor described the *Johnson* case, and her cross-examination of Davis’s testimony at trial.

Pearman, on duty as a Pittsburg police officer, detained Erika Johnson for driving under the influence.⁴ She was combative and “foul mouth[ed].” Officer Pearman eventually arrested Johnson and brought her to the police station. “She continued to be very oppositional,” and had to be “instructed 48 times to sit down and to be calm.” Johnson made “aggressive moves” toward Officer Pearman, at one point trying to head butt him. Officer Pearman forced Johnson to the ground and, in the process, chipped her tooth.

The next day, Johnson made a complaint against Officer Pearman, claiming he had stopped at a vacant lot before taking her to the police station and massaged her breasts. The police department investigated the complaint, and a detective interviewed Johnson

³ The prosecutor played the surveillance videos for the jury.

⁴ In Davis’s perjury case, the prosecution read portions of Davis’s testimony in *Johnson* into the record and the court admitted excerpts of that testimony into evidence.

and her boyfriend. Based — among other things — on the police car’s mileage and a video recording of Johnson and her boyfriend discussing the “gains they would get . . . if they were successful” in framing Officer Pearman, the police department determined Johnson’s complaint was false. Johnson was charged with driving under the influence with prior convictions, resisting arrest, and making a false police report against Officer Pearman.

Johnson’s attorney subpoenaed Davis to testify at her trial, to attack Officer Pearman’s “credibility, to show that he had a propensity for sexual inappropriateness, and to discredit him as a witness[.]” At the 2010 trial, Davis testified under oath that he and his wife were shopping at the JP Penny store in the Sunvalley Mall in May 2008. While his wife picked out pants in the junior girls department, Davis waited outside the fitting rooms, and noticed a man — Pearman — standing nearby with a cell phone in his hand. Over the next few minutes, two teenage girls walked out of the fitting rooms, and Pearman appeared to take photos of them with his phone. Pearman then walked into the fitting room hallway with his phone, apparently trying to photograph women inside the stalls. Davis saw Pearman walking along the hallway of the fitting rooms with his cell phone facing upward in the gap between the bottom of the fitting room doors and the floor.

Davis complained to a sales clerk that Pearman had taken ““pictures of the girls and had taken the phone and slid it underneath the changing area[.]”” The clerk told Davis that Pearman was a store security guard, but Davis was not satisfied and asked to see a store manager. As Davis and his wife rode the escalator to see a supervisor, Pearman ran down the escalator and elbowed Davis’s wife, saying, ““You didn’t. I work here. I’m a security guard. I’ve been here 13 years. I was looking at pictures of my son.”” Davis responded: ““I don’t care how long you’ve been here. . . . You were taking pictures of those girls under there. And if you’ve been here 13 years, you just had your last day.”” Davis spent 30 minutes with the store manager and filed a complaint. He thought Pearman’s behavior was ““completely inappropriate and unprofessional and just uncalled for[.]””

On cross-examination, Davis testified he saw Pearman use his cell phone to take pictures of two girls — one wearing a “revealing” top — as they came out of the fitting room. Then Pearman walked down to the fitting rooms. Pearman walked along the fitting room stalls — where Davis’s wife was trying on clothes — with his camera in his hand. Pearman was ““walking by the stalls, with his camera in his hand, bent down”” Davis demonstrated what Pearman purportedly did, using his hands in a motion indicating Pearman was taking pictures while ““walking by the stalls”” with the camera ““underneath the door.”” Davis estimated there was a two-foot gap between the bottom of the fitting room door and the floor. Davis submitted a formal complaint to the store.

The prosecutor showed Davis his complaint, which Davis conceded did not mention Pearman putting the phone underneath the fitting room doors. Davis explained: ““I spent 40 minutes with [the manager] and I . . . had better things to do with my time than to go into every little detail.”” When the prosecutor asked Davis whether he would be surprised to learn that the fitting room doors extended all the way to the floor, Davis responded, ““Yes.”” The prosecutor showed Davis the surveillance video, which demonstrated the fitting room doors extended to the floor, making it impossible for someone to place a camera underneath and take pictures. Davis acknowledged the surveillance video accurately reflected the incident and agreed that it would be impossible to put a cell phone underneath the fitting room door. He claimed, however, that he saw Pearman ““put that camera down, sliding it along the floor. [¶] . . . [¶] [a]ccording to my memory, I just remember seeing him sliding it.””

Johnson was convicted of the charges.

C. Evidence of the Police Investigation of Davis’s False Testimony in *Johnson*

Pittsburg Police Officer Joe Reposa conducted an investigation to determine whether Davis committed perjury in *Johnson*. Officer Reposa interviewed several witnesses and determined Davis’s trial testimony could not have been true because: (1) the surveillance videos showed Pearman had not entered the fitting rooms as Davis claimed; (2) the doors in the fitting room area extended to the floor, so even if Pearman

had entered the area, he could not have put his phone under the doors; and (3) Zuniga and Phillips remembered that Davis complained Pearman took photographs of girls as they exited the fitting rooms, but *not* that Pearman tried to take photographs under the fitting room doors. Such a complaint would have immediately registered as false because Zuniga and Phillips knew the fitting room doors extended to the floor. In 2011, Officer Reposa inspected the fitting room doors and confirmed it would have been impossible for someone to put a camera phone underneath the doors. Officer Reposa noticed the fitting room doors had slats, but they were solid and “tightly overlapping.”

Defense Evidence in Davis’s Perjury Prosecution

Davis’s wife, Sabrina, testified about the incident at JC Penny.⁵ Sabrina went into the fitting room to try on a pair of pants. When she left the changing room, she saw a man — Pearman — walking by; she thought it was “weird” a man was in “the girl’s locker room.” Sabrina and Davis filled out a complaint; later they “got ran down [*sic*] by Pearman going down the escalator.”

On cross-examination, Sabrina stated she saw Pearman two times. The first time, Sabrina was by herself in the fitting room area. While Sabrina was trying on clothes, Davis was in another part of the store. Forty-five minutes to an hour later, Davis returned to the fitting room area with a ring and asked Sabrina to marry him “all over again.” They “hugged for about five minutes” and Sabrina went back into her fitting room to try on a pair of pants. When she came out of the fitting room a second time, she encountered Davis, who had “seen something” and was “mad.” Sabrina told Davis, “when you weren’t here I [saw] that guy down [in] the girl’s locker room[.]” At that point, she and Davis decided to “look for somebody to go tell.”

Sabrina conceded she did not see a man walk down the hallway of the fitting room when she was in the changing room the second time. Sabrina did not think Pearman was taking pictures of her in the fitting room; she thought he was “walking down the hallway with his phone on the side, just going across slowly.” He “slid something down.”

⁵ We refer to Sabrina by her first name for clarity and convenience.

Verdict and Sentence

After deliberating for approximately one hour, the jury convicted Davis of perjury (§ 118). The court placed Davis on probation for three years.

DISCUSSION

I.

Sufficient Evidence Supports the Perjury Conviction

Davis contends insufficient evidence supports his conviction for perjury (§ 118). ““When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citation.] . . . In so doing, [we] “presume[] in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” [Citation.]” (*People v. Rangel* (2016) 62 Cal.4th 1192, 1212-1213.)

A. Davis’s False Statements in *Johnson*

The prosecution alleged Davis made the following false statements in *Johnson*:

““QUESTION: Okay. Did you notice this man doing anything else?

“ANSWER: Yes. After that, I noticed another girl walk out—um—and he was like raising the thing up and then also taking the pictures. And so I—at that point, I walked in and I sat down about 10 feet from him. And then after that, I noticed when the girl came out he walked back. There’s all individual stalls. And I noticed him take the camera and walk—walk along the—where my wife was changing and another girl and slide the camera down as he walked by. I seen him. So then when I walked back, he’s down, my wife was in the middle stall of the changing area. He goes all the way down to the end and I see him open one of the stalls and pick up like a coat hanger or something. And as I turn around, I see him with this thing in his hand, a coat hanger. I can’t be specific if it had a piece of clothing on it. But then as I—as I see him walk back towards me, I see the cell phone in his hand underneath the stalls. I seen him with the camera

bent down, walking by the stalls with his camera and his hand bent down, walking, you know, kind of— could I show you or—

“QUESTION: Certainly.

“ANSWER: The stalls are this way. He’s got the camera and he’s walking like this.

“QUESTION: Okay. So he’s like moving as—

“ANSWER: Yes.

“QUESTION: —he’s going down?

“ANSWER: Yes.

“QUESTION: With the camera?

“ANSWER: Yeah, underneath.

“QUESTION: Underneath?

“ANSWER: Underneath.

“QUESTION: Underneath the door?

“ANSWER: Underneath the door. There’s a gap about—I would—my memory is about this high. I would say approximately two feet off the ground. [¶] Yeah, I told him, “Then what were you doing with your phone taking pictures underneath the stalls?”

“QUESTION: And he did—and did he have any reply to that?

“ANSWER: That he was working as a security guard and that was part of his job.

“QUESTION: So he told you that he was working as a security guard and it was part of his job. Did you take that to mean that part of his job is to put his phone underneath the door?

“ANSWER: Yes.””

B. There Was Sufficient Evidence Davis Had the Specific Intent to Make False Statements When He Testified in *Johnson*

“[S]ection 118 criminalizes . . . perjury.” (*Rivera v. Lynch* (9th Cir. 2016) 816 F.3d 1064, 1072.) The elements of perjury are “a willful statement, under oath, of any material matter which the witness knows to be false. [Citation.]” (*People v. Howard* (1993) 17 Cal.App.4th 999, 1004 (*Howard*)). The ““willful[]” element of perjury

“requires proof the defendant made [the] statement ‘with the consciousness that he did not know that it was true, and with the intent that it should be received as a statement of what was true in fact.’” (*People v. Hagen* (1998) 19 Cal.4th 652, 663-664 (*Hagen*), quoting *People v. Von Tiedeman* (1898) 120 Cal. 128, 135.) Put another way, “[a] conviction for perjury requires that the accused have the specific intent to make a false statement under penalty of perjury. [Citations.] The statement must be known by the accused to be false at the time it was made and must be willfully made. An act is willfully done when done intentionally and without excuse. [Citation.]” (*People v. Story* (1985) 168 Cal.App.3d 849, 853 (*Story*).)

Davis concedes the testimony he gave in *Johnson* was false, but claims there is no evidence “he knew the testimony . . . was false.” We are not persuaded. Davis testified falsely by stating he saw Pearman taking pictures under the fitting room stalls. (See *People v. Rubio* (2004) 121 Cal.App.4th 927, 935 [“[f]alse testimony that affects the credibility of a witness is material and will support a perjury conviction”].) When Davis testified in the *Johnson* case, he must have known his testimony was false because he submitted a written complaint after the JC Penny incident stating Pearman took pictures of women as they exited the fitting rooms. The complaint did *not* state Pearman took pictures under the fitting room stall doors. Davis also told Zuniga and Phillips that Pearman was photographing girls when they came out of the fitting room, not taking pictures under the fitting room doors.

In the *Johnson* case, Davis testified he was upset after the incident and thought Pearman’s behavior was ““completely inappropriate and unprofessional and just uncalled for,”” yet he failed to include this supposedly outrageous — and criminal — behavior in his complaint. (See § 647, subd. (j)(1) [misdemeanor to use, among other things, a camera or mobile phone to view interior of a changing, fitting, or dressing room “with the intent to invade the privacy of a person or persons inside”].) Davis’s explanation for the omission — that he ““had better things to do . . . than to go into every little detail”” — is not credible. In the perjury prosecution, the jury heard testimony that Davis was angry at Pearman after the JC Penny incident, and thought he should be fired,

supporting an inference Davis had a motive to lie and did lie to tarnish Pearman's reputation.⁶ Together, this evidence creates an inference Davis knowingly fabricated the story about Pearman taking pictures under the fitting room stalls.

Davis claims he "truly believed that he saw Pearman go into the dressing room area with his camera underneath the stall doors." A good faith belief a statement is true negates intent (*People v. Von Tiedeman, supra*, 120 Cal. at p. 134) but there is no evidence Davis honestly believed his testimony was true. Davis did not testify at the perjury trial and, as a result, there was no evidence of his state of mind when he testified in *Johnson*. Nor did Sabrina's testimony establish Davis had an "honest belief" his testimony in the *Johnson* case was true. (*Id.* at p. 130.) Instead, Sabrina testified she saw Pearman in the girls locker room when Davis was not there. Sabrina also testified she did *not* see Pearman taking pictures under the fitting room stalls, and she did *not* think Pearman was taking pictures of her in the fitting room.

We conclude substantial evidence supports the jury's finding that Davis knowingly made materially false statements under oath in the *Johnson* case. (See *Story, supra*, 168 Cal.App.3d at pp. 853–854 [prosecution satisfied "burden of proving . . . specific intent" in perjury prosecution]; *People v. McRae* (1967) 256 Cal.App.2d 95, 113 [sufficient evidence supported perjury conviction]; *Hagen, supra*, 19 Cal.4th at pp. 670–671 [jury could properly conclude the defendants did not believe their tax "returns to be true and correct as to every material matter"].)

⁶ This is not a situation in which Davis gave inaccurate testimony "due to confusion, mistake or faulty memory." (*Howard, supra*, 17 Cal.App.4th at p. 1003, quoting *U.S. v. Dunnigan* (1993) 507 U.S. 87, 95; compare, *People v. Viniegra* (1982) 130 Cal.App.3d 577, 584 [jury could conclude the defendant, who could not read and was mentally handicapped, lacked the specific intent to declare falsely under penalty of perjury when she signed application for public aid and food stamps].)

II.

Excluding Evidence Regarding the Fitting Room Doors Was Not an Abuse of Discretion

Davis claims the erroneous exclusion of evidence “showing the actual gaps on the fitting room stall doors” at the JC Penny store denied him the right to present a defense.

A. Motions to Admit Evidence Regarding the JC Penny Fitting Room Doors

On the first day of trial, Davis filed a motion to permit the jury to “physically inspect” the fitting room doors at the JC Penny store. The court held an unreported chambers conference and denied the motion, stating: “my understanding of what [the attorneys] have told me about . . . the layout of JC Penny’s” rendered inspection by the jury unnecessary.

On direct examination, Zuniga testified it would be impossible to put a cell phone under the fitting room doors because “the doors went all the way to the floor. There was no opening[.]” Zuniga was “positive” there was not a one-to-two foot gap between the floor and the fitting room doors. On cross-examination, Zuniga testified the doors had “slats” but they were “totally touching each other” and you “couldn’t see through” them. Defense counsel asked Zuniga, “If I was to tell you that there was . . . a video that would show gaps where you could see inside, would you . . . agree with that?” The court told defense counsel: “[i]f you have such a video, then you need to show it.” Defense counsel retrieved the video from Sabrina. Outside the presence of the jury, the court held two unreported conferences and determined the jury was “not going to see” the video. Defense counsel withdrew his question about the video and resumed cross-examination.

Near the end of the prosecution’s case-in-chief, defense counsel moved to admit photographs taken by Sabrina in January 2015 of the “louvers” on the fitting room doors in the JC Penny store. The photographs apparently showed “that in some areas you can see through the louvers.” The court excluded the photographs, determining they were irrelevant because the perjury charge related to whether Davis saw Pearman put his hand under the fitting room doors.

B. The Court Properly Excluded the Video and Photographs

Davis contends the exclusion of “evidence showing the actual gaps” on the fitting room doors denied him the right to present a defense. Davis seems to challenge the exclusion of the video and the photographs, not the denial of his motion for the jury to inspect the fitting room doors. We review a trial court’s evidentiary ruling for abuse of discretion. (*People v. Avila* (2006) 38 Cal.4th 491, 578.)

The court properly excluded the video because it had not been authenticated. (See Evid. Code, § 1401.) A “video recording is typically authenticated by showing it is a fair and accurate representation of the scene depicted. [Citations.]’ [Citation.] This foundation may—but need not be—supplied by the photographer or by a person who witnessed the event being recorded; in addition, authentication ‘may be supplied by other witness testimony, circumstantial evidence, content and location’ and ‘also may be established “by any other means provided by law” [citation] including a statutory presumption. [Citation.]’ [Citation.]” (*In re K.B.* (2015) 238 Cal.App.4th 989, 994-995; *Ashford v. Culver City Unified School Dist.* (2005) 130 Cal.App.4th 344, 349 [videotapes inadmissible “Without Foundation Evidence”], disapproved on another ground in *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499.) On the record before us, there is no indication defense counsel authenticated the video by making an offer of proof that Sabrina took the video, or that the video accurately depicted the fitting room at the JC Penny store when the incident occurred. Nor is there any indication, as Davis claims, the court failed to give him an opportunity to lay a foundation.

The video was also irrelevant. (Evid. Code, § 350.) “‘Relevant evidence’ means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) “‘The test of relevance is whether the evidence tends “logically, naturally, and by reasonable inference” to establish material facts such as identity, intent, or motive. [Citations.]’ [Citation.]” (*People v. Bivert* (2011) 52 Cal.4th 96, 116-117.) Here, an undated video of

the fitting room doors purportedly showing “gaps where you could see inside” was not relevant to the issue in the perjury prosecution: whether Davis falsely testified Pearman put his camera under the fitting room doors. (*People v. Thomas* (2012) 53 Cal.4th 771, 804 [to be admissible, crime scene videotape must be a “reasonable representation of that which it is alleged to portray” and “assist the jurors in their determination of the facts of the case”].)

The same is true with respect to the photographs of the louvers on the fitting room doors in the JC Penny store, apparently taken by Sabrina in January 2015 and showing “that in some areas you can see through the louvers.” The court properly excluded the photographs. The photographs were not authenticated, and they were irrelevant. As the court correctly observed, photographs taken seven years after the JC Penny incident had “no relationship to the perjury charge” because the charge related to whether Davis saw Pearman put his hand under the fitting room doors, *not* whether there were spaces between the slats or louvers on the doors permitting someone to see inside the fitting rooms.

The exclusion of the video and photographs did not — as Davis contends — violate his constitutional right to present a defense. (See, e.g., *People v. Abilez* (2007) 41 Cal.4th 472, 503 [discretionary evidentiary ruling did not violate right to present a defense]; *People v. Cunningham* (2001) 25 Cal.4th 926, 999 [exclusion of defense evidence on a “subsidiary point” did not deprive the defendant of due process].)

III.

Davis’s Prosecutorial Misconduct Claim Fails

Davis claims the prosecutor committed misconduct by appealing to jurors’ sympathy for Pearman, and by offering his personal opinion about Davis.

A. Appealing to Jurors’ Sympathy

Davis contends the prosecutor appealed to jurors’ sympathy for Pearman three times during the prosecution’s case-in-chief:

- When questioning Zuniga, the prosecutor referred to Pearman as “Mr. Pearman.” But when Zuniga responded, she referred to him as “Donnie.” At one point,

Zuniga testified: when “I spoke with Donnie and he showed me . . . his phone and . . . but there were pictures of his child. He was a new father.”

- The prosecutor asked the *Johnson* prosecutor why Johnson’s attorney would subpoena Davis to testify as a defense witness. The *Johnson* prosecutor explained, “Officer Pearman . . . testified in the [*Johnson*] case And when a witness testifies . . . , their [*sic*] credibility is definitely at issue [¶] Mr. Davis presented testimony of an incident in 2008 where it was his opinion that Mr. Pearman . . . did something sexually inappropriate . . . while performing as studios security guard.” When the prosecutor asked why Davis’s testimony would be important, defense counsel objected that the question elicited “improper opinion” testimony and was “beyond the realm of this witness.” The court overruled the objection and the *Johnson* prosecutor responded: “Mr. Davis’s testimony was to impugn Officer Pearman, to attack his credibility, to show that he had a propensity for sexual inappropriateness, and to discredit him as a witness so that [the] jury would not believe him when he testified about [Johnson] driving under the influence, about her resisting arrest, and about her making a false police report.” Defense counsel did not object.

- The prosecutor asked Pearman whether the *Johnson* case was important to him, and he replied, “It was very important to me” and explained: “[A]s a police officer, your credibility is everything. In the 20 years that I’ve been a police officer, I’ve never had my credibility attacked like this. I’ve never dealt with something like this before and, as a police officer, your credibility is everything. So this case was very important to me.” The prosecutor then asked how Pearman felt when he learned Davis would testify in the *Johnson* case. Pearman responded, “I don’t know the way to describe it. I was very pissed off. Again, Mr. Davis was attacking my credibility and, in my mind, he was completely making up something that was completely false.” Defense counsel did not object.

B. Offering Personal Opinion

Davis argues the prosecution offered his personal opinion three times during closing and rebuttal closing argument:

- At the outset of his closing argument, the prosecutor argued Davis testified falsely in the *Johnson* case because “he was so upset by the fact that nobody took him seriously” when he complained about the JC Penny incident and was “so offended by the way that JC Penny had handled his situation[.]” Defense counsel did not object.

- During closing argument, the prosecutor argued Davis’s testimony in the *Johnson* case was inherently implausible: “[I]f [Sabrina] was in that fitting room and he saw Officer Pearman stick a camera underneath the fitting room doors, what is the first thing Mr. Davis would have done? He would have go[ne] up right to Officer Pearman and grabbed that camera from him. . . . If that was truly what happened, would you think he had just stood by suspiciously, sort of waiting, hanging out outside the fitting room? Absolutely not.” The prosecutor argued Davis needed to “come up with some way, somehow to sort of justify possibly that he didn’t lie because we’ve all seen the video They know that what Mr. Davis has said is factually impossible. So, here, in court, his wife comes in and says . . . maybe Officer Pearman or maybe not . . . somebody else was taking pictures of me . . . earlier. Well, there are two problems with that. Mrs. Davis described somebody . . . being in the area of the fitting room about a half hour before it was reported. Mrs. Davis also said that her husband was nowhere to be seen at that point. . . . So if in fact that actually happened, there’s no way that Thomas Davis was actually present for it. But at trial, he testified that he was. Perjury. That was based upon something that his wife had told him. And he came in and testified that he in fact observed those facts. That is perjury.” Defense counsel did not object.

- During rebuttal closing argument, the prosecutor urged the jury to reject defense counsel’s characterization of Davis as a victim. The prosecutor stated: “You know [defense counsel] sort of made this out to . . . seem like . . . no good deed goes unpunished. He was saying that Mr. Davis is sort of the victim. Mr. Davis was sort of the victim of . . . an overly aggressive prosecutor . . . a police officer who had felt wrong[ed], Officer Pearman; a defense attorney who sort of put him up there No. Mr. Davis is a grown man. He knows what he said. He was the one who made the decision to say those things and he will have to face the consequences of that. . . . [I]t

would be one thing if Mr. Davis had come and said, hey, this is what I saw that day, I saw him walking out, and he was taking pictures of women. And we look at the video and go, no, it's not right, but he knows what he saw and he was mistaken about it.” At that point, defense counsel moved to strike as “improper. He’s quoting on the Fifth Amendment . . . [and] telling the jury why my client didn’t take the stand.” The court overruled the objection.

C. Davis Forfeited His Prosecutorial Misconduct Claim, and There Was No Misconduct

“The applicable federal and state standards regarding prosecutorial misconduct are well established. “A prosecutor’s . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so “egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.”” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ““the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.”” [Citation.]” (*People v. Navarette* (2003) 30 Cal.4th 458, 506.)

Davis’s prosecutorial misconduct claim is forfeited because he failed to object and request the jury be admonished. “To preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely objection, make known the basis of his objection, and ask the trial court to admonish the jury.” (*People v. Panah* (2005) 35 Cal.4th 395, 462; *People v. Sandoval* (2015) 62 Cal.4th 394, 440 [prosecutorial misconduct claim forfeited where the defendant did not timely object and request the jury be admonished].) Davis concedes trial counsel did not object, and we reject as unpersuasive his claim that objecting would have been futile because defense counsel was “‘subjected to a constant barrage’ of improper conduct by the prosecutor.” (See *People v. Arias* (1996) 13 Cal.4th 92, 159-160 [rejecting claim that misconduct “objections would have been futile”].)⁷

⁷ As described above, during the prosecution’s rebuttal closing, defense counsel objected and moved to strike as “improper. . . . quoting on the Fifth Amendment . . .

Davis’s prosecutorial misconduct claim also fails on the merits because the prosecutor did not appeal to jurors’ sympathy when questioning Zuniga. (*People v. Fields* (1983) 35 Cal.3d 329, 362-363.) Zuniga worked with Pearman and it was reasonable for her to refer to him by his first name when answering the prosecutor’s questions. Zuniga’s description of Pearman as a “new father” explained what Pearman was doing in the fitting room waiting area and corroborated Pearman’s claim that he was pretending to look at videos on his phone. Nor did the prosecutor commit misconduct by asking the *Johnson* prosecutor to explain why defense counsel in the *Johnson* case subpoenaed Davis to testify. The prosecutor’s question was relevant to the materiality of Davis’s testimony (see § 118) and did not “appeal[] to the sympathy or passions of the jury.” (*People v. Fields, supra*, at p. 362.) We also conclude the prosecutor’s question to Pearman about why the *Johnson* case was important was not misconduct. This question was relevant to underscore the obvious falsity of Davis’s testimony, not to elicit sympathy from the jury.

Finally, the prosecutor did not commit misconduct by trying to explain why Davis testified falsely in the *Johnson* case or by suggesting what Davis would have done if he had actually seen Pearman taking pictures under the fitting room stalls. “[P]rosecutors have wide latitude to discuss and draw inferences from the evidence presented at trial. “Whether the inferences the prosecutor draws are reasonable is for the jury to decide.”” (*People v. Thornton* (2007) 41 Cal.4th 391, 454.)

DISPOSITION

The judgment is affirmed.

[and] telling the jury why my client didn’t take the stand.” This objection did not preserve Davis’s prosecutorial misconduct claim for appellate review. Nor did defense counsel’s objection to the questioning of the *Johnson* prosecutor as calling for “improper opinion” beyond the “realm of this witness.” (See *People v. Fernandez* (2013) 216 Cal.App.4th 540, 560 [prosecutorial misconduct claim forfeited, as conceded by the defendant, because trial counsel objected “only . . . on the vague ground of ‘improper argument’”].)

Jones, P.J.

We concur:

Needham, J.

Bruiniers, J.

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